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

MOTION RECORD
(Returnable July 24, 2013
Advice and Directions)

June 21, 2013

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
Lesley Mercer LSUC #: 54491E
Tel: (416) 869-6859
Fax: (416) 947-0866

Lawyers for the Monitor

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

INDEX

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

NOTICE OF MOTION (ADVICE AND DIRECTIONS)

FTI Consulting Canada ULC, the Court-appointed Monitor (the "**Monitor**") of Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (collectively, the "**Applicants**"), will make a motion to the Court on Wednesday, July 24, 2013 at 10:00 a.m. or as soon after that time as the motion can be heard at 330 University Avenue, Toronto, Ontario.

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

THE MOTION IS FOR:

1. Advice and directions from the Court concerning the following issues:

   (a) Whether or not the beneficiaries of the Executive Plan are precluded from asserting a deemed trust over any accounts or inventory of Indalex Limited and their proceeds as a result of the doctrine of *res judicata*; and

   (b) Whether the US Trustee is entitled to claim interest and costs in respect of the DIP Loan and whether such claim is entitled to priority over the claims of the other Responding Parties, other than any claims secured by the Directors' Charge (up to a maximum of US$1.0 million); and

2. An order approving the Twenty-First Report of the Monitor and the activities of the Monitor described therein.

THE GROUNDS OF THE MOTION ARE:

1. The Order of the Honourable Mr. Justice Campbell dated May 31, 2013 (the "**May 31 Order**");

2. Those grounds set forth in the Twenty-First Report of the Monitor;

3. Rules 2.03, 3.02 and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended; and

4. Such further grounds as counsel may advise and this Honourable Court may permit.

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

1. The Twenty-First Report of the Monitor dated June 21, 2013;

2. Such further and other materials as counsel may serve and file in accordance with the May 31 Order; and

3. Such further and other materials as counsel may advise and this Honourable Court may permit.

June 21, 2013

STIKEMAN ELLIOTT LLP
Barristers and Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Ontario M5L 1B9

Ashley John Taylor LSUC No.: 39932E
Tel: (416) 869-5236
Fax: (416) 947-0866

Lawyers for the Monitor

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE-
(COMMERCIAL LIST)

Proceeding commenced at Toronto

NOTICE OF MOTION
(ADVICE AND DIRECTIONS)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Ontario M5L 1B9

Ashley John Taylor LSUC No.: 39932E
Tel: (416) 869-5236
Fax: (416) 947-0866

Lawyers for the Monitor

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

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

TWENTY-FIRST REPORT OF THE MONITOR

June 21, 2013

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.

TWENTY-FIRST REPORT TO THE COURT SUBMITTED BY FTI CONSULTING CANADA ULC IN ITS CAPACITY AS MONITOR

INTRODUCTION

1. On April 3, 2009, Indalex Limited ("**Indalex**"), Indalex Holdings (B.C.) Ltd. ("**Indalex BC**"), 6326765 Canada Inc. ("**632**") and Novar Inc. ("**Novar**") (collectively, the "**Applicants**") made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") and an Initial Order (the "**Initial Order**") was made by the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") granting, *inter alia*, a stay of proceedings against the Applicants until May 1, 2009 (the "**Stay Period**"), and appointing FTI Consulting Canada ULC as monitor (the "**Monitor**"). The proceedings commenced by the Applicants under the CCAA will be referred to herein as the "**CCAA Proceedings**".

2. 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. On March 20, 2009, Indalex Holding, Indalex Finance, Indalex Inc., Caradon Lebanon, Inc. and Dolton Aluminum Company, Inc. (collectively, the "**US Debtors**") commenced proceedings (the "**Ch.11 Proceedings**") under chapter 11 of the United States Bankruptcy Code (the "**USBC**") in the United States Bankruptcy Court, District of Delaware (the "**US Court**"). The case was assigned to Judge Walsh.

3. The Stay Period has been extended a number of times and currently expires on June 28, 2013. The Monitor has filed a motion returnable on June 26, 2013, seeking an extension of the Stay Period until October 31, 2013.

4. The Initial Order was amended and restated on April 8, 2009 to, *inter alia*, authorize the Applicants to exercise certain restructuring powers and authorize Indalex to borrow funds pursuant to a debtor-in-possession credit agreement (the "**Amended and Restated Initial Order**").

5. The Amended and Restated Initial Order was further amended on May 12, 2009, to correct certain references and typographical errors, and on June 12, 2009, to increase the Canadian sub-facility borrowing limit under the DIP Credit Agreement (the "**Amended Amended and Restated Initial Order**"). Attached hereto as Appendix A is a copy of the final DIP Credit Agreement, showing the amendments made to the form approved by the Court.

6. On April 22, 2009, Justice Morawetz granted an Order which, *inter alia*, approved a marketing process to identify a "Stalking Horse" bid for the sale of the Applicants' business and approved the retention of Jefferies & Company, Inc. to assist with the marketing process.

7. On July 2, 2009, Justice Morawetz granted an Order which, *inter alia*, approved the Asset Purchase Agreement dated as of June 16, 2009, by and among the US Debtors and the Applicants (other than Novar), as sellers, and Sapa Holding AB, on its own behalf and on behalf of one or more Canadian Purchasers to be named, ("**Sapa**") (the "**Asset Purchase Agreement**") as a "Qualified Bid", approved the Bidding Procedures and approved the Break Fee.

8. No additional Qualified Bids were received prior to the Bidding Deadline in the Stalking Horse process. On July 20, 2009, Justice Campbell granted an Order (the "**Approval and Vesting Order**") which, *inter alia*, approved the sale of substantially all of the assets and business of the Applicants and the US Debtors pursuant to the terms of the Asset Purchase Agreement (the "**Sapa Transaction**"), and ordered a partial distribution of proceeds. A copy of the Approval and Vesting Order is attached hereto as Appendix B. The US Court approved the Sapa Transaction on the same date.

9. The Sapa Transaction closed in Canada and the U.S. on July 31, 2009. On the same date, all of the Applicants' directors and officers resigned.

10. On July 30, 2009, a procedure for the submission, evaluation and adjudication of claims against the Applicants and for the submission of claims, if any, against the directors and officers of the Applicants (the "**Claims Procedure**") was approved pursuant to the Order of Justice Morawetz (the "**Claims Procedure Order**").

11. On October 14, 2009, Judge Walsh of the US Court granted an order converting the Ch.11 Proceedings to proceedings under Chapter 7 of the USBC (the "**Ch.7 Proceedings**"). On October 30, 2009, George L. Miller was appointed as the Chapter 7 Trustee of the Bankruptcy Estates of the US Debtors (the "**US Trustee**").

12. On October 27, 2009, the Court granted an order (the "**Monitor's Powers Order**") increasing the Monitor's powers in order to facilitate the orderly completion of the CCAA Proceedings and the winding up of the Applicants' estates, including:

    (a) Completing the Claims Procedure;

    (b) Completing the working capital calculation and any related purchase price adjustment pursuant to the Sapa Transaction. The working capital adjustment and the final purchase price were settled between the Applicants, the US Debtors, Sapa, Sun Indalex Finance, LLC ("**Sun**") and the Monitor in July 2010. As a result, the Monitor received a total of US$4,485,000 in additional proceeds;

    (c) Responding to the leave to appeal motion of the Retired Executives in connection with the SERP Motion and any resulting appeal. The Retired Executives' motion for leave to appeal was dismissed by the Court of Appeal on March 24, 2010; and

    (d) Responding to any matters resulting from the decision of Justice Campbell in relation to the Deemed Trust Motions (defined below) and the Bankruptcy Leave Motion (defined below), including the filing of or responding to any appeal therefrom and the filing of any assignment in bankruptcy of any Applicant.

13. Following the release of the SCC Decision (as defined below), on March 15, 2013, having first notified the primary stakeholders of its intent to do so, the Monitor paid the US Trustee US$10,751,247.22 pursuant to the Approval and Vesting Order. The Monitor is currently holding approximately US$918,090.72 and C$4,228,629.54, which amounts are available for distribution to the creditors of the estate, subject to the payment of the legal and professional costs to complete the estate (the "**Estate Funds**").

14. On March 14, 2013, and March 22, 2013, respectively, counsel to the USW and counsel to the Retired Executives wrote to counsel to the Monitor requesting a distribution of the Estate Funds to both the Salaried Plan and the Executive Plan. On March 26, 2013, counsel to the Monitor responded to both counsel that a number of legal issues needed to be resolved before any distribution of the Estate Funds could occur.

PURPOSE OF REPORT

15. On May 31, 2013, the Monitor brought a motion seeking the Court's advice and direction with respect to a litigation process and schedule. The USW, the Retired Executives, the Pension Administrators, FSCO, the US Trustee, Sun and the Monitor agreed to the terms of two draft orders each of which outlined a different schedule for the determination of certain threshold legal issues, described below. The first order, preferred by the Retired Executives and the USW, contemplated a single motion to determine the legal issues. The second order, preferred by the Pension Administrators, FSCO, the US Trustee and Sun, contemplated two motions to determine the legal issues.

16. The purpose of the litigation process and schedule is twofold: (a) to provide a structure and timeline within which the parties could attempt to negotiate a settlement; and (b) to provide a process for the determination of certain threshold legal issues that (i) must be determined prior to any distribution of Estate Funds to creditors and (ii) may establish boundaries that will assist the parties to reach a negotiated settlement, and avoid or at least delay the cost of determining other fact-laden issues.

17. The parties submitted that proceeding in this fashion provided a cost-effective process to deal with key gating issues while attempting to preserve the Estate Funds and thereby protect the pension plan beneficiaries and other creditors, and avoid giving any party an opportunity to create leverage through the threat of advancing expensive factual issues when the resolution of one or more narrow issues of law could resolve matters more expeditiously and economically.

18. On June 10, 2013, Justice Campbell approved the second order providing for a bifurcated litigation schedule.

19. The Monitor has filed reports on various matters relating to the CCAA Proceedings. This, the Monitor's Twenty-First Report, is filed in accordance with the Order (Advice and Direction) of Justice Campbell dated May 31, 2013 (the "**May 31 Order**") in order to provide a factual basis for the first of two contemplated motions seeking the Court's advice and direction in respect of certain matters that, absent a negotiated settlement regarding the entitlement and priority of numerous parties to the Estate Funds, must be determined prior to any distribution to creditors.

20. A number of parties are asserting priority claims to the Estate Funds. These claims, as the Monitor understands them, are summarized as follows:

    (a) The US Trustee claims interest and costs accruing on the Subrogated DIP Claim, estimated to be in the amount of approximately US$5.4 million (the "**US Trustee Claim**"). The US Trustee asserts priority for the US Trustee Claim under all security for the DIP Loan, including the DIP Charge and the DIP Security Agreements;

    (b) The Salaried Plan claims the amount of the wind-up deficit of the Salaried Plan, estimated by the Salaried Plan Administrator to be approximately $5,008,100 as at February 18, 2013 (the "**Salaried Plan Claim**"). Priority for the Salaried Plan Claim is asserted based on the deemed trust and lien and charge provisions of the Ontario *Pension Benefits Act*, R.S.O. c. P.8 (the "**PBA**");

(c) The Executive Plan claims the amount of the wind-up deficit of the Executive Plan, estimated by the Executive Plan Administrator to be approximately $3,305,500 as at February 18, 2013 (the "**Executive Plan Claim**"). Priority for the Executive Plan Claim is asserted based on the deemed trust and lien and charge provisions of the PBA; and

(d) Sun claims the amount of approximately $38,049,926.54 owing pursuant to the Amended and Restated Credit Agreement dated as of May 21, 2008, as amended, and the Canadian Security Agreement dated as of February 2, 2006, as amended (the "**Sun Claim**"). Sun claims priority for the Sun Claim based on the Canadian Security Agreement dated as of February 2, 2006, among Indalex Holding Corp., Indalex Limited, the subsidiary parties identified therein and JPMorgan Chase Bank, N.A., as Administrative Agent, as amended.

21. In addition to the parties asserting priority claims against the Estate Funds, 347 creditors filed claims against the Applicants for an aggregate amount of $33.8 million. In addition, it is possible that there are inter-company claims owing to the US Debtors which were not filed under the Claims Procedure Order.

22. The Claims Bar Date was August 28, 2009. The US Trustee was not appointed until October 2009. The US Trustee has not filed a Proof of Claim. However, in March 2011, the US Trustee informed the Monitor that there were several payments in the aggregate amount of $12,355,201.30 made by the US Debtors to one or more of the Applicants that could potentially constitute preferential payments under the USBC. The US Trustee further informed the Monitor that it wished to preserve these claims against the Applicants and in order to do so was required to file a Complaint in the US Court by no later than April 18, 2011. The US Trustee requested and obtained the Monitor's consent to a lifting of the CCAA stay of proceedings to permit the filing of the Complaint in the US Court on the basis that: (a) the US Trustee would take no further steps beyond the filing of the Complaint in the US Court and service of the Complaint, if necessary, without the consent of the Monitor or leave of the Court; and (b) the Monitor reserved all of its rights with respect to the Complaint, including the right to object to the late filing of a Proof of Claim in the Claims Procedure based on the preference claim, provided that the Monitor would not argue that any further delay (after March 4, 2011) in applying to

the Court for leave to file the claim is a basis to refuse leave to file the claim late.

23. If some or all of the priority claims asserted by the stakeholders described earlier in this report are found to be valid, then there will be insufficient Estate Funds to provide for any distribution to the unsecured creditors. Accordingly and as previously reported, the Monitor has not reviewed the unsecured claims filed in accordance with the Claims Procedure. However, the Monitor notes that there is a potential scenario where there could be funds available for distribution to the unsecured creditors. In order for there to be Estate Funds available for distribution to unsecured creditors, the following series of events would have to unfold:

(a) The US Trustee's claim for interest and costs would have to fail;

(b) The Salaried Plan deemed trust would have to be defeated, either through a bankruptcy of Indalex Limited or otherwise;

(c) The deemed trust claimed by the Executive Plan would have to be defeated, either on the basis of *res judicata*, through a bankruptcy of Indalex Limited or otherwise;

(d) The lien and charge of the Plan Administrators would have to be defeated, either through a bankruptcy of Indalex Limited or otherwise; and

(e) The secured claim of Sun Indalex would have to be defeated, either through a challenge as a preference in a bankruptcy of Indalex Limited or otherwise.

24. The Monitor has not attempted to quantify the chances of each of those events happening, nor is it certain that all of these issues will be dealt with by the Court, particularly if a negotiated settlement is reached among the parties asserting priority positions. However, the Monitor notes the possibility in order that the Court is aware of its existence and so that it can be addressed appropriately as the circumstances warrant.

25. The first of the two motions contemplated by the May 31 Order (the "**July 24 Motion**") seeks the Court's advice and direction on the following two legal issues:

(a) Whether or not the beneficiaries of the Executive Plan, as defined below, are precluded from asserting a deemed trust over any accounts or inventory of Indalex Limited and their proceeds as a result of the doctrine of *res judicata*; and

(b) Whether the US Trustee is entitled to claim interest and costs in respect of the DIP Loan and whether such claim is entitled to priority over all claims, other than any claims secured by the Directors' Charge (up to a maximum of US$1.0 million).

26. The second of the two motions contemplated by the May 31 Order, to be heard on a date to be set by the Court, seeks the Court's advice and direction on the following legal four issues:

(a) Unless the Court has determined that the Executive Plan members cannot advance a deemed trust claim against any accounts or inventory of Indalex Limited or their proceeds, whether the deemed trust claimed by the Executive Plan arising from the wind up order dated August 27, 2010, with an effective date of September 30, 2009, is enforceable against any accounts or inventory of Indalex Limited or their proceeds;

(b) What would be the effect of a bankruptcy order on the existence, enforceability and priority of the deemed trust in favour of the Salaried Plan, as defined below, and, subject to the decision of the Court with respect to the First Motion, the deemed trust asserted by the Executive Plan members;

(c) Whether the beneficiaries of the Salaried Plan or, unless the Court has decided that the beneficiaries of the Executive Plan are precluded from asserting a deemed trust over any accounts or inventory of Indalex Limited or their proceeds, the Executive Plan are "secured creditors" of Indalex Limited for purposes of the Bankruptcy and Insolvency Act and, if so, what would the priority of such claims be in a bankruptcy; and

(d) Whether the administrator of the Salaried Plan and the administrator of the Executive Plan are "secured creditors" of Indalex Limited for purposes of the Bankruptcy and Insolvency Act and, if so, what would the priority of such claims be in a bankruptcy.

27. The motions contemplated by the May 31 Order and described above are intended, in the absence of a negotiated settlement, to determine some, but not all, of the legal issues that would need to be determined prior to distributing the Sale Proceeds and were chosen because they do not require substantial findings of fact.

28. It is anticipated that, in the absence of a negotiated settlement, prior to any distribution being made it would also be necessary to obtain a determination of, *inter alia*, the following additional legal and factual issues:

(a) Whether accounts or inventory that were located outside of Ontario and the proceeds thereof are covered by the deemed trust created pursuant to section 57(4) of the PBA;

(b) Whether members of the Salaried Plan and the Executive Plan that are not Ontario residents are entitled to the benefit of the deemed trust created pursuant to section 57(4) of the PBA;

(c) What is the actual amount of the windup deficiency of the Salaried Plan or the Executive Plan under the PBA;

(d) What amount of the funds held by the Monitor is proceeds of accounts and inventory as referenced in section 30(7) of the Ontario PPSA; and

(e) Whether the Sun Claim is valid and enforceable and has priority.

29. Notwithstanding the efforts of the Monitor and the primary stakeholders to identify all of the potential legal and factual issues, it is possible, if not probable, that additional issues will be identified and, unless there is a negotiated settlement, require determination by the Court.

30. In preparing this Report, the Monitor has relied upon unaudited financial information, other information available to the Monitor and, where appropriate, the Applicants' books and records and discussions with various parties (collectively, the "**Information**").

31. Except as described in this Report:

    (a) The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the Canadian Institute of Chartered Accountants Handbook; and

    (b) The Monitor has not examined or reviewed financial forecasts and projections referred to in this report in a manner that would comply with the procedures described in the Canadian Institute of Chartered Accountants Handbook.

32. Future oriented financial information reported or relied on in preparing this report is based on assumptions regarding future events; actual results may vary from forecast and such variations may be material.

33. The Monitor has prepared this Report in connection with the July 24 Motion. The Report should not be relied on for other purposes.

34. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars. Capitalized terms not otherwise defined herein have the meanings defined in the previous reports of the Monitor, the Amended Amended and Restated Initial Order or other Orders issued in the CCAA Proceedings.

ASSERTION OF DEEMED TRUST BY EXECUTIVE PLAN

35. The first issue to be determined at the July 24 Motion is whether or not the beneficiaries of the Executive Plan are precluded from asserting a deemed trust over any accounts or inventory of Indalex Limited and their proceeds as a result of the doctrine of *res judicata.*

THE REGISTERED PENSION PLANS

36. Indalex Limited was the sponsor and administrator of two registered pension plans:

(a) The Retirement Plan for Salaried Employees of Indalex Canada and Associated Companies, registered with the Financial Services Commission of Ontario ("**FSCO**") and the Canada Revenue Agency ("**CRA**") under Registration No. 0533646 (the "**Salaried Plan**"); and

(b) The Retirement Plan for the Executive Employees of Indalex Canada and Associated Companies, registered with FSCO and CRA under Registration No. 0455626 (the "**Executive Plan**").

37. The USW represents seven members of the USW located in Quebec who are beneficiaries of the Salaried Plan. The Salaried Plan was wound up effective December 31, 2006, more than two years prior to the commencement of the CCAA proceedings. Morneau Sobeco Limited Partnership (now Morneau Shepell Ltd.) was appointed as the administrator of the Salaried Plan on November 5, 2009, by the Superintendent of Financial Services of Ontario (the "**Salaried Plan Administrator**").

38. In the affidavit of Timothy R.J. Stubbs sworn April 3, 2009, in support of the CCAA filing, Mr. Stubbs stated that as at December 31, 2007, the Salaried Plan had a wind-up deficiency of $2,252,900. The Report Prepared Pursuant to Section 32 of Regulation 909 on the Funded Position as at December 31, 2008 in respect of the Wind-Up as at December 31, 2006 prepared by Mercer Human Resource Consulting in respect of the Salaried Plan indicated a "Provisional wind-up deficiency as at December 31, 2008" of $1,795,600. The Salaried Plan Administrator recently estimated the wind-up deficit of the Salaried Plan as at February 18, 2013, to be approximately $5,008,100.

39. On November 5, 2009, Morneau Sobeco Limited Partnership (now Morneau Shepell Ltd.) was appointed as the administrator of the Executive Plan (the "**Executive Plan Administrator**", and together with the Salaried Plan Administrator, the "**Pension Administrators**") by the Superintendent of Financial Services of Ontario. On March 10, 2010, FSCO issued a Notice of Proposal proposing to wind up the Executive Plan effective September 30, 2009. A copy of the Notice of Proposal is attached hereto as Appendix C. The Executive Plan was wound up by order of the Superintendent of Financial Services of Ontario dated August 27, 2010, with an effective wind up date of September 30, 2009. A copy of the order of the Superintendent is attached as Appendix D.

40. The Report on the Actuarial Valuation for Funding Purposes as at January 1, 2008, prepared by Mercer (Canada) Limited in respect of the Executive Plan indicated a wind-up deficiency of $2,996,400. On July 16, 2009, Morneau Sobeco Limited Partnership (now Morneau Shepell Ltd.) provided counsel to the Retired Executives with a letter setting forth a "rough estimate of the amount that should be deposited into the [Executive Plan] assuming it were [sic] to be wound up as at July 15, 2009." Subject to a number of assumptions set forth in their letter dated July 16, 2009, Morneau estimated the wind up liability to be $8.0 million and the assets available for benefits to be $4.8 million, resulting in a wind up deficiency as at July 15, 2009 of $3.2 million. The Executive Plan Administrator recently estimated the wind-up deficit of the Executive Plan as at February 18, 2013, to be approximately $3,305,500.

CLAIM FOR DEEMED TRUST

41. On June 12, 2009, Justice Morawetz approved an increase to the Canadian sub-facility borrowing limit under the DIP Credit Agreement. Counsel to the Retired Executives appeared at the hearing seeking a "reservation of rights" in respect of the priority of the DIP Loan over claims of the Retired Executives in relation to the wind-up deficiency. Attached hereto as Appendix E is a copy of the Endorsement of Justice Morawetz dated June 12, 2009.

42. On June 26, 2009, counsel to the Retired Executives wrote to counsel to the Applicants and the Monitor with a copy to the Service List stating, *inter alia*, that:

> "In the event the company does not adequately fund the Executive Plan or if it [sic] the Executive Plan will be wound-up in an underfunded state, please be advised that we will be asserting all rights under section 57(4) of the Ontario *Pension Benefits Act*, which states:
>
> (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.
>
> We will also rely on section 57(5) of the Ontario *Pension Benefits Act* which states:
>
> (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 subsection subsections [sic] (1), (3) and (4)."

43. On July 20, 2009, the Court heard a motion brought by the Applicants for, inter alia, an order approving the Asset Purchase Agreement (the "**Sale Approval Motion**") and authorizing, upon the closing of the Sapa Transaction "an interim distribution of proceeds of sale" to the DIP Lenders.

44. At the Sale Approval Motion, the Retired Executives opposed the Sapa Transaction on the basis that the liquidation values set forth in the Seventh Report of the Monitor would provide greater return for unsecured creditors than the Sapa Transaction. That objection was dismissed by the Court on the basis that there was no clear evidence to support the proposition and in any event the Sapa Transaction would preserve value for suppliers, customers and preserve approximately 750 jobs of the Applicants' plant employees in Canada. The Asset Purchase Agreement approval motion was supported by the USW.

45. The Sapa Transaction was approved by Justice Campbell pursuant to the Approval and Vesting Order.

46. Also at the Sale Approval Motion, the Retired Executives opposed the requested distribution of proceeds to the DIP Lenders without provision being made for payment of the amount asserted to be subject to a deemed trust claim in respect of the Executive Plan. The USW reserved its rights to assert a deemed trust claim in respect of the Salaried Plan. Both parties requested that an amount representing their estimate of the underfunded deficiencies be included in a reserve to be retained by the Monitor pending further order of the Court, being $3.25 million in respect of the Executive Plan and $3.5 million in respect of the Salaried Plan. The Approval and Vesting Order provided that the Monitor make a distribution to the DIP Lenders, from the Canadian sale proceeds, in satisfaction of the Applicants' obligations to the DIP Lenders, subject to a reserve that the Monitor considered to be appropriate in the circumstances. As stated in the Reasons of Justice Campbell dated February 18, 2010 (the "**February 18 Decision**"):

> "As a result of the Former Executives and USW's reservation of rights, the Monitor has retained the amount of $6.75 million as Undistributed Proceeds, in addition to other amounts reserved by the Monitor."

A copy of the February 18 Decision is attached hereto as Appendix F.

47. On July 27, 2009, Justice Campbell approved an agreed timetable for the hearing of the Retired Executives' Deemed Trust Motion on August 28, 2009.

48. On August 28, 2009, counsel to the Retired Executives filed a Proof of Claim (as defined in the Claims Procedure Order) with the Monitor. A copy of the Proof of Claim is attached hereto as Appendix G.

RETIRED EXECUTIVES' DEEMED TRUST MOTION

49. On August 28, 2009, certain members of the Executive Plan (the "**Retired Executives**") brought a motion (the "**Retirees' Motion**") seeking, *inter alia*:

> "1. A Declaration that the amount of $3.2 million representing the wind up liability owing to the Executive Plan by the Applicants that is currently held in reserve by the Monitor is subject to a deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the PBA to be paid into the fund of the Executive Plan in accordance with the PBA, and that such amounts are not distributable to other creditors of the Applicants and that such declarations survive any bankruptcy of the Applicants;
>
> 2. An Order, if necessary, directing the Applicants to proceed with the wind up process of the Executive Plan in accordance with section 68 of the PBA;
>
> 3. In the alternative, an Order directing the Monitor to pay the $3.2 million it is holding in reserve to the fund of the Executive Plan;
>
> 4. An Order, in the alternative, directing the Ontario Superintendent of Financial Services to appoint an administrator over the Executive Plan to proceed with the wind up process under section 71 of the PBA;
>
> 5. An Order if necessary, lifting the stay of proceedings to allow any of the foregoing Orders to be made;"

50. The Retired Executive's factum filed in support of the Retirees' motion, a copy of which is attached hereto as Appendix H, stated the issue in question as follows:

> "Does the deemed trust in section 57(4) of the PBA apply to the $3.2 million currently held in reserve by the Monitor and rendering such funds not distributable to other creditors, should that amount be paid to the Executive Plan and should such orders and declarations survive any bankruptcy of the Applicants?"

51. The Retired Executive's reply factum, a copy of which is attached hereto as Appendix I, stated:

> "This motion involves a dispute between the Pensioners of the Executive Plan and the Applicants over $3.2 million of the proceeds of the sale of the Applicants' Canadian assets to SAPA. The Executive Plan is underfunded on a wind up basis by approximately $3.2 million. The Pensioners assert a deemed trust over those amounts under section 57(4) of the Ontario *Pension Benefits Act* (PBA). The deemed trust in the PBA has priority over secured creditors under section 30(7) of the Ontario *Personal Property Security Act*."

52. Sun did not file evidence or a factum at the Retirees' Motion, however, its counsel attended and made submissions in opposition to the Retirees' Motion and in support of the support of the Bankruptcy Leave Motion (as defined below).

53. Although prior to the Sale Approval Motion it was contemplated that the Executive Plan would be wound up in accordance with the requirements of the PBA, as at date of the Sale Approval Motion, the date of closing of the Sapa Transaction and the date of the Deemed Trust Motion, the Executive Plan had not yet been wound up. As stated earlier in this report, the Executive Plan was subsequently wound up by FSCO by order dated August 27, 2010, effective as of September 30, 2009.

54. The Executive Plan was underfunded prior to the closing of the Sapa Transaction. Pursuant to the terms of the Sapa Transaction, Sapa did not assume the Applicants' obligations under the Executive Plan.

THE USW DEEMED TRUST MOTION

55. Also on August 28, 2009, the USW brought a motion (together with the Retirees' Motion, the "**Deemed Trust Motions**") seeking, *inter alia*:

> "(a) a Declaration that seven members of the moving party union, United Steelworkers, are beneficiaries of a Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies, registered with the Financial Services Commission of Ontario ("FSCO") and the Canadian Revenue Agency under Registration No. 0533646 (the "Salaried Plan");
>
> (b) an Order that Indalex Limited account for and repay any deficiency in the Salaried Plan;
>
> (c) an Order that Indalex Limited holds funds in trust for beneficiaries of the Salaried Plan equivalent to the amount of the deficiency in the Salaried Plan (the "Trust Funds");
>
> (d) an Order that the Trust Funds not be distributed to any creditor of Indalex Limited (or its associated companies);
>
> (e) an Order that the Trust Funds be segregated by Indalex Limited, and not commingled with any other funds or assets;
>
> (f) in the alternative, an Order directing Indalex Limited or the Monitor or any other party in receipt of Trust Funds to purchase an annuity sufficient to satisfy any deficiency in the Salaried Plan;

(g) An Order that, in the event that Indalex Limited does not currently hold the Trust Funds, that any funds subsequently obtained by Indalex Limited be designated as Trust Funds;"

BANKRUPTCY LEAVE MOTION

56. Also on August 28, 2009, the Applicants brought a motion (the "**Bankruptcy Leave Motion**") seeking an order, *inter alia*:

> "lifting the stay of proceedings for the purpose of allowing the Applicants, or any of them, to (i) file a voluntary assignment in bankruptcy pursuant to section 49 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"), and (ii) take all steps necessary and incidental to the filing of a voluntary assignment in bankruptcy;"

57. The Deemed Trust Motions and the Bankruptcy Leave Motion were heard by Justice Campbell on August 28, 2009. The February 18 Decision held that no deemed trusts arose with respect to wind up deficiencies under either the Executive Plan or the Salaried Plan. Based on that decision, Justice Campbell concluded that it was unnecessary to deal with the Bankruptcy Leave Motion. There is currently no bankruptcy proceeding before the Court. The effect of a bankruptcy order on various claims is one of the legal issues that the parties have deferred to the second motion.

APPEAL TO THE COURT OF APPEAL

58. Leave to appeal the Deemed Trust Decision was granted by the Court of Appeal for Ontario on May 20, 2010 and the appeal was heard on November 23 and 24, 2010 (the "**Pension Appeal**").

59. On November 15, 2010, the US Trustee sought and was granted leave to intervene in the appeal by O'Connor, A.C.J.O.

60. In its factum filed with the Court of Appeal, a copy of which is attached hereto as Appendix J, the Retired Executives characterized their motion before Justice Campbell as follows:

"3. On August 28, 2009, three motions were argued before the CCAA Judge:

a) A motion by the Retirees for a declaration that the amount representing the wind up liability owing to the Executive Plan is subject to a deemed trust under section 57(4) of the *Ontario Pension Benefits Act*, R.S.O. 1990, c. P. 8 ("PBA") for the benefit of the beneficiaries of the Executive Plan and is to be paid to the fund of the Executive Plan. The Retirees also argued that the company had breached its fiduciary duty to the Retirees;"

61. The Retired Executives characterized the issues on appeal as follows:

"30. This appeal raises the following issues:

a) Did the CCAA Judge err by not giving effect to the wind up deemed trust?

b) Did the company breach its fiduciary duty to the Retirees of the Executive Plan?

c) Are wind up payments that are owing to the Executive Plan subject to the wind up deemed trust?

d) Did the CCAA Judge err by not applying the priority rule in the PPSA that explicitly gives priority to the PBA deemed trust over secured creditors?"

62. On April 7, 2011, the Court of Appeal allowed the Pension Appeal and ordered the Monitor to pay from the reserve fund into each of the Salaried Plan and the Executive Plan an amount sufficient to satisfy the deficiencies in each plan (the "**CA Pension Decision**"). A copy of the CA Pension Decision is attached hereto as Appendix K.

63. The Court of Appeal found that:

(a) the PBA deemed trust applies to the wind-up deficiency of wound up pension plans [the Salaried Plan] but declined to decide whether the deemed trust applied to the wind-up deficiency of a plan that had not been wound up [the Executive Plan];

(b) in the absence of paramountcy, the PBA deemed trust has priority over the DIP Charge;

(c) Indalex breached its fiduciary duty to the pension plans' beneficiaries by taking a number of actions, including applying for CCAA protection and seeking approval of the DIP Loan and priority charge without notice to the beneficiaries of the pension plans, which had the potential to adversely affect the plans' beneficiaries; and

(d) the appropriate remedy for the breaches of fiduciary duty was to impose a constructive trust over funds held by the Monitor in respect of both the Salaried Plan and the Executive Plan which "take priority over the claim asserted by Indalex U.S./Sun Indalex".

APPEAL TO THE SUPREME COURT OF CANADA

64. The US Trustee, Sun and the Monitor, on behalf of Indalex Limited, filed applications for leave to appeal the CA Pension Decision to the Supreme Court of Canada (the "**SCC Leave Applications**"). The SCC Leave Applications were granted by the Supreme Court of Canada on December 1, 2011.

65. The appeal of the CA Pension Decision was heard by the Supreme Court of Canada on June 5, 2012.

66. On February 1, 2013, the Supreme Court of Canada released its decision (the "**SCC Decision**"). The majority of the Court allowed the appeals of the US Trustee, Sun and the Monitor. A copy of the SCC Decision is attached hereto as Appendix L.

67. The Supreme Court of Canada found that the deemed trust provision contained in the PBA does not apply to the wind-up deficit of the Executive Plan as it had not been wound up. With respect to the Salaried Plan, the majority of the Court determined that the PBA deemed trust applies to the wind-up deficiency as set out in the PBA. However, due to the application of the doctrine of paramountcy, the SCC found that the DIP Charge granted by the CCAA judge trumped the provincial PBA deemed trust enjoyed by the Salaried Plan.

68. The majority of the Supreme Court of Canada also determined that Indalex, as the employer-administrator of both the Salaried Pension Plan and the Executive Pension Plan, had breached its fiduciary duty to plan members when it sought approval of the DIP Loan and DIP Charge without taking steps to ensure that its pension plan beneficiaries had the opportunity to have their interests effectively represented. Indalex did not breach its fiduciary duties by considering, seeking or obtaining CCAA protection (or by failing to give notice of the initial CCAA application), nor did it breach its duties by making a bankruptcy application. However, the majority of the Supreme Court of Canada agreed that the outcome of the restructuring would have been no different had the members been represented by a third party or been given notice of the DIP approval motion and determined that the imposition of a constructive trust was not appropriate. As a result, the Supreme Court of Canada reversed the decision of the Court of Appeal with respect to the constructive trust.

CLAIM OF US TRUSTEE FOR INTEREST AND COSTS

69. The second issue to be determined at the July 24 Motion is whether the US Trustee is entitled to claim interest and costs in respect of the amount paid by the guarantor of the DIP Loan (the US Debtors) on account of the DIP Loan and whether such claim is entitled to priority over all other claims, other than any claims secured by the Directors' Charge (up to a maximum of US$1.0 million).

70. The DIP Loan was approved by the Court on April 8, 2009. Set forth below is an excerpt from the affidavit of Patrick Lawlor, the Chief Financial Officer of Indalex Limited, sworn on April 8, 2009, in support of the DIP approval motion:

"4. On the hearing of the initial Application in these proceedings on April 3, 2009, the Applicants advised the Court that it was their intention to return to Court within a short period of time to:

(a) seek approval for debtor in possession financing ("**DIP Financing**") from the Applicants' primary secured lenders (in such capacity the "**DIP Lenders**"), on behalf of whom JP Morgan Chase Bank N.A. ("**JPMorgan**") is acting as the administrative agent (in such capacity, the "**DIP Administrative Agent**"), together with a Court ordered charge as security for the DIP Financing (the "**DIP Lenders' Charge**"), and

(b) to seek approval of restructuring powers for the Applicants that will enable them to obtain a going concern solution with the assistance of the Monitor.

5. The Initial Order was obtained on the basis that, pending finalization of terms of the proposed DIP Financing, the DIP Lenders in their capacity as the current secured lenders of the Applicants (in such capacity, the "**Revolving Lenders**") had agreed to extend the terms of the Forbearance Agreement currently in place (as described below) to April 8, 2009 to permit the Applicants to continue to operate under their existing operating facilities from the Revolving Lenders, as discussed below.

6. The Applicants agreed that pending a return to Court for approval of the DIP Financing, the beneficiaries of the Administration Charge and the Directors' and Officers' Charge (collectively, the "**Charges**") would be fully subordinated to the existing priority of the Revolving Lenders. The parties also agreed that all rights would be reserved by all parties in respect of these priorities, and their priority would be negotiated and determined in the context of negotiating the terms of the DIP Financing. ...

PRE-FILING CREDIT FACILITY

9. A discussion of the Applicants' pre-filing credit facility is set out [sic] the Stubbs Affidavit. For ease of reference, that discussion is substantially restated below.

10. To date, credit has been provided to the Indalex Group by the Revolving Lenders pursuant to an Amended and Restated Credit Agreement (the "**Amended Credit Agreement**") dated May 21, 2008, among the Applicants, Indalex U.S., the Revolving Lenders, Sun Indalex, LLC (the "**Term Lender**") and JPMorgan as Administrative Agent (the "**Pre-Filing Administrative Agent**"). The Amended Credit Agreement amended certain terms to an original credit agreement dated as of February 2, 2006.

11. Pursuant to the Amended Credit agreement, Indalex Holding had access to a U.S. $200 million revolving credit facility (the "**Revolving Credit Facility**"). Up to $80 million of the Revolving Credit Facility was available to Indalex Canada pursuant to a revolving credit sub-facility (the "**Sub-Facility**").

12. The funds available to Indalex Canada under the Sub-Facility could not exceed a borrowing base comprised of eligible accounts receivable, inventory, machinery and equipment and real property of Indalex Canada and the other Applicants, subject to an aggregate sub-cap of $80 million and subject to a further aggregate total cap, when taken together with the amounts borrowed by Indalex U.S., of $200 million.

13. As of April 6, 2009, the total balance due on the Revolving Credit Facility was approximately U.S.$48.4 million. The amount owing by the Applicants under the Sub-Facility, as of April 6, 2009 is approximately CDN$20.9 million.

14. The obligations of Indalex Canada under the Amended Credit Agreement are guaranteed by Indalex Finance, Indalex Holdings, and their U.S. subsidiaries, as well as the three other Canadian entities, Indalex BC, 632, and Novar.

15. Prior to entering into the Forbearance Agreement, the obligations of Indalex Holding (the US borrower) under the Amended Credit Agreement were guaranteed by Indalex Finance and any U.S. subsidiary of Indalex Holding, only.

16. Indalex Canada's obligations under the Amended Credit Agreement are secured in Canada by a Security Agreement dated February 2, 2006 (the "**Security Agreement**"), two Deeds of Hypothec dated February 2, 2006, together with certain other debentures, pledge agreements, and security documents securing the personal and real property of the Applicants. [FN 1 listing the security documents is excluded] To clarify the Stubbs Affidavit, the Security Agreement was executed by 6461948 Canada Inc. and Indalex Canada; one Deed was executed by 6461948 Canada Inc. and the other Deed was executed by Indalex Canada. On February 2, 2006, 6461948 Canada Inc. and Indalex Canada amalgamated.

17. The security provided by the Applicants is registered under the relevant personal property security registries in Ontario, Quebec, British Columbia, and Alberta.

March 6, 2009 Forbearance Agreement

18. As noted above, on March 6, 2006, Indalex U.S. and the Applicants entered into a Forbearance Agreement with the Pre-Filing Administrative Agent, the Term Lender and the Revolving Lenders.

19. The Forbearance Agreement, as amended, as it applies to the Applicants, provides a temporary waiver of certain existing events of default under the Amended Credit Agreement that terminates and expires on April 3, 2009 (as extended), or on the occurrence of any other default under the Amended Credit Agreement, or on the acceleration or enforcement of certain senior secured notes issued by Indalex U.S.

20. Under the Forbearance Agreement, the aggregate revolving commitments under the Revolving Credit Facility have been reduced from $200 million to $150 million.

21. In consideration for the forbearance arrangements set out in the Forbearance Agreement, the provision of additional borrowings in the amount of U.S.$1.5 million for Indalex Canada and U.S.$4.5 million for Indalex U.S., and the continued provision of credit pursuant to the Amended Credit Agreement which has enabled the Applicants to continue in business and honour trade obligations and obligations to employees to date, the Applicants agreed under the Forbearance Agreement to guarantee the obligations of Indalex U.S. under the Amended Credit Agreement (the "**Pre-Filing Guarantee**").

22. The Pre-Filing Guarantee was agreed to by Indalex Canada in order to obtain continued support from the Revolving Lenders for Indalex Canada. Without the provision of this support, Indalex Canada was at risk of losing its operating financing and its ability to continue as a going concern.

> 23. When documenting the Forbearance Agreement, the parties did not amend Section 9.20 of the Amended Credit Agreement which provides that notwithstanding any other provision of the Amended Credit Agreement or any other agreement between the parties, the collateral of the Applicants will not secure Indalex U.S. obligations under the Amended Credit Agreement. Nevertheless, and at all times, it was intended by the Applicants to provide the Pre-Filing Guarantee and have the obligations under the Pre-Filing Guarantee be secured by the security granted to the Revolving Lenders."

71. On April 8, 2009, Justice Morawetz granted the Amended and Restated Initial Order which, *inter alia*, approved the DIP Credit Agreement. Pursuant to the DIP Credit Agreement additional advances of up to $24.36 million were made available to the Applicants to fund their operations, subject to a borrowing base calculation.

72. The Amended and Restated Initial Order and the DIP Credit Agreement were amended on June 12, 2009, to reduce the "availability block", increase the Canadian sub-facility borrowing limit and thereby permit the Applicants to borrow up to an additional US$5,140,000 under the DIP Credit Agreement

73. Post-filing collections by the Applicants were applied to repay the pre-filing indebtedness of the Applicants owing in respect of the pre-filing Revolving Credit Facility.

74. The direct indebtedness of the Applicants under the DIP Credit Agreement was secured by a Court-ordered super priority charge:

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

75. In addition, the US Debtors guaranteed the indebtedness of the Applicants, which guarantee obligation was secured by a Court-ordered charge granted by the US Court, which was a condition of the extension of credit by the DIP Lenders to the Applicants.

76. Advances under the DIP Loan were used to fund the Applicants' working capital needs. The DIP Credit Agreement contemplated that the DIP Loan advances would be repaid from the proceeds derived from a going concern sale of Indalex's assets.

77. As stated earlier in this report, the Sapa Transaction closed on July 31, 2009. The Canadian Cash Purchase Price paid by the Purchaser was US$30,902,000, subject to further adjustment in respect of a working capital adjustment in accordance with the Asset Purchase Agreement. On closing the Canadian Cash Purchase Price was disbursed as follows:

Payment of Cure Costs	US$445,926
Legal and Professional Fees	US$1,322,010
Repayment of DIP Loan	US$17,041,391.80
Canadian Escrow (to support the working capital adjustment)	US$2,750,000
Reserves held by the Monitor	US$9,342,672

78. The partial repayment of the DIP Loan resulted in a claim by the DIP Lenders on the guarantee granted by the US Debtors of US$10,751,247.22, which amount was paid by the US Debtors.

79. Pursuant to paragraph 14 of the Approval and Vesting Order, the US Debtors were subrogated to the rights of the DIP Lenders in respect of the amount paid under the DIP guarantee "to the extent of such Guaranteed Payment":

> "14. THIS COURT ORDERS AND DIRECTS that on Closing the Sale Proceeds shall be paid to the Monitor on behalf of the Canadian Sellers and on or following the Closing, subject to the Monitor on behalf of the Canadian Sellers, maintaining a reserve of the Sale Proceeds in an amount satisfactory to the Monitor (the "Reserve"), the Monitor on behalf of the Canadian Sellers is hereby authorized and directed, without further Order of the Court, to make one or more distributions (the "Distributions") to JPMorgan Chase Bank, N.A., in its capacity as administrative agent (the "Agent") for and on behalf of the DIP Lenders (as defined in the Amended Amended Restated Initial Order dated May 12, 2009, as further amended, the "Initial Order") in an amount up to the aggregate amount of all primary indebtedness, liabilities and obligations now or hereafter owing by the Canadian Sellers to the DIP Lenders (the "Canadian Obligations"). To the extent that any Canadian Obligations are satisfied by any of the Canadian Sellers' affiliated entities resident in the United States (collectively, "Indalex US") (the "Guarantee Payment") Indalex US shall be entitled to be subrogated to the rights of the Agent and the DIP Lenders under the DIP Lenders Charge (as defined in the Initial Order) to the extent of such Guaranteed Payment and following indefeasible payment in full of the Canadian Obligations, Indalex US shall be entitled to receive any Distributions, pursuant to Indalex US' subrogation rights under the DIP Lenders Charge, in an amount up to the Guarantee Payment, subject to the Reserve."

80. In the Notice of Motion filed by the US Trustee in connection with its motion to intervene in the Pension Appeal, the US Trustee stated the following, *inter alia*, as grounds for the motion:

> "8. The Approval and Vesting Order also provided that, to the extent that any indebtedness owing by the Canadian Debtors to the DIP Lenders was satisfied by any of the US Debtors or their affiliates under their guarantee, the US Debtors are subrogated to the rights of the DIP Lenders under the DIP Charge to the extent of such payment. ...
>
> 10. The available Canadian sale proceeds (net of the Monitor's reserve) were insufficient to re-pay the DIP loan in full. Accordingly, the US Debtors paid US$10,751,247.22 to satisfy the obligations of the Canadian Debtors to the DIP Lenders. Pursuant to the Approval and Vesting Order, the US Debtors are subrogated to the super-priority rights of the DIP Lenders under the DIP Charge for that amount."

A copy of the Notice of Motion of the US Trustee is attached hereto as Appendix M. Those grounds were repeated in the factum of the US Trustee [paragraphs 13 and 15] filed in support of the US Trustee's motion to intervene in the Pension Appeal, a copy of which is attached hereto as Appendix N.

81. In support of the US Trustee's motion to intervene, the US Trustee filed the affidavit of Amy Casella [a legal assistant] sworn November 8, 2010, attaching a number of documents. One of the attached documents was the letter from counsel to the US Trustee to counsel for a number of other parties dated October 29, 2010. That letter reads, in part:

> "As you are aware, approximately $10.7M of the DIP loan was paid by the US Debtors which, pursuant to paragraph 14 of the Approval and Vesting Order, have a subrogated claim for the amount paid, secured by the DIP Lenders Charge against the assets of the Canadian Debtors."

A copy of the October 29, 2010 letter is attached hereto as Appendix O.

82. In the factum filed by the US Trustee in connection with the Pension Appeal, the US Trustee states:

> "3. Pursuant to the Initial Order and the Approval and Vesting Order, the US Debtors are subrogated to the super-priority rights of the DIP Lenders under the DIP Charge for the amount of US$10,751,247.22 paid by the US Debtors to the DIP Lenders to satisfy the obligations of the Applicants. ...
>
> 15. The Canadian sale proceeds available for distribution were insufficient to re-pay the DIP loan in full. Accordingly, the US Debtors paid US$10,751,247.22 to satisfy the obligations of the Applicants to the DIP Lenders, and claims the benefit of the DIP Charge to secure repayment of that amount."

A copy of the US Trustee's factum filed in connection with the Pension Appeal is attached hereto as Appendix P.

83. On March 15, 2013, having first notified the stakeholders of its intent to do so, the Monitor paid the US Trustee US$10,751,247.22 pursuant to paragraph 14 of the Approval and Vesting Order.

The Monitor respectfully submits to the Court this, its Twenty-First Report.

Dated this 21st day of June, 2013.

FTI Consulting Canada ULC
in its capacity as the Monitor of
Indalex Limited, Indalex Holdings (B.C.) Ltd.,
6326765 Canada Inc. and Novar Inc.
and not in its personal or corporate capacity

Nigel D. Meakin
Senior Managing Director

APPENDIX "A"

CREDIT AGREEMENT

dated as of

April 8, 2009,

among

INDALEX HOLDINGS FINANCE, INC., a Debtor and Debtor in Possession,

INDALEX HOLDING CORP., a Debtor and Debtor in Possession,
as Parent Borrower,

INDALEX LIMITED, as an applicant under the Companies' Creditors Arrangement Act,
as Canadian Subsidiary Borrower,

The Domestic Subsidiary Loan Parties Party Hereto, each, a Debtor and Debtor in Possession,

The Foreign Subsidiary Loan Parties Party Hereto,

The Lenders Party Hereto

and

JPMORGAN CHASE BANK, N.A.,
as Administrative Agent

JPMORGAN CHASE BANK, N.A.,
as Sole Bookrunner and Sole Lead Arranger

TABLE OF CONTENTS

ARTICLE X

Loan Guaranty

SCHEDULES:

EXHIBITS:

CREDIT AGREEMENT dated as of April 8, 2009 (as it may be amended or modified from time to time, this "Agreement"), among INDALEX HOLDINGS FINANCE, INC., a Delaware corporation ("Holdings"), as a debtor and debtor in possession under Chapter 11 of the Bankruptcy Code (as defined below), INDALEX HOLDING CORP., a Delaware corporation and a wholly-owned subsidiary of Holdings (the "Parent Borrower"), as a debtor and debtor in possession under Chapter 11 of the Bankruptcy Code, INDALEX LIMITED, a Canadian corporation and a wholly-owned subsidiary of the Parent Borrower (the "Canadian Subsidiary Borrower"), as an applicant under the CCAA (as defined below), the Domestic Subsidiaries of the Parent Borrower party hereto, each as a debtor and debtor in possession under Chapter 11 of the Bankruptcy Code, the Foreign Subsidiaries of the Parent Borrower party hereto (other than the Canadian Subsidiary Borrower), each as an applicant under the CCAA, the Lenders party hereto and JPMORGAN CHASE BANK, N.A., as Administrative Agent.

WHEREAS, on March 20, 2009 (the "Petition Date"), Holdings, the Parent Borrower and the Parent Borrower's Domestic Subsidiaries each filed a voluntary petition for relief (collectively, the "Bankruptcy Cases") under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court");

WHEREAS, on April 3, 2009, the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties made an application for relief (the "Canadian Proceeding") under the Companies' Creditors Arrangement Act (the "CCAA") and were granted an initial order under the CCAA (as amended or restated with the consent of the Required Lenders, the "Canadian Order") by the Ontario Superior Court of Justice (the "Canadian Court");

WHEREAS Holdings, the Parent Borrower and the Domestic Subsidiaries are continuing to operate their respective businesses and manage their respective properties as debtors and debtors in possession under Sections 1107 and 1108 of the Bankruptcy Code;

WHEREAS the Canadian Subsidiary Borrower and certain of the Parent Borrower's other Foreign Subsidiaries are continuing to operate their respective businesses and manage their respective properties pursuant to the provisions of the CCAA and the terms of the Canadian Order;

WHEREAS Holdings and the Parent Borrower have requested that the Lenders provide a secured super-priority credit facility of up to $[~~•~~]**85,877,371** in order to, among other purposes, fund the continued operation of the businesses of Holdings, the Parent Borrower, the Canadian Subsidiary Borrower and such Subsidiaries; and

WHEREAS the Lenders are willing to make available to Holdings, the Parent Borrower, the Canadian Subsidiary Borrower and such Subsidiaries such credit facility upon the terms and subject to the conditions set forth herein;

NOW, THEREFORE, in consideration of the mutual agreements contained herein and other good and valuable consideration, the sufficiency and receipt of which are hereby acknowledged, the parties hereto agree, subject to the satisfaction of the conditions set forth herein, as follows:

ARTICLE I

Definitions

SECTION 1.01. Defined Terms. As used in this Agreement, the following terms have the meanings specified below:

"ABR", when used in reference to any Loan or Borrowing, refers to whether such Loan, or the Loans comprising such Borrowing, are bearing interest at a rate determined by reference to the Alternate Base Rate.

"Account" has the meaning assigned to such term in each Security Agreement.

"Account Debtor" means any Person obligated on an Account.

"Account Debtor Insolvency Proceeding" means, with respect to any Account Debtor, any proceeding in respect of bankruptcy, insolvency, winding up, receivership, dissolution or assignment for the benefit of creditors under Bankruptcy Law.

"Adequate Protection" means the adequate protection as set forth in the Orders, in form and substance satisfactory to the Administrative Agent, for the Prepetition Agent and the Prepetition Revolving Lenders, including, among other things, (a) replacement Liens on the Collateral that are immediately junior to the Liens securing the Secured Obligations and senior to the Liens securing the obligations under the Prepetition Credit Agreement, (b) superpriority administrative claims under Section 507(b) of the Bankruptcy Code that are immediately junior to the Superpriority Claims of the Administrative Agent and the Lenders and senior to the obligations under the Prepetition Credit Agreement, (c) the payment of the reasonable fees and out-of-pocket expenses incurred by the Prepetition Agent (except that fees and expenses for the Prepetition Agent's professionals shall be limited to reasonable fees of one lead counsel in each relevant jurisdiction (including New York, Delaware and Canada) and one financial consultant) and the continuation of the payment on a current basis of the administration fees that are provided for under the Prepetition Credit Agreement (or any related fee letter) and (d) the payment in cash on a monthly basis of current interest at the Alternate Base Rate plus 9.00% on the outstanding principal amount of Prepetition Indebtedness under the Prepetition Credit Agreement.

"Adjusted Eligible Accounts" means, at any time, the Eligible Accounts of (a) the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties at such time, in the case of the Domestic Borrowing Base or (b) the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties at such time, in the case of the Canadian Borrowing Base, in each case minus the applicable Dilution Reserve at such time.

"Adjusted LIBO Rate" means (a) with respect to any Eurodollar Borrowing for any Interest Period, an interest rate per annum equal to (i) the LIBO Rate for such Interest Period multiplied by (ii) the Statutory Reserve Rate or (b) with respect to any ABR Borrowing or U.S. Base Rate Borrowing, for any day, the rate appearing on Reuters BBA Libor Rates Page 3750 (or on any successor or substitute page of such service, or any successor to or substitute for such service, providing rate quotations comparable to those currently provided on such page of such service, as determined by the Administrative Agent from time to time for purposes of providing quotations of interest rates applicable to U.S. Dollar deposits in the London interbank market) at approximately 11:00 a.m., London time, on the date of determination for deposits in dollars with a term commencing on such date equivalent to one month; provided that in the event that such rate is not available at any time for any reason, then the "Adjusted LIBO Rate" with respect to such Borrowing shall be the rate per annum determined by the

Administrative Agent to be the rate at which dollar deposits for delivery on the date of determination in immediately available funds in the amount of $1,000,000 and with a term commencing on such date equivalent to one month would be offered by the Administrative Agent's London branch to major banks in the London interbank eurodollar market at their request at approximately 11:00 a.m., London time, on the date of determination. If at any time the Adjusted LIBO Rate would otherwise be less than 3.50% based on the foregoing methodology, the Adjusted LIBO Rate shall be deemed to be 3.50% at such time notwithstanding the foregoing.

"Administrative Agent" means (a) JPMorgan Chase Bank, N.A., in its capacity as administrative agent for the Lenders hereunder (or, as applicable, such Affiliates thereof as it shall from time to time designate for the purpose of performing its obligations hereunder in such capacity) and (b) with respect to Loans or Borrowings made to the Canadian Subsidiary Borrower, or Letters of Credit deemed issued, pursuant to Section 2.04(a), for the account of the Canadian Subsidiary Borrower or any Foreign Subsidiary, JPMorgan Chase Bank, N.A., Toronto Branch (or, as applicable, such Affiliates thereof as it shall from time to time designate for the purpose of performing its obligations hereunder in such capacity), and, in each case, its successors in such capacity as provided in Article VIII.

"Administration Charge" means the court ordered priority charge granted in the Canadian Order in an amount not to exceed $500,000 and otherwise on terms acceptable to the Administrative Agent to secure (a) all reasonable fees and expenses of Blake, Cassels & Graydon LLP, Canadian legal counsel to the Canadian Loan Parties, (b) all reasonable fees and expenses of the Monitor and the Monitor's legal counsel and (c) all reasonable fees and expenses of other professional advisors of the Canadian Loan Parties incurred with the prior written consent of the Administrative Agent.

"Administrative Questionnaire" means an Administrative Questionnaire in a form supplied by the Administrative Agent.

"Affiliate" means, with respect to a specified Person, another Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified; provided, however, that for purposes of Section 6.09, the term "Affiliate" shall also include any person that directly, or indirectly through one or more intermediaries, owns 10% or more of any class of Equity Interests of the Person specified or that is an officer or director of the Person specified.

"Agreement" has the meaning assigned to such term in the preamble to this Agreement.

"Alternate Base Rate" means, for any day, a rate per annum equal to the greatest of (a) the Prime Rate in effect on such day, (b) the Federal Funds Effective Rate in effect on such day plus 0.50% and (c) the Adjusted LIBO Rate in effect on such day plus 1.00%. Any change in the Alternate Base Rate due to a change in the Prime Rate, the Federal Funds Effective Rate or the Adjusted LIBO Rate shall be effective from and including the effective date of such change in the Prime Rate, the Federal Funds Effective Rate or the Adjusted LIBO Rate, as applicable.

"Applicable Percentage" means, at any time with respect to any Revolving Lender, the percentage of the aggregate Revolving Commitments at such time represented by such Lender's Revolving Commitment at such time. If the Revolving Commitments have terminated or expired, the Applicable Percentages shall be determined based upon the Revolving Commitments most recently in effect, giving effect to any assignments of Revolving Exposure that occur after such termination or expiration.

"Applicable Rate" means, for any day, with respect to any (a) Eurodollar Loan, 10.00% per annum, (b) ABR Loan, 9.00% per annum, (c) U.S. Base Rate Revolving Loan, 9.00% per annum, (d) Canadian Base Rate Revolving Loan, 9.00% per annum and (e) Commitment Fee, 1.00% per annum.

"Approved Fund" has the meaning assigned to such term in Section 9.04(b).

"Assignment and Assumption" means an assignment and assumption entered into by a Lender and an assignee (with the consent of any party whose consent is required by Section 9.04), and accepted by the Administrative Agent, substantially in the form of Exhibit A or any other form approved by the Administrative Agent.

"Availability" means, at any time, an amount equal to (a) the Total Borrowing Base at such time, minus (b) the aggregate Revolving Exposure at such time.

"Availability Block" means, at any time, an amount equal to the Stub Availability Block at such time, plus the dollar amounts set forth below for such time:

Time	Amount
From the Effective Date through April 17, 2009:	$2,000,000
From April 18, 2009 through May 1, 2009:	$2,500,000
From May 2, 2009 through May 15, 2009:	$3,000,000
From May 16, 2009 through May 29, 2009:	$3,500,000
After May 29, 2009:	$4,000,000

"Availability Period" means the period from and including the Effective Date to but excluding the earlier of the Termination Date and the date of termination of the Revolving Commitments.

"Banking Services" means each and any of the following bank services provided to any Loan Party by any Revolving Lender or any of its Affiliates after the Effective Date: (a) commercial credit cards, (b) stored value cards and (c) treasury management services (including controlled disbursement, currency, automated clearinghouse transactions, return items, overdrafts and interstate depository network services).

"Banking Services Obligations" of the Loan Parties means any and all obligations of the Loan Parties, whether absolute or contingent and howsoever and whensoever created, arising, evidenced or acquired (including all renewals, extensions and modifications thereof and substitutions therefor) in connection with Banking Services.

"Bankruptcy Cases" shall have the meaning assigned to such term in the recitals to this Agreement.

"Bankruptcy Code" means Title 11 of the United States Code entitled "Bankruptcy Code", as now and hereinafter in effect, or any successor statute.

"Bankruptcy Court" shall have the meaning assigned to such term in the recitals to this Agreement; provided, however, that "Bankruptcy Court" shall also mean any other court having competent jurisdiction over the Bankruptcy Cases.

"Bankruptcy Law" means the Bankruptcy Code and any other Federal, state or foreign bankruptcy, insolvency, reorganization, receivership or similar law.

"Bidder" has the meaning assigned to it in Section 5.14(b).

"Board" means the Board of Governors of the Federal Reserve System of the United States of America.

"Borrowers" means, collectively, the Parent Borrower and the Canadian Subsidiary Borrower.

"Borrowing" means Loans of the same Class and Type, made, converted or continued on the same date and, in the case of Eurodollar Loans, as to which a single Interest Period is in effect.

"Borrowing Base Certificate" means the Daily Borrowing Base Certificate and/or the Weekly Borrowing Base Certificate, as the context may require.

"Borrowing Request" means a request by the applicable Borrower for a Borrowing in accordance with Section 2.03.

"Business Day" means any day that is not a Saturday, Sunday or other day on which commercial banks in New York City are authorized or required by law to remain closed, provided that (a) when used in connection with a Eurodollar Loan, the term "Business Day" shall also exclude any day on which banks are not open for dealings in U.S. Dollar deposits in the London interbank market, and (b) when used in connection with a Loan made to, or a Letter of Credit deemed issued, pursuant to Section 2.04(a), for the account of, the Canadian Subsidiary Borrower, the term "Business Day" shall also (i) exclude any day on which banks are not open for dealings in deposits in Toronto but (ii) include any day on which banks are open for dealings in deposits in Toronto.

"Canadian Base Rate" means, for any day, the rate of interest per annum equal to the greater of (a) the interest rate per annum publicly announced from time to time by the Administrative Agent as its prime rate in effect on such day at its principal office in Toronto for determining interest rates applicable to commercial loans denominated in Canadian Dollars in Canada and (b) the CDOR Rate plus 0.50%. Any change in such prime rate or the CDOR Rate shall be effective as of the opening of business on the effective date of such change in the prime rate or the CDOR Rate, as applicable. If at any time the Canadian Base Rate would otherwise be less than 4.50% based on the foregoing methodology, the Canadian Base Rate shall be deemed to be 4.50% at such time notwithstanding the foregoing.

"Canadian Benefit Plans" means all employee benefit plans maintained or contributed to by the Borrowers or any Subsidiary that are not Canadian Pension Plans or Canadian Multi-Employer Plans, including all profit sharing, savings, post-retirement, supplemental retirement, retiring allowance, severance, pension, deferred compensation, welfare, bonus, incentive compensation, phantom stock, legal services, supplementary unemployment benefit plans or arrangements and all life, hospitalization

insurance, medical, health, dental and disability plans and arrangements in which Canadian employees or former Canadian employees of the Borrowers or any Subsidiary participate or are eligible to participate.

"Canadian Borrowing Base" means, at any time, the sum of (a) 85% of the U.S. Dollar Equivalent of the aggregate Adjusted Eligible Accounts of the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties at such time, plus (b) the lesser of (i) 85% of the product of (x) the Net Recovery Liquidation Rate in effect (based on the then most recent independent Inventory appraisal in form, scope and substance reasonably satisfactory to the Administrative Agent) at such time multiplied by (y) the U.S. Dollar Equivalent of the aggregate amount of Inventory of the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties at such time (as reported in accordance with the applicable Loan Party's Inventory records) minus any applicable Reserves, and (ii) the sum of (A) 75% of the U.S. Dollar Equivalent of the aggregate cost of Eligible Aluminum Billets and (B) 65% of the U.S. Dollar Equivalent of the aggregate cost of Other Eligible Inventory, in each case of the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties at such time minus any applicable Reserves (in the case of each of subclauses (i) and (ii) of this clause (b), with any Inventory, Eligible Inventory, Eligible Aluminum Billets and Other Eligible Inventory to be valued on a first-in, first-out basis), provided that the aggregate amount determined pursuant to this clause (b) shall not constitute more than 50% of the Canadian Borrowing Base at such time and shall not be greater than $4,000,000, plus (c) the PP&E Component at such time minus (d) without duplication, Reserves with respect to the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties at such time. The Administrative Agent may, in its Permitted Discretion, from time to time, reduce the advance rates set forth above or establish and revise ineligibles and Reserves reducing the amount of Eligible Accounts, Inventory, Eligible Inventory, Eligible Aluminum Billets, Other Eligible Inventory, Eligible Machinery and Equipment and Eligible Real Property used in computing the Canadian Borrowing Base, with any such changes to be effective one Business Day after delivery of notice thereof to the Canadian Subsidiary Borrower and the Lenders (which notice shall describe in reasonable detail the reasons for such changes), provided that any Reserve established by the Administrative Agent shall not apply in respect of items excluded from Eligible Accounts, Eligible Inventory, Eligible Aluminum Billets, Other Eligible Inventory, Eligible Machinery and Equipment and Eligible Real Property pursuant to the definitions thereof or covered by any other Reserve in effect at the time such Reserve is established. The Canadian Borrowing Base at any time shall be determined by reference to the most recent Daily Borrowing Base Certificate delivered to the Administrative Agent (i) in the case of the initial Canadian Borrowing Base, at or prior to the Effective Date or (ii) thereafter, pursuant to Section 5.01(f).

"Canadian Court" has the meaning assigned to such term in the recitals to this Agreement.

"Canadian Dollars" or "C$" means the lawful money of Canada.

"Canadian GAAP" means the generally accepted accounting principles in Canada.

"Canadian Hypothec" means a trust deed of hypothec granted or to be granted by any Loan Party in favor of the Administrative Agent on moveable or immoveable property pursuant to the laws of the Province of Quebec, together with all bonds, debentures and pledges or hypothecs thereof, as amended, supplemented or otherwise modified from time to time.

"Canadian L/C Disbursement" means a payment made by the Issuing Bank pursuant to a Letter of Credit deemed issued, pursuant to Section 2.04(a), for the account of the Canadian Subsidiary Borrower or for the account of any Foreign Subsidiary.

"Canadian L/C Exposure" means, at any time, the sum of (a) the aggregate undrawn amount of all outstanding Letters of Credit deemed issued, pursuant to Section 2.04(a), for the account of the Canadian Subsidiary Borrower and the Foreign Subsidiaries at such time plus (b) the aggregate amount of all Canadian L/C Disbursements that have not yet been reimbursed (including by the making of Revolving Loans hereunder) by or on behalf of the Canadian Subsidiary Borrower and the Foreign Subsidiaries at such time. The Canadian L/C Exposure of any Revolving Lender at any time shall be its Applicable Percentage of the Canadian L/C Exposure at such time.

"Canadian Lending Office" means, as to any Lender, the applicable branch, office or Affiliate of such Lender designated by such Lender to make Canadian Revolving Loans to the Canadian Subsidiary Borrower.

"Canadian Mortgage" means a mortgage, deed of trust, assignment of leases and rents, leasehold mortgage or other security document (including any amendment, modification or supplement thereto) granting a Lien on any Mortgaged Property located in Canada or any province thereof to secure the Secured Obligations. Each Canadian Mortgage shall be reasonably satisfactory in form and substance to the Administrative Agent.

"Canadian Multi-Employer Plan" means a multi-employer plan within the meaning of the Regulations under the Canadian Tax Act.

"Canadian Obligations" means (a) all unpaid principal of and accrued and unpaid interest on Loans made to the Canadian Subsidiary Borrower, (b) all L/C Exposure in respect of Letters of Credit deemed issued, pursuant to Section 2.04(a), for the account of the Canadian Subsidiary Borrower and the Foreign Subsidiaries and (c) all accrued and unpaid fees and all expenses, reimbursements, indemnities and other obligations of the Canadian Subsidiary Borrower and the Foreign Subsidiary Loan Parties owed to the Lenders or to any Lender, the Administrative Agent, the Issuing Bank or any indemnified party arising under the Loan Documents (including the Guarantees provided by the Loan Guarantors pursuant to Article X).

"Canadian Order" has the meaning assigned to such term in the recitals to this Agreement.

"Canadian Pension Plan" means any "registered pension plan" as defined in the Canadian Tax Act established, maintained or contributed to by either Borrower or any Subsidiary for their Canadian employees or former Canadian employees but does not include a Canadian Multi-Employer Plan.

"Canadian Perfection Certificate" means, at any time, the certificate most-recently delivered to the Administrative Agent (a) in the case of the Effective Date, pursuant to Section 4.01(e) or (b) thereafter, pursuant to Section 3.03(c) of the Canadian Security Agreement, in each case in the form of Exhibit F or any other form approved by the Administrative Agent.

"Canadian Proceeding" has the meaning assigned to such term in the recitals to this Agreement.

"Canadian Receivables Account" has the meaning assigned to the term "Receivables Account" in Section 3.06 of the Canadian Security Agreement.

"Canadian Resident" means a Person that is (a) resident in Canada for purposes of the Canadian Tax Act or (b) deemed to be resident in Canada for purposes of the Canadian Tax Act in respect

of all amounts paid or credited hereunder by the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties.

"Canadian Revolving Exposure" means, at any time, the sum of (a) the U.S. Dollar Equivalent of the aggregate principal amount of Canadian Revolving Loans denominated in Canadian Dollars outstanding at such time, (b) the aggregate principal amount of the Canadian Revolving Loans denominated in U.S. Dollars outstanding at such time and (c) the U.S. Dollar Equivalent of the Canadian L/C Exposure at such time. The Canadian Revolving Exposure of any Revolving Lender at any time shall be its Applicable Percentage of the Canadian Revolving Exposure at such time.

"Canadian Revolving Loan" means a Loan made by a Revolving Lender pursuant to Section 2.01(b). Each Canadian Revolving Loan (a) denominated in Canadian Dollars shall be a Canadian Base Rate Revolving Loan and (b) denominated in U.S. Dollars shall be a U.S. Base Rate Revolving Loan or a Eurodollar Revolving Loan.

"Canadian Revolving Sub-Commitment" means, with respect to each Revolving Lender, the commitment of such Lender to make Canadian Revolving Loans or acquire participations in Letters of Credit, expressed as an amount expressed in U.S. Dollars representing the maximum potential aggregate amount of such Lender's Canadian Revolving Exposure, as such commitment may be (a) reduced from time to time pursuant to Section 2.08 or Section 2.18(b) or (b) reduced or increased from time to time pursuant to assignments by or to such Lender pursuant to Section 9.02(d), Section 9.02(e) or Section 9.04. The initial amount of each Revolving Lender's Canadian Revolving Sub-Commitment is set forth opposite such Lender's name in the Commitment Schedule directly below the column entitled "Canadian Revolving Sub-Commitments" or in the Assignment and Assumption pursuant to which such Lender shall have assumed its Canadian Revolving Sub-Commitment, and, in any such case, shall be equal to such Lender's Applicable Percentage of the aggregate Canadian Revolving Sub-Commitments. The initial aggregate amount of the Revolving Lenders' Canadian Revolving Sub-Commitments is $24,360,000.

"Canadian Sale Process Order" has the meaning assigned to it in Section 5.14(a).

"Canadian Security Agreement" means the Canadian Security Agreement dated on or about the date hereof, substantially in the form attached hereto as Exhibit G-2, among the Parent Borrower, the Canadian Subsidiary Borrower, each Subsidiary Loan Party party thereto and the Administrative Agent.

"Canadian Subsidiary Borrower" has the meaning assigned to such term in the preamble to this Agreement.

"Canadian Subsidiary Loan Party" means any Subsidiary that is organized under the laws of Canada or any territory or province thereof (other than the Canadian Subsidiary Borrower) and that is a Foreign Subsidiary Loan Party.

"Canadian Tax Act" means the Income Tax Act (Canada) or any successor law purported to cover the same subject matter, as amended from time to time.

"Canadian Trademark Security Agreement" means the Canadian Trademark Security Agreement dated on or about the date hereof, in form and substance satisfactory to the Administrative Agent, among the Canadian Subsidiary Borrower, each Subsidiary Loan Party party thereto and the Administrative Agent.

"Capital Expenditures" means, for any period, (a) the additions to property, plant and equipment and other capital expenditures of the Parent Borrower and the Subsidiaries that are (or should be) set forth in a consolidated statement of cash flows of the Parent Borrower for such period prepared in accordance with GAAP and (b) Capital Lease Obligations incurred by the Parent Borrower and the Subsidiaries during such period, but excluding in each case (i) expenditures made by the Parent Borrower or the applicable Subsidiary to effect leasehold improvements to any property leased by the Parent Borrower or such Subsidiary to the extent such expenditures are reimbursed by the landlord in respect of such property within 30 days of such expenditures (as such number of days may be extended with the written consent of the Administrative Agent) and (ii) expenditures actually paid for by a third party (excluding Holdings or any subsidiary thereof) and for which no Loan Party has provided or is required to provide any consideration to such third party.

"Capital Lease Obligations" of any Person means the obligations of such Person to pay rent or other amounts under any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which obligations are required to be classified and accounted for as capital leases on a balance sheet of such Person under GAAP, and the amount of such obligations shall be the capitalized amount thereof determined in accordance with GAAP.

"Carve-Out" means (a) the unpaid fees due and payable to the Clerk of the Bankruptcy Court and the Office of the United States Trustee pursuant to 28 U.S.C. § 1930, (b) all reasonable fees and expenses incurred by a trustee under Section 726(b) of the Bankruptcy Code in an amount not exceeding $25,000 in the aggregate and (c) after the occurrence and during the continuance of an Event of Default, the payment of allowed and unpaid professional fees and disbursements incurred after the occurrence of such Event of Default by Holdings, the Parent Borrower and the Domestic Subsidiaries and any statutory committee appointed in the Bankruptcy Cases (in each case, other than any such fees and disbursements incurred in connection with the initiation or prosecution of any claims, causes of action, adversary proceedings or other litigation against the Prepetition Agent or the Prepetition Revolving Lenders) in an aggregate amount not in excess of the Carve-Out Cap, provided that notwithstanding the foregoing, prior to the occurrence of an Event of Default, the payment by Holdings, the Parent Borrower and the Domestic Subsidiaries of the compensation and reimbursement of expenses allowed and payable under Sections 330 and 331 of the Bankruptcy Code shall not reduce the Carve-Out.

"Carve-Out Cap" means $1,000,000.

"Cash Collateral Loans" has the meaning assigned to such term in the Interim Cash Collateral Order.

"Cash Flow Forecast" collectively means the 13-week cash flow forecast prepared each week by the Parent Borrower in form and with detail substantially similar to the 13-week cash flow forecast delivered to the Administrative Agent on March 25, 2009, which shall reflect the Parent Borrower's good faith projection of all cash receipts and disbursements in connection with the operation of its and the Subsidiaries' businesses for the next 13-week period.

"Cash Management Order" means that certain order issued by the Bankruptcy Court in substantially the form of Exhibit I (Form of Cash Management Order) and otherwise in form and substance reasonably satisfactory to the Administrative Agent.

"CCAA" has the meaning assigned to such term in the recitals to this Agreement.

"CCAA Charges" means the Administration Charge and the Directors Charge.

"CCAA Plan" means any plan of compromise or arrangement in the Canadian Proceeding, made pursuant to the CCAA.

"CDOR Rate" means, on any date, an interest rate per annum equal to the average discount rate applicable to bankers' acceptances denominated in Canadian Dollars with a term of 30 days appearing on the Reuters Screen CDOR Page (or on any successor or substitute page of such Screen, or any successor to or substitute for such Screen, providing rate quotations comparable to those currently provided on such page of such Screen, as determined by the Administrative Agent from time to time) at approximately 10:00 a.m., Toronto time, on such date (or, if such date is not a Business Day, on the next preceding Business Day) or, if such rate is not so reported, the average of the rate quotes for bankers' acceptances denominated in Canadian Dollars (expressed as a decimal and rounded upward, if necessary, to the nearest 1/100 of 1%) with a term of 30 days received by the Administrative Agent at approximately 10:00 a.m., Toronto time, on such date (or, if such date is not a Business Day, on the next preceding Business Day) from the Schedule I Reference Lenders.

"Change in Law" means (a) the adoption of any law, rule or regulation after the Effective Date, (b) any change in any law, rule or regulation or in the interpretation or application thereof by any Governmental Authority after the Effective Date or (c) compliance by any Lender or the Issuing Bank (or, for purposes of Section 2.14(b), by any lending office of such Lender or by such Lender's or the Issuing Bank's holding company, if any) with any request, guideline or directive (whether or not having the force of law) of any Governmental Authority made or issued after the Effective Date.

"Chapter 11 Plan" means a Chapter 11 plan in any of the Bankruptcy Cases.

"Class", when used in reference to any Loan or Borrowing, refers to whether such Loan, or the Loans comprising such Borrowing, are U.S. Revolving Loans, Canadian Revolving Loans or Term Loans and, when used in reference to any Commitment, refers to whether or not such Commitment is a Canadian Revolving Sub-Commitment.

"Class", when used in reference to any Lender, refers to whether such Lender has a Loan or Commitment with respect to a particular Class.

"CLO" has the meaning assigned to such term in Section 9.04(b).

"Code" means the Internal Revenue Code of 1986, as amended from time to time.

"Collateral" means all the "Collateral" or "Property" as defined in any Collateral Document, the Orders and the Canadian Order and shall also include the Mortgaged Properties.

"Collateral Access Agreement" has the meaning assigned to such term in the Security Agreements.

"Collateral Documents" means, collectively, the Security Agreements, the Canadian Hypothecs, the Mortgages and any other documents granting a Lien upon the Collateral as security for payment of the Secured Obligations specified therein.

"Commitment" means, with respect to any Lender, such Lender's Revolving Commitment and/or Canadian Revolving Sub-Commitment (as the context requires).

"Commitment Fee" has the meaning assigned to such term in Section 2.11(a).

"Commitment Schedule" means Schedule 2.01 hereto.

"Company Sale" has the meaning assigned to such term in Section 5.14(b).

"Consolidated EBITDA" means, for any period, Consolidated Net Income for such period plus (a) without duplication and to the extent deducted in determining such Consolidated Net Income, the sum of (i) consolidated interest expense, amortization or write-off of debt discount and debt issuance costs and commissions, discounts and other fees and charges associated with Indebtedness for such period, (ii) consolidated income tax expense (and expenses for franchise tax in the nature of income tax) and foreign withholding tax expense for such period and any expense for state single business, unitary, gross receipts or similar taxes for such period, (iii) all amounts attributable to depreciation and amortization (including amortization of intangibles (including goodwill and organizational costs)) for such period (excluding any amortization expense attributable to a prepaid cash item that was paid in a prior period), (iv) any extraordinary, unusual or non-recurring non-cash charges for such period (but excluding any such non-cash charge in respect of an item to the extent that it was included in Consolidated Net Income in a prior period and any such charge that results from the write-down or write-off of inventory), (v) fees and expenses incurred during such period in connection with any proposed or actual issuance of any Indebtedness or Equity Interests, or any proposed or actual investments, asset sales or divestitures, in each case permitted hereunder, in an aggregate amount not to exceed (for each such transaction) 2.0% of the aggregate value of such transaction, (vi) non-cash expenses resulting from the grant of stock options or other equity-related incentives to any director, officer or employee of Holdings, the Parent Borrower or any Subsidiary pursuant to a written plan or agreement approved by the Board of Directors of Holdings, (vii) non-cash exchange, translation or performance losses relating to any foreign currency or commodities hedging transactions or currency fluctuations, (viii) any non-cash losses during such period resulting from the application of Financial Accounting Standards No. 142 (relating to changes in accounting for the amortization of goodwill and certain other intangibles) and Financial Accounting Standards No. 144 (relating to writedowns of long-lived assets), (ix) payments by Holdings, the Parent Borrower or any Subsidiary in respect of earn-outs to which the seller in any acquisition or disposition becomes entitled during such period, (x) any loss during such period in respect of post-retirement benefits as a result of the application of Financial Accounting Standards No. 106, (xi) any loss resulting from the disposition of any asset of Holdings, the Parent Borrower or any Subsidiary not in the ordinary course of business, (xii) charges during such period in respect of legal, pension, warranty, workers compensation, occupancy and severance costs relating to discontinued businesses that are unrelated to the continuing business of the Parent Borrower and the Subsidiaries and (xiii) amounts received from customers relating to margin calls, as calculated in accordance with the methodology employed in the Forecast for determining the item entitled "Hedge Pickup", minus (b) without duplication and (except in the case of clause (i)) to the extent included in determining such Consolidated Net Income, the sum of (i) any cash disbursements during such period that relate to non-cash charges or losses added to Consolidated Net Income pursuant to clause (a)(iv) or (a)(vi) of this paragraph in any prior period, (ii) any extraordinary, unusual or non-recurring non-cash gains for such period, (iii) any non-cash gains for such period that represent the reversal of any accrual in a prior period for, or the reversal of any cash reserves established in a prior period for, anticipated cash charges, (iv) non-cash exchange, translation or performance gains relating to any foreign currency or commodities hedging transactions or currency fluctuations, (v) any non-cash gains during such period resulting from the application of Financial Accounting Standards No. 142 (relating to changes in accounting for the amortization of goodwill and certain other intangibles) and Financial Accounting Standards No. 144 (relating to writedowns of long-lived assets), (vi) any gain during such period in respect of post-retirement benefits as a result of the application of Financial Accounting Standards No. 106, (vii) any gain during such period from discontinued operations of the Parent Borrower and (viii) any gain resulting from the disposition of any asset of Holdings, the Parent

Borrower or any Subsidiary not in the ordinary course of business, all as determined on a consolidated basis in accordance with GAAP.

"Consolidated Net Income" means, for any period, the net income (excluding interest income) or loss of Holdings, the Parent Borrower and the Subsidiaries for such period determined on a consolidated basis in accordance with GAAP, provided that there shall be excluded (a) the income of any Subsidiary to the extent that the declaration or payment of dividends or other distributions by such Subsidiary of that income is not at the time permitted by a Requirement of Law or any agreement or instrument applicable to such Subsidiary (other than the Loan Documents, the Prepetition Loan Documents and the Senior Secured Notes Documents), except to the extent of the amount of cash dividends or other cash distributions actually paid to the Parent Borrower or any Subsidiary (unless the income of such Subsidiary would be excluded from Consolidated Net Income pursuant to clause (b) of this proviso) during such period, (b) the income of any Person (other than the Parent Borrower or any Subsidiary that is not accounted for using the equity method of accounting) in which the Parent Borrower or any Subsidiary owns an Equity Interest, except to the extent of the amount of cash dividends or other cash distributions actually paid to the Parent Borrower or any Subsidiary (unless the income of such Subsidiary would be excluded from Consolidated Net Income pursuant to clause (a) of this proviso) during such period and (c) unrealized gains and losses with respect to Swap Agreements during such period.

"Consolidated Net Sales" means, for any period, the net sales of Holdings, the Parent Borrower and the Subsidiaries for such period determined on a consolidated basis in accordance with GAAP.

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies, or the dismissal or appointment of management, of a Person, whether through the ability to exercise voting power, by contract or otherwise. The terms "Controlling" and "Controlled" have meanings correlative thereto.

"Daily Borrowing Base Certificate" means a certificate, signed and certified as accurate and complete by a Financial Officer or any other officer of the Parent Borrower reasonably acceptable to the Administrative Agent, in substantially the form of Exhibit C-1 or another form that is reasonably acceptable to the Administrative Agent in its sole discretion, which shall include appropriate exhibits, schedules, supporting documentation and additional reports (a) as outlined in Schedule 1 to Exhibit C-1 and (b) as reasonably requested by the Administrative Agent.

"Default" means any event or condition that constitutes an Event of Default or that upon notice, lapse of time or both would, unless cured or waived, become an Event of Default.

"Defaulting Lender" means any Revolving Lender, as determined by the Administrative Agent, that has (a) failed to fund any portion of its Revolving Loans or participations in Letters of Credit within three Business Days of the date required to be funded by it hereunder, (b) notified the Parent Borrower, the Administrative Agent, the Issuing Bank or any Lender in writing that it does not intend to comply with any of its funding obligations under this Agreement or has made a public statement to the effect that it does not intend to comply with its funding obligations under this Agreement or under other agreements in which it commits to extend credit, (c) failed, within three Business Days after request by the Administrative Agent, to confirm that it will comply with the terms of this Agreement relating to its obligations to fund prospective Revolving Loans and participations in then outstanding Letters of Credit, (d) otherwise failed to pay over to the Administrative Agent or any other Revolving Lender any other amount required to be paid by it hereunder within three Business Days of the date when due, unless the subject of a good faith dispute or (e) (i) become or is insolvent or has a parent company that has become

or is insolvent or (ii) become the subject of a bankruptcy or insolvency proceeding, or has had a receiver, conservator, trustee or custodian appointed for it, or has taken any action in furtherance of, or indicating its consent to, approval of or acquiescence in any such proceeding or appointment or has a parent company that has become the subject of a bankruptcy or insolvency proceeding, or has had a receiver, conservator, trustee or custodian appointed for it, or has taken any action in furtherance of, or indicating its consent to, approval of or acquiescence in any such proceeding or appointment.

"Dilution Factors" means, without duplication, with respect to any period, the aggregate amount of all deductions, credit memos, returns, adjustments, allowances, bad debt write-offs and other non-cash credits that are recorded during such period to reduce (x) with respect to the Domestic Borrowing Base, the Accounts of the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties in a manner consistent with current and historical accounting practices of the Parent Borrower and such Domestic Subsidiary Loan Parties, as the case may be, or (y) with respect to the Canadian Borrowing Base, the Accounts of the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties in a manner consistent with current and historical accounting practices of the Canadian Subsidiary Borrower and such Canadian Subsidiary Loan Parties, as the case may be.

"Dilution Ratio" means, on any date, the quotient (expressed as a percentage) equal to (x) with respect to the Domestic Borrowing Base, (i) the aggregate amount of the Dilution Factors in respect of the Accounts of the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties for the twelve fiscal month period most recently ended on or prior to such date divided by (ii) the aggregate gross sales of the Parent Borrower and such Domestic Subsidiary Loan Parties for such twelve fiscal month period, or (y) with respect to the Canadian Borrowing Base, (i) the aggregate amount of the Dilution Factors in respect of the Accounts of the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties for the twelve fiscal month period most recently ended on or prior to such date divided by (ii) the aggregate gross sales of the Canadian Subsidiary Borrower and such Canadian Subsidiary Loan Parties for such twelve fiscal month period.

"Dilution Reserve" means, on any date, (x) with respect to the Domestic Borrowing Base, the product of (i) the excess, if any, of the applicable Dilution Ratio over 5% multiplied by (ii) the aggregate amount of Eligible Accounts of the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties, in each case as of such date, or (y) with respect to the Canadian Borrowing Base, the product of (i) the excess, if any, of the applicable Dilution Ratio over 5% multiplied by (ii) the aggregate amount of Eligible Accounts of the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties, in each case as of such date.

"DIP Lenders' Charge" has the meaning assigned to such term in Section 2.21(b).

"Directors Charge" means a superpriority charge provided for in the Canadian Order securing the indemnity owing by the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties to their directors and officers in an amount not to exceed $1,000,000 in priority to the DIP Lenders' Charge.

"Disclosed Matters" means the actions, suits and proceedings and the environmental matters disclosed in Schedule 3.06.

"Document" has the meaning assigned to such term in the Domestic Security Agreement.

"Domestic Borrowing Base" means, at any time, the sum of (a) 85% of the U.S. Dollar Equivalent of the aggregate Adjusted Eligible Accounts of the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties at such time, plus (b) the lesser of (i) 85% of the product of (x) the Net

Recovery Liquidation Rate in effect (based on the then most recent independent Inventory appraisal in form, scope and substance reasonably satisfactory to the Administrative Agent) at such time multiplied by (y) the aggregate amount of Inventory of the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties at such time (as reported in accordance with the applicable Loan Party's Inventory records) minus any applicable Reserves, and (ii) the sum of (A) 75% of the aggregate cost of Eligible Aluminum Billets and (B) 65% of the aggregate cost of Other Eligible Inventory, in each case of the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties at such time minus any applicable Reserves (in the case of each of subclauses (i) and (ii) of this clause (b), with any Inventory, Eligible Inventory, Eligible Aluminum Billets and Other Eligible Inventory to be valued on a first-in, first-out basis), provided that the aggregate amount determined pursuant to this clause (b) shall not constitute more than 50% of the Domestic Borrowing Base at such time and shall not be greater than $8,000,000, plus (c) the PP&E Component at such time minus (d) without duplication, Reserves with respect to the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties at such time. The Administrative Agent may, in its Permitted Discretion, from time to time, reduce the advance rates set forth above or establish and revise ineligibles and Reserves reducing the amount of Eligible Accounts, Inventory, Eligible Inventory, Eligible Aluminum Billets, Other Eligible Inventory, Eligible Machinery and Equipment and Eligible Real Property used in computing the Domestic Borrowing Base, with any such changes to be effective one Business Day after delivery of notice thereof to the Parent Borrower and the Lenders (which notice shall describe in reasonable detail the reasons for such changes), provided that any Reserve established by the Administrative Agent shall not apply in respect of items excluded from Eligible Accounts, Eligible Inventory, Eligible Aluminum Billets, Other Eligible Inventory, Eligible Machinery and Equipment and Eligible Real Property pursuant to the definitions thereof or covered by any other Reserve in effect at the time such Reserve is established. The Domestic Borrowing Base at any time shall be determined by reference to the most recent Daily Borrowing Base Certificate delivered to the Administrative Agent (i) in the case of the initial Domestic Borrowing Base, at or prior to the Effective Date or (ii) thereafter, pursuant to Section 5.01(f).

"Domestic Security Agreement" means the Domestic Security Agreement dated on or about the date hereof, among Holdings, the Parent Borrower, each Domestic Subsidiary Loan Party and the Administrative Agent, substantially in the form attached hereto as Exhibit G-1.

"Domestic Subsidiary" means any Subsidiary that is organized under the laws of the United States of America, any State thereof or the District of Columbia.

"Domestic Subsidiary Loan Party" means any Domestic Subsidiary.

"Effective Date" means the date on which the conditions specified in Section 4.01 are satisfied (or waived in accordance with Section 9.02), which date may not occur more than five Business Days after the date on which both the Interim Order and the Canadian Order have been entered.

"Eligible Accounts" means, at any time, the Accounts of (x) the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties at such time, in the case of the Domestic Borrowing Base, or (y) the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties at such time, in the case of the Canadian Borrowing Base, but excluding any Account:

(a) that is not, after giving effect to the Orders and the Canadian Order, subject to a first priority perfected security interest in favor of the Administrative Agent (other than the CCAA Charges with respect to the Accounts of the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties) or to which the applicable Loan Party does not have sole lawful and absolute title;

(b) that is subject to any Lien other than (i) a Lien in favor of the Administrative Agent, (ii) a Lien in favor of the Prepetition Agent under the Prepetition Loan Documents, (iii) Liens granted under the Orders or the Canadian Order and (iv) a Permitted Encumbrance that does not have priority over the Lien in favor of the Administrative Agent;

(c) with respect to which the scheduled due date is more than 90 days after the original invoice date, that is unpaid more than 120 days after the date of the original invoice therefor or more than 60 days after the original due date, or that has been written off the books of the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, or otherwise designated as uncollectible;

(d) that is owing by an Account Debtor for which more than 50% of the aggregate amount of Accounts owing from such Account Debtor and its Affiliates are ineligible hereunder;

(e) that is owing by an Account Debtor to the extent the aggregate amount of Accounts owing from such Account Debtor and its Affiliates to (i) the Parent Borrower or any wholly-owned Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, exceeds 10% (or, in the case of Utility Trailer Manufacturing Co. or Eastern Metal Supply, 15%) of the aggregate Eligible Accounts attributable to the Domestic Borrowing Base, and (ii) the Canadian Subsidiary Borrower or any wholly-owned Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, exceeds 10% (or, in the case of Utility Trailer Manufacturing Co. or Eastern Metal Supply, 15%) of the aggregate Eligible Accounts attributable to the Canadian Borrowing Base;

(f) with respect to which any covenant, representation or warranty contained in any Loan Document has been breached or is not true;

(g) that (i) does not arise from the sale of goods or performance of services in the ordinary course of business, (ii) is not evidenced by an invoice or other documentation reasonably satisfactory to the Administrative Agent that has been sent to the Account Debtor, (iii) represents a progress billing, (iv) is contingent upon (A) the Parent Borrower or any Domestic Subsidiary Loan Party's, in the case of the Domestic Borrowing Base, or (B) the Canadian Subsidiary Borrower or any Canadian Subsidiary Loan Party's, in the case of the Canadian Borrowing Base, completion of any further performance, (v) represents a sale on a bill-and-hold, guaranteed sale, sale-and-return, sale on approval, consignment, cash-on-delivery or any other repurchase or return basis (other than customary customer return rights) or (vi) relates to payments of interest;

(h) (i) for which the goods giving rise to such Account have not been shipped to the Account Debtor or its designee, (ii) for which the services giving rise to such Account have not been performed by (A) the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (B) the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, (iii) for which the associated income has not been earned or (iv) if such Account was invoiced more than once;

(i) that is owed by an Account Debtor that has (i) applied for, suffered or consented to the appointment of any receiver, interim receiver, receiver manager, custodian, trustee, or liquidator of its assets, (ii) has had possession of all or a material part of its property taken by any receiver, interim receiver, receiver manager, custodian, trustee or liquidator, (iii) filed, or had filed against

it, any request or petition for liquidation, reorganization, arrangement, adjustment of debts, adjudication as bankrupt, winding-up or voluntary or involuntary case under any federal, state, provincial or foreign bankruptcy or insolvency laws, (iv) has admitted in writing its inability, or is generally unable to, pay its debts as they become due, (v) become insolvent or (vi) ceased operation of its business;

(j) that is owed by an Account Debtor that (i) does not maintain its chief executive office in the United States of America, any State thereof or the District of Columbia or Canada or any province thereof, or (ii) is not organized under applicable law of the United States of America or any state thereof or Canada or any province thereof, in each case, unless such Account (or portion thereof that is reasonably acceptable to the Administrative Agent) is backed by a letter of credit, guarantee or eligible bankers' acceptance acceptable to the Administrative Agent and in which the Administrative Agent has a perfected security interest;

(k) that is owed in any currency other than U.S. Dollars or Canadian Dollars;

(l) that is owed by (i) the government (or any department, agency, public corporation or instrumentality thereof) of any country other than (A) the United States of America, in the case of the Domestic Borrowing Base, or (B) the United States of America or Canada, in the case of the Canadian Borrowing Base, in each case, unless such Account (or portion thereof that is reasonably acceptable to the Administrative Agent) is backed by a letter of credit, guarantee or eligible bankers' acceptance acceptable to the Administrative Agent and in which the Administrative Agent has a perfected security interest, (ii) the government of the United States of America, or any department, agency, public corporation or instrumentality thereof, unless the Federal Assignment of Claims Act of 1940, as amended (31 U.S.C. §§ 3727 et seq. and 41 U.S.C. §§ 15 et seq.), and any other steps necessary to perfect the Lien of the Administrative Agent in such Account have been complied with to the Administrative Agent's reasonable satisfaction, or (iii) in the case of the Canadian Borrowing Base, the government of Canada, or any department, agency, public corporation or instrumentality thereof, unless the Financial Administration Act (Canada), as amended, and any other steps necessary to perfect the Lien of the Administrative Agent in such Account have been complied with to the Administrative Agent's reasonable satisfaction;

(m) that is owed by any Affiliate (other than any portfolio company directly or indirectly owned by the Sponsor so long as such Account has terms comparable to those provided to third parties on an arms length basis), employee, officer, director, agent or stockholder of any Loan Party;

(n) that, for any Account Debtor, exceeds a credit limit determined by the Administrative Agent in its Permitted Discretion, to the extent of such excess;

(o) that is owed by an Account Debtor or any Affiliate of such Account Debtor to which (i) the Parent Borrower or any Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (ii) the Canadian Subsidiary Borrower or any Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, is indebted, but only to the extent of such indebtedness, or is subject to any security, deposit, progress payment, retainage or other similar advance made by or for the benefit of an Account Debtor, in each case to the extent thereof;

(p) that is subject to any counterclaim, deduction, defense, setoff or dispute (but only to the extent of any such counterclaim, deduction, defense, setoff or dispute) or is subject to offset related to actual or anticipated sales volume rebates (but only to the extent of any such rebate);

(q) that is owed by an Account Debtor located in any jurisdiction that requires filing of a "Notice of Business Activities Report" or other similar report in order to permit (i) the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (ii) the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, to seek judicial enforcement in such jurisdiction of payment of such Account, unless the Parent Borrower, such Domestic Subsidiary Loan Party, the Canadian Subsidiary Borrower or such Canadian Subsidiary Loan Party, as applicable, has filed such report or qualified to do business in such jurisdiction, unless such failure to file may be cured by the payment of a de minimis amount;

(r) with respect to which (i) the Parent Borrower or any Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (ii) the Canadian Subsidiary Borrower or any Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, has made any agreement with the Account Debtor for any reduction thereof, other than discounts and adjustments given in the ordinary course of business, or any Account that was partially paid and the Parent Borrower, such Domestic Subsidiary Loan Party, the Canadian Subsidiary Borrower or such Canadian Subsidiary Loan Party, as applicable, created a new receivable for the unpaid portion of such Account;

(s) that does not comply in all material respects with the requirements of all applicable laws and regulations, whether federal, state, provincial or local, including, where applicable, the Federal Consumer Credit Protection Act, the Federal Truth in Lending Act and Regulation Z of the Board;

(t) that is for goods that have been sold under a purchase order or pursuant to the terms of a contract or other agreement or understanding (written or oral) that indicates or purports that any Person other than (i) the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (ii) the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, has or has had an ownership interest in such goods, or that indicates any party other than (A) the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (B) the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, as payee or remittance party (it being understood and agreed that the transfer of a purchase order from the Parent Borrower or any Domestic Subsidiary Loan Party to the Canadian Subsidiary Borrower or any Canadian Subsidiary Loan Party, or from the Canadian Subsidiary Borrower or any Canadian Subsidiary Loan Party to the Parent Borrower or any Domestic Subsidiary Loan Party, as the case may be, for capacity or other ordinary course business reasons shall not, in itself, result in the Account created in respect of such purchase order being deemed ineligible pursuant to this clause (t) for purposes of (1) the Domestic Borrowing Base, if the transferee is the Parent Borrower or any Domestic Subsidiary Loan Party, or (2) the Canadian Borrowing Base, if the transferee is the Canadian Subsidiary Borrower or any Canadian Subsidiary Loan Party);

(u) that was created on cash on delivery terms;

(v) that arises from sales to third party processors to the extent that the underlying inventory will be returned to the applicable Loan Party;

(w) that the Administrative Agent determines in its Permitted Discretion may not be paid by reason of the Account Debtor's inability to pay; or

(x) that is deemed ineligible by the Administrative Agent in its Permitted Discretion.

In addition to the foregoing, Eligible Accounts shall not include any portion of Accounts related to unreconciled variances between the accounts receivable aging and the general ledger to the extent that the general ledger is less than the accounts receivable aging. In determining the amount of an Eligible Account, the face amount of an Account shall be reduced by, without duplication, to the extent not reflected in such face amount, (i) the amount of all accrued and actual discounts, claims, credits or credits pending, promotional program allowances, price adjustments, finance charges or other allowances (including any amount that (A) the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (B) the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, may be obligated to rebate to an Account Debtor pursuant to the terms of any agreement or understanding (written or oral)) and (ii) the aggregate amount of all cash received in respect of such Account but not yet applied by (A) the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (B) the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, to reduce the amount of such Account. In determining the aggregate amount from the same Account Debtor that is unpaid more than 120 days from the original invoice date or more than 60 days from the original due date pursuant to clause (c) above, there shall be excluded the amount of any net credit balances relating to Accounts due from such Account Debtor with invoice dates more than 120 days from the original invoice date or more than 60 days from the original due date, as the case may be.

"Eligible Aluminum Billets" means, at any time, the portion of Eligible Inventory of (x) the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties at such time, in the case of the Domestic Borrowing Base, or (y) the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties at such time, in the case of the Canadian Borrowing Base, in each case that is comprised of aluminum billets and logs as shown on the applicable Loan Party's Inventory records in accordance with such Loan Party's current and historical accounting practices.

"Eligible Inventory" means, at any time, the Inventory of (x) the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties at such time, in the case of the Domestic Borrowing Base, or (y) the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties at such time, in the case of the Canadian Borrowing Base, but excluding any Inventory:

(a) that is not subject to a first priority perfected Lien in favor of the Administrative Agent (other than the CCAA Charges with respect to Inventory of the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties), except to the extent that this clause (a) would exclude any Inventory that is otherwise expressly included pursuant to this definition;

(b) that is subject to any Lien other than (i) a Lien in favor of the Administrative Agent, (ii) a Lien in favor of the Prepetition Agent under the Prepetition Credit Agreement, (iii) Liens granted under the Orders or the Canadian Order and (iv) a Permitted Encumbrance that does not have priority over the Lien in favor of the Administrative Agent, except in each case to the extent

that this clause (b) would exclude any Inventory that is otherwise expressly included pursuant to this definition;

(c) that is, in the Administrative Agent's reasonable opinion, seconds or thirds, stale, slow-moving, obsolete, unmerchantable, defective, used, unfit for sale, not salable in the ordinary course of business at prices approximating at least the cost of such Inventory, or unacceptable due to age, type, category and/or quantity, or that is identified by the applicable Loan Party as overstock or excess;

(d) with respect to which any covenant, representation or warranty contained in any Loan Document has been breached or is not true and that does not conform to all standards imposed by any Governmental Authority;

(e) in which any Person other than (i) the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties, in the case of the Domestic Borrowing Base, and (ii) the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties, in the case of the Canadian Borrowing Base, shall (A) have any direct or indirect ownership, interest or title to such Inventory, except for any interest (and any rights associated therewith, other than title) of such Person that arises in respect of Inventory (1) (x) as identified goods pursuant to Section 2-501 of the Uniform Commercial Code or (y) pursuant to Section 2-716 of the Uniform Commercial Code or (2) pursuant to any similar Canadian law or laws or (B) be indicated on any purchase order or invoice with respect to such Inventory as having or purporting to have an interest therein;

(f) that constitutes spare or replacement parts, subassemblies, packaging and shipping material, manufacturing supplies, samples, prototypes, displays or display items, bill-and-hold goods, goods that are returned or marked for return, repossessed goods, defective, damaged or rejected goods, goods held by any Loan Party on consignment, or goods that are not of a type held for sale in the ordinary course of business;

(g) that (i) is not located in the United States of America (in the case of the Domestic Borrowing Base) or Canada (in the case of the Canadian Borrowing Base) or (ii) is in transit with a common carrier from vendors and suppliers (as opposed to in transit with a common carrier between locations of Loan Parties, in which case such Inventory shall not be excluded by virtue thereof) or (iii) is being held by a Governmental Authority for purposes of customs clearance, except that any Inventory excluded pursuant to subclause (ii) or (iii) of this clause (g) having an aggregate Inventory Value not to exceed $5,000,000 at any time may qualify as Eligible Inventory if (A) the applicable Loan Party has title to such Inventory at such time and (B) such Inventory is insured in a manner that is reasonably satisfactory to the Administrative Agent;

(h) that is located in any location leased by (i) the Parent Borrower or any wholly-owned Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (ii) the Canadian Subsidiary Borrower or any wholly-owned Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, in each case, unless (A) the lessor has delivered to the Administrative Agent a Collateral Access Agreement or (B) a Reserve for up to three months' rent, charges and other amounts due or to become due with respect to such facility has been established by the Administrative Agent in its Permitted Discretion;

(i) that is located in any third party warehouse or is in the possession of a bailee (other than a third party processor) and is not evidenced by a Document, unless (i) such warehouseman or bailee has delivered to the Administrative Agent a Collateral Access Agreement and such other

documentation as the Administrative Agent may require or (ii) a Reserve has been established by the Administrative Agent in its Permitted Discretion;

(j) that is being processed offsite at a third party location or outside processor (unless (i) the Administrative Agent has received a Collateral Access Agreement from such location or processor with respect to such Inventory or (ii) a Reserve has been established by the Administrative Agent in respect of such Inventory), or is in-transit to or from said third party location or outside processor;

(k) that is a discontinued product or component thereof;

(l) that is the subject of a consignment by (i) the Parent Borrower or any Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (ii) the Canadian Subsidiary Borrower or any Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, as consignor;

(m) that contains or bears any intellectual property rights licensed to (i) the Parent Borrower or any Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (ii) the Canadian Subsidiary Borrower or any Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, in each case, unless the Administrative Agent is satisfied that it may sell or otherwise dispose of such Inventory without (A) infringing the rights of such licensor, (B) materially violating any contract with such licensor or (C) incurring any liability with respect to payment of royalties other than royalties incurred pursuant to sale of such Inventory under the current licensing agreement;

(n) that is not reflected in the current inventory records of (i) the Parent Borrower or any wholly-owned Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (ii) the Canadian Subsidiary Borrower or any wholly-owned Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base;

(o) any portion of the Inventory Value that is attributable to intercompany profit among the applicable Loan Party or its Affiliates; or

(p) that is deemed ineligible by the Administrative Agent in its Permitted Discretion.

"Eligible Machinery and Equipment" means the equipment listed on Schedule 1.01(a) and any additional equipment acquired after the Effective Date, in each case that is owned by (x) the Parent Borrower or any wholly-owned Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (y) the Canadian Subsidiary Borrower or any wholly-owned Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, in each case (i) that is acceptable in the Permitted Discretion of the Administrative Agent for inclusion in the applicable Borrowing Base, (ii) in respect of which an appraisal report has been delivered to the Administrative Agent in form, scope and substance reasonably satisfactory to the Administrative Agent (it being understood and agreed that, except as the Administrative Agent may otherwise notify the Parent Borrower otherwise (orally or in writing), appraisal reports delivered and satisfactory to the Prepetition Agent prior to the Petition Date shall be deemed delivered and satisfactory to the Administrative Agent) and (iii) in respect of which the Administrative Agent is satisfied that, after giving effect to the Orders and the Canadian Order, all actions

necessary in order to create valid first priority Liens on such equipment have been taken, and, in each case, meeting each of the following requirements:

(a) (i) the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (ii) the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, in each case has good title to such equipment and solely to the extent that no other Person has any direct or indirect ownership, interest or title;

(b) (i) the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (ii) the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, has the right to subject such equipment to a Lien in favor of the Administrative Agent; and such equipment is subject to a first priority perfected Lien in favor of the Administrative Agent (other than CCAA Charges in respect of the equipment of the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties) and is free and clear of all other Liens of any nature whatsoever (except for Permitted Encumbrances that do not have priority over the Lien in favor of the Administrative Agent);

(c) the full purchase price for such equipment has been paid by (i) the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (ii) the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base;

(d) such equipment is located on premises (i) owned by (A) the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (B) the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, and, in each case, subject to a first priority perfected Lien in favor of the Administrative Agent (other than CCAA Charges in respect of premises of the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties), or (ii) leased by (A) the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (B) the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, in each case, where (x) the lessor has delivered to the Administrative Agent a Collateral Access Agreement or (y) a Reserve for up to three months' rent, charges and other amounts due or to become due with respect to such facility has been established by the Administrative Agent in its Permitted Discretion;

(e) such equipment is in good working order and condition (ordinary wear and tear excepted);

(f) such equipment is not subject to any agreement (other than the Loan Documents, the Prepetition Loan Documents and the Senior Secured Notes Documents) that restricts the ability of (i) the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (ii) the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, to use, sell, transport or dispose of such equipment or that restricts the Administrative Agent's ability to take possession of, sell or otherwise dispose of such equipment; and

(g) such equipment does not constitute "fixtures" under the applicable laws of the jurisdiction in which such equipment is located (unless the Administrative Agent is satisfied that all actions necessary to create a perfected first priority Lien (subject to the Liens described in

clauses (a) and (b) (to the extent that (i) the applicable warehouseman, bailee or other Person described in clause (b) of the definition of "Permitted Encumbrance" has delivered to the Administrative Agent a Collateral Access Agreement or (ii) a Reserve has been established by the Administrative Agent in respect of such equipment) of the definition of "Permitted Encumbrances") in favor of the Administrative Agent on such fixtures have been taken).

"Eligible Real Property" means the real property listed on Schedule 1.02 owned by (x) the Parent Borrower or any wholly-owned Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (y) the Canadian Subsidiary Borrower or any wholly-owned Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, and meeting each of the following requirements:

(a) in respect of which an appraisal report has been delivered to the Administrative Agent in form, scope and substance reasonably satisfactory to the Administrative Agent (it being understood and agreed that, except as the Administrative Agent may otherwise notify the Parent Borrower (orally or in writing), appraisal reports delivered and satisfactory to the Prepetition Agent prior to the Petition Date shall be deemed delivered and satisfactory to the Administrative Agent);

(b) in respect of which the Administrative Agent is satisfied that all actions necessary in order to create a perfected first priority Lien (subject to the CCAA Charges in respect of real property of the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties and Liens described in clauses (a), (b) and (f) of the definition of "Permitted Encumbrances") in favor of the Administrative Agent on such real property have been taken, including the filing, registration and recording of the applicable Mortgage (or the delivery of the applicable Mortgage to the title insurance company for filing, registration or recording) to the extent the Administrative Agent notifies the Parent Borrower (orally or in writing) that it believes such actions to be necessary;

(c) that is adequately protected by valid title insurance with endorsements and in amounts reasonably acceptable to the Administrative Agent, insuring that the Administrative Agent, for the benefit of the Lenders, shall have a perfected first priority Lien (subject to Liens described in clauses (a), (b) and (f) of the definition of "Permitted Encumbrances") on such real property, evidence of which shall have been provided in form and substance reasonably satisfactory to the Administrative Agent, to the extent the Administrative Agent notifies the Parent Borrower (orally or in writing) that it believes such insurance to be necessary; and

(d) to the extent the Administrative Agent notifies the Parent Borrower (orally or in writing) that it believes such surveys, opinions and certificates to be necessary, (i) a Canadian or other non-U.S. survey has been delivered for which all necessary fees have been paid and which is dated no more than 30 days prior to the date on which the applicable Mortgage is registered or recorded, certified to the Administrative Agent and the issuer of the title insurance policy in a manner reasonably satisfactory to the Administrative Agent by a land surveyor duly registered and licensed in the state or province in which such Eligible Real Property is located and reasonably acceptable to the Administrative Agent, and shows all buildings and other improvements, any material offsite improvements, the location of any easements, parking spaces, rights of way, building setback lines and other dimensional regulations and the absence of encroachments, either by such improvements or on to such property, and other defects, other than encroachments and other defects reasonably acceptable to the Administrative Agent and (ii) in respect of which (A) the Parent Borrower or the applicable Domestic Subsidiary Loan Party, in the case of the Domestic Borrowing Base, or (B) the Canadian Subsidiary Borrower or the applicable Canadian Subsidiary Loan Party, in the case of the Canadian Borrowing Base, shall

have used its commercially reasonable efforts to obtain estoppel certificates executed by all tenants of such Eligible Real Property and such other consents, agreements and confirmations of lessors and third parties have been delivered as the Administrative Agent may deem necessary or desirable, together with evidence that all other actions that the Administrative Agent may deem necessary or desirable in order to create, after giving effect to the Orders and the Canadian Orders, perfected first priority Liens on the property described in the applicable Mortgage have been taken (subject to the CCAA Charges in respect of real property of the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties).

"Environmental Laws" means all treaties, laws, rules, regulations, codes, ordinances, orders, decrees, directives, judgments, injunctions, notices or binding agreements issued, promulgated or entered into by or with any Governmental Authority, relating in any way to the environment, the preservation or reclamation of natural resources, the generation, management, Release of, or exposure to, any Hazardous Material or to occupational health and safety matters.

"Environmental Liability" means any liability, obligation, claim, action, suit, judgment or order under or relating to any Environmental Law for any damages, injunctive relief, losses, fines, penalties, fees, expenses (including reasonable fees and expenses of attorneys and consultants) or costs, whether contingent or otherwise, including those arising from or relating to (a) any actual or alleged violation of any Environmental Law or permit, license or approval issued thereunder, (b) the generation, use, handling, transportation, storage, treatment or disposal of any Hazardous Materials, (c) exposure to any Hazardous Materials, (d) the Release of any Hazardous Materials or the presence of any Hazardous Materials in, on or under any real property or (e) any contract, agreement or other consensual arrangement pursuant to which liability is assumed or imposed with respect to any of the foregoing.

"Equity Interests" means shares of capital stock, partnership interests, membership interests in a limited liability company, beneficial interests in a trust or other equity ownership interests in a Person, and any warrants, options or other rights entitling the holder thereof to purchase or acquire any such equity interest.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended from time to time.

"ERISA Affiliate" means any trade or business (whether or not incorporated) that, together with the Parent Borrower, is treated as a single employer under Section 414(b) or (c) of the Code or, solely for purposes of Section 302 of ERISA and Section 412 of the Code, is treated as a single employer under Section 414 of the Code.

"ERISA Event" means (a) any "reportable event", as defined in Section 4043 of ERISA or the regulations issued thereunder with respect to a Plan (other than an event for which the 30-day notice period is waived), (b) any failure by any Plan to satisfy the minimum funding standard (within the meaning of Section 412 of the Code or Section 302 of ERISA) applicable to such Plan whether or not waived, (c) the filing pursuant to Section 412(c) of the Code or Section 302(c) of ERISA of an application for a waiver of the minimum funding standard with respect to any Plan, (d) the incurrence by the Parent Borrower or any of its ERISA Affiliates of any liability under Title IV of ERISA with respect to the termination of any Plan, (e) the receipt by the Parent Borrower or any ERISA Affiliate from the PBGC or a plan administrator of any notice relating to an intention to terminate any Plan or Multiemployer Plan, or the commencement of proceedings by the PBGC to terminate a Plan or Multiemployer Plan or the occurrence of any event or condition which could reasonably be expected to constitute grounds under ERISA for the termination of or the appointment of a trustee to administer any Plan, in each case where Plan assets are not sufficient to pay all Plan liabilities, (f) the imposition of any

liability under Title IV of ERISA, other than for PBGC premiums due but not delinquent under Section 4007 of ERISA, upon the Parent Borrower or any ERISA Affiliate, (g) the incurrence by the Parent Borrower or any of its ERISA Affiliates of any liability with respect to the withdrawal or partial withdrawal from any Plan or Multiemployer Plan, (h) the receipt by the Parent Borrower or any ERISA Affiliate of any notice, or the receipt by any Multiemployer Plan from the Parent Borrower or any ERISA Affiliate of any notice, concerning the imposition of Withdrawal Liability or a determination that a Multiemployer Plan is, or is expected to be, insolvent or in reorganization, within the meaning of Title IV of ERISA, (i) a determination that any Plan is, or is expected to be, in "at-risk" status (as defined in Section 303(i)(4) of ERISA or Section 430(i)(4) of the Code), (j) the occurrence of a nonexempt "prohibited transaction" with respect to which the Parent Borrower or any ERISA Affiliate is a "disqualified individual" (within the meaning of Section 4975 of the Code) or a "party in interest" (within the meaning of Section 406 of ERISA) or which could otherwise result in liability to the Parent Borrower or any ERISA Affiliate or (k) any other event or condition with respect to a Plan or Multiemployer Plan that could result in material liability of the Parent Borrower or any Subsidiary.

"Eurodollar", when used in reference to any Loan or Borrowing, refers to whether such Loan, or the Loans comprising such Borrowing, are bearing interest at a rate determined by reference to the Adjusted LIBO Rate (other than pursuant to the definition of Alternate Base Rate or U.S. Base Rate).

"Event of Default" has the meaning assigned to such term in Article VII.

"Exchange Act" means the Securities Exchange Act of 1934, as amended.

"Exchange Rate" means, on any day, for purposes of determining the U.S. Dollar Equivalent of Canadian Dollars, the rate at which Canadian Dollars may be exchanged into U.S. Dollars at the time of determination on such day on the Reuters WRLD Page for Canadian Dollars. In the event that such rate does not appear on any Reuters WRLD Page, the Exchange Rate shall be determined by reference to such other publicly available service for displaying exchange rates as may be agreed upon by the Administrative Agent and the Parent Borrower, or, in the absence of such an agreement, such Exchange Rate shall instead be the arithmetic average of the spot rates of exchange of the Administrative Agent in the market where its foreign currency exchange operations in respect of Canadian Dollars are then being conducted, at or about such time as the Administrative Agent shall elect after determining that such rates shall be the basis for determining the Exchange Rate, on such date for the purchase of U.S. Dollars for delivery two Business Days later, provided that if at the time of any such determination, for any reason, no such spot rate is being quoted, the Administrative Agent may use any reasonable method it deems appropriate to determine such rate, and such determination shall be conclusive absent manifest error.

"Excluded Amount" means the amount of the Loan Guaranty by the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties of Secured Obligations of the Parent Borrower and the Domestic Subsidiaries in an amount up to, but not exceeding, the amount of any reduction of the U.S. Revolving Exposure (as defined in the Prepetition Credit Agreement) since the Petition Date.

"Excluded Taxes" means, with respect to the Administrative Agent, any Lender, the Issuing Bank or any other recipient of any payment to be made by or on account of any obligation of any Loan Party hereunder,

(a) income or franchise taxes imposed on (or measured by) its net income by the United States of America or Canada, or by the jurisdiction under the laws of which such recipient is organized or in which its principal office is located or, in the case of the Administrative Agent,

the Issuing Bank or any Lender, in which its applicable lending office is located, or any amount withheld on account of such tax pursuant to the laws of Canada or any province or territory therein;

(b) any branch profits taxes imposed by the United States of America or Canada or any similar tax imposed by any other jurisdiction described in clause (a) above;

(c) any withholding tax that is attributable to the Administrative Agent's, the Issuing Bank's or a Lender's failure to comply with Section 2.16(e);

(d) in the case of the Administrative Agent, the Issuing Bank or any Lender (other than an assignee pursuant to a request by a Borrower under Section 2.18(b)), any withholding tax imposed by the United States of America that is in effect and would apply to amounts payable to the Administrative Agent, the Issuing Bank or such Lender at the time the Administrative Agent, the Issuing Bank or such Lender became a party to this Agreement (or designates a new lending office), except to the extent that (i) the Administrative Agent, the Issuing Bank or such Lender (or its assignor, if any) was entitled, at the time of designation of a new lending office (or assignment), to receive additional amounts from a Loan Party with respect to any withholding tax pursuant to Section 2.16(a) or (ii) such withholding tax shall have resulted from the making of any payment to a location other than the office designated by the Administrative Agent, the Issuing Bank or such Lender for the receipt of payments of the applicable type; and

(e) any withholding tax imposed under the laws of Canada or any province or territory therein that is in effect and would apply to amounts payable to the Administrative Agent, the Issuing Bank or any Lender, were such amounts paid at the time the Administrative Agent, the Issuing Bank or such Lender, as the case may be, became a party to this Agreement (or designates a new lending office), except any such withholding tax that would not have arisen but for (i) an assignment made pursuant to a request by a Borrower under Section 2.18(b) or (ii) the making of any payment to a location other than the office designated by the Administrative Agent, the Issuing Bank or Lender, as the case may be, for the receipt of payments of the applicable type.

"Facility Fee" means $1,120,000, payable by the Parent Borrower to the Administrative Agent for the accounts of the respective Revolving Lenders ratably in accordance with their Revolving Commitments.

"Fair Labor Standards Act" means the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.

"Federal Funds Effective Rate" means, for any day, the weighted average (rounded upwards, if necessary, to the next 1/100 of 1%) of the rates on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers, as published on the next succeeding Business Day by the Federal Reserve Bank of New York, or, if such rate is not so published for any day that is a Business Day, the average (rounded upwards, if necessary, to the next 1/100 of 1%) of the quotations for such day for such transactions received by the Administrative Agent from three Federal funds brokers of recognized standing selected by it.

"Final Order" has the meaning assigned to such term in Section 4.02(a)(iii).

"Final Order Date" means the day on which the Final Order is issued by the Bankruptcy Court.

"Financial Officer" means, with respect to any Person, the chief financial officer, principal accounting officer, vice president of finance, assistant treasurer, treasurer or controller of such Person. Unless otherwise expressly indicated, "Financial Officer" shall mean a Financial Officer of the Parent Borrower.

"Forecast" means the weekly Cash Flow Forecast and the budget prepared by the Parent Borrower (as may be periodically updated and supplemented by the Parent Borrower), which shall reflect the Parent Borrower's projection of all cash receipts and disbursements of the Parent Borrower and the Subsidiaries for the thirteen week period ended June 26, 2009. Unless the context specifically requires otherwise, the Forecast shall refer to the Forecast delivered to the Administrative Agent by the Parent Borrower on April 8, 2009.

"Foreign Lender" means any Lender that is organized under the laws of a jurisdiction other than that in which the Parent Borrower is located except that in respect of the Canadian Subsidiary Borrower or any Canadian Subsidiary Loan Party, "Foreign Lender" means a Lender that is not a Canadian Resident. For purposes of this definition, the United States of America, each State thereof and the District of Columbia shall be deemed to constitute a single jurisdiction.

"Foreign Subsidiary" means any Subsidiary that is organized under the laws of a jurisdiction other than the United States of America, any State thereof or the District of Columbia.

"Foreign Subsidiary Loan Party" means any Foreign Subsidiary (other than the Canadian Subsidiary Borrower), including any Canadian Subsidiary Loan Party but excluding (a) Indalex UK Limited and (b) any other Foreign Subsidiary (i) that is prohibited under mandatory provisions of its organizational documents, applicable law or contractual restrictions in existence on the date such Foreign Subsidiary became a Subsidiary (and not created in anticipation thereof) from guaranteeing, providing Collateral to secure, or otherwise becoming liable for, the Secured Obligations or (ii) in the event that any officer, director or employee thereof would more likely than not incur liability under applicable law (including, for the avoidance of doubt, any financial assistance laws of England and Wales or the United Kingdom) in connection with such Foreign Subsidiary being deemed a "Foreign Subsidiary Loan Party" under the Loan Documents or from guaranteeing, providing Collateral to secure, or otherwise becoming liable for, the Secured Obligations.

"Fronting Fee" has the meaning assigned to such term in Section 2.11(b).

"Funding Account" means Account No. 3751572376 maintained at Bank of America, N.A. or such other account identified in writing by the Parent Borrower to the Administrative Agent.

"GAAP" means generally accepted accounting principles in the United States of America.

"Governmental Authority" means the government of the United States of America, any other nation or any political subdivision thereof, whether state, provincial, territorial or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government (including any supra-national bodies such as the European Union or the European Central Bank).

"Granting Lender" has the meaning assigned to such term in Section 9.04(e).

"Guarantee" of or by any Person (the "guarantor") means any obligation, contingent or otherwise, of the guarantor guaranteeing or having the economic effect of guaranteeing any Indebtedness or other obligation of any other Person (the "primary obligor") in any manner, whether directly or indirectly, and including any obligation of the guarantor, direct or indirect, (a) to purchase or pay (or advance or supply funds for the purchase or payment of) such Indebtedness or other obligation or to purchase (or to advance or supply funds for the purchase of) any security for the payment thereof, (b) to purchase or lease property, securities or services for the purpose of assuring the owner of such Indebtedness or other obligation of the payment thereof, (c) to maintain working capital, equity capital or any other financial statement condition or liquidity of the primary obligor so as to enable the primary obligor to pay such Indebtedness or other obligation or (d) as an account party in respect of any letter of credit or letter of guaranty issued to support such Indebtedness or obligation, provided that the term Guarantee shall not include endorsements for collection or deposit in the ordinary course of business; and provided further that the amount of any Guarantee shall be deemed to be equal to the lesser of (i) an amount equal to the stated or determinable amount of the primary obligation in respect of which such Guarantee is made and (ii) (x) the maximum amount for which such guarantor may be liable pursuant to the terms of the instrument embodying such Guarantee or (y) if such Guarantee is not an unconditional guarantee of the entire amount of the primary obligation in respect of which such Guarantee is made and such maximum amount is not stated or determinable, the amount of such guarantor's maximum reasonably-anticipated liability in respect thereof as determined by such guarantor in good faith.

"Guaranteed Obligations" has the meaning assigned to such term in Section 10.01(a).

"Guaranteed Parties" has the meaning assigned to such term in Section 10.09.

"Hazardous Materials" means (i) any petroleum products or byproducts and all other hydrocarbons, coal ash, radon gas, asbestos, urea formaldehyde foam insulation, polychlorinated biphenyls, chlorofluorocarbons and other ozone-depleting substances, and toxic mold; and (ii) any chemical, material, substance or waste that is prohibited, limited or regulated by or pursuant to any Environmental Law.

"Holdings" has the meaning assigned to such term in the preamble to this Agreement.

"Indebtedness" of any Person means, without duplication, (a) all obligations of such Person for borrowed money, (b) all obligations of such Person evidenced by bonds, debentures, notes or similar instruments, (c) all obligations of such Person under conditional sale or other title retention agreements relating to property acquired by such Person, (d) all obligations of such Person in respect of the deferred purchase price of property or services (excluding (x) deferred compensation arrangements and (y) accounts payable that are not more than 60 days past due, in each case entered into or incurred, as the case may be, in the ordinary course of business), (e) all Indebtedness of others secured by (or for which the holder of such Indebtedness has an existing right, contingent or otherwise, to be secured by) any Lien on property owned or acquired by such Person, whether or not the Indebtedness secured thereby has been assumed, (f) all Guarantees by such Person of Indebtedness of others, (g) all Capital Lease Obligations of such Person, (h) all obligations, contingent or otherwise, of such Person as an account party in respect of letters of credit and letters of guaranty, (i) all obligations, contingent or otherwise, of such Person in respect of bankers' acceptances and (j) any other Off-Balance Sheet Liability. The Indebtedness of any Person shall include the Indebtedness of any other entity (including any partnership in which such Person is a general partner) to the extent such Person is liable therefor as a result of such Person's ownership interest in or other relationship with such entity, except to the extent the terms of such Indebtedness provide that such Person is not liable therefor. The amount of Indebtedness of any Person for purposes of clause (e) above shall (unless such Indebtedness has been assumed by, or is otherwise recourse to, such Person) be deemed to be equal to the lesser of (i) the aggregate unpaid amount of such

Indebtedness and (ii) the fair market value of the property encumbered thereby as determined by such Person in good faith, and the amount of any contingent Indebtedness of any Person shall be the maximum reasonably anticipated liability in respect thereof as determined by such Person in good faith.

"Indemnified Taxes" means Taxes other than Excluded Taxes.

"Indemnitee" has the meaning assigned to such term in Section 9.03(b).

"Interest Election Request" means a request by the applicable Borrower to convert or continue a Revolving Borrowing in accordance with Section 2.07.

"Interest Payment Date" means (a) with respect to any ABR, U.S. Base Rate or Canadian Base Rate Loan, the last day of each calendar month and the Termination Date and (b) with respect to any Eurodollar Loan, the last day of the Interest Period applicable to the Borrowing of which such Loan is a part.

"Interest Period" means, with respect to any Eurodollar Borrowing, the period commencing on the date of such Borrowing and ending on the numerically corresponding day in the calendar month that is one month thereafter, as the applicable Borrower may elect, provided that (a) if any Interest Period would end on a day other than a Business Day, such Interest Period shall be extended to the next succeeding Business Day unless such next succeeding Business Day would fall in the next calendar month, in which case such Interest Period shall end on the next preceding Business Day and (b) any Interest Period that commences on the last Business Day of a calendar month (or on a day for which there is no numerically corresponding day in the last calendar month of such Interest Period) shall end on the last Business Day of the last calendar month of such Interest Period. For purposes hereof, the date of a Eurodollar Borrowing initially shall be the date on which such Borrowing is made and thereafter shall be the effective date of the most recent conversion or continuation of such Borrowing.

"Interim Cash Collateral Order" means the interim order (I) authorizing the use of Prepetition Lenders' cash collateral under 11 U.S.C. § 363, (II) granting adequate protection under 11 U.S.C. §§ 361, 362 and 363 and (III) scheduling a final hearing under Bankruptcy Rule 4001(b) entered by the Bankruptcy Court on March 23, 2009.

"Interim Order" has the meaning assigned to such term in Section 4.01(m).

"Inventory" has the meaning assigned to such term in the Security Agreements.

"Inventory Value" means, at any time, with respect to the Inventory of any Loan Party, the U.S. Dollar Equivalent of the standard cost of such Inventory carried on the records of such Loan Party at such time (valued on a first-in, first-out basis) less any markup on any such Inventory received from an Affiliate, provided that in the event variances under the standard cost method (a) are capitalized, favorable variances shall be deducted from Inventory and unfavorable variances shall not be added to Inventory, or (b) are expensed, a reserve shall be determined in the Administrative Agent's Permitted Discretion as appropriate in order to adjust the standard cost of Inventory to approximate actual cost.

"Issuing Bank" means JPMorgan Chase Bank, N.A., in its capacity as the issuer of Letters of Credit.

"Joinder Agreement" has the meaning assigned to such term in Section 5.11(a).

"Judgment Currency" has the meaning assigned to such term in Section 9.19(a).

"Judgment Currency Conversion Date" has the meaning assigned to such term in Section 9.19(a).

"L/C Collateral Account" has the meaning assigned to such term in Section 2.04(h).

"L/C Disbursement" means a U.S. L/C Disbursement or Canadian L/C Disbursement, as the context may require.

"Lenders" means (a) the Persons listed on the Commitment Schedule, (b) the Term Lenders and (c) any other Person that shall have become a party hereto pursuant to Section 9.04, in each case other than any such Person that ceases to be a party hereto pursuant to Section 9.02(d), Section 9.02(e) or Section 9.04. References to any Lender in this Agreement or any other Loan Document shall be deemed to mean such Lender's affiliated Canadian Lending Office, where applicable.

"Letter of Credit" means any letter of credit deemed issued pursuant to Section 2.04(a).

"LIBO Rate" means, with respect to any Eurodollar Borrowing for any Interest Period, the rate appearing on Reuters BBA Libor Rates Page 3750 (or on any successor or substitute page of such service, or any successor to or substitute for such service, providing rate quotations comparable to those currently provided on such page of such service, as determined by the Administrative Agent from time to time for purposes of providing quotations of interest rates applicable to U.S. Dollar deposits in the London interbank market) at approximately 11:00 a.m., London time, two Business Days prior to the commencement of such Interest Period, as the rate for U.S. Dollar deposits in an amount comparable to the amount of such Eurodollar Borrowing and with a maturity comparable to such Interest Period. In the event that such rate is not available at such time for any reason, then the "LIBO Rate" with respect to such Eurodollar Borrowing for such Interest Period shall be the rate at which U.S. Dollar deposits of an amount comparable to the amount of such Eurodollar Borrowing and for a maturity comparable to such Interest Period are offered by the principal London office of the Administrative Agent in immediately available funds in the London interbank market at approximately 11:00 a.m., London time, two Business Days prior to the commencement of such Interest Period.

"Lien" means, with respect to any asset, (a) any mortgage, deed of trust, lien, pledge, hypothecation, encumbrance, charge (including any court-ordered charge) or security interest in, on or of such asset, (b) the interest of a vendor or a lessor under any conditional sale agreement, capital lease or title retention agreement (or any financing lease having substantially the same economic effect as any of the foregoing) relating to such asset and (c) in the case of securities owned by the applicable Person, any purchase option, call or similar right of a third party with respect to such securities.

"Loan Documents" means this Agreement, any promissory notes issued pursuant to this Agreement, the Collateral Documents, the Loan Guaranty and all other agreements, instruments, documents and certificates identified in Section 4.01 executed and delivered to, or in favor of, the Administrative Agent or any Lenders and including all other pledges, powers of attorney, consents, assignments, contracts and letter of credit agreements whether heretofore, now or hereafter executed by or on behalf of any Loan Party, or any employee of any Loan Party, and delivered to the Administrative Agent or any Lender in connection with the Agreement or the transactions contemplated thereby. Any reference in the Agreement or any other Loan Document to a Loan Document shall include all appendices, exhibits or schedules thereto, and all amendments, restatements, supplements or other

modifications thereto, and shall refer to the Agreement or such Loan Document as the same may be in effect at any and all times such reference becomes operative.

"Loan Guarantors" means, collectively, each of Holdings, the Parent Borrower (with respect to the Canadian Obligations and the other Loan Parties' Banking Services Obligations), the Canadian Subsidiary Borrower (with respect to the U.S. Obligations and the other Loan Parties' Banking Services Obligations) and the Subsidiary Loan Parties.

"Loan Guaranty" means Article X of this Agreement and, to the extent necessary, each separate Guarantee, in form and substance reasonably satisfactory to the Administrative Agent, delivered by each Loan Guarantor that is a Foreign Subsidiary (which Guarantee shall be governed by the laws of the applicable jurisdiction in which such Foreign Subsidiary is located), as it may be amended or modified and in effect from time to time.

"Loan Parties" means Holdings, the Parent Borrower, the Canadian Subsidiary Borrower and the Subsidiary Loan Parties.

"Loans" means the loans and advances made by the Lenders pursuant to this Agreement, including pursuant to Sections 2.01(c), 2.01(d) and 2.01(e).

"Local Time" means (a) with respect to a Loan or Borrowing made to the Parent Borrower or a Letter of Credit deemed issued, pursuant to Section 2.04(a), for the account of the Parent Borrower or a Domestic Subsidiary, New York City time, and (b) with respect to a Loan or Borrowing made to the Canadian Subsidiary Borrower or a Letter of Credit deemed issued, pursuant to Section 2.04(a), for the account of the Canadian Subsidiary Borrower or a Foreign Subsidiary, Toronto time.

"Material Adverse Effect" means a material adverse effect on (a) the business, assets, results of operations or financial condition of Holdings, the Parent Borrower and the Subsidiaries, taken as a whole, (b) the ability of any Loan Party to perform any of its material obligations under any Loan Document, (c) the Collateral, taken as a whole, or the Administrative Agent's Liens (on behalf of itself and the Lenders) on the Collateral, taken as a whole, or the priority of such Liens, or (d) the rights and remedies, taken as a whole, of the Administrative Agent, the Issuing Bank or the Lenders under the Loan Documents, provided that the filing of the Bankruptcy Cases and the Canadian Proceeding, the CCAA Charges and the DIP Lenders' Charge and the consequences that customarily result from proceedings under Chapter 11 of the Bankruptcy Code or the CCAA, as the case may be, shall not be considered in determining whether there has been a "Material Adverse Effect".

"Material Indebtedness" means Indebtedness (other than the Loans and Letters of Credit), or obligations in respect of one or more Swap Agreements, of any one or more of Holdings, the Parent Borrower and the Subsidiaries in an aggregate principal amount exceeding $1,000,000. For purposes of determining Material Indebtedness, the "principal amount" of the obligations of Holdings, the Parent Borrower or any Subsidiary in respect of any Swap Agreement at any time shall be the maximum aggregate amount (giving effect to any netting agreements) that Holdings, the Parent Borrower or such Subsidiary would be required to pay if such Swap Agreement were terminated at such time.

"Maturity Date" means the date that is 180 days after the Effective Date, or any earlier date on which the Commitments are reduced to zero or otherwise terminated pursuant to the terms hereof.

"Moody's" means Moody's Investors Service, Inc.

"Mortgage" means a Canadian Mortgage or a Canadian Hypothec in respect of Mortgaged Property, as the context may require.

"Mortgaged Property" means, initially, each parcel of real property and the improvements thereto owned by a Loan Party and identified on Schedule 1.03, and includes each other parcel of real property and the improvements thereto owned by a Loan Party with respect to which a Lien to secure any of the Secured Obligations is granted pursuant to Section 5.11 or by order of the Bankruptcy Court or Canadian Court.

"Monitor" means FTI Consulting Canada ULC in its capacity as court appointed monitor in the Canadian Proceeding.

"Multiemployer Plan" means a multiemployer plan as defined in Section 4001(a)(3) of ERISA that is maintained, sponsored or contributed to by the Parent Borrower or any ERISA Affiliate.

"Net Orderly Liquidation Value" means, at any time, with respect to Inventory, Eligible Real Property or Eligible Machinery and Equipment of any Person, the orderly liquidation value thereof (or, in the case of calculations made in respect of the Canadian Borrowing Base, the U.S. Dollar Equivalent of the orderly liquidation value thereof) as determined in a manner reasonably acceptable to the Administrative Agent by an appraiser reasonably acceptable to the Administrative Agent, net of all costs of liquidation thereof.

"Net Proceeds" means, with respect to any event, (a) the cash proceeds received in respect of such event, including (i) any cash received in respect of any non-cash proceeds (including any cash payments received by way of deferred payment of principal pursuant to a note or installment receivable or purchase price adjustment receivable, earn-out or otherwise, but excluding any reasonable interest payments), but only as and when received, (ii) in the case of a casualty, cash insurance proceeds, and (iii) in the case of a condemnation or similar event, cash condemnation awards and similar payments received in connection therewith, minus (b) the sum of (i) all reasonable fees and out-of-pocket expenses (including commissions and legal, accounting and other professional and transaction fees) paid by Holdings, the Parent Borrower and the Subsidiaries to third parties (other than Affiliates) in connection with such event, (ii) in the case of a sale, transfer or other disposition of an asset (including pursuant to a casualty or a condemnation or similar proceeding), the amount of all payments that are permitted hereunder and are made by Holdings, the Parent Borrower and the Subsidiaries as a result of such event to repay Indebtedness (other than Loans) secured by such asset or otherwise subject to mandatory prepayment as a result of such event, and (iii) in the case of a disposition by any Loan Party of any asset, any stamp taxes or similar taxes paid or reasonably estimated to be payable as a result of such disposition.

"Net Recovery Liquidation Rate" means, at any time, with respect to Inventory of any Person, the quotient (expressed as a percentage) of (i) the Net Orderly Liquidation Value thereof divided by (ii) the Inventory Value thereof (or, in the case of calculations made in respect of the Canadian Borrowing Base, the U.S. Dollar Equivalent of the Inventory Value thereof), determined on the basis of the then most recent independent Inventory appraisal in form, scope and substance reasonably satisfactory to the Administrative Agent.

"Non-Paying Guarantor" has the meaning assigned to such term in Section 10.10(a).

"Obligated Party" has the meaning assigned to such term in Section 10.02.

"Obligation Currency" has the meaning assigned to such term in Section 9.19(a).

"Obligations" means, collectively, the U.S. Obligations and the Canadian Obligations.

"Off-Balance Sheet Liability" of a Person means (a) any repurchase obligation or liability of such Person with respect to accounts or notes receivable sold by such Person to the extent such amounts could reasonably be expected to become due, (b) any indebtedness, liability or monetary obligation under any so-called "synthetic lease" transaction entered into by such Person or (c) any indebtedness, liability or obligation arising with respect to any other transaction that is the functional equivalent of or takes the place of borrowing but that does not constitute a liability on the balance sheets of such Person (other than operating leases).

"Orders" means the Interim Order and the Final Order.

"Other Eligible Inventory" means, at any time, the portion of Eligible Inventory of (x) the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties at such time, in the case of the Domestic Borrowing Base, or (y) the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties at such time, in the case of the Canadian Borrowing Base, in each case that is comprised of Inventory other than aluminum billets and logs as shown on the applicable Loan Party's Inventory records in accordance with such Loan Party's current and historical accounting practices.

"Other Taxes" means any and all present or future recording, stamp or documentary taxes or any other excise or property taxes, charges or similar levies arising from any payment made under any Loan Document or from the execution, delivery or enforcement of, or otherwise with respect to, any Loan Document, provided that, for the avoidance of doubt, Other Taxes shall not include any income taxes or withholding taxes.

"Parent Borrower" has the meaning assigned to such term in the preamble to this Agreement.

"Participant" has the meaning assigned to such term in Section 9.04(c)(i).

"Participation Fee" has the meaning assigned to such term in Section 2.11(b).

"Participant Register" has the meaning assigned to such term in Section 9.04(c).

"Paying Guarantor" has the meaning assigned to such term in Section 10.10(a).

"PBGC" means the Pension Benefit Guaranty Corporation referred to and defined in ERISA and any successor entity performing similar functions.

"Permitted Discretion" means a determination made in good faith and in the exercise of reasonable (from the perspective of a secured asset-based lender) business judgment.

"Permitted Encumbrances" means:

(a) Liens imposed by law for Taxes (including customs duties), assessments or other governmental charges or levies that are not yet due, are being contested in compliance with Section 5.04 or are permitted to be due hereunder;

(b) carriers', warehousemen's, mechanics', materialmen's, suppliers', repairmen's, construction, builders', landlords' and other like Liens imposed by statutory or common law,

arising in the ordinary course of business and securing obligations that are not overdue by more than 60 days or are being contested in compliance with Section 5.04;

(c) pledges and deposits made in the ordinary course of business in compliance with workers' compensation, unemployment insurance and other social security laws or regulations;

(d) deposits to secure the performance of bids, tenders, trade contracts, government contracts, leases, statutory obligations, self-insurance or reinsurance obligations, stay customs, surety and appeal or similar bonds, performance bonds, security deposits (including (x) security deposits for import or customs duties and other amounts that are being contested in compliance with Section 5.04 and (y) customary security deposits for the payment of rent) and other obligations of a like nature, in each case in the ordinary course of business;

(e) judgment liens in respect of judgments that do not constitute an Event of Default hereunder;

(f) immaterial survey exceptions, easements, zoning restrictions, rights-of-way, agreements with Governmental Authorities disclosed by registered titles to the Mortgaged Properties and similar encumbrances on real property imposed by law or arising in the ordinary course of business that do not secure any monetary obligations and that either (i) in the aggregate do not materially detract from the value of the affected property or interfere with the ordinary conduct of business of the Parent Borrower or any Subsidiary or (ii) are described in a mortgage policy of the title insurance or surveys issued in favor of and accepted by the Administrative Agent or the Prepetition Agent with respect to any property;

(g) Liens arising from Permitted Investments described in clause (d) of the definition of the term "Permitted Investments";

(h) Canadian deemed statutory trusts or Liens for employee source deductions made under workers' compensation, unemployment insurance or other social security legislation and for goods and services under the Excise Tax Act (Canada); and

(i) deposits to secure utility bills approved by the Bankruptcy Court and, with respect to the Canadian Subsidiary Borrower or any Canadian Subsidiary Loan Party, the Canadian Court,

provided that the term "Permitted Encumbrances" shall not include any Lien securing Indebtedness (other than Indebtedness in respect of Permitted Investments described in clause (g) above), and provided further that notwithstanding anything to the contrary contained in this Agreement or any Collateral Document (including any provision for, reference to, or acknowledgement of, any Lien or Permitted Encumbrance), nothing herein and no approval by the Administrative Agent or the Lenders of any Lien or Permitted Encumbrance (whether such approval is oral or in writing) shall be construed as or deemed to constitute a subordination by the Administrative Agent or the Lenders of any security interest or other right, interest or Lien in or to the Collateral or any part thereof in favor of any Lien or Permitted Encumbrance or any holder of any Lien or Permitted Encumbrance, except to the extent specifically set forth herein or in such approval.

"Permitted Fee Receiver" means any Person that, with respect to any fees paid under Section 2.11(a) or Section 2.11(b) of this Agreement, delivers to the Administrative Agent, on or prior to the date on which such Person becomes a party hereto (and from time to time thereafter upon the request of the Parent Borrower and the Administrativ e Agent, unless such Person becomes legally unable to do so solely as a result of a Change in Law after becoming a party hereto), accurate and duly completed copies

(in such number as requested) of one or more of Internal Revenue Service Forms W-9, W-8ECI, W-8EXP, W-8BEN or W-8IMY (together with, if applicable, one of the aforementioned forms duly completed from each direct or indirect beneficial owner of such Person), or any successor form thereto, that entitles such Person to a complete exemption from U.S. withholding tax on such payments (provided that, in the case of the Internal Revenue Service Form W-8BEN, a Person providing such form shall qualify as a Permitted Fee Receiver only if such form establishes such exemption on the basis of the "business profits" or "other income" articles of a tax treaty to which the United States is a party and provides a U.S. taxpayer identification number), in each case together with such supplementary documentation as may be prescribed by applicable law to permit the Parent Borrower or the Administrative Agent to determine whether such Person is entitled to such complete exemption.

"Permitted Investments" means:

(a) direct obligations of, or obligations the principal of and interest on which are unconditionally guaranteed by, the United States of America (or by any agency thereof to the extent such obligations are backed by the full faith and credit of the United States of America), in each case maturing within one year from the date of acquisition thereof;

(b) investments in commercial paper maturing within 270 days from the date of acquisition thereof and having, at such date of acquisition, the highest credit rating obtainable from S&P or from Moody's;

(c) investments in certificates of deposit, banker's acceptances and time or demand deposits maturing within 365 days from the date of acquisition thereof issued or guaranteed by or placed with, and money market deposit accounts issued or offered by, any domestic office of any commercial bank organized under the laws of the United States of America or any State thereof which has a combined capital and surplus and undivided profits of not less than $500,000,000;

(d) fully collateralized repurchase agreements with a term of not more than 30 days for securities described in clause (a) above and entered into with a financial institution satisfying the criteria described in clause (c) above;

(e) investments in securities with maturities of 365 days or less from the date of acquisition thereof issued or fully guaranteed by any state, commonwealth or territory of the United States of America, or by any political subdivision or taxing authority thereof, and with a rating of A or higher by S&P and A2 or higher by Moody's;

(f) Indebtedness issued by Persons (other than the Sponsor or any Sponsor Affiliate) with a rating of A or higher by S&P and A2 or higher by Moody's;

(g) investments in any money market fund that invests at least 95% of its assets in securities of the types described in clauses (a) through (f) above; and

(h) in the case of the Canadian Subsidiary Borrower or any Foreign Subsidiary, (i) investments of the type and maturity described in clauses (a) through (g) above of foreign obligors, which investments or obligors (or the parents of such obligors) have ratings described in clause (b) above or equivalent ratings from comparable foreign rating agencies or (ii) investments of the type and maturity described in clauses (a) through (g) above of foreign obligors (or the parents of such obligors), which investments or obligors (or the parents of such obligors) are not rated as provided in such clauses or in clause (i) above but which are, in the reasonable judgment

of the Parent Borrower, comparable in investment quality to such investments and obligors (or the parents of such obligors).

"Permitted Prepetition Payment" means a payment on account of any pre-petition claim set forth on Schedule 1.01(c) or approved by the Required Lenders, provided that no such payment shall be made after the occurrence and during the continuance of, or if such payment would result in, a Default.

"Person" means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, Governmental Authority or other entity.

"Petition Date" shall have the meaning assigned to such term in the recitals to this Agreement.

"Plan" means any employee pension benefit plan (other than a Multiemployer Plan) subject to the provisions of Title IV of ERISA or Section 412 of the Code or Section 302 of ERISA sponsored, maintained or contributed to by the Parent Borrower or any ERISA Affiliate. For the avoidance of doubt, "Plan" does not include any Canadian Pension Plan or any Canadian Multi-Employer Plan.

"PP&E Component" means, at the time of any determination, (a) with respect to the Domestic Borrowing Base, an amount equal to the sum of (i) 85% of the Net Orderly Liquidation Value of Eligible Machinery and Equipment of the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties at such time, provided that the aggregate amount determined pursuant to this subclause (a)(i) shall not constitute more than 25% of the aggregate Domestic Borrowing Base at such time, and (ii) the lesser of (A) 50% of the fair market value (as set forth in the then most recent independent appraisal in form, scope and substance reasonably satisfactory to the Administrative Agent) of Eligible Real Property of the Parent Borrower and the wholly-owned Domestic Subsidiary Loan Parties at such time, and (B) $6,000,000, and (b) with respect to the Canadian Borrowing Base, an amount equal to the sum of (i) 85% of the U.S. Dollar Equivalent of the Net Orderly Liquidation Value of Eligible Machinery and Equipment of the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties at such time, provided that the aggregate amount determined pursuant to this subclause (b)(i) shall not constitute more than 25% of the aggregate Canadian Borrowing Base at such time, and (ii) the lesser of (A) 50% of the U.S. Dollar Equivalent of the fair market value (as set forth in the then most recent independent appraisal in form, scope and substance reasonably satisfactory to the Administrative Agent) of Eligible Real Property of the Canadian Subsidiary Borrower and the wholly-owned Canadian Subsidiary Loan Parties at such time, and (B) $2,000,000. Notwithstanding the foregoing, (x) at the time of any determination, the aggregate amount of the PP&E Component with respect to the Domestic Borrowing Base and the Canadian Borrowing Base, on a combined basis, shall not exceed $30,000,000 and (y) the Parent Borrower shall have the option, at one time during the term of this Agreement, to reallocate the amounts between clauses (a)(ii)(B) and (b)(ii)(B) (so long as the aggregate amount under such clauses does not exceed $8,000,000).

"Prepetition Agent" means JPMorgan Chase Bank, N.A., in its capacity as Administrative Agent under the Prepetition Credit Agreement, and its successors in such capacity.

"Prepetition Banking Services Obligations" means the collective reference to the Banking Services Obligations under the Prepetition Credit Agreement owed to certain of the Lenders as of the Petition Date as identified on Schedule 1.01(e).

"Prepetition Credit Agreement" means the Amended and Restated Credit Agreement dated as of May 21, 2008, among Holdings, the Parent Borrower, the Canadian Subsidiary Borrower, the

other Subsidiaries of the Parent Borrower party thereto, the Lenders named therein and the Prepetition Agent, as further amended as of November 25, 2008 and March 6, 2009.

"Prepetition Guarantors" means the "Loan Guarantors" under and as defined in the Prepetition Credit Agreement.

"Prepetition Indebtedness" means the Indebtedness and other obligations that are outstanding as of the Petition Date incurred by the Parent Borrower, the Canadian Subsidiary Borrower and the Prepetition Guarantors under the Prepetition Loan Documents and owed to the Prepetition Revolving Lenders. For the avoidance of doubt, Prepetition Indebtedness does not include any term loans made by the Sponsor or any Sponsor Affiliate under the Prepetition Credit Agreement or any accrued interest, fees or other amounts payable in respect thereof.

"Prepetition Letters of Credit" means the collective reference to the letters of credit issued and outstanding under the Prepetition Credit Agreement as of the Petition Date as identified on Schedule 1.01(b).

"Prepetition Loan Documents" means the "Loan Documents" under and as defined in the Prepetition Credit Agreement.

"Prepetition Revolving Lenders" means the lenders from time to time party to the Prepetition Credit Agreement, but excluding the Sponsor or any Sponsor Affiliate as a lender thereunder.

"Prepetition Revolving Loans" means the collective reference to the revolving loans outstanding under the Prepetition Credit Agreement as of the Petition Date as identified on Schedule 1.01(f).

"Prepetition Swap Obligations" means the collective reference to the Swap Obligations under the Prepetition Credit Agreement owed to certain of the Lenders or their affiliates as of the Petition Date as identified on Schedule 1.01(d), including Swap Obligations in connection with the Prior Swap, **provided that at such time that the Prior Swap is amended and restated in accordance with clause (d) of Schedule 5.15 or otherwise, it shall cease to be a Prepetition Swap Obligation and shall be deemed to be a Swap Obligation**.

"Prime Rate" means the rate of interest per annum publicly announced from time to time by JPMorgan Chase Bank, N.A., as its prime rate in effect at its principal office in New York City (the Prime Rate not being intended to be the lowest rate of interest charged by JPMorgan Chase Bank, N.A., in connection with extensions of credit to debtors).

"Priority Rules" means, with respect to any prepayment or repayment of Loans, the allocation by the Administrative Agent of the proceeds of such payments in the following order:

(a)for payments that are made in connection with a permanent partial reduction of the aggregate Revolving Commitments pursuant to Section 2.08, allocation to pay U.S. Revolving Loans to the extent of prepayments required to be made in order to comply with Section 2.08(b) after giving effect to such reduction;

(b)for payment that are made in connection with (or after) a total reduction or termination of the aggregate Revolving Commitments pursuant to Section 2.08 or Article VII, or an acceleration of Loans pursuant to Article VII, ratable allocation between the U.S. Revolving

Loans and the Term Loans in proportion to the aggregate outstanding principal amount of each such Class of Loans; and

(c)for other prepayments or repayments, allocation (i) first, to the payment of the principal amount of outstanding U.S. Revolving Loans and (ii) second, after the principal amount of all outstanding U.S. Revolving Loans has been paid in full, to the payment of outstanding Term Loans.

"Prior Swap" means the ISDA Master Agreement, dated as of August 9, 2007, between the Parent Borrower and JPMorgan Chase Bank, N.A., acting in its individual capacity and not as Administrative Agent, as such agreement may be amended and restated in accordance with clause (d) of Schedule 5.15 or otherwise.

"Projections" has the meaning assigned to such term in Section 5.01(e).

"Proposed Change" has the meaning assigned to such term in Section 9.04(d).

"Register" has the meaning set forth in Section 9.04(b)(iv).

"Related Parties" means, with respect to any specified Person, such Person's Affiliates and the respective directors, officers, employees, agents and advisors of such Person and such Person's Affiliates.

"Release" means any actual or threatened release, spill, emission, leaking, dumping, injection, pouring, deposit, disposal, discharge, dispersal, leaching or migration into or through the environment (including ambient air, surface water, groundwater, land surface or subsurface strata) or within or upon any building, structure, facility or fixture.

"Replacement Liens" has the meaning set forth in Section 4.01(m).

"Report" means reports prepared by the Administrative Agent or another Person showing the results of appraisals, field examinations or audits pertaining to the Parent Borrower or any Subsidiary's assets from information furnished by or on behalf of the Parent Borrower or any such Subsidiary, after the Administrative Agent has exercised its rights of inspection pursuant to this Agreement, which Reports may be distributed to the Lenders by the Administrative Agent.

"Required Lenders" means, at any time, Lenders having Revolving Exposure and unused Revolving Commitments representing more than 50% of the sum of the aggregate Revolving Exposure and the aggregate unused Revolving Commitments at such time.

"Requirement of Law" means, with respect to any Person, (a) the charter, articles or certificate of organization or incorporation and by-laws or other organizational or governing documents of such Person and (b) any statute, law, treaty, rule, regulation, order, decree, writ, injunction or determination of any arbitrator or court or other Governmental Authority, in each case applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject, and including Environmental Laws.

"Reserves" means any and all reserves that the Administrative Agent deems necessary, in its Permitted Discretion, to maintain (including, without duplication, reserves for overdue or accrued and unpaid interest on the Secured Obligations, reserves for up to three months' rent at locations leased by any Loan Party and for consignee's, warehousemen's and bailee's charges (in each case to the extent the

Inventory located at such leased location or warehouse or subject to such consignment or bailment is not covered by a Collateral Access Agreement), reserves for lower of cost or market Inventory valuation, reserves for Inventory shrinkage, reserves for customs charges and shipping charges related to any Inventory in transit, reserves for the Term Loans, reserves for Swap Obligations, reserves for priority claims of employees of the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties under the Wage Earners Protection Program Act (Canada) ("WEPP Reserves"), reserves for contingent liabilities of any Loan Party that are reasonably likely to become actual liabilities, reserves for the amount of the Carve-Out in an amount not to exceed the Carve-Out Cap, reserves for the CCAA Charges, reserves for uninsured losses of any Loan Party, reserves for uninsured, underinsured, un-indemnified or under-indemnified liabilities or potential liabilities with respect to any litigation that are reasonably likely to become actual liabilities and reserves for taxes, fees, assessments and other governmental charges and employee source deductions, workers' compensation obligations, vacation pay or pension fund obligations) with respect to the Collateral or any Loan Party. Any Reserve (including the amount of such Reserve) shall bear a reasonable relationship to the events, conditions or circumstances that are the basis for such Reserve. The amount of any Reserve shall not be duplicative of the amount of any other Reserve taken by any Loan Party with respect to the same events, conditions or circumstances. In the event that the Administrative Agent determines in its Permitted Discretion that (a) the events, conditions or circumstances underlying the maintenance of any Reserve shall cease to exist or (b) the liability that is the basis for any Reserve has been reduced, then such Reserve shall be rescinded or reduced in an amount as determined in the Administrative Agent's Permitted Discretion, as applicable, at the request of the Parent Borrower. It is understood and agreed that WEPP Reserves and the reserve for the Directors Charge may, in the discretion of the Administrative Agent, be applied in whole or in part against the Domestic Borrowing Base instead of the Canadian Borrowing Base.

"Responsible Officer" means the chief executive officer or president of any Person or any Financial Officer of such Person, and any other officer of such Person with responsibility for the administration of the obligations of such Person under this Agreement. Unless otherwise expressly indicated, "Responsible Officer" shall mean a Responsible Officer of the Parent Borrower.

"Restricted Payment" means any dividend or other distribution (whether in cash, securities or other property) with respect to any Equity Interests in Holdings, the Parent Borrower or any Subsidiary, or any payment (whether in cash, securities or other property), including any sinking fund or similar deposit, on account of the purchase, redemption, retirement, acquisition, cancelation or termination of any Equity Interests in Holdings, the Parent Borrower or any Subsidiary or any option, warrant or other right to acquire any such Equity Interests in Holdings, the Parent Borrower or any Subsidiary, or any other payment (including any payment under any Swap Agreement) that has a substantially similar effect to any of the foregoing, other than compensation in the ordinary course of business.

"Reuters Screen CDOR Page" means the display designated as page CDOR on the Reuters Monitor Money Rates Service or such other page as may, from time to time, replace that page on that service for the purpose of displaying bid quotations for bankers' acceptances accepted by leading Canadian banks.

"Revolving Commitment" means, with respect to each Revolving Lender, the commitment, if any, of such Lender to make Revolving Loans and to acquire participations in Letters of Credit hereunder during the Availability Period, expressed as an amount in U.S. Dollars representing the maximum potential aggregate amount of such Lender's Revolving Exposure, as such commitment may be (a) reduced from time to time pursuant to Section 2.08 or Section 2.18(b) or (b) reduced or increased from time to time pursuant to assignments by or to such Lender pursuant to Section 9.02(d), Section 9.02(e) or Section 9.04. The initial amount of each Revolving Lender's Revolving Commitment is set forth on the

Commitment Schedule directly below the column entitled "Revolving Commitments" or in the Assignment and Assumption pursuant to which such Lender shall have assumed its Revolving Commitment, as the case may be. The initial aggregate amount of the Revolving Lenders' Revolving Commitments is $85,387,371.

"Revolving Exposure" means, with respect to any Revolving Lender at any time, the sum of the outstanding principal amount of such Lender's U.S. Revolving Exposure and Canadian Revolving Exposure at such time. The aggregate Revolving Exposure at any time shall be the aggregate amount of the Revolving Exposure of all Revolving Lenders at such time.

"Revolving Lender" means a Lender with a Revolving Commitment or, if the Revolving Commitments have terminated or expired, a Lender with Revolving Exposure.

"Revolving Loans" means, collectively, the U.S. Revolving Loans and the Canadian Revolving Loans.

"S&P" means Standard & Poor's Ratings Group, Inc.

"Sale Closing" means the consummation of a Company Sale.

"Schedule I Lender" means any Lender named on Schedule I to the Bank Act (Canada).

"Schedule I Reference Lenders" means any one or more of the Schedule I Lenders as may be agreed by the Canadian Subsidiary Borrower and the Administrative Agent from time to time.

"SEC" means the Securities and Exchange Commission or any successor thereto.

"Secured Obligations" means all Obligations, Swap Obligations ~~in connection with the Prior Swap~~**permitted hereunder** and Banking Services Obligations.

"Secured Parties" has the meaning assigned to such term in the Security Agreements.

"Security Agreements" means, collectively, the Domestic Security Agreement, the Canadian Security Agreement and the Canadian Trademark Security Agreement.

"Senior Secured Notes" means the 11.5% Second-Priority Senior Secured Notes due 2014 issued by the Parent Borrower under the Senior Secured Notes Indenture on February 2, 2006.

"Senior Secured Notes Documents" means the Senior Secured Notes Indenture, all side letters, instruments, agreements and other documents evidencing or governing the Senior Secured Notes, providing for any Guarantee or other right in respect thereof, affecting the terms of the foregoing or entered into in connection therewith and all schedules, exhibits and annexes to each of the foregoing.

"Senior Secured Notes Indenture" means the Indenture dated as of February 2, 2006, among the Parent Borrower, the Subsidiaries listed therein and the Senior Secured Notes Indenture Trustee.

"Senior Secured Notes Indenture Trustee" means U.S. Bank, National Association, as trustee under the Senior Secured Notes Indenture.

"Solvent" means, with respect to any Person on any date of determination, that on such date (a) the fair value of the property of such Person is greater than the total amount of liabilities,

including contingent liabilities, of such Person, (b) the present fair salable value of the assets of such Person is not less than the amount that will be required to pay the probable liability of such Person on its debts as they become absolute and matured, (c) such Person does not intend to, and does not believe that it will, incur debts or liabilities beyond such Person's ability to pay such debts and liabilities as they mature, (d) such Person is not engaged in business or a transaction, and is not about to engage in business or a transaction, for which such Person's property would constitute an unreasonably small capital, and (e) such Person is able to pay its debts and liabilities, contingent obligations and other commitments as they mature in the ordinary course of business. The amount of contingent liabilities at any time shall be computed as the amount that, in the light of all the facts and circumstances existing at such time, represents the amount that can reasonably be expected to become an actual or matured liability.

"Sponsor" means Sun Capital Partners, Inc.

"Sponsor Affiliate" means any Affiliate of the Sponsor other than (a) Holdings, the Parent Borrower and the Subsidiaries and (b) any other operating company or a Person controlled by such an operating company.

"SPV" has the meaning assigned to such term in Section 9.04(e).

"Statutory Reserve Rate" means a fraction (expressed as a decimal), the numerator of which is the number one and the denominator of which is the number one minus the aggregate of the maximum reserve percentages (including any marginal, special, emergency or supplemental reserves) expressed as a decimal established by the Board to which the Administrative Agent is subject with respect to the Adjusted LIBO Rate, for eurocurrency funding (currently referred to as "Eurocurrency Liabilities" in Regulation D of the Board). Such reserve percentages shall include those imposed pursuant to such Regulation D. Eurodollar Loans shall be deemed to constitute eurocurrency funding and to be subject to such reserve requirements without benefit of or credit for proration, exemptions or offsets that may be available from time to time to any Lender under such Regulation D or any comparable regulation. The Statutory Reserve Rate shall be adjusted automatically on and as of the effective date of any change in any reserve percentage.

"Stub Availability Block" means the sum of the Stub U.S. Availability Block and the Stub Canadian Availability Block.

"Stub U.S. Availability Block" means, on any day, the "U.S. Revolving Exposure" outstanding on such date under (and as defined in) the Prepetition Credit Agreement.

"Stub Canadian Availability Block" means, on any day, the "Canadian Revolving Exposure" outstanding on such date under (and as defined in) the Prepetition Credit Agreement.

"subsidiary" means, with respect to any Person (the "parent") at any date, any corporation, limited liability company, partnership, association or other entity the accounts of which would be consolidated with those of the parent in the parent's consolidated financial statements if such financial statements were prepared in accordance with GAAP as of such date, as well as any other corporation, limited liability company, partnership, association or other entity (a) of which securities or other ownership interests representing more than 50% of the equity or more than 50% of the ordinary voting power or, in the case of a partnership, more than 50% of the general partnership interests are, as of such date, owned, controlled or held, or (b) that is, as of such date, otherwise Controlled, by the parent or one or more subsidiaries of the parent or by the parent and one or more subsidiaries of the parent.

"Subsidiary" means any subsidiary of the Parent Borrower.

"Subsidiary Loan Parties" means, collectively, the Domestic Subsidiary Loan Parties and the Foreign Subsidiary Loan Parties.

"Superpriority Claim" means a claim against the Parent Borrower and any Loan Guarantor in any of the Bankruptcy Cases under Section 364(c)(1) of the Bankruptcy Code that is an administrative expense claim having priority over any and all administrative expenses of the kind specified in Sections 503 and 507(b) of the Bankruptcy Code.

"Swap Agreement" means any agreement with respect to any swap, forward, future or derivative transaction or option or similar agreement involving, or settled by reference to, one or more rates, currencies, commodities, equity or debt instruments or securities, or economic, financial or pricing indices or measures of economic, financial or pricing risk or value or any similar transaction or any combination of these transactions, provided that no phantom stock or similar plan providing for payments only on account of services provided by current or former directors, officers, employees or consultants of Holdings, the Parent Borrower or the Subsidiaries shall be a Swap Agreement.

"Swap Obligations" of a Person means any and all obligations of such Person, whether absolute or contingent and howsoever and whensoever created, arising, evidenced or acquired (including all renewals, extensions and modifications thereof and substitutions therefor), under (a) any and all Swap Agreements and (b) any and all cancellations, buy backs, reversals, terminations or assignments of any Swap Agreement transaction.

"Taxes" means any and all present or future taxes, levies, imposts, duties, deductions, charges or withholdings imposed by any Governmental Authority.

"Termination Date" means the date that is earliest to occur of (i) the Maturity Date, (ii) the earlier of (x) the date a Chapter 11 Plan becomes effective in accordance with its terms and (y) the date a CCAA Plan becomes effective in accordance with its terms, (iii) the date that is 30 days after the entry of the Interim Order if the Final Order has not been entered prior to such date, (iv) the date of acceleration of the Loans and the termination of the Commitments in accordance with this Agreement and (v) a Sale Closing for a Company Sale.

"Term Lender" means a Lender with an outstanding Term Loan.

"Term Loans" mean Loans to the Parent Borrower from certain Lenders deemed made in accordance with Section 2.01(e).

"Total Borrowing Base" means, at any time, the aggregate of the Domestic Borrowing Base and the Canadian Borrowing Base at such time.

"Total L/C Exposure" means, at any time, the aggregate of the U.S. L/C Exposure and the U.S. Dollar Equivalent of the Canadian L/C Exposure at such time.

"Transactions" means, collectively, (a) the filing of the Bankruptcy Cases and the commencement of the Canadian Proceeding, (b) the execution and delivery of the Loan Documents, (c) the borrowing of Revolving Loans hereunder, (d) the payment of related fees and expenses and (e) the conversion and exchange of certain Prepetition Revolving Loans, Prepetition Swap Obligations,

Prepetition Banking Services Obligations, Prepetition Letters of Credit and Cash Collateral Loans pursuant to the Loan Documents, the Orders and the Canadian Order into Obligations hereunder.

"Type", when used in reference to any Loan or Borrowing, refers to whether the rate of interest on such Loan, or on the Loans comprising such Borrowing, is determined by reference to the Adjusted LIBO Rate, the Alternate Base Rate, the U.S. Base Rate or the Canadian Base Rate.

"UCC" means the Uniform Commercial Code as in effect from time to time in the State of New York or any other state the laws of which are required to be applied in connection with the issue of perfection of security interests.

"Unliquidated Obligations" means, at any time, any Secured Obligations (or portion thereof) that are contingent in nature or unliquidated at such time, including any Secured Obligation that is (a) an obligation to reimburse a bank for drawings not yet made under a letter of credit issued by it, (b) any other obligation (including any guarantee or indemnity) that is contingent in nature at such time or (c) an obligation to provide collateral to secure any of the foregoing types of obligations.

"Up-front Fee" means $600,000, payable by the Parent Borrower to the Administrative Agent for the accounts of the respective Revolving Lenders ratably in accordance with their Revolving Commitments.

"U.S. Base Rate" means, for any day, the rate of interest per annum equal to the greatest of (a) the interest rate per annum publicly announced from time to time by the Administrative Agent as its reference rate in effect on such day at its principal office in Toronto for determining interest rates applicable to commercial loans denominated in U.S. Dollars in Canada, (b) the Federal Funds Effective Rate in effect on such day plus 0.50% and (c) the Adjusted LIBO Rate effect on such day plus 1.00%. Any change in the U.S. Base Rate due to a change in such reference rate, the Federal Funds Effective Rate or the Adjusted LIBO Rate shall be effective as of the opening of business on the effective day of such change in the reference rate, the Federal Funds Effective Rate or the Adjusted LIBO Rate, as applicable.

"U.S. Dollar Equivalent" means, on any date of determination, (a) with respect to any amount in U.S. Dollars, such amount, and (b) with respect to any amount in Canadian Dollars, the equivalent in U.S. Dollars of such amount, determined by the Administrative Agent pursuant to Section 1.05 using the Exchange Rate with respect to such currency at that time in effect under the provisions of such Section.

"U.S. Dollars" or "$" means lawful money of the United States of America.

"U.S. L/C Disbursement" means a payment made by the Issuing Bank pursuant to a Letter of Credit deemed issued, pursuant to Section 2.04(a), for the account of the Parent Borrower or for the account of any Domestic Subsidiary.

"U.S. L/C Exposure" means, at any time, the sum of (a) the aggregate undrawn amount of all outstanding Letters of Credit deemed issued, pursuant to Section 2.04(a), for the account of the Parent Borrower and the Domestic Subsidiaries at such time, plus (b) the aggregate amount of all U.S. L/C Disbursements that have not yet been reimbursed (including by the making of Loans hereunder) by or on behalf of the Parent Borrower and the Domestic Subsidiaries at such time. The U.S. L/C Exposure of any Lender at any time shall be its Applicable Percentage of the U.S. L/C Exposure at such time.

"U.S. Lending Office" means, as to any Lender, the applicable branch, office or Affiliate of such Lender designated by such Lender to make Loans to the Parent Borrower.

"U.S. Obligations" means (a) all unpaid principal of and accrued and unpaid interest on the Loans made to the Parent Borrower, (b) all U.S. L/C Exposure in respect of Letters of Credit deemed issued pursuant to Section 2.04(a) for the account of the Parent Borrower and the Domestic Subsidiaries and (c) all accrued and unpaid fees and all expenses, reimbursements, indemnities and other obligations of Holdings, the Parent Borrower and the Domestic Subsidiary Loan Parties owed to the Revolving Lenders or to any Revolving Lender, the Administrative Agent, the Issuing Bank or any Related Party of any of the foregoing arising under the Loan Documents (including the Guarantees provided by the Loan Guarantors pursuant to Article X in respect of such obligations).

"U.S. Receivables Account" has the meaning assigned to it in Section 3.06 of the Domestic Security Agreement.

"U.S. Revolving Exposure" means, at any time, the sum of (a) the outstanding principal amount of U.S. Revolving Loans at such time and (b) the U.S. L/C Exposure at such time. The U.S. Revolving Exposure of any Revolving Lender at any time shall be such Lender's Applicable Percentage of the U.S. Revolving Exposure at such time.

"U.S. Revolving Loan" means a Loan made by a Revolving Lender pursuant to Section 2.01(a) (including pursuant to the application of Sections 2.01(c) and 2.01(d)). Each U.S. Revolving Loan shall be an ABR Revolving Loan or a Eurodollar Revolving Loan.

"wholly-owned subsidiary" means, with respect to any Person at any date, a subsidiary of such Person of which securities or other ownership interests representing 100% of the Equity Interests (other than directors' qualifying shares) are, as of such date, owned, controlled or held by such Person or one or more wholly-owned Subsidiaries of such Person or by such Person and one or more wholly-owned Subsidiaries of such Person. For purposes of this Agreement, "wholly-owned Subsidiary" means a direct or indirect wholly-owned subsidiary of the Parent Borrower.

"Weekly Borrowing Base Certificate" means a certificate, signed and certified as accurate and complete by a Financial Officer or any other officer of the Parent Borrower reasonably acceptable to the Administrative Agent, in substantially the form of Exhibit C-2 or another form that is reasonably acceptable to the Administrative Agent in its sole discretion, which shall include appropriate exhibits, schedules, supporting documentation and additional reports (a) as outlined in Schedule 1 to Exhibit C-2 and (b) as reasonably requested by the Administrative Agent.

"Withdrawal Liability" means liability to a Multiemployer Plan as a result of a complete or partial withdrawal from such Multiemployer Plan, as such terms are defined in Part I of Subtitle E of Title IV of ERISA.

"Withholding Agent" has the meaning assigned to such term in Section 2.16(a).

SECTION 1.02. Classification of Loans and Borrowings. For purposes of this Agreement, (a) Loans may be classified and referred to by Class (e.g., a "U.S. Revolving Loan") or by Type (e.g., a "Eurodollar Loan") or by Class and Type (e.g., a "Eurodollar U.S. Revolving Loan"), and Borrowings also may be classified and referred to by Class (e.g., a "U.S. Revolving Borrowing") or by Type (e.g., a "Eurodollar Borrowing") or by Class and Type (e.g., a "Eurodollar U.S. Revolving

Borrowing") and (b) "Revolving Borrowings" means the U.S. Revolving Borrowings, the Canadian Revolving Borrowings or both, as the context may require.

SECTION 1.03.Terms Generally. The definitions of terms herein shall apply equally to the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words "include", "includes" and "including" shall be deemed to be followed by the phrase "without limitation". The word "will" shall be construed to have the same meaning and effect as the word "shall". Unless the context requires otherwise (a) any definition of or reference to any agreement, instrument or other document herein shall be construed as referring to such agreement, instrument or other document as from time to time amended, amended and restated, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth herein), (b) any reference herein to any Person shall be construed to include such Person's successors and assigns, (c) the words "herein", "hereof" and "hereunder", and words of similar import, shall be construed to refer to this Agreement in its entirety and not to any particular provision hereof, (d) all references herein to Articles, Sections, Exhibits and Schedules shall be construed to refer to Articles and Sections of, and Exhibits and Schedules to, this Agreement, (e) the words "asset" and "property" shall be construed to have the same meaning and effect and to refer to any and all tangible and intangible assets and properties, including cash, securities, accounts and contract rights and (f) any reference to any Requirement of Law shall, unless otherwise specified, refer to such Requirement of Law as amended, modified or supplemented from time to time.

SECTION 1.04.Accounting Terms; GAAP. Except as otherwise expressly provided herein, all terms of an accounting or financial nature shall be construed in accordance with GAAP, as in effect from time to time, consistently applied, provided that if the Parent Borrower notifies the Administrative Agent that the Parent Borrower requests an amendment to any provision hereof (including any defined term) to eliminate the effect of any change occurring after the date hereof in GAAP or in the application thereof on the operation of such provision (or if the Administrative Agent notifies the Parent Borrower that the Required Lenders request an amendment to any provision (including any definition) hereof for such purpose), regardless of whether any such notice is given before or after such change in GAAP or in the application thereof, then such provision shall be interpreted on the basis of GAAP as in effect and applied immediately before such change shall have become effective until such notice shall have been withdrawn or such provision amended in accordance herewith. Upon any such request for an amendment, the Parent Borrower, the Required Lenders and the Administrative Agent agree to consider in good faith any such amendment in order to amend the provisions of this Agreement so as to reflect equitably such accounting changes so that the criteria for evaluating the Parent Borrower's financial condition shall be the same after such accounting changes as if such accounting changes had not occurred. In no event shall any capital stock be deemed to constitute Indebtedness or any payment of any dividend or distribution thereon be deemed to constitute interest solely as a result of the application of Financial Accounting Standards No. 150.

SECTION 1.05.Currency Translation. (a)Except as specifically provided in clause (b) of this Section 1.05, for purposes of determining compliance as of any date with the terms of any Loan Document (other than the limits and sublimits for Revolving Exposure set forth in Article II of this Agreement), amounts incurred or outstanding in Canadian Dollars shall be translated into U.S. Dollars at the exchange rates in effect on the first Business Day of the fiscal quarter in which such determination occurs or in respect of which such determination is being made, as such exchange rates shall be determined in good faith by the Parent Borrower. No Default shall arise as a result of any limitation or threshold set forth in U.S. Dollars in any Loan Document (other than the limits and sublimits for Revolving Exposure set forth in Article II of this Agreement) being exceeded solely as a result of changes

in currency exchange rates from those rates applicable on the first day of the fiscal quarter in which such determination occurs or in respect of which such determination is being made.

(b)(i) The Administrative Agent shall determine the U.S. Dollar Equivalent of any Letter of Credit denominated in Canadian Dollars, as well as of each component of the Domestic Borrowing Base and the Canadian Borrowing Base, as of each date (with such date to be reasonably determined by the Administrative Agent) that is on or about the date of each request for the amendment, renewal or extension of such Letter of Credit, using the Exchange Rate for the applicable currency in relation to U.S. Dollars in effect on the date of determination, and each such amount shall be the U.S. Dollar Equivalent of such Letter of Credit (or such Domestic Borrowing Base component or Canadian Borrowing Base component, as the case may be) until the next required calculation thereof pursuant to this paragraph (b)(i) (or, in the case of such Domestic Borrowing Base component or Canadian Borrowing Base component, pursuant to paragraph (b)(ii) or (b)(v)) of this Section 1.05.

(ii) The Administrative Agent shall determine the U.S. Dollar Equivalent of any Borrowing denominated in Canadian Dollars as well as of each component of the Domestic Borrowing Base and the Canadian Borrowing Base, as of each date (with such date to be reasonably determined by the Administrative Agent) that is on or about the date of a Borrowing Request or Interest Election Request with respect to any such Borrowing, or as of each date of any termination or reduction of Commitments hereunder or the prepayment of Loans hereunder, in each case using the Exchange Rate for the applicable currency in relation to U.S. Dollars in effect on the date of determination, and each such amount shall be the U.S. Dollar Equivalent of such Borrowing (or such Domestic Borrowing Base component or Canadian Borrowing Base component, as the case may be) until the next required calculation thereof pursuant to this paragraph (b)(ii) (or, in the case of such Domestic Borrowing Base component or Canadian Borrowing Base component, pursuant to paragraph (b)(i) or (b)(v)) of this Section 1.05.

(iii) The U.S. Dollar Equivalent of any Canadian L/C Disbursement made by the Issuing Bank in Canadian Dollars and not reimbursed by the Canadian Subsidiary Borrower shall be determined as set forth in paragraphs (e) or (k) of Section 2.04, as applicable. In addition, the U.S. Dollar Equivalent of the Canadian L/C Exposure shall be determined as set forth in paragraph (k) of Section 2.04, at the time and in the circumstances specified therein.

(iv) The Administrative Agent shall notify the Borrowers, the applicable Lenders and the Issuing Bank of each calculation of the U.S. Dollar Equivalent of each Letter of Credit, Borrowing and L/C Disbursement.

(v) In addition to the requirements set forth in paragraphs (b)(i) and (b)(ii) of this Section 1.05, the Administrative Agent shall determine the U.S. Dollar Equivalent of each applicable component of the Domestic Borrowing Base and the Canadian Borrowing Base as of each date (with such date to be reasonably determined by the Administrative Agent) that is on or about the date of delivery of each Borrowing Base Certificate hereunder, in each case using the Exchange Rate for the applicable currency in relation to U.S. Dollars in effect on the date of determination, and each such amount shall be the U.S. Dollar Equivalent of such Domestic Borrowing Base component or Canadian Borrowing Base component until the next required calculation thereof pursuant to paragraph (b)(i), (b)(ii) or (b)(v) of this Section 1.05.

ARTICLE II

The Credits

SECTION 2.01.Commitments. Subject to the terms and conditions set forth herein,

(a) each Revolving Lender agrees to make U.S. Revolving Loans to the Parent Borrower in U.S. Dollars, from time to time during the Availability Period, in an aggregate principal amount that will not result in (i) such Lender's Revolving Exposure exceeding such Lender's Revolving Commitment, (ii) the U.S. Revolving Exposure exceeding the Domestic Borrowing Base then in effect minus the Stub U.S. Availability Block, (iii) the aggregate Revolving Exposure exceeding the lesser of (A) the aggregate Revolving Commitments minus the Stub Availability Block and (B) an amount equal to (x) the Total Borrowing Base then in effect minus (y) the Availability Block or (iv) the aggregate Revolving Exposure exceeding the amount permitted by the Interim Order, the Canadian Order or the Final Order, as applicable;

(b) each Revolving Lender agrees to make Canadian Revolving Loans to the Canadian Subsidiary Borrower in Canadian Dollars and/or U.S. Dollars from time to time during the Availability Period, in an aggregate principal amount that will not result in (i) such Lender's Canadian Revolving Exposure exceeding such Lender's Canadian Revolving Sub-Commitment, (ii) such Lender's Revolving Exposure exceeding such Lender's Revolving Commitment, (iii) the Canadian Revolving Exposure exceeding the lesser of (A) the aggregate Canadian Revolving Sub-Commitments minus the Stub Canadian Availability Block, and (B) the Canadian Borrowing Base then in effect minus the Stub Canadian Availability Block, (iv) the aggregate Revolving Exposure exceeding the lesser of (A) the aggregate Revolving Commitments minus the Stub Availability Block and (B) an amount equal to (x) the Total Borrowing Base then in effect minus (y) the Availability Block or (v) the aggregate Revolving Exposure exceeding the amount permitted by the Interim Order, the Canadian Order or the Final Order, as applicable;

(c) Subject to, and in accordance with the terms of, the Final Order, as of the Final Order Date, each U.S. Revolving Loan under (and as defined in) the Prepetition Credit Agreement outstanding as of such date made by a Lender to the Parent Borrower shall be deemed to have been converted into a U.S. Revolving Loan made by such Lender to the Parent Borrower pursuant to Section 2.01(a) hereunder. Each Revolving Loan deemed made pursuant to this Section 2.01(c) shall initially be of the same Type as it was under the Prepetition Credit Agreement on the Final Order Date prior to the application of this Section 2.01(c);

(d) Subject to, and in accordance with the terms of, the Interim Order, as of the Effective Date, each Cash Collateral Loan (plus accrued and unpaid interest thereon) made by a Lender to the Parent Borrower under the Interim Cash Collateral Order shall be deemed converted into a U.S. Revolving Loan made by such Lender to the Parent Borrower. Each Revolving Loan deemed made pursuant to this Section 2.01(d) shall initially be an ABR Loan; and

(e) Subject to, and in accordance with the terms of, the Final Order, as of the Final Order Date, the amount of each "Swap Obligation" arising out of a "Swap Agreement" terminated in accordance with its terms (which shall not include the Prior Swap) and the amount of each "Banking Services Obligation", in each case under (and each such term as defined in) the Prepetition Credit Agreement owed to any Lender or Affiliate of any Lender hereunder and outstanding as of the Petition Date shall be deemed to have been converted into a Term Loan made by the relevant Lender to the Parent Borrower in a principal amount in U.S. dollars equal to the aggregate amount owing to such Lender or its Affiliate under such Swap Obligation or

Banking Services Obligation as of the Final Order Date. Each Term Loan deemed made pursuant to this Section 2.01(e) shall initially be an ABR Loan.

Within the foregoing limits and subject to the terms and conditions set forth herein, the Borrowers may borrow, prepay and reborrow Revolving Loans. Amounts repaid or prepaid in respect of Term Loans may not be reborrowed.

SECTION 2.02. Loans and Borrowings. (a)Each Loan shall be made as part of a Borrowing consisting of Loans of the same Class and Type made by the Lenders, subject to Sections 2.01(c), 2.01(d) and 2.01(e), (i) in the case of U.S. Revolving Borrowings, ratably in accordance with their respective Revolving Commitments as of the date of borrowing and (ii) in the case of Canadian Revolving Borrowings, ratably in accordance with their respective Canadian Revolving Sub-Commitments as of the date of borrowing. Any failure of any Lender to make any Loan required to be made by it shall not relieve any other Lender of its obligations hereunder, provided that each of the Revolving Commitments and Canadian Revolving Sub-Commitments of the Lenders are several and no Lender shall be responsible for any other Lender's failure to make Loans as required.

(b)Subject to Sections 2.01(c), 2.01(d), 2.01(e) and 2.13, (i) each U.S. Revolving Borrowing shall be comprised entirely of ABR Revolving Loans or Eurodollar Revolving Loans as the Parent Borrower may request in accordance herewith, (ii) each Term Loan shall be comprised entirely of ABR Term Loans or Eurodollar Term Loans as the Parent Borrower may request in accordance herewith and (iii) each Canadian Revolving Borrowing (A) denominated in U.S. Dollars shall be comprised entirely of U.S. Base Rate Revolving Loans or Eurodollar Revolving Loans, as the Canadian Subsidiary Borrower may request in accordance herewith, and (B) denominated in Canadian Dollars shall be comprised entirely of Canadian Base Rate Revolving Loans. Subject to Section 2.18, each Lender at its option may make any Eurodollar Loan by causing any domestic or foreign branch or Affiliate of such Lender to make such Loan, provided that any exercise of such option shall not affect the obligation of the applicable Borrower to repay such Loan in accordance with the terms of this Agreement.

(c)Subject to Section 2.01(c), at the commencement of each Interest Period for any Eurodollar Borrowing, such Borrowing shall be in an aggregate amount that is an integral multiple of $1,000,000 and not less than $5,000,000. Borrowings of more than one Class and Type may be outstanding at the same time, provided that there shall not at any time be more than a total of eight Eurodollar Borrowings outstanding.

(d)Notwithstanding any other provision of this Agreement, the applicable Borrower shall not be entitled to request, or to elect to convert or continue, any Borrowing if the Interest Period requested with respect thereto would end after the Maturity Date.

SECTION 2.03. Requests for Borrowings. To request a Borrowing, the applicable Borrower shall notify the Administrative Agent of such request either in writing (delivered by hand or facsimile) in a form approved by the Administrative Agent and signed by the applicable Borrower or by telephone (a) in the case of a Eurodollar Borrowing, not later than 12:00 noon, Local Time, three Business Days before the date of the proposed Borrowing, (b) in the case of an ABR Borrowing, not later than 11:00 a.m., New York City time, on the date of the proposed Borrowing, (c) in the case of a Canadian Base Rate Revolving Borrowing, not later than 11:00 a.m., Toronto time, on the date of the proposed borrowing and (d) in the case of a U.S. Base Rate Revolving Borrowing, not later than 12:00 noon, Toronto time, one Business Day before the date of the proposed Borrowing. Each such Borrowing Request shall be irrevocable and, if telephonic, shall be confirmed promptly by hand delivery or facsimile to the Administrative Agent of a written Borrowing Request in a form approved by the Administrative

Agent and signed by the applicable Borrower. Each such written and telephonic Borrowing Request shall specify the following information:

(i) the Borrower requesting such Borrowing;

(ii) whether such Borrowing is to be a U.S. Revolving Borrowing or a Canadian Revolving Borrowing;

(iii) the currency and aggregate amount of such Borrowing;

(iv) the date of such Borrowing, which shall be a Business Day;

(v) whether such Borrowing is to be an ABR Borrowing, U.S. Base Rate Revolving Borrowing, Canadian Base Rate Revolving Borrowing or Eurodollar Borrowing;

(vi) in the case of a Eurodollar Borrowing, the initial Interest Period to be applicable thereto, which shall be a period contemplated by the definition of the term "Interest Period";

(vii) the location and number of the applicable Borrower's account to which funds are to be disbursed, which shall comply with the requirements of Section 2.06; and

(viii) that as of such date Section 4.02(a) is satisfied.

If no election as to the Type of Borrowing is specified, then the requested Borrowing shall be (A) in the case of a U.S. Revolving Borrowing, an ABR Revolving Borrowing, and (B) in the case of a Canadian Revolving Borrowing, a Canadian Base Rate Revolving Borrowing. If no Interest Period is specified with respect to any requested Eurodollar Borrowing, then the applicable Borrower shall be deemed to have selected an Interest Period of one month's duration. Promptly following receipt of a Borrowing Request in accordance with this Section 2.03, the Administrative Agent shall advise each Lender of the details thereof and the amount of such Lender's Loan to be made as part of the requested Borrowing. If no currency is specified with respect to any Canadian Revolving Borrowing, then the currency of such Canadian Revolving Borrowing shall be Canadian Dollars (unless the applicable Borrowing Request otherwise specified that such Borrowing shall be a U.S. Base Rate Canadian Revolving Borrowing or a Eurodollar Canadian Revolving Borrowing, in which case the currency of such Canadian Revolving Borrowing shall be U.S. Dollars). Solely with respect to the application of Sections 2.01(c) and 2.01(e) on the Final Order Date and Section 2.01(d) on the Effective Date, the provisions of this Section 2.04 shall not apply.

SECTION 2.04.Letters of Credit. (a)General. Subject to and in accordance with the terms and conditions of the Final Order, as of the Final Order Date, each Prepetition Letter of Credit will, automatically and without any action on the part of any Person, be deemed to be a Letter of Credit issued hereunder for all purposes of this Agreement and the other Loan Documents and the provisions of the Prepetition Credit Agreement shall no longer apply thereto. In the event of any inconsistency between the terms and conditions of this Agreement and the terms and conditions of any form of letter of credit application or other agreement submitted by the applicable Borrower or Subsidiary to, or entered into by the applicable Borrower or Subsidiary with, the Issuing Bank relating to any Letter of Credit, the terms and conditions of this Agreement shall control. No Letters of Credit may be issued hereunder other than as provided in this Section 2.04(a).

(b)Notice of Amendment, Renewal, Extension; Certain Conditions. To request the amendment, renewal or extension of an outstanding Letter of Credit, the applicable Borrower (and, as applicable, Subsidiary) shall hand deliver or facsimile (or transmit by electronic communication, if arrangements for doing so have been approved by the Issuing Bank) to the Issuing Bank and the Administrative Agent (reasonably in advance of the requested date of amendment, renewal or extension) a notice (i) identifying the Letter of Credit to be amended, renewed or extended, (ii) specifying the date of such amendment, renewal or extension (which shall be a Business Day), (iii) the date on which such Letter of Credit is to expire (which shall comply with paragraph (c) of this Section 2.04), (iv) the amount of such Letter of Credit, (v) the name and address of the beneficiary thereof and (vi) such other information as shall be necessary to amend, renew or extend such Letter of Credit. A Letter of Credit shall be amended, renewed or extended only if (and, upon amendment, renewal or extension of each Letter of Credit, the applicable Borrower (and, as applicable, Subsidiary) shall be deemed to represent and warrant that), after giving effect to such amendment, renewal or extension (A) the Total L/C Exposure shall not be increased, (B) the aggregate Revolving Exposure shall not exceed the amount permitted under the Interim Order, the Final Order or the Canadian Order, as applicable and (C) such Letter of Credit, as amended, renewed or extended, would not expire after the close of business on the date that is five Business Days prior to the Maturity Date (unless any such amendment did not change the expiration date of such letter of credit).

(c)Participations. Each Revolving Lender hereby acquires from the Issuing Bank a participation in each Letter of Credit equal to such Lender's Applicable Percentage of the aggregate amount available to be drawn under such Letter of Credit. In consideration and in furtherance of the foregoing, (i) each Revolving Lender hereby absolutely and unconditionally agrees to pay to the Administrative Agent, for the account of the Issuing Bank, such Lender's Applicable Percentage of each U.S. L/C Disbursement made by the Issuing Bank and not reimbursed by the Parent Borrower or applicable Domestic Subsidiary on the date due as provided in paragraph (e) of this Section 2.04 or of any reimbursement payment required to be refunded to the Parent Borrower or applicable Domestic Subsidiary for any reason and (ii) each Revolving Lender hereby absolutely and unconditionally agrees to pay to the Administrative Agent, for the account of the Issuing Bank, such Lender's Applicable Percentage of each Canadian L/C Disbursement made by the Issuing Bank and not reimbursed by the Canadian Subsidiary Borrower or applicable Foreign Subsidiary on the date due as provided in paragraph (e) of this Section 2.04 or of any reimbursement payment required to be refunded to the Canadian Subsidiary Borrower or applicable Foreign Subsidiary for any reason. Each Revolving Lender acknowledges and agrees that its obligation to acquire participations pursuant to this paragraph in respect of Letters of Credit is absolute and unconditional and shall not be affected by any circumstance whatsoever, including any amendment, renewal or extension of any Letter of Credit or the occurrence and continuance of a Default or reduction or termination of the Commitments, and that each such payment shall be made without any offset, abatement, withholding or reduction whatsoever.

(d)Reimbursement. If the Issuing Bank shall make any L/C Disbursement in respect of a Letter of Credit, the applicable Borrower or Subsidiary shall reimburse such L/C Disbursement by paying to the Administrative Agent an amount equal to such L/C Disbursement not later than 3:00 p.m., Local Time, on the date that such L/C Disbursement is made, if the applicable Borrower or Subsidiary shall have received notice of such L/C Disbursement prior to 10:00 a.m., Local Time, on such date, or, if such notice has not been received by the applicable Borrower or Subsidiary prior to such time on such date, then not later than (i) 3:00 p.m., Local Time, on the Business Day that the applicable Borrower or Subsidiary receives such notice, if such notice is received prior to 10:00 a.m., Local Time, on the day of receipt, or (ii) 12:00 noon, Local Time, on the Business Day immediately following the day that the applicable Borrower or Subsidiary receives such notice, if such notice is not received prior to 10:00 a.m., Local Time, on the day of receipt, provided that the applicable Borrower or Subsidiary may, subject to the conditions to borrowing set forth herein, request in accordance with Section 2.03 that such payment be

financed with (A) in the case of a Letter of Credit deemed issued pursuant to Section 2.04(a) for the account of the Parent Borrower or any Domestic Subsidiary, an ABR Revolving Borrowing made to the Parent Borrower, or (B) in the case of a Letter of Credit deemed issued pursuant to Section 2.04(a) for the account of the Canadian Subsidiary Borrower or any Foreign Subsidiary, a Canadian Base Rate Revolving Loan made to the Canadian Subsidiary Borrower and denominated in Canadian Dollars, in each case, in an equivalent amount and, to the extent so financed, the obligation of the applicable Borrower or Subsidiary to make such payment shall be discharged and replaced by the resulting ABR Revolving Borrowing or Canadian Base Rate Revolving Borrowing, as the case may be. If the applicable Borrower or Subsidiary fails to make such payment when due, the Administrative Agent shall notify each Revolving Lender of the applicable L/C Disbursement, the payment then due from the applicable Borrower or Subsidiary in respect thereof and such Lender's Applicable Percentage thereof. Promptly following receipt of such notice, each Revolving Lender shall pay to the Administrative Agent its Applicable Percentage of the payment then due from the applicable Borrower or Subsidiary, in the same manner as provided in Section 2.06 with respect to Loans made by such Lender (and Section 2.06 shall apply (other than with respect to any time limits set forth therein), mutatis mutandis, to the payment obligations of the Revolving Lenders), and the Administrative Agent shall promptly pay to the Issuing Bank the amounts so received by it from the Revolving Lenders. Promptly following receipt by the Administrative Agent of any payment from the applicable Borrower or Subsidiary pursuant to this paragraph, the Administrative Agent shall distribute such payment to the Issuing Bank or, to the extent that Revolving Lenders have made payments pursuant to this paragraph to reimburse the Issuing Bank, then to such Lenders and the Issuing Bank as their interests may appear. Any payment made by a Revolving Lender pursuant to this paragraph to reimburse the Issuing Bank for any L/C Disbursement (other than the funding of ABR Revolving Loans or Canadian Base Rate Revolving Loans as contemplated above) shall not constitute a Loan and shall not relieve the applicable Borrower or Subsidiary of its obligation to reimburse such L/C Disbursement.

(e)Obligations Absolute. The applicable Borrower or Subsidiary's obligation to reimburse L/C Disbursements as provided in paragraph (e) of this Section 2.04 shall be absolute, unconditional and irrevocable and shall be performed strictly in accordance with the terms of this Agreement under any and all circumstances whatsoever and irrespective of (i) any lack of validity or enforceability of any Letter of Credit or this Agreement or any term or provision therein or herein, (ii) any draft or other document presented under a Letter of Credit proving to be forged, fraudulent or invalid in any respect or any statement therein being untrue or inaccurate in any respect, (iii) payment by the Issuing Bank under a Letter of Credit against presentation of a draft or other document that does not comply with the terms of such Letter of Credit or (iv) any other event or circumstance whatsoever, whether or not similar to any of the foregoing, that might, but for the provisions of this Section 2.04, constitute a legal or equitable discharge of, or provide a right of setoff against, the obligations of the applicable Borrower or Subsidiary hereunder. Neither the Administrative Agent, the Lenders nor the Issuing Bank, nor any of their Related Parties, shall have any liability or responsibility by reason of or in connection with the issuance or transfer of any Letter of Credit or any payment or failure to make any payment thereunder (irrespective of any of the circumstances referred to in the preceding sentence) or any error, omission, interruption, loss or delay in transmission or delivery of any draft, notice or other communication under or relating to any Letter of Credit (including any document required to make a drawing thereunder), any reasonable error in interpretation of technical terms or any consequence arising from causes beyond the control of the Issuing Bank, provided that the foregoing shall not be construed to excuse the Issuing Bank from liability to the applicable Borrower or Subsidiary to the extent of any direct damages (as opposed to consequential damages, claims in respect of which are hereby waived by such Borrower or Subsidiary to the extent permitted by applicable law) suffered by such Borrower or Subsidiary that are caused by the Issuing Bank's failure to exercise care when determining whether drafts and other documents presented under a Letter of Credit comply with the terms thereof. The parties hereto expressly agree that, in the absence of gross negligence or wilful misconduct on the part of the Issuing Bank (as finally determined

by a court of competent jurisdiction), the Issuing Bank shall be deemed to have exercised care in each such determination. In furtherance of the foregoing and without limiting the generality thereof, the parties agree that, with respect to documents presented that appear on their face to be in substantial compliance with the terms of a Letter of Credit, the Issuing Bank may, in its sole discretion, either accept and make payment upon such documents without responsibility for further investigation, regardless of any notice or information to the contrary, or refuse to accept and make payment upon such documents if such documents are not in strict compliance with the terms of such Letter of Credit, and any such acceptance or refusal shall be deemed not to constitute gross negligence or wilful misconduct.

(f)Disbursement Procedures. The Issuing Bank shall, promptly following its receipt thereof, examine all documents purporting to represent a demand for payment under a Letter of Credit. The Issuing Bank shall promptly notify the Administrative Agent and the applicable Borrower or Subsidiary by telephone (confirmed by facsimile) of such demand for payment and whether the Issuing Bank has made or will make an L/C Disbursement thereunder, provided that any failure to give or delay in giving such notice shall not relieve such Borrower or Subsidiary of its obligation to reimburse the Issuing Bank and the Revolving Lenders with respect to any such L/C Disbursement in accordance with Section 2.04(e).

(g)Interim Interest. If the Issuing Bank shall make any L/C Disbursement, then, unless the applicable Borrower or Subsidiary shall reimburse such L/C Disbursement in full on the date such L/C Disbursement is made, the unpaid amount thereof shall bear interest, for each day from and including the date such L/C Disbursement is made to but excluding the date that such Borrower or Subsidiary reimburses such L/C Disbursement, at the rate per annum then applicable to (i) ABR Revolving Loans, in the case of Letters of Credit deemed issued pursuant to Section 2.04(a) for the account of the Parent Borrower or any Domestic Subsidiary, or (ii) Canadian Base Rate Revolving Loans, in the case of Letters of Credit deemed issued pursuant to Section 2.04(a) for the account of the Canadian Subsidiary Borrower or any Foreign Subsidiary, provided that, if the applicable Borrower or Subsidiary fails to reimburse such L/C Disbursement when due pursuant to paragraph (e) of this Section 2.04, then Section 2.12(c) shall apply. Interest accrued pursuant to this paragraph shall be for the account of the Issuing Bank, except that interest accrued on and after the date of payment by any Revolving Lender pursuant to paragraph (e) of this Section 2.04 to reimburse the Issuing Bank shall be for the account of such Lender to the extent of such payment.

(h)Cash Collateralization. Upon the occurrence of the Termination Date, or, if any Event of Default shall occur and be continuing, on the Business Day that the Parent Borrower receives notice from the Administrative Agent or the Required Lenders (or, if the maturity of the Revolving Loans has been accelerated, the Revolving Lenders with a Total L/C Exposure representing greater than 50% of the Total L/C Exposure) demanding the deposit of cash collateral pursuant to this paragraph, then in either such case the Parent Borrower and the Canadian Subsidiary Borrower shall deposit in an account with the applicable Administrative Agent, in the name of the Administrative Agent and for the benefit of the Revolving Lenders (each, an "L/C Collateral Account"), an amount in cash equal to 105% of the U.S. L/C Exposure and the Canadian L/C Exposure, respectively, as of such date plus accrued and unpaid interest thereon (or, at the request of the Issuing Bank, in lieu of such cash collateral, with respect to any such Letter of Credit, deliver to the Issuing Bank a backstop letter of credit in favor of the Issuing Bank, from a bank satisfactory to the Issuing Bank and in form and substance satisfactory to the Issuing Bank, in an amount equal to 105% of the face amount of such Letter of Credit). Such deposit shall be held by the Administrative Agent as collateral for the payment and performance of the Secured Obligations. The Administrative Agent shall have exclusive dominion and control, including the exclusive right of withdrawal, over such accounts and the Borrowers hereby grant the Administrative Agent a security interest in the L/C Collateral Account as set forth in Section 2.20. Other than any interest earned on the investment of such deposits, which investments shall be made at the option and sole discretion of the

Administrative Agent and at the Borrowers' risk and expense, such deposits shall not bear interest. Interest or profits, if any, on such investments shall accumulate in such accounts. Moneys in such accounts shall be applied by the Administrative Agent to reimburse the Issuing Bank for L/C Disbursements for which it has not been reimbursed and, to the extent not so applied, such moneys shall be held for the satisfaction of the reimbursement obligations of the Borrowers for the Total L/C Exposure at such time or, if the maturity of the Loans has been accelerated (but subject to the consent of the Issuing Bank and Revolving Lenders with a Total L/C Exposure representing greater than 50% of the Total L/C Exposure), such moneys shall be applied to satisfy other Secured Obligations. If any Borrower is required to provide an amount of cash collateral hereunder as a result of the occurrence of an Event of Default, such amount (to the extent not applied as aforesaid) shall be returned to the applicable Borrower within three Business Days after all such Events of Defaults have been cured or waived, if at such time the Termination Date has not occurred.

SECTION 2.05.[Reserved.]

SECTION 2.06.Funding of Borrowings. (a)Each Lender shall make each Loan to be made by it on the proposed date thereof by wire transfer of immediately available funds by 1:00 p.m., Local Time, to the account of the Administrative Agent most recently designated by it for such purpose by notice to the Lenders. The Administrative Agent will make such Loans available to the applicable Borrower by promptly crediting the amounts so received, in like funds, to such Borrower's Funding Account, provided that ABR Revolving Loans, U.S. Base Rate Revolving Loans and Canadian Base Rate Revolving Loans made to finance the reimbursement of an L/C Disbursement and reimbursements as provided in Section 2.04(e) shall be remitted by the Administrative Agent to the Issuing Bank or, to the extent that the Revolving Lenders have made payments to the Issuing Bank pursuant to Section 2.04(e) to reimburse the Issuing Bank, then to such Lenders and the Issuing Bank as their interests may appear.

(b)Unless the Administrative Agent shall have received notice from a Lender prior to the proposed date of any Borrowing that such Lender will not make available to the Administrative Agent such Lender's share of such Borrowing, the Administrative Agent may assume that such Lender has made such share available on such date in accordance with paragraph (a) of this Section 2.06 and may, in reliance upon such assumption, make available to the applicable Borrower a corresponding amount. In such event, if a Lender has not in fact made its share of such Borrowing available to the Administrative Agent, then the applicable Lender and the applicable Borrower severally agree to pay to the Administrative Agent forthwith on demand such corresponding amount with interest thereon, for each day from and including the date such amount is made available to the applicable Borrower to but excluding the date of payment to the Administrative Agent, at (i) in the case of such Lender, the greater of (A)(1) if such amount corresponds to a Borrowing made by the Parent Borrower, the Federal Funds Effective Rate, or (2) if such amount corresponds to a Borrowing made by the Canadian Subsidiary Borrower, the rate reasonably determined by the Administrative Agent to be the cost to it of funding such amount, and (B) a rate determined by the Administrative Agent in accordance with banking industry rules on interbank compensation, (ii) in the case of the Parent Borrower, the interest rate applicable to ABR Revolving Loans or (iii) in the case of the Canadian Subsidiary Borrower, (A) if such amount corresponds to a Borrowing made in U.S. Dollars, the interest rate applicable to U.S. Base Rate Revolving Loans, and (B) if such amount corresponds to a Borrowing made in Canadian Dollars, the interest rate applicable to Canadian Base Rate Revolving Loans. If such Lender pays such amount to the Administrative Agent, then such amount shall constitute such Lender's Loan included in such Borrowing.

SECTION 2.07.Interest Elections. (a)Subject to Sections 2.01(c), 2.01(d) and 2.01(e), each Borrowing initially shall be of the Type specified in the applicable Borrowing Request and, in the case of a Eurodollar Borrowing, shall have an initial Interest Period as specified in such Borrowing Request. Thereafter, the Borrower may elect to convert such Borrowing to a different Type or to continue

such Borrowing and, in the case of a Eurodollar Borrowing, may elect Interest Periods therefor, all as provided in this Section 2.07. The applicable Borrower may elect different options with respect to different portions of the affected Borrowing, in which case each such portion shall be allocated ratably among the Lenders holding the Loans comprising such Borrowing and the Loans resulting from an election made with respect to any such portion shall be considered a separate Borrowing.

(b)To make an election pursuant to this Section 2.07, the applicable Borrower shall notify the Administrative Agent of such election by telephone by the time that a Borrowing Request would be required under Section 2.03 if such Borrower were requesting a Borrowing of the Type resulting from such election to be made on the effective date of such election. Each such telephonic Interest Election Request shall be irrevocable and shall be confirmed promptly by hand delivery or facsimile to the Administrative Agent of a written Interest Election Request in a form approved by the Administrative Agent and signed by the applicable Borrower. Notwithstanding any other provision of this Section 2.07, no Borrower shall be permitted to (i) change the currency of any Borrowing, (ii) elect an Interest Period for Eurodollar Loans that does not comply with Section 2.02(d) or (iii) convert any Borrowing to a Borrowing not available under the Class of Commitments pursuant to which such Borrowing was made. Each such written and telephonic Interest Election Request shall specify the following information:

(i) the Borrowing to which such Interest Election Request applies and, if different options are being elected with respect to different portions thereof, the portions thereof to be allocated to each resulting Borrowing (in which case the information to be specified pursuant to clauses (iii) and (iv) below shall be specified for each resulting Borrowing);

(ii) the effective date of the election made pursuant to such Interest Election Request, which shall be a Business Day;

(iii) whether the resulting outstanding credit extension is to be an ABR Borrowing, U.S. Base Rate Revolving Borrowing, Canadian Base Rate Revolving Borrowing or Eurodollar Borrowing; and

(iv) if the resulting Borrowing is a Eurodollar Borrowing, the Interest Period to be applicable thereto after giving effect to such election, which shall be a period contemplated by the definition of the term "Interest Period".

If any such Interest Election Request requests a Eurodollar Borrowing but does not specify an Interest Period, then the applicable Borrower shall be deemed to have selected an Interest Period of one month's or 30 days' duration. Promptly following receipt of an Interest Election Request, the Administrative Agent shall advise each Lender of the details thereof and of such Lender's portion of each resulting Borrowing.

(c)If a Borrower fails to deliver a timely Interest Election Request with respect to a Eurodollar Borrowing prior to the end of the Interest Period applicable thereto, then, unless such Borrowing is repaid as provided herein, at the end of such Interest Period such Borrowing shall (i) in the case of a Eurodollar U.S. Revolving or Term Borrowing, be converted to an ABR Borrowing and (ii) in the case of a Eurodollar Canadian Revolving Borrowing, be converted to a U.S. Base Rate Revolving Borrowing. Notwithstanding any contrary provision hereof, if an Event of Default has occurred and is continuing and the Administrative Agent, at the request of the Required Lenders, so notifies the Parent Borrower, then, so long as an Event of Default is continuing, (i) no outstanding Borrowing may be converted to or continued as a Eurodollar Borrowing, and (ii) unless repaid, each Eurodollar Borrowing shall (A) in the case of a Eurodollar U.S. Revolving or Term Borrowing, be converted to an ABR Borrowing at the end of the Interest Period applicable thereto, and (B) in the case of a Eurodollar

Canadian Revolving Borrowing, be converted to a U.S. Base Rate Revolving Borrowing at the end of the Interest Period applicable thereto.

SECTION 2.08. Termination and Reduction of Commitments. (a)The Commitments shall automatically terminate on the Termination Date.

(b)The Borrowers may at any time terminate, or from time to time reduce, the Commitments of any Class, provided that (i) each partial reduction of the Commitments of any Class shall be in an amount that is an integral multiple of $1,000,000, (ii) the Borrowers shall not terminate or reduce the Revolving Commitments if, after giving effect to any concurrent prepayment of the Revolving Loans in accordance with Section 2.10, the aggregate Revolving Exposure would exceed the lesser of (A) the aggregate Revolving Commitments minus the Stub Availability Block and (B) an amount equal to (x) the Total Borrowing Base then in effect minus (y) the Availability Block, (iii) the Borrowers shall not terminate or reduce the Revolving Commitments if, after giving effect to any concurrent prepayment of the U.S. Revolving Loans in accordance with Section 2.10, the U.S. Revolving Exposure would exceed an amount equal to the Domestic Borrowing Base then in effect minus the Stub U.S. Availability Block and (iv) the Borrowers shall not terminate or reduce the Canadian Revolving Sub-Commitments if, after giving effect to any concurrent prepayment of the Canadian Revolving Loans in accordance with Section 2.10, the Canadian Revolving Exposure would exceed the lesser of (A) the aggregate Canadian Revolving Sub-Commitments minus the Stub Canadian Availability Block and (B) an amount equal to the Canadian Borrowing Base then in effect minus the Stub Canadian Availability Block.

(c)The applicable Borrower shall notify the Administrative Agent of any election to terminate or reduce the Revolving Commitments or Canadian Revolving Sub-Commitments under paragraph (b) of this Section 2.08 at least three Business Days prior to the effective date of such termination or reduction, specifying such election and the effective date thereof. Promptly following receipt of any notice, the Administrative Agent shall advise the Lenders of the contents thereof. Each notice delivered by a Borrower pursuant to this Section 2.08 shall be irrevocable, provided that a notice of termination of the Revolving Commitments or the Canadian Revolving Sub-Commitments delivered by a Borrower may state that such notice is conditioned upon consummation of an acquisition or sale transaction, the effectiveness of other credit facilities, the receipt of proceeds from the issuance of other Indebtedness, the effectiveness of a Chapter 11 Plan or the effectiveness of any CCAA Plan, in which case such notice may be revoked by such Borrower (by notice to the Administrative Agent on or prior to the specified effective date) if such condition is not satisfied. Any termination or reduction of the Commitments of any Class shall be permanent. Each reduction of the Commitments of any Class shall be made ratably among the Lenders in accordance with their respective Commitments of such Class.

(d)The Parent Borrower shall pay to the Administrative Agent for the account of the Lenders, on the date of each termination or reduction, the Commitment Fees on the amount of the Commitments so terminated or reduced accrued to but excluding the date of such termination or reduction.

SECTION 2.09. Repayment of Loans; Evidence of Debt. (a)Each Borrower hereby unconditionally promises to pay on the Termination Date to the Administrative Agent for the account of each Revolving Lender the then unpaid principal amount of each Revolving Loan of such Lender made to such Borrower. The Parent Borrower hereby unconditionally promises to pay on the Termination Date to the Administrative Agent for the account of each Term Lender, the then unpaid principal amount of each Term Loan of such Term Lender made to the Parent Borrower.

(b)On each Business Day prior to the Final Order Date, at or before 12:00 noon, Local Time, the Administrative Agent shall apply all immediately available funds held by it pursuant to Section

3.06 of the Domestic Security Agreement to (i) first, in accordance with the terms of the Interim Order, prepay Prepetition Revolving Loans made to the Parent Borrower, (ii) second, prepay the Loans made to the Parent Borrower hereunder, (iii) third, cash collateralize outstanding Total L/C Exposure hereunder in the manner provided in Section 2.04(h) and (iv) pay other obligations of the Parent Borrower hereunder, provided that (x) such prepayments shall be applied in a manner that minimizes payments due pursuant to Section 2.15, (y) the Administrative Agent shall apply prepayments of the Loans pursuant to Section 2.09(b)(ii) in accordance with the Priority Rules and (z) the order of prepayments under this Section 2.09(b) may be modified by the unanimous written agreement of the Revolving Lenders and no consent of any of the Loan Parties shall be required for any such modification (notwithstanding any other provision of this Agreement).

(c)On each Business Day on or following the Final Order Date, at or before 12:00 noon, Local Time, the Administrative Agent shall apply all immediately available funds held by it pursuant to Section 3.06 of the Domestic Security Agreement to (i) first, prepay the Loans made to the Parent Borrower hereunder, (ii) second, to cash collateralize outstanding Total L/C Exposure hereunder in the manner provided in Section 2.04(h) and (iii) to pay other obligations of the Parent Borrower hereunder, provided that (x) such prepayments shall be applied in a manner that minimizes payments due pursuant to Section 2.15, (y) the Administrative Agent shall apply prepayments of the Loans pursuant to Section 2.09(c)(i) in accordance with the Priority Rules and (z) the order of prepayments under this Section 2.09(c) may be modified by the unanimous written agreement of the Revolving Lenders and no consent of any of the Loan Parties shall be required for any such modification (notwithstanding any other provision of this Agreement), which modified order may include the prepayment of outstanding Prepetition Revolving Loans.

(d)On each Business Day, at or before 12:00 noon, Local Time, the Administrative Agent shall apply all immediately available funds held by it pursuant to Section 3.06 of the Canadian Security Agreement to (i) first, prepay Prepetition Canadian Revolving Loans in accordance with the terms of the Canadian Order, (ii) second, prepay the Loans made to the Canadian Subsidiary Borrower hereunder and (iii) third, pay other obligations of the Canadian Subsidiary Borrower hereunder, provided that (x) such prepayments shall be applied in a manner that minimizes payments due pursuant to Section 2.15 and (y) the order of prepayments under clauses (i), (ii) and (iii) of this Section 2.09(d) may be re-ordered by the unanimous written agreement of the Revolving Lenders and no consent of any of the Loan Parties shall be required for any such modification (notwithstanding any other provision of this Agreement).

(e)Each Lender shall maintain in accordance with its usual practice an account or accounts evidencing the Indebtedness of each Borrower to such Lender resulting from each Loan made by such Lender.

(f)The Administrative Agent shall maintain accounts in which it shall record (i) the amount of each Loan made hereunder, the currency thereof, the Class and Type thereof and the Interest Period (if any) applicable thereto, (ii) the amount of any principal, interest due or other amount due and payable or to become due and payable from each Borrower to each Lender hereunder and (iii) the amount of any sum received by the Administrative Agent hereunder for the account of the Lenders and each Lender's share thereof.

(g)The entries made in the accounts maintained pursuant to paragraph (e) or (f) of this Section 2.09 shall be, absent manifest error, prima facie evidence of the existence and amounts of the obligations recorded therein, provided that the failure of any Lender or the Administrative Agent to maintain such accounts or any error therein shall not in any manner affect the obligation of any Borrower to repay the Loans in accordance with the terms of this Agreement.

(h)Any Lender may request that Loans of any Class made by it be evidenced by a promissory note. In such event, the applicable Borrower shall prepare, execute and deliver to such Lender a promissory note payable to the order of such Lender (or, if requested by such Lender, to such Lender and its registered assigns) and in a form approved by the Administrative Agent unless the applicable Borrower shall have already delivered a note representing such Loans, in which case the applicable Borrower shall have the right to have such note returned to it prior to delivering a new note. Thereafter, the Loans evidenced by such promissory note and interest thereon shall at all times (including after assignment pursuant to Section 9.04) be represented by one or more promissory notes in such form payable to the order of the payee named therein (or, if such promissory note is a registered note, to such payee and its registered assigns).

SECTION 2.10.Prepayments. (a)Each Borrower shall have the right at any time and from time to time to prepay Borrowings, in whole or in part, without premium or penalty (but subject to Section 2.15), subject to the requirements of this Section 2.10.

(b)In the event and on such occasion that (i) the aggregate Revolving Exposure exceeds the lesser of (A) the aggregate Revolving Commitments minus the Stub Availability Block and (B) an amount equal to (x) the Total Borrowing Base then in effect minus (y) the Availability Block, (ii) the U.S. Revolving Exposure exceeds the Domestic Borrowing Base then in effect minus the Stub U.S. Availability Block, (iii) the Canadian Revolving Exposure exceeds the lesser of (A) the aggregate Canadian Revolving Sub-Commitments minus the Stub Canadian Availability Block or (B) the Canadian Borrowing Base then in effect minus the Stub Canadian Availability Block or (iv) the aggregate Revolving Exposure, U.S. Revolving Exposure or Canadian Revolving Exposure exceeds, in any case, the amount permitted by the Interim Order, the Canadian Order or Final Order, as applicable, the applicable Borrower shall prepay the applicable Revolving Borrowings (or, if no such Borrowings are outstanding, deposit cash collateral in the applicable L/C Collateral Account or provide for backstop letters of credit, in each case pursuant to Section 2.04(h)) in an aggregate amount equal to such excess within one Business Day after the day of such event or occasion.

(c) Subject to Section 2.09(b) and 2.09(c), any optional or mandatory prepayments by the Parent Borrower shall be allocated between Revolving Loans and Term Loans in accordance with the Priority Rules. Subject to the foregoing, prior to any optional or mandatory prepayment of Borrowings, the applicable Borrower shall select the Borrowing or Borrowings of the applicable Class or Classes of Loans to be prepaid and shall specify such selection in the notice of such prepayment pursuant to paragraph (d) of this Section 2.10.

(d)The applicable Borrower shall notify the Administrative Agent by telephone (confirmed by facsimile) of any prepayment hereunder (i) in the case of prepayment of a Eurodollar Borrowing, not later than 12:00 noon, Local Time, three Business Days before (or, in the case of a Eurodollar Borrowing prepaid pursuant to Section 2.10(b), 10:00 a.m., Local Time, on) the date of prepayment or (ii) in the case of prepayment of any ABR Borrowing, U.S. Base Rate Revolving Borrowing or Canadian Base Rate Revolving Borrowing, not later than 12:00 noon, Local Time, one Business Day before (or, in the case of any such Borrowing prepaid pursuant to Section 2.10(b), 10:00 a.m., Local Time, on) the date of prepayment. Each such telephonic notice shall be irrevocable and shall specify the prepayment date, the principal amount of each Borrowing or portion thereof to be prepaid and, in the case of a mandatory prepayment, a reasonably detailed calculation of the amount of such prepayment, provided that if a notice of prepayment is given in connection with a conditional notice of termination of the Revolving Commitments or Canadian Revolving Sub-Commitments as contemplated by Section 2.08, then such notice of prepayment may be revoked if such notice of termination is revoked in accordance with Section 2.08. In addition, a notice of optional prepayment may state that such notice is conditional upon the consummation of an acquisition or asset sale or upon the effectiveness of other

credit facilities or the receipt of proceeds from the issuance of other Indebtedness or the effectiveness of a Chapter 11 Plan or a CCAA Plan, in which case such notice may be revoked if the applicable contingency has not occurred. Promptly following receipt of any such notice, the Administrative Agent shall advise the Lenders of the contents thereof. Each partial prepayment of any Borrowing shall be in an amount that would be permitted in the case of an advance of a Borrowing of the same Type as provided in Section 2.02, except as necessary to apply fully the required amount of a mandatory prepayment. Each prepayment of a Borrowing shall be applied ratably to the Loans included in such prepaid Borrowing. Prepayments shall be accompanied by accrued interest to the extent required by Section 2.12. No notice of prepayment shall be required under this Section 2.10(d) for prepayments made pursuant to Section 2.09(b), 2.09(c) or 2.09(d).

SECTION 2.11.Fees. (a)The Parent Borrower agrees to pay to the Administrative Agent for the account of each Revolving Lender a commitment fee (a "Commitment Fee"), which shall accrue at the Applicable Rate on the average daily unused amount of the Revolving Commitment of such Lender during the period from and including the Effective Date to but excluding the date on which such Lender's Revolving Commitment terminates. Commitment Fees accrued through and including the last day of each calendar month shall be payable on the third Business Day following such last day, commencing on the first such date to occur after the date hereof, provided that all such accrued Commitment Fees shall be payable on the date on which the Revolving Commitments terminate (including in connection with terminations or reductions pursuant to Section 2.08). All Commitment Fees shall be computed on the basis of a year of 360 days and shall be payable for the actual number of days elapsed (including the first day but excluding the last day). For purposes of computing Commitment Fees, a Revolving Commitment of a Revolving Lender shall be deemed to be used to the extent of the outstanding Revolving Loans and Total L/C Exposure of such Lender and to the extent of such Lender's Applicable Percentage of the Stub Availability Block.

(b)The Parent Borrower agrees to pay (i) to the Administrative Agent for the account of each Revolving Lender a participation fee (a "Participation Fee") with respect to its participations in Letters of Credit, which shall accrue at the Alternate Base Rate plus the same Applicable Rate used to determine the interest rate applicable to ABR Borrowings on the average daily amount of such Lender's Total L/C Exposure (excluding any portion thereof attributable to unreimbursed L/C Disbursements) during the period from and including the Effective Date to but excluding the later of the date on which such Lender's Revolving Commitments terminate and the date on which such Lender ceases to have any Total L/C Exposure, and (ii) to the Issuing Bank a fronting fee (a "Fronting Fee"), which shall accrue at the rate of 0.25% per annum on the average daily amount of the Total L/C Exposure (excluding any portion thereof attributable to unreimbursed L/C Disbursements) during the period from and including the Effective Date to but excluding the later of the date of termination of the Revolving Commitments and the date on which there ceases to be any Total L/C Exposure, as well as the Issuing Bank's standard fees with respect to the amendment, renewal or extension of any Letter of Credit or processing of drawings thereunder. Participation Fees and Fronting Fees accrued through and including the last day of each calendar month shall be payable on the third Business Day following such last day, commencing on the first such date to occur after the Effective Date, provided that all such accrued fees shall be payable on the date on which the Revolving Commitments terminate and any such fees accruing after the date on which the Revolving Commitments terminate shall be payable on demand. Any other fees payable to the Issuing Bank pursuant to this paragraph shall be payable within 10 Business Days after written demand. All Participation Fees and Fronting Fees shall be computed on the basis of a year of 360 days and shall be payable for the actual number of days elapsed (including the first day but excluding the last day).

(c)Each Borrower agrees to pay to the Administrative Agent, for its own account, fees payable in the amounts and at the times separately agreed upon between the Parent Borrower and the Administrative Agent.

(d)The Parent Borrower agrees to pay the Facility Fee, which fee shall be fully earned as of the Effective Date and payable to the Administrative Agent for the account of each Revolving Lender on the Termination Date.

(e)All fees payable hereunder shall be paid on the dates due, in immediately available funds, to the Administrative Agent (or to the Issuing Bank, in the case of fees payable to it) for distribution, in the case of Commitment Fees, Participation Fees and ~~Final Order~~**Facility** Fee, to the Lenders entitled thereto. Fees paid (other than any portion of such fees that represent overpayments) shall not be refundable under any circumstances.

SECTION 2.12.Interest. (a)(i) The Loans comprising each ABR Borrowing shall bear interest at the Alternate Base Rate plus the Applicable Rate, (ii) the Loans comprising each U.S. Base Rate Revolving Borrowing shall bear interest at the U.S. Base Rate plus the Applicable Rate and (iii) the Loans comprising each Canadian Base Rate Revolving Borrowing shall bear interest at the Canadian Base Rate plus the Applicable Rate.

(b)The Loans comprising each Eurodollar Borrowing shall bear interest at the Adjusted LIBO Rate for the Interest Period in effect for such Borrowing plus the Applicable Rate.

(c)Notwithstanding the foregoing, if an Event of Default occurs, then, until such Event of Default shall have been cured or waived and shall cease to exist, all amounts outstanding under this Agreement and the other Loan Documents shall bear interest (after as well as before judgment), at a rate per annum equal to (i) in the case of principal of any Loan, 2.00% plus the rate otherwise applicable to such Loan as provided in the other paragraphs of this Section 2.12 or (ii) in the case of any other amount, 2.00% plus the rate applicable to (A) in the case of an amount owed by the Parent Borrower, an ABR Loan, (B) in the case of an amount owed by the Canadian Subsidiary Borrower and denominated in U.S. Dollars, a U.S. Base Rate Loan or (C) in the case of an amount owed by the Canadian Subsidiary Borrower and denominated in Canadian Dollars, a Canadian Base Rate Loan.

(d)Accrued interest on each Loan shall be payable in arrears on each Interest Payment Date for such Loan and, in the case of Loans in respect of any Class, upon termination of the Revolving Commitments in respect of such Class, provided that (i) interest accrued pursuant to paragraph (c) of this Section 2.12 shall be payable on demand, (ii) in the event of any repayment or prepayment of any Loan (other than repayments or prepayments pursuant to Sections 2.09(b), 2.09(c) and 2.09(d)), accrued interest on the principal amount repaid or prepaid shall be payable on the date of such repayment or prepayment, (iii) in the event of any conversion of any Eurodollar Loan prior to the end of the current Interest Period therefor, accrued interest on such Loan shall be payable on the effective date of such conversion and (iv) interest accrued on any Loan made pursuant to Section 2.01(c), 2.01(d) or 2.01(e) shall not be payable (but shall accrue in accordance with Section 2.12(g)) until the first Interest Payment Date occurring on or after the Effective Date, in the case of Loans made pursuant to Section 2.01(d), and the Final Order Date, in the case of Loans made pursuant to Sections 2.01(c) and 2.01(e).

(e)All interest hereunder shall be computed on the basis of a year of 360 days, except that interest computed by reference to (i) the Alternate Base Rate at times when the Alternate Base Rate is based on the Prime Rate and (ii) the U.S. Base Rate or the Canadian Base Rate shall be, other than when computed on the basis of the LIBO Rate, computed on the basis of a year of 365 days (or 366 days in a leap year) and, in each case shall be payable for the actual number of days elapsed (including the first day

but excluding the last day). The applicable Alternate Base Rate, U.S. Base Rate, Canadian Base Rate and Adjusted LIBO Rate shall be determined by the Administrative Agent and such determination shall be conclusive absent manifest error.

(f)Solely for purposes of the Interest Act (Canada), (i) whenever any interest or fee under this Agreement is calculated using a rate based on a year of 360 days or 365 days, as the case may be, the rate determined pursuant to such calculation, when expressed as an annual rate, is equivalent to the applicable rate based on a year of 360 days or 365 days, as the case may be, multiplied by a fraction, the numerator of which is the actual number of days in the calendar year in which the period for which such interest or fee is payable (or compounded) ends and the denominator of which is 360 or 365, as the case may be, (ii) the rates of interest under this Agreement are nominal rates and not effective rates or yields and (iii) the principle of deemed reinvestment of interest does not apply to any interest calculation under this Agreement.

SECTION 2.13.Alternate Rate of Interest. If prior to the commencement of any Interest Period for a Eurodollar Borrowing:

(a) the Administrative Agent determines (which determination shall be conclusive absent manifest error) that adequate and reasonable means do not exist for ascertaining the Adjusted LIBO Rate or the LIBO Rate, as applicable, for such Interest Period; or

(b) the Administrative Agent is advised by the Required Lenders that the Adjusted LIBO Rate or the LIBO Rate, as applicable, for such Interest Period will not adequately and fairly reflect the cost to such Lenders (or Lender) of making or maintaining their Loans (or its Loan) included in such Borrowing for such Interest Period;

then the Administrative Agent shall give notice thereof to the applicable Borrower and the Lenders by telephone or facsimile as promptly as practicable thereafter and, until the Administrative Agent notifies the applicable Borrower and the Lenders that the circumstances giving rise to such notice no longer exist, (i) any Interest Election Request that requests the conversion of any Borrowing to, or continuation of any Borrowing as, a Eurodollar Borrowing shall be ineffective, and (ii) if any Borrowing Request requests a Eurodollar Borrowing, such Borrowing shall be made as (A) in the case of a Borrowing Request made by the Parent Borrower, an ABR Borrowing, and (B) in the case of a Borrowing Request made by the Canadian Subsidiary Borrower denominated in U.S. Dollars, a U.S. Base Rate Revolving Borrowing. During such time, the Adjusted LIBO Rate shall be deemed to be 3.50% for purposes of the definitions of "Alternate Base Rate", "Canadian Base Rate" and "U.S. Base Rate".

SECTION 2.14.Increased Costs. (a)If any Change in Law shall:

(i) impose, modify or deem applicable any reserve, special deposit or similar requirement against assets of, deposits with or for the account of, or credit extended by, any Lender (except any such reserve requirement reflected in the Adjusted LIBO Rate) or the Issuing Bank, or

(ii) impose on any Lender or the Issuing Bank or the London interbank market any other condition affecting this Agreement or Eurodollar Loans made by such Lender or any Letter of Credit or participation therein,

and the result of any of the foregoing shall be to increase the cost to such Lender of making or maintaining any Eurodollar Loan (or of maintaining its obligation to make any such Loan) or to increase the cost to such Lender or the Issuing Bank of participating in or maintaining any Letter of Credit or to

reduce the amount of any sum received or receivable by such Lender or the Issuing Bank hereunder (whether of principal, interest or otherwise), then the applicable Borrower will pay to such Lender or the Issuing Bank, as the case may be, such additional amount or amounts as will compensate such Lender or the Issuing Bank, as the case may be, for such additional costs incurred or reduction suffered.

(b)If any Lender or the Issuing Bank determines in good faith that any Change in Law regarding capital requirements has or would have the effect of reducing the rate of return on such Lender's or the Issuing Bank's capital or on the capital of such Lender's or the Issuing Bank's holding company, if any, as a consequence of this Agreement or the Loans made by, or participations in Letters of Credit held by, such Lender, or the Letters of Credit deemed issued pursuant to Section 2.04(a) by the Issuing Bank, to a level below that which such Lender or the Issuing Bank or such Lender's or the Issuing Bank's holding company could have achieved but for such Change in Law (taking into consideration such Lender's or the Issuing Bank's policies and the policies of such Lender's or the Issuing Bank's holding company with respect to capital adequacy), then from time to time the applicable Borrower will pay to such Lender or the Issuing Bank, as the case may be, such additional amount or amounts as will compensate such Lender or the Issuing Bank or such Lender's or the Issuing Bank's holding company for any such reduction suffered.

(c)A certificate of a Lender or the Issuing Bank setting forth the amount or amounts necessary to compensate such Lender or the Issuing Bank or its holding company in reasonable detail, as the case may be, as specified in paragraph (a) or (b) of this Section 2.14, shall be delivered to the applicable Borrower and shall be conclusive absent manifest error. The applicable Borrower shall pay such Lender or the Issuing Bank, as the case may be, the amount shown as due on any such certificate within five Business Days after receipt thereof.

(d)Failure or delay on the part of any Lender or the Issuing Bank to demand compensation pursuant to this Section 2.14 shall not constitute a waiver of such Lender's or the Issuing Bank's right to demand such compensation, provided that no Borrower shall be required to compensate a Lender or the Issuing Bank pursuant to this Section 2.14 for any increased costs or reductions incurred more than 180 days prior to the date that such Lender or the Issuing Bank, as the case may be, notifies such Borrower of the Change in Law giving rise to such increased costs or reductions and of such Lender's or the Issuing Bank's intention to claim compensation therefor; provided further that if the Change in Law giving rise to such increased costs or reductions is retroactive, then the 180-day period referred to above shall be extended to include the period of retroactive effect thereof.

SECTION 2.15.Break Funding Payments. In the event of (a) the payment of any principal of any Eurodollar Loan other than on the last day of an Interest Period applicable thereto (including as a result of an Event of Default), (b) the conversion of any Eurodollar Loan other than on the last day of the Interest Period applicable thereto, (c) the failure to borrow, convert, continue or prepay any Eurodollar Loan on the date specified in any notice delivered pursuant hereto (regardless of whether such notice may be revoked under Section 2.10(d) and is revoked in accordance therewith), or (d) the assignment of any Eurodollar Loan other than on the last day of the Interest Period applicable thereto as a result of a request by the applicable Borrower pursuant to Section 2.18, then, in any such event, the applicable Borrower shall compensate each Lender for the loss, cost and expense attributable to such event. In the case of a Eurodollar Loan, such loss, cost or expense to any Lender shall be deemed to include an amount determined by such Lender to be the excess, if any, of (i) the amount of interest which would have accrued on the principal amount of such Loan had such event not occurred, at the Adjusted LIBO Rate that would have been applicable to such Loan, for the period from the date of such event to the last day of the then current Interest Period therefor (or, in the case of a failure to borrow, convert or continue, for the period that would have been the Interest Period for such Loan), over (ii) the amount of interest which would accrue on such principal amount for such period at the interest rate which such

Lender would bid were it to bid, at the commencement of such period, for dollar deposits of a comparable amount and period from other banks in the Eurodollar market. A certificate of any Lender setting forth any amount or amounts that such Lender is entitled to receive pursuant to this Section 2.15 shall be delivered to the applicable Borrower and shall be conclusive absent manifest error. The applicable Borrower shall pay such Lender the amount shown as due on any such certificate within five Business Days after receipt thereof.

SECTION 2.16.Taxes. (a)Any and all payments by or on account of any obligation of any Loan Party under any Loan Document shall be made free and clear of and without deduction for any Indemnified Taxes or Other Taxes, provided that if any applicable law (as determined in the good faith discretion of an applicable Withholding Agent (as defined below)) requires the deduction or withholding of any Tax from any such payment (including, for the avoidance of doubt, any such deduction or withholding required to be made by the applicable Loan Party or the Administrative Agent, or in the case of any Lender that is treated as a partnership for U.S. Federal income tax purposes, by such Lender for the account of any of its direct or indirect beneficial owners), the applicable Loan Party, the Administrative Agent, the Lender or the applicable direct or indirect beneficial owner of a Lender (any such person, a "Withholding Agent") may make such deductions and shall timely pay the full amount deducted to the relevant Governmental Authority in accordance with applicable law and, if such Tax is an Indemnified Tax or Other Tax, then the sum payable by the applicable Loan Party shall be increased as necessary so that after making all required deductions (including deductions applicable to additional sums payable under this Section 2.16) the Administrative Agent, Issuing Bank or Lender (as the case may be) receives an amount equal to the sum it would have received had no such deductions been made.

(b)In addition, the Loan Parties shall timely pay any Other Taxes to the relevant Governmental Authority in accordance with applicable law.

(c)Each Loan Party shall indemnify the Administrative Agent, the Issuing Bank and each Lender, within 10 days after written demand therefor, for the full amount of any Indemnified Taxes or Other Taxes paid by the Administrative Agent, the Issuing Bank or such Lender, as the case may be, on or with respect to any payment by or on account of any obligation of such Loan Party under any Loan Document (including Indemnified Taxes or Other Taxes imposed or asserted on or attributable to amounts payable under this Section 2.16) and any penalties, interest and reasonable expenses arising therefrom or with respect thereto, whether or not such Indemnified Taxes or Other Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to the applicable Loan Party by the Issuing Bank or a Lender, or by the Administrative Agent on its own behalf or on behalf of a Lender or the Issuing Bank, shall be conclusive absent manifest error.

(d)Each Lender shall indemnify the Administrative Agent within five Business Days after demand therefor, for the full amount of any Excluded Taxes imposed on such Lender that are paid or payable by the Administrative Agent, and reasonable expenses arising therefrom or with respect thereto, whether or not such Excluded Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to any Lender by the Administrative Agent shall be conclusive absent manifest error.

(e)As soon as practicable after any payment of Indemnified Taxes, Other Taxes or Excluded Taxes by the applicable Loan Party to a Governmental Authority, such Loan Party shall deliver to the Administrative Agent the original or a certified copy of a receipt issued by such Governmental Authority evidencing such payment, a copy of the return reporting such payment or other evidence of such payment reasonably satisfactory to the Administrative Agent.

(f)The Administrative Agent, the Issuing Bank or any Lender that is entitled to an exemption from or reduction of withholding tax under the law of the jurisdiction in which the applicable Borrower is resident, or any treaty to which such jurisdiction is a party, with respect to payments under this Agreement shall deliver to such Borrower (in the case of the Issuing Bank or such Lender, with a copy to the Administrative Agent), at the time or times prescribed by applicable law, such properly completed and executed documentation prescribed by applicable law, if any, or reasonably requested by such Borrower as will permit such payments to be made without withholding or at a reduced rate, provided that the Administrative Agent, the Issuing Bank or such Lender has received written notice from such Borrower advising it of the availability of such exemption and supplying all applicable documentation. The Administrative Agent, the Issuing Bank or such Lender, as the case may be, shall cooperate with the applicable Borrower in good faith to identify the potential availability of such exemption or reduction.

(g)Each Lender hereby represents that it is a Permitted Fee Receiver and agrees to update Internal Revenue Service Form W-9 (or its successor form) or the applicable Internal Revenue Service Form W-8 (or its successor form) upon any change in such Lender's circumstances or if such form expires or becomes inaccurate or obsolete, and to promptly notify the Borrower and the Administrative Agent if such Lender becomes legally ineligible to provide such form.

(h)If the Administrative Agent, the Issuing Bank or a Lender, as the case may be, determines, in its sole discretion, that it has received a refund of any Indemnified Taxes or Other Taxes as to which it has been indemnified by any Loan Party or with respect to which any Loan Party has paid additional amounts pursuant to this Section 2.16, it shall pay over such refund to such Loan Party (but only to the extent of indemnity payments made, or additional amounts paid, by such Loan Party under this Section 2.16 with respect to the Indemnified Taxes or Other Taxes giving rise to such refund), net of all out-of-pocket expenses of the Administrative Agent, the Issuing Bank or such Lender and without interest (other than any interest paid by the relevant Governmental Authority with respect to such refund), provided that such Loan Party, upon the request of the Administrative Agent, the Issuing Bank or such Lender, as the case may be, agrees to repay the amount paid over to such Loan Party (plus any penalties, interest or other charges imposed by the relevant Governmental Authority) to the Administrative Agent, the Issuing Bank or such Lender in the event the Administrative Agent, the Issuing Bank or such Lender, as the case may be, is required to repay such refund to such Governmental Authority. This Section 2.16 shall not be construed to require the Administrative Agent, the Issuing Bank or any Lender to make available its tax returns (or any other information relating to its taxes which it deems confidential) to any Loan Party or any other Person.

SECTION 2.17.Payments Generally; Pro Rata Treatment; Sharing of Set-offs.
(a)Each Borrower shall make each payment required to be made by it under any Loan Document (whether of principal, interest, fees or reimbursement of L/C Disbursements, or of amounts payable under Section 2.14, 2.15 or 2.16, or otherwise) or under the Orders prior to the time expressly required under such Loan Document or such Order for such payment (or, if no such time is expressly required, prior to 12:00 noon, Local Time), on the date when due, in immediately available funds, without set-off or counterclaim. Any amounts received after such time on any date may, in the discretion of the Administrative Agent, be deemed to have been received on the next succeeding Business Day for purposes of calculating interest thereon. All such payments shall be made to the Administrative Agent at its offices at 270 Park Avenue, New York, New York 10017 (or, in the case of payments made in respect of the Canadian Obligations, to the Administrative Agent at its offices at 200 Bay Street, 18th Floor, Royal Bank Plaza, South Tower, Toronto, Ontario M5J 2J2), except payments to be made directly to the Issuing Bank as expressly provided herein and except that payments pursuant to Sections 2.14, 2.15, 2.16 and 9.03 shall be made directly to the Persons entitled thereto and payments pursuant to other Loan Documents shall be made directly to the Persons specified therein. The Administrative Agent shall

distribute any such payments received by it for the account of any other Person to the appropriate recipient promptly following receipt thereof. If any payment under any Loan Document shall be due on a day that is not a Business Day, the date for payment shall be extended to the next succeeding Business Day, and, in the case of any payment accruing interest, interest thereon shall be payable for the period of such extension. All payments under each Loan Document of principal or interest in respect of any Loan (or of any breakage indemnity in respect of any Loan) shall be made in the currency of such Loan; all other payments under each Loan Document shall be made in U.S. Dollars, except as otherwise expressly provided therein. Solely for purposes of determining the amount of Loans available for borrowing purposes, checks and cash or other immediately available funds from collections of items of payment and proceeds of any Collateral shall be applied in whole or in part against the Obligations, on the day of receipt, subject to actual collection.

(b)If at any time insufficient funds are received by and available to the Administrative Agent to pay fully all amounts of principal, unreimbursed L/C Disbursements, interest and fees then due hereunder, such funds shall be applied (i) first, towards payment of interest and fees then due hereunder, ratably among the parties entitled thereto in accordance with the amounts of interest and fees then due to such parties (based on the U.S. Dollar Equivalent of such amounts or the U.S. Dollar amount thereof, as applicable), and (ii) second, towards the payment of principal and unreimbursed L/C Disbursements then due hereunder, ratably among the parties entitled thereto in accordance with the amounts of principal and amounts of unreimbursed L/C Disbursements then due to such parties (based on the U.S. Dollar Equivalent of such amounts or the U.S. Dollar amount thereof, as applicable).

(c)At the election of the Administrative Agent, all payments of principal, interest, amounts owing in respect of any L/C Disbursements, fees, premiums, reimbursable expenses (including, without limitation, all reimbursement for fees and expenses pursuant to Section 9.03), and other sums payable under the Loan Documents (in each case, solely to the extent such amounts are payable to the Revolving Lenders), may be paid from the proceeds of Borrowings made hereunder, whether made following a request by the applicable Borrower pursuant to Section 2.03 or a deemed request as provided in this Section 2.17, or may be deducted from any deposit account of the applicable Borrower maintained with the Administrative Agent. Each Borrower hereby irrevocably authorizes (i) the Administrative Agent to make a Borrowing for the purpose of paying each payment of principal, interest, fees and any other amount as it becomes due under any Loan Document and agrees that all such amounts charged shall constitute Loans and that all such Borrowings shall be deemed to have been requested pursuant to Sections 2.03 or 2.04, as applicable, and (ii) the Administrative Agent to charge any deposit account of such Borrower maintained with the Administrative Agent for each payment of principal, interest, fees and any other amount due under any Loan Document.

(d)If any Lender shall, by exercising any right of set-off or counterclaim or otherwise (including pursuant to a secured claim under Section 553 of the Bankruptcy Code or other security or interest arising from, or in lieu of, such secured claim, received by such Lender under any applicable Bankruptcy Law), obtain payment in respect of any principal of or interest on any of its Loans and amounts owing in respect of participations in L/C Disbursements resulting in such Lender receiving payment of a greater proportion of the aggregate amount of its Loans and amounts owing in respect of participations in L/C Disbursements and accrued interest thereon than the proportion received by any other Lender, then the Lender receiving such greater proportion shall purchase (for cash at face value) participations in the Loans and amounts owing in respect of participations in L/C Disbursements of other Lenders to the extent necessary so that the benefit of all such payments shall be shared by the Lenders ratably in accordance with the aggregate amount of principal of and accrued interest on their respective Loans and amounts owing in respect of participations in L/C Disbursements, provided that (i) if any such participations are purchased and all or any portion of the payment giving rise thereto is recovered, such participations shall be rescinded and the purchase price restored to the extent of such recovery, without

interest, and (ii) the provisions of this paragraph shall not be construed to apply to any payment made by any Borrower, or any application of the Priority Rules, pursuant to and in accordance with the express terms of this Agreement or any payment obtained by a Lender as consideration for the assignment of or sale of a participation in any of its Loans or participations in L/C Disbursements to any assignee or participant, other than to the Parent Borrower or any Subsidiary or Affiliate thereof (as to which the provisions of this paragraph shall apply). Each Borrower consents to the foregoing and agrees, to the extent it may effectively do so under applicable law, that any Lender acquiring a participation pursuant to the foregoing arrangements may exercise against such Borrower rights of set-off and counterclaim with respect to such participation as fully as if such Lender were a direct creditor of such Borrower in the amount of such participation.

(e)Unless the Administrative Agent shall have received notice from the applicable Borrower prior to the date on which any payment is due to the Administrative Agent for the account of the Lenders or the Issuing Bank hereunder that such Borrower will not make such payment, the Administrative Agent may assume that such Borrower has made such payment on such date in accordance herewith and may, in reliance upon such assumption, distribute to the Lenders or the Issuing Bank, as the case may be, the amount due. In such event, if the applicable Borrower has not in fact made such payment, then each of the Lenders or the Issuing Bank, as the case may be, severally agrees to repay to the Administrative Agent forthwith on demand the amount so distributed to such Lender or Issuing Bank with interest thereon, for each day from and including the date such amount is distributed to it to but excluding the date of payment to the Administrative Agent, at the greater of (i)(A) in the case of Loans made to the Parent Borrower or U.S. L/C Disbursements, the Federal Funds Effective Rate, or (B) in the case of Loans made to the Canadian Subsidiary Borrower or Canadian L/C Disbursements, the rate reasonably determined by the Administrative Agent to be the cost to it of funding such amount, and (ii) a rate determined by the Administrative Agent in accordance with banking industry rules on interbank compensation.

(f)If any Lender shall fail to make any payment required to be made by it pursuant to Section 2.04(d) or (e), Section 2.06(a) or (b), Section 2.16(d), Section 2.17(e) or Section 9.03(c), then the Administrative Agent may, in its discretion (notwithstanding any contrary provision hereof), apply any amounts thereafter received by the Administrative Agent for the account of such Lender to satisfy such Lender's obligations under such Sections until all such unsatisfied obligations are fully paid.

SECTION 2.18.Mitigation Obligations; Replacement of Lenders. (a)If any Lender requests compensation under Section 2.14, or if any Borrower is required to pay any additional amount to any Lender or any Governmental Authority for the account of any Lender pursuant to Section 2.16, then such Lender shall use reasonable efforts to designate a different lending office for funding or booking its Loans hereunder or to assign its rights and obligations hereunder to another of its offices, branches or affiliates, if, in the reasonable judgment of such Lender, such designation or assignment (i) would eliminate or reduce amounts payable pursuant to Section 2.14 or 2.16, as the case may be, in the future and (ii) would not subject such Lender to any unreimbursed cost or expense and would not otherwise be disadvantageous to such Lender. Each Borrower hereby agrees to pay all reasonable costs and expenses incurred by any Lender in connection with any such designation or assignment.

(b)If any Lender requests compensation under Section 2.14, or if any Borrower is required to pay any additional amount to any Lender or any Governmental Authority for the account of any Lender pursuant to Section 2.16, or if any Lender is a Defaulting Lender, then the applicable Borrower may, at its sole expense and effort, upon notice to such Lender and the Administrative Agent, require such Lender to assign and delegate, without recourse (in accordance with and subject to the restrictions contained in Section 9.04), all its interests, rights and obligations under this Agreement to an assignee that shall assume such obligations (which assignee may be another Lender, if a Lender accepts

such assignment), provided that (i) the applicable Borrower shall have received the prior written consent of the Administrative Agent and the Issuing Bank, which consent shall not unreasonably be withheld, (ii) such Lender shall have received payment of an amount equal to the outstanding principal amount of its Loans, amounts owing in respect of participations in L/C Disbursements, accrued interest thereon, accrued fees and all other amounts payable to it under any Loan Document, from the assignee (to the extent of such outstanding principal, amounts owing in respect of participations in L/C Disbursements and accrued interest and fees) or the applicable Borrower (in the case of all other amounts) and (iii) in the case of any such assignment resulting from a claim for compensation under Section 2.14 or payments required to be made pursuant to Section 2.16, such assignment will result in a reduction in such compensation or payments. A Lender shall not be required to make any such assignment and delegation if, prior thereto, as a result of a waiver by such Lender or otherwise, the circumstances entitling the applicable Borrower to require such assignment and delegation cease to apply.

SECTION 2.19.Returned Payments. If after receipt of any payment which is applied to the payment of all or any part of the Obligations, the Administrative Agent or any Lender is for any reason compelled to surrender such payment or proceeds to any Person because such payment or application of proceeds is invalidated, declared fraudulent, set aside, determined to be void or voidable as a preference, impermissible setoff, or a diversion of trust funds, or for any other reason, then the Obligations or part thereof intended to be satisfied shall be revived and continued and this Agreement shall continue in full force as if such payment or proceeds had not been received by the Administrative Agent or such Lender. The provisions of this Section 2.19 shall be and remain effective notwithstanding any contrary action which may have been taken by the Administrative Agent or any Lender in reliance upon such payment or application of proceeds. The provisions of this Section 2.19 shall survive the termination of this Agreement.

SECTION 2.20.Security Interest in L/C Collateral Account. Pursuant to Section 364(c)(2) of the Bankruptcy Code, the Parent Borrower hereby assigns and pledges to the Administrative Agent, for its benefit and for the benefit of the Issuing Bank and ratable benefit of the Lenders, as their interests may appear, a first priority security interest, senior to all other Liens, if any, in all of the Parent Borrower's right, title and interest in and to the L/C Collateral Account and any investment of the funds contained therein. Cash held in the L/C Collateral Account shall not be available for use by Holdings, the Borrowers or any of their Subsidiaries, whether pursuant to Section 363 of the Bankruptcy Code or otherwise, and shall be released to the Borrower only as described in Section 2.04(h).

SECTION 2.21.Priority and Liens. (a)Subject to the Orders, Holdings and the Borrowers hereby covenant, represent and warrant that, upon entry of the Interim Order (and the Final Order, as applicable), the Secured Obligations and subject to the Carve-Out:

(i) pursuant to Section 364(c)(1) of the Bankruptcy Code, shall at all times constitute allowed Superpriority Claims in the Bankruptcy Cases having priority over any and all administrative expenses, diminution claims and all other claims against Holdings, the Parent Borrower and the Domestic Subsidiaries, now existing or hereafter arising, of any kind whatsoever, including all administrative expenses of the kind specified in Sections 503(b) or 507(b) of the Bankruptcy Code;

(ii) pursuant to Section 364(c)(2) of the Bankruptcy Code, shall at all times be secured by a valid, binding, continuing, enforceable and fully-perfected first priority senior security interest in and Lien on all tangible and intangible property of Holdings', the Parent Borrower's and the Domestic Subsidiaries' respective estates in the Bankruptcy Cases that is not subject to valid, perfected, non-avoidable and enforceable Liens in existence as of the Petition Date or valid Liens in existence on the Petition Date

that are perfected subsequent to such date to the extent permitted by Section 546(b) of the Bankruptcy Code, including all present and future accounts receivable, inventory, general intangibles, chattel paper, real property, leaseholds, fixtures, machinery and equipment, deposit accounts, patents, copyrights, trademarks, tradenames, rights under license agreements and other intellectual property, capital stock of any Subsidiaries and Subsidiary Loan Guarantors and on all cash and investments maintained in the L/C Collateral Account (but excluding Holdings', the Parent Borrower's and the other Loan Guarantors' rights in respect of avoidance actions under the Bankruptcy Code, it being understood that, notwithstanding such exclusion of such actions, the proceeds of such actions shall be subject to such Liens under Section 364(c)(2) of the Bankruptcy Code and available to satisfy the Secured Obligations subject to and effective upon entry of the Final Order);

(iii) pursuant to Section 364(c)(3) of the Bankruptcy Code, shall be secured by valid, binding, continuing, enforceable and fully-perfected security interests in and Liens upon all tangible and intangible property of Holdings, the Parent Borrower and the Domestic Subsidiaries (provided that as set forth in clause (iv) of this sentence, the existing Liens that presently secure the obligations of Holdings, the Parent Borrower and the Domestic Subsidiaries and the Prepetition Guarantors under the Prepetition Credit Agreement will be primed by the Lien in favor of the Administrative Agent as described in clause (iv) of this sentence) that is subject to valid, perfected and non-avoidable Liens in existence on the Petition Date or that is subject to valid Liens in existence on the Petition Date that are perfected subsequent to the Petition Date as permitted by Section 546(b) of the Bankruptcy Code (other than the property referred to in clause (iv) below that is subject to the existing Liens described in clause (iv) below, as to which the Lien in favor of the Administrative Agent and the Lenders will be as described in clause (iv) below), junior to such valid, perfected, and non-avoidable Liens; and

(iv) pursuant to Section 364(d)(1) of the Bankruptcy Code, shall be secured by a valid, binding, continuing, enforceable and fully-perfected first priority senior priming security interest in and senior priming Lien on all of the tangible and intangible property of Holdings, the Parent Borrower and the Domestic Subsidiaries that is subject to existing Liens that presently secure (x) the Prepetition Indebtedness under the Prepetition Credit Agreement, (y) outstanding "Term Loans" under (and as defined in) the Prepetition Credit Agreement and (z) the Senior Secured Notes (but subject and subordinate to any Liens in existence on the Petition Date to which the Liens being primed hereby are subject or become subject subsequent to the Petition Date as permitted by Section 546(b) of the Bankruptcy Code), senior to all of such Liens;

provided, however, that (x) no portion of the Carve-Out may be utilized to fund the prosecution or assertion of any claims against the Administrative Agent, the Lenders or the Issuing Bank, (y) following the Termination Date, amounts in the L/C Collateral Account shall not be subject to the Carve-Out and (z) except as otherwise provided in the Orders, no portion of the Carve-Out shall be utilized for the payment of professional fees and disbursements incurred in connection with any challenge to the amount, extent, priority, validity, perfection or enforcement of the Prepetition Indebtedness owing to the Prepetition Revolving Lenders or to the collateral securing the Prepetition Indebtedness. The Lenders agree that so long as no Event of Default shall have occurred and be continuing, the Parent Borrower, the Canadian Subsidiary Borrower and the other Loan Guarantors shall be permitted to pay compensation and reimbursement of expenses allowed by the Bankruptcy Court and payable under Sections 330 and 331 of the Bankruptcy Code, as the same may be due and payable, and the same shall not reduce the Carve-Out.

(b)Subject to the Canadian Order, Holdings and the Borrowers hereby covenant, represent and warrant that, upon entry of the Canadian Order, the Secured Obligations shall at all times be secured by a valid, binding, continuing, enforceable and, subordinate only to the CCAA Charges, fully perfected first priority security interest in, and first ranking court-ordered charge on (or applicable equivalents outside of the Province of Ontario to such security and charge), all of the existing and after-acquired real and personal, tangible and intangible, assets of the Canadian Subsidiary Borrower and each of the Canadian Subsidiary Loan Parties, including, without limitation, all cash, cash equivalents, bank accounts, deposit accounts, securities accounts, accounts, other receivables, chattel paper, contract rights, inventory, instruments, documents, securities (whether or not marketable), equipment, fixtures, real property interests, franchise rights, patents, tradenames, trademarks, copyrights, industrial designs, intellectual property, general intangibles, intangibles, capital stock, investment property, supporting obligations, letter of credit rights, documents of title, commercial tort claims, causes of action and all substitutions, accessions and proceeds of the foregoing, wherever located, including insurance or other proceeds (the "DIP Lenders' Charge");

(c)Subject to the priorities set forth in subsections (a) and (b) above and to the Carve-Out and the CCAA Charges, as applicable, as to all real property now owned or hereafter acquired the title to which is held by the Parent Borrower, the Canadian Subsidiary Borrower or any of the other Loan Guarantors (whether or not such real property secures the Prepetition Indebtedness), or the possession of which is held by Parent Borrower, the Canadian Subsidiary Borrower or any of the other Loan Guarantors pursuant to leasehold interests, each of the Parent Borrower, the Canadian Subsidiary Borrower and the other Loan Guarantors hereby assigns and conveys as security, grants a security interest in, hypothecates, mortgages, pledges and sets over unto the Administrative Agent for the benefit of the Secured Parties to secure its Secured Obligations all of the right, title and interest in all of such owned real property and in all such leasehold interests, together in each case with all of the right, title and interest of the Parent Borrower, the Canadian Subsidiary Borrower and such Loan Guarantor in and to all buildings, improvements, and fixtures related thereto, any lease or sublease thereof, all general intangibles relating thereto and all proceeds thereof. The Parent Borrower, the Canadian Subsidiary Borrower and each other Loan Guarantor acknowledges that, pursuant to the Orders and the Canadian Order, as applicable, the Liens in favor of the Administrative Agent in all of such real property and leasehold instruments shall be perfected without the recordation of any instruments of mortgage or assignment or other documents.

SECTION 2.22.Payment of Obligations. Subject to the provisions of Article VII, upon the Termination Date or upon the maturity (whether by acceleration or otherwise) of any of the Obligations under this Agreement or any of the other Loan Documents of the Parent Borrower, the Canadian Subsidiary Borrower and the other Loan Guarantors, the Lenders shall be entitled to immediate payment of such Obligations without further application to or order of the Bankruptcy Court or the Canadian Court.

SECTION 2.23.No Discharge; Survival of Claims. Each of the Parent Borrower, the Canadian Subsidiary Borrower and the Loan Guarantors agrees that (i) its Obligations hereunder shall not be discharged by the entry of an order confirming a Chapter 11 Plan or an order sanctioning a CCAA Plan (and each of Holdings, the Parent Borrower and the Domestic Subsidiaries, pursuant to Section 1141(d)(4) of the Bankruptcy Code, hereby waives any such discharge) and (ii) the Superpriority Claim granted to the Administrative Agent and the Lenders pursuant to the Orders in the Bankruptcy Cases and the DIP Lenders' Charge granted to the Administrative Agent and the Lenders in the Canadian Proceeding pursuant to the Canadian Order and described in Section 2.21 and the other Liens granted to the Administrative Agent pursuant to the Orders and the Canadian Order, if any, and described in Sections 2.20 and 2.21 shall not be affected in any manner by the entry of an order confirming a Chapter 11 Plan or an order sanctioning a CCAA Plan, in each such case unless the Obligations are indefeasibly paid in full in cash on the Chapter 11 Plan effective date or the CCAA Plan effective date, as the case may

be, and the actions required to be taken pursuant to Section 2.04(h) in respect of the Letters of Credit have been taken.

SECTION 2.24. Use of Cash Collateral. Notwithstanding anything to the contrary contained herein, the Parent Borrower shall not be permitted to request a Borrowing under Section 2.03 unless the Bankruptcy Court shall have granted to the Parent Borrower use of all cash collateral, subject to the Orders, for the purposes described in Section 5.08.

SECTION 2.25. Defaulting Lenders. Notwithstanding any provision of this Agreement to the contrary, if any Revolving Lender becomes a Defaulting Lender, then the following provisions shall apply for so long as such Lender is a Defaulting Lender:

(a) Commitment Fees shall cease to accrue on the unused portion of the Revolving Commitment of such Defaulting Lender pursuant to Section 2.11(a);

(b) the Revolving Commitment and Revolving Exposure of such Defaulting Lender shall not be included in determining whether all Lenders or the Required Lenders have taken or may take any action hereunder (including any consent to any amendment or waiver pursuant to Section 9.02), provided that any waiver, amendment or modification requiring the consent of all Lenders or each affected Lender which affects such Defaulting Lender differently than other affected Lenders shall require the consent of such Defaulting Lender;

(c) if any Total L/C Exposure exists at the time a Lender becomes a Defaulting Lender then:

(i) all or any part of such Total L/C Exposure shall be reallocated among the non-Defaulting Lenders in accordance with their respective Applicable Percentages but only to the extent (x) the sum of all non-Defaulting Lenders' Revolving Exposures plus such Defaulting Lender's Total L/C Exposure does not exceed the excess of the total of all non-Defaulting Lenders' Commitments minus the Stub Availability Block and (y) the conditions set forth in Section 4.02 are satisfied at such time;

(ii) if the reallocation described in clause (i) above cannot, or can only partially, be effected, the Parent Borrower shall within one Business Day following notice by the Administrative Agent, cash collateralize (or provide a backstop letter of credit for) such Defaulting Lender's Total L/C Exposure (after giving effect to any partial reallocation pursuant to clause (i) above) in accordance with the procedures set forth in Section 2.04(h) for so long as such Total L/C Exposure is outstanding;

(iii) if the Parent Borrower cash collateralizes (or provides a backstop letter of credit for) any portion of such Defaulting Lender's Total L/C Exposure pursuant to Section 2.25(c), the Parent Borrower shall not be required to pay any Participation Fees to such Defaulting Lender pursuant to Section 2.11(b) with respect to such Defaulting Lender's Total L/C Exposure during the period to the extent of such cash collateralization (or backstop letter of credit);

(iv) if the Total L/C Exposure of the non-Defaulting Lenders is reallocated pursuant to Section 2.25(c), then the fees payable to the Lenders pursuant to Section 2.11(a) and Section 2.11(b) shall be adjusted in accordance with such non-Defaulting Lenders' Applicable Percentages; and

(v) to the extent any Defaulting Lender's Total L/C Exposure is neither cash collateralized (or backstopped) nor reallocated pursuant to Section 2.25(c), then, without prejudice to any rights or remedies of the Issuing Bank or any Lender hereunder, all Participation Fees payable under Section 2.11(b) with respect to such Defaulting Lender's Total L/C Exposure shall be payable to the Issuing Bank until such Total L/C Exposure is cash collateralized and/or reallocated;

(d)so long as any Revolving Lender is a Defaulting Lender, the Issuing Bank shall not be required to extend, renew or amend any Letter of Credit, unless it is satisfied that the related exposure will be 100% covered by the Revolving Commitments of the non-Defaulting Lenders and/or cash collateral (or backstop letters of credit) will be provided by the Parent Borrower in accordance with Section 2.25(c), and participating interests in any such extended, renewed or amended Letter of Credit shall be allocated among non-Defaulting Lenders in a manner consistent with Section 2.25(c)(i) (and Defaulting Lenders shall not participate therein); and

(e)any amount payable to such Defaulting Lender hereunder (whether on account of principal, interest, fees or otherwise and including any amount that would otherwise be payable to such Defaulting Lender pursuant to Section 2.17 but excluding Section 2.18) shall, in lieu of being distributed to such Defaulting Lender, be retained by the Administrative Agent in a segregated account and, subject to any applicable requirements of law, be applied at such time or times as may be determined by the Administrative Agent (i) first, to the payment of any amounts owing by such Defaulting Lender to the Administrative Agent hereunder, (ii) second, to the payment of any amounts owing by such Defaulting Lender to the Issuing Bank hereunder, (iii) third, to the funding of any Revolving Loan or the funding or cash collateralization of any participating interest in any Letter of Credit in respect of which such Defaulting Lender has failed to fund its portion thereof as required by this Agreement, as determined by the Administrative Agent, (iv) fourth, if so determined by the Administrative Agent and the Parent Borrower, held in such account as cash collateral for future funding obligations of the Defaulting Lender under this Agreement, (v) fifth, pro rata, to the payment of any amounts owing to the Parent Borrower or the Lenders as a result of any judgment of a court of competent jurisdiction obtained by the Parent Borrower or any Lender against such Defaulting Lender as a result of such Defaulting Lender's breach of its obligations under this Agreement and (vi) sixth, to such Defaulting Lender or as otherwise directed by a court of competent jurisdiction; provided that if such payment is (x) a prepayment of the principal amount of any Loans or reimbursement obligations in respect of L/C Disbursements which a Defaulting Lender has funded its participation obligations and (y) made at a time when the conditions set forth in Section 4.02 are satisfied, such payment shall be applied solely to prepay the Loans of, and reimbursement obligations owed to, all non-Defaulting Lenders pro rata prior to being applied to the prepayment of any Loans, or reimbursement obligations owed to, any Defaulting Lender.

In the event that the Administrative Agent, the Parent Borrower and the Issuing Bank each agrees that a Defaulting Lender has adequately remedied all matters that caused such Lender to be a Defaulting Lender, then the Total L/C Exposure of the Revolving Lenders shall be readjusted to reflect the inclusion of such Lender's Revolving Commitment and on such date such Lender shall purchase at par such of the Revolving Loans of the other Revolving Lenders as the Administrative shall determine may be necessary in order for such Revolving Lender to hold such Revolving Loans in accordance with its Applicable Percentage.

ARTICLE III

Representations and Warranties

Each Loan Party represents and warrants to the Lenders that:

SECTION 3.01. Organization; Powers. Each of the Loan Parties and each of its subsidiaries (i) is duly organized, validly existing and, to the extent such concept is applicable in the corresponding jurisdiction, in good standing under the laws of the jurisdiction of its organization, (ii) subject to the entry of the Interim Order (or the Final Order, when applicable) and the Canadian Order and after giving effect thereto, has all requisite power and authority to carry on its business as now conducted and as proposed to be conducted, to execute, deliver and perform its obligations under each Loan Document to which it is a party and to effect the Transactions, and (iii) except where the failure to do so, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect, is qualified to do business in, and is in good standing in, every jurisdiction where the conduct of its business requires such qualification.

SECTION 3.02. Authorization; Enforceability. Upon the entry of the Interim Order (or the Final Order, when applicable) and the Canadian Order and after giving effect thereto, the Transactions are within each Loan Party's corporate (or, to the extent applicable, other organization) powers and have been duly authorized by all necessary corporate (or, to the extent applicable, other organization) action and, if required, stockholder action. Upon the entry of the Interim Order (or the Final Order, when applicable) and the Canadian Order and after giving effect thereto, the Loan Documents to which each Loan Party is a party have been duly executed and delivered by such Loan Party and constitute a legal, valid and binding obligation of such Loan Party, enforceable in accordance with its terms, the Orders and the Canadian Order.

SECTION 3.03. Governmental Approvals; No Conflicts. Subject to the entry of the Interim Order (or the Final Order, when applicable) and the Canadian Order, the Transactions (a) do not require any material consent or approval of, registration or filing with, or any other action by, any Governmental Authority, except (i) such as have been obtained or made and are in full force and effect and (ii) for filings necessary to perfect Liens created pursuant to the Loan Documents, (b) will not violate any Requirement of Law applicable to any Loan Party or any of its subsidiaries, (c) will not violate or result in a default under any material indenture, agreement or other instrument entered into after the Petition Date binding upon any Loan Party or any of its subsidiaries or its assets, or give rise to a right thereunder to require any payment to be made by any Loan Party or any of its subsidiaries or give rise to a right of, or result in, termination, cancelation or acceleration of any obligation thereunder, and (d) will not result in the creation or imposition of any Lien on any asset of any Loan Party or any of its subsidiaries, except Liens created pursuant to the Loan Documents or under the Orders or the Canadian Order.

SECTION 3.04. Financial Condition; No Material Adverse Change. (a)The Parent Borrower has heretofore furnished to the Administrative Agent the consolidated balance sheet and statements of income, stockholders equity and cash flows of Holdings and its consolidated subsidiaries, in each case as of and for the fiscal year ended December 31, 2007, reported on by Crowe Chizek and Company LLC, independent public accountants. Such financial statements present fairly, in all material respects, the financial position and results of operations and cash flows of Holdings and its consolidated subsidiaries as of such dates and for such periods and, in the case of the financial statements referred to in clause (i) above, were prepared in accordance with GAAP, subject to year-end audit adjustments and the absence of footnotes.

(b)No event, change, effect or circumstance has occurred that, individually or in the aggregate, has had, or could reasonably be expected to have, a Material Adverse Effect, since December 31, 2007.

(c)The projections set forth in the Forecast have been prepared by the Parent Borrower or its financial advisor in light of the past operations of its business, and reflect projections on a week by week basis for each week beginning with March 30, 2009 and ending as of June 26, 2009. Such projections are based upon estimates and assumptions stated therein, all of which the Parent Borrower believes to be reasonable and fair in light of current conditions and current facts known to the Parent Borrower and, as of the Effective Date, reflect the Parent Borrower's estimates of the future financial performance of the Parent Borrower and its Subsidiaries and of the other information projected therein for the periods set forth therein.

SECTION 3.05.Properties. (a)As of the date of this Agreement, Schedule 3.05(a) sets forth the address of each parcel of real property that is owned or leased by each Loan Party. Other than as a result of the stay imposed in the Bankruptcy Cases and the Canadian Proceeding, each of such leases and subleases is valid and enforceable in accordance with its terms and is in full force and effect, and no default by any party to any such lease or sublease exists, except any such default that could not reasonably be expected to result in a Material Adverse Effect. Other than as a result of the Bankruptcy Cases and the Canadian Proceeding, each of the Loan Parties and its subsidiaries has good title to, or valid leasehold interests in, all its real and personal property material to its business (including the Mortgaged Properties), except for minor defects in title that do not materially interfere with its ability to conduct its business as currently conducted.

(b)Each Loan Party and its subsidiaries owns, or is licensed to use, all trademarks, tradenames, copyrights, patents and other intellectual property material to its business as currently conducted, a list (correct and complete in all material respects) of which, as of the date of this Agreement, is set forth on Schedule 3.05(b), and the use thereof by the Loan Parties and their respective subsidiaries does not infringe in any material respect upon the rights of any other Person, and, as of the date of this Agreement, the Loan Parties' rights thereto are not subject to any licensing agreement or similar arrangement, except as set forth on Schedule 3.05(b).

(c)As of the Effective Date, no Loan Party nor any of its subsidiaries has received notice of, or, to the knowledge of any Responsible Officer of any Loan Party or any of its subsidiaries, has knowledge of, any pending or contemplated condemnation or expropriation proceeding affecting any Mortgaged Property or any sale or disposition thereof in lieu of condemnation except any that may exist in connection with the Bankruptcy Cases or the Canadian Proceeding. Except in respect of any purchase agreement entered into for Mortgaged Property that does not conflict with the terms hereof, neither any Mortgaged Property nor any interest therein is subject to any right of first refusal, option or other contractual right to purchase such Mortgaged Property or interest therein.

SECTION 3.06.Litigation and Environmental Matters. (a)Other than the Bankruptcy Cases and the Canadian Proceeding, there are no actions, suits or proceedings by or before any arbitrator or Governmental Authority pending against or, to the knowledge of any Responsible Officer of any Loan Party or any of its subsidiaries, threatened against or affecting the Loan Parties or any of their respective subsidiaries (i) that could reasonably be expected, individually or in the aggregate, to result in a Material Adverse Effect (other than the Disclosed Matters) or (ii) that involve any of the Loan Documents or the Transactions.

(b)Except for the Disclosed Matters and except with respect to any other matters that, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect

(i) no Loan Party nor any of its subsidiaries (A) has received written notice of any claim with respect to any Environmental Liability or knows of any basis for any Environmental Liability, (B) has failed to comply with any Environmental Law or to obtain, maintain or comply with any permit, license or other approval required under any Environmental Law or (C) has become subject to any Environmental Liability, and (ii) there are no facts, circumstances or conditions that could reasonably be expected to result in any claim for or relating to any Environmental Liability, including any claim in connection with the Bankruptcy Cases or the Canadian Proceeding, against any Loan Party or any of its subsidiaries.

SECTION 3.07.Compliance with Laws and Agreements. Each Loan Party and its subsidiaries is in compliance with (a) all Requirements of Law applicable to it or its property and (b) all indentures, agreements and other instruments entered into after the Petition Date binding upon it or its property, except, in the case of each of clauses (a) and (b), where the failure to do so, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect.

SECTION 3.08.Investment Company Status. No Loan Party nor any of its subsidiaries is an "investment company" as defined in, or subject to regulation under, the Investment Company Act of 1940.

SECTION 3.09.Taxes. Except as set forth on Schedule 3.09, each Loan Party and its subsidiaries (a) has timely filed or caused to be filed all Tax returns and reports required to have been filed, except to the extent that failure to do so could not reasonably be expected to result in a Material Adverse Effect and (b) has paid or caused to be paid all material Taxes required to have been paid by it, except Taxes that are being contested in good faith by appropriate proceedings, provided that such Loan Party or such subsidiary, as applicable, has set aside on its books adequate reserves as required by GAAP and the failure to pay such Taxes could not be expected to result in a Material Adverse Effect.

SECTION 3.10.ERISA. (a)Each of the Parent Borrower and its Subsidiaries is in compliance in all material respects with the applicable provisions of ERISA and the Code and the regulations thereunder as applicable to any Plan. No ERISA Event has occurred or is reasonably expected to occur that, when taken together with all other such ERISA Events for which liability is reasonably expected to occur, could reasonably be expected to result in a Material Adverse Effect. The present value of all accumulated benefit obligations under all Plans (based on the assumptions used for purposes of Statement of Financial Accounting Standards No. 87) did not, as of the date of the most recent financial statements reflecting such amounts, exceed the fair market value of the assets of such Plans by more than $26,708,998, and the present value of all accumulated benefit obligations of all underfunded Plans (based on the assumptions used for purposes of Statement of Financial Accounting Standards No. 87) did not, as of the date of the most recent financial statements reflecting such amounts, exceed by more than $26,708,998 the fair market value of the assets of all such underfunded Plans. The minimum funding standards of ERISA and the Code with respect to each Plan have been satisfied.

(b)Canadian Benefit and Pension Plans. The Canadian Pension Plans are duly registered and have been administered in accordance with any Requirement of Law that requires registration and no event has occurred or is reasonably expected to occur which could reasonably be expected to cause the loss of such registered status. All material obligations of the Borrowers and each Subsidiary (including fiduciary, funding, investment and administration obligations) required to be performed in connection with the Canadian Benefit Plans, the Canadian Pension Plans, the Canadian Multi-Employer Plans and the funding agreements therefor have been performed in a timely fashion. As of the Effective Date, there are no outstanding disputes concerning the assets held under the funding agreements for the Canadian Pension Plans or the Canadian Benefit Plans. The funded status, on a wind-up basis, of each of the Canadian Pension Plans as determined in the actuarial valuations last filed with the applicable Governmental Authorities prior to the Effective Date, which were prepared in accordance with applicable

law and based on methods and assumptions that are consistent with generally accepted actuarial principles, is set out in Schedule 3.10(b). To the knowledge of the Loan Parties, except as set out in Schedule 3.10(b), there has been no full or partial wind-ups of any Canadian Pension Plan. As of the Effective Date, except as set out in Schedule 3.10(b), the Loan Parties have received no inquiries from any Governmental Authority and no notice of any dispute with respect to the potential application of the decision of the Supreme Court of Canada in Monsanto Canada Inc. v. Superintendent of Financial Services (Ontario) [2004], 3 S.C.R. 152 to any Canadian Pension Plan. No promises of benefit improvements under the Canadian Pension Plans or the Canadian Benefit Plans have been made except where such improvement could not reasonably be expected to have a Material Adverse Effect. All contributions or premiums required to be made or paid by either Borrower or any Subsidiary to the Canadian Pension Plans, any Canadian Multi-Employer Plan or the Canadian Benefit Plans have been made or paid in a timely fashion in accordance with the terms of such plans and all Requirements of Law. All employee contributions to the Canadian Pension Plans, the Canadian Multi-Employer Plans or the Canadian Benefit Plans by way of authorized payroll deduction or otherwise have been properly withheld or collected by each of the Borrowers and the Subsidiaries, as the case may be, and fully paid into such plans in a timely manner. Schedule 3.10(b) lists, as of the Effective Date, all "participation agreements" and collective agreements entered into by either Borrower or any Subsidiary and a labor union with respect to such Borrower or Subsidiary's participation in a Canadian Multi-Employer Plan and the most current executed supplement thereto as of the Effective Date. Subject to Requirements of Law, the contribution obligations of the Canadian Subsidiary Borrower and any Canadian Subsidiary Loan Party to a Canadian Multi-Employer Plan, as set out under the applicable participation agreements and collective agreements, are limited to contributing a specified amount per employee hour worked. There have been no improper withdrawals or applications of the assets of the Canadian Pension Plans. Any assessments owed to the Pension Benefits Guarantee Fund established under the Pension Benefits Act (Ontario) have been paid when due. The pension fund under each Canadian Pension Plan is exempt from the payment of any income tax and, to the knowledge of the Loan Parties, there are no taxes, penalties or interest owing in respect of any such pension fund. All material reports and disclosures relating to the Canadian Pension Plans required by such plans and any Requirement of Law to be filed or distributed have been filed or distributed in a timely manner.

SECTION 3.11.Disclosure. None of the reports, financial statements, certificates or other information furnished by or on behalf of any Loan Party to (i) the Administrative Agent or any Lender in connection with the negotiation of this Agreement or any other Loan Document (as modified or supplemented by other information so furnished and excluding information of a general economic or industry-specific nature), or (ii) the Bankruptcy Court in connection with the Transactions or the Orders or the Canadian court in connection with the Canadian Proceeding or the Canadian Order, when taken as a whole, contains any material misstatement of fact or omits to state any material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading, provided that with respect to projected financial information, the Parent Borrower and Holdings represent only that such information was prepared in good faith based upon assumptions believed to be reasonable at the time delivered and, if such projected financial information was delivered prior to the Effective Date, as of the Effective Date.

SECTION 3.12.Insurance. Schedule 3.12 sets forth a description of all insurance maintained by or on behalf of the Loan Parties and their respective subsidiaries as of the Effective Date. As of the Effective Date, all premiums then due in respect of such insurance have been paid or have been satisfied by a financing expressly permitted hereunder. Each Loan Party believes that the insurance maintained by or on behalf of Loan Parties and its subsidiaries is in such amounts (with no greater risk retention) and against such risks as is (i) customarily maintained by companies of established repute

engaged in the same or similar businesses operating in the same or similar locations and (ii) considered adequate by Holdings and the Parent Borrower.

SECTION 3.13.Capitalization and Subsidiaries. Holdings does not have any subsidiaries other than the Parent Borrower and the Subsidiaries. Schedule 3.13 sets forth (a) a correct and complete list of the name and relationship to the Parent Borrower of each Subsidiary, (b) a true and complete listing of each class of each of the Parent Borrower's and each Subsidiary's authorized Equity Interests, of which all of such issued shares are validly issued, outstanding, fully paid and non-assessable, and owned beneficially and of record by the Persons identified on Schedule 3.13, and (c) the type of entity of the Parent Borrower and each Subsidiary, in each case as of the Effective Date. All of the issued and outstanding Equity Interests issued by any Subsidiary that are owned by any Loan Party have been (to the extent such concepts are relevant with respect to such ownership interests) duly authorized and issued and are fully paid and non-assessable.

SECTION 3.14.Labor Disputes. As of the Effective Date, there are no strikes, lockouts or slowdowns or any other material labor disputes against any Loan Party or any of its subsidiaries pending or, to the knowledge of any Responsible Officer of any Loan Party or any of its subsidiaries, threatened. The hours worked by and payments made to employees of the Loan Parties and their respective subsidiaries have not been in violation of the Fair Labor Standards Act or any other applicable federal, state, provincial, local or foreign law dealing with such matters, except for any such violations that, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect. All payments due from any Loan Party or any of its subsidiaries, or for which any claim may be made against any Loan Party or any of its subsidiaries, on account of wages and employee health and welfare insurance and other benefits, have been paid or accrued as a liability on the books of the Loan Party or such subsidiary, except for any such failures to do so that, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect. There is no organizing activity involving any Loan Party or any of its subsidiaries pending or, to the knowledge of any Responsible Officer of any Loan Party or any of its subsidiaries, threatened by any labor union or group of employees, except those that, in the aggregate, could not reasonably be expected to have a Material Adverse Effect. There are no representation proceedings pending or, to the knowledge of any Loan Party or any of its subsidiaries, threatened with the National Mediation Board, and no labor organization or group of employees of any Loan Party or any of its subsidiaries has made a pending demand for recognition, except those that, in the aggregate, could not reasonably be expected to have a Material Adverse Effect. There are no material complaints or charges against any Loan Party or any of its subsidiaries pending or, to the knowledge of any Responsible Officer of any Loan Party or any of its subsidiaries, threatened to be filed with any Governmental Authority or arbitrator based on, arising out of, in connection with, or otherwise relating to the employment or termination of employment by any Loan Party or any of its subsidiaries of any individual, except those that, in the aggregate, could not reasonably be expected to have a Material Adverse Effect. The consummation of the Transactions will not give rise to any right of termination or right of renegotiation on the part of any union under any collective bargaining agreement to which any Loan Party or any of its subsidiaries is bound.

SECTION 3.15.Indalex UK Limited. As of the Effective Date, Indalex UK Limited does not own, lease, manage or operate any properties or assets (including cash), other than de minimis properties and assets.

SECTION 3.16.Collateral Documents. The Collateral Documents, upon execution and delivery thereof by the parties thereto and upon entry by the Bankruptcy Court of the Interim Order and entry by the Canadian Court of the Canadian Order, will be effective to create in favor of the Administrative Agent, for the benefit of the Secured Parties, a legal, valid and enforceable security interest in the Collateral (as defined in the Collateral Documents) and the proceeds thereof, and, after

giving effect to the Orders and the Canadian Order, the Lien created under the Collateral Documents will constitute a fully perfected Lien on, and security interest in, all right, title and interest of the Loan Parties in such Collateral, in each case prior and superior in right to any other Person, other than with respect to (A) Liens having priority by law and (B) the CCAA Charges.

SECTION 3.17.Reorganization Matters. (a)The Bankruptcy Cases were commenced on the Petition Date and the Canadian Proceeding was commenced on April 3, 2009, in each case in accordance with applicable law and proper notice thereof and proper notice of the hearings to consider entry of the Interim Order and entry of the Canadian Order has been given or dispensed with pursuant to the terms of the Canadian Order and proper notice of the hearing to consider entry of the Final Order will be given.

(b)Each of the Interim Order (with respect to the period prior to entry of the Final Order), the Final Order (with respect to the period following the entry of the Final Order) and the Canadian Order is in full force and effect and has not been reversed, stayed, modified, vacated or amended without the written consent of the Administrative Agent and the Required Lenders.

(c)Subject to and after the entry of the Interim Order (with respect to the period prior to entry of the Final Order), the Final Order (with respect to the period following the entry of the Final Order) and the Canadian Order, notwithstanding the provisions of Section 362 of the Bankruptcy Code or the stay of proceedings contained in the Canadian Order, upon the Termination Date (whether by acceleration or otherwise) of any of the Obligations hereunder, the Administrative Agent and Lenders shall be entitled to immediate payment in full in cash of such Obligations and to enforce the remedies provided for hereunder and under the other Loan Documents, without further application to or order by the Bankruptcy Court or the Canadian Court, as more fully set forth in and subject to the Interim Order, the Final Order and the Canadian Order.

ARTICLE IV

Conditions

SECTION 4.01.Effective Date. The obligations of the Lenders to make Loans (including as contemplated by Sections 2.01(c), (d) and (e)) shall not become effective until the date on which each of the following conditions is satisfied (or waived in accordance with Section 9.02):

(a)Credit Agreement and Loan Documents. The Administrative Agent (or its counsel) shall have received (i) from each Loan Party and the Lenders either (A) a counterpart of this Agreement signed on behalf of such party or (B) written evidence reasonably satisfactory to the Administrative Agent (which may include facsimile transmission of a signed signature page of this Agreement) that such party has signed a counterpart of this Agreement and (ii) duly executed copies of the other Loan Documents and such other certificates, documents, instruments and agreements as the Administrative Agent shall reasonably request in connection with the transactions contemplated by this Agreement and the other Loan Documents, including any promissory notes requested by a Lender pursuant to Section 2.09(h) payable to the order of each such requesting Lender.

(b)Closing Certificates; Certified Certificate of Incorporation; Good Standing Certificates. The Administrative Agent shall have received (i) a certificate of each Loan Party, dated the Effective Date and executed by its Secretary or Assistant Secretary, which shall (A) certify the resolutions of its Board of Directors, members or other body authorizing the execution, delivery and performance of the Loan Documents to which it is a party, (B) identify by name and title and bear the signatures of the Financial Officers and any other officers of such Loan Party authorized to sign the Loan Documents to

which it is a party, and (C) contain appropriate attachments, including the certificate or articles of incorporation or organization of each Loan Party certified by the relevant authority of the jurisdiction of organization of such Loan Party and a true and correct copy of its by-laws or operating, management or partnership agreement, and (ii) a long-form good standing certificate for each Loan Party from its jurisdiction of organization, all in form and substance reasonably satisfactory to the Administrative Agent and its counsel.

(c)No Default Certificate. The Administrative Agent shall have received a certificate, dated the Effective Date and signed by a Financial Officer, (i) stating that, as of the Effective Date and after giving effect to the Transactions, no Default has occurred and is continuing, (ii) stating that the representations and warranties contained in Article III that are qualified by materiality shall be true and correct, and the representations and warranties that are not so qualified shall be true and correct in all material respects, as of the Effective Date, and (iii) certifying any other factual matters as may be reasonably requested by the Administrative Agent.

(d)Fees. The Administrative Agent shall have received all fees (including the Up-front Fee, but excluding the ~~Final Order~~**Facility** Fee) required to be paid to it and to the Lenders, and all expenses for which invoices have been presented on or before the Effective Date (including the reasonable fees and expenses of legal counsel to the Administrative Agent and to any Lender, and the financial advisor to the Administrative Agent's legal counsel).

(e)Canadian Perfection Certificate; Lien Searches. The Administrative Agent shall have received (i) a completed Canadian Perfection Certificate, dated the Effective Date and signed by a Financial Officer or legal officer of the Canadian Subsidiary Borrower, together with all attachments contemplated thereby, and (ii) the results of a recent lien search in (A) each of the jurisdictions where assets of the Loan Parties are located and (B) the jurisdiction of formation of each Loan Party, and such search shall reveal no Liens on any of the assets of the Loan Parties or their respective subsidiaries except for Liens permitted by Section 6.02 or discharged on or prior to the Effective Date pursuant to documentation reasonably satisfactory to the Administrative Agent.

(f)Pledged Stock; Stock Powers; Pledged Notes. The Administrative Agent shall have received (i) the certificates representing the Equity Interests to be pledged pursuant to the Collateral Documents, together with an undated stock power for each such certificate executed in blank by a duly authorized officer of the pledgor thereof and (ii) each promissory note (if any) pledged to the Administrative Agent pursuant to the Collateral Documents endorsed (without recourse) in blank (or accompanied by an executed transfer form in blank) by the pledgor thereof.

(g)Filings, Registrations and Recordings. Each document (including any financing statement, fixture filing, mortgage, deed of trust or other document) required by the Collateral Documents or under law or reasonably requested by the Administrative Agent to be filed, registered or recorded in order to create or maintain in favor of the Administrative Agent, for the benefit of the Lenders, a perfected Lien on the Collateral described therein, prior and superior in right to any other Person (other than the CCAA Charges and Liens having priority by law), shall be in proper form for filing, registration or recordation.

(h)Mortgages, etc. The Administrative Agent shall have received, with respect to each Mortgaged Property (other than with respect to the Mortgaged Properties located in British Columbia and

Alberta), each of the following, in form and substance reasonably satisfactory to the Administrative Agent, to the extent requested by the Administrative Agent (orally or in writing):

(i) a Mortgage on such property;

(ii) evidence that a counterpart of the Mortgage (or any necessary amendment to any Mortgage existing immediately prior to the Effective Date to reflect the consummation of the Transactions) has been recorded (or delivered to the title insurance company to be recorded after the consummation of the Transactions) in the place necessary, in the Administrative Agent's judgment, to create a valid and enforceable first priority Lien in favor of the Administrative Agent for the benefit of itself and the Lenders;

(iii) evidence of a commitment to title insure from an insurer acceptable to the Administrative Agent, acting reasonably with an assertion from such insurer that its gap coverage has been declared to be in effect; and

(iv) such other information, documentation, and certifications as may be reasonably required by the Administrative Agent.

(i)Consummation of Transactions. The commencement of the Bankruptcy Cases and the Canadian Proceeding and the consummation of the other Transactions contemplated hereunder and by the other Loan Documents shall have been duly authorized by the Borrowers and each other Loan Guarantor.

(j)Indebtedness. After giving effect to the Transactions, none of Holdings, the Parent Borrower nor any Subsidiary shall have outstanding any Indebtedness or any shares of preferred stock, other than (i) the Loans and other Indebtedness incurred under this Agreement and the other Loan Documents, (ii) Prepetition Indebtedness, (iii) the Senior Secured Notes, (iv) Indebtedness set forth on Schedule 6.01 and (v) the other Indebtedness permitted by Section 6.01.

(k)Consents and Approvals. All requisite material Governmental Authorities shall have approved or consented to the Transactions to the extent required and there shall be no governmental or judicial action, actual or threatened, that could reasonably be expected to restrain, prevent or impose materially burdensome conditions on the Transactions.

(l)Other Documents. The Administrative Agent shall have received such other documents as the Administrative Agent, the Issuing Bank, any Lender or their respective counsel may have reasonably requested.

(m)Interim Order. Entry of an order of the Bankruptcy Court in substantially the form of Exhibit H (the "Interim Order") approving the Loan Documents, granting the Superpriority Claim status in respect of the Obligations and the senior priming and other Liens described in Article II hereof and provided for in the Collateral Documents, which Interim Order (i) shall have been entered, upon an application or motion of the Parent Borrower reasonably satisfactory in form and substance to the Administrative Agent, on such prior notice to such parties as required under the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure and the Local Rules for the District of Delaware, (ii) shall authorize extensions of credit in an amount not to exceed ~~$[•]~~**42,500,000** (excluding amounts in respect of the Prior Swap), (iii) shall approve the payment by the Parent Borrower of all of the fees and expenses provided for in the Loan Documents (including the reasonable attorneys' fees and expenses of the Administrative Agent, the Issuing Bank and the Lenders), (iv) shall be in full force and effect, (v) shall have authorized the use by the Borrowers and the Loan Guarantors of any cash collateral of the Loan

Parties, (vi) shall provide for no adequate protection in respect of the diminution in value of the interests of the Sponsor or any Sponsor Affiliate (in its capacity as a term lender under the Prepetition Credit Agreement) or any holder of Senior Secured Notes occurring as a result of the use of cash collateral, the priming of liens and the imposition of the automatic stay, other than (A) replacement Liens, which Liens shall have the priority set forth in the Orders (the "Replacement Liens") **and (B) payments not in excess of $25,000 in the aggregate in any calendar month for (x) the legal fees of Kirkland & Ellis LLP, as counsel for the term lender under the Prepetition Credit Agreement and (y) other reimburseable expenses of the term lender under the Prepetition Credit Agreement**, (vii) shall not have been vacated, stayed, reversed, modified or amended in any respect without the written consent of the Administrative Agent and the Required Lenders, (viii) shall have permitted the application of proceeds to the Prepetition Indebtedness and the advancing of Loans to the Borrowers **and the establishment of the Secured Obligations, in each case** having the priority set forth in Section 2.21, (ix) shall provide for Adequate Protection for the Prepetition Agent and the Prepetition Revolving Lenders as set forth in the form of Exhibit H, and (x) shall be in form and substance acceptable to the Administrative Agent and the Required Lenders; and, if the Interim Order is the subject of a pending appeal in any respect, neither the making of any Loans nor the deemed issuance pursuant to Section 2.04(a) of any Letter of Credit nor the performance by the Borrowers or any of the other Loan Guarantors of any of their respective obligations hereunder or under the Loan Documents or under any other instrument or agreement referred to herein shall be the subject of a presently effective stay pending appeal.

(n)Canadian Order. Issuance and entry by the Canadian Court of the Canadian Order in form and substance satisfactory to the Administrative Agent and the Required Lenders, which Canadian Order (i) shall have been made upon the application of the Canadian Subsidiary Borrower and Canadian Subsidiary Loan Parties, in form and substance satisfactory to the Administrative Agent and the Required Lenders and (ii) shall not have been vacated, stayed, reversed, modified or amended in any respect without the prior written consent of the Administrative Agent and the Required Lenders and shall not be subject to a pending appeal or motion for leave to appeal or other proceeding to set aside such order; and if the Canadian Order is the subject of a pending appeal in any respect, neither the making of any Loans nor the deemed issuance pursuant to Section 2.04(a) of any Letter of Credit nor the performance by the Borrowers or any of the other Loan Guarantors of any of their respective obligations hereunder or under the Loan Documents or under any other instrument or agreement referred to herein shall be the subject of a presently effective stay pending appeal.

(o)Forecast. The Lenders shall have received and be satisfied with the Forecast.

(p)The Administrative Agent shall have received a Daily Borrowing Base Certificate on or within one Business Day prior to the Effective Date.

(q)The Parent Borrower shall have retained an investment bank or other strategic advisor acceptable to the Required Lenders to assist it in consummating a Company Sale (it being understood and agreed that Jefferies & Company, Inc. is an acceptable investment bank).

The Administrative Agent shall notify the Parent Borrower and the Lenders of the Effective Date, and such notice shall be conclusive and binding. Notwithstanding the foregoing, the obligations of the Lenders to make Loans (including as contemplated by Sections 2.01(c), 2.01(d) and 2.01(e)) shall not become effective unless each of the foregoing conditions is satisfied (or waived pursuant to Section 9.02) at or prior to 11:00 a.m., New York City time, the date five Business Days after the date of this Agreement (and, in the event such conditions are not so satisfied or waived, the Commitments shall terminate at such time).

SECTION 4.02. Each Credit Event. (a)The obligation of each Lender to make a Loan on the occasion of any Borrowing and of the Issuing Bank to amend, renew or extend any such Letter of Credit, is subject to the satisfaction of the following conditions:

(i) the representations and warranties of each of the Loan Parties set forth in the Loan Documents that are qualified by materiality shall be true and correct, and the representations and warranties that are not so qualified shall be true and correct in all material respects, in each case on and as of the date of such Borrowing or the date of the amendment, renewal or extension of such Letter of Credit, as applicable (other than with respect to any representation and warranty that expressly relates to an earlier date, in which case such representation and warranty shall be true and correct, or true and correct in all material respects, as the case may be, as of such earlier date); and

(ii) at the time of and immediately after giving effect to such Borrowing or the amendment, renewal or extension of such Letter of Credit, as applicable, no Default shall have occurred and be continuing.

(iii) The Interim Order and the Canadian Order shall be in full force and effect and shall not have been vacated, stayed, reversed, modified or amended in any respect in a manner determined by the Administrative Agent or the Required Lenders to be adverse to the interests of the Administrative Agent and the Lenders and an order of the Bankruptcy Court in substantially the form of the Interim Order (with only such modifications thereto as are satisfactory in form and substance to the Administrative Agent and the Required Lenders) (the "Final Order") shall have been entered by the Bankruptcy Court no later than 30 days after the entry of the Interim Order, and at such time the Final Order shall be in full force and effect, shall authorize extensions of credit up to $[~~•~~]**85,877,371** (excluding amounts in respect of the Prior Swap), shall have approved the conversion of certain Prepetition Revolving Loans, Prepetition Swap Obligations, Prepetition Banking Services Obligations and Prepetition Letters of Credit (and granted such converted Prepetition Revolving Loans, Prepetition Swap Obligations, Prepetition Banking Services Obligations and Prepetition Letters of Credit **and any other Secured Obligations established hereby** Superpriority Claim status, secured by Liens and having the priority, in each case as set forth in Section 2.21), shall have approved the Adequate Protection and shall not have been vacated, stayed, reversed, modified or amended in any respect in a manner determined by the Administrative Agent or the Required Lenders to be adverse to the interests of the Administrative Agent and the Lenders; and if the Interim Order, the Final Order or the Canadian Order is the subject of a pending appeal in any respect, neither the making of the Loans, the amendment, renewal or extension of any Letter of Credit, nor the performance by the Parent Borrower or any Loan Guarantor of any of their respective obligations under any of the Loan Documents shall be subject to a stay pending appeal. Each such Order as then in effect shall permit the use of cash collateral under the Prepetition Credit Agreement by the Borrower and the Loan Guarantors in a manner satisfactory to the Administrative Agent and the Required Lenders.

(iv) The Lenders shall have received and be satisfied with the most recent Cash Flow Forecast required to be delivered pursuant to Section 5.01(j).

Each Borrowing and each amendment, renewal or extension of a Letter of Credit shall be deemed to constitute a representation and warranty by the applicable Borrower on the date thereof as to the matters

specified in this Section 4.02(a).

(b)Prior to (i) the making of each Loan (other than as contemplated by Sections 2.01(c), 2.01(d) and 2.01(e)), the Administrative Agent shall have received a Borrowing Request meeting the requirements of Section 2.03 and a Daily Borrowing Base Certificate in compliance with Section 5.01(g), and (ii) the amendment, renewal or extension of each Letter of Credit, the Administrative Agent and the Issuing Bank shall have received a notice meeting the requirements of Section 2.04(b).

ARTICLE V

Affirmative Covenants

Until the Commitments have expired or been terminated and the principal of and interest on each Loan and all fees, expenses and other amounts payable under any Loan Document shall have been paid in full and all Letters of Credit shall have expired or terminated (or shall have been cash collateralized or supported by a letter of credit as provided in Section 2.04(h)) and all L/C Disbursements shall have been reimbursed, the Loan Parties covenant and agree, jointly and severally, with the Lenders that:

SECTION 5.01.Financial Statements; Borrowing Base and Other Information. Holdings and the Parent Borrower will furnish to the Administrative Agent and each Lender:

(a) within 120 days after the end of each fiscal year of the Parent Borrower, the unaudited consolidated balance sheet and related statements of income, stockholders' equity and cash flows for each of the Parent Borrower and its consolidated subsidiaries, on the one hand, and the Canadian Subsidiary Borrower and its consolidated subsidiaries, on the other hand, in each case as of the end of and for such year, setting forth in each case in comparative form the figures for the previous fiscal year, all certified by a Financial Officer as presenting fairly in all material respects the financial condition and results of operations of the Parent Borrower and its consolidated subsidiaries or the Canadian Subsidiary Borrower and its consolidated subsidiaries, as the case may be, on a consolidated basis in accordance with GAAP (or, in the case of the financial statements of the Canadian Subsidiary Borrower and its consolidated subsidiaries, Canadian GAAP) consistently applied;

(b) within 45 days after the end of each of the first three fiscal quarters of each fiscal year of the Parent Borrower, the unaudited consolidated balance sheet and related statements of income, stockholders' equity and cash flows for each of the Parent Borrower and its consolidated subsidiaries, on the one hand, and the Canadian Subsidiary Borrower and its consolidated subsidiaries, on the other hand, in each case as of the end of and for such fiscal quarter and the then elapsed portion of the fiscal year, setting forth in each case in comparative form the figures for the corresponding period or periods of (or, in the case of the balance sheet, as of the end of) the previous fiscal year, all certified by a Financial Officer as presenting fairly in all material respects the financial condition and results of operations of the Parent Borrower and its consolidated subsidiaries or the Canadian Subsidiary Borrower and its consolidated subsidiaries, as the case may be, on a consolidated basis in accordance with GAAP (or, in the case of the financial statements of the Canadian Subsidiary Borrower and its consolidated subsidiaries, Canadian GAAP) consistently applied, subject to normal year-end audit adjustments and the absence of footnotes;

(c) within 30 days after the end of each of the first two fiscal months of each fiscal quarter of the Parent Borrower, the unaudited consolidated balance sheet and related statements

of income, stockholders' equity and cash flows for each of the Parent Borrower and its consolidated subsidiaries, on the one hand, and the Canadian Subsidiary Borrower and its consolidated subsidiaries, on the other hand, in each case as of the end of and for such fiscal month and the then elapsed portion of the fiscal year, setting forth in each case in comparative form the figures for the corresponding period or periods of (or, in the case of the balance sheet, as of the end of) the previous fiscal year, all certified by a Financial Officer as presenting fairly in all material respects the financial condition and results of operations of the Parent Borrower and its consolidated subsidiaries or the Canadian Subsidiary Borrower and its consolidated subsidiaries;

(d) concurrently with any delivery of financial statements under clause (a), (b) or (c) above, a compliance certificate of a Financial Officer in substantially the form of Exhibit D (i) certifying as to whether a Default has occurred and, if a Default has occurred, specifying the details thereof and any action taken or proposed to be taken with respect thereto, (ii) stating whether any change in GAAP or in the application thereof has occurred since the date of the audited financial statements referred to in Section 3.04 and, if any such change has occurred, specifying the effect of such change on the financial statements accompanying such certificate and (iii) setting forth calculations demonstrating compliance with each of Sections 6.16, 6.17 and 6.18;

(e) as soon as available, but in any event not more than 30 days after the end of each fiscal year of the Parent Borrower, a copy of the plan and forecast (including a projected consolidated and consolidating balance sheet, income statement and funds flow statement) of the Parent Borrower and the Subsidiaries on a consolidated basis for each month of the upcoming fiscal year (the "Projections") in form reasonably satisfactory to the Administrative Agent and, promptly when available, any significant revisions of such Projections;

(f) on or before the first Wednesday following the end of each calendar week, as of the end of the week then ended, a Weekly Borrowing Base Certificate and supporting information in connection therewith, together with any additional reports with respect to each Borrowing Base as the Administrative Agent may reasonably request;

(g) on or before 11:00 a.m., New York City time, on each Business Day, as of the end of the previous Business Day, a Daily Borrowing Base Certificate and supporting information in connection therewith, together with any additional reports with respect to each Borrowing Base as the Administrative Agent may reasonably request;

(h) promptly after the same become publicly available, copies of all periodic and other reports, proxy statements and other materials filed by Holdings, the Parent Borrower or any Subsidiary with the SEC, or any Governmental Authority succeeding to any or all of the functions of the SEC, or with any national securities exchange, or distributed by Holdings to its shareholders generally, as the case may be;

(i) promptly following any written request therefor from the Administrative Agent (on its own behalf or on behalf of any Lender), such other information regarding the operations, business affairs and financial condition of Holdings, the Parent Borrower or any Subsidiary, or compliance with the terms of this Agreement, as the Administrative Agent (on its own behalf or on behalf of such Lender) may reasonably request (including any information required to be provided by the Parent Borrower and the Canadian Subsidiary Borrower pursuant to Section 9.14);

(j) promptly after the request by the Administrative Agent or any Lender, copies of (i) any documents described in Section 101(k)(1) of ERISA that the Parent Borrower or any of its ERISA Affiliates may request with respect to any Multiemployer Plan and (ii) any notices described in Section 101(l)(1) of ERISA that the Parent Borrower or any of its ERISA Affiliates may request with respect to any Multiemployer Plan, provided that if the Parent Borrower or any of its ERISA Affiliates has not requested such documents or notices from the administrator or sponsor of the applicable Multiemployer Plan, the Parent Borrower or the applicable ERISA Affiliate shall promptly make a request for such documents or notices from such administrator or sponsor and shall provide copies of such documents and notices promptly after receipt thereof;

(k) on the first Wednesday in New York City following the end of each calendar week, (i) a Cash Flow Forecast and a cash report reflecting aggregate cash balances in all accounts of the Parent Borrower and its Subsidiaries with financial and other institutions as of the immediately preceding Saturday and (ii) a comparison of actual performance for the preceding week to the Cash Flow Forecast previously provided and an explanation for any material variances, in form substantially similar to the forecast and report delivered under the Prepetition Credit Agreement prior to the Petition Date, together with a certificate of the Chief Financial Officer or the Chief Executive Officer to the effect that such forecasts have been prepared in good faith and based upon assumptions believed to be reasonable at the time when prepared; and

(l) on or prior to the fifteenth calendar day of each calendar month, an updated and supplemented Forecast reflecting any changes to the Forecast previously delivered, together with a certificate of the Chief Financial Officer or the Chief Executive Officer to the effect that such Forecast has been prepared in good faith and based upon assumptions believed to be reasonable at the time when prepared.

SECTION 5.02. Notices of Material Events. Holdings and the Parent Borrower will furnish to the Administrative Agent (for distribution to each Lender) prompt written notice of a Responsible Officer's obtaining knowledge of any of the following:

(a) the occurrence of any Default;

(b) receipt of any notice of any governmental investigation or any litigation or proceeding commenced or threatened against any Loan Party that (i) seeks material damages, (ii) seeks material injunctive relief, (iii) is asserted or instituted against any Plan, any Canadian Pension Plan, any Canadian Benefits Plan or, in each case, its fiduciaries or its assets, (iv) alleges criminal misconduct by any Loan Party, (v) alleges the material violation of, or seeks material remedies in connection with, any Environmental Laws or alleges a material Environmental Liability, (vi) contests any material tax, fee, assessment or other governmental charge, or (vii) involves any product recall;

(c) any Lien (other than Liens permitted hereunder) or claim made or asserted against any of the Collateral;

(d) any loss, damage or destruction to the Collateral in the amount of $1,000,000 or more, whether or not covered by insurance, or the commencement of any action or proceeding for the taking of any material portion of or material interest in the Collateral under power of eminent domain or by condemnation or similar proceeding;

(e) any and all default notices received under or with respect to any leased location or public warehouse where Collateral is located in excess of $500,000 (which shall be delivered within five Business Days after receipt thereof);

(f) the occurrence of any ERISA Event or any fact or circumstance that gives rise to a reasonable expectation that any ERISA Event will occur that, in either case, alone or together with any other ERISA Events that have occurred or are reasonably expected to occur, could reasonably be expected to result in material liability of Holdings, the Parent Borrower and the Subsidiaries;

(g) any failure of either Borrower or any Subsidiary to make any contribution required to pay the "normal cost", as defined in the Regulations to the Pension Benefits Act (Ontario), of the benefits under any Canadian Pension Plan or any required contribution to a Canadian Multi-Employer Plan or the receipt of any notice from the funding agent for any Canadian Pension Plan or Canadian Multi-Employer Plan or from any Governmental Authority to such effect that could reasonably be expected to result in a material liability to Holdings, the Parent Borrower and the Subsidiaries;

(h) any contribution by a Borrower or any Subsidiary to a Canadian Pension Plan which is a "special payment", as defined in the Regulations to the Pension Benefits Act (Ontario), to fund any unfunded liability thereunder which is made during the period covered by the Canadian Order; and

(i) any other development that results in, or could reasonably be expected to result in, a Material Adverse Effect.

Each notice delivered under this Section 5.02 shall be accompanied by a statement of a Financial Officer or other executive officer of the Parent Borrower setting forth the details of the event or development requiring such notice and any action taken or proposed to be taken with respect thereto.

SECTION 5.03.Existence. Each Loan Party will, and will cause each of its subsidiaries other than Indalex UK Limited to, do or cause to be done all things necessary (a) to preserve, renew and keep in full force and effect (i) its legal existence and (ii) except as otherwise excused by the Bankruptcy Code or the Canadian Order, the rights, qualifications, privileges, permits, franchises, governmental authorizations, intellectual property rights, licenses and permits material to the conduct of its business, except, in the case of this subclause (ii), to the extent that failure to do so could not reasonably be expected to result in a Material Adverse Effect, and (b) maintain all requisite authority to conduct its business in each jurisdiction in which its business is conducted, except, in the case of this clause (b), to the extent that the failure to do so could not reasonably be expected to result in a Material Adverse Effect, provided that the foregoing shall not prohibit any merger, consolidation, liquidation or dissolution permitted under Section 6.03.

SECTION 5.04.Payment of Obligations. Except in accordance with the Bankruptcy Code, the Canadian Order, the CCAA or any applicable order issued by the Bankruptcy Court or the Canadian Court, each Loan Party will, and will cause each of its subsidiaries to, pay or discharge all Material Indebtedness, all lawful claims for labor, materials and supplies or otherwise that constitute administrative expense under Section 503(b) of the Bankruptcy Code, all material Taxes and all other material liabilities and obligations that have resulted, or may result, in a Lien being imposed on any Loan Party's assets (which, in the case of the Canadian Pension Plans, shall mean all contributions required to pay the "normal cost" of the benefits thereunder, as defined in the Regulations to the Pension Benefits Act (Ontario) and in the case of a Canadian Multi-Employer Plan, shall mean the contributions thereto

required under the applicable collective agreement or participation agreement) (other than Liens expressly permitted by Section 6.02), in each case arising after the Petition Date, before the same shall become delinquent or in default, except where (a) the validity or amount thereof is being contested in good faith by appropriate proceedings, (b) such Loan Party or such subsidiary has set aside on its books adequate reserves with respect thereto in accordance with GAAP, (c) such contest effectively suspends collection of the contested obligation and the enforcement of any Lien securing such obligation and (d) the failure to make payment pending such contest could not reasonably be expected to result in a Material Adverse Effect.

SECTION 5.05.Maintenance of Properties. Each Loan Party will, and will cause each of its subsidiaries to, keep and maintain all property material to the conduct of its business in good working order and condition, ordinary wear and tear, casualty and condemnation excepted.

SECTION 5.06.Books and Records; Inspection Rights. (a)Each Loan Party will, and will cause each of its subsidiaries to, (i) keep proper books of record and account in which full, true and correct entries are made of all dealings and transactions in relation to its business and activities and (ii) permit any representatives designated by the Administrative Agent, any Lender or any other party in interest to the Bankruptcy Cases or the Canadian Proceeding (including employees of the Administrative Agent, any Lender or any consultants, accountants, lawyers and appraisers retained by the Administrative Agent), upon reasonable prior notice, to visit and inspect its properties during normal business hours, to examine and make extracts from its books and records (including environmental assessment reports and Phase I or Phase II studies), to discuss its affairs, finances and condition with its officers and independent accountants and to meet with its suppliers, all at such reasonable times and as often as reasonably requested, provided that a representative of the Loan Parties shall have the right to be present. The Loan Parties acknowledge that the Administrative Agent, after exercising its rights of inspection, may prepare and distribute to the Lenders certain Reports pertaining to the Loan Parties' assets for internal use by the Administrative Agent and the Lenders.

(b)Each Loan Party will, and will cause each of its subsidiaries to, permit any representatives designated by the Administrative Agent (including any consultants, accountants, lawyers and appraisers retained by the Administrative Agent) to conduct periodic collateral examinations and periodic collateral appraisals of the Parent Borrower's and the Canadian Subsidiary Borrower's computation of their respective Borrowing Base and the assets included in each such Borrowing Base, all at such reasonable times and as often as reasonably requested by the Administrative Agent in its sole discretion. The Parent Borrower shall pay the reasonable fees and expenses (including internally allocated fees and expenses of employees of the Administrative Agent) of any such representatives retained by the Administrative Agent as to which invoices have been furnished to conduct any such examination or appraisal, including the reasonable fees and expenses associated with collateral monitoring services performed by the IB ABL Portfolio Mgmt Group of the Administrative Agent. The Loan Parties acknowledge that the Administrative Agent, after exercising its rights with respect to collateral examinations and collateral appraisals, may prepare and distribute (and, upon the request of any Lender, will distribute) to the Lenders certain Reports pertaining to the Loan Parties' assets for internal use by the Administrative Agent and the Lenders. Each of the Parent Borrower and the Canadian Subsidiary Borrower also agrees to modify or adjust the computation of its Borrowing Base (which may include maintaining additional reserves or modifying the eligibility criteria for the components of the Borrowing Base) to the extent required by the Administrative Agent or the Required Lenders as a result of any such collateral examination or collateral appraisal or otherwise.

(c)In the event that historical accounting practices, systems or reserves relating to the components of either Borrowing Base are modified in a manner that is adverse to the Lenders in any material respect, the Parent Borrower and the Canadian Subsidiary Borrower, as applicable, shall agree to

maintain such additional reserves (for purposes of computing the applicable Borrowing Base) in respect of the components of the applicable Borrowing Base and make such other adjustments to its parameters for including the components of the applicable Borrowing Base as the Administrative Agent in its Permitted Discretion shall require based upon such modifications.

SECTION 5.07.Compliance with Laws. Each Loan Party will, and will cause each of its subsidiaries to, comply with all Requirements of Law applicable to it or its property, except where the failure to do so, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Effect.

SECTION 5.08.Use of Proceeds; Forecast. (a) The Borrowers will use the proceeds of the Loans solely (i) to pay fees and expenses associated with this Agreement (including attorneys' fees and expenses required to be paid pursuant to Section 9.03), (ii) to make payments in respect of Adequate Protection, (iii) to make payments or fund amounts otherwise permitted by this Agreement and (iv) subject to clause (b) below, for working capital and general corporate purposes. The Borrower shall use the entire amount of the proceeds of each Loan solely in accordance with this Section 5.08, provided that nothing herein shall in any way prejudice or prevent the Administrative Agent or the Lenders from objecting, for any reason, to any requests, motions or applications made in the Bankruptcy Court or the Canadian Court, including any applications for interim or final allowances of compensation for services rendered or reimbursement of expenses incurred under Section 330 or 331 of the Bankruptcy Code, by any party in interest. No part of the proceeds of any Loan will be used, whether directly or indirectly, for any purpose that entails a violation of any of the Regulations of the Board, including Regulations T, U and X.

(b)For each cumulative period commencing with and including the week ended April 3, 2009, and ending on any Friday thereafter (the first such period being the week ended April 3, 2009): (i) the actual aggregate cash receipts during such period for all line items in the Forecast delivered April 8, 2009 shall exceed 80% of the projected aggregate cash receipts for such period and (ii) the actual aggregate cash disbursements during such period for all line items in the Forecast delivered April 8, 2009 shall not exceed 120% of the projected aggregate cash disbursements for such period.

SECTION 5.09.Insurance. Each Loan Party will, and will cause each of its subsidiaries to, maintain with financially sound and reputable carriers (a) insurance in such amounts (with no greater risk retention) with customary deductibles and against such risks (including loss or damage by fire and loss in transit; theft, burglary, pilferage, larceny, embezzlement, and other criminal activities; business interruption; and general liability) and such other hazards, as is (i) customarily maintained by companies of established repute engaged in the same or similar businesses operating in the same or similar locations and (ii) considered adequate by Holdings and the Parent Borrower and (b) all insurance as may be required by law. Each Loan Party shall, and shall cause each of its subsidiaries to, (A) cause all such property and property casualty insurance policies to be endorsed or otherwise amended to include a lender's loss payable endorsement, in form and substance reasonably satisfactory to the Administrative Agent; (B) deliver original or certified copies of all such policies or a certificate of an insurance broker to the Administrative Agent; (C) cause each such policy to provide that it shall not be canceled, modified or not renewed upon less than 30 days' prior written notice (or 10 days' prior written notice in the case of any failure to pay any premium due thereunder) thereof by the insurer to the Administrative Agent; and (D) deliver to the Administrative Agent, prior to the cancelation, modification or nonrenewal of any such policy of insurance, a copy of a renewal or replacement policy (or other evidence of renewal of a policy previously delivered to the Administrative Agent), or insurance certificate with respect thereto, together with evidence reasonably satisfactory to the Administrative Agent of payment of the premium therefor.

The Parent Borrower will furnish to the Lenders, upon request of the Administrative Agent, information in reasonable detail as to the insurance so maintained.

SECTION 5.10.Depository Banks. The Parent Borrower and each Subsidiary will maintain the Administrative Agent, Bank of America, N.A., Royal Bank of Canada or such other bank or banks that are reasonably satisfactory to the Administrative Agent, as its principal depository bank, including for the maintenance of operating, administrative, cash management, collection activity, and other deposit accounts for the conduct of its business.

SECTION 5.11.Additional Collateral; Further Assurances. (a)To the extent permitted by applicable law, each Borrower and each Subsidiary Loan Party shall cause each of its subsidiaries formed or acquired after the date of this Agreement to become a Loan Party by executing the Joinder Agreement set forth as Exhibit E hereto (the "Joinder Agreement"). Upon execution and delivery thereof, each such Person (i) shall automatically become a Loan Guarantor hereunder and thereupon shall have all of the rights, benefits, duties, and obligations in such capacity under the Loan Documents, the Orders and the Canadian Order and (ii) will grant, if so requested by the Administrative Agent, and including by executing the applicable Collateral Documents (or supplements thereto), Liens to the Administrative Agent, for the benefit of the Administrative Agent and the Lenders, in any property of such Loan Party that constitutes Collateral, including any parcel of real property owned by such Loan Party.

(b)To the extent permitted by applicable law, the Loan Parties will cause 100% of the issued and outstanding Equity Interests of each Loan Party Subsidiary to be subject at all times to a first priority, perfected Lien (subject to Permitted Encumbrances and the CCAA Charges) in favor of the Administrative Agent to secure the Secured Obligations pursuant to the terms and conditions of the Orders, the Canadian Order, the applicable Collateral Document or other security documents as the Administrative Agent shall reasonably request.

(c)Without limiting the foregoing and to the extent permitted by applicable law, each Loan Party will, and will cause each of its subsidiaries to, execute and deliver, or cause to be executed and delivered, to the Administrative Agent such documents, agreements and instruments, and will take or cause to be taken such further actions (including the filing and recording of financing statements, fixture filings, mortgages, deeds of trust and other documents and such other actions or deliveries of the type required by Section 4.01, as applicable), which may be required by law or which the Administrative Agent may, from time to time, reasonably request (taking into account the Orders and the Canadian Order) to carry out the terms and conditions of this Agreement and the other Loan Documents and to ensure perfection and priority of the Liens created or intended to be created by the Collateral Documents, all at the expense of the Loan Parties.

(d)If any material assets (including any real property or improvements thereto or any interest therein) are acquired by any Loan Party after the Effective Date (other than assets constituting Collateral under the Collateral Documents, an Order or the Canadian Order that become subject to the Lien created by the applicable Collateral Document, Order or the Canadian Order upon acquisition thereof), such Loan Party will notify the Administrative Agent and the Lenders thereof, and, if requested by the Administrative Agent or the Required Lenders and to the extent permitted by applicable law, such Loan Party will cause such assets to be subjected to a Lien securing the Secured Obligations and will take such actions as shall be necessary or reasonably requested by the Administrative Agent to grant and perfect such Liens (subject to any exceptions set forth in the Collateral Documents, Orders and the Canadian Order), including actions described in paragraph (c) of this Section 5.11, all at the expense of the Loan Parties.

(e)Notwithstanding the foregoing, the Administrative Agent shall not take a security interest in those assets as to which the Administrative Agent shall determine, in its reasonable discretion, that the cost of obtaining such security interest (including any mortgage, stamp, intangibles or other tax) are excessive in relation to the benefit to the Lenders of the security afforded thereby.

SECTION 5.12.Bankruptcy Cases. The Borrower shall obtain entry of the Final Order and, in addition, shall use its best efforts to deliver or cause to be delivered to the Administrative Agent's counsel all pleadings, motions and other documents filed on behalf of the Loan Parties with the Bankruptcy Court or in the Canadian Proceeding or distributed by or on behalf of the Parent Borrower, the Canadian Subsidiary Borrower or the other Loan Guarantors to any statutory committee appointed in the Bankruptcy Cases or the Canadian Proceeding, the Monitor or other parties in interest.

SECTION 5.13.Strategic Advisor. The Parent Borrower shall (i) retain an investment bank or other strategic advisor acceptable to the Required Lenders to assist it in consummating a Company Sale (it being understood and agreed that Jefferies & Company, Inc. is an acceptable investment bank) and (ii) upon the resignation or termination of any such investment bank, retain a replacement investment bank or strategic advisor acceptable to the Required Lenders on terms and conditions satisfactory to the Required Lenders no later than five Business Days following such resignation or termination.

SECTION 5.14.Milestones.

(a) On or before the date that is 10 Business Days after the Effective Date, the Canadian Subsidiary Borrower shall have obtained the approval of the Canadian Court for a sale process for the sale of all or substantially all of its assets, together with the assets of the other Loan Parties and their Subsidiaries substantially on the same terms as the process required under Section 363 of the Bankruptcy Code and otherwise acceptable to the Administrative Agent (the "Canadian Sale Process Order").

(b) On or before the date that is 30 calendar days after the Effective Date, the Parent Borrower or Holdings shall receive at least one letter of intent from a Person that is not an Affiliate of any Loan Party (a "Bidder") containing a written proposal to acquire, directly or indirectly, all or substantially all of the assets of the Loan Parties and their subsidiaries under Section 363 of the Bankruptcy Code and in compliance with the Canadian Sale Process Order for cash consideration (a "Company Sale"), which proposal, in the reasonable opinion of the Administrative Agent, is capable from a financial, legal and regulatory standpoint of being consummated.

(c) On or before the date that is 70 calendar days after the Effective Date, the Parent Borrower or Holdings shall (i) execute a definitive agreement with a Bidder for a Company Sale that in the reasonable discretion of the Administrative Agent would reasonably be expected to result in a Sale Closing and Net Proceeds in cash in an aggregate dollar amount greater than [redacted], of which at least [redacted] would be attributable to the sale of assets of the Parent Borrower and its Domestic Subsidiaries and (ii) file a motion in the Bankruptcy Court and the Canadian Court seeking approval of such Company Sale.

(d) Holdings or the Parent Borrower shall effect a Sale Closing on or before the date that is 100 days after the Effective Date for a Company Sale resulting in Net Proceeds in cash in an aggregate dollar amount greater than [redacted], of which at least [redacted] is attributable to the sale of assets of the Parent Borrower and its Domestic Subsidiaries.

(e) The Parent Borrower shall deliver to the Administrative Agent, (i) on or before the date that is 15 days after the Effective Date a plan setting forth substantial proposed reductions in the operating costs of the Loan Parties' businesses and (ii) on or before the date that is 30 days after the Effective Date a plan setting forth the specific cost reductions and actions to be taken, including timing and cost to implement, which plan, in each case, shall be reasonably satisfactory to the Required Lenders.

(f) The Parent Borrower shall deliver a proposal for restructuring its Senior Secured Notes, acceptable in the reasonable discretion of the Required Lenders, on or before the date that is 30 days after the Effective Date.

(g) The Parent Borrower shall file a disclosure statement in form and substance satisfactory to the Administrative Agent and the Required Lenders describing the Chapter 11 Plan on or before the date that is 70 days after the Effective Date.

(h) The Parent Borrower shall ensure that on or before the date that is 100 days after the Effective Date, (i) the Bankruptcy Court shall approve a Chapter 11 Plan and (ii) the Canadian Court shall have sanctioned a plan of arrangement in connection with the Canadian Proceeding.

SECTION 5.15.Post Closing Items. Each of the Loan Parties shall take or cause to be taken each action set forth on Schedule 5.15 and such action shall be completed within the time period set forth on Schedule 5.15 for such action, it being understood that the Required Lenders may, in their sole discretion, grant extensions to the time periods set forth thereon.

ARTICLE VI

Negative Covenants

Until the Commitments have expired or been terminated and the principal of and interest on each Loan and all fees, expenses and other amounts payable under any Loan Document have been paid in full and all Letters of Credit have expired or terminated (or shall have been cash collateralized or supported by a letter of credit as provided in Section 2.04(h)) and all L/C Disbursements shall have been reimbursed, the Loan Parties covenant and agree, jointly and severally, with the Lenders that:

SECTION 6.01.Indebtedness. No Loan Party will, nor will it permit any of its subsidiaries to, create, incur or suffer to exist any Indebtedness, except:

(a) Indebtedness created hereunder and under the Loan Documents;

(b) Indebtedness existing on the Effective Date and set forth in Schedule 6.01;

(c) Indebtedness of the Parent Borrower to any Subsidiary and of any Subsidiary to the Parent Borrower or any other Subsidiary, provided that (i) Indebtedness of any Subsidiary that is not a Loan Party to the Parent Borrower or any Subsidiary Loan Party shall be subject to Section 6.04 and (ii) Indebtedness of the Parent Borrower to any Subsidiary and Indebtedness of any Subsidiary that is a Loan Party to any Subsidiary that is not a Loan Party shall be subordinated to the Secured Obligations on terms reasonably satisfactory to the Administrative Agent;

(d) Guarantees by (i) the Parent Borrower of Indebtedness of any Subsidiary Loan Guarantor and by any Subsidiary Loan Guarantor of Indebtedness of the Parent Borrower or any other Subsidiary Loan Guarantor, provided that (A) the Indebtedness so Guaranteed is permitted

by this Section 6.01 and (B) Guarantees permitted under this clause (d) shall be subordinated to the Secured Obligations of the applicable Subsidiary Loan Guarantor on the same terms as the Indebtedness so Guaranteed is subordinated to the Secured Obligations, provided that no such Guarantee in any case shall be made after the Petition Date in respect of Indebtedness outstanding before the Petition Date;

(e) Indebtedness of the Parent Borrower or any Subsidiary incurred to finance the acquisition, construction or improvement of any fixed or capital assets (whether or not constituting purchase money Indebtedness), including Capital Lease Obligations and any Indebtedness assumed by the Parent Borrower or any Subsidiary in connection with the acquisition of any such assets or secured by a Lien on any such assets prior to the acquisition thereof, provided that (i) such Indebtedness is incurred prior to or within 90 days after such acquisition or the completion of such construction or improvement and (ii) the aggregate principal amount of Indebtedness permitted by this clause (e) shall not exceed $1,000,000 at any time outstanding;

(f) Indebtedness owed to any Person (including obligations in respect of letters of credit for the benefit of such Person) providing workers' compensation, health, disability or other employee benefits or property, casualty or liability insurance, pursuant to reimbursement or indemnification obligations to such person, in each case incurred in the ordinary course of business;

(g) Indebtedness of the Parent Borrower or any Subsidiary in respect of performance bonds, bid bonds, customs bonds, appeal bonds, surety bonds, performance and completion guarantees and similar obligations (other than in respect of other Indebtedness), in each case provided in the ordinary course of business;

(h) Indebtedness in respect of insurance premium financings in the ordinary course of business;

(i) to the extent constituting Indebtedness, obligations of the Loan Parties and their subsidiaries under operating leases;

(j) Indebtedness arising from the honoring by a bank or other financial institution of a check, draft or similar instrument drawn against insufficient funds in the ordinary course of business and other Indebtedness arising in connection with banking services provided by any Person that is not a Lender or an Affiliate of a Lender to the extent such banking services are provided in the ordinary course of business; provided, however, that such Indebtedness is extinguished within five Business Days of its incurrence;

(k) Indebtedness arising from agreements of the Parent Borrower or any Subsidiary to provide indemnification or similar obligations in connection with the disposition of any business or assets of the Parent Borrower or such Subsidiary, as the case may be, to the extent such disposition or acquisition is permitted hereby, provided that (i) such Indebtedness is not reflected on the balance sheet of the Parent Borrower or any Subsidiary (it being understood and agreed that contingent obligations referred to in a footnote to the financial statements of the Parent Borrower or any Subsidiary shall not be deemed to be reflected on such balance sheet for purposes of this clause (i)) and (ii) the maximum assumable liability in respect of all such Indebtedness shall not exceed the gross proceeds actually received by the Parent Borrower or the applicable Subsidiary in connection with the applicable dispositions;

(l) Indebtedness under the Prepetition Credit Agreement and the Senior Secured Indenture outstanding as of the Petition Date, and, in each case, interest permitted to accrue thereon during the pendency of the Bankruptcy Cases under Section 506(b) of the Bankruptcy Code to the extent that the value of the property securing such Indebtedness is greater than the amount of such Indebtedness outstanding as of the Petition Date; and

(m) Indebtedness in respect of Swap Obligations ~~in connection with the Prior Swap~~**permitted hereunder**.

SECTION 6.02.Liens. No Loan Party will, nor will it permit any of its subsidiaries to, create, incur, assume or permit to exist any Lien on any property or asset now owned or hereafter acquired by it, or assign or sell any income or revenues (including accounts receivable) or rights in respect of any thereof, except (subject (except with respect to (b) below) at all times to the priority set forth in Section 2.21 of this Agreement):

(a) Liens created pursuant to any Loan Document, the Orders or the Canadian Order;

(b) Liens securing the Prepetition Indebtedness and Replacement Liens (including those granted as Adequate Protection pursuant to the Orders);

(c) Permitted Encumbrances;

(d) Liens on fixed or capital assets acquired, constructed or improved (including any such assets made the subject of a Capital Lease Obligation incurred) by the Parent Borrower or any Subsidiary, provided that (i) such Liens secure Indebtedness permitted by Section 6.01(e), (ii) such Liens and the Indebtedness secured thereby are incurred prior to or within 90 days after such acquisition or the completion of such construction or improvement, (iii) the Indebtedness secured thereby does not exceed $1,000,000 at any time outstanding and (iv) such Liens shall not apply to any other property or assets of the Parent Borrower or Subsidiary;

(e) any Lien existing on any property or asset prior to the acquisition thereof by the Parent Borrower or any Subsidiary or existing on any property or asset of any Person that becomes a Loan Party after the date hereof prior to the time such Person becomes a Loan Party, provided that (i) such Lien is not created in contemplation of or in connection with such acquisition or such Person becoming a Loan Party, as the case may be, (ii) such Lien shall not apply to any other property or assets of the Loan Party and (iii) such Lien shall secure only those obligations which it secures on the date of such acquisition or the date such Person becomes a Loan Party, as the case may be;

(f) Liens of a collecting bank arising in the ordinary course of business under Section 4-208 of the Uniform Commercial Code in effect in the relevant jurisdiction covering only the items being collected upon;

(g) Liens (i) created by sales contracts documenting unconsummated asset dispositions permitted hereby and (ii) in favor of consignors, provided that such Liens attach only to those assets that are the subject of the applicable sales contract or that are consigned to the applicable Loan Party or Subsidiary;

(h) Liens arising by operation of law or contract on insurance policies and the proceeds thereof to secure premiums thereunder;

(i) Liens consisting of the interest of (i) the lessor or sublessor under any lease or sublease entered into by any Loan Party or any of its subsidiaries in its ordinary course of business and (ii) the lessee or sublessee under any lease or sublease granted to others by any Loan Party or any of its subsidiaries in its ordinary course of business;

(j) Liens that are rights of set-off or that arise solely by virtue of any statutory or common law provision relating to deposit accounts in favor of banks and other depositary institutions arising in the ordinary course of business;

(k) Liens (i) representing the interest of the licensor or sublicensor under any license or sublicense entered into by any Loan Party or any of its subsidiaries in its ordinary course of business and (ii) arising from the granting of a license to any Person in the ordinary course of business of a Loan Party or any of its subsidiaries, provided that (A) such Liens attach only to those assets that are the subject of the applicable license and (B) in the case of subclause (ii), the granting of such license is permitted hereunder;

(l) the filing of UCC financing statements solely as a precautionary measure in connection with operating leases entered into by the Parent Borrower or any Subsidiary in its ordinary course of business;

(m) Liens in favor of the issuers of surety bonds issued for the account of the Parent Borrower or any Subsidiary in its ordinary course of business;

(n) to the extent not otherwise permitted by the foregoing, Liens existing on the date hereof that are described on Schedule 6.02, provided that such Liens secure only the obligations that they secure as of the date hereof; and

(o) Liens existing as of the Petition Date securing obligations under the Prepetition Credit Agreement and the Senior Secured Notes Indenture permitted under Section 6.01(l).

SECTION 6.03. Fundamental Changes. (a)No Loan Party will, nor will it permit any of its subsidiaries to, merge into or amalgamate or consolidate with any other Person, or permit any other Person to merge into or amalgamate or consolidate with it, or liquidate or dissolve, except that, if at the time thereof and immediately after giving effect thereto no Event of Default shall have occurred and be continuing (i) any Subsidiary (other than Canadian Subsidiary Borrower) may merge into the Parent Borrower or the Canadian Subsidiary Borrower in a transaction in which the Parent Borrower or the Canadian Subsidiary Borrower, as applicable, is the surviving corporation, (ii) any Subsidiary may amalgamate with the Canadian Subsidiary Borrower in a transaction in which the resulting entity becomes, and assumes the rights and obligations hereunder of, the Canadian Subsidiary Borrower and (iii) any Subsidiary (other than the Canadian Subsidiary Borrower) may merge into or amalgamate or consolidate with any Subsidiary Loan Party in a transaction in which the surviving or resulting entity is a Loan Party.

(b)The Parent Borrower and the Loan Parties will not engage to any material extent in any business other than businesses of the type conducted by the Parent Borrower and the Loan Parties on the Effective Date and businesses reasonably related, complementary or ancillary thereto.

(c)Holdings will not engage in any business or activity other than the ownership of all the outstanding shares of capital stock of the Parent Borrower and activities incidental thereto and compliance with its obligations under the Loan Documents. Holdings will not own or acquire any assets (other than Equity Interests of the Parent Borrower, the cash proceeds of any Restricted Payments permitted by

Section 6.08 and other de minimis assets held in its ordinary course of business) or incur any liabilities (other than liabilities under the Loan Documents, liabilities expressly permitted by the terms hereof (including the Indebtedness of Holdings permitted by Section 6.04(e)), liabilities imposed by law, including tax liabilities, and liabilities reasonably incurred in connection with its maintenance of its existence, including payment of directors).

SECTION 6.04. Investments, Loans, Advances, Guarantees and Acquisitions. No Loan Party will, nor will it permit any of its subsidiaries to, purchase, hold or acquire (including pursuant to any merger with any Person that was not a Loan Party and a wholly-owned Subsidiary prior to such merger) any Equity Interests in or evidences of Indebtedness or other securities (including any option, warrant or other right to acquire any of the foregoing) of, make or permit to exist any loans or advances to, Guarantee any obligations of, or make or permit to exist any investment or any other interest in, any other Person, or purchase or otherwise acquire (in one transaction or a series of transactions) any assets of any other Person constituting a business unit (whether through purchase of assets, merger or otherwise), except:

(a) cash and Permitted Investments;

(b) investments in existence on the Effective Date and described in Schedule 6.04;

(c) investments by Holdings in the Parent Borrower and by the Parent Borrower and the Subsidiaries in Equity Interests in Subsidiary Loan Guarantors, provided that any such Equity Interests held by a Loan Party shall be pledged pursuant to the applicable Collateral Document;

(d) loans or advances made by the Parent Borrower to any Subsidiary Loan Guarantor and made by any Subsidiary Loan Guarantor to the Parent Borrower or any other Subsidiary Loan Guarantor;

(e) Guarantees of Indebtedness that are permitted by Section 6.01;

(f) investments of any Person existing at the time such Person becomes a Subsidiary or consolidates, amalgamates or merges with or into the Parent Borrower or any Subsidiary so long as such investments were not made in contemplation of such Person becoming a Subsidiary or of such consolidation, amalgamation or merger;

(g) investments received in connection with the disposition of any asset permitted by Section 6.05;

(h) investments received (i) in exchange for any other investment or account receivable in connection with or as a result of a bankruptcy, workout, reorganization or recapitalization of the third party issuer of such other investment or account receivable, (ii) as a result of a foreclosure by the Parent Borrower or any Subsidiary with respect to any secured investment or other transfer of title with respect to any secured investment in default or (iii) in settlement or compromise of legal claims and delinquent accounts receivable;

(i) investments constituting deposits described in clause (c) or (d) of the definition of the term "Permitted Encumbrances"; and

(j) extensions of trade credit in the ordinary course of business.

SECTION 6.05.Asset Sales. No Loan Party will, nor will it permit any of its subsidiaries to, sell, transfer, lease or otherwise dispose of any asset, including any Equity Interest owned by it, nor will the Parent Borrower permit any Subsidiary to issue any additional Equity Interest in such Subsidiary (other than to the Parent Borrower or a Subsidiary Loan Guarantor in compliance with Section 6.04(c)), except:

(a) sales, transfers and dispositions of (i) inventory, (ii) used, obsolete, worn out or surplus equipment or property and (iii) Permitted Investments, in each case in the ordinary course of business;

(b) sales, transfers and dispositions to the Parent Borrower or any Subsidiary Loan Guarantor;

(c) (i) sales, transfers and dispositions of accounts receivable in connection with the compromise, settlement or collection thereof consistent with past practice and (ii) the settlement or compromise of any legal claims;

(d) sales, transfers and dispositions of investments permitted by clauses (f), (g) or (h) of Section 6.04 (in each case, other than Equity Interests in a Subsidiary);

(e) licenses or sublicenses of intellectual property in the ordinary course of business, to the extent that they do not materially interfere with the business of Holdings, the Parent Borrower or any Subsidiary;

(f) dispositions resulting from any casualty or other insured damage to, or any taking under power of eminent domain or by condemnation or similar proceeding of, any property or asset of the Parent Borrower or any Subsidiary; and

(g) the provision of samples and displays to consumers or prospective customers,

provided that (i) all sales, transfers, leases and other dispositions permitted hereby (other than those permitted by clauses (b), (e), (f) and (g) above) shall be made for fair value and (other than those permitted by clauses (b), (c)(ii), (e), (f) or (g) above) for consideration entirely in cash payable at the time of such sale, transfer or other disposition; (ii) any consideration in the form of Permitted Investments or cash equivalents, in each case that are disposed of for cash consideration within 10 Business Days after such sale, transfer or other disposition shall be deemed to be cash consideration in an amount equal to the amount of such cash consideration for purposes of this proviso and (iii) any cash consideration received from sales, transfers, leases and other dispositions of assets located in the United States shall be deposited in a U.S. Receivables Account, and any cash consideration received from sales, transfers, leases and other dispositions of assets located outside the United States shall be deposited in a Canadian Receivables Account

SECTION 6.06.Sale and Leaseback Transactions. No Loan Party will, nor will it permit any of its subsidiaries to, enter into any arrangement, directly or indirectly, whereby it shall sell or transfer any property, real or personal, used or useful in its business, whether now owned or hereafter acquired, and thereafter rent or lease such property or other property that it intends to use for substantially the same purpose or purposes as the property sold or transferred.

SECTION 6.07.Swap Agreements. No Loan Party will, nor will it permit any of its subsidiaries to, enter into any Swap Agreement~~(~~, other than the Prior Swap~~)~~**, and foreign exchange transactions and currency options between the Loan Parties and the Administrative Agent or its**

affiliates that do not involve an aggregate U.S. dollar equivalent face amount exceeding $5,000,000 at any time and expire or terminate within five Business Days of entry by the parties into such transaction or option.

SECTION 6.08.Restricted Payments; Certain Payments of Indebtedness. (a)No Loan Party will, nor will it permit any of its subsidiaries to, declare or make, or agree to pay or make, directly or indirectly, any Restricted Payment, or incur any obligation (contingent or otherwise) to do so, except wholly-owned Subsidiaries may declare and pay dividends with respect to their Equity Interests.

(b)No Loan Party will, nor will it permit any of its subsidiaries to, make or agree to pay or make, directly or indirectly, any payment or other distribution (whether in cash, securities or other property) of or in respect of principal of or interest on any Indebtedness outstanding on the Petition Date, or any payment or other distribution (whether in cash, securities or other property), including any sinking fund or similar deposit, on account of the purchase, redemption, retirement, acquisition, cancellation or termination of any Indebtedness outstanding on the Petition Date, or any other payment (including any payment under any Swap Agreement) that has a substantially similar effect to any of the foregoing, in each case except as provided in the Orders, the Canadian Order or this Agreement and except in connection with the Prior Swap.

SECTION 6.09.Transactions with Affiliates. No Loan Party will, nor will it permit any of its subsidiaries to, sell, lease or otherwise transfer any property or assets to, or purchase, lease or otherwise acquire any property or assets from, or otherwise engage in any other transactions with, any of its Affiliates, except (a) transactions that (i) are in the ordinary course of business and (ii) are at prices and on terms and conditions not less favorable to the Parent Borrower or such Subsidiary than could be obtained on an arm's-length basis from unrelated third parties, (b) transactions between or among the Parent Borrower and any Subsidiary Loan Guarantor, (c) transactions between or among the Parent Borrower and any Affiliate that is not a Loan Party so long as such transactions are expressly permitted hereby, (d) the payment of reasonable fees to directors of Holdings, the Parent Borrower or any Subsidiary who are not employees of Holdings, the Parent Borrower or any Subsidiary, and compensation and employee benefit arrangements paid to, and indemnities provided for the benefit of, and employment severance arrangements entered into with, directors, officers or employees of Holdings, the Parent Borrower or the Subsidiaries in the ordinary course of business, (e) any Restricted Payment permitted under Section 6.08 (f) payments not in excess of $25,000 in the aggregate in any calendar month for (x) the legal fees of Kirkland & Ellis LLP, as counsel for the term lender under the Prepetition Credit Agreement, and (y) other reimburseable expenses of the term lender under the Prepetition Credit Agreement.

SECTION 6.10.Restrictive Agreements. No Loan Party will, nor will it permit any of its subsidiaries to, directly or indirectly, enter into, incur or permit to exist any agreement or other arrangement that prohibits, restricts or imposes any condition upon (a) the ability of such Loan Party or any of its subsidiaries to create, incur or permit to exist any Lien upon any of its property or assets, or (b) the ability of any Subsidiary to pay dividends or other distributions with respect to any shares of its Equity Interests or to make or repay loans or advances to the Parent Borrower or any other Subsidiary or to Guarantee Indebtedness of the Parent Borrower or any other Subsidiary, provided that (i) the foregoing shall not apply to restrictions and conditions imposed by law or by any Loan Document or existing on the Effective Date and identified on Schedule 6.10 (but shall apply to any extension or renewal of, or any amendment or modification expanding the scope of, any such restriction or condition), (ii) clause (a) of the foregoing shall not apply to restrictions or conditions imposed by any agreement relating to secured Indebtedness permitted by this Agreement if such restrictions or conditions apply only to the property or assets securing such Indebtedness, (iii) clause (a) of the foregoing shall not apply to customary provisions in leases, intellectual property licenses and other contracts restricting the assignment thereof and (iv)

clauses (a) and (b) of the foregoing shall not apply to restrictions on net worth or cash or other deposits imposed by customers, suppliers or landlords under contracts entered into by the Parent Borrower or any Subsidiary in its ordinary course of business.

SECTION 6.11. Amendment of Material Documents. No Loan Party will, nor will it permit any of its subsidiaries to, amend, modify, waive or release any of its rights under (a) any agreement relating to any Indebtedness permitted under Section 6.01(b), (b) its certificate of incorporation, by-laws, operating, management or partnership agreement or other organizational documents or (c) any agreement in respect of any joint venture to which such Loan Party or subsidiary, as applicable, is a party.

SECTION 6.12. Certain Equity Securities. No Loan Party will, nor will it permit any of its subsidiaries to, issue any Equity Interests.

SECTION 6.13. Changes in Fiscal Periods. The Parent Borrower will neither (a) permit its fiscal year or the fiscal year of any Subsidiary to end on a day other than December 31, nor (b) change its method of determining fiscal quarters.

SECTION 6.14. Chapter 11 and CCAA Claims. No Loan Party will incur, create, assume or permit to exist any administrative expense, unsecured claim, or other Superpriority Claim or Lien that is pari passu with or senior to the Superpriority Claims or DIP Lenders' Charge, as applicable, of the Lenders and the Administrative Agent against the Loan Parties hereunder, or apply to the Bankruptcy Court or the Canadian Court for authority to do so, except for the Carve-Out and the CCAA Charges.

SECTION 6.15. The Orders and the Canadian Order. No Loan Party will make or permit to be made any change, amendment or modification, or any application or motion for any change, amendment or modification, to either Order, the Canadian Order, the Cash Management Order or any "first day order" without the prior written consent of the Administrative Agent and the Required Lenders, except for any change, amendment or modification that would not adversely affect the Administrative Agent or the Lenders.

SECTION 6.16. Minimum EBITDA. Holdings will not permit Consolidated EBITDA on any date on or after April 30, 2009 to be less than $500,000 for the period ending on such date and commencing on the Petition Date.

SECTION 6.17. Minimum Net Sales. Holdings will not permit Consolidated Net Sales for any period commencing on March 27, 2009 and ending on any date set forth below to be less than the amount set forth opposite such date.

Date	Consolidated Net Sales Amount
April 3, 2009	$8,078,000
April 10, 2009	$16,496,000
April 17, 2009	$24,914,000
April 24, 2009	$33,672,000
May 1, 2009	$41,776,000
May 8, 2009	$50,219,000
May 15, 2009	$59,160,000

May 22, 2009	$68,461,000
May 29, 2009	$77,652,000
June 5, 2009	$86,844,000
June 12, 2009	$96,036,000
June 19, 2009	$105,228,000
June 26, 2009	$114,420,000
July 31, 2009	$147,643,000
August 31, 2009	$184,715,000
September 30, 2009	$230,571,000

SECTION 6.18.Expenditures. The Loan Parties will not make more than $800,000 in Capital Expenditures and tool and die expenditures, in the aggregate, during any period of four consecutive calendar weeks ending on or after the Effective Date.

SECTION 6.19.Cross-Border Property; Accounts. On and after the Effective Date, (i) Holdings, the Parent Borrower and the Domestic Subsidiaries shall not permit any of their assets to be located outside of the United States and will not transfer any funds to any Deposit Account (as defined in the Domestic Security Agreement) that is not the subject of a Deposit Account Control Agreement pursuant to Article III of the Domestic Security Agreement (other than Deposit Accounts specifically exempted by Section 3.04(b) of the Domestic Security Agreement) and (ii) the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties shall not permit any of their assets to be located outside of Canada (other than assets in Bank of America UK account number 600855368015, which shall not at any time exceed $115,000, and assets in The Industrial Bank of China, Guandong Provincial Branch account number 1CBKCNBJGDG-20130903091000062 78 (the "Chinese Account"), which shall not at any time exceed $40,000) and will not transfer any funds to any Deposit Account (as defined in the Canadian Security Agreement) that is not the subject of a Deposit Account Control Agreement pursuant to Article III, other than (x) Deposit Accounts specifically exempted by Sections 3.04(b)(i) and (ii), (y) so long as no Default has occurred **and is continuing**, Deposit Accounts specifically exempted by Section 3.04(b)(iii) ~~[~~or (z) so long as no Default has occurred and **is continuing** provided that such transferred funds do not exceed $30,000 in any calendar month, to the Chinese Account~~]~~.

ARTICLE VII

Events of Default

If any of the following events ("Events of Default") shall occur:

(a) either Borrower shall fail to pay any principal of any Loan or any reimbursement obligation in respect of any L/C Disbursement when and as the same shall become due and payable, whether at the due date thereof or at a date fixed for prepayment thereof or otherwise;

(b) either Borrower shall fail to pay any interest on any Loan or any fee or any other amount (other than an amount referred to in clause (a) of this Article) payable under this Agreement, when and as the same shall become due and payable, and such failure shall continue unremedied for a period of three Business Days;

(c) any representation or warranty made or deemed made by or on behalf of any Loan Party or any of its subsidiaries in or in connection with this Agreement or any Loan Document or any amendment or modification thereof or waiver thereunder, or in any report, certificate, financial statement or other document furnished pursuant to or in connection with this Agreement or any Loan Document or any amendment or modification thereof or waiver thereunder, shall prove to have been incorrect in any material respect when made or deemed made;

(d) any Loan Party shall fail to observe or perform any covenant, condition or agreement contained in Section 5.01(k), 5.01(l), 5.02, 5.03 (with respect to a Loan Party's existence), 5.08, 5.13, 5.14 or 5.15 or in Article VI;

(e) any Loan Party shall fail to observe or perform any covenant, condition or agreement contained in this Agreement (other than those specified in clause (a), (b) or (d) of this Article), and such failure shall continue unremedied for a period of (i) one Business Day (with or without the giving of notice by the Administrative Agent) if such breach relates to terms or provisions of Section 5.01(f) or 5.01(g), (ii) 10 days after notice thereof from the Administrative Agent (which notice will be given at the request of any Lender) if such breach relates to terms or provisions of Section 5.01 (other than those paragraphs discussed above), 5.03 through 5.07, 5.09 or 5.10 of this Agreement and (iii) 30 days after notice thereof from the Administrative Agent (which notice will be given at the request of any Lender) if such breach relates to terms or provisions of any other Section of this Agreement;

(f) any Loan Party or any of its subsidiaries shall fail to make any payment (whether of principal or interest and regardless of amount) in respect of any Material Indebtedness incurred after the Petition Date (other than the Obligations) with respect to Holdings, the Parent Borrower and the Domestic Subsidiaries, or incurred after the date of issuance of the Canadian Order with respect to the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties, in each case when and as the same shall become due and payable;

(g) any event or condition occurs that results in any Material Indebtedness incurred after the Petition Date with respect to Holdings, the Parent Borrower and the Domestic Subsidiaries, or incurred after the date of issuance of the Canadian Order with respect to the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties, becoming due prior to its scheduled maturity or that enables or permits (with all applicable grace periods having expired) the holder or holders of any such Material Indebtedness or any trustee or agent on its or their behalf to cause any such Material Indebtedness to become due, or to require the prepayment, repurchase, redemption or defeasance thereof, prior to its scheduled maturity, provided that this clause (g) shall not apply to secured Indebtedness that becomes due as a result of the sale, transfer or other disposition (including as a result of a casualty or condemnation event) of the property or assets securing such Indebtedness (to the extent such sale, transfer or other disposition is not prohibited under this Agreement);

(h) any Loan Party shall make any payments (including any adequate protection payments) relating to pre-Petition Date obligations or interests, in each case of any Loan Party, other than (i) as permitted under the Orders or the Canadian Order, (ii) in respect of accrued payroll and related expenses and employee benefits as of the Petition Date, (iii) in accordance with, and to the extent authorized by orders of the Bankruptcy Court or Canadian Court reasonably satisfactory to the Administrative Agent and the Required Lenders, and (iv) as otherwise provided for in this Agreement;

(i) one or more judgments for the payment of money in an aggregate amount in excess of $1,000,000 of post-Petition Date liability with respect to Holdings, the Parent Borrower and the Domestic Subsidiaries, or following the commencement of the Canadian Proceeding with respect to the Canadian Subsidiary Borrower or the Canadian Subsidiary Loan Parties (excluding amounts covered by funded indemnities or insurance as to which the applicable insurance company is solvent and has acknowledged liability in respect thereof) shall be rendered against any Loan Party, any of its subsidiaries or any combination thereof, and the same shall remain undischarged for a period of 30 consecutive days during which execution shall not be effectively stayed, or any action shall be legally taken by a judgment creditor to attach or levy upon any assets of any Loan Party or any of its subsidiaries (to the extent such assets attached or levied upon have an aggregate fair market value in excess of $100,000) to enforce any such judgment, or any Loan Party or any of its subsidiaries shall fail within 30 days to discharge one or more non-monetary judgments or orders in respect of a post-Petition Date event which, individually or in the aggregate, could reasonably be expected to have a Material Adverse Effect, which judgments or orders, in any such case, are not stayed on appeal or otherwise being appropriately contested in good faith by proper proceedings diligently pursued;

(j) (i) an event that could result in the imposition of a Lien with respect to any Plan or Multiemployer Plan shall have occurred or (ii) an ERISA Event shall have occurred that, in the opinion of the Required Lenders, when taken together with all other ERISA Events that have occurred, could reasonably be expected to result in a Material Adverse Effect;

(k) the occurrence of any "default", as defined in any Loan Document (other than this Agreement) or the breach of any of the terms or provisions of any Loan Document (other than this Agreement), which default or breach continues beyond any period of grace therein provided, and if no grace period is provided, such period shall be 30 days after notice to the Parent Borrower from the Administrative Agent (which notice will be given at the request of any Lender);

(l) the Loan Guaranty shall fail to remain in full force or effect (except as permitted by the Loan Documents) or any action shall be taken to discontinue or to assert the invalidity or unenforceability of the Loan Guaranty (other than any action taken by a third party with respect to the Loan Guaranty by the Canadian Subsidiary Borrower and the Canadian Subsidiary Loan Parties of ~~up to $[•] of Secured Obligations of the Parent Borrower~~**an amount up to the Excluded Amount**), or any Loan Guarantor shall fail to comply with any of the terms or provisions of the Loan Guaranty to which it is a party, or any Loan Guarantor shall deny that it has any further liability under the Loan Guaranty to which it is a party, or shall give notice to such effect;

(m) the Collateral Documents, the Orders and the Canadian Order shall for any reason fail to create a valid Lien on any of the Collateral purported to be covered thereby or such Lien shall cease to be a perfected Lien having the priority provided herein and in the Orders pursuant to Section 364 of the Bankruptcy Code against any applicable Loan Party, or any Loan Party shall so allege in any pleading filed in any court, or (ii) any Loan Party shall file a complaint or initiate any other action against any of the Lenders or the Prepetition Revolving Lenders or the Prepetition Agent or any entity shall obtain a judgment that affects such Lenders' or Prepetition Revolving Lenders' claims or the Collateral, except to the extent expressly allowed in the Interim Order, the Final Order or the Canadian Order;

(n) any material provision of any Loan Document for any reason ceases to be valid, binding and enforceable in accordance with its terms (or any Loan Party shall challenge the

enforceability of any Loan Document or shall assert in writing, or engage in any action or inaction based on any such assertion, that any provision of any of the Loan Documents has ceased to be or otherwise is not valid, binding and enforceable in accordance with its terms);

(o) any of the Bankruptcy Cases shall be dismissed (or the Bankruptcy Court shall make a ruling requiring the dismissal of the Bankruptcy Cases), suspended or converted to a case under Chapter 7 of the Bankruptcy Code, or any applicable Loan Party shall file any pleading requesting any such relief; or an application shall be filed by any Loan Party for the approval of, or there shall arise, (i) any other claim having priority senior to or pari passu with the Superpriority Claims of the Administrative Agent and the Lenders under the Loan Documents or any other claim having priority over any or all administrative expenses of the kind specified in Section 503(b) or Section 507(b) of the Bankruptcy Code (in each case, other than the Carve-Out) or (ii) any Lien on the Collateral having a priority senior to or pari passu with the Liens and security interests granted herein, except as expressly provided herein, or the Bankruptcy Court shall enter an order terminating the use of the Prepetition Revolving Lenders' cash collateral;

(p) the Bankruptcy Court shall enter an order appointing (i) a Chapter 11 trustee in any of the Bankruptcy Cases or (ii) a responsible officer or an examiner with enlarged powers (A) to operate or manage the financial affairs of any Loan Party or (B) beyond the duty to investigate and report, as set forth in subclauses (3) and (4) of clause (a) of Section 1106 of the Bankruptcy Code, in any of the Bankruptcy Cases;

(q) (i) the stay of proceedings granted in the Canadian Order shall expire or shall be terminated, (ii) leave is sought by any Person from the Canadian Court to file an application for a bankruptcy order against any Loan Party under the Bankruptcy and Insolvency Act (Canada) and leave is granted by the Canadian Court and such Person is not stayed from proceeding with the application, or (iii) the Canadian Proceeding shall be dismissed or converted to a liquidation proceeding under the Bankruptcy and Insolvency Act (Canada) with respect to any of the Canadian Subsidiary Borrower or the Canadian Subsidiary Loan Parties or a receiver, interim receiver, receiver and manager or trustee in bankruptcy is appointed in the Canadian Proceeding in respect of any of the Canadian Subsidiary Borrower or the Canadian Subsidiary Loan Parties.

(r) (i) the Interim Order or the Canadian Order shall (A) not have been entered by the Bankruptcy Court or the Canadian Court, as applicable or (B) once issued, cease to be in full force and effect and the Final Order shall not have been entered prior to such cessation in the case of the Interim Order (ii) the Final Order shall not have been entered by the Bankruptcy Court on or before the 30th day following the Effective Date, (iii) from and after the date of entry thereof, the Final Order shall cease to be in full force and effect, (iv) any Loan Party shall fail to comply with the terms of the Interim Order, the Canadian Order or the Final Order in any respect or (v) the Interim Order, the Canadian Order or the Final Order shall be amended, supplemented, stayed, reversed, vacated or otherwise modified (or any of the Loan Parties shall apply for authority to do so) in a manner that is adverse to the Lenders as reasonably determined by the Administrative Agent or the Required Lenders;

(s) any Loan Party shall file a motion seeking, or the Bankruptcy Court shall enter, an order (i) approving payment of any pre-petition claim other than a Permitted Prepetition Payment, (ii) approving a "first day order" not approved by the Administrative Agent, (iii) granting relief from the automatic stay applicable under Section 362 of the Bankruptcy Code to any holder of any security interest to permit foreclosure on any assets having a book value in excess of $100,000 in the aggregate or (iv) except to the extent the same would not constitute a Default under any of the previous clauses, approving any settlement or other stipulation with any creditor

of any Loan Party, other than the Administrative Agent and the Lenders, or otherwise providing for payments as adequate protection or otherwise with respect to such creditor's pre-petition claim (other than payments not in excess of $25,000 in the aggregate in any calendar month for (x) the legal fees of Kirkland & Ellis LLP, as counsel for the term lender under the Prepetition Credit Agreement and (y) other reimburseable expenses of the term lender under the Prepetition Credit Agreement);

(t) any Borrower or Loan Guarantor shall file a Chapter 11 Plan or a CCAA Plan that does not provide for the payment in full in cash of the principal of and interest on each Loan and all fees and all expenses or amounts payable under any Loan Document on the Chapter 11 Plan effective date or the effective date of a CCAA Plan and for the actions required to be taken pursuant to Section 2.04(h) in respect of the Letters of Credit to be taken;

(u) the period of exclusivity in the Bankruptcy Cases terminates or exclusivity is otherwise lifted in the Bankruptcy Cases without a Chapter 11 Plan having been filed that provides for the payment in full in cash of the principal of and interest on each Loan and all fees and other expenses or amounts payable under any Loan Document on the Chapter 11 Plan effective date and for the actions required to be taken pursuant to Section 2.04(h) in respect of the Letters of Credit to be taken; or

(v) any event or condition shall have occurred in respect of any Canadian Pension Plan or Canadian Multi-Employer Plan which, in the opinion of the Required Lenders, could reasonably be expected to result in a Material Adverse Effect;

then, and in every such event, and at any time thereafter during the continuance of such event, the Administrative Agent may, and at the request of the Required Lenders shall, by notice to the Parent Borrower, take either or both of the following actions, at the same or different times: (i) terminate the Commitments, and thereupon the Commitments shall terminate immediately, and (ii) declare the Loans then outstanding to be due and payable in whole (or in part, in which case any principal not so declared to be due and payable may thereafter be declared to be due and payable), and thereupon the principal of the Loans so declared to be due and payable, together with accrued interest thereon and all fees and other obligations of each Borrower accrued hereunder, shall become due and payable immediately, without presentment, demand, protest or other notice of any kind, all of which are hereby waived by each Borrower. Upon the occurrence and the continuance of an Event of Default, the Administrative Agent may, and at the request of the Required Lenders shall, exercise any rights and remedies provided to the Administrative Agent under the Loan Documents, the Orders or the Canadian Order or otherwise at law or equity, including all remedies provided under the UCC and other applicable personal property security laws in the relevant jurisdictions (it being understood and agreed that, except as expressly provided herein (including pursuant to Section 9.08) or in any other Loan Document, only the Administrative Agent, acting on behalf of the Secured Parties, may exercise such rights and remedies in respect of the Collateral). In addition, subject solely to any requirement of the giving of notice by the terms of the Interim Order, the Canadian Order or the Final Order, the automatic stay provided in Section 362 of the Bankruptcy Code and the stay of proceeding contained in the Canadian Order shall be deemed automatically vacated without further action or order of the Bankruptcy Court or the Canadian Court to the extent necessary to allow the Administrative Agent and the Lenders, upon three Business Days' written notice to the Borrower, to exercise all of their respective rights and remedies under the Loan Documents, including all rights and remedies with respect to the Collateral and the Loan Guarantors.

ARTICLE VIII

The Administrative Agent

Each of the Lenders and the Issuing Bank hereby irrevocably appoints the Administrative Agent as its agent and authorizes the Administrative Agent to take such actions on its behalf, including execution of the other Loan Documents, and to exercise such powers as are delegated to the Administrative Agent by the terms of the Loan Documents, together with such actions and powers as are reasonably incidental thereto. The provisions of this Article are solely for the benefit of the Administrative Agent, the Lenders and the Issuing Bank, and no Loan Party shall have rights as a third party beneficiary of any of such provisions.

The bank serving as the Administrative Agent hereunder shall have the same rights and powers in its capacity as a Lender as any other Lender and may exercise the same as though it were not the Administrative Agent, and such bank and its Affiliates may accept deposits from, lend money to and generally engage in any kind of business with the Loan Parties or any Subsidiary of a Loan Party or other Affiliate thereof as if it were not the Administrative Agent hereunder.

The Administrative Agent shall not have any duties or obligations except those expressly set forth in the Loan Documents. Without limiting the generality of the foregoing, (a) the Administrative Agent shall not be subject to any fiduciary or other implied duties, regardless of whether a Default has occurred and is continuing, (b) the Administrative Agent shall not have any duty to take any discretionary action or exercise any discretionary powers, except discretionary rights and powers expressly contemplated by the Loan Documents that the Administrative Agent is required to exercise in writing as directed by the Required Lenders (or such other number or percentage of the Lenders as shall be necessary or believed by the Administrative Agent in good faith to be necessary under the circumstances as provided in Section 2.04(h), Section 9.02 or Section 9.04(e)), and (c) except as expressly set forth in the Loan Documents, the Administrative Agent shall not have any duty to disclose, and shall not be liable for the failure to disclose, any information relating to any Loan Party or any of its subsidiaries that is communicated to or obtained by the bank serving as Administrative Agent or any of its Affiliates in any capacity. The Administrative Agent shall not be liable for any action taken or not taken by it with the consent or at the request of the Required Lenders (or such other number or percentage of the Lenders as shall be necessary or believed by the Administrative Agent in good faith to be necessary under the circumstances as provided in Section 2.04(h), Section 9.02 or Section 9.04(e)) or in the absence of its own gross negligence or wilful misconduct. The Administrative Agent shall be deemed not to have knowledge of any Default unless and until written notice thereof is given to the Administrative Agent by the Parent Borrower or a Lender, and the Administrative Agent shall not be responsible for or have any duty to ascertain or inquire into (i) any statement, warranty or representation made in or in connection with any Loan Document, (ii) the contents of any certificate, report or other document delivered under or in connection with any Loan Document, (iii) the performance or observance of any of the covenants, agreements or other terms or conditions set forth in any Loan Document or the occurrence of any Default, (iv) the validity, enforceability, effectiveness or genuineness of any Loan Document or any other agreement, instrument or document, (v) the creation, perfection or priority of Liens on the Collateral or the existence of the Collateral, or (vi) the satisfaction of any condition set forth in Article IV or elsewhere in any Loan Document, other than to confirm receipt of items expressly required to be delivered to the Administrative Agent.

The Administrative Agent shall be entitled to rely upon, and shall not incur any liability for relying upon, any notice, request, certificate, consent, statement, instrument, document or other writing (including any electronic message, Internet or intranet website posting or other distribution) believed by it to be genuine and to have been signed or sent or otherwise authenticated by the proper

Person. The Administrative Agent also may rely upon any statement made to it orally or by telephone and believed by it to be made by the proper Person, and shall not incur any liability for relying thereon. The Administrative Agent may consult with legal counsel (who may be counsel for either Borrower), independent accountants, financial advisors and other experts selected by it, and shall not be liable for any action taken or not taken by it in accordance with the advice of any such counsel, accountants, advisors or experts.

The Administrative Agent may perform any and all its duties and exercise its rights and powers by or through any one or more sub-agents appointed by the Administrative Agent. The Administrative Agent and any such sub-agent may perform any and all its duties and exercise its rights and powers through their respective Related Parties. The exculpatory provisions of the preceding paragraphs shall apply to any such sub-agent and to the Related Parties of the Administrative Agent and any such sub-agent, and shall apply to their respective activities in connection with the syndication of the credit facilities provided for herein as well as activities as Administrative Agent.

Subject to the appointment and acceptance of a successor Administrative Agent as provided in this paragraph, the Administrative Agent may resign at any time by notifying the Lenders, the Issuing Bank and the Borrowers. Upon any such resignation, the Required Lenders shall have the right, in consultation with the Borrowers, to appoint a successor. If no successor shall have been so appointed by the Required Lenders and shall have accepted such appointment within 30 days after the retiring Administrative Agent gives notice of its resignation, then the retiring Administrative Agent may, on behalf of the Lenders and the Issuing Bank, appoint a successor Administrative Agent which shall be a bank with an office in New York, New York or an Affiliate of any such bank. Upon the acceptance of its appointment as Administrative Agent hereunder by a successor, such successor shall succeed to and become vested with all the rights, powers, privileges and duties of the retiring Administrative Agent, and the retiring Administrative Agent shall be discharged from its duties and obligations under the Loan Documents. The fees payable by the Borrowers to a successor Administrative Agent shall be the same as those payable to its predecessor unless otherwise agreed between the Borrowers and such successor. After the Administrative Agent's resignation hereunder, the provisions of this Article and Section 9.03 shall continue in effect for the benefit of such retiring Administrative Agent, its sub-agents and their respective Related Parties in respect of any actions taken or omitted to be taken by any of them while the retiring Administrative Agent was acting as Administrative Agent.

Each Lender and the Issuing Bank acknowledges that it has, independently and without reliance upon the Administrative Agent or any other Lender or any of their Related Parties and based on such documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Agreement. Each Lender and the Issuing Bank also acknowledges that it will, independently and without reliance upon the Administrative Agent or any other Lender or any of their Related Parties and based on such documents and information as it shall from time to time deem appropriate, continue to make its own decisions in taking or not taking action under or based upon this Agreement, any other Loan Document or related agreement or any document furnished hereunder or thereunder.

Each Lender hereby agrees that (a) it has requested a copy of each Report prepared by or on behalf of the Administrative Agent, (b) the Administrative Agent (i) makes no representation or warranty, express or implied, as to the completeness or accuracy of any Report or any of the information contained therein or any inaccuracy or omission contained in or relating to a Report and (ii) shall not be liable for any information contained in any Report, (c) the Reports are not comprehensive audits or examinations, and that any Person performing any field examination will inspect only specific information regarding the Loan Parties and will rely significantly upon the Loan Parties' books and records, as well as on representations of the Loan Parties' personnel and that the Administrative Agent

undertakes no obligation to update, correct or supplement the Reports, (d) it will keep all Reports confidential and strictly for its internal use, not share the Report with any Loan Party or any other Person except as otherwise permitted pursuant to this Agreement, and (e) without limiting the generality of any other indemnification provision contained in this Agreement, it will pay and protect, and indemnify, defend, and hold the Administrative Agent and any such other Person preparing a Report harmless from and against, the claims, actions, proceedings, damages, costs, expenses, and other amounts (including reasonable attorney fees) incurred by as the direct or indirect result of any third parties who might obtain all or part of any Report through the indemnifying Lender.

Notwithstanding anything herein to the contrary, the Bookrunner and Arranger listed on the cover page hereof shall not have any powers, duties or responsibilities under any Loan Document, except in its Affiliate's capacity, as applicable, as the Administrative Agent, a Lender or the Issuing Bank hereunder.

ARTICLE IX

Miscellaneous

SECTION 9.01.Notices. (a)Except in the case of notices and other communications expressly permitted to be given by telephone (and subject to paragraph (b) below), all notices and other communications provided for herein shall be in writing and shall be delivered by hand or overnight courier service, mailed by certified or registered mail or sent by facsimile, as follows:

(i) if to any Loan Party, to the Parent Borrower at:

Indalex Holding Corp.
75 Tri-State International, Suite 450
Lincolnshire, IL 60069
Attention: Patrick Lawlor
Facsimile No: (847) 295-3851

with a copy to:

Sun Capital Partners, Inc.
5200 Town Center Circle, Suite 420
Boca Raton, FL 33486
Attention: C. Deryl Couch, Esq.
Facsimile No.: (561) 394-0550

and

Sun Capital Partners, Inc.
11111 Santa Monica Boulevard
Los Angeles, CA 90025
Attention: Matthew Garff
Facsimile No.: (310) 473-1119

(ii) if to the Administrative Agent, the Issuing Bank, to JPMorgan Chase Bank, N.A. at:

Loan and Agency Services Group
1111 Fannin Street, 10th Floor

Houston, TX 77002
Attention: Cynthia Freeman
Facsimile No: (713) 750-2223

(iii) if to any other Lender, to it at its address or facsimile number set forth in its Administrative Questionnaire.

All such notices and other communications (i) sent by hand or overnight courier service, or mailed by certified or registered mail, shall be deemed to have been given when received or (ii) sent by facsimile shall be deemed to have been given when sent, provided that if not given during normal business hours for the recipient, shall be deemed to have been given at the opening of business on the next Business Day for the recipient.

(b)Notices and other communications to the Lenders and the Issuing Bank hereunder may be delivered or furnished by electronic communications (including e-mail and internet or intranet websites) pursuant to procedures approved by the Administrative Agent, provided that the foregoing shall not apply to notices pursuant to Article II and no Event of Default certificates delivered pursuant to Section 5.01(d) unless otherwise agreed by the Administrative Agent and the applicable Lender or the Issuing Bank, as the case may be. The Administrative Agent or the Parent Borrower (on behalf of the Loan Parties) may, in its discretion, agree to accept notices and other communications to it hereunder by electronic communications pursuant to procedures approved by it, provided that approval of such procedures may be limited to particular notices or communications. All such notices and other communications (i) sent to an e-mail address shall be deemed received upon the sender's receipt of an acknowledgement from the intended recipient (such as by the "return receipt requested" function, as available, return e-mail or other written acknowledgement), provided that if not given during the normal business hours of the recipient, such notice or communication shall be deemed to have been given at the opening of business on the next Business Day for the recipient, and (ii) posted to an Internet or intranet website shall be deemed received upon the deemed receipt by the intended recipient at its e-mail address as described in the foregoing clause (b)(i) of notification that such notice or communication is available and identifying the website address therefor.

(c)Any party hereto may change its address or facsimile number for notices and other communications hereunder by notice to the other parties hereto.

SECTION 9.02.Waivers; Amendments. (a)No failure or delay by the Administrative Agent, the Issuing Bank or any Lender in exercising any right or power hereunder or under any other Loan Document shall operate as a waiver thereof, nor shall any single or partial exercise of any such right or power, or any abandonment or discontinuance of steps to enforce such a right or power, preclude any other or further exercise thereof or the exercise of any other right or power. The rights and remedies of the Administrative Agent, the Issuing Bank and the Lenders hereunder and under any other Loan Document are cumulative and are not exclusive of any rights or remedies that they would otherwise have. No waiver of any provision of any Loan Document or consent to any departure by any Loan Party therefrom shall in any event be effective unless the same shall be permitted by paragraph (b) of this Section 9.02, and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given. Without limiting the generality of the foregoing, the making of a Loan (including as contemplated by Sections 2.01(c), 2.01(d) and 2.01(e)) or the issuance, amendment, renewal or extension of a Letter of Credit shall not be construed as a waiver of any Default, regardless of whether the Administrative Agent, any Lender or the Issuing Bank may have had notice or knowledge of such Default at the time. No notice or demand on Holdings or either Borrower in any case shall entitle

Holdings or such Borrower, as the case may be, to any other or further notice or demand in similar or other circumstances.

(b)Neither this Agreement nor any other Loan Document nor any provision hereof or thereof may be waived, amended or modified except in the case of this Agreement, pursuant to an agreement or agreements in writing entered into by the Parent Borrower and the Required Lenders or, in the case of any other Loan Document, pursuant to an agreement or agreements in writing entered into by the Administrative Agent and the Loan Party or Loan Parties that are parties thereto, in each case with the consent of the Required Lenders, provided that no such agreement shall (i) increase the Commitment of any Lender without the written consent of such Lender (it being understood that a waiver of any condition precedent in Section 4.01 or 4.02 or the waiver of a Default or an Event of Default shall not constitute an increase of any Commitment of a Lender for purposes of this clause (i)), (ii) reduce or forgive the principal amount of any Loan or L/C Disbursement or reduce the rate of interest thereon, or reduce or forgive any interest or fees payable hereunder, without the written consent of each Lender affected thereby (it being understood that neither (A) any amendment to this Agreement that has the effect of increasing Availability and that is approved by the Required Lenders (or, if applicable, the percentage of Lenders required under clause (v) or (ix) of this Section 9.02(b)) nor (B) any waiver or forgiveness of a Default or Event of Default hereunder, shall constitute a reduction of the rate of interest or Commitment Fees for purposes of this clause (ii)), (iii) postpone the maturity of any Loan or any scheduled date of payment of the principal amount of any Loan or L/C Disbursement, or any date for the payment of any interest, fees or other Obligations payable hereunder, or reduce the amount of, waive or excuse any such payment, or postpone the scheduled date of expiration of any Commitment, without the written consent of each Lender affected thereby, (iv) change Section 2.17(b), 2.17(d) or 9.20 in a manner that would alter the manner in which payments are shared, without the written consent of each Lender, (v) increase the advance rates set forth in the definition of the Canadian Borrowing Base or the Domestic Borrowing Base, add new categories of eligible assets or eliminate Reserves that were imposed by the Required Lenders or by the Administrative Agent at the request of the Required Lenders, in each case in respect of either Borrowing Base, without the written consent of Lenders having Revolving Exposure and unused Revolving Commitments representing more than 66 2/3% of the sum of the total Revolving Exposure and Revolving Commitments at such time (it being understood and agreed that the rescission of a Reserve by the Administrative Agent acting in its Permitted Discretion (as opposed to at the request of the Required Lenders) shall not require the consent of the Lenders under this clause (v)), (vi) change any of the provisions of this Section 9.02 or the definition of "Required Lenders" or any other provision of any Loan Document specifying the number or percentage of Lenders (or Lenders of any Class) required to waive, amend or modify any rights thereunder or make any determination or grant any consent thereunder, without the written consent of each Lender (or each Lender of such Class, as the case may be), (vii) release any Loan Guarantor from its obligation under its Loan Guaranty or limit its liability with respect to such Loan Guaranty (except as otherwise expressly permitted herein or in the other Loan Documents), without the written consent of each Lender directly and adversely affected thereby, (viii) except as expressly provided in this Section 9.02 or in any Collateral Document, release all or substantially all the Collateral without the written consent of each Lender, (ix) eliminate the ineligibility of any portion of the assets comprising either Borrower Base (including the Availability Block), without the written consent of Lenders having Revolving Exposure and unused Revolving Commitments representing more than 66 2/3% of the sum of the total Revolving Exposure and Revolving Commitments at such time, (x) change any provisions of any Loan Document in a manner that by its terms adversely affects the rights in respect of Collateral or payments due to Lenders holding Loans of any Class differently than those holding Loans of any other Class, without the written consent of Lenders holding a majority in interest of the outstanding Loans and unused Commitments of each affected Class or (xi) modify the protection afforded an SPV pursuant to the provisions of Section 9.04(e) without the written consent of such SPV; provided further that (A) no such agreement shall amend, modify or otherwise affect the rights or duties of the Administrative Agent or the Issuing Bank hereunder without the prior written consent of the

Administrative Agent or the Issuing Bank, as the case may be, (B) any waiver, amendment or modification of this Agreement that by its terms affects the rights and duties under this Agreement of Lenders holding Loans or Commitments of a particular Class (but not Lenders holding Loans or Commitments of any other Class) may be effected by an agreement or agreements in writing entered into by the Parent Borrower and the requis ite percentage in interest of the affected Class of Lenders that would be required to consent thereto under this Section if such Class of Lenders were the only Class of Lenders hereunder at the time and (C) if the terms of any waiver, amendment or modification of any Loan Document provide that any Class of Loans (together with all accrued interest thereon and all accrued fees payable with respect to the Commitments of such Class) will be repaid or paid in full, and the Commitments of such Class (if any) terminated, as a condition to the effectiveness of such waiver, amendment or modification, then so long as the Loans of such Class (together with such accrued interest and fees) are in fact repaid or paid and such Commitments are in fact terminated, in each case prior to or simultaneously with the effectiveness of such amendment, then such Loans and Commitments shall not be included in the determination of the Required Lenders with respect to such amendment. The Administrative Agent may also amend the Commitment Schedule to reflect assignments entered into pursuant to Section 9.04.

(c)The Lenders hereby irrevocably authorize the Administrative Agent, at its option and in its sole discretion, to release any Liens granted to the Administrative Agent by the Loan Parties on any Collateral (i) upon the termination of all the Commitments, payment and satisfaction in full in cash of all Secured Obligations (other than Unliquidated Obligations), and the cash collateralization or support by a letter of credit as provided in Section 2.04(h) of all Unliquidated Obligations in a manner reasonably satisfactory to each affected Lender, (ii) constituting property being sold or disposed of (other than to a Loan Party) if the Loan Party disposing of such property certifies to the Administrative Agent that the sale or disposition is made in compliance with the terms of this Agreement (and the Administrative Agent may rely conclusively on any such certificate, without further inquiry), (iii) constituting property leased to a Loan Party under a lease which has expired or been terminated in a transaction permitted under this Agreement, or (iv) as required to effect any sale or other disposition of such Collateral in connection with any exercise of remedies of the Administrative Agent and the Lenders pursuant to Article VII. Any such release shall not in any manner discharge, affect, or impair the Obligations or any Liens (other than those expressly being released) upon (or obligations of the Loan Parties in respect of) all interests retained by the Loan Parties, including the proceeds of any sale, all of which shall continue to constitute part of the Collateral.

(d)In connection with any proposed amendment, modification, waiver or termination (a "Proposed Change") requiring the consent of all Lenders or all affected Lenders, if the consent of the Required Lenders (and, to the extent any Proposed Change requires the consent of Lenders holding Loans of any Class pursuant to clause (vi) or (x) of the first proviso to paragraph (b) of this Section, the consent of a majority in interest of the outstanding Loans and unused Commitments of such Class) to such Proposed Change is obtained, but the consent to such Proposed Change of other Lenders whose consent is required is not obtained (any such Lender whose consent is not obtained as described in paragraph (b) of this Section being referred to as a "Non-Consenting Lender"), then, so long as the Lender that is acting as Administrative Agent is not a Non-Consenting Lender, the Parent Borrower may, at its sole expense and effort, upon notice to such Non-Consenting Lender and the Administrative Agent, require such Non-Consenting Lender to assign and delegate, without recourse (in accordance with and subject to the restrictions contained in Section 9.04), all its interests, rights and obligations under this Agreement to an assignee that shall assume such obligations (which assignee may be another Lender, if a Lender accepts such assignment), provided that (a) the Parent Borrower shall have received the prior written consent of the Administrative Agent and the Issuing Bank, which consent shall not unreasonably be withheld, (b) such Non-Consenting Lender shall have received payment of an amount equal to the outstanding principal of its Loans and participations in L/C Disbursements, accrued interest thereon, accrued fees and

all other amounts payable to it hereunder from the assignee (to the extent of such outstanding principal and accrued interest and fees) or the Borrowers (in the case of all other amounts) and (c) the Parent Borrower or such assignee shall have paid to the Administrative Agent the processing and recordation fee specified in Section 9.04(b).

(e)In the event that S&P, Moody's and Thompson's BankWatch (or InsuranceWatch Ratings Service, in the case of Lenders that are insurance companies (or Best's Insurance Reports, if such insurance company is not rated by Insurance Watch Ratings Service)) shall, after the date that any Lender becomes a Lender, downgrade the long-term certificate of deposit ratings of such Lender, and the resulting ratings shall be below BBB-, Baa3 and C (or BB, in the case of a Lender that is an insurance company (or B, in the case of an insurance company not rated by InsuranceWatch Ratings Service)), then the Issuing Bank shall have the right, but not the obligation, upon notice to such Lender and the Administrative Agent and following consultation with the Parent Borrower, to replace such Lender with an assignee (in accordance with and subject to the restrictions contained in Section 9.04(b)), and such Lender hereby agrees to transfer and assign without recourse (in accordance with and subject to the restrictions contained in Section 9.04(b)) all its interests, rights and obligations under this Agreement to such assignee; provided, however, that (i) no such assignment shall conflict with any law, rule and regulation or order of any Governmental Authority, (ii) such Lender shall have received payment of an amount equal to the outstanding principal of its Loans and participations in L/C Disbursements, accrued interest thereon, accrued fees and all other amounts payable to it hereunder from the assignee (to the extent of such outstanding principal and accrued interest and fees) or the Borrowers (in the case of all other amounts) and (iii) the Parent Borrower or such assignee shall have paid to the Administrative Agent the processing and recordation fee specified in Section 9.04(b).

SECTION 9.03.Expenses; Indemnity; Damage Waiver. (a)The Borrowers, as applicable, shall pay (i) all reasonable out-of-pocket expenses incurred by the Administrative Agent and its Affiliates, including the reasonable fees, charges and disbursements of counsel for the Administrative Agent and such counsel's financial advisor, in connection with the syndication and distribution (including, without limitation, via the internet or through a service such as Intralinks) of the credit facilities provided for herein and the consummation of the Transactions (including the Bankruptcy Cases and the Canadian Proceeding), the preparation and administration of the Loan Documents or any amendments, modifications or waivers of the provisions of the Loan Documents (whether or not the transactions contemplated hereby or thereby shall be consummated), (ii) all reasonable out-of-pocket expenses incurred by each Lender and its Affiliates, including the reasonable fees, charges and disbursements of counsel for such Lender, in connection with the consummation of the Transactions (including the Bankruptcy Cases and the Canadian Proceeding) and the preparation and review of the Loan Documents or any amendments, modifications or waivers of the provisions of the Loan Documents (whether or not the transactions contemplated hereby or thereby shall be consummated), (iii) all reasonable out-of-pocket expenses incurred by the Issuing Bank in connection with the deemed issuance, pursuant to Section 2.04(a), amendment, renewal or extension of any Letter of Credit or any demand for payment thereunder and (iv) all out-of-pocket expenses incurred by the Administrative Agent, the Issuing Bank or any Lender, including the reasonable fees, charges and disbursements of one counsel for the Administrative Agent, the Issuing Bank and the Lenders (in addition to one local counsel in each relevant jurisdiction, including Canadian local counsel) and such counsel's financial advisor, in connection with the enforcement, collection or protection of its rights in connection with the Loan Documents, including its rights under this Section 9.03, or in connection with the Loans made (including as contemplated by Sections 2.01(c), 2.01(d) and 2.01(e)) or Letters of Credit hereunder, including all such out-of-pocket expenses incurred during any workout, restructuring or negotiations in respect of such Loans or Letters of Credit. Expenses being reimbursed by the Borrowers under this Section 9.03 include, without limiting the generality of the foregoing, reasonable costs and expenses incurred in connection with:

(i) appraisals (limited to specified per diem costs and expenses);

(ii) field examinations and the preparation of Reports based on the fees charged by a third party retained by the Administrative Agent or the internally allocated fees for each Person employed by the Administrative Agent with respect to each field examination (limited to specified per diem costs and expenses);

(iii) lien and title searches and title insurance;

(iv) taxes, fees and other charges for recording any Mortgages, filing financing statements and continuations, and other actions to perfect, protect, and continue the Administrative Agent's Liens;

(v) sums paid or incurred to take any action required of any Loan Party under the Loan Documents that such Loan Party fails to pay or take; and

(vi) forwarding loan proceeds, collecting checks and other items of payment, and establishing and maintaining the accounts and lock boxes, and costs and expenses of preserving and protecting the Collateral.

All of the foregoing costs and expenses may be charged to the Parent Borrower as Revolving Loans or to another deposit account, all as described in Section 2.17(c). The above list shall not be construed to negate any specific limitation on the Loan Parties' obligations to reimburse items hereunder.

(c)The Borrowers, as applicable, shall indemnify the Administrative Agent, the Issuing Bank and each Lender, and each Related Party of any of the foregoing Persons (each such Person being called an "Indemnitee") against, and hold each Indemnitee harmless from, any and all losses, claims, damages, penalties, liabilities and related expenses, including the reasonable fees, charges and disbursements of one counsel for the Indemnitees (in addition to one local counsel in each relevant jurisdiction, including Canadian local counsel and a financial advisor to such counsel), except in the case where there is a divergent or conflicting interest between the Administrative Agent and the Lenders, in which case there shall be one separate counsel for the Administrative Agent, on the one hand, and the Lenders as a group, on the other hand, incurred by or asserted against any Indemnitee arising out of, in connection with, or as a result of (i) the execution or delivery of any Loan Document or any agreement or instrument contemplated thereby, the performance by the parties to the Loan Documents of their respective obligations thereunder or the consummation of the Transactions (including the Bankruptcy Cases and the Canadian Proceeding) or any other transactions contemplated thereby, (ii) any Loan or Letter of Credit or the use of the proceeds therefrom (including any refusal by the Issuing Bank to honor a demand for payment under a Letter of Credit if the documents presented in connection with such demand do not strictly comply with the terms of such Letter of Credit, but subject to Section 2.04(f)), (iii) any actual or alleged presence or Release of Hazardous Materials on or from any property currently or formerly owned or operated by Holdings, the Parent Borrower or any Subsidiary, or any Environmental Liability related in any way to Holdings, the Parent Borrower or any Subsidiary, or (iv) any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing, whether based on contract, tort or any other theory, whether brought by a third party or by Holdings, the Parent Borrower or any Subsidiary and regardless of whether any Indemnitee is a party thereto, provided that such indemnity shall not, as to any Indemnitee, be available to the extent that such losses, claims, damages, penalties, liabilities or related expenses are determined by a court of competent jurisdiction by final judgment to have resulted from the gross negligence, bad faith or wilful misconduct of such Indemnitee or any of its Related Parties.

(d)To the extent that either Borrower fails to pay any amount required to be paid by it to the Administrative Agent or the Issuing Bank under paragraph (a) or (b) of this Section 9.03, each Lender severally agrees to pay to the Administrative Agent or the Issuing Bank, as the case may be, such Lender's pro rata share (determined as of the time that the applicable unreimbursed expense or indemnity payment is sought) of such unpaid amount, provided that the unreimbursed expense or indemnified loss, claim, damage, penalty, liability or related expense, as the case may be, was incurred by or asserted against the Administrative Agent or the Issuing Bank in its capacity as such. For purposes hereof, a Lender's "pro rata share" shall be determined based upon its share of the aggregate Revolving Exposures and unused Commitments at the time.

(e)To the extent permitted by applicable law, no Loan Party shall assert, and each hereby waives, any claim against any Indemnitee, on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of, in connection with, or as a result of, any Loan Document or any agreement or instrument contemplated hereby, the Transactions (including the Bankruptcy Cases and the Canadian Proceeding), any Loan, Letter of Credit, Banking Services Obligation, Prepetition Loan, Prepetition Letter of Credit, Prepetition Swap Obligation, Prepetition Banking Services Obligation or the use of the proceeds thereof.

(f)All amounts due under this Section 9.03 shall be payable not later than five Business Days after written demand therefor.

SECTION 9.04.Successors and Assigns. (a)The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns permitted hereby, except that (i) neither Borrower may assign or otherwise transfer any of its rights or obligations hereunder without the prior written consent of each Lender (and any attempted assignment or transfer by either Borrower without such consent shall be null and void) and (ii) no Lender may assign or otherwise transfer its rights or obligations hereunder except in accordance with this Section 9.04. Nothing in this Agreement, expressed or implied, shall be construed to confer upon any Person (other than the parties hereto, their respective successors and assigns permitted hereby, Participants (to the extent provided in paragraph (c) of this Section 9.04) and, to the extent expressly contemplated hereby, the Related Parties of each of the Administrative Agent, the Issuing Bank and the Lenders) any legal or equitable right, remedy or claim under or by reason of this Agreement. Notwithstanding any other provision of this Agreement, no Lender shall be permitted to assign or otherwise transfer its rights or obligations hereunder to any Sponsor or Sponsor Affiliate.

(b)(i) Subject to the conditions set forth in paragraph (b)(ii) below and the last sentence of paragraph (a) above, any Lender may assign to one or more assignees all or a portion of its rights and obligations under this Agreement (including all or a portion of its Commitment and the Loans at the time owing to it) with the prior written consent (such consent not to be unreasonably withheld or delayed) of:

(A) the Parent Borrower, provided that no consent of the Parent Borrower shall be required for an assignment to a Lender, an Affiliate of a Lender, an Approved Fund or, if an Event of Default has occurred and is continuing, any other assignee;

(B) the Administrative Agent; and

(C) the Issuing Bank.

(ii) Assignments shall be subject to the following additional conditions:

(A) except in the case of an assignment to a Lender or an Affiliate of a Lender or

an assignment of the entire remaining amount of the assigning Lender's Commitment or Loans of any Class, the amount of the Commitment or Loans of the assigning Lender subject to each such assignment (determined as of the date the Assignment and Assumption with respect to such assignment is delivered to the Administrative Agent) shall not be less than $5,000,000, unless each of the Parent Borrower and the Administrative Agent otherwise consent, provided that no such consent of the Parent Borrower shall be required if an Event of Default has occurred and is continuing;

(B) each partial assignment shall be made as an assignment of a proportionate part of all the assigning Lender's rights and obligations under this Agreement;

(C) the parties to each assignment shall execute and deliver to the Administrative Agent an Assignment and Assumption, together with a processing and recordation fee of $3,500, provided that assignments made pursuant to Section 2.18(b) or 9.02(d) shall not require the signature of the assigning Lender to become effective;

(D) the assignee, if it shall not be a Lender, shall deliver to the Administrative Agent an Administrative Questionnaire and any tax forms required by Section 2.16(e);

(E) any assignment of all or a portion of a Revolving Lender's Revolving Commitment shall be accompanied by a simultaneous assignment of a pro rata portion of such Lender's Canadian Revolving Sub-Commitment (it being understood and agreed that no Lender may separately assign such Lender's Canadian Revolving Sub-Commitment); and

(F) whether or not an Event of Default has occurred, no assignment shall be made to a Person (without the written consent of the Administrative Agent, which consent may be withheld in the Administrative Agent's sole discretion) if such Person would not be a Permitted Fee Receiver.

For the purposes of this paragraph (b) of this Section 9.04, the term "Approved Fund" has the following meaning:

"Approved Fund" means (a) a CLO and (b) with respect to any Lender that is a fund that invests in bank loans and similar extensions of credit, any other fund that invests in bank loans and similar extensions of credit and is managed by the same investment advisor as such Lender or by an Affiliate of such investment advisor.

"CLO" means an entity (whether a corporation, partnership, trust or otherwise) that is engaged in making, purchasing, holding or otherwise investing in bank loans and similar extensions of credit in the ordinary course of its business and is administered or managed by a Lender or an Affiliate of such Lender.

(iii) Subject to acceptance and recording thereof pursuant to paragraph (b)(v) of this Section 9.04, from and after the effective date specified in each Assignment and Assumption the assignee thereunder shall be a party hereto and, to the extent of the interest assigned by such Assignment and Assumption, have the rights and obligations of a Lender under this Agreement, and the assigning Lender thereunder shall, to the extent of the interest assigned by such Assignment and Assumption, be released from its obligations under this Agreement (and, in the case of an Assignment and Assumption covering all of the assigning Lender's rights and obligations under this Agreement, such

Lender shall cease to be a party hereto but shall continue to be entitled to the benefits of Sections 2.14, 2.15, 2.16 and 9.03). Any assignment or transfer by a Lender of rights or obligations under this Agreement that does not comply with this Section 9.04 shall be treated for purposes of this Agreement as a sale by such Lender of a participation in such rights and obligations in accordance with paragraph (c) of this Section 9.04.

(iv) The Administrative Agent, acting for this purpose as an agent of the Borrowers, shall maintain at one of its offices a copy of each Assignment and Assumption delivered to it and a register for the recordation of the names and addresses of the Lenders, and the Commitment of, and principal amount of the Loans and L/C Disbursements owing to, each Lender pursuant to the terms hereof from time to time (the "Register"). The entries in the Register shall be conclusive, and the Borrowers, the Administrative Agent, the Issuing Bank and the Lenders may treat each Person whose name is recorded in the Register pursuant to the terms hereof as a Lender hereunder for all purposes of this Agreement, notwithstanding notice to the contrary. The Register shall be available for inspection by the Borrowers, the Issuing Bank and any Lender, at any reasonable time and from time to time upon reasonable prior notice.

(v) Upon its receipt of a duly completed Assignment and Assumption executed by an assigning Lender and an assignee, the assignee's completed Administrative Questionnaire and any tax forms required by Section 2.16(e) (unless the assignee shall already be a Lender hereunder), the processing and recordation fee referred to in paragraph (b) of this Section 9.04 and any written consent to such assignment required by paragraph (b) of this Section 9.04, the Administrative Agent shall accept such Assignment and Assumption and record the information contained therein in the Register, provided that if either the assigning Lender or the assignee shall have failed to make any payment required to be made by it pursuant to Section 2.04, Section 2.06(b), Section 2.16(d), Section 2.17(e) or Section 9.03(c), the Administrative Agent shall have no obligation to accept such Assignment and Assumption and record the information therein in the Register unless and until such payment shall have been made in full, together with all accrued interest thereon. No assignment shall be effective for purposes of this Agreement unless it has been recorded in the Register as provided in this paragraph.

(c)(i)

or the Issuing Bank, sell participations to one or more banks or other entities (other than any Person that would not be a Permitted Fee Receiver, unless such Person receives the written consent of the Administrative Agent (which consent may be withheld in the Administrative Agent's sole discretion) and other than any Sponsor or Sponsor Affiliate) (a "Participant") in all or a portion of such Lender's rights and obligations under this Agreement (including all or a portion of its Commitment and the Loans owing to it), provided that (A) such Lender's obligations under this Agreement shall remain unchanged, (B) such Lender shall remain solely responsible to the other parties hereto for the performance of such obligations and (C) the Borrowers, the Administrative Agent, the Issuing Bank and the other Lenders shall continue to deal solely and directly with such Lender in connection with such Lender's rights and obligations under this Agreement. For the avoidance of doubt, each Lender shall be responsible for the indemnity under Section 2.16(d) with respect to any payments made by such Lender to its Participant(s). Any agreement or instrument pursuant to which a Lender sells such a participation shall provide that such Lender shall retain the sole right to enforce this Agreement and to approve any amendment, modification or waiver of any provision of this Agreement, provided that such agreement or instrument may provide that such Lender will not, without the consent of the Participant, agree to any amendment, modification or waiver described in clauses (i), (ii), (iii), (vii) and (viii) of the first proviso to Section 9.02(b) (to the extent such amendment, modification or waiver directly and adversely affects such Participant). Subject

to paragraph (c)(ii) of this Section 9.04, each Borrower agrees that each Participant shall be entitled to the benefits of Sections 2.14, 2.15 and 2.16 to the same extent as if it were a Lender and had acquired its interest by assignment pursuant to paragraph (b) of this Section 9.04. To the extent permitted by law, each Participant also shall be entitled to the benefits of Section 9.08 as though it were a Lender, provided such Participant agrees to be subject to Sections 2.17 and 2.18 as though it were a Lender. Each Lender that sells a participation shall, acting solely for this purpose as an agent of the Borrower, maintain a register on which it enters the name and address of each Participant and the principal amounts (and stated interest) of each participant's interest in the Loans or other obligations under this Agreement (the "Participant Register"). The entries in the Participant Register shall be conclusive absent manifest error, and such Lender shall treat each person whose name is recorded in the Participant Register as the owner of such participation for all purposes of this Agreement notwithstanding any notice to the contrary.

(ii) A Participant shall not be entitled to receive any greater payment under Section 2.14 or 2.16 than the applicable Lender would have been entitled to receive with respect to the participation sold to such Participant, unless the sale of the participation to such Participant is made with the Parent Borrower's prior written consent (not to be unreasonably withheld or delayed), provided that the Participant shall be subject to the provisions of Sections 2.18 and 2.19 as if it were an assignee under Section 9.04.

(d)Any Lender may at any time pledge or assign a security interest in all or any portion of its rights under this Agreement to secure obligations of such Lender (other than to a Sponsor or Sponsor Affiliate), including without limitation any pledge or assignment to secure obligations to a Federal Reserve Bank, and this Section 9.04 shall not apply to any such pledge or assignment of a security interest, provided that no such pledge or assignment of a security interest shall release a Lender from any of its obligations hereunder or substitute any such pledgee or assignee for such Lender as a party hereto.

(e)(i)
"Granting Lender") may grant to a special purpose funding vehicle organized and administered by such Lender (an "SPV"), identified as such in writing from time to time by such Granting Lender to the Administrative Agent and the Parent Borrower, the option to provide to the applicable Borrower all or any part of any Loan that such Granting Lender would otherwise be obligated to make to such Borrower pursuant to this Agreement, provided that (i) nothing herein shall constitute a commitment by any SPV to make any Loan, (ii) if an SPV elects not to exercise such option or otherwise fails to provide all or any part of such Loan, such Granting Lender shall be obligated to make such Loan pursuant to the terms hereof, (iii) such Granting Lender's other obligations under this Agreement shall remain unchanged, (iv) such Granting Lender shall remain solely responsible to the other parties hereto for the performance of such obligations, (v) the Borrowers, the Administrative Agent, the Issuing Bank and the other Lenders shall continue to deal solely and directly with the Granting Lender in connection with such Granting Lender's right and obligations under this Agreement and (vi) an SPV shall not be entitled to receive any greater payment under Section 2.14 or Section 2.16 than the applicable Granting Lender would have been entitled to receive. The making of a Loan by an SPV hereunder shall utilize the Commitment of the Granting Lender to the same extent, and as if, such Loan were made by such Granting Lender. Any agreement or instrument pursuant to which the Granting Lender grants such an option to an SPV shall provide that such Granting Lender shall retain the sole right to enforce this Agreement and to approve any amendment, modification or waiver of any provision of this Agreement, provided that such agreement or instrument may provide that such Granting Lender will not, without the consent of such SPV, agree to any amendment, modification or waiver described in clauses (i), (ii), (iii), (vii) and (viii) of the first proviso to Section 9.02(b) (to the extent such amendment, modification or waiver directly and adversely affects such SPV). Subject to paragraph (e)(ii) of this Section 9.04, each Borrower agrees that each SPV shall be entitled to the benefits of Sections 2.14, 2.15 and 2.16 to the same extent as if it were a Lender and had acquired its interest by assignment pursuant to paragraph (b) of this Section 9.04. To the extent

permitted by law, each SPV also shall be entitled to the benefits of Section 9.08 as though it were a Lender, provided such SPV agrees to be subject to Section 2.17(d) as though it were a Lender.

(ii) An SPV that would be a Foreign Lender if it were a Lender shall not be entitled to the benefits of Section 2.16 unless such SPV agrees, for the benefit of the Borrowers, to comply with Section 2.16(e) as though it were a Lender.

(iii) Each party hereto hereby agrees that no SPV shall be liable for any indemnity or similar payment obligation under this Agreement (all liability for which shall remain with the Granting Lender). In furtherance of the foregoing, each party hereto hereby agrees (which agreement shall survive the termination of this Agreement) that, prior to the date that is one year and one day after the payment in full of all outstanding commercial paper or other senior indebtedness of any SPV, such party will not institute against, or join any other person in instituting against, such SPV any bankruptcy, reorganization, arrangement, insolvency or liquidation proceedings under the laws of the United States or any state thereof or Canada or any province thereof.

(iv) In addition, notwithstanding anything to the contrary contained in this Section 9.04, any SPV may (i) with notice to, but without the prior written consent of, the Parent Borrower and the Administrative Agent and without paying any processing fee therefor, assign all or a portion of its interests in any Loans to the Granting Lender or to any financial institutions (consented to by the Borrower and Administrative Agent) providing liquidity or credit support to or for the account of such SPV to support the funding or maintenance of Loans and (ii) subject to Section 9.12, disclose on a confidential basis any non-public information relating to its Loans to any rating agency, commercial paper dealer or provider of any surety, guarantee or credit or liquidity enhancement to such SPV.

SECTION 9.05.Survival. All covenants, agreements, representations and warranties made by the Loan Parties in the Loan Documents and in the certificates or other instruments delivered in connection with or pursuant to this Agreement or any other Loan Document shall be considered to have been relied upon by the other parties hereto and shall survive the execution and delivery of the Loan Documents and the making of any Loans and deemed issuance, pursuant to Section 2.04(a), amendment, renewal or extension of any Letters of Credit, regardless of any investigation made by any such other party or on its behalf and notwithstanding that the Administrative Agent, the Issuing Bank or any Lender may have had notice or knowledge of any Default or incorrect representation or warranty at the time any credit is extended hereunder, and shall continue in full force and effect as long as the principal of or any accrued interest on any Loan or any fee or any other amount payable under this Agreement is outstanding and unpaid or any Letter of Credit is outstanding and so long as the Commitments have not expired or terminated. The provisions of Sections 2.14, 2.15, 2.16, 9.03 and 9.12 and Article VIII shall survive and remain in full force and effect regardless of the consummation of the transactions contemplated hereby, the repayment of the Loans, the expiration or termination of the Letters of Credit and the Commitments or the termination of this Agreement or any provision hereof.

SECTION 9.06.Counterparts; Integration; Effectiveness. This Agreement may be executed in counterparts (and by different parties hereto on different counterparts), each of which shall constitute an original, but all of which when taken together shall constitute a single contract. This Agreement, the other Loan Documents and any separate letter agreements with respect to fees payable to the Administrative Agent or the syndication of the Loans and Commitments constitute the entire contract among the parties relating to the subject matter hereof and supersede any and all previous agreements and understandings, oral or written, relating to the subject matter hereof. Except as provided in Section 4.01,

this Agreement shall become effective when it shall have been executed by the Administrative Agent and when the Administrative Agent shall have received counterparts hereof that, when taken together, bear the signatures of each of the other parties hereto, and thereafter shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. Delivery of an executed counterpart of a signature page of this Agreement by facsimile shall be effective as delivery of a manually executed counterpart of this Agreement.

SECTION 9.07.Severability. Any provision of any Loan Document held to be invalid, illegal or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity, illegality or unenforceability without affecting the validity, legality and enforceability of the remaining provisions thereof; and the invalidity of a particular provision in a particular jurisdiction shall not invalidate such provision in any other jurisdiction.

SECTION 9.08.Right of Setoff. If an Event of Default shall have occurred and be continuing, each Lender, the Issuing Bank and each of its Affiliates is hereby authorized at any time and from time to time, to the fullest extent permitted by law and without further order of or application to the Bankruptcy Court, to set off and apply any and all deposits (general or special, time or demand, provisional or final, in whatever currency) at any time held and other obligations (in whatever currency) at any time owing by such Lender, the Issuing Bank or any such Affiliate to or for the credit or the account of either Borrower or any Loan Guarantor against any of and all the Secured Obligations held by such Lender or the Issuing Bank, irrespective of whether or not such Lender or the Issuing Bank shall have made any demand under the Loan Documents and although such obligations may be unmatured. The applicable Lender and the Issuing Bank shall notify the Parent Borrower and the Administrative Agent of such set-off or application, provided that any failure to give or any delay in giving such notice shall not affect the validity of any such set-off or application under this Section 9.08. The rights of each Lender, the Issuing Bank and their respective Affiliates under this Section 9.08 are in addition to other rights and remedies (including other rights of setoff) which such Lender, the Issuing Bank and their respective Affiliates may have.

SECTION 9.09.Governing Law; Jurisdiction; Consent to Service of Process. (a)The Loan Documents (other than those containing a contrary express choice of law provision) shall be governed by and construed in accordance with the laws of the State of New York, except to the extent that the Bankruptcy Code governs; provided that Section 9.18 of this Agreement shall be governed by and construed in accordance with the laws of the Province of Quebec.

(b)Each Loan Party hereby irrevocably and unconditionally submits, for itself and its property, to the nonexclusive jurisdiction of the Bankruptcy Court or any U.S. Federal or New York State court sitting in New York, New York in any action or proceeding arising out of or relating to any Loan Documents, or for recognition or enforcement of any judgment, and each of the parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding may be heard and determined in such New York State or, to the extent permitted by law, in such Federal court. Each of the parties hereto agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. Nothing in this Agreement or any other Loan Document shall affect any right that the Administrative Agent, the Issuing Bank or any Lender may otherwise have to bring any action or proceeding relating to this Agreement or any other Loan Document against any Loan Party or its properties in the courts of any jurisdiction.

(c)Each Loan Party hereby irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so, any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement or any other Loan

Document in any court referred to in paragraph (b) of this Section 9.09. Each of the parties hereto hereby irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any such court.

(d)Each party to this Agreement irrevocably consents to service of process in the manner provided for notices in Section 9.01. Nothing in this Agreement or any other Loan Document will affect the right of any party to this Agreement to serve process in any other manner permitted by law.

SECTION 9.10.WAIVER OF JURY TRIAL. EACH PARTY HERETO HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT, ANY OTHER LOAN DOCUMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 9.10.

SECTION 9.11.Headings. Article and Section headings and the Table of Contents used herein are for convenience of reference only, are not part of this Agreement and shall not affect the construction of, or be taken into consideration in interpreting, this Agreement.

SECTION 9.12.Confidentiality. (a)Each of the Administrative Agent, the Issuing Bank and the Lenders agrees to maintain the confidentiality of the Information (as defined below), except that Information may be disclosed (i) to its and its Affiliates' directors, officers, employees and agents, including accountants, legal counsel and other advisors (it being understood that the Persons to whom such disclosure is made will be informed of the confidential nature of such Information and instructed to keep such Information confidential), (ii) to the extent requested by any governmental or regulatory authority, (iii) to the extent required by Requirement of Law or by any subpoena or similar legal process (including, in each case, in respect of the Bankruptcy Cases or the Canadian Proceeding), (iv) to any other party to this Agreement or to the Monitor, (v) in connection with the exercise of any remedies hereunder or any suit, action or proceeding relating to this Agreement or any other Loan Document or the enforcement of rights hereunder or thereunder, (vi) subject to an agreement containing provisions substantially the same as those of this Section 9.12, to (A) any assignee of or Participant in, or any prospective assignee of or Participant in, any of its rights or obligations under this Agreement or (B) any actual or prospective counterparty (or its advisors) to any swap or derivative transaction relating to the Loan Parties and their obligations, (vii) with the consent of the Parent Borrower or (viii) to the extent such Information (A) becomes publicly available other than as a result of a breach of this Section 9.12 or (B) becomes available to the Administrative Agent, the Issuing Bank or any Lender on a nonconfidential basis from a source other than the Parent Borrower, provided that the source is not actually known by such disclosing party to be bound by an agreement containing provisions substantially the same as those contained in this Section 9.12. For the purposes of this Section 9.12, "Information" means all information received from the Parent Borrower relating to the Parent Borrower or its business, other than any such information that is available to the Administrative Agent, the Issuing Bank or any Lender on a nonconfidential basis prior to disclosure by the Parent Borrower. Any Person required to maintain the confidentiality of Information as provided in this Section 9.12 shall be considered to have complied with

its obligation to do so if such Person has exercised the same degree of care to maintain the confidentiality of such Information as such Person would accord to its own confidential information.

(b)EACH LENDER ACKNOWLEDGES THAT INFORMATION AS DEFINED IN SECTION 9.12(a) FURNISHED TO IT PURSUANT TO THIS AGREEMENT MAY INCLUDE MATERIAL NON-PUBLIC INFORMATION CONCERNING HOLDINGS, THE BORROWERS, THE LOAN PARTIES AND THEIR RELATED PARTIES OR THEIR RESPECTIVE SECURITIES AND CONFIRMS THAT IT HAS DEVELOPED COMPLIANCE PROCEDURES REGARDING THE USE OF MATERIAL NON-PUBLIC INFORMATION AND THAT IT WILL HANDLE SUCH MATERIAL NON-PUBLIC INFORMATION IN ACCORDANCE WITH THOSE PROCEDURES AND APPLICABLE LAW, INCLUDING FEDERAL AND STATE SECURITIES LAWS.

(c)ALL INFORMATION, INCLUDING REQUESTS FOR WAIVERS AND AMENDMENTS FURNISHED BY EITHER BORROWER OR THE ADMINISTRATIVE AGENT PURSUANT TO, OR IN THE COURSE OF ADMINISTERING, THIS AGREEMENT, WILL BE SYNDICATE-LEVEL INFORMATION, WHICH MAY CONTAIN MATERIAL NON-PUBLIC INFORMATION ABOUT HOLDINGS, THE BORROWERS, THE LOAN PARTIES AND THEIR RELATED PARTIES OR THEIR RESPECTIVE SECURITIES. ACCORDINGLY, EACH LENDER REPRESENTS TO THE BORROWERS AND THE ADMINISTRATIVE AGENT THAT IT HAS IDENTIFIED IN ITS ADMINISTRATIVE QUESTIONNAIRE A CREDIT CONTACT WHO MAY RECEIVE INFORMATION THAT MAY CONTAIN MATERIAL NON-PUBLIC INFORMATION IN ACCORDANCE WITH ITS COMPLIANCE PROCEDURES AND APPLICABLE LAW, INCLUDING FEDERAL AND STATE SECURITIES LAWS.

SECTION 9.13.Several Obligations; Nonreliance; Violation of Law. The respective obligations of the Lenders hereunder are several and not joint and the failure of any Lender to make any Loan or perform any of its obligations hereunder shall not relieve any other Lender from any of its obligations hereunder. Anything contained in this Agreement to the contrary notwithstanding, neither the Issuing Bank nor any Lender shall be obligated to extend credit to the Borrower in violation of any Requirement of Law.

SECTION 9.14.USA PATRIOT Act. Each Lender that is subject to the requirements of the USA Patriot Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the "Act") hereby notifies each Borrower that pursuant to the requirements of the Act, it is required to obtain, verify and record information that identifies such Borrower, which information includes the name and address of such Borrower and other information that will allow such Lender to identify such Borrower in accordance with the Act.

SECTION 9.15.Disclosure. Each Loan Party and each Lender hereby acknowledges and agrees that the Administrative Agent and/or its Affiliates from time to time may hold investments in, make other loans to or have other relationships with any of the Loan Parties and their respective Affiliates.

SECTION 9.16.Appointment for Perfection. Each Lender hereby appoints each other Lender as its agent for the purpose of perfecting Liens, for the benefit of the Administrative Agent and the Lenders, in assets which, in accordance with Article 9 of the UCC or any other applicable law can be perfected only by possession. Should any Lender (other than the Administrative Agent) obtain possession of any such Collateral, such Lender shall notify the Administrative Agent thereof, and, promptly upon the Administrative Agent's request therefor shall deliver such Collateral to the

Administrative Agent or otherwise deal with such Collateral in accordance with the Administrative Agent's instructions.

SECTION 9.17. Interest Rate Limitation. Notwithstanding anything herein to the contrary, if at any time the interest rate applicable to any Loan, together with all fees, charges and other amounts which are treated as interest on such Loan under applicable law (collectively the "Charges"), shall exceed the maximum lawful rate (the "Maximum Rate") which may be contracted for, charged, taken, received or reserved by the Lender holding such Loan in accordance with applicable law, the rate of interest payable in respect of such Loan hereunder, together with all Charges payable in respect thereof, shall be limited to the Maximum Rate and, to the extent lawful, the interest and Charges that would have been payable in respect of such Loan but were not payable as a result of the operation of this Section 9.17 shall be cumulated and the interest and Charges payable to such Lender in respect of other Loans or periods shall be increased (but not above the Maximum Rate therefor) until such cumulated amount, together with interest thereon at the Federal Funds Effective Rate to the date of repayment, shall have been received by such Lender.

SECTION 9.18. Quebec. For greater certainty, and without limiting the powers of the Administrative Agent or any other Person acting as an agent, attorney-in-fact or mandatary for the Administrative Agent under this Agreement or under any other Loan Document, each Lender and Administrative Agent hereby (a) irrevocably constitutes, to the extent necessary, the Administrative Agent as the holder of an irrevocable power of attorney (fondé de pouvoir within the meaning of Article 2692 of the *Civil Code of Québec*) for the purposes of holding any Liens, including hypothecs, granted or to be granted by any Loan Party on movable or immovable property pursuant to the laws of the Province of Quebec to secure obligations of a Loan Party under any bond issued by a Loan Party; and (b) appoints and agrees that the Administrative Agent, acting as agent for the Lenders, may act as the bondholder and mandatary with respect to any bond that may be issued and pledged from time to time for the benefit of the Lenders the Administrative Agent.

The said constitution of the Administrative Agent as fondé de pouvoir (holder of an irrevocable power of attorney within the meaning of Article 2692 of the *Civil Code of Québec*) and as bondholder and mandatary with respect to any such bond shall be deemed to have been ratified and confirmed by any assignee pursuant to Section 9.04 by the execution of the applicable Assignment and Assumption.

Notwithstanding the provisions of Section 32 of An Act respecting the special powers of legal persons (Quebec), the Administrative Agent may purchase, acquire and be the holder of any bond issued by any Loan Party. Each Loan Party hereby acknowledges that any such bond shall constitute a title of indebtedness, as such term is used in Article 2692 of the *Civil Code of Québec*.

The Administrative Agent herein appointed as fondé de pouvoir shall have the same rights, powers and immunities of the Administrative Agent as stipulated in Article VIII, which shall apply mutatis mutandis. Without limitation, the provisions of Article VIII of this Agreement shall apply mutatis mutandis to the resignation and appointment of a successor to the Administrative Agent acting as fondé de pouvoir.

SECTION 9.19. Judgment Currency. (a)The obligations of any Loan Party under this Agreement and the other Loan Documents to make payments in U.S. Dollars or in Canadian Dollars (in any such case, the "Obligation Currency") shall not be discharged or satisfied by any tender or recovery pursuant to any judgment expressed in or converted into any currency other than the Obligation Currency, except to the extent that such tender or recovery results in the effective receipt by the Administrative Agent, the Issuing Bank or the respective Lender, as the case may be, of the full amount of the Obligation

Currency expressed to be payable to the Administrative Agent, the Issuing Bank or such Lender, as the case may be, under this Agreement or the other Loan Documents. If, for the purpose of obtaining or enforcing a judgment against any Loan Party in any court or in any jurisdiction, it becomes necessary to convert into or from any currency other than the Obligation Currency (such other currency, the "Judgment Currency") an amount due in the Obligation Currency, the conversion shall be made at the rate of exchange quoted by the Administrative Agent, determined, in each case, as of the business day immediately preceding the day on which the judgment is given (such business day, the "Judgment Currency Conversion Date").

(b)If there is a change in the rate of exchange prevailing between the Judgment Currency Conversion Date and the date of actual payment of the amount due, each Loan Party covenants and agrees to pay, or cause to be paid, such additional amounts, if any (but in any event not a lesser amount), as may be necessary to ensure that the amount paid in the Judgment Currency, when converted at the rate of exchange prevailing on the actual date of payment, will produce the amount of the Obligation Currency that could have been purchased with the amount of the Judgment Currency stipulated in the judgment or judicial award at the rate of exchange prevailing on the Judgment Currency Conversion Date.

(c)For purposes of determining any rate of exchange for this Section 9.19, such amounts shall include any premium and costs payable in connection with the purchase of the Obligation Currency.

SECTION 9.20.Application of Collateral Proceeds. Subject to Sections 2.09, 2.10 and 6.05 (but not subject to such Sections if an Event of Default has occurred and is continuing and the Administrative Agent has elected, or has been requested by the Required Lenders, to exercise rights and remedies in respect of Collateral), each of the Lenders hereby agrees that the Administrative Agent shall apply the proceeds of any collection or sale of Collateral, including any Collateral consisting of cash, under the Security Agreements or any other Collateral Document (or any Lien granted pursuant to the Orders or the Canadian Order) securing the Obligations as follows:

(i) FIRST, to the payment of all costs and expenses incurred by the Administrative Agent in connection with such collection or sale or otherwise in connection with any Loan Document or any of the Secured Obligations, including all court costs and the fees and expenses of its agents and legal counsel (and such legal counsel's financial advisor), the repayment of all advances made by the Administrative Agent under any Loan Document on behalf of any Loan Party and any other costs or expenses incurred in connection with the exercise of any right or remedy under any Loan Document;

(ii) SECOND, to the payment in full of the Secured Obligations (the amounts so applied to be distributed among the Secured Parties pro rata in accordance with the amounts of the Secured Obligations owed to them on the date of any such distribution); and

(iii) THIRD, to the Loan Parties, their successors or assigns, or as a court of competent jurisdiction may otherwise direct.

ARTICLE X

Loan Guaranty

SECTION 10.01.Guaranty. (a)Each Loan Guarantor hereby agrees that it is jointly and severally liable for, and, as primary obligor and not merely as surety, absolutely and unconditionally

guarantees to the Lenders the prompt payment when due, whether at stated maturity, upon acceleration or otherwise, and at all times thereafter, of the Secured Obligations and all costs and expenses including, without limitation, all court costs and attorneys' and paralegals' fees and expenses paid or incurred by the Administrative Agent, the Issuing Bank and the Lenders in endeavoring to collect all or any part of the Secured Obligations from, or in prosecuting any action against, either Borrower, any Loan Guarantor or any other guarantor of all or any part of the Secured Obligations (such costs and expenses, together with the Secured Obligations, collectively the "Guaranteed Obligations"). Each Loan Guarantor further agrees that the Guaranteed Obligations may be extended or renewed in whole or in part without notice to or further assent from it, and that it remains bound upon its guarantee notwithstanding any such extension or renewal.

(b)All terms of this Loan Guaranty apply to and may be enforced by or on behalf of any domestic or foreign branch or Affiliate of any Lender that extended any portion of the Guaranteed Obligations.

SECTION 10.02.Guaranty of Payment. This Loan Guaranty is a guaranty of payment and not of collection. Each Loan Guarantor waives any right to require the Administrative Agent, the Issuing Bank or any Lender to sue either Borrower, any Loan Guarantor, any other guarantor, or any other person obligated for all or any part of the Guaranteed Obligations (each, an "Obligated Party"), or otherwise to enforce its payment against any collateral securing all or any part of the Guaranteed Obligations.

SECTION 10.03.No Discharge or Diminishment of Loan Guaranty. (a)Except as otherwise provided for herein, the obligations of each Loan Guarantor hereunder are unconditional and absolute and not subject to any reduction, limitation, impairment or termination for any reason (other than the payment in full in cash of the Guaranteed Obligations), including: (i) any claim of waiver, release, extension, renewal, settlement, surrender, alteration, or compromise of any of the Guaranteed Obligations, by operation of law or otherwise; (ii) any change in the corporate existence, structure or ownership of either Borrower or any other guarantor of or other person liable for any of the Guaranteed Obligations; (iii) any insolvency, bankruptcy, reorganization or other similar proceeding affecting any Obligated Party, or their assets or any resulting release or discharge of any obligation of any Obligated Party; or (iv) the existence of any claim, setoff or other rights which any Loan Guarantor may have at any time against any Obligated Party, the Administrative Agent, the Issuing Bank, any Lender or any other person, whether in connection herewith or in any unrelated transactions.

(b)The obligations of each Loan Guarantor hereunder are not subject to any defense or setoff, counterclaim, recoupment, or termination whatsoever by reason of the invalidity, illegality, or unenforceability of any of the Guaranteed Obligations or otherwise, or any provision of applicable law or regulation purporting to prohibit payment by any Obligated Party, of the Guaranteed Obligations or any part thereof.

(c)Further, the obligations of any Loan Guarantor hereunder are not discharged or impaired or otherwise affected by: (i) the failure of the Administrative Agent, the Issuing Bank or any Lender to assert any claim or demand or to enforce any remedy with respect to all or any part of the Guaranteed Obligations; (ii) any waiver or modification of or supplement to any provision of any agreement relating to the Guaranteed Obligations; (iii) any release, non-perfection, or invalidity of any indirect or direct security for the obligations of either Borrower for all or any part of the Guaranteed Obligations or any obligations of any other guarantor of or other person liable for any of the Guaranteed Obligations; (iv) any action or failure to act by the Administrative Agent, the Issuing Bank or any Lender with respect to any collateral securing any part of the Guaranteed Obligations; or (v) any default, failure or delay, willful or otherwise, in the payment or performance of any of the Guaranteed Obligations, or

any other circumstance, act, omission or delay that might in any manner or to any extent vary the risk of such Loan Guarantor or that would otherwise operate as a discharge of any Loan Guarantor as a matter of law or equity (other than the payment in full in cash of the Guaranteed Obligations).

SECTION 10.04.Defenses Waived. To the fullest extent permitted by applicable law, each Loan Guarantor hereby waives any defense based on or arising out of any defense of either Borrower or any Loan Guarantor or the unenforceability of all or any part of the Guaranteed Obligations from any cause, or the cessation from any cause of the liability of either Borrower or any Loan Guarantor, other than the payment in full in cash of the Guaranteed Obligations. Without limiting the generality of the foregoing, each Loan Guarantor irrevocably waives acceptance hereof, presentment, demand, protest and, to the fullest extent permitted by law, any notice not provided for herein, as well as any requirement that at any time any action be taken by any person against any Obligated Party, or any other person. The Administrative Agent may, at its election, foreclose on any Collateral held by it by one or more judicial or nonjudicial sales, accept an assignment of any such Collateral in lieu of foreclosure or otherwise act or fail to act with respect to any collateral securing all or a part of the Guaranteed Obligations, compromise or adjust any part of the Guaranteed Obligations, make any other accommodation with any Obligated Party or exercise any other right or remedy available to it against any Obligated Party, without affecting or impairing in any way the liability of such Loan Guarantor under this Loan Guaranty except to the extent the Guaranteed Obligations have been fully paid in cash. To the fullest extent permitted by applicable law, each Loan Guarantor waives any defense arising out of any such election even though that election may operate, pursuant to applicable law, to impair or extinguish any right of reimbursement or subrogation or other right or remedy of any Loan Guarantor against any Obligated Party or any security.

SECTION 10.05.Rights of Subrogation. No Loan Guarantor will assert any right, claim or cause of action, including, without limitation, a claim of subrogation, contribution or indemnification that it has against any Obligated Party, or any collateral, until the Loan Parties and the Loan Guarantors have fully performed all their Obligations to the Administrative Agent, the Issuing Bank and the Lenders.

SECTION 10.06.[Reserved.]

SECTION 10.07.Information. Each Loan Guarantor assumes all responsibility for being and keeping itself informed of the applicable Borrower's financial condition and assets, and of all other circumstances bearing upon the risk of nonpayment of the applicable Guaranteed Obligations and the nature, scope and extent of the risks that each Loan Guarantor assumes and incurs under this Loan Guaranty, and agrees that neither the Administrative Agent, the Issuing Bank nor any Lender shall have any duty to advise any Loan Guarantor of information known to it regarding those circumstances or risks.

SECTION 10.08.Taxes. All payments of the Guaranteed Obligations will be made by each Loan Guarantor free and clear of and without deduction for any Indemnified Taxes or Other Taxes, provided that if any Loan Guarantor shall be required to deduct any Indemnified Taxes or Other Taxes from such payments, then (i) the sum payable shall be increased as necessary so that after making all required deductions (including deductions applicable to additional sums payable under this Section 10.08) the Administrative Agent, Lender or Issuing Bank (as the case may be) receives an amount equal to the sum it would have received had no such deductions been made, (ii) such Loan Guarantor shall make such deductions and (iii) such Loan Guarantor shall pay the full amount deducted to the relevant Governmental Authority in accordance with applicable law.

SECTION 10.09.Independent Obligation. As an original and independent obligation under this Guaranty, each Loan Guarantor shall indemnify each of the Administrative Agent, the Issuing Bank and each Lender (together with its Affiliates, if applicable; such Persons, the "Guaranteed Parties") and keep each of them indemnified against all costs, losses, expenses and liabilities of whatever kind

resulting from the failure by any of the Loan Guarantors to make due and punctual payment of any of the Guaranteed Obligations or resulting from any of the Guaranteed Obligations being or becoming void, voidable, unenforceable or ineffective against such Loan Guarantors (including all legal and other costs, charges and expenses incurred by the Guaranteed Parties, or any of them, in connection with preserving or enforcing, or attempting to preserve or enforce, its rights under this Guaranty) and pay on demand the amount of such costs, losses, expenses and liabilities whether or not any of the Guaranteed Parties have attempted to enforce any rights against any other Loan Guarantor or any other Person or otherwise.

SECTION 10.10. Liability Cumulative. The liability of each Loan Party as a Loan Guarantor under this Article X is in addition to and shall be cumulative with all liabilities of each Loan Party to the Administrative Agent, the Issuing Bank and the Lenders under this Agreement and the other Loan Documents to which such Loan Party is a party or in respect of any obligations or liabilities of the other Loan Parties, without any limitation as to amount, unless the instrument or agreement evidencing or creating such other liability specifically provides to the contrary.

[The remainder of this page is blank. Signature pages follow.]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their respective authorized officers as of the day and year first above written.

INDALEX HOLDINGS FINANCE, INC.,

By _____
Name:
Title:

INDALEX HOLDING CORP., as Parent Borrower,

By _____
Name:
Title:

INDALEX LIMITED, as Canadian Subsidiary Borrower,

By _____
Name:
Title:

INDALEX INC., as a Subsidiary Loan Party,

By _____
Name:
Title:

DOLTON ALUMINUM COMPANY, INC., as a Subsidiary Loan Party,

By _____
Name:
Title:

CARADON LEBANON INC., as a Subsidiary Loan Party,

By _____
Name:
Title:

INDALEX HOLDINGS (B.C.) LTD., as a Subsidiary Loan Party,

By _____
Name:
Title:

6326765 CANADA INC., as a Subsidiary Loan Party,

By _____
Name:
Title:

NOVAR INC., as a Subsidiary Loan Party,

By _____
Name:
Title:

JPMORGAN CHASE BANK, N.A., individually and as Administrative Agent and Issuing Bank,

By _____
Name:
Title:

JPMORGAN CHASE BANK, N.A., TORONTO BRANCH, as Canadian Lending Office for the Administrative Agent and Issuing Bank,

By _____
Name:
Title:

SIGNATURE PAGE TO CREDIT AGREEMENT DATED AS OF APRIL ___, 2009 AMONG INDALEX HOLDINGS FINANCE, INC., INDALEX HOLDING CORP., INDALEX LIMITED, THE SUBSIDIARIES OF INDALEX HOLDING CORP. PARTY THERETO, THE LENDERS PARTY THERETO, AND JPMORGAN CHASE BANK, N.A., AS ADMINISTRATIVE AGENT

Name of Institution:

_____

By

_____

Name:

Title:

APPENDIX "B"

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE
	)	
JUSTICE CAMPBELL	)	20th DAY OF JULY, 2009

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

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

APPROVAL AND VESTING ORDER

THIS MOTION, made by Indalex Limited, Indalex Holdings (B.C.) Ltd., and 6326765 Canada Inc. (collectively, the "Canadian Sellers") for an order approving the sale transaction (the "Transaction") contemplated by an agreement of purchase and sale among Indalex Holdings Finance, Inc., Indalex Holding Corp., Indalex Inc., Caradon Lebanon, Inc., Dolton Aluminum Company, Inc., the Canadian Sellers, and SAPA Holding AB (which has assigned all of its rights and obligations thereunder in respect of the Canadian Acquired Assets (as defined in the Sale Agreement) to SAPA Canada Inc.) (the "Canadian Purchaser") made as of June 16, 2009 and appended to the Affidavit of Fred Fazio sworn June 29, 2009, together with such non-material amendments relative to the Applicants as may be consented to by the Monitor (defined below) (the "Sale Agreement") and vesting in the Canadian Purchaser, the Canadian Sellers' right, title and interest in and to the Canadian Acquired Assets, was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the material filed, including the Notice of Motion and the Seventh Report of the court-appointed monitor, FTI Consulting Canada ULC (the "Monitor") and on hearing the submissions of counsel for the Canadian Sellers, counsel for the Monitor, counsel for the

Canadian Purchaser and counsel for the JPMorgan Chase Bank, N.A., and on being advised that the Canadian Sellers' Service List was served with the Motion Record herein;

APPROVAL AND VESTING

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

2. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved, and that the Sale Agreement is commercially reasonable and in the best interests of the Canadian Sellers and its stakeholders. The execution of the Sale Agreement by the Canadian Sellers is hereby authorized and approved, and the Canadian Sellers are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of, or to further evidence or document, the Transaction and for the conveyance of the Canadian Acquired Assets to the Canadian Purchaser.

3. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's certificate to the Canadian Purchaser substantially in the form attached as Schedule A hereto (the "Monitor's Certificate"), and, with respect to the Quebec Property (as defined in Schedule B) only, the execution of a deed of transfer of the Quebec Property by Indalex Limited (being one of the Canadian Sellers), to the Canadian Purchaser in accordance with the Deed of Transfer (hereinafter defined) and, with respect to the Quebec Property only, the execution of the Deed of Mainlevée (as hereinafter defined) in accordance with paragraphs 9 and 10 of this Order, all of the Canadian Sellers' right, title and interest in and to the Canadian Acquired Assets described in the Sale Agreement (including, without limitation, the real and immoveable property described in Schedule B) shall vest absolutely in the Canadian Purchaser free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "Claims"), whether such Claims came into existence prior to, subsequent to, or as a result of any previous orders of this Court, contractually, by operation of law or otherwise, including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of

the Honourable Justice Morawetz dated April 3, 2009, as amended and restated; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system, including, without limitation, registrations made at the Registry of Personal and Moveable Real Rights in the Province of Quebec; and (iii) those Claims listed on Schedule C hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule D (the "Permitted Encumbrances")) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Canadian Acquired Assets are hereby expunged and discharged as against the Canadian Acquired Assets. Notwithstanding the foregoing, the Canadian Acquired Assets shall vest in the Canadian Purchaser subject to the Permitted Liens (as both terms are defined in the Sale Agreement);

REAL PROPERTY

(a) Ontario

4. THIS COURT ORDERS that upon the registration in the Land Registry Office for the Land Titles Division of Toronto (No. 66) (the "Toronto Land Registry Office) of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and the *Land Registration Reform Act* (Ontario) with respect to the Toronto Property (as defined in Schedule B), the Land Registrar for the Toronto Land Registry Office is hereby directed to enter the Canadian Purchaser as the owner of the Toronto Property in fee simple, and is hereby directed to delete and expunge from title to the Toronto Property all of the Claims relating to the Toronto Property, including but not limited to, the Claims listed in Schedule C, subject only to the Permitted Encumbrances relating to the Toronto Property listed in Schedule D.

5. THIS COURT ORDERS that upon registration in the Land Registry Office for the Land Titles Division of Peel (No. 43) (the "Mississauga Land Registry Office") of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and the *Land Registration Reform Act* (Ontario) with respect to the Mississauga Property (as defined in Schedule B), the Land Registrar for the Mississauga Land Registry Office is hereby directed to enter the Canadian Purchaser as the owner of the Mississauga Property in fee simple, and is hereby directed to delete and expunge from title to the Mississauga Property all of the Claims relating to the

Mississauga Property, including but not limited to, the Claims listed in Schedule C, subject only to the Permitted Encumbrances relating to the Mississauga Property listed in Schedule D.

(b) Alberta

6. THIS COURT ORDERS that, subject to the Permitted Encumbrances relating to the Alberta Property (as defined in Schedule B) listed in Schedule D, upon being presented with an original letter from counsel to the Canadian Sellers, Blake, Cassels & Graydon LLP, directed to the Alberta Land Titles Office confirming receipt of the Canadian Purchase Price (as defined in the Sale Agreement) payable on Closing Date (as defined in the Sale Agreement), and an Affidavit of Value as prescribed by the *Land Titles Act* (Alberta), the Alberta Land Titles Office be and is hereby authorized and directed to cancel the existing certificates of title to the Alberta Property and to issue new certificates of title in the name of the Canadian Purchaser, c/o Heenan Blaikie P.O. Box 185, Suite 2600, 200 Bay Street, South Tower, Royal Bank Plaza, Toronto Ontario, M5J 2J4, as specifically set out in the said letter, and the Alberta Land Titles Office be and is hereby directed to delete and expunge from title to the Alberta Property all of the Claims relating to the Alberta Property, including but not limited to, the Claims listed on Schedule C, subject only to the Permitted Encumbrances relating to the Alberta Property listed in Schedule D.

7. THIS COURT ORDERS that the cancellation of titles and issuance of new titles and discharge of instruments as set out in paragraph 6 shall be registered notwithstanding the requirements of Section 191(1) of the *Land Titles Act* (Alberta).

(c) British Columbia

8. THIS COURT ORDERS that the BC Property (as defined in Schedule B) is hereby conveyed to and vested in the Canadian Purchaser and upon presentation for registration in the Land Title Office for the Land Title District of New Westminster of a certified copy of this Order, the Registrar of Land Titles (the "BC Registrar") is hereby directed to enter the Canadian Purchaser as owner of the BC Property together with all buildings and other structures, facilities and improvements located thereon and fixtures, systems, interests, licences, rights, covenants, restrictive covenants, commons, ways, profits, privileges, easements and appurtenances to the said hereditaments belonging, or with the same or any part thereof, held or enjoyed or appurtenant thereto, in fee simple in respect of BC Property, and this Court, having considered

the interests of third parties, further orders that the BC Registrar is hereby directed to discharge, release, delete and expunge from title to the BC Property all of the Claims relating to the BC Property, including but not limited to, the Claims listed in Schedule C, subject only to the Permitted Encumbrances relating to the BC Property listed in Schedule D, and this Court declares that it has been proved to the satisfaction of the Court on investigation that the title of the Canadian Purchaser in and to the BC Property is a good, safe holding and marketable title and directs the BC Registrar to register indefeasible title in favour of the Canadian Purchaser as aforesaid.

(d) Quebec

9. THIS COURT ORDERS AND DIRECTS, in order to give effect to this Order prior to closing of the Transaction, Indalex Limited and the Canadian Purchaser to enter into a deed of transfer with respect to the Quebec Property, upon the same terms and conditions substantially as those set forth in the draft deed of transfer attached hereto as Schedule E (the "Deed of Transfer"), which Deed of Transfer shall be effective only upon the delivery of the Monitor's Certificate to the Canadian Purchaser.

10. THIS COURT ORDERS AND DIRECTS, in order to give effect to this Order prior to closing of the Transaction, JPMorgan Chase Bank, N.A. to execute a deed of mainlevée with respect to the Claims listed in Schedule C relating to only the Quebec Property (the "Deed of Mainlevée"), which Deed of Mainlevée shall be effective only upon the delivery of the Monitor's Certificate to the Canadian Purchaser.

GENERAL PROVISIONS

11. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, proceeds from the sale of the Canadian Acquired Assets, which for clarity shall include, without limitation, all deposits, reserves, holdbacks and adjustments to the Canadian Purchase Price in favour of the Canadian Sellers (as defined in the Sale Agreement) (including amounts released from the Canadian Escrow Amount in accordance with the Sale Agreement), but shall not include the (i) Canadian Escrow Amount, and (ii) the Canadian Sellers' Cure Cost Amount (collectively, the "Sale Proceeds"), shall stand in the place and stead of the Canadian Acquired Assets, and that from and after the delivery of the Monitor's Certificate all Claims and

Encumbrances (other than the Permitted Exceptions and Permitted Liens) shall attach to the Sale Proceeds with the same priority as they had with respect to the Canadian Acquired Assets immediately prior to the sale, as if the Canadian Acquired Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

12. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

13. THIS COURT ORDERS that immediately following the filing of the Monitor's Certificate, the Monitor shall be authorized and empowered, in the name of and on behalf of the Applicants, (i) to take such acts as the Monitor shall deem necessary and appropriate to further give effect to, evidence or document the Transaction; and, (ii) make any disbursements required in connection with the actions described in (i) hereof and on account of fees and disbursements of the Monitor and its counsel and counsel to the Applicants, with no personal liability to the Monitor in connection therewith.

14. THIS COURT ORDERS AND DIRECTS that on Closing the Sale Proceeds shall be paid to the Monitor on behalf of the Canadian Sellers and on or following the Closing, subject to the Monitor on behalf of the Canadian Sellers, maintaining a reserve of the Sale Proceeds in an amount satisfactory to the Monitor (the "Reserve"), the Monitor on behalf of the Canadian Sellers is hereby authorized and directed, without further Order of the Court, to make one or more distributions (the "Distributions") to JPMorgan Chase Bank, N.A., in its capacity as administrative agent (the "Agent") for and on behalf of the DIP Lenders (as defined in the Amended Amended Restated Initial Order dated May 12, 2009, as further amended, the "Initial Order") in an amount up to the aggregate amount of all primary indebtedness, liabilities and obligations now or hereafter owing by the Canadian Sellers to the DIP Lenders (the "Canadian Obligations"). To the extent that any Canadian Obligations are satisfied by any of the Canadian Sellers' affiliated entities resident in the United States (collectively, "Indalex US") (the "Guarantee Payment") Indalex US shall be entitled to be subrogated to the rights of the Agent and the DIP Lenders under the DIP Lenders Charge (as defined in the Initial Order) to the extent of such Guaranteed Payment and following indefeasible payment in full of the Canadian Obligations, Indalex US shall be entitled to receive any Distributions, pursuant to Indalex US'

subrogation rights under the DIP Lenders Charge, in an amount up to the Guarantee Payment, subject to the Reserve.

15. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act* ("PIPEDA") and pursuant to section 18 of the *Act Respecting the Protection of Personal Information in the Private Sector*, R.S.Q. c P-39.1 (the "Quebec Privacy Act"), and any other similar legislation in the Provinces of British Columbia and Alberta, the Canadian Sellers are authorized and permitted to disclose and transfer to the Canadian Purchaser all human resources and payroll information in the Canadian Sellers' records pertaining to the Canadian Sellers' past and current employees. The Canadian Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects in compliance with the provisions of PIPEDA and the Quebec Privacy Act.

16. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Canadian Sellers and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of any of the Canadian Sellers;

the vesting of the Canadian Acquired Assets in the Canadian Purchaser pursuant to this Order and any Distributions made pursuant to paragraph 14 shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Canadian Sellers and shall not be void or voidable by creditors of the relevant Applicant nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

17. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).

18. 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 Canadian Sellers and its 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 Canadian Sellers, as may be necessary or desirable to give effect to this Order or to assist the Canadian Sellers and their agents in carrying out the terms of this Order.

19. THIS COURT ORDERS AND AUTHORIZES the provisional execution of this Order in the Province of Quebec.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 20 2009

PER / PAR:

Schedule A – Form of Monitor's Certificate

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")

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (the "Court") dated April 3, 2009, FTI Consulting Canada ULC was appointed as the monitor of the Applicants.

B. Pursuant to an Order of the Court dated [DATE], the Court approved the agreement of purchase and sale made as of June 16, 2009 (the "Sale Agreement") among Indalex Limited, Indalex Holdings (B.C.) Ltd., and 6326765 Canada Inc. (collectively, the "Canadian Sellers"), Indalex Holdings Finance, Inc., Indalex Holding Corp., Indalex Inc., Caradon Lebanon, Inc., Dolton Aluminum Company, Inc., and SAPA Holding AB (which has assigned all of its rights and obligations thereunder in respect of the Canadian Acquired Assets to SAPA Canada Inc.) (the "Canadian Purchaser") and provided for the vesting in the Canadian Purchaser of the Canadian Sellers' right, title and interest in and to the Canadian Acquired Assets, which vesting is to be effective with respect to the Canadian Acquired Assets upon the delivery by the Monitor to the Canadian Purchaser of a certificate confirming (i) the payment by the Canadian Purchaser of the Canadian Purchase Price for the Canadian Acquired Assets; (ii) that the conditions to Closing as set out in Article 9 of the Sale Agreement have been satisfied or waived by the

Canadian Sellers and the Canadian Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE MONITOR CERTIFIES the following:

1. The Canadian Purchaser has paid and the Canadian Sellers have received the Canadian Purchase Price for the Canadian Acquired Assets payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions to Closing as set out in Article 9 of the Sale Agreement have been satisfied or waived by the Canadian Sellers and the Canadian Purchaser; and

3. The Transaction has been completed to the satisfaction of the Monitor.

4. This Certificate was delivered by the Monitor at _____ [TIME] on _____ [DATE].

FTI Consulting Canada ULC, in its capacity as Monitor of the Applicants, and not in its personal capacity

Per: _____

Name:

Title:

Schedule B – Real and Immoveable Property

1. PIN 10293-0044 (LT): Lot 4 on Plan 3521 North York and Part of Lots 5 and 9 on Plan 3521 North York, as in Instrument No. TB931608, subject to Instrument Nos. NY526170E and NY594168, Toronto (North York), City of Toronto

   (the "Toronto Property").

2. Firstly: PIN 13291-1236 (LT): Parcel 48-1, Section 43M-425, being Block 48 on Plan 43M-425, except Part 2 on Plan 43R-25314, together with an easement over Part of Lot 4, Concession 2 east of Hurontario Street, Toronto Township, designated as Parts 1, 2, and 3 on Plan 43R-31684, as in Instrument No. PR1340212, City of Mississauga, Regional Municipality of Peel

   Secondly: PIN 13291-1282 (LT): Part of Lot 4, Concession 2, east of Hurontario Street, as in Instrument No. RO1053352, save and except Part 1 on Plan 43R-25314 and Part 2 on Plan 43R-29386, subject to Instrument No. RO832725, together with an easement over Part of Lot 4, Concession 2 east of Hurontario Street, Toronto Township, designated as Parts 1, 2, and 3 on Plan 43R-31684, as in Instrument No. PR1340212, City of Mississauga, Regional Municipality of Peel

   (collectively, the "Mississauga Property").

3. PID: 011-122-111
   Block 13, District Lot 288, Group 1
   New Westminster District Plan 4667
   (the "BC Property")

4. Plan 2007JK, Block 8, Lots 13 & 14
   Excepting thereout all mines and minerals
   (the "Alberta Property")

5. Lot 2 528 235 of the Cadastre of Quebec
   Registration Division of Montreal
   (the "Quebec Property")

Schedule C – Claims to be deleted and expunged from title to Real Property

Toronto Property:

1. Instrument No. AT1013992, registered on December 19, 2005, is an Application to Change Name by Owner wherein the name of the registered owner is changed from 1053334 Ontario Limited to 6326765 Canada Inc.

2. Instrument No. AT1053604, registered on February 2, 2006, is a charge/mortgage in favour of JPMorgan Chase Bank, N.A.

3. Instrument No. AT1053605, registered on February 2, 2006, is a notice of assignment of rents – general in favour of JPMorgan Chase Bank, N.A.

4. Instrument No. AT2045510, registered on April 9, 2009, is a charge/mortgage in favour of JPMorgan Chase Bank, National Association.

5. Instrument No. AT2045603, registered on April 9, 2009, is a notice of assignment of rents – general in favour of JPMorgan Chase Bank, National Association.

Mississauga Property:

6. Instrument No. PR986328, registered on December 19, 2005, is an Application to Change Name by Owner wherein the name of the registered owner is changed from 1053334 Ontario Limited to 6326765 Canada Inc.

7. Instrument No. PR988798, registered on December 22, 2005, is an Application to Change Name by Owner wherein the name of the registered owner is changed from 1053334 Ontario Limited to 6326765 Canada Inc.

8. Instrument No. PR991412, registered on December 30, 2005, is an Notice of Change of Address for service respecting a change in the address for service for 6326765 Canada Inc.

9. Instrument No. PR1008796, registered on February 2, 2006, is a charge/mortgage in favour of JPMorgan Chase Bank, N.A.

10. Instrument No. PR1008797, registered on February 2, 2006, is a notice of assignment of rents – general in favour of JPMorgan Chase Bank, N.A.

11. Instrument No. PR1624662, registered on April 9, 2009, is a charge/mortgage in favour of JPMorgan Chase Bank, National Association.

12. Instrument No. PR1624663, registered on April 9, 2009, is a notice of assignment of rents – general in favour of JPMorgan Chase Bank, National Association.

BC Property:

13. Instrument No. BA463980, registered on February 8, 2006, is a mortgage in favour of JPMorgan Chase Bank, National Association.

14. Instrument No. BA463981, registered on February 8, 2006, is an assignment of rents in favour of JPMorgan Chase Bank, National Association.

15. Instrument No. CA1082821, registered on April 14, 2009, is a mortgage in favour of JPMorgan Chase Bank, National Association.

16. Instrument No. CA1082822, registered on April 14, 2009, is an assignment of rents in favour of JPMorgan Chase Bank, National Association.

Alberta Property:

17. Instrument No. 061 067 977, registered on February 15, 2006, is a mortgage in favour of JPMorgan Chase Bank, National Association.

18. Instrument No. 061 067 978, registered on February 15, 2006, is a caveat re: assignment of rents in favour of JPMorgan Chase Bank, National Association.

19. Instrument No. 091 100 289, registered on April 16, 2009, is a mortgage in favour of JPMorgan Chase Bank, National Association.

20. Instrument No. 091 100 290, registered on April 16, 2009, is a caveat re: assignment of rents in favour of JPMorgan Chase Bank, National Association.

Quebec Property:

21. Instrument No. 13 033 043, registered on February 2, 2006, is a deed of hypothec in favour of JPMorgan Chase Bank, N.A.

22. Instrument No. 16 074 149, registered on April 9, 2009, is a deed of hypothec in favour of JPMorgan Chase Bank, N.A.

Schedule D – Permitted Encumbrances, Easements and Restrictive Covenants Related to the Real Property (Registrations Unaffected by Vesting Order)

Toronto Property:

1. Instrument No. NY378985, registered on March 7, 1962, is a by-law passed by the Corporation of the Borough of North York.

2. Instrument No. NY526170E, registered on December 11, 1967, is a transfer of easement and an expropriation certificate in favour of the Corporation of the Borough of North York.

3. Instrument No. NY594168, registered on May 20, 1971, is a transfer of easement in favour of the Corporation of the Borough of North York.

4. Instrument No. 64BA559, deposited on July 18, 1974, is a plan pursuant to the *Boundaries Act* which confirms the boundaries of Sheppard Avenue.

5. Instrument No. TR57844, registered on March 27, 2000, is notice of Pearson Airport zoning regulations.

6. Instrument No. AT2005560, registered on February 2, 2009, is a notice of security interest in favour of NRB Inc.

Mississauga Property:

7. Instrument No. TT120053, registered on June 15, 1959, is a notice of amendment to Toronto-Malton Airport zoning regulations.

8. Instrument No. TT144298, registered on March 13, 1962, is a notice of amendment to Toronto-Malton Airport zoning regulations.

9. Instrument No. VS248789, registered on February 12, 1973, is a notice of amendment to Toronto-Malton Airport zoning regulations.

10. Instrument No. LT350099, registered on November 4, 1981, is a notice of drainage and occupancy agreement in favour of the Corporation of the City of Mississauga.

11. Instrument No. LT351441, registered on November 12, 1981, is a by-law passed by the Corporation of the City of Mississauga.

12. Instrument No. LT1398393, registered on March 30, 1993, is an application (general) re: partial release of Instrument No. LT350099.

13. Instrument No. RO832725, registered on January 19, 1988, is a transfer of easement in favour of the Corporation of the City of Mississauga.

14. Instrument No. LT2057426, registered on March 27, 2000, is notice of Pearson Airport zoning regulations.

BC Property:

15. Instrument No. BE282930, registered on October 25, 1991, is a statutory right of way in favour of the City of Port Coquitlam.

16. Instrument No. BT274870, registered on July 30, 2002, is a development permit.

17. Instrument No. BH306436, registered on August 18, 1994, is a development permit.

18. Instrument No. BX589964, registered on December 1, 2005, is a covenant entered into between the City of Port Coquitlam and Indalex Holdings (B.C.) Ltd. with respect to the building covenant.

Alberta Property:

19. Instrument No. 6499IQ, registered on June 18, 1963, is a utility right of way in favour of the City of Calgary.

20. Instrument No. 6500IQ, registered on June 18, 1963, is a utility right of way in favour of the City of Calgary for pole anchor site.

21. Instrument No. 4661JC, registered on December 9, 1964, is a utility right of way in favour of Canadian Pacific Railway and C.N.R.

22. Instrument No. 4534LD, registered on November 4, 1971, is a utility right of way in favour of the City of Calgary.

23. Instrument No. 4535LD, registered on November 4, 1971, is a utility right of way in favour of the City of Calgary.

24. Instrument No. 731 074 497, registered on November 21, 1973 is a caveat re: encroachment agreement in favour of the City of Calgary.

25. Instrument No. 771 147 064, registered on October 20, 1977, is notice of Calgary International Airport zoning regulations.

26. Instrument No. 991 220 194, registered on August 3, 1999, is a caveat re: easement and common access agreement between Westway Equipment Leasing Inc. and Caradon Limited.

Quebec Property:

27. Instrument No. 1 459 846 is a servitude granted by Her Majesty The Queen in favour of the City of Pointe-Claire for sanitary trunk sewer.

28. Instrument No. 3 914 366 is a servitude in favour of Department of Transport (Canada) to limit the height of the buildings for the Dorval International Airport (Pierre-Elliott Trudeau International Airport).

29. Instrument No. 3 914 366 is a servitude in favour of Department of Transport (Canada) to limit the use of the immovables to industrial or commercial purposes.

Schedule E - Deed of Transfer

DEED OF TRANSFER

On this _____ day of _____, Two thousand nine (2009),

APPEARED: **INDALEX LIMITED**, a Canadian corporation, having a place of business at 5675 Kennedy Road, Mississauga, Ontario, L4Z 2H9, formerly known under the name Caradon Limited , which name was changed by Certificate of Amendment dated April 30th, 2000, and prior to that was known as Indal Corporation, which change was made by way of Articles of Amendment on March 30th, 1994, the whole as more fully described in the notice of change of name registered at Montreal under the number 13 033 163, herein acting and represented by Marc Flynn, its Authorized Representative, duly authorized for the purposes hereof in virtue of a power of attorney dated July 16th, 2009 and a resolution of Indalex Limited's board of directors dated _____ 2009;

(hereinafter called the "**Transferor**")

AND: **SAPA CANADA INC.**, a corporation duly incorporated, having its head office at 200 Bay Street, South Tower, Royal Bank Plaza, Toronto, Ontario M5J 2J4, herein acting and represented by Timothy Lawson, its Vice-President, duly authorized for the purposes hereof as he so declares.

(hereinafter called the "**Transferee**")

WHICH PARTIES HAVE AGREED AS FOLLOWS:

1. TRANSFER

The Transferor hereby transfers to the Transferee hereto present and accepting all of its right, title and interest, in, and to the following immovable property, namely:

DESCRIPTION

An emplacement known and designated as lot number TWO MILLION FIVE HUNDRED AND TWENTY-EIGHT THOUSAND TWO HUNDRED

AND THIRTY-FIVE (2 528 235) of the Cadastre of Québec, Registration Division of Montreal.

With the building thereon erected bearing civic number 325 Avro Road, in the City of Pointe-Claire, Province of Québec.

As the same now subsists with all its rights, members and appurtenance and without any exception or reserve of any kind.

(hereinafter called the "**Property**").

2. TITLE

The Property was conveyed unto the Transferor by **Indal Limited** in virtue of a Deed of Sale concluded February 18, 1994 and registered at Montreal on March 23, 1994, under number 4 686 343.

3. POSSESSION

In virtue of these presents, the Transferee shall become the owner and have immediate possession of the Property as of _____.

4. ASSIGNMENT OF WARRANTIES

The Transferor hereby assigns in favour of the Transferee all warranties related to the Property, if any, the Transferee hereby accepting such assignment.

5. PRICE

The present transfer is thus made for and in consideration of the price of EIGHT MILLION NINE HUNDRED AND FIFTY-TWO THOUSAND DOLLARS ($8,952,000.00) paid upon execution of this Deed of Transfer, whereof quit.

6. GOVERNING LAW

This Deed of Transfer shall be governed by the laws of the Province of Québec.

7. LANGUAGE

The parties hereto declare that they have specifically requested, and do hereby confirm their request, that this Deed of Transfer be drafted and executed in the English language. *Les parties aux présentes déclarent qu'elles ont spécifiquement demandé que le présent acte de transfert soit rédigé et signé en anglais et par les présentes confirment leur dite demande.*

8. PARTICULARS REQUIRED UNDER SECTION 9 OF AN *ACT RESPECTING DUTIES ON TRANSFERS OF IMMOVABLES* (R.S.Q. C. D-15.1)

The Transferor and Transferee, in order to conform to the provisions of the above described Act, establish, acknowledge and declare the following particulars and facts:

a) the name and address of the Transferor and Transferee are as they are described in their appearance above;

b) the immovable property herein transferred is situated in the territory of the City of Pointe-Claire, Québec;

c) according to the parties, the amount of the consideration for the transfer of the immovable property herein transferred is:

EIGHT MILLION NINE HUNDRED AND FIFTY-TWO THOUSAND DOLLARS ($8,952,000.00)

d) according to the parties, the amount constituting the basis of imposition of the transfer duties is:

ELEVEN MILLION THREE HUNDRED THOUSAND DOLLARS ($11,300,000.00);

e) the amount of transfer duties, if applicable, is:

ONE HUNDRED AND SIXTY-EIGHT THOUSAND DOLLARS ($168,000.00); and

f) the transfer of the immovable property does not include, at the same time, a corporeal immovable property and movable property which is permanently attached or joined to the immovable, without losing its individuality and without being incorporated and which, in the immovable, are used for the operation of an enterprise or the pursuit of activities, the whole as provided in section 1.0.1 of the above-described Act.

IN WITNESS THEREOF the parties hereto have duly executed this Deed of Transfer in Toronto, Province of Ontario, on the day first mentioned above.

INDALEX LIMITED

Per: _____

Name: Marc Flynn
Title: Authorized Representative

SAPA CANADA INC.

Per: _____

Name: Timothy Lawson
Title: Vice-President

CERTIFICATE TO A DEED OF TRANSFER EXECUTED BY INDALEX LIMITED, AS TRANSFEROR AND SAPA CANADA INC., AS TRANSFEREE IN TORONTO, ON _____
_____, 2009

I, the undersigned, _____, hereby certify that:

1. I have verified the identity, quality and capacity of the Transferor, Indalex Limited, to the present Deed of Transfer;

2. The present Deed of Transfer represents the will expressed by the Transferor, Indalex Limited; and

3. The present Deed of Transfer is valid as to its form.

Certified at Montreal, on _____, 2009.

Name:

Quality:

Address:

_____

CERTIFICATE TO A DEED OF TRANSFER EXECUTED BY INDALEX LIMITED, AS TRANSFEROR AND SAPA CANADA INC., AS TRANSFEREE IN TORONTO, ON

_____2009

I, the undersigned, Paul M. Lalonde, Advocate, hereby certify that:

4. I have verified the identity, quality and capacity of the Transferee, SAPA Canada Inc., to the present Deed of Transfer;

5. The present Deed of Transfer represents the will expressed by the Transferee, SAPA Canada Inc.; and

6. The present Deed of Transfer is valid as to its form.

Certified at Toronto, on _____, 2009.

Name: Paul M. Lalonde

Quality: Advocate Bar of Quebec

Address: Royal Bank Plaza, South Tower
200 Bay Street
Bureau 2600
Toronto ON M5J 2J4

_____
Paul M. Lalonde

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.

Court File No: CV-09-8122-

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

APPROVAL AND VESTING ORDER

BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors
Box 25, Commerce Court West
199 Bay Street, Suite 2800
Toronto, Ontario M5L 1A9

Linc Rogers LSUC No.: 43562N
Tel: (416) 863-4168

Katherine McEachern LSUC No.: 38345M
Tel: (416) 863-2566
Fax: (416) 863-2653

Jackie Moher LSUC No.: 53166V
Tel: (416) 863-3174
Fax: (416) 863-2653

Lawyers for the Applicants

APPENDIX "C"

Financial Services Commission of Ontario

Pension Plans Branch
5160 Yonge Street, 4th Floor
Box 85
Toronto ON M2N 6L9

Telephone: (416) 226-7776
Facsimile: (416) 226-7777

Commission des services financiers de l'Ontario

Direction des régimes de retraite
5160 rue Yonge, 4e étage
boite 85
Toronto ON M2N 6L9

Téléphone: (416) 226-7776
Télécopieur: (416) 226-7777

Ontario

REGISTERED MAIL

March 10, 2010

Heidi Pietila
Senior Regulatory Analyst
Morneau Sobeco Limited Partnership
895 Don Mills Road, Suite 700
One Morneau Sobeco Centre
Toronto ON M3C 1W3

Indalex Limited
c/o FTI Consulting Canada ULC
TD Canada Trust Tower, Suite 2733
161 Bay Street
Toronto ON M5J 2S1

Attention: Nigel D. Meakin, Senior Managing Director

Dear Sir/Madam:

Re: Retirement Plan for Executive Employees of Indalex Limited and Associated Companies Registration Number 0455626

Enclosed please find a Notice of Proposal in respect to the above pension plan.

Yours truly,

Ann Marie Gumbs
Administrative Coordinator

Enclosure

c: Jai J. Persaud, Pension Plans Branch, FSCO

IN THE MATTER OF the Pension Benefits Act, R.S.O. 1990, c. P.8, as amended (the "*PBA*");

AND IN THE MATTER of a Proposal of the Superintendent of Financial Services to make an Order under section 69 of the *PBA*, respecting the **Retirement Plan for Executive Employees of Indalex Limited and Associated Companies** Registration Number **0455626**

TO: Heidi Pietila
Senior Regulatory Analyst
Morneau Sobeco Limited Partnership
895 Don Mills Road, Suite 700
One Morneau Sobeco Centre
Toronto ON M3C 1W3

Administrator

AND TO: Indalex Limited
c/o FTI Consulting Canada ULC
TD Canada Trust Tower, Suite 2733
161 Bay Street
Toronto ON M5J 2S1

Attention: Nigel D. Meakin
Senior Managing Director

Employer

NOTICE OF PROPOSAL

I PROPOSE TO MAKE AN ORDER under section 69 of the *PBA* that the **Retirement Plan for Executive Employees of Indalex Limited and Associated Companies** (the "Plan") be wound up effective **September 30, 2009.**

REASONS:

There was a cessation or suspension of employer contributions to the pension fund.

A significant number of members of the pension plan ceased to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer.

Such further and other reasons as may come to my attention.

YOU ARE ENTITLED TO A HEARING by the Financial Services Tribunal (the "Tribunal") pursuant to section 89(6) of the *PBA*. **To request a hearing, you must deliver to the Tribunal a written notice that you require a hearing, within thirty (30) days after this Notice of Proposal is served on you.**[1]

YOUR WRITTEN NOTICE must be delivered to:

Financial Services Tribunal
5160 Yonge Street
14th Floor
Toronto, Ontario
M2N 6L9

Attention: The Registrar

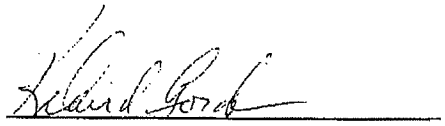
FOR FURTHER INFORMATION on a Form for the written notice, please see the Tribunal website at www.fstontario.ca **or** contact the Registrar of the Tribunal by phone at 416- 590-7294, toll free at 1-800-668-0128, ext. 7294, or by fax at 416-226-7750.

IF YOU FAIL TO REQUEST A HEARING WITHIN THIRTY (30) DAYS, I MAY CARRY OUT THE PROPOSAL AS DESCRIBED IN THIS NOTICE.

DATED at Toronto, Ontario, this 10th day of March 2010

---

[1] NOTE - Pursuant to section 112 of the *PBA* any Notice, Order or other document is sufficiently given, served or delivered if delivered personally or sent by regular mail and any document sent by regular mail shall be deemed to be given, served or delivered on the seventh day after the date of mailing.



K. David Gordon
Deputy Superintendent, Pensions

APPENDIX "D"

Financial Services Commission of Ontario

Pension Plans Branch
5160 Yonge Street, 4th Floor
Box 85
Toronto ON M2N 6L9

Telephone: (416) 226-7776
Facsimile: (416) 226-7777

Commission des services financiers de l'Ontario

Direction des régimes de retraite
5160 rue Yonge, 4e étage
boîte 85
Toronto ON M2N 6L9

Téléphone: (416) 226-7776
Télécopieur: (416) 226-7777

Ontario

REGISTERED MAIL

August 27, 2010

Heidi Pietila
Senior Regulatory Analyst
Morneau Sobeco Limited Partnership
895 Don Mills Road, Suite 700
One Morneau Sobeco Centre
Toronto, ON M3C 1W3

Dale Tabinowski
Administrator
Indalex Limited and Associated Companies
75 Tri-State International, Suite 450
Lincolnshire, IL 60069
USA

Nigel D. Meakin
Senior Managing Director
FTI Consulting Canada ULC
TD Canada Trust Tower, Suite 2733
1616 Bay Street
Toronto, ON M5J 2S1

Dear Sir/Madam:

Re: **Retirement Plan for Executive Employees of Indalex Limited and Associated Companies**
Registration Number **455626**

Enclosed please find the Order in respect to the above pension plan.

Yours truly,
per

Ann Marie Gumbs
Administrative Coordinator

Enclosure

cc: Jai Persaud, FSCO, Pension Plans Branch

Superintendent of Financial Services

Ontario

Surintendant des services financiers

IN THE MATTER OF the Pension Benefits Act, R.S.O. 1990, c. P.8, as amended (the "*PBA*");

AND IN THE MATTER of a Proposal of the Superintendent of Financial Services to make an Order under section 69 of the *PBA*, respecting the **Retirement Plan for Executive Employees of Indalex Limited and Associated Companies** Registration Number **455626**

TO: Heidi Pietila
Senior Regulatory Analyst
Morneau Sobeco Limited Partnership
895 Don Mills Road, Suite 700
One Morneau Sobeco Centre
Toronto, ON M3C 1W3

Administrator

AND TO: Dale Tabinowski
Administrator
Indalex Limited and Associated Companies
75 Tri-State International, Suite 450
Lincolnshire, IL 60069
USA

Employer

AND TO: Nigel D. Meakin
Senior Managing Director
FTI Consulting Canada ULC
TD Canada Trust Tower, Suite 2733
1616 Bay Street
Toronto, ON M5J 2S1

Monitor

ORDER

No request requiring a hearing was delivered to the Financial Services Tribunal within the time prescribed by subsection 89(6) of the *PBA* respecting a Notice of Proposal to make an Order to wind up the **Retirement Plan for Executive Employees of Indalex Limited and Associated Companies** (the "Plan").

IT IS THEREFORE ORDERED that the Plan be wound up in full effective **September 30, 2009** for the following reasons:

There was a cessation or suspension of employer contributions to the pension fund.

A significant number of members have ceased to be employed by the employer as a result the discontinuance or reorganization of all or part of business of the employer.

Failure of employer to make contributions to the pension fund as required by the Act or the Regulations;

DATED at Toronto, Ontario, this 27 day of August, 2010

Brian Mills
Director, Pension Plans Branch
by Delegated Authority from
the Superintendent of Financial Services

APPENDIX "E"

COURT FILE NO.: CV-09-8122-00CL

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

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

Applicants

BEFORE: **MORAWETZ J.**

COUNSEL: **Linc Rogers and Jackie Moher, for the Applicants**

Ashley Taylor, for FTI Consulting Canada ULC, Monitor

G. Moysa, for JPMorgan (DIP Lender)

Andrew Hatnay, for Certain Retirees

G. Finlayson, for Second Priority Secured Noteholders

John D. Leslie, for the U.S. Unsecured Creditors' Committee

HEARD: **JUNE 12, 2009**

ENDORSEMENT

[1] These are the reasons in respect of my endorsement of June 12, 2009.

[2] The motion was short served with the Applicants citing urgency. Counsel to the Applicants and counsel to the Monitor both indicated that additional availability on the DIP Financing is required (1) so that overdue payables can be satisfied; (2) to support ongoing operations; and (3) to support the Marketing Process.

[3] It is preferable, of course, for proper notice to be given. However, this was not done in this case. I have been satisfied that urgency has been established and no party is opposed to the motion.

[4] 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.

[5] 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 was to be increased with a reservation of rights, uncertainty would prevail if such a reservation was also granted. Would it cause the DIP Lender to withhold advances? or, if advances were made - would they have priority?

[6] Second, neither the retirees nor the Noteholders put forth any alternative.

[7] In the face of no alternative suggestions or proposal – uncertainty would again prevail. At this stage of the CCAA proceedings additional uncertainly does not represent a positive development.

[8] Having reviewed the record and having heard submissions, I am satisfied that the requested relief is necessary and appropriate.

[9] With respect to the retirees, counsel to the Applicants made the point that the amendment increases the availability of funds. It is hoped that the advance will improve the position of the stakeholders.

[10] Counsel to the retirees subsequently advised that, having had the opportunity, during a recess, to discuss this matter with counsel to the Applicants and his clients, his clients were no longer insisting on a reservation of rights.

[11] With respect to the Noteholders, I note that there is still an issue that remains outstanding, namely status to appear (this is also an issue with the UCC). This issue need not be addressed today but given the cross-boarder relationships between the Chapter 11 proceedings and the CCAA proceedings, it is an issue that should be resolved sooner as opposed to later.

[12] For the purposes of this motion, counsel to the Noteholders did advise that there is an ongoing challenge in the Chapter 11 proceeds, relating to the priority of secured parties. Counsel also advised that his clients have reserved their rights on this issue in the Chapter 11 proceedings.

[13] The Noteholders are, of course, in a position to raise the issues in the Chapter 11 proceedings. Nothing in this motion today should be taken as impairing the ability of the Noteholders to continue with their challenge in the Chapter 11 proceedings, or in these proceedings.

[14] However, it is also clear and has been acknowledged by counsel to the Noteholders that his clients are not claiming priority over the increase in the DIP Facility in these proceedings. On this point there is no reservation of rights. I also note for the record that counsel to the UCC was not opposed to the relief and that counsel to J.P. Morgan supports the request of the Applicants and that the Monitor recommended that the relief be granted.

[15] I am satisfied that it is appropriate to grant the requested relief.

[16] Order to go in the form presented.

MORAWETZ J.

DATE: June 15, 2009

Typed Version Released: July 16, 2009

APPENDIX "F"

2010 CarswellOnt 893, 2010 ONSC 1114, [2010] W.D.F.L. 1375, [2010] W.D.F.L. 1374, 79 C.C.P.B. 301

2010 CarswellOnt 893, 2010 ONSC 1114, [2010] W.D.F.L. 1375, [2010] W.D.F.L. 1374, 79 C.C.P.B. 301

Indalex Ltd., Re

In The Matter of The Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, as amended

In The Matter of a Plan of Compromise or Arrangement of Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (the "Applicants")

Ontario Superior Court of Justice [Commercial List]

C. Campbell J.

Heard: July 20, 2009; August 28, 2009
Judgment: February 18, 2010[FN*]
Docket: CV-09-8122-00CL

Counsel: Katherine McEachern, Linc Rogers, J.A. Prestage for Applicants

Ashley Taylor, Lesley Mercer for Monitor, FTI Consulting

Andrew Hatnay, Demetrios Yiokaris for various employees

Darrell Brown for United Steelworkers

Mark Bailey for Superintendent of Financial Services

Fred Myers, Brian Empey for Sun Indalex Finance, LLC

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial; Civil Practice and Procedure

2010 CarswellOnt 893, 2010 ONSC 1114, [2010] W.D.F.L. 1375, [2010] W.D.F.L. 1374, 79 C.C.P.B. 301

Bankruptcy and insolvency --- Property of bankrupt — Trust property — Miscellaneous

Pensions — Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act — Debtor company secured debtor in possession loans — Assets were sold — Monitor held certain funds in reserve due to unresolved claims — Applicants purported that certain funds were held in trust under salaried and executive pensions — Salaried plan had been wound up, executive plan had not — Pension claimants brought motion for declaration of trust in sale funds — Motion dismissed — Debtor in possession lenders had priority under pension claimants — Neither pension subject to trust — No deficiencies in executive pension up to date of motion — Court did not have discretion, and priority was set by insolvency legislation — Contributions to rectify deficiencies in salaried plan were not due and payable at time of transfer of assets under Pension Benefits Act (PBA) — Future payments required under PBA were halted by stay.

Bankruptcy and insolvency --- Property of bankrupt — Pension funds

Trusts — Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act — Debtor company secured debtor in possession loans — Assets were sold — Monitor held certain funds in reserve due to unresolved claims — Applicants purported that certain funds were held in trust under salaried and executive pensions — Salaried plan had been wound up, executive plan had not — Pension claimants brought motion for declaration of trust in sale funds — Motion dismissed — Debtor in possession lenders had priority under pension claimants — Neither pension subject to trust — No deficiencies in executive pension up to date of motion — Court did not have discretion, and priority was set by insolvency legislation — Contributions to rectify deficiencies in salaried plan were not due and payable at time of transfer of assets under Pension Benefits Act (PBA) — Future payments required under PBA were halted by stay.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

Cases considered by *C. Campbell J.*:

Ganong, Re (1940), [1941] S.C.R. 125, [1941] 1 D.L.R. 433, 1940 CarswellNB 34 (S.C.C.) — considered

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — considered

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, (sub nom. *Sproule v. Nortel Networks Corp.*) 2010 C.L.L.C. 210-005 (Ont. C.A.) — considered

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

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

Generally — referred to

s. 57 — considered

s. 57(3) — considered

s. 57(4) — considered

s. 75 — considered

s. 75(2) — considered

Regulations considered:

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

General, R.R.O. 1990, Reg. 909

Generally — referred to

s. 28 — considered

s. 31 — considered

s. 31(1) — considered

s. 31(2) — considered

MOTION by pension claimants for declaration of trust interest in funds from sale of debtor corporation's assets.

***C. Campbell J.*:**

1 On July 20, 2009, this Court heard a motion for approval of a sale and for a Vesting Order in a joint cross-border hearing with Justice Walsh of the United States Bankruptcy Court for the District of Delaware.

Background

2 On March 20, 2009, Indalex US commenced reorganization proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code before the U.S. Court.

3 On April 3, 2009, the Applicants commenced parallel proceedings and filed for and obtained protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36, as amended (the "*CCAA*") pursuant to an order of Morawetz J. (the "Initial Order") Pursuant to the Initial Order, FTI Consulting Canada ULC was appointed as Monitor of the Applicants.

4 On April 8, 2009, the Initial Order was amended and restated to, *inter alia*, authorize the Applicants to exercise certain restructuring powers and authorize Indalex Limited to borrow funds (the "DIP Borrowings") pursuant to a debtor-in-possession credit agreement among Indalex US, title Applicants and a syndicate of lenders (the "DIP Lenders") for which JPMorgan Chase Bank, N.A. is administrative agent (the "DIP Agent")

5 The Applicants' obligation to repay the DIP Borrowings was guaranteed by Indalex US. The guarantee by Indalex US was a condition to the extension of credit by the DIP Lenders to the Applicants.

6 On April 22, 2009, this Court granted an Order which, inter alia, extended the stay of proceedings to June 26, 2009, and approved a marketing process.

7 By Order dated July 20, 2009 (the "Approval and Vesting Order"), this Court approved the sale of the Applicants' assets as a going concent to SAPA Holding AB (including any assignees, "SAPA"), and ordered that upon closing of the SAPA transaction, the proceeds of sale (the "Canadian Sale Proceeds") were to be paid to the Monitor.

8 Pursuant to the Approval and Vesting Order, the Monitor was ordered and directed to make

a distribution to the DIP Lenders, from the Canadian Sale Proceeds, in satisfaction of the Applicants' obligations to the DIP Lenders, subject to a reserve that the Monitor considered to be appropriate in the circumstances (the "Undistributed Proceeds.")

9 At the sale approval hearing, both the Former Executives and the United Steel Workers (USW) asserted deemed trust claims over the Canadian Sale Proceeds in respect of underfunded pension liabilities in connection with certain pension plans administered by Indalex Limited, and requested that an amount representing their estimate of the under-funded deficiencies be included in the amount retained by the Monitor as Undistributed Proceeds, pending further order of the Court.

10 As a result of the Former Executives and USW's reservation of rights, the Monitor has retained the amount of $6.75 million as Undistributed Proceeds, in addition to other amounts reserved by the Monitor.

11 On July 31, 2009, the sale of Indalex's assets to SAPA closed. A total payment of US$17,041,391.80 was made from the Canadian Sale Proceeds by the Monitor, on behalf of the Applicants, to the DIP Agent As this resulted in a deficiency of US$10,751,247.22 in respect of the DIP Borrowings, the DIP Agent called on the guarantee granted to the DIP Lenders by Indalex US for the amount of the deficiency (the "Guarantee Payment") and Indalex US has" satisfied the obligation of the Applicants.

12 The approval motion was either supported or unopposed by all parties except for an issue raised on behalf of certain retirees under pension plans of the Company. Pursuant to paragraph 14 of the Approval and Vesting Order, Indalex US is fully surrogated to die rights of the DIP Lenders under the DIP Lenders' Charge for the amount of the Guarantee Payment.

13 Counsel for the retirees objected to the sale on the basis that the liquidation values set forth in the 7th Monitor's Report would, it was suggested, provide greater return for unsecured creditors than would the proposed sale, That objection was dismissed on the basis that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs of the Applicants' plant employees in Canada.[FN1]

14 The second objection by certain retirees and employees involves a claim based on a statutory deemed trust said to be in respect of certain funds held by the Monitor proposed to be reserved from the funds for distribution on closing to the DIP Lenders.

15 At the July 20, 2009 hearing, the Court expressed concern that the position of the retirees and employees, which was brought only at the time of the approval motion, if it were to be dealt with at all, without an adjournment of the approval hearing, should be dealt with promptly as part of the overall approval process.

2010 CarswellOnt 893, 2010 ONSC 1114, [2010] W.D.F.L. 1375, [2010] W.D.F.L. 1374, 79 C.C.P.B. 301

16 Following the submissions of counsel, it was agreed that an expedited hearing process on the retirees' and employees' positions would be undertaken promptly, and that the funds on hand with the Monitor would be sufficient if required to satisfy retirees' alleged trust claims.

17 The motion in respect of the deemed trust came on for hearing on August 28, 2009. The position of the retirees was opposed by the Applicants and the purchaser. Submissions were also made by counsel for "the Superintendent under the Ontario *Pension Benefits Act*, R.S.O. 1990 c. P-8 ("*PBA*") This decision was then reserved pending the November 26,2009 ruling of the Court of Appeal rendered in *Nortel Networks Corp., Re*, reported, 2009 ONCA 833 (Ont. C.A.).

18 There are two groups of retired employees at issue in this matter. Those represented by Mr. Hatnay and his colleagues seek a declaration that the amount of $3.2 million, which represents the wind up liability said to be owing by the Applicants to the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies (the "Executive Plan") and which is currently held in reserve by the Monitor, is subject to the deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the *PBA*. The Pensioners further seek an order that such amounts are not distributable to other creditors of the Applicants and are to be paid into the fund of the Executive Plan and that such orders and declarations survive any subsequent bankruptcy of the Applicants.

19 There were, as of January 1, 2008, eighteen members of the Executive Plan, none of whom are active employees.

20 The second group of pension claimants are members of the United Steel Workers, who seek recovery from the sale proceeds based on deemed trust of a pension plan in wind-up of an amount equal to the deficiency in the Retirement Plan for Salaried Employees of Indalex and Associated Companies ("Salaried Plan.") The deficiency in the Salaried Plan is said to be $1,795,600 as of December 31, 2008.

The Issues

1. Do the deemed trust provisions of s. 57 and s. 75 of the *PBA* apply to the funds currently held in reserve by the Monitor in respect of:

    a. The Executive Plan;

    b. The Salaried Plan?

2. Should the stay currently in place under the *CCAA* be lifted to permit the Applicants to file for bankruptcy under the *BIA*?

21 There are several differences between the Executive Plan and the Salaried Plan. The Salaried Plan contains both a defined benefit and defined contribution component Indalex and

members of the Salaried Plan were required to make joint contributions to the Salaried Plan.

22 The Salaried Plan is in the process of being fully wound up with an effective wind-up date, of December 31, 2006. No pensions have accrued since that date. The wind-up deficiency in the Salaried Plan at December 31, 2008 was $1,795,600, has been subject to special payments to deal with that deficiency, of $709,013 in 2007, $875,313 in 2008 and $601,000 in 2009, all of which have been made. The last special payment was scheduled to be made on December 31, 2009.

The Executive Plan

23 The Executive Plan has not been wound up. The material filed with the Court exhibits an intention on the part of the Applicants to wind up that Plan. The uncontested evidence of Bob Kavanagh on behalf of the Applicants in his affidavit sworn August 12, 2009 is to the following effect:

> 16. Indalex has made all required contributions to the Executive Plan to date and no amounts are currently due or owing to the Executive Plan, including special payments.
>
> 17. As at January 1, 2008, the Executive Plan had an estimated deficiency of $2,996,400 determined on a wind-up basis. In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments are due to be made to the Executive Plan until 2011.
>
> 18. If the Executive Plan were to be fully wound up, the funded status of the plan as of the wind-up date could only be determined by an actuarial valuation of the plan performed after the wind-up date once the plan's assets and liabilities have been determined. No actuarial valuation of the Executive Plan has been prepared since the valuation performed with an effective date of January 1, 2008.
>
> 19. Sixteen individuals with benefit entitlements under the Executive Plan were last employed by Indalex in Ontario and two individuals with benefit entitlements under the Executive Plan were last employed by Indalex in Alberta.
>
> 20. There is currently one member of the Executive Plan who is on long term disability and continues to accrue benefits under the plan.
>
> 21. Currently, approximately 80% of the assets of the Executive Plan are invested in fixed income securities and approximately 20% of the assets of the Executive Plan are invested in equities.
>
> 22. The market value of the assets of the Executive Plan as at June 30, 2009 was $5,022,940. Attached hereto as Exhibit "C" is a copy of the Statement of Net Assets Available for Benefits as of June 30, 2009.

24 The affidavit of Keith Carruthers exhibits a letter of July 13, 2009 on behalf of the Monitor confirming the intention of the Applicants to wind up the Executive Plan in accordance with the provisions of the *PBA*. There are no deficiencies in payments under the Executive Plan as of July 20, 2009. The Executive Plan is not wound up. Given the analysis that follows in respect of the Salaried Plan, I see no basis for a deemed trust of any amount at this time in respect of the Executive Plan.

The Salaried Plan

25 This motion essentially involves one aspect of the Salaried Plan of Indalex, namely the windup deficiency of the said plan. It is the position of the *CCAA* Applicants that prior to the sale of assets approved on July 20, 2009, all pension payments required under obligation to Indalex employees, both statutory and contractual, were met.

26 What is at issue here is the requirement for an annual deficiency payment that was established to be made when the Salaried Plan was wound up as at December 31, 2006.

27 The term "wind up" can be a misnomer unless understood in context. When a pension plan is "wound up," at the effective date it means that no new entrants are permitted. An actuarial calculation is then made of the assets to determine whether, based on certain actuarial assumptions, there will be sufficient monies available at the times required to pay the pension entitlement of employees who have and will retire.

28 If the assets as of the wind-up date are found to be insufficient, that deficiency will be required to be made up under the *PBA*. As in this case, the Plan may be permitted to have the deficiency rectified in a period of up to five years by annual instalments.

29 The issue for this Court is whether or not under the *PBA* there is a requirement that the deficiency commencing at the wind up date be paid as at the date of closing of the sale and transfer of assets, namely July 20, 2009.

30 The issue is to be determined by analysis and application of the provisions of the *PBA*. The sections involved arc the following:

> 57.
>
> (3) An employer who is required to pay contributions to a pension fond 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.

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 mat would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee fund applies to the pension plan,

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

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

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario, R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.

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

31 Section 75 of the *PBA* is amplified by sections of the regulations under the statute * * (see R.R.O. 1990 Regulation 909.) Section 28 and the following 144 pages of the Regulation deal with wind-up notices. Section 31(1) and (2) are as follows:

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund. O. Reg. 712/92, s. 19.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of

> the Act in equal payments, payable annually in advance, over not more than five years; and
>
> (b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30 (2) (b) and (c). O. Reg. 712/92, s. 19.

32 The most pertinent of all of these sections are 57(4) and 75(2), as they apply to this windup situation. The submission on behalf of the Superintendent distinguished between the words "due" and "accruing due." The assertion is that the word "accrue" must be given meaning. The meaning suggested is that by virtue of the inclusion" of the word "accrue," the remaining deficiency payments become payable since they fall within the deemed trust provisions.

33 The distinction to be made between amounts that are accruing and amounts that are due is that, in the case of an amount accruing, it is not yet payable, while generally an amount that is due is payable.

34 The deemed trust provision of s. 57(4) requires the employer to accrue "to the date of the windup but not yet due." The windup in this case is December 31, 2006. In my view the section contemplates the calculation to be made as of the date of wind-up of the amounts required to make up the deficiency. If, as here, the regulator permits that deficiency to be made up over a period of years, the amount of the yearly payments does not become due until it is required to be paid. It is "payable annually in advance."

35 In *Ganong, Re* (1940), [1941] S.C.R. 125 (S.C.C.), it was held:

> ...the words 'all dividends accrued due' can surely only mean dividends which have become payable by the corporation to the shareholder, as the words "dividends accruing due" during any stated period can only mean dividends as they become payable by the corporation to the shareholder.

The court went on to say:

> How can these dividends possibly be said to have 'accrued due' or to be 'accruing due' when no profits have been earned to provide for their payment and no declaration has been made by the directors fixing any date therefor? The shareholders acquire no right to payment of any dividends until there are net profits, out of which alone they can be paid and until such time as the directors determine they shall be paid.

36 The use of the word "accrue" connotes the ability to calculate a precise amount of money. The word "due" connotes that it is payable whether or not the time for payment has arrived. See

Black's Law Dictionary, 6th ed., The West Group at p. 499, where it is noted that with respect to the word "due," "it imports a fixed and settled obligation or liability but with reference to the time for its payment, there is considerable ambiguity in the use of the term."

37 In *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.), Farley J. dealt with the deemed trust provisions under what is now section 57(4) of the *PBA* in a context in which a declaration was sought prior to a bankruptcy petition. He said at paragraph 26:

> It therefore appears to me that the deemed trust provisions of subs. 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 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 been 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.)

38 The issue was dealt with again in *Ivaco Inc., Re* (2006), 25 C.B.R. (5th) 176 (Ont. C.A.), J. Laskin J.A. speaking for the Court of Appeal noted at paragraph 38 that "in a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the federal statute."

39 Paragraph 44 of that decision states:

> 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.

40 In the text "Essentials of Canadian Law-Pension Law" (Toronto: IrwinLaw, 2006) author Ari N. Kaplan at page 396 states:

> The *PBA* does not expressly state whether a 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.

2010 CarswellOnt 893, 2010 ONSC 1114, [2010] W.D.F.L. 1375, [2010] W.D.F.L. 1374, 79 C.C.P.B. 301

41 The author goes on in the next paragraph:

> 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 windup of the pension plan.

The *Usarco* decision referred to above is the foundation for that statement.

42 In his paper given at an Insight Conference, "Pension Management in Insolvency and Restructuring: What Is At Stake?" September 20, 2005, Gregory J. Winfield at page 29 states:

> Of particular note to secured creditors will be the fact that the courts have determined that the deemed trust created under that *OPBA* does not extend to the unfunded pension liability upon the windup 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 wind up, at present this is an unsecured claim on the assets of the debtor. [Reference omitted]

43 The difficulty in reconciling the requirements of the pension statute with the regime of the *CCAA* is that a company such as Indalex is entitled to carry on business and to make payments in the ordinary course of such business including those that may be required under the initial order which may well, as here, include certain ongoing pension obligations while in *CCAA*.

44 Were it not for the provisions in s. 31 of the Regulations, Indalex would have had under s. 75 of the *PBA* to pay in as of the date of wind-up any Plan deficiency. Section 31 of the Regulation as anticipated in s. 75 of the Act spreads that into five equal annual instalments.

45 One obvious purpose behind the provision in s. 31 of the Regulation is to case the burden on the Company to enable it to have the funds to operate its normal business operations while it earns the revenue to make up the deficiency.

46 The pension issues that have arisen given the nature of the recent recession, as here, are often complex and pit as adversaries creditors of a corporation who most often having advanced funds under security which creditors assert give them priority as to the repayment, as against employees many of whom are long-term or even retired who have seen the assets supporting their pensions decrease in value, risking the payments to which the employees are otherwise entitled by the terms of the plan of which they are members.

47 In circumstances such as this, the Court does not have the mandate to exercise the discretion to do what it or any group might consider fair and equitable. The federal insolvency legislation in force (the *CCAA* and *BIA*) provide schemes of priority among creditors commencing with those who have security over the assets of the company. Pitted against those with security are those unsecured creditors who must share in whatever is left over after the secured creditors are paid.

48 Employees or retired employees are entitled to pensions in accordance with the contractual terms of their pension plan. In certain circumstances those contractual terms will be augmented by the provisions of the *PBA* to the extent that they do not conflict with federal insolvency legislation. In some of these circumstances, a "deemed trust" will arise.

49 In this case I have concluded there is no conflict between the federal and provincial legislation. I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the *PBA* or the Regulations thereunder to pay any amount into the Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the *CCAA*.

50 Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.

51 Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

Motion To Lift Stay

52 The Applicants and Indalex US, in addition to disputing the validity of the deemed trust claim, sought to file a voluntary assignment in bankruptcy to ensure the priority regime they urged as the basis for resisting the deemed trust.

53 In support of that position, it was urged that since the Applicants no longer carried on business, have no active employees and no tangible assets apart from tax refunds (other than the cash sale proceeds associated with the above motion), and no directors (they having resigned), an assignment in bankruptcy is appropriate. The stay granted under the Initial Order, it is urged, should be lifted for that purpose.

54 The decision on the voluntary assignment was reserved pending a decision in the main motion above, since to allow the bankruptcy to proceed might have deprived employees of an argument under the *CCAA*.

55 Given that disposition, the question of bankruptcy assignment might well be moot. In my view, a voluntary assignment under the *BIA* should not be used to defeat a secured claim under valid Provincial legislation, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the *CCAA* or the *BIA*. For that reason I did not entertain the bankruptcy assignment motion first.

56 I conclude that it is not necessary to deal with the issue of the voluntary assignment, at least

2010 CarswellOnt 893, 2010 ONSC 1114, [2010] W.D.F.L. 1375, [2010] W.D.F.L. 1374, 79 C.C.P.B. 301

on the basis sought by the Applicants at this time. I did not find conflict between the federal and provincial regimes.

57 Should the Applicants wish to renew the request for bankruptcy relief, the motion can be scheduled through the Commercial List.

Motion dismissed.

FN* A corrigendum issued by the court on March 12, 2010 has been incorporated herein.

FN1 Monitor's 7th Report, July 15, 2009, p. 13, paragraphs 34(c)(d)

END OF DOCUMENT

APPENDIX "G"

APPENDIX "H"

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

(Motion by retirees re: Deemed Trust, returnable August 28, 2009)

August 20, 2009

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900, Box 52
Toronto, Ontario M5H 3R3

Andrew J. Hatnay LSUC#: 31885W
Email: ahatnay@kmlaw.ca
Tel: 416-595-2083
Fax: 416-204-2872

Demetrios Yiokaris LSUC#: 45852L
Email: dyiokaris@kmlaw.ca
Tel: 416-595-2130
Fax: 416-204-2810

Andrea McKinnon LSUC#: 55900A
Email: amckinnon@kmlaw.ca
Tel: 416-595-2150
Fax: 416-204-2874

Lawyers for Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser and Fred Granville, members of the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies

TO: ATTACHED SERVICE LIST

PART I – OVERVIEW

1. The moving parties, Keith Carruthers, Leon Kozierok, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser, Richard Benson, John Faveri, John (Jack) Rooney, Ken Waldron and Fred Granville (the "Pensioners") are pensioners who earned entitlements to pension benefits from pension plans administered by the Applicants.

Affidavit of Keith B. Carruthers, sworn June 23, 2009 ("Carruthers June 23 Affidavit"), at para. 14.

Affidavit of Keith B. Carruthers, sworn August 15, 2009 ("Carruthers August 15 Affidavit"), at para. 3.

2. The Pensioners seek a Declaration that the amount of $3.2 million, which represents the wind up liability owing by the Applicants to the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies (the "Executive Plan") and which is currently held in reserve by the Monitor is subject to the deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the Ontario *Pension Benefits Act*, R.S.O. c. P. 8 ("PBA"). The Pensioners further seek an order that such amounts are not distributable to other creditors of the Applicants and are to be paid into the fund of the Executive Plan and that such orders and declarations survive any subsequent bankruptcy of the Applicants.

Carruthers August 15 Affidavit, at paras. 3, 17, 18.

3. There are no active employees remaining in the Executive Plan. The latest actuarial valuation report prepared by the Applicants' actuary (Mercer) indicates that as at January 1, 2008, there were 18 members of the Executive Plan, consisting of 14 pensioners and survivors, two deferred pensioners, one transferred member with frozen service and one disabled member.

Carruthers August 15 Affidavit – Exhibit D – Report on the Actuarial Valuation for Funding Purposes as at January 1, 2008 ("Mercer Actuarial Report") at p. 32.

4. The former Vice-President, Corporate Controller of Indalex Limited, has deposed that there are sixteen individuals with benefit entitlements under the Executive Plan who were last employed by Indalex in Ontario and two individuals with benefit entitlements under the Executive Plan who were last employed by Indalex in Alberta. One individual of the Executive Plan is on long-term disability.

Affidavit of Bob Kavanaugh, sworn August 12, 2009, at paras. 18, 19, Responding Motion Record.

5. The payment of the $3.2 million into the Executive Plan would benefit not only the moving parties but all members of the Executive Plan and their beneficiaries.

PART II – THE FACTS

6. The Pensioners have been very badly affected by the Applicants' activities while under CCAA protection. First, the Applicants permanently stopped paying the Pensioners supplemental pension benefits. Second, the Pensioners are facing further losses to their retirement pension benefits due to the wind up of the Executive Plan in its underfunded state. If the latter occurs, the Pensioners will lose 1/2 to two-thirds of their retirement pension benefits.

Supplemental Pension Benefits have been permanently stopped

7. Aside from the Executive Plan, the Pensioners are entitled to receive benefits from the Supplemental Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the "Supplemental Plan"). The purpose of the Supplemental Plan is to provide pension income which was earned by the Pensioners during their employment and which exceeds the maximum limits imposed on the Executive Plan by the *Income Tax Act* (Canada) ("ITA"). The pension benefits under the Supplemental Plan are to be paid out of the general revenues of the Applicants.

Carruthers June 23 Affidavit, at para. 14.

8. The Applicants stopped paying pension benefits under the Supplemental Plan immediately after obtaining protection from creditors under the CCAA. The Pensioners have not received such pension benefits since March, 2009. The purchaser of the Applicants' assets did not adopt the Supplemental Plan. These pension benefits have been totally lost.

Carruthers June 23 Affidavit, at paras. 5, 6, 18, 19, 40-46.

Carruthers August 15 Affidavit, at para. 8.

9. The Pensioners brought a motion before this Honourable Court on July 2, 2009 requesting an order to require the Applicants to reinstate payment of the supplemental pension benefits owing to the Pensioners from the Supplemental Plan, given that the company was liquidating and not restructuring. This motion was dismissed.

Affidavit of Andrea McKinnon, sworn July 17, 2009 ("McKinnon Affidavit"), at paras. 3, 4.

Carruthers August 15 Affidavit – Exhibit B – Endorsement of Morawetz J., dated July 24, 2009.

The Executive Plan is underfunded - the Pensioners are facing further benefit cuts

10. The Executive Plan is underfunded by $3.2 million on a wind up basis. According to the Actuarial Valuation Report prepared by the plan's actuary, Mercer, as at January 1, 2008, the Executive Plan had a funding deficiency on an ongoing basis of $2,535,100, on a solvency basis of $1,082,800 and on a wind-up basis of $2,996,400.

Carruthers August 15 Affidavit, at para. 15.

Carruthers August 15 Affidavit – Exhibit D - Mercer Actuarial Report at p. 1.

11. However, a recent valuation estimate prepared by the actuarial firm of Morneau Sobeco indicates that the funded status of the Executive Plan has worsened since January 1, 2008, and now has a deficit of approximately $3.2 million on a wind up basis.

Carruthers August 15 Affidavit, at para. 17.

Carruthers August 15 Affidavit – Exhibit E - Letter from Morneau Sobeco to Andrew Hatnay of Koskie Minsky LLP, dated July 16, 2009.

12. If the Executive Plan is wound up in its current underfunded state, the Pensioners will have cuts to their pension benefits for the Executive Plan in the range of approximately 30-40%. Compounded with the Pensioners' loss of their pension benefits from the Supplemental Plan, this will result in an overall total loss in monthly pension benefits in the range of 1/2 to two-thirds for the Pensioners. This is a dramatic loss which will create financial hardship for the Pensioners and their surviving spouses who are entitled to survivor benefits on the death of the Pensioner.

McKinnon Affidavit, at para. 5.

Carruthers August 15 Affidavit, at para. 9.

Indalex's CCAA Proceedings

13. On April 3, 2009, the Applicants obtained protection from their creditors under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "CCAA"). FTI Consulting was appointed as Monitor.

Eighth Report of the Monitor, dated July 28, 2009 (the "Monitor's Eighth Report") at paras. 1, 2.

Carruthers June 23 Affidavit, at para. 23.

Once under CCAA protection the Applicants rapidly commenced a marketing and sale process. There was no attempt at restructuring.

On June 26, 2009, Pensioners put company and Service List on notice of deemed trust claim

14. In a letter dated June 26, 2009, counsel for the Pensioners informed counsel to the Applicants and the Monitor and copied to the Service List that the Pensioners assert the deemed trust in accordance with section 57 of the PBA in respect of amounts owing to

the Executive Plan, in the event the company did not adequately fund the Executive Plan, or if the Executive Plan were to be wound up in an underfunded state.

Carruthers August 15 Affidavit, at para. 18.

Carruthers August 15 Affidavit – Exhibit F – Letter from Koskie Minsky LLP to counsel for the Monitor and counsel for the Applicants, dated June 26, 2009.

15. There was no response or objection to this letter from any party.

Carruthers August 15 Affidavit, at para. 19.

16. In a letter dated July 13, 2009, the Monitor confirmed that the Executive Plan is expected to be wound up:

> 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).*** [emphasis added]

Carruthers August 15 Affidavit, at para. 6 – Exhibit A – Letter from Stikeman Elliott LLP to Koskie Minsky LLP, dated July 13, 2009.

17. One of the terms of the sale approved by the Court on July 20, 2009 was that SAPA would not take on the Applicants' liabilities under the Executive Plan and the Supplemental Plan.

Monitor's Eighth Report, at para. 7.

Carruthers August 15 Affidavit, at para. 8.

18. At the motion for court approval of the asset sale to SAPA on July 20, 2009, the Pensioners again asserted their claim to a deemed trust in respect of the Executive Plan in accordance with section 57(4) of the PBA in opposition to a request by the Applicants to

distribute the proceeds of sale, as the Applicants had made no recognition to give effect to the deemed trust.

Similar to Century

19. The Honourable Justice Campbell approved the sale of the Applicants' assets to SAPA, but endorsed that a sufficient reserve be set aside with the Monitor for the $3.2 million pending a motion by the Pensioners for a declaration recognizing the deemed trust claim.

July 20, 2009 Endorsement and Orders of Justice Campbell.

Monitor's Eighth Report, at paras. 21, 22, 24, 25.

20. On July 27, 2009, the parties attended before Justice Campbell and set down a timetable on consent regarding the delivery of material and the within motion date.

July 27, 2009 Endorsement of Justice Campbell.

21. On July 30, 2009, the Applicants moved for and were granted two further orders by Justice Morawetz extending the CCAA stay to October 30, 2009, and approving the implementation of a claims process with a claims bar date of August 28, 2009.

PART III – THE ISSUE

22. Does the deemed trust in section 57(4) of the PBA apply to the $3.2 million currently held in reserve by the Monitor and rendering such funds not distributable to other creditors, should that amount be paid to the Executive Plan and should such orders and declarations survive any bankruptcy of the Applicants?

Answer: **Yes to all.**

PART IV – THE LAW

23. The purpose of the PBA is to protect members and pensioners of pension plans. The Supreme Court of Canada recently re-affirmed this purpose.

> [28] The purpose of the PBA was explained at para. 13 of *Monsanto*, citing *GenCorp Canada Inc. v. Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at para. 16:
>
> > [T]he *Pension Benefits Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures".
>
> ***Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39, at para. 28.**

24. The Ontario Court of Appeal has also confirmed that the purpose of the PBA is to protect members and pensioners of pension plans:

> [25] I start with this observation: pension plans are for the benefit of the employees, not the companies which create them. They are a particularly important component of the compensation employees receive in return for their labour. They are not a gift from the employer; they are earned by the employees. Indeed, in addition to their labour, employees usually agree to other trade-offs in order to obtain a pension. As explained by Cory J. in *Schmidt v. Air Products Canada Ltd.*, 1994 CanLII 104 (S.C.C.), [1994] 2 S.C.R. 611 at 646:
>
> > In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour.
>
> [26] Similar statements have been expressed by this court in several cases. In *Gencorp Canada Inc. v. Ontario (Superintendent of Pensions)* 1998 CanLII 2947 (ON C.A.), (1998), 39 O.R. (3d) 38 at 43 (C.A.), Robins J.A. said:
>
> > [T]he *Pension Benefit Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans . . . .

***Huus v. Ontario (Superintendent of Pensions)*, 2002 CanLII 23593 (Ont. C.A.) 58 O.R. (3d) 380, at paras. 25-26**

Winding up a pension plan under the PBA

25. The PBA comprehensively regulates all aspects of registered pension plans in Ontario, including their wind up. The PBA provides a complete scheme setting out what is required to wind up a pension plan including the provision of notice to plan members, benefit entitlements and funding requirements.

26. The wind up of a pension plan is a process and not a single event. It is commenced by an event that triggers the commencement of the wind up and continues until the last dollar is liquidated from the pension fund.

Ari N. Kaplan, *Pension Law* (2006: Irwin Law, Toronto) ("Pension Law") at p. 503.

27. Under the PBA, there are two ways a pension plan may be wound up. First, the employer who is sponsoring the plan (and who is the administrator) may wind up the plan. Second, the Superintendent of Financial Services may order a pension plan to be wound up.

PBA, s. 68, 69.

28. The relevant wind up sections in the PBA for a single employer pension plan such as the Executive Plan are set out below:

WINDING UP

Winding up

68. (1) The employer or, in the case of a multi-employer pension plan, the administrator may wind up the pension plan in whole or in part. R.S.O. 1990, c. P.8, s. 68 (1).

...

Notice

(2) The administrator shall give written notice of proposal to wind up the pension plan to,

(a) the Superintendent;

(b) each member of the pension plan;

(c) each former member of the pension plan;

(d) each trade union that represents members of the pension plan;

(e) the advisory committee of the pension plan; and

(f) any other person entitled to a payment from the pension fund. R.S.O. 1990, c. P.8, s. 68 (2).

. . .

Information

(4) The notice of proposal to wind up shall contain the information prescribed by the regulations. R.S.O. 1990, c. P.8, s. 68 (4).

Effective date

(5) The effective date of the wind up shall not be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension benefits, or, in any other case, on the date notice is given to members. R.S.O. 1990, c. P.8, s. 68 (5).

Order by Superintendent

(6) The Superintendent by order may change the effective date of the wind up if the Superintendent is of the opinion that there are reasonable grounds for the change. R.S.O. 1990, c. P.8, s. 68 (6).

PBA, at s. 68.

29. The Superintendent of Financial Services has published a detailed policy explaining the wind up process.

***Filing Requirements and Procedure on Full or Partial Wind Up of a Pension Plan*, FSCO Policy Bulletin W100-102, December 9, 2004 ("FSCO Bulletin W100-102).**

Winding up by order of the Superintendent

30. A pension plan may also be ordered to be wound up by the Superintendent. The PBA provides:

Winding up order by Superintendent

69.(1)The Superintendent by order may require the wind up of a pension plan in whole or in part if,

(a) there is a cessation or suspension of employer contributions to the pension fund;

(b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;

(c) the employer is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada);

(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;

(e) all or a significant portion of the business carried on by the employer at a specific location is discontinued;

(f) all or part of the employer's business or all or part of the assets of the employer's business are sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person;

(g) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in whole or in part;

(h) in the case of a multi-employer pension plan,

(i) there is a significant reduction in the number of members, or

(ii) there is a cessation of contributions under the pension plan or a significant reduction in such contributions; or

(i) any other prescribed event or prescribed circumstance occurs. R.S.O. 1990, c. P.8, s. 69 (1); 2002, c. 18, Sched. H, s. 5 (1).

Date and notice

(2)In an order under subsection (1), the Superintendent shall specify the effective date of the wind up, the persons or class or classes of persons to whom the administrator shall give notice of the order and the information that shall be given in the notice. R.S.O. 1990, c. P.8, s. 69 (2).

[emphasis added]

31. Under section 71(1) of the PBA, where a plan that is to be wound up does not have an administrator or the administrator fails to act, the Superintendent may act as the administrator or appoint an administrator.

PBA, s. 71(1).

The Wind Up Date

32. As noted above, when an employer is in the course of the wind up process, a wind up date will need to be selected. FSCO Bulletin W100-102 describes how the wind up date is to be selected within the parameters of section 68(5) of the PBA:

> **1.2 Legislative Requirements and Current FSCO Practice**
>
> **1.2.1 Effective Date of Wind Up**
>
> Subsection 68(5) of the PBA provides that the effective date of wind up cannot be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension plans, or in any other case, on the date the notice of wind up is given to members. Where a wind up results from a specific event such as plant closure, bankruptcy or purchase and sale, the effective date may not be earlier than the date of the specific even precipitating the wind up unless the requirements of subsection 68(5) of the PBA have been met prior to that date.
>
> The Superintendent may change the effective date of the wind up by order, if in the Superintendent's view there are reasonable grounds for such a change (subsection 68(6) of the PBA). The effective date of wind up may not be obvious in some circumstances, such as where there are a series of terminations of employment related to a downsizing. In such situations, the administrator or agent is encouraged to submit a written proposal supporting the selection of both the effective date of wind up and the time period during which the termination of a member will result in the member being included in the wind up. FSCO staff will consider the proposal in light of legislative requirements.
>
> **FSCO Bulletin W100-102, *supra.*, paras. 1,2.**

33. The Executive Plan is not contributory and in any case there are no active employees. Thus, according to section 68(5) of the PBA, the wind up date should be the date that the notice of wind up is given to plan members by the Applicants, if they do so.

34. However, under section 68(6), the Superintendent has discretion to change the wind up date if the Superintendent is of the opinion that there are reasonable grounds for the change. FSCO Bulletin W100-102 states that where a wind up stems from a specific event such as a purchase and sale of the business, the wind up date cannot be earlier than the date of the specific event that precipitates the wind up.

35. In either scenario, whether a wind up is effected by the employer or by order of the Superintendent, the employer is responsible to pay any amounts that remain owing to the pension plan:

> **Liability of employer on wind up**
>
> 75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
>
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
>
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
>
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.
>
> **Payment**
>
> (2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times. R.S.O. 1990, c. P.8, s. 75 (2).
>
> **PBA, s. 75.**

36. Section 31 of Regulation 909 under the PBA states that the amounts to be paid to a pension plan on its wind up by an employer must be paid within a five year period starting from the date of the wind up:

> 31. (1) ***The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.***
>
> (2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, ***over not more than five years***; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30(2)(*b*) and (*c*).

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

(4) Subsection (5) applies to a qualifying plan or to a plan with the following history:

1. An election was made in respect of the plan under subsection 5.1(1) or (2).

2. The election was rescinded in accordance with subsection 5.1(12).

3. After the date of the election but within five years after the date on which the election was rescinded, the plan was wound up.

(5) For a qualifying plan or a plan with the history described in subsection (4), the liability to be funded under section 75 of the Act shall be funded by monthly special payments by the employer to the pension fund over a period of not more than one year beginning on the effective date of the wind up. [emphasis added]

PBA Regulation 909, R.R.O. 1990, Amended to O. Reg. 570/06.

The PBA Deemed Trust

37. Section 57(4) of the PBA states that where a pension plan is wound up, an employer who is required to pay contributions to the fund of the pension plan shall be deemed to hold an amount equal to employer contributions in trust, even if those amounts are not yet due under the pension plan terms or the PBA:

Trust property

. . .

Wind up

57(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.

PBA, s. 57.

38. Article 14 of the Executive Plan text states that upon wind up of the plan, the Company shall make contributions to the fund "as required by the Plan and Applicable Pension Legislation". Article 14 states:

> **Article 14 – Right to Amend or Termination the Plan**
>
> ...
>
> 14.3 Termination of the Plan
>
> ...
>
> b) If the Plan is wound up, in whole or in part, the Employer will not make further contributions to the Fund in respect of the Plan or the portion of the Plan being wound up, as applicable, ***except for amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation.*** [emphasis added]

Carruthers August 15 Affidavit, at para. 13.

39. In *Abraham v. Coopers & Lybrand* the court held that the purpose of the deemed trust in the PBA is protect the members of the pension plan.

> (a) What are the features of the provincial legislation in question? The legislation involves laws of general application applicable to all employees in the province without distinction. It is agreed that the relevant statutory provisions are intra vires of the province. They were enacted pursuant to the provincial constitutional authority of property and civil rights. Looking at s. 15 of the *Employment Standards Act* and s. 23(3) of the *Pension Benefits Act*, ***it is clear that there is both a trust and a separate lien created to protect the employees. The provincial statutory provisions elevate the employees' entitlement beyond simple debt in a creditor/debtor relationship.*** This provincial legislation creates a lien against assets in the amount of the trust claim. [emphasis added]

Abraham v. Coopers & Lybrand **(1993) 13 O.R. (3d) 649 (Gen. Div.), at para. 57.**

40. In *Ivaco,* Farley J. considered section 57 of the PBA and concluded that in a non-bankruptcy situation, the assets of the company are subject to a deemed trust on account of both unpaid contributions and wind up liabilities in favour of the pension beneficiaries:

> [11] While in a non-bankruptcy situation, ***the Ivaco Companies' assets are subject to a deemed trust on account of unpaid contributions and wind up liabilities*** in favour of the pension beneficiaries by s. 57(3) of the *Pension Benefits Act* (Ontario), [emphasis added]
>
> ***Re Ivaco Inc.*, 2005 CanLII 27605 (Ont.S.C.), at para. 11.**

The PBA Deemed Trust has priority over secured creditors

41. Section 30(7) of the PPSA expressly gives priority to the deemed trust in the PBA over secured creditors. The section states:

> **Priorities**
> **30.** (1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:
>
> . . .
>
> **Deemed trusts**
> (7) A security interest in an account or inventory and its proceeds ***is subordinate to the interest of a person who is the beneficiary of a deemed trust*** arising under the *Employment Standards Act* or **under the *Pension Benefits Act***.
>
> ***Personal Property Security Act*, R.S.O. 1990, c. P. 10, s. 30.**

42. In *Usarco*, Farley, J. first gave effect to the deemed trust in section 57 of the PBA and then applied the priority rule in section 30(1) of the PPSA and ordered the receiver to pay an amount of money equal to the regular and special payments required to have been made but not yet paid into the pension plan:

> 13 Therefore, since the bankruptcy petition has not been dealt with, we are presently dealing with a claim by the administrator for certain trust funds held by the receiver. ***The security interest of the bank is subordinate to the interest of the beneficiaries of the deemed trust*** (represented by the administrator) (see: s. 30(7), *PPSA*).
>
> ***Re Usarco Limited* (1991) 42 E.T.R. 235 (Ont. Gen. Div.), at para. 29 ("*Usarco*").**

The deemed trust in the PBA also creates a fiduciary duty on the Applicants

43. A plan administrator owes a fiduciary duty to pension plan members and pensioners in respect of all activities administering a pension plan both under section 22 of the PBA and the common law.

***Pension Law*, supra, at pp. 330-345.**

44. The administrator's fiduciary duty continues through the wind up of a pension plan and extends to any discretionary decisions made by an administrator during the wind up process. The exercise of discretion by an administrator during the wind up process must be discharged in a manner that avoids any conflicts of interest in respect of its role as both administrator and employer.

***Pension Law*, supra, at pp. 522-523.**

45. In *Usarco*, Justice Farley also held that the deemed trust provisions themselves in the PBA imply a fiduciary obligation on the company.

***Usarco, supra*, at para. 16.**

46. The Applicants are required to act in the best interests of the Pensioners. For the subject of this motion, this means that the Applicants should be required to give effect to the deemed trust and direct the payment of the $3.2 million into the fund of the Executive Plan.

47. If the deemed trust is not given effect and paid to the fund of the Executive Plan, then the $3.2 million being held by the Monitor will be used to pay other creditors. The British Columbia Court of Appeal recently held that the section 11 stay powers in the CCAA do not permit the CCAA court to authorize a breach of the deemed trust for the benefit of another creditor.

***Re Ted Leroy Trucking Ltd.*, 2009 BCCA 205, at para. 30.**

PART V - ORDERS REQUESTED

48. The Pensioners respectfully request:

a) A declaration that the $3.2 million held in reserve by the Monitor is subject to a deemed trust for the beneficiaries of the Executive Plan and not distributable to other creditors and that such orders and declarations survive any bankruptcy of the Applicants; and

b) An order for costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of August, 2009.

Andrew J. Hatnay LSUC#: 31885W

Demetrios Yiokaris LSUC#: 45852L

Andrea McKinnon LSUC#: 55900A

TAB A

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services),* 2009 SCC 39.

2. *Huus v. Ontario (Superintendent of Pensions)*, 2002 CanLII 23593 (Ont. C.A.); 58 O.R. (3d) 380.

3. Ari N. Kaplan, *Pension Law* (2006: Irwin Law, Toronto).

4. *Filing Requirements and Procedure on Full or Partial Wind Up of a Pension Plan*, FSCO Policy Bulletin W100-102, December 9, 2004.

5. *Abraham v. Coopers & Lybrand* (1993), 13 O.R. (3d) 649 (Gen. Div.).

6. *Re Ivaco Inc.,* 2005 CanLII 27605 (Ont.S.C.).

7. *Re Usarco Limited.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.).

8. *Re Ted Leroy Trucking Ltd.*, 2009 BCCA 205.

TAB B

SCHEDULE "B"
RELEVANT STATUTES

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

Powers of court

11. (1) 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.

Initial application

(2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.

Initial application court orders

(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.

2. *Pension Benefits Act*, R.S.O. 1990, c. P.8.

Care, diligence and skill

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

Special knowledge and skill

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

Member of pension committee, etc.

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

Conflict of interest

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

Employment of agent

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

Trustee of pension fund

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

Responsibility for agent

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

Employee or agent

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

Benefit by administrator

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

Member of pension committee, etc.

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

Payment to agent

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

Trust property

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.

Money withheld

(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.

Accrued contributions

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

Wind up

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

Lien and charge

(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).

Application of subss. (1, 3, 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.

Money to be paid to insurance company

(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. R.S.O. 1990, c. P.8, s. 57.

WINDING UP

Winding up

68. (1) The employer or, in the case of a multi-employer pension plan, the administrator may wind up the pension plan in whole or in part. R.S.O. 1990, c. P.8, s. 68 (1).

Same, jointly sponsored pension plans

(1.1) The following rules apply, and subsection (1) does not apply, with respect to jointly sponsored pension plans:

1. If a jointly sponsored pension plan is also a multi-employer pension plan, the administrator may wind up the plan in whole or in part unless the documents that create and support the plan authorize another person or entity to do so. In that case, the authorized person or entity may wind up the plan in whole or in part.

2. If a jointly sponsored pension plan is not a multi-employer pension plan, the administrator or another person or entity may wind up the plan in whole or in part if the documents that create and support the plan authorize the administrator, person or entity to do so. 2005, c. 31, Sched. 18, s. 8.

Notice

(2) The administrator shall give written notice of proposal to wind up the pension plan to,

(a) the Superintendent;

(b) each member of the pension plan;

(c) each former member of the pension plan;

(d) each trade union that represents members of the pension plan;

(e) the advisory committee of the pension plan; and

(f) any other person entitled to a payment from the pension fund. R.S.O. 1990, c. P.8, s. 68 (2).

Notice of partial wind up

(3) In the case of a proposal to wind up only part of a pension plan, the administrator is not required to give written notice of the proposal to members, former members or other persons entitled to payment from the pension fund if they will not be affected by the proposed partial wind up. R.S.O. 1990, c. P.8, s. 68 (3).

Information

(4) The notice of proposal to wind up shall contain the information prescribed by the regulations. R.S.O. 1990, c. P.8, s. 68 (4).

Effective date

(5) The effective date of the wind up shall not be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension benefits, or, in any other case, on the date notice is given to members. R.S.O. 1990, c. P.8, s. 68 (5).

Order by Superintendent

(6) The Superintendent by order may change the effective date of the wind up if the Superintendent is of the opinion that there are reasonable grounds for the change. R.S.O. 1990, c. P.8, s. 68 (6).

Winding up order by Superintendent

69.(1)The Superintendent by order may require the wind up of a pension plan in whole or in part if,

(a) there is a cessation or suspension of employer contributions to the pension fund;

(b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;

(c) the employer is bankrupt within the meaning of the *Bankruptcy and Insolvency Act* (Canada);

(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;

(e) all or a significant portion of the business carried on by the employer at a specific location is discontinued;

(f) all or part of the employer's business or all or part of the assets of the employer's business are sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person;

(g) the liability of the Guarantee Fund is likely to be substantially increased unless the pension plan is wound up in whole or in part;

(h) in the case of a multi-employer pension plan,

(i) there is a significant reduction in the number of members, or

(ii) there is a cessation of contributions under the pension plan or a significant reduction in such contributions; or

(i) any other prescribed event or prescribed circumstance occurs. R.S.O. 1990, c. P.8, s. 69 (1); 2002, c. 18, Sched. H, s. 5 (1).

Date and notice

(2)In an order under subsection (1), the Superintendent shall specify the effective date of the wind up, the persons or class or classes of persons to whom the administrator shall give notice of the order and the information that shall be given in the notice. R.S.O. 1990, c. P.8, s. 69 (2).

Appointment of administrator to wind up

71.(1)If a pension plan that is to be wound up in whole or in part does not have an administrator or the administrator fails to act, the Superintendent may act as or may appoint an administrator.

Costs of administration on winding up

(2)The reasonable administration costs of the Superintendent or of the administrator appointed by the Superintendent may be paid out of the pension fund. R.S.O. 1990, c. P.8, s. 71.

Termination

(3)The Superintendent may terminate the appointment of an administrator appointed by him or her if the Superintendent considers it reasonable to do so. 1999, c. 15, s. 13.

Liability of employer on wind up

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

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

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

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

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

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

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.

Payment

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

Exception, jointly sponsored pension plans

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

3. ***Pension Benefits Act*, R.R.O. 1990, Regulation 909.**

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund. O. Reg. 712/92, s. 19.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30 (2) (b) and (c). O. Reg. 712/92, s. 19.

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded. O. Reg. 712/92, s. 19.

(4) Subsection (5) applies to a qualifying plan or to a plan with the following history:

1. An election was made in respect of the plan under subsection 5.1 (1) or (2).

2. The election was rescinded in accordance with subsection 5.1 (12).

3. After the date of the election but within five years after the date on which the election was rescinded, the plan was wound up. O. Reg. 712/92, s. 19.

(5) For a qualifying plan or a plan with the history described in subsection (4), the liability to be funded under section 75 of the Act shall be funded by monthly special payments by the employer to the pension fund over a period of not more than one year beginning on the effective date of the wind up. O. Reg. 712/92, s. 19.

4. ***Personal Property Security Act,*** **R.S.O. 1990, c. P.10.**

Priorities

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

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

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

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

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

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

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

Idem

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

Future advances

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

Exception

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

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

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

Proceeds

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

Reperfected security interests

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

Same, extended time

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

Deemed trusts

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

Exception

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

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

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

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

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at **Toronto**

FACTUM
(Motion by retirees re: Deemed Trust, returnable August 28, 2009)

KOSKIE MINSKY LLP
900-20 Queen Street West, Box 52
Toronto, ON M5H 3R3

Andrew J. Hatnay (LSUC#: 31885W)
Email: ahatnay@kmlaw.ca
Tel: 416-595-2083
Fax: 416-204-2877

Demetrios Yiokaris (LSUC#: 45852L)
Email: dyiokaris@kmlaw.ca
Tel: 416-595-2130
Fax: 416-204-2810

Andrea McKinnon (LSUC#: 55900A)
Email: amckinnon@kmlaw.ca
Tel: 416-595-2150
Fax: 416-204-2874

Lawyers for Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser and Fred Granville, members of the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies

APPENDIX "I"

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

REPLY FACTUM OF THE PENSIONERS

(Motion by retirees re: Deemed Trust, returnable August 28, 2009)

August 27, 2009

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900, Box 52
Toronto, Ontario M5H 3R3

Andrew J. Hatnay LSUC#: 31885W
Email: ahatnay@kmlaw.ca
Tel: 416-595-2083
Fax: 416-204-2872

Demetrios Yiokaris LSUC#: 45852L
Email: dyiokaris@kmlaw.ca
Tel: 416-595-2130
Fax: 416-204-2810

Lawyers for Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser and Fred Granville, members of the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies

TO: THE SERVICE LIST

REPLY FACTUM

1. This Factum is filed by the Pensioners in support of their Deemed Trust motion returnable on August 28, 2009 and in reply to the Applicants' Factum.

2. This motion involves a dispute between the Pensioners of the Executive Plan and the Applicants over $3.2 million of the proceeds of the sale of the Applicants' Canadian assets to SAPA. The Executive Plan is underfunded on a wind up basis by approximately $3.2 million. The Pensioners assert a deemed trust over those amounts under section 57(4) of the Ontario *Pension Benefits Act* (PBA). The deemed trust in the PBA has priority over secured creditors under section 30(7) of the Ontario *Personal Property Security Act*.

3. The Applicants business has been sold to SAPA as a going concern. The Applicants' directors have resigned, there is no remaining business and they are "insolvent shells" (per affidavit of Keith Cooper sworn August 24, 2009, paras. 33 and 35).

4. The Executive Plan will be wound up. If it is wound up in its current underfunded state, then the Pensioners will have the pension benefits that they earned during years of employment with the Applicants, and upon which they depend for income for the rest of their lives, significantly reduced.

5. The Pensioners are opposed by the Applicants, however, as noted above, the Applicants have no management and no business. On August 12, 2009, following the sale to SAPA, the Applicants entered into a Shareholder Declaration granting full power and control of its management to Indalex Holdings Corp. ("Indalex U.S."), a U.S. company in parallel chapter 11 proceedings. Indalex U.S. now administers the Executive Plan.

6. Indalex U.S. has directed that Indalex Limited seek leave of this court to assign itself into bankruptcy as part of efforts to defeat the Pensioners' deemed trust claim. If the Pensioners' deemed trust claim is defeated, the amount held in reserve by the Monitor in

respect of the deemed trust motions will be used in a U.S. claims process to pay the claims of U.S. creditors.

Cross-examination of Keith Cooper, August 26, 2009

The Wind Up of the Executive Plan is a Certainty

7. According to the Affidavit of Keith Cooper sworn August 24, 2009 (a senior managing director with FTI Consulting Inc. and currently the chief restructuring officer of Indalex U.S.:

> The Applicants are no longer carrying on business, have no active employees and no tangible assets, other than cash (including sales proceeds and certain tax refunds). The Board of Directors of the Applicants has resigned and the former directors are currently employed by SAPA. The Applicants are insolvent shells.

Due to the sale of the Applicants business and the request for leave to assign itself into bankruptcy, the wind up of the Executive Plan is a certainty.

8. A pension plan must be administered in the best interests of the members of the plan. As explained in the Pensioners main factum, the pension plan administrator owes a fiduciary duty to the members and former members of the plan. The administration of the plan and the decisions and acts performed by the administrator must be performed in the best interests of the members and former members. The fiduciary duty on a plan administrator has been confirmed in numerous authorities including the Ontario Court of Appeal in *Ivaco*.

9. The delay by Indalex U.S. to proceed with the wind up and instead seek an assignment in bankruptcy are manoeuvres designed to defeat the Pensioners' deemed trust claim and to channel the $3.2 million in reserve to the U.S. company which in turn will be used to pay U.S. creditors. Indalex U.S., the administrator of the Executive Plan, is in flagrant conflict of interest and breach of its fiduciary duty to the Pensioners. This Court should not permit that breach to occur.

10. As the Applicants are not proceeding with the wind up process on their own, then under section 69 of the PBA, the Superintendent of Financial Services will require the wind up of a pension plan as certain circumstances as set out below have occurred:

> 69.(1)The Superintendent by order may require the wind up of a pension plan in whole or in part if,
>
> (a) there is a cessation or suspension of employer contributions to the pension fund;
>
> (b) the employer fails to make contributions to the pension fund as required by this Act or the regulations;
>
> (c) the employer is bankrupt within the meaning of the Bankruptcy and Insolvency Act (Canada);
>
> (d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;
>
> (e) all or a significant portion of the business carried on by the employer at a specific location is discontinued; [or]
>
> (f) all or part of the employer's business or all or part of the assets of the employer's business are sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer's pension plan who become employees of the person;

11. In this case, the criteria in 69(1)(a)(d)(e) and (f) have all been met. The criteria in section 69 are disjunctive, meaning that only one of the criteria need be met to warrant the Superintendent to step in and require the wind up of a pension plan. In this case, four of the criteria are met.

12. The Applicants say that since the wind up process for the Executive Plan has not yet commenced, the deemed trust does not yet arise. The chief restructuring officer of Indalex U.S. who is now administering the Executive Plan, has deposed under oath that he does not disagree with the Monitor's statement in the letter attached to the Monitor's 7th Report that the Executive Plan will be wound up.

13. There is a shortfall in the amount of assets in the Executive Plan to pay for pensions. The most recent actuarial valuation for the Executive Plan as of January 1, 2008 stated that the deficiency in the Executive Plan on a wind up basis was $2,996,400. In a more recent review of the funded status of Executive Plan conducted by the actuarial firm Morneau Sobeco, they estimate that the wind up liability for the Executive Plan if wound up as of July 15, 2009 is $3.2 million.

14. Section 57 of the PBA provides:

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

15. The deemed trust in section 57(4) captures amounts that are owing to a pension plan "that are not yet due under the plan or the regulations". Even though Indalex U.S. has not started the wind up process, it is inevitable that a wind up will occur and that there will be a shortfall. The best evidence before this court is that the wind up liability is $3.2 million as of July 15, 2009. According to the affidavit of Bob Kavanaugh sworn August 12, 2009 (para. 21) he states that "*currently, approximately 80% of the assets of the Executive Plan are invested in fixed income securities and approximately 20% of the assets of the Executive Plan are invested in equities.*" Accordingly, there will be no appreciable change to the funded status of the Executive Plan even if one were to consider recent market improvements. The plan will certainly be underfunded in the approximate amount of $3.2 million on its wind-up. The prospective language of section 57(4) captures that amount.

16. Further, section 58(1) is entitled "Accrual" and states that "Money that an employer is require to pay into a pension fund accrues on a daily basis". This means that all amounts that will have accrued to the date of the wind up are captured by the deemed trust in section 57(4).

PBA, section 58(1)

The Applicants proposed interpretation of the PBA is wrong

17. The *PBA* sets out a detailed process governing how an Ontario pension plan is to be wound-up. Section 75 of the *PBA* imposes a comprehensive liability on an employer to pay into the pension fund on its wind up all amounts that are required to be paid into the fund to provide the pension benefits that the plan is required to pay to its members. Section 75 states:

> Liability of employer on Wind Up
>
> 75. (1) Where a pension plan is wound up in whole or in part, ***the employer shall pay into the pension fund,***
>
> (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued ***and that have not been paid into the pension fund; and***
>
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
>
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, ***and***
>
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200. [emphasis added]

18. Section 75 breaks out the different categories of required payments in its subsections, all of which are required to be paid into a pension plan by an employer as of the date of the plan wind up.

19. Section 75(1)(a) requires an employer to pay "an amount equal to the total of all payments that ... are due or that have accrued and have not been paid into the pension fund." This subsection would capture, for example, the amount of all unpaid current service costs and unpaid special payments (i.e., payments that are required while the pension plan is in operation), as those amounts are either due for payment (and have not been paid) or they have accrued but are not yet due to be paid under the payment schedule for special payments in the PBA regulations. On wind up, those payments are captured under section 75(1)(a) for payment as of the wind up date.

20. But section 75 does not stop there. Section 75(1)(b) then requires a further calculation to determine an amount to be paid into the pension plan by an employer comprised of three additional categories in subsections 75(1)(b)(i)(ii) and (iii) that is based on a comparison of the benefits the plan is to provide to the amount of assets in the fund. Section 75(1)(b) calculates the difference and if there is a shortfall, then that shortfall is added to the liability calculated in section 75(1)(a) to arrive at the total employer wind up liability.

21. The Applicants argue in paragraph 17 of their factum that section 75(1)(b) "creates a separate funding obligation in respect to any deficiency that exists in a plan 'following' the wind up." and the amounts in section 75(1)(b) are not subject to the deemed trust in section 57(4). That proposed interpretation is incorrect and is not supported by the words of the PBA.

22. There is no additional liability that accrues "following" a wind up. The wind up liability of a plan is determined as of the wind up date. As noted in the Pensioner's main factum, the wind up date is governed by section 68(5) and (6) of the PBA. All events crystallize on the wind up date: all pension benefit accruals by members cease and all amounts that an employer is required to pay into an underfunded plan are calculated as of the wind up

date. There is no additional or separate wind up liability that develops over time "following" the wind up, as the Applicants suggest.

23. Section 75(1)(a) is differently worded than section 57(4) further eliminating any possible interpretation that section 57(4) only applies to section 75(1)(a) payments. Section 75(1)(a) does not include a reference to amounts accrued "to the date of wind up" which is referenced in section 57(4). The court must give meaning to all words used by the Legislature. In the Pensioners submission, the words accrued "to the date of wind up" are intended to import the wind up deficit into section 57(4) because the wind up deficit accrues as of the date of the wind up. The absence of these words in section 75(1)(a) reinforces the conclusion that section 75(1)(a)'s scope is smaller and only encompasses contributions which were required while the pension plan was in operation.

24. Further, if the Legislature intended that the deemed trust wind up provision in section 57(4) be restricted to amounts determined in section 75(1)(a) as opposed to all of section 75, it would have said so. This is not what the Legislature has done. The language in section 57(4) has no such restriction. The Applicants' proposed interpretation is unsupportable. Section 57(4) encompasses all amounts accrued "to the date of wind up" which, based on the above reasoning, must necessarily include the wind up deficit under section 75(1)(b).

25. The interpretation proposed by the Applicants is not only not inconsistent with the words of the PBA, it is also an interpretation that would not protect pensioners, particularly in a wind up of an underfunded pension plan, where the pensioners are especially vulnerable and need the protection in the PBA. The Applicants' proposed interpretation is entirely contrary to the purpose of the PBA that has been enunciated by the Supreme Court of Canada and numerous other cases. The Applicants' proposed interpretation must be rejected.

Payment of the amounts determined by section 75

26. Once the win dup liability amount has been calculated under section 75, the employer is required to pay that amount into the pension plan. The process by which an employer does so is described in FSCO Bulletin W100-102:

> 3.2 If the wind up report reveals that the plan does not have sufficient assets to pay the liabilities on wind up, the employer must pay into the pension fund amounts required under section 75 of the PBA.
>
> The amount of the deficit to be funded pursuant to clause 75(1)(b) of the PBA is the amount by which the Ontario wind up liability, exclusive of the unfunded portion of non-plan-vested benefits, exceeds the value of plan assets allocated for payment of pension benefits accrued with respect to employment in Ontario. Pursuant to clause 29(9)(a) of the Regulation, where payments are being made in accordance with section 75 of the PBA, the employer is not liable to pay the unfunded portion (based on the wind up funded ratio) of non-plan-vested benefits.
>
> Where the employer funds the deficit by a lump sum payment and the actuary files a certification that the obligations under section 75 of the PBA have been fully funded, the benefits can be paid. As a minimum , the deficit must be funded in accordance with section 31 of the Regulation by annual special payments, payable annually in advance, over a maximum period of five years commencing at the effective date of wind up (for qualifying plans, by monthly special payments over one year).
>
> The administrator is required under section 32 of the Regulation to file a report annually until the employer's obligation under section 75 of the PBA has been fulfilled. This annual report must be prepared by an actuary and must satisfy all standards normally applicable to a valuation report. In addition, the report should provide a again and loss analysis since the last report filed and specify the special payments required to liquidate the remaining liability obligation under section 75 of the PBA. Where a report shows that no further amount is to be funded, subsection 32(4) of the Regulation provides that any surplus may revert to the employer, subject to the requirements of section 79 of the PBA.
>
> Subsection 29(7) and (8) of the Regulation set out the restrictions on cash out, transfers and annuity purchases prior to the plan being fully funded. For information, see policy W100-440 ("Restrictions on Payments in Deficit Situations").

27. The first wind up special payment is due to be paid by the employer on the effective date of the wind up and the balance of payments are due annually over a five year period.

This schedule is designed to ease the burden of making wind up payments by allowing an employer to pay wind up payments in instalments over 5 years. In this way, the required wind up payments are captured by the deemed trust in section 57(4) as they are "*accrued to the date of wind up but not yet due under the plan or regulations.*". If the wind up special payments that can be made in the future were not so captured then it would allow an employer to escape the deemed trust simply by following the 5 year payment schedule. That would undermine the entire purpose of section 57(4).

The Applicants rely on cases that do not deal with the wind up deemed trust

28. The Applicants rely on the *Usarco* and *Ivaco* decisions. The motions before the courts in those cases were not seeking wind up deemed trust under section 57(4) of the PBA. Those cases dealt with motions for deemed trusts for unpaid current service and special payments.

Ivaco (2006) 83 O.R. (3d)108 (C.A.) affirming _Ivaco Inc._, 2005 CanLII 27605 (Ont.S.C.)
Usarco Limited (1991) 42 E.T.R. 235 (Ont. Gen. Div.)

29. It is inappropriate for the Applicants rely upon Justice Laskin's *obiter* in Ivaco as determinative of the issue on this motion. Justice Laskin wrote:

> 44. At paragraph 11 of his Decision, the Motions Judge said that both unpaid contributions and Wind Up liabilities are deemed to be held in Trust ***under section 57(3)***. In his earlier Decision, *Toronto Dominion Bank v. Usarco* (1991), 42 E.T.R. 235, Farley J. said, that at para. 25, that the equivalent legislation then in force under the *Pension Benefits Act*, 1987 S.O. 1987 the 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 this 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.).**

30. Justice Laskin only refers to section 57(3), the "Accrued Contributions" deemed trust provision, not section 57(4), the wind up deemed trust provision. Further, Justice Laskin states that his comments are *in obiter* and not binding. It is clear that Justice Laskin never considered this matter at length, nor did he have to.

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

Andrew J. Hatnay LSUC#: 31885W

Demetrios Yiokaris LSUC#: 45852L

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

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

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

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at **Toronto**

REPLY FACTUM OF THE PENSIONERS

(Motion by retirees re: Deemed Trust, returnable August 28, 2009)

KOSKIE MINSKY LLP
900-20 Queen Street West, Box 52
Toronto, ON M5H 3R3

Andrew J. Hatnay (LSUC#: 31885W)
Email: ahatnay@kmlaw.ca
Tel: 416-595-2083
Fax: 416-204-2877

Demetrios Yiokaris (LSUC#: 45852L)
Email: dyiokaris@kmlaw.ca
Tel: 416-595-2130
Fax: 416-204-2810

Lawyers for Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser and Fred Granville, members of the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies

APPENDIX "J"

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

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

Applicants

FACTUM

(Appeal by Retirees regarding pension plan wind up deemed trust and breach of fiduciary duty)

KOSKIE MINSKY LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Andrew J. Hatnay (LSUC# 31885W)
Tel: 416-595-2083
Fax: 416-204-2877
Email: ahatnay@kmlaw.ca

Demetrios Yiokaris (LSUC# 45852L)
Tel: 416-595-2130
Fax: 416-204-2810
Email: dyiokaris@kmlaw.ca

Lawyers for Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser and Fred Granville, members of the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies Appellants (the "Retirees")

TO: **SACK GOLDBLATT MITCHELL LLP**
20 Dundas Street West,
Suite 1100
Toronto, ON M5G 2G8

Darrell Brown
Tel: 416-979-4050
Fax: 416-591-7333
Email: dbrown@sgmlaw.com

Lawyers for the United Steelworkers

TO: **STIKEMAN ELLIOTT LLP**
Barristers and Solicitors
Commerce Court West
199 Bay Street, Suite 5300
Toronto, ON M5L IB9

Ashley Taylor
Tel: 416-869-5236
E-mail: ataylor@stikeman.com

Lesley Mercer
Tel: 416-869-6859
E-mail: lmercer@stikeman.com

Lawyers for the Monitor, FTI Consulting Canada ULC

AND TO: **GOODMANS LLP**
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Brian Empey
Tel: 416-597-4194
Fax: 416-979-1234
E-mail: bempey@goodmans.ca

Fred Myers
Tel: 416-597-5923
Fax: 416-979-1234
E-mail: fmyers@goodmans.ca

Lawyers for Sun Indalex Finance, LLC

AND TO: **FINANCIAL SERVICES COMMISSION OF ONTARIO**
Legal Services Branch
5160 Yonge Street
17th Floor, Box 85
Toronto, ON M2N 6L9

Mark Bailey
Tel: 416-590-7555
Fax: 416-590-7556
Email: mark.bailey@fsco.gov.on.ca

Counsel for the Superintendent of Financial Services

PART 1 - THE APPELLANTS AND THE DECISION UNDER APPEAL

1. This is an appeal from the decision of Justice Campbell of the Ontario Superior Court of Justice (Commercial List) (the "CCAA judge") dated February 18, 2010 by Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser and Fred Granville (collectively, the "Retirees").

2. The Retirees are retired employees of the Applicants or their predecessor companies (hereinafter, "Indalex" or the "company"). They are entitled to receive pension benefits from the *Retirement Plan for Executive Employees of Indalex Canada and Associated Companies*, a registered pension plan sponsored by the company and filed with the Financial Services Commission of Ontario and Canada Revenue Agency under Registration No. 0455626 (the "Executive Plan").

3. On August 28, 2009, three motions were argued before the CCAA Judge:

   (a) A motion by the Retirees for a declaration that the amount representing the wind up liability owing to the Executive Plan is subject to a deemed trust under section 57(4) of the Ontario *Pension Benefits Act*, R.S.O. 1990, c, P.8 ("PBA") for the benefit of the beneficiaries of the Executive Plan and is to be paid to the fund of the Executive Plan. The Retirees also argued that the company had breached its fiduciary duty to the Retirees;

   (b) A motion by the United Steelworkers ("USW") for a declaration that the amount representing the wind up payments owing to the Retirement Plan for Salaried

Employees of Indalex and Associated Companies (the "Salaried Plan") is subject to a deemed trust for the benefit of the beneficiaries of the Salaried Plan to be paid to the fund of the Salaried Plan; and

(c) A motion by the company for an order lifting the CCAA stay of proceedings to allow the company to file a voluntary assignment in bankruptcy, and take all steps necessary for the filing of an assignment in bankruptcy.

4. The motions were decided by the CCAA Judge in one Reasons for Decision released on February 18, 2010. The results of the motions are as follows:

(a) The CCAA Judge dismissed the Retirees' motion essentially on the basis that since the wind up of the Executive Plan had not yet occurred, there were "no deficiencies in payments" owing to the Executive Plan and thus there was no basis for a deemed trust "at this time".[1] The CCAA Judge also erroneously concluded without any analysis and without addressing the company's breach of fiduciary duty that the Court "did not have the mandate to exercise discretion to do what it or any group might consider fair and equitable."[2]

(b) The CCAA Judge dismissed the USW's motion on the basis that, although the wind up process had commenced and wind up payments had been calculated, a payment was not actually due on July 20, 2009, the date of the sale approval motion (discussed further below) and therefore no amount was subject to a deemed trust as of that date. The CCAA Judge stated:

---

[1] Reasons for Decision of Justice Campbell of the Ontario Superior Court of Justice (Commercial List), dated February 18, 2010 [Campbell Reasons], Appeal Book and Compendium of the Retirees [Retirees' Compendium], Tab 5 at para. 24.

[2] Campbell Reasons, Retirees' Compendium, Tab 5 at para. 47

> [49] In this case I have concluded there is no conflict between the federal and provincial legislation. I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the PBA or the Regulations thereunder to pay any amount into the [Salaried] Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the CCAA.
>
> [50] Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.[3]

(c) The CCAA Judge dismissed the company's motion for leave to assign itself into bankruptcy on the basis that, given his rejection of on the deemed trust motions, the company's motion for an assignment into bankruptcy was moot. He stated:

> [52] The Applicants and Indalex US, in addition to disputing the validity of the deemed trust claim, sought to file a voluntary assignment in bankruptcy to ensure the priority regime they urged as the basis for resisting the deemed trust.
> ...
>
> [55] Given that disposition, the question of bankruptcy assignment might well be moot. In my view, a voluntary assignment under the BIA should not be used to defeat a secured claim under valid Provincial legislation, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the CCAA or the BIA. For that reason I did not entertain the bankruptcy assignment motion first.[4]

PART II – OVERVIEW

5. Through their years of employment service with the company, the Retirees earned an entitlement to be paid pension benefits on their retirement from the company under the Executive Plan.

---

[3] Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 49-50.

[4] Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 52 and 55.

6. The Executive Plan is a defined benefit plan. As of January 1, 2008, there were 18 members of the Executive Plan, none of whom were active employees. The pension benefits from the Executive Plan are to be paid for the lives of the Retirees and the lives of the designated beneficiaries.[5]

7. The Executive Plan is underfunded. As of January 1, 2008, the Executive Plan had funding deficiencies on an ongoing basis of $2,535,100, on a solvency basis of $1,102,800 and on a wind-up basis of $2,996,400. As of July 15, 2009, an actuarial review indicated that the wind up deficiency had worsened and was estimated at $3,200,000.

8. On April 3, 2009, Indalex obtained protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 ("CCAA"). An Initial CCAA Order was issued as of that date, and subsequently amended (the "Initial CCAA Order").

9. This was a "liquidating CCAA" proceeding from its outset. There was no restructuring of the company. There was no plan of compromise prepared and presented to creditors. Two and half weeks after obtaining CCAA protection, the company commenced a marketing process to sell itself.

10. On July 20, 2009, the CCAA court approved the sale of all the company's assets to a purchaser called SAPA Holdings AB. As a term of the sale negotiated between Indalex and SAPA, SAPA did not assume any responsibility or liability for the Executive Plan.

11. The company did nothing with the underfunded Executive Plan and did nothing to fund the deficit. In fact, the company took active steps to defeat the Retirees' claim for a

---

[5] Affidavit of Keith Carruthers, sworn June 23, 2009 [Carruthers June 23, 2009 Affidavit], Retirees' Compendium, Tab 14 at para. 40.

deemed trust. The Ontario Superintendent of Financial Services subsequently appointed an administrator to take over the administration of the Executive Plan and wind up the plan.

12. There are no funds to pay unsecured creditors.

13. The Retirees are being severely prejudiced. Due to its current underfunded state, the Retirees have already had their monthly pension benefits from the Executive Plan cut by approximately 30-40%.[6] Unless money is paid into the Executive Plan, those cuts will become permanent. Coupled with the additional loss of their supplemental pension benefits that were terminated by the company after it obtained CCAA protection, this means that the Retirees are incurring a one-half to two-third cut to their pension benefits from the company.[7] This is a very substantial loss of pension benefits during their retirement years.[8]

14. The CCAA Judge erred in his interpretation of section 57(4) of the PBA that the deemed trust only applies to a pension plan that has already been wound up, and erred in his conclusion that an amount must actually be due and payable to a wound up pension plan as of a specific date for the deemed trust to apply. Although those were the conclusions upon which he based his decision, the CCAA Judge went further and erred in his suggestion that the wind up deemed trust does not cover unpaid wind up liability payments. He erred further by not deleting the provision of the Initial CCAA Order that granted priority to the DIP lender over deemed trusts, which is contrary to section 30(1) of the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P. 10, s. 30 ("PPSA") where paramountcy was not invoked.

---

[6] Exhibit F to the Carruthers June 23, 2009 Affidavit, Retirees' Compendium, Tab 14, Letter to Counsel from Koskie Minsky LLP, dated June 17, 2009.

[7] Carruthers June 23, 2009 Affidavit, Retirees' Compendium, Tab 14 at paras. 18 and 19 and Exhibit D to the Carruthers June 23, 2009 Affidavit, Affidavit of Timothy R. J. Stubbs, sworn April 3, 2009; Affidavit of Max Degen, sworn August 6, 2009, Tab 16.

[8] Exhibit G to the Affidavit of Andrea McKinnon, sworn July 1, 2009 [McKinnon Affidavit], Retirees' Compendium, Tab 15, Letter from Morneau Sobeco dated July 16, 2009.

PART III – THE FACTS

15. On March 20, 2009, the Applicants' U.S.-based affiliates comprised of Indalex Holdings Finance, Inc., Indalex Holdings Corp. ("Indalex Holding"), Indalex Inc., Caradon Lebanon, Inc., and Dolton Aluminum Company, Inc. ("Indalex US") commenced reorganization proceedings under Chapter II of Title 11 of the United States Code.[9] On April 3, 2009, the Applicants commenced parallel proceedings in Canada and obtained protection from their creditors under the CCAA.[10]

16. On April 8, 2009, the CCAA Court authorized Indalex to borrow funds (the "DIP Borrowings") pursuant to a debtor-in-possession credit agreement among Indalex US, the Applicants and a syndicate of lenders (the "DIP Lenders") for which JPMorgan Chase Bank, N.A. was the administrative agent (the "DIP Agent"). The Applicants' obligation to repay the DIP loan was guaranteed by Indalex U.S.[11]

17. The actuarial report of the Executive Plan revealed that the Executive Plan had a substantial wind up deficiency. On June 26, 2009, counsel to the Retirees sent a letter to counsel to Indalex and the Monitor with a copy to the entire Service List advising that the Retirees reserve all rights to the deemed trust under section 57(4) of the PBA in the

---

[9] Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 2-3; Keith Cooper Affidavit, sworn August 24, 2009 [Cooper Affidavit], Retirees' Compendium, Tab 20 at paras. 4-5.

[10] Order of Justice Morawetz, dated April 3, 2009, (Initial Order – Stay Period to May 1, 2009), Retirees' Compendium, Tab 6.

[11] Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 2-3; Cooper Affidavit, Retirees' Compendium, Tab 20 at paras. 7-10; Order of Justice Morawetz, dated April 8, 2009 (Amended and Restated Initial Order), Retirees' Compendium, Tab 7 at para. 32; Order of Justice Campbell, dated July 20, 2009, (Approval and Vesting Order) Retirees' Compendium, Tab 9 at para. 14.

company's CCAA proceedings. There was no response or objection to that letter from the company, Monitor or any other party.[12]

18. On July 13, 2009, counsel to the Monitor confirmed that the Executive Plan would be wound up:

> As discussed at the July 2, 2009 Court hearing, it is unlikely that any bidder will elect to absorb obligations owing 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).[13]

19. On July 20, 2009, the company moved for court approval of the sale to SAPA and to distribute the proceeds of the sale to its lenders (the "Sale Approval and Distribution Motion"). There was no provision in that motion for the purchaser to continue the administration of the Executive Plan nor for any of the sale proceeds to be paid to the Executive Plan.

20. The Retirees opposed the Sale Approval and Distribution Motion as there was no provision in the sale for the purchaser to continue the administration of the Executive Plan. The Retirees also opposed the distribution of the sale proceeds as sought by the company to its lenders because it was not making any payment to the underfunded Executive Plan.[14] The Retirees again advanced the PBA deemed trust.

21. At the July 20, 2009 court attendance, the CCAA Judge approved the sale to SAPA and approved a cash distribution to the DIP Lender from the sale proceeds to pay the

---

[12] Exhibit "A" to the McKinnon Affidavit, Retirees' Compendium, Tab 15, Letter from Koskie Minsky LLP to counsel to Indalex and counsel to the Monitor dated June 26, 2009.

[13] Exhibit D to the McKinnon Affidavit, Retirees' Compendium, Tab 15, Letter from Stikeman Elliott to Koskie Minsky LLP, dated July 13, 2009.

[14] Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 9, 18.

company's obligations to the DIP Lender.[15] The CCAA Judge directed that $3.2 million representing the wind-up liability in the Executive Plan be held back by the Monitor pending the disposition of a motion by the Retirees for a declaration that the deemed trust applied and that the $3.2 million should be paid to the Executive Plan.[16]

22. On July 31, 2009, the sale of the company's assets to SAPA closed. A total payment of US $17,041,391.80 was made from the Canadian Sale Proceeds by the Monitor, on behalf of the Applicants, to the DIP Agent. This resulted in a shortfall of US $10,751,247.22 in respect of the DIP loan. The DIP Agent then called on the guarantee granted to the DIP Lenders by Indalex US for the shortfall. Indalex US paid the shortfall amount. The DIP Lender has been paid in full and has no interest in this proceeding, nor did it appear on the motion before the CCAA Judge.[17]

23. The Retirees' and the USW's deemed trust motions were set down to be argued on August 28, 2009. On August 12, 2009, after the litigation schedule for those motions was in place and approved by the CCAA Judge, the company announced it would file a motion to lift the CCAA stay to assign itself into bankruptcy. At a subsequent case conference, the CCAA Judge directed that the company's bankruptcy motion be added to the August 28, 2009 hearing. The motions were decided by the CCAA Judge in one Reasons for Decision released on February 18, 2010.

24. On July 31, 2009, all the directors of Indalex Canada resigned. Also on that date, pursuant to the Unanimous Shareholders Declaration, Indalex Holding Corp (part of Indalex

---

[15] Order of Justice Campbell, dated July 20, 2009 (Approval and Vesting Order), Retirees' Compendium, Tab 9.

[16] Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 8, 10.

[17] Campbell Reasons, Retirees' Compendium, Tab 5 at para. 11.

U.S.) became the management of Indalex in Canada.[18] Indalex U.S. and Indalex as of July 31, 2009 had the same management. Indalex U.S. was also the administrator of the Executive Plan. The administrator of the Executive Plan was in a conflict of interest.

25. According to the Affidavit of Keith Cooper, sworn August 24, 2009 (a senior managing director with FTI Consulting Inc. and at the material time the Chief Restructuring Officer of Indalex U.S.):

> The CCAA Applicants are no longer carrying on business, have no active employees and no tangible assets, other than cash (including sales proceeds and certain tax refunds). The Board of Directors of the Applicants has resigned and the former directors are currently employed by [the purchaser] SAPA The Applicants are insolvent shells.[19]

26. Keith Cooper deposed under cross-examination on August 26, 2009 that he was the administrator of the Indalex pension plans.[20] He also confirmed that he was the primary negotiator of the DIP Credit Agreement on behalf of the Indalex Group of Companies.[21]

27. Under the cross-examination he further admitted that:

- He and his staff acted as the administrator of the Executive Plan.[22]
- As the chief restructuring officer of Indalex U.S. he "was basically a co-CEO of the company [Indalex U.S.]" whose main duties were to "manage and direct" Indalex U.S. in the restructuring and eventual bankruptcy.[23]

---

[18] Cross-Examination Transcript of Keith Cooper, August 26, 2009 [Cooper Transcript], Retirees' Compendium, Tab 21 at questions 15, and 75 to 80.
[19] Cooper Affidavit, Retirees' Compendium, Tab 20 at paras. 33.
[20] Cooper Affidavit, Retirees' Compendium, Tab 20 at paras. 30-31.
[21] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 6-9 at 5.
[22] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 62, 65 and 66, at 22 and 23.

- He was a senior managing director of FTI Consulting Inc., of which the Monitor in the Canadian CCAA proceedings, FTI Consulting Canada ULC, is a subsidiary.[24]

- He knew the Executive Plan was underfunded on a wind up basis.[25]

- He knew the Retirees would have their pension benefits reduced if the Executive Plan was wound up in its underfunded state.[26]

- He refused to answer questions about what steps the company took to have the purchaser of the company take over the administration of the Executive Plan. The inference was that the company took no such steps or even contrary steps.[27]

- He was the pension plan administrator and directing mind of the company at the time the company sought to assign itself into bankruptcy to defeat the Retirees' deemed trust motion.[28]

- He knew that if the deemed trust motions were defeated in the Canadian court then the money held in reserve by the Monitor "would be distributed to Indalex Inc. [Indalex U.S.]".[29]

28. Under the PBA there are two ways that a pension plan can be wound up. First, under section 68, an employer may voluntarily wind-up the pension plan. Second, under section 69,

---

[23] Cooper Transcript, Retirees' Compendium, Tab 21 at question 33.
[24] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 2, 3 and 31.
[25] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 54, 55, at 20.
[26] Cooper Transcript, Retirees' Compendium, Tab 21 at question 55, at 20.
[27] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 91-98, at 30-32.
[28] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 63 and 70, at 23 and 25.
[29] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 83 to 86.

where any of the listed conditions in the section exist – as was the case here - the Ontario Superintendent of Financial Services will become involved and appoint an outside party (typically an actuarial firm) to administer the wind up process.

29. On November 4, 2009, the Superintendent appointed the actuarial firm of Morneau Sobeco ("Morneau") as administrator to wind up the Executive Plan.[30] On March 2010, based on the recommendation of Morneau, the Superintendent issued a Notice of Proposal to wind up the Executive Plan effective as of September 30, 2009.[31] The wind up process is currently underway.

PART IV – THE ISSUES AND THE LAW

30. This appeal raises the following issues:

(a) Did the CCAA judge err by not giving effect to the wind up deemed trust?

(b) Did the company breach its fiduciary duty to the Retirees of the Executive Plan?

(c) Are wind up payments that are owing to the Executive Plan subject to the wind up deemed trust?

(d) Did the CCAA judge err by not applying the priority rule in the PPSA that explicitly gives priority to the PBA deemed trust over secured creditors?

---

[30] Affidavit of Jenny Correia, sworn March 24, 2010 [Correia Affidavit], Retirees' Compendium, Tab 19 at para. 2.

[31] Correia Affidavit, Retirees' Compendium, Tab 19 at para. 2.

Issue #1: Did the CCAA judge err by not giving effect to the wind up deemed trust?

31. Section 57(4) of the PBA deems an employer to hold in trust an amount that is owing to a pension plan on its wind up regardless of whether the money has been segregated or not, and regardless of whether the amount is not yet due to be paid to the pension plan. Section 57(4) states:

> **Wind up**
>
> (4) ***Where*** a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money ***equal to employer contributions accrued to the date of the wind up but not yet due*** under the plan or regulations.[32]

32. Generally, a deemed trust is a statutory device whose purpose is to secure a payment of amounts to persons, funds or any other entity that Parliament or a provincial Legislature has determined is in need of protection and should receive a priority payment.[33] Deemed trusts exist in a plethora of federal and provincial statutes across Canada.

33. Deemed trusts have been specifically enacted to protect employees and members of pension plans.[34] For example, in addition to the deemed trust in the PBA, a deemed trust exists in the Ontario *Employment Standards Act*, 2000, S.O. 2000, c. 41 ("ESA") for vacation pay that is owing to employees.

---

[32] PBA, s. 57 [emphasis added].

[33] Kevin McElcheran, *Commercial Insolvency in Canada* (Toronto: LexisNexis/Butterworths, 2005) [McElcheran], Book of Authorities of the Retirees [Retirees' Book of Authorities], Tab 11 at 110-112.

[34] *Employment Standards Act, 2000*, S.O. 2000, c. 41 [ESA], s. 40.

34. A deemed trust is valid in CCAA proceedings. The *only* situation where a deemed trust is not valid under current caselaw is where a company becomes a "bankrupt" as defined in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").[35]

35. With respect to the deemed trust in section 57 of the PBA, the Ontario Legislature also enacted a priority to the deemed trust ahead of the claims of secured creditors in the Ontario *Personal Property Security Act* R.S.O. 1990, c.P.10 ("PPSA").[36] It is clear that the Legislature intended to protect the pensioners over secured creditors.[37]

The CCAA Judge misinterpreted section 57(4) of the PBA

36. The CCAA judge held that since the wind up of the Executive Plan had not yet occurred at the time of the motion on August 28, 2009, no deemed trust arose. With respect, this conclusion is incorrect for at least four reasons.

37. First, section 57(4) of the PBA states that the amount that is subject to the deemed trust are amounts owing to a pension plan that are "not yet due" to be paid. This phrase is clearly prospective. The section is aimed at attaching the deemed trust to amounts that *will be owed* to a pension plan on its wind up *in the future* and which are not yet required to be paid to the pension plan in the present. In the case at bar, the company knew that the Executive Plan was underfunded on a wind up basis and the Monitor confirmed the plan would be wound up. The wind up of the Executive Plan and the wind up liability owing to the plan are a certainty. The deemed trust applies.

---

35 McElcheran, *supra*, Retirees' Book of Authorities, Tab 11 at 127-129.
36 PPSA, s. 30(7).
37 McElcheran, *supra*, Retirees' Book of Authorities, Tab 11 at 131.

38. Second, section 57(4) states that a deemed trust arises "Where" a pension is wound up – not "When". The deemed trust does not arise only when a wind up payment is due on a specific calendar date, which is how the CCAA Judge interpreted the section. The use of the broader word "Where" indicates that the deemed trust applies to any situation where there is an amount owing to a pension plan on its wind up – whether actually due to be paid or not.

39. Third, the Monitor in its letter of July 13, 2009 confirmed that the Executive Plan would be wound up. The company had been sold, it was an assetless shell and it had no board of directors. The wind up of the Executive Plan was a certainty at the time and is now well underway. The CCAA Judge acknowledged that "The material filed with the Court exhibits as intention or the part of the Applicants to wind up that Plan".[38] For the CCAA Judge to decide that the deemed trust did not apply because the Executive Plan had not yet began the wind up process ignores the evidence that the plan *was going to be* wound up. If also incorrectly places form over substance.

40. Fourth, the CCAA Judge's reasoning that the deemed trust did not apply because the Executive Plan had not yet started the wind up process puts in place a very troubling rule that the courts should not countenance.[39] It rewards the company for failing to administer and fund the Executive Plan properly and sends the message that a company in CCAA can avoid the PBA deemed trust and avoid paying wind up payments by simply doing nothing to wind up an underfunded pension plan. That holding encourages the exact opposite behaviour that the Ontario Legislature seeks in the PBA: the protection of pension plan members. The CCAA Judge's holding cannot be supported.

---

[38] Campbell Reasons, Retirees' Compendium, Tab 5 at para. 23.
[39] Campbell Reasons, Retirees' Compendium, Tab 5.

Issue #2: Did the company breach its fiduciary duty to the Retirees of the Executive Plan?

41. The law is settled that a pension plan administrator owes a fiduciary duty to pension plan members.[40] That duty derives from both section 22 of the PBA and the common law.

42. In *Usarco,* Justice Farley held that the PBA deemed trust provisions themselves imply a fiduciary obligation on the employer.[41]

43. Indalex, as the administrator of the Executive Plan, owed a duty to the Retirees to act in the Retirees' best interests and not be in a conflict of interest. The evidence shows that Indalex did the exact opposite.

44. From the outset of the CCAA proceeding, when the company obtained a CCAA order that gave priority to the DIP Lender over the "statutory trust" without notice to the Retirees, the company embarked on a course of conduct that ranged from doing nothing to protect the Retirees from the looming reductions to their pension benefits, to aggressive efforts to defeat the Retirees' deemed trust claim, including bringing a motion to bankrupt the company. If that motion had been successful it would have rendered the PBA deemed trust of no force or effect under current caselaw and resulted in the amounts held in reserve by the Monitor transferred to Indalex U.S.

45. The evidence is incontrovertible that the company did not act in the best interests of the Retirees, was in a conflict of interest and breached its fiduciary duty:

---

[40] *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152 (C.A.) [*Ivaco*], Retirees' Book of Authorities, Tab 10 at para. 51; *Toronto-Dominion Bank v. Usarco Ltd.*, [1991] O.J. No. 1314, 42 E.T.R. 235 (Gen. Div.) [*Usarco*], Retirees' Book of Authorities, Tab 17 at 5; E.E. Gillese, 1996, "The Fiduciary Liability of the Employer as Pension Plan Administrator, Toronto, Ontario" 18 November 1996, The Canadian Institute, Retirees' Book of Authorities, Tab 6 at 1-25; *R. v. Christophe*, 2009 ONCJ 586, 78 C.C.P.B. 34 (Gen. Div.), Retirees' Book of Authorities, Tab 15 at paras. 165-166; PBA, s. 22.

[41] *Usarco, supra*, Retirees' Book of Authorities, Tab 17 at 5.

(a) Indalex was the administrator of the Executive Plan;[42]

(b) Indalex knew that the Executive Plan was underfunded;[43]

(c) Indalex knew that a wind up of the Executive Plan in its underfunded state would cause the retirees' pension benefits to be reduced;[44]

(d) Indalex entered into a loan arrangement and applied to court without giving notice to the members of the Executive Plan for an Initial CCAA order that contained a provision that reversed the priority in the PPSA that grants priority to the PBA deemed trust;[45]

(e) Indalex sold the assets of the company without any provision for the purchaser to assume the Executive Plan;

(f) Indalex did not respond to the correspondence from counsel to the Retirees (and to the Monitor and all other stakeholders) stating that the Retirees rely on the PBA deemed trust;[46]

(g) Indalex moved before the CCAA Judge to obtain orders approving the sale and approving a distribution of all the sale proceeds to the DIP lender with no payment being made to the underfunded Executive Plan;

---

[42] Cooper Transcript, Retirees' Compendium, Tab 21 at question 62 at 22.

[43] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 38-53 at 15-20.

[44] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 54-55 at 20.

[45] Campbell Reasons, Retirees' Compendium, Tab 5 at paras. 2-3; Cooper Affidavit, Retirees' Compendium, Tab 20 at paras. 4-5; Order of Justice Morawetz, dated April 3, 2009 (Initial Order – Stay Period to May 1, 2009), Retirees' Compendium, Tab 6.

[46] Affidavit of Keith Carruthers, sworn August 15, 2009, at paras. 18-19 and Exhibit F, Letter from Koskie Minsky LLP to counsel for the Monitor and counsel for the Applicants, dated June 26, 2009, Retirees' Compendium, Tab 17; Exhibit "A" to the McKinnon Affidavit, Retirees' Compendium, Tab 15, Letter from Koskie Minsky LLP to counsel to Indalex and counsel to the Monitor dated June 26, 2009.

(h) Indalex brought a motion returnable at the same time as the Retirees' deemed trust motion to bankrupt the company in an attempt defeat the Retirees' deemed trust claim;[47] and

(i) Indalex took no steps to wind up the Executive Plan despite its knowledge that the plan was underfunded, the company was selling itself, and the purchaser was not taking over the Executive Plan. Indalex then used its inaction to argue at the Retirees' motion before the CCAA Judge that the PBA deemed trust should not apply because the Executive Plan had not yet been wound up.

46. On July 31, 2009, all the directors of Indalex in Canada resigned. Also on July 31, 2009, pursuant to Unanimous Shareholders Declaration, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex in Canada. Indalex U.S. and Indalex Canada had the same management. On August 13, 2009 Indalex which was now under the management of Indalex U.S. announced it would bring a motion to bankrupt the Canadian company. Keith Cooper admitted that the defeating of the deemed trust would see the reserve amount be paid to Indalex U.S.

47. The evidence is incontrovertible that Indalex U.S., now the administrator of the Executive Plan, vigorously sought to defeat the Retirees' deemed trust for the purpose of gaining the amounts held in reserve for Indalex U.S. and deny them to the Retirees. The administrator of Indalex was in a flagrant conflict of interest. Indalex U.S.'s conduct was inequitable.

---

[47] Campbell Reasons, Retirees' Compendium, Tab 5 at para. 52.

The Court has wide powers to remedy breaches of fiduciary duty

48. Where a breach of fiduciary duty has been found, a court has wide latitude to fashion the appropriate remedy. The guiding factors are fairness and justice:

> It therefore seems appropriate in this case to assess damages according to the principles which generally govern damages for breach of fiduciary duty, having regard to the admonition in Canson that ***the remedy awarded need not be confined to that given in previous situations if the requirements of fairness and justice demand more***, and that reference to the principles of assessment in contract and tort maybe of assistance in so far as they are relevant.
> As discussed in Canson, the goal of equity is to restore the plaintiff as fully as possible to the position he or she would have been in had the equitable breach not occurred.... Traditionally, equity made the defaulting trustee who had mismanaged a fund, for example, restore the entire fund, and would not countenance deductions for market fluctuation or failure of the beneficiary to mitigate or take appropriate care, as would the law of tort or contract. This is not a case where the traditional equitable remedies of restitution and account are available. Restoration in specie is not possible. And the plaintiff's loss is not economic. ***Where these remedies are not available, equity awards compensation in their stead: see Canson, supra at pp. 574-75. In awarding damages the same generous, restorative remedial approach, which stems from the nature of the obligation in equity, applies. The fiduciary, being the person with the advantage of power, assumes full responsibility and cannot be heard to complain that the victim of his or her abuse cooperated in his or her defalcation or failed to take reasonable care for his or her own interests.***[48]

49. Given the breach of fiduciary duty by the company to the Retirees, the requirements of fairness and justice require that this Court order the Executive Plan be funded so that it will provide the pension benefits the Retirees are owed. This can be done from the amounts held in reserve with the Monitor. Alternatively, damages should be ordered to be paid to the Retirees directly. Again, this can be done from the amounts held in reserve with the Monitor.

---

[48] *Norberg v. Wynrib*, [1992] 2 SCR 226, Retirees' Book of Authorities, Tab 13 at paras. 103-104 [emphasis added].

Equitable Subordination

50. If this Court orders either payment to the Executive Plan or damages directly to the Retirees to remedy the company's breach of fiduciary duty, then the doctrine of equitable subordination, as well as fairness and equity, apply for this court to give those payments priority over the claim of Indalex U.S. which it advances in its capacity as guarantor of the DIP loan.

51. The doctrine of equitable subordination was recently summarized by Justice Pepall:

> **2. Equitable Subordination**
>
> [28] In considering this argument, it is helpful to briefly review its treatment in Canada. The Supreme Court of Canada was asked to invoke the doctrine in Canada Deposit Insurance Corp. v. Canadian Commercial Bank. That case involved the characterization of an advance of funds to the Canadian Commercial Bank and whether it constituted a loan or an investment of capital. Having concluded that it was in the nature of a loan and therefore the "lenders" would rank pari passu with the other unsecured creditors, Iacobucci J. went on to discuss the doctrine of equitable subordination. It was argued before the Supreme Court that the equitable jurisdiction of superior courts gives them authority in insolvency matters to subordinate claims that, while valid as against the insolvent's estate, arise from or are connected with conduct that is prejudicial to the interests of other creditors. This argument had not been made in the courts below but in any event, Iacobucci J. did not see the need to opine on whether such a doctrine should exist in Canada as some of its requisite elements had not been established. He stated that as he understood it, in the U.S., three requirements must be met:
>
> 1. the claimant must have engaged in some type of inequitable conduct;
> 2. the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and
> 3. equitable subordination must not be inconsistent with the provisions of the bankruptcy statute. ...
>
> [29] Two years prior to the Supreme Court's decision, in the case of Virtual Network Services Corporation, the U.S. Court of Appeals, Seventh Circuit, held that the doctrine no longer required inequitable conduct on the part of the creditor. Rather, the decision depended on a consideration of the fairness of the circumstances of each case. The

right to make use of the doctrine had been codified in the Bankruptcy Reform Act of 1978, section 510(c)(1) of which stated:

> ...after notice and a hearing, the court may -
>
> (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest.

[30] The Seventh Circuit Court of Appeals felt that this provision did not mandate a requirement of inequitable conduct. Other appellate courts in the U.S. also abandoned the misconduct requirement in certain instances. For instance, in Re Envirodyne Industries, Inc., the U.S. Court of Appeals, Seventh Circuit held that section 510(c)(1) authorized "courts to equitably subordinate claims to other claims on a case by case basis without requiring in every instance inequitable conduct on the part of the creditor claiming parity among other unsecured general creditors."

[31] The UTC submits that, amongst other things, the Supreme Court of Canada's understanding of the doctrine of equitable subordination was inexact because it was outdated and incomplete. In my view, this is an unfair assumption. Virtual Networks was cited to the Supreme Court of Canada in the Canadian Commercial Bank case but the Court chose not to refer to it. I also note that the U.S. Supreme Court considered the doctrine in U.S. v. Noland and did not depart from the three part test. While the Court said that it was clear that Congress meant to give courts some leeway to develop the doctrine, the Court expressly declined to decide whether a bankruptcy court must always find creditor misconduct before a claim may be equitably subordinated.

[32] Since the Canadian Supreme Court's decision in Canada Deposit Insurance Corp. v. Canadian Commercial Bank, the treatment of the doctrine in Canada has been uneven. ReMax Metro City Realty ltd. v. Baker (Trustee of), Pioneer Distributors Ltd. v. Bank of Montreal, and CIBC v. Sayani all are examples of courts that have refused to consider the applicability of the doctrine. Another line of cases has followed the lead of the Supreme Court and has considered the doctrine without opining on whether it in fact exists in Canada. Olympia & York Developments Ltd. v. Royal Trust Co.,] Lorbeth Development v. 795243 Ontario Ltd., Unisource Canada v. Hong Kong Bank of Canada, National Bank of Canada v. Merit Energy Ltd. and New Solution Financial Corp. v. 952339 Ontario Ltd. are all examples of this approach. Some other cases have applied the doctrine: *Bulut v. Brampton (City)* and Re Blue Range Resource Corp.

....

[33]...***On the other hand, a vibrant legal system must be responsive to new developments in the law and the need for reform. Jurisprudence from other jurisdictions often provides the impetus or basis for much needed legal developments.***

> [34]...*It seems to me that the importation or application of a doctrine such as equitable subordination should respond to a lacuna in our law.* ...[49]

52. The factors for the equitable subordination of Indalex U.S.'s claim have been met. Indalex U.S. as management of Indalex and administrator of the Executive Plan behaved inequitably and in conflict of interest. As noted above, Keith Cooper admitted at his August 26, 2009 cross-examination that:

- He and his staff acted as the administrator of the Executive Plan.[50]
- As the chief restructuring officer of Indalex U.S. he "was basically a co-CEO of the company [Indalex U.S.]" whose main duties were to "manage and direct" Indalex U.S. in the restructuring and eventual bankruptcy.[51]
- He was a senior managing director of FTI Consulting Inc., of which the Monitor in the Canadian CCAA proceedings, FTI Consulting Canada ULC is a subsidiary.[52]
- He knew the Executive Plan was underfunded on a wind up basis.[53]
- He knew the Retirees would have their pension benefits cut if the Executive Plan was wound up in its underfunded state.[54]

---

[49] *I. Waxman & Sons Ltd. (Re)*, 89 O.R. (3d) 427, [2008] O.J. No. 885 (S.C.J.), Retirees' Book of Authorities, Tab 9, at paras. 28-34 (citations removed) [emphasis added]; *Bulut v. Brampton (City) (2000)*, 48 O.R. (3d) 108, [2000] O.J. No. 1062 (C.A.), Retirees' Book of Authorities, Tab 2.

[50] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 62, 65 and 66, at 22 and 23.

[51] Cooper Transcript, Retirees' Compendium, Tab 21 at question 33.

[52] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 2, 3 and 31.

[53] Cooper Transcript, Retirees' Compendium, Tab 21 at questions 54, 55, at 20.

[54] Cooper Transcript, Retirees' Compendium, Tab 21 at question 55, at 20.

- He was the pension plan administrator and directing mind of the company at the time the company assigned into bankruptcy in an attempt to defeat the deemed trust motion by the Retirees.[55]

- He knew that if the deemed trust motions were defeated in the Canadian court then the money held in reserve by the Monitor "would be distributed to Indalex Inc. [Indalex U.S.]".[56]

53. The record indicates that the doctrine of equitable subordination as well as fairness and equity dictate that the funds held in reserve be distributed to the Executive Plan or the Retirees in priority to Indalex U.S.

Issue #3: Are all amounts that are owing to a pension plan on wind up (i.e. going concern payments, special payments and wind up payments) subject to the wind up deemed trust or only going concern payments or special payments?

54. An employer who sponsors a pension plan as part of the employment arrangement for its employees is required to make different categories of payments to the plan to ensure that the plan is adequately funded and capable of paying the benefits that are promised to the employees on their retirement. The categories of payments were recently summarised in *Fraser Papers* as follows:

> Employer pension contributions are described by M. Starnino, J-C Killey and C. P. Prophet in their article entitled "The Intersection of Labour and Restructuring Law in Ontario: A Survey of Current Law".
>
> > "In the case of a defined benefit plan, (i.e., a plan that promises to pay the beneficiaries of the plan a specific amount in retirement) the amount of the current service contribution is determined using actuarial estimations having regard to, among other things, the amount of the benefit to be provided, the demographics of the workforce and the

---

55 Cooper Transcript, Retirees' Compendium, Tab 21 at questions 63 and 70, at 23 and 25.

56 Cooper Transcript, Retirees' Compendium, Tab 21 at questions 83 to 86.

> anticipated returns generated by the investments in which the pension plan is invested.
>
> Second, if the pension plan is a defined benefit plan then an employer may be required to make additional contributions to the pension plan called "special payments". The obligation to make special payments arises where the original plan experience or investment performance differed from that assumed by the actuaries in order to provide the benefit promised to employees and the plan develops either a going concern unfunded liability or a solvency deficiency.
>
> A going concern unfunded liability arises when it appears, based on a periodic actuarial assessment of the plan, that the plan is insufficiently funded to pay the benefits that are or will become due, assuming that the pension plan continues indefinitely. Once a going concern unfunded liability is identified, the employer is required to make monthly special payments to fund the deficiency within fifteen years.
>
> A solvency deficiency [ie a wind up deficiency] arises when it appears, based upon a periodic actuarial assessment of the plan, that the plan's current assets are insufficient to meet the obligations that would be due if the employer immediately discontinued its business and the plan were wound up. In the case of a solvency deficiency, the employer is required to make special payments to fix the deficiency within a five year time frame. Pending amendments will extend this period to 10 years." [57]

55. The CCAA Judge suggests in his Reasons for Decision that the PBA wind up deemed trust would not extend to wind-up payments. Respectfully, that interpretation is not correct and cannot be supported by the language of the PBA. It is also contrary to the purpose of the PBA which is to protect the members of pension plans.

56. As noted, Section 57(4) of the PBA establishes a deemed trust over wind up contributions that an employer is "required to pay . . . but [are] not yet due" to be paid to the pension fund. Section 57(4) states:

---

[57] *Fraser Papers Inc. (Re)*, [2009] O.J. No. 3188, 55 C.B.R. (5th) 217, Retirees' Book of Authorities, Tab 5 at para. 13.

> (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.[58]

57. The amount of the wind-up liability for a pension plan, and hence, the deemed trust under section 57(4), is determined with reference to section 75 of the PBA. Section 75 requires an employer to pay "the total of all payments that...are due or that have accrued and that have not been paid into the pension fund" as well as other amounts set out in subsections 75(1)(b)(i)(ii) and (iii):

> **Liability of employer on wind up**
>
> 75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,
>
> (a) an amount equal to ***the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund;*** and
>
> (b) an amount equal to the amount by which,
>
> (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
>
> (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
>
> (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,
>
> exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.
>
> **Payment**
>
> (2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.[59]

58. The published policies of the Ontario Financial Services Commission have described the scope of the wind up liability to include all amounts owing to the pension plan:

---

[58] PBA, s. 57(4) [emphasis added].

[59] PBA, s. 75.

> ***The wind up liability must reflect all benefits provided under the plan and the applicable legislation on wind up*** and should be separately summarized for each major category of membership....
>
> If the wind up report reveals that the plan does not have sufficient assets to pay the liabilities on wind up, the employer must pay into the pension fund amounts required under section 75 of the PBA.[60]

59. In paragraphs 37 to 39 of his Reasons for Decision, the CCAA Judge refers to the *Usarco* and *Ivaco* decisions to suggest that the wind up deficiency is not subject to the section 57(4) deemed trust.[61] However, those cases dealt with motions for deemed trusts for unpaid current service and special payments under current Section 57(3) of the PBA, not wind up payments.

60. The CCAA Judge in the case under review seemed to prefer the earlier approach of Justice Farley in *Usarco*, however, the CCAA Judge did not perform any analysis on the applicable provisions of the PBA. Further, the two legal commentaries referred to by the CCAA Judge are devoid of any legal analysis and are merely summaries of Justice Farley's *obiter* in *Usarco*.

The deemed trust should be interpreted with regard to its purpose to protect members of pension plans

61. The Supreme Court of Canada had made clear that statutory interpretation should be approached in a manner which takes into consideration not only the words of an Act, but also the "scheme of the Act, the object of the Act, and the intention of Parliament".[62]

---

[60] PBA, ss. 73 – 75; Financial Services Commission of Ontario, Filing Requirements and Procedure on Full and Partial Wind Up of a Pension Plan, Index No. W100-101 (December 9, 2004), Retirees' Book of Authorities, Tab 10 [emphasis added].

61 *Ivaco Inc., supra*, Retirees' Book of Authorities, Tab 10 at para. 51, *Usarco, supra*, Retirees' Book of Authorities, Tab 17.

[62] *Bell ExpressVu Ltd. v. Partnership v. Rex*, [2002] 2 S.C.R. 559, Retirees' Book of Authorities, Tab 1 at paras. 26-27; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, Retirees' Book of Authorities, Tab 16 at para. 21.

62. The purpose of the PBA is to protect the members of pension plans. The Supreme Court of Canada has confirmed this purpose in many cases.

> [28] The purpose of the PBA was explained at para. 13 of *Monsanto*, citing *GenCorp Canada Inc.* v. *Ontario (Superintendent, Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at para. 16:
>
> > [T]he Pension Benefits Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures".[63]

63. The purpose of the PBA is well summarized in the unanimous decision of this Court in *Huus* v. *Ontario Superintendent of Pensions.*[64]

> [25] I start with this observation: pension plans are for the benefit of the employees, not the companies which create them. They are a particularly important component of the compensation employees receive in return for their labour. They are not a gift from the employer; they are earned by the employees. Indeed, in addition to their labour, employees usually agree to other trade-offs in order to obtain a pension. As explained by Cory J. in *Schmidt* v. *Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at 646:
>
> > In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour.
>
> [261 Similar statements have been expressed by this court in several cases. In *Gencorp Canada Inc.* v. *Ontario (Superintendent of Pensions)* (1998), 39 O.R. (3d) 38 at 43 (C.A.), Robins J.A. said:
>
> > [T]he Pension Benefits Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans....

---

[63] *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678, Retirees' Book of Authorities, Tab 12 at para. 28

[64] *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3rd) 380, [2002] O.J. No. 524 (C.A.), Retirees' Book of Authorities, Tab 8.

> [27] In *Firestone Canada Inc.* v. *Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122 at 127 (C.A.) ("Firestone"), Blair J.A. stated that the PBA "is clearly intended to benefit employees" and "[i]n. particular. . . evinces a special solicitude for employees affected by plant closures".[65]

64. The language of Sections 57(4) and 75 of the PBA must be interpreted with the purpose of the PBA in mind. The correct interpretation supports the application of the deemed trust over the totality of amounts owed by an employer to a pension plan on its wind up.

Issue #4: Can a CCAA judge issue an Initial Order granting priority to a secured creditor over the deemed trust contrary to the provisions of the PPSA without invoking paramountcy?

65. Section 30(7) of the PPSA expressly gives priority to the PBA deemed trust over secured creditors. The section states:

> **Priorities**
>
> 30. Deemed trusts
>
> (7) A security interest in an account or inventory and its proceeds ***is subordinate to the interest of a person who is the beneficiary of a deemed trust*** arising under the *Employment Standards Act* or **under the *Pension Benefits Act*.**[66]

66. In *Usarco*, Farley, J. gave effect to the priority rule in section 30(7) of the PPSA and ordered the receiver to pay an amount of money equal to the regular and special payments required to have been made but not yet paid into the pension plan:

> Therefore, since the bankruptcy petition has not been dealt with, we are presently dealing with a claim by the administrator for certain trust funds held by the receiver. ***The security interest of the bank is***

---

[65] *Huus, supra,* Retirees' Book of Authorities, Tab 8 at paras. 25-27.

[66] PPSA, s. 30.

subordinate to the interest of the beneficiaries of the deemed trust (represented by the administrator) (see: s. 30(7), PPSA).[67]

67. Paragraphs 45 of the Initial CCAA Order states that the DIP Lenders will have priority over "statutory trusts". In respect of the PBA deemed trust, this provision is in direct conflict with the PPSA, as well as the holding of the court in *Usarco*.[68] The CCAA Judge also referenced this priority change in his Reasons, but without removing the provision from the Initial CCAA Order and without any analysis of the doctrine of paramountcy.[69] In so doing, the CCAA Judge erred.

68. Provincial laws, such as the PPSA, in federally regulated bankruptcy and insolvency proceedings continue to apply so long as the doctrine of paramountcy is not triggered. In this case paramountcy has not been triggered.[70]

69. In *Nortel Networks Corp. (Re),*[71] this Court held that the only way a valid provincial law can be rendered inoperative in a CCAA proceeding is if the doctrine of paramountcy was invoked to show that the provincial law is frustrating the purpose of the CCAA:

> [35]...As there is no specific protection from the general stay provision for the ESA termination and severance payments, the questions to be determined is whether the court is entitled to extend the effect of its stay order to such payments based on the constitutional doctrine of paramountcy: *Crystalline Investments Ltd. Domgroup Ltd.*,[2004] 1 S.C.R. 60 at para. 43.
>
> [36] The scope, intent and effect of the operation of the doctrine of paramountcy was recently reviewed and summarized by Binnie and

---

[67] *Usarco, supra,* Retirees' Book of Authorities, Tab 17 at 4-5 [emphasis added].

[68] Order of Justice Morawetz, dated April 8, 2009 (Amended and Restated Initial Order), Retirees' Compendium, Tab 7 at para. 45; Campbell Reasons, Retirees' Compendium, Tab 5 at para. 51.

[69] Campbell Reasons, Retirees' Compendium, Tab 5.

[70] *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, Retirees' Book of Authorities, Tab 4 at para. 43; *GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123, Retirees' Book of Authorities, Tab 7 at para. 50-52.

[71] *Nortel Networks Corp. (Re)*, 2009 ONCA 833, 99 O.R. (3d) 708 (CA) [*Nortel*], Retirees' Book of Authorities, Tab 14.

> Level JJ. in *Canadian Western Bank v. Alberta,* [2007] 2 S.C.R. at paras. 69-75. They reaffirmed the "conflict" test stated by Dickson J. in *Multiple Access Ltd. v. McCutcheon,* [1982] 2 S.C.R. 161:
>
> > In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191].
>
> [37] However, they also explained an important proviso or gloss on the strict conflict rule that has developed in the case law since *Multiple Access:*
>
> ...
>
> [38] ***Therefore, the doctrine of paramountcy will apply either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament.***[72]

70. This was a liquidating CCAA proceeding. There was no restructuring. There is no plan of compromise.

71. In this case, not only was paramountcy not invoked by the company when it applied to court for a CCAA order that overrides the PPSA priority, but even if paramountcy was invoked, the record indicates that the PPSA priority of the deemed trust over the DIP Lender would not have frustrated the Company's liquidation efforts and thus, would not have frustrated the purpose of the CCAA. Without a finding of paramountcy, the PPSA priority continues in force and operates to require the company to pay the PBA deemed trust amount to the Executive Plan. Accordingly, with respect to the PBA deemed trust, paragraph 45 of the Initial CCAA Order should be declared of no force or effect.

---

[72] *Nortel, supra,* Retirees' Book of Authorities, Tab 14 at paras. 35-38 [emphasis added].

PART IV - ORDERS REQUESTED

72. The Retirees respectfully request:

(a) an order allowing the appeal and declaring that the deemed trust in section 57(4) of the PBA is valid and ordering payment of the $3.2 million held in reserve by the Monitor to the fund of the Executive Plan;

(b) in the alternative, allowing the appeal and declaring that the company breached its fiduciary duty to the Retirees of the Executive Plan and ordering damages payable of $3.2 million to the Executive Plan or alternatively, damages to the Retirees directly;

(c) a declaration that paragraph 45 of the Initial CCAA Order in respect of the priority of the DIP Lender over the PBA deemed trust is of no force or effect; and

(d) costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of July, 2010.

Andrew J. Hatnay

Demetrios Yiokaris

CERTIFICATE OF COUNSEL

I, Andrew Hatnay, lawyer for the Appellants, certify that:

1. An order under subrule 61.09(2) is not required; and

2. The estimated time of my oral argument is 4 hours, not including reply.

Date: July 2, 2010

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900, Box 52
Toronto, Ontario
M5H 3R3

Andrew J. Hatnay (LSUC# 31885W)
Tel: 416-595-2083
Fax: 416-204-2877
Email: ahatnay@kmlaw.ca
Lawyers for the Appellants

SCHEDULE "A"
LIST OF AUTHORITIES

1. McElcheran, Kevin, *Commercial Insolvency in Canada* (Toronto: LexisNexis/Butterworths, 2005).

2. *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.lJ. No. 4152 (C.A.).

3. *Toronto-Dominion Bank v. Usarco Ltd.*, [1991] O.J. No. 1314, 42 E.T.R. 235 (Gen. Div.).

4. Gillese, E.E., 1996, "The Fiduciary Liability of the Employer as Pension Plan Administrator, Toronto, Ontario" 18 November 1996, The Canadian Institute.

5. *R. v. Christophe*, 2009 ONCJ 586, 78 C.C.P.B. 34 (Gen. Div.)

6. *Norberg v. Wynrib*, [1992] 2 SCR 226.

7. *I. Waxman & Sons Ltd. (Re)*, 89 O.R. (3d) 427, [2008] O.J. No. 885 (S.C.J.).

8. *Bulut v. Brampton (City)* (2000), 48 O.R. (3d) 108, [2000] O.J. No. 1062 (C.A.).

9. *Fraser Papers Inc. (Re)*, [2009] O.J. No. 3188, 55 C.B.R. (5th) 217.

10. Financial Services Commission of Ontario, Filing Requirements and Procedure on Full and Partial Wind Up of a Pension Plan, Index No. W100-101 (December 9, 2004).

11. *Bell ExpressVu Ltd. v. Partnership v. Rex*, [2002] 2 S.C.R. 559.

12. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

13. *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678.

14. *Huus v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3rd) 380, [2002] O.J. No. 524 (C.A.).

15. *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60.

16. *GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123.

17. *Nortel Networks Corp. (Re)*, 2009 ONCA 833, 99 O.R. (3d) 708 (CA).

SCHEDULE "B"
RELEVANT STATUTES

Employment Standards Act, 2000 S.O. 2000, c. 41

Vacation pay in trust

40.(1) Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the employer has kept the amount for it separate and apart.

Same

(2) An amount equal to vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account, even if it is not entered in the books of account.

Care, diligence and skill

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

Special knowledge and skill

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

Member of pension committee, etc.

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

Conflict of interest

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

Employment of agent

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

Trustee of pension fund

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

Responsibility for agent

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

Employee or agent

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

Benefit by administrator

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

Member of pension committee, etc.

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

Payment to agent

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

Trust property

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.

Money withheld

(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.

Accrued contributions

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

Wind up

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

Lien and charge

(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).

Application of subss. (1, 3, 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.

Money to be paid to insurance company

(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. R.S.O. 1990, c. P.8, s. 57.

Determination of entitlements

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

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

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

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

Transfer rights on wind up

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

Combination of age and years of employment

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

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

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

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

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

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

Part year

(2) In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership at the effective date of the wind up.

Member for ten years

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

Prorated bridging benefit

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

Notice of termination of employment

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

Application of subs. (5)

(6) Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment.

Consent of employer

(7) For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

Consent of administrator, jointly sponsored pension plans

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

Application of section

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

Refund

(9) A person affected by a wind up who elects to receive a benefit under subsection (1) is not entitled to payment of any refund of contributions or interest under subsection 63 (3) or (4) (refunds).

Liability of employer on wind up

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

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

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

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

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

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

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

Exception, jointly sponsored pension plans

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

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

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

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

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

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

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

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

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

Idem

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

Future advances

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

Exception

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

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

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

Proceeds

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

Reperfected security interests

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

Same, extended time

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

Deemed trusts

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

Exception

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

N 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
NDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Applicants

Court of Appeal File No.
Court File No: CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at **Toronto**

FACTUM

(Appeal by retirees regarding pension plan wind up deemed trust and breach of fiduciary duty)

KOSKIE MINSKY LLP
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Andrew J. Hatnay (LSUC# 31885W)
Tel: 416-595-2083

Demetrios Yiokaris (LSUC# 45852L)
Tel: 416-595-2130

Lawyers for Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser and Fred Granville, members of the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies

APPENDIX "K"

CITATION: Indalex Limited (Re), 2011 ONCA 265
DATE: 20110407
DOCKET: C52187 & C52346

COURT OF APPEAL FOR ONTARIO

MacPherson, Gillese and Juriansz JJ.A.

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/Respondents

Andrew J. Hatnay and Demetrios Yiokaris for the Former Executives, appellants

Darrell L. Brown for the United Steelworkers, appellants

Mark Bailey for the Superintendent of Financial Services

Hugh O'Reilly and Adam Beatty for Morneau Sobeco Limited Partnership, Intervenor

Fred Myers and Brian Empey for Sun Indalex Finance, LLC

Ashley Taylor and Lesley Mercer for the Monitor, FTI Consulting Canada ULC

Harvey Chaiton and George Benchetrit for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

Heard: November 23 and 24, 2010

On appeal from the orders of Campbell J., of the Superior Court of Justice, dated

February 18, 2010.

Gillese J.A.:

[1] A Canadian company is insolvent. Its pension plans are underfunded and in the process of being wound up. The company is the administrator of the pension plans.

[2] The company obtains protection under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (*CCAA*). A court order enables it to borrow funds pursuant to a debtor-in-possession (DIP) credit agreement. The order creates a "super-priority" charge in favour of the DIP lenders. The obligation to repay the DIP lenders is guaranteed by the company's U.S. parent company (the Guarantee).

[3] The company is sold through the *CCAA* proceedings but the sale proceeds are insufficient to repay the DIP lenders. The U.S. parent company covers the shortfall, in accordance with its obligations under the Guarantee.

[4] The *CCAA* monitor holds some of the sale proceeds in a reserve fund. The pension plan beneficiaries claim the money based on the deemed trust provisions in the *Pension Benefits Act,* R.S.O. 1990, c. P.8 (*PBA*). The U.S. parent company claims the money based on its payment under the Guarantee.

[5] Must the money in the reserve fund be used to pay the deficiencies in the pension plans in preference to the secured creditor? What fiduciary obligations, if any, does the company have in respect of its underfunded pension plans during the *CCAA* proceeding? These appeals wrestle with these difficult questions.

OVERVIEW

[6] Indalex Limited was the sponsor and administrator of two registered pension plans: 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) (collectively, the Plans).

[7] On March 20, 2009, Indalex's parent company and its U.S. based affiliates (collectively, Indalex U.S.) sought Chapter 11 protection in the United States.

[8] On April 3, 2009, Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Indalex or the Applicants) obtained protection from their creditors under the *CCAA*. At that time, the Salaried Plan was in the process of being wound up. Both Plans were underfunded. FTI Consulting Canada ULC (the Monitor) was appointed as monitor.

[9] On April 8, 2009, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement. The court order gave the DIP lenders a super-priority charge on Indalex's property. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders.

[10] On July 20, 2009, Indalex moved for approval of the sale of its assets on a going-concern basis. It also moved for approval to distribute the sale proceeds to the DIP lenders, with the result that there would be nothing to fund the deficiencies in the Plans.

Without further payments, the underfunded status of the Plans will translate into significant cuts to the retirees' pension benefits.

[11] At the sale approval hearing, the United Steelworkers appeared on behalf of its members who had been employed by Indalex and are the beneficiaries of the Salaried Plan (the USW). In addition, a group of retired executives appeared on behalf of the beneficiaries of the Executive Plan (the Former Executives).

[12] Both the USW and the Former Executives objected to the planned distribution of the sale proceeds. They asked that an amount representing the total underfunding of the Plans (the Deficiencies) be retained by the Monitor as undistributed proceeds, pending further court order. Their position was based on, among other things, the deemed trust provisions in the *PBA* that apply to unpaid amounts owing to a pension plan by an employer.

[13] The court approved the sale. However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve (the Reserve Fund), an amount approximating the Deficiencies.[1]

[14] The sale closed on July 31, 2009. The sale proceeds were insufficient to repay the DIP lenders. Indalex U.S. paid the shortfall of approximately US$10.75 million, pursuant to its obligations under the Guarantee.

---

[1] The Monitor retained the Reserve Fund as part of the Undistributed Proceeds. The Undistributed Proceeds also include amounts for the payment of cure costs, other costs associated with the completion of the SAPA transaction, legal and professional fees, and amounts owing under the DIP charge.

[15] In accordance with a process designed by the *CCAA* court, the USW and the Former Executives brought motions returnable on August 28, 2009, based on their deemed trust claims. They claimed the Reserve Fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. They also claimed that during the *CCAA* proceedings, Indalex breached its fiduciary obligations to the Plans' beneficiaries.

[16] Indalex then brought a motion in which it sought to lift the stay and assign itself into bankruptcy (the Indalex bankruptcy motion). This motion was directed to be heard on August 28, 2009, along with the USW and Former Executives' motions.

[17] By orders dated February 18, 2010, (the Orders under Appeal), the *CCAA* judge dismissed the USW and Former Executives' motions on the basis that, at the date of sale, no deemed trust under the *PBA* had arisen in respect of either plan. He found it unnecessary to decide the Indalex bankruptcy motion.

[18] The USW and the Former Executives (together, the appellants) appeal. They ask this court to order the Monitor to pay the Reserve Fund to the Plans.

[19] On November 5, 2009, the Superintendent of Financial Services (Superintendent) appointed the actuarial firm of Morneau Sobeco Limited Partnership (Morneau) as administrator of the Plans.

[20] Morneau was granted intervenor status. It supports the appellants.

[21] The Superintendent also appeared. He, too, supports the appellants.

[22] Sun Indalex, as the principal secured creditor of Indalex U.S., asks that the appeals be dismissed and the Reserve Fund be paid to it. As a result of its payment under the Guarantee, Indalex U.S. is subrogated to the rights of the DIP lenders. Its claim to the Reserve Fund is based on the super-priority charge.

[23] The Monitor appeared. It supports Sun Indalex and asks that the appeals be dismissed. The Monitor and Sun Indalex will be referred to collectively as the respondents.

[24] George L. Miller, the trustee of the bankruptcy estates of Indalex U.S., appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the U.S. Trustee), was given leave to intervene. He joins with the Monitor and Sun Indalex in opposing these appeals.

[25] For the reasons that follow, I would allow the appeals and order the Monitor to pay, from the Reserve Fund, amounts sufficient to satisfy the deficiencies in the Plans. For ease of reference, the various statutory provisions to which I make reference can be found in the schedules at the end of these reasons.

BACKGROUND

[26] Indalex Limited is a Canadian corporation. It is the entity through which the Indalex group of companies operates in Canada. It is a direct wholly-owned subsidiary of its U.S. parent, Indalex Holding Corp., which in turn is a wholly-owned subsidiary of Indalex Finance.

[27] Together, the group of companies referred to as Indalex and Indalex U.S. were the second largest manufacturer of aluminum extrusions in the United States and Canada. Aluminum is a durable, light weight metal that can be strengthened through the extrusion process, which involves pushing aluminum through a die and forming it into strips, which can then be customized for a wide array of end-user markets.

[28] Indalex Limited produced a portion of the raw material used in the extrusion process, called aluminum extrusion billets, through its casting division located in Toronto. It also processed the raw extrusion billets into extruded product at its Canadian extrusion plants, for sale to end users. In 2008, Indalex Limited accounted for approximately 32% of the Indalex group of companies total sales to third parties.

[29] Indalex Limited provided separate pension plans for its executives and salaried employees. The Plans were designed to pay pension benefits for the lives of the retirees and those of their designated beneficiaries. Indalex Limited was the sponsor and administrator of both Plans. The Plans were registered with the Financial Services Commission of Ontario (FSCO) and the Canadian Revenue Agency.

The Salaried Plan

[30] The USW has several locals certified as bargaining agents on behalf of members employed with Indalex, including members who are beneficiaries of the Salaried Plan. It was certified to represent certain Indalex employees, seven of whom were members of the Salaried Plan and have deferred vested entitlements under that plan.

[31] The Salaried Plan contains a defined benefit and defined contribution component.

[32] Unlike the Executive Plan, the Salaried Plan was in the process of being wound up when Indalex began *CCAA* proceedings. The effective date of wind up is December 31, 2006. Special wind up payments were made in 2007 ($709,013), 2008 ($875,313) and 2009 ($601,000). As of December 31, 2008, the wind up deficiency was $1,795,600.

[33] All current service contributions have been made to the Salaried Plan.

[34] Article 4.02 of the Salaried Plan obligates Indalex to make sufficient contributions to the Salaried Plan. Article 14.03 of the Salaried Plan requires Indalex to remit "amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation".

The Executive Plan

[35] The Executive Plan is a defined benefit plan. Effective September 1, 2005, Indalex closed the Executive Plan to new members.

[36] As of January 1, 2008, there were eighteen members of the Executive Plan, none of whom were active employees.

[37] The Executive Plan is underfunded.

[38] As of January 1, 2008, the Executive Plan had an estimated funding deficiency, on an ongoing basis, of $2,535,100. On a solvency basis, the funding deficiency was $1,102,800 and on a windup basis, the deficiency was $2,996,400. An actuarial review

indicated that as of July 15, 2009, the wind up deficiency had increased to an estimated $3,200,000.

[39] In 2008, Indalex made total special payments of $897,000 to the Executive Plan. No further special payments were due to be made to the Executive Plan until 2011. All current service contributions had been made.

[40] Due to its underfunded status, the Former Executives' monthly pension benefits have already been cut by 30-40%. Unless money is paid into the Executive Plan, these cuts will become permanent. The Former Executives have also lost their supplemental pension benefits which were unfunded and terminated by Indalex after it obtained *CCAA* protection. Between the two cuts, the Former Executives have lost between one half and two-thirds of their pension benefits.

[41] On June 26, 2009, counsel for the Former Executives sent a letter to counsel to Indalex and the Monitor, advising that the Former Executives reserved all rights to the deemed trust under s. 57(4) of the *PBA* in the *CCAA* proceedings. There was no response or objection to that letter from Indalex, the Monitor or any other party.

[42] At the time the Orders under Appeal were made, the Executive Plan had not been wound up. However, a letter from counsel for the Monitor dated July 13, 2009, indicated that it was expected that the Executive Plan would be wound up.

[43] On March 10, 2010, the Superintendent issued a Notice of Proposal to wind up the Executive Plan effective as of September 30, 2009. The wind up process is currently underway.

Pension and Corporate Governance During the CCAA Proceedings

[44] Keith Cooper, the Senior Managing Director of FTI Consulting Inc., was a key advisor to the Indalex group of companies prior to and during the *CCAA* proceedings. On March 19, 2009, he was appointed the Chief Restructuring Officer for all of the Indalex U.S. based companies. However, he was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the Applicants. Mr. Cooper described his role as being to maximize recovery for Indalex as a whole.

[45] Mr. Cooper was the primary negotiator of the DIP credit agreement on behalf of Indalex. He does not recall discussing Indalex's pension obligations in respect of the Salaried and Executive Plans during the negotiation of the DIP credit agreement. He was aware that the Plans were underfunded and that pensions would be reduced if the shortfalls were not met.

[46] FTI Consulting Inc., the company for which Mr. Cooper works, and the Monitor are affiliated entities. The Monitor (FTI Consulting Canada ULC) is a wholly-owned subsidiary of FTI Consulting Inc.

[47] On July 31, 2009, all of the directors of Indalex resigned. On that same day, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex. Thus, as of July 31, 2009, Indalex and Indalex U.S. formally had the same management.

[48] On August 12, 2009, a Unanimous Shareholder Declaration was executed in which Mr. Cooper was appointed to direct the affairs of all Indalex entities.

[49] On August 13, 2009, Indalex (which was now under the management of Indalex U.S.) announced its intention to bring a motion to bankrupt the Canadian company.

THE *CCAA* PROCEEDINGS

The Initial Order, as amended (April 3 and 8, 2009)

[50] On April 3, 2009, pursuant to the order of Morawetz J., Indalex obtained protection from its creditors under the *CCAA* (the Initial Order). A stay of proceedings against Indalex was ordered.

[51] On April 8, 2009, the Initial Order was amended to authorize Indalex to borrow funds pursuant to a DIP credit agreement among Indalex, Indalex U.S. and a syndicate of lenders (the DIP lenders). JP Morgan Chase Bank, N.A. was the administrative agent (the DIP Agent). The DIP credit agreement contemplated that the DIP loan would be repaid from the proceeds derived from a going-concern sale of Indalex's assets on or before August 1, 2009.

[52] Indalex's obligation to repay the DIP borrowings was guaranteed by Indalex U.S. The Guarantee was a condition to the extension of credit by the DIP lenders.

[53] Paragraph 45 of the Initial Order, as amended, is the super-priority charge. It provides that the DIP lenders' charge "shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", other than the Administration Charge and the Directors' Charge, as those terms are defined in the Initial Order.

The Initial Order is Further Amended (June 12, 2009)

[54] On June 12, 2010, Morawetz J. heard and granted a motion by the Applicants for approval of an amendment to the DIP credit agreement to increase the borrowings by about $5 million, from US$24.36 million to US$29.5 million. This resulted in an order dated June 12, 2009, further amending the Initial Order (the June 12, 2009 order).

[55] Counsel for the Former Executives was served with motion material on June 11, 2009, at 8:27 p.m. In response to an email from the Former Executives' counsel questioning the urgency of the motion, the Monitor's counsel responded that the motion was simply directed at obtaining more money under the DIP credit agreement.

[56] At the hearing of the motion on June 12, 2010, the Former Executives initially sought to reserve their rights to confirm that the motion was about an increase to the DIP and nothing more. When that was confirmed, the Former Executives withdrew their reservation and the motion proceeded later that afternoon.

The Sale Approval Order (July 20, 2009)

[57] Indalex brought two motions that were heard on July 20, 2009, by Campbell J. (the *CCAA* judge).

[58] First, Indalex sought approval of a sale of its assets, as a going concern, to SAPA Holdings AB (SAPA). Total consideration for the sale of Indalex and Indalex U.S. was approximately US$151,183,000.00. The Canadian sale proceeds were to be paid to the Monitor.

[59] As a term of the sale, SAPA assumed no responsibility or liability for the Plans.

[60] Second, Indalex moved for approval of an interim distribution of the sale proceeds to the DIP lenders.

[61] Both the Former Executives and the USW objected to the planned distribution of the sale proceeds. They asserted statutory deemed trust claims in respect of the underfunded pension liabilities in the Plans, arguing that preference was to be given for amounts owing to the Plans pursuant to ss. 57 and 75 of the *PBA*. They also relied on s. 30(7) of the Ontario *Personal Property Security Act,* R.S.O. 1990, c. P.10 (*PPSA)*, which expressly gives priority to the deemed trust in the *PBA* over secured creditors.

[62] The Former Executives and the USW further argued that Indalex had breached its fiduciary duty to the Plans' beneficiaries by failing to adequately meet its obligations under the Plans and by abdicating its responsibilities as administrator once *CCAA* proceedings had been undertaken.

[63] The court approved the sale in an order dated July 20, 2009 (the Sale Approval order). However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional $6.75 million of the sale proceeds in reserve, an amount approximating the Deficiencies.

[64] It was agreed that an expedited hearing process would be undertaken in respect of the USW and Former Executives' deemed trust claims and that the Reserve Fund held by the Monitor would be sufficient, if required, to satisfy the deemed trust claims.

The Guarantee is Called on

[65] On July 31, 2009, the sale to SAPA closed. The sale proceeds available for distribution were insufficient to repay the DIP loan in full. The Monitor made a payment of US$17,041,391.80 to the DIP Agent. This resulted in a shortfall of US$10,751,247.22 in respect of the DIP borrowings. The DIP Agent called on the Guarantee for the amount of the shortfall, which Indalex U.S. paid.

The Orders under Appeal (August 28, 2009)

[66] The USW and Former Executives brought motions to determine their deemed trust claims. The motions were set for hearing on August 28, 2009. Indalex then filed its bankruptcy motion, in which it sought to file a voluntary assignment in bankruptcy.

[67] By orders dated February 18, 2010, the *CCAA* judge dismissed the USW and Former Executives' motions.

[68] The *CCAA* judge found it unnecessary to deal with Indalex's bankruptcy motion.

THE REASONS OF THE *CCAA* JUDGE

The Former Executives' Motion

[69] The CCAA judge dismissed the Former Executives' motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments to that plan as of July 20, 2009. As there were no deficiencies in payments, there was no basis for a deemed trust.

The USW Motion

[70] Because the Salaried Plan was in the process of being wound up, the CCAA judge dismissed the USW motion for different reasons.

[71] The CCAA judge saw the issue raised on the USW motion to be whether the *PBA* required Indalex to pay the windup deficiency in the Salaried Plan as at the date of closing of the sale and transfer of assets, namely, July 20, 2009. In resolving the issue, the *CCAA* judge considered ss. 57 and 75 of the *PBA*. He called attention to the words "accrued to the date of the wind up but not yet due" in s. 57(4).

[72] The *CCAA* judge also considered ss. 31(1) and (2) of R.R.O. 1990, Reg. 909 (the Regulations). He concluded that because s. 31 of the Regulations permitted Indalex to make up the deficiency in the Salaried Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. Were it not for s. 31 of the Regulations, the *CCAA* judge stated that Indalex would have had an obligation under the *PBA* to pay in any deficiency as of the date of wind up.

[73] The CCAA judge concluded:

> [49] ... I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the *PBA* or the Regulations thereunder to pay any amount into the [Salaried] Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the CCAA.
>
> [50] Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.
>
> [51] Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

The Indalex Bankruptcy Motion

[74] Having found that the deemed trust claims failed, the *CCAA* judge considered that the question of Indalex's assignment into bankruptcy might be moot. He went on, in para. 55 of his reasons for decision, to state:

> [55] ... In my view, **a voluntary assignment under the *BIA* should not be used to defeat a secured claim under valid Provincial legislation**, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the *CCAA* or the *BIA*. For that reason I did not entertain the bankruptcy assignment motion first. [Emphasis added.]

[75] He found no conflict between the federal and provincial legislative regimes and allowed the Applicants to renew their request for bankruptcy relief in a further motion.

THE ISSUES

[76] The central issue raised on these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA* and, specifically, in finding that no deemed trust existed with respect to the Deficiencies as at July 20, 2009.

[77] The USW and the Former Executives ask the court to decide a second issue: whether during the *CCAA* proceedings Indalex breached the fiduciary obligations that it owed to the Plans' beneficiaries by virtue of being the Plans' administrator.[2]

[78] The U.S. Trustee's submission raises two additional issues. Does the collateral attack rule bar the appellants' deemed trust motions? Do the principles of cross-border insolvencies apply to these appeals?

[79] The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

[80] Given the centrality of the wind up process to these appeals, I will briefly outline the salient aspects of the wind up process before turning to a consideration of each of these issues.

WINDING UP A PENSION PLAN

[81] To understand the wind up process, one must first understand how the pension plan operates while it is ongoing.

---

[2] The appellants had raised this issue below but it had not been dealt with by the *CCAA* judge.

[82] A pension plan to which the employees contribute is called a contributory plan. In the case of contributory plans, the employer is obliged to remit the employee contributions, including payroll deductions, within a specified time frame. This aspect of an employer's obligations does not arise in these appeals.

[83] In addition to remitting the employee contributions, if any, while a defined benefit pension plan is ongoing, the employer must make two types of contributions to ensure that the plan is adequately funded and capable of paying the promised pension benefits.

> 1. **Current service or "normal cost" contributions** – the employer contributions necessary to pay for current service costs in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active employees. These must be made in monthly instalments within 30 days after the month to which they relate.
>
> 2. **Special payments** – a plan administrator must file an actuarial report annually in which the pension plan is valued on two different bases: a "going-concern" basis, where it is assumed the plan will continue to operate indefinitely; and a "solvency" basis, where it is assumed that the employer will discontinue its business and wind up its plan. If the actuarial report discloses a going-concern liability, the employer is required to make monthly special payments over a 15 year period to fund the unfunded liability. If the actuarial report discloses a solvency deficiency, the

employer is required to make monthly special payments over a 5 year period to fund the deficiency.

[84] It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.

[85] The wind up of a pension plan is defined in the *PBA* as "the termination of the pension plan and the distribution of the assets of the pension fund" (s. 1(1)). At the effective date of wind up, the plan members cease to accrue further entitlements under the plan. Naturally, no new members may join the plan after the wind up date. The pension fund of a plan that is wound up continues to be subject to the *PBA* and the Regulations until all of the assets of the fund have been disbursed (s. 76).

[86] Winding up a pension plan must be distinguished from closing the plan, which simply means that no new entrants are permitted to join the plan.

[87] Under the *PBA*, there are two ways that a pension plan can be wound up. First, s. 68(1) recognizes that an employer[3] can voluntarily wind up the pension plan. Second, under s. 69(1), in certain circumstances, the Superintendent may order the wind up of the plan.

---

[3] Or, in the case of a multi-employer plan, the administrator.

[88] The *PBA* contains a detailed statutory scheme that must be followed when a pension plan is to be wound up. This scheme imposes obligations on the employer and plan administrator, including the following:

- The administrator has to give written notice of proposal to wind up to various people, including the Superintendent, and the notice must contain specified information (s. 68(2) and (4));
- A wind up date must be chosen and the administrator must file a wind up report showing, among other things, the plan's assets and liabilities as at that date (s. 70(1));
- No payments can be made out of the pension fund until the Superintendent has approved the wind up report (s. 70(4));
- Plan members with a certain combination of age and years of service or membership in the plan are entitled to additional benefits on wind up (grow-ins) (s. 74).

[89] Importantly, s. 75 requires an employer to make two different categories of payment on plan wind up. Sections 75(1)(a) and (b) read as follows:

> **Liability of employer on wind up**
>
> **75.** (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

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

[90] Section 75(1)(a) requires the employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund. Any unpaid current service costs and unpaid special payments are caught by this subsection. In other words, by virtue of this subsection, any payments that the employer had to make while the plan was ongoing must be paid. It will be recalled that while the plan was ongoing, some special payments could be made over time.

[91] Section 75(1)(b) requires the employer to pay additional amounts into the pension fund if there are insufficient assets to cover the value of the pension benefits in the three categories set out in s. 75(1)(b).

[92] It will be apparent that on wind up, an employer will often be faced with having to make significant additional contributions under s. 75(1)(b), in addition to being required to bring all contributions up to date because of s. 75(1)(a). Section 75(2) stipulates that "the employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times." Section 31 of the Regulations prescribes the manner and timing for the s. 75 wind up payments. It provides that the amounts an employer is to contribute under section 75 shall be by annual special payments, commencing at the effective date of the wind up, over not more than five years.

THE *PBA* DEEMED TRUST

[93] The central issue in these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA*. Section 57(4) reads as follows:

> **57.** (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.** [emphasis added]

[94] The modern approach to statutory construction dictates that in interpreting s. 57(4), the words must be read

> in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[4]

[95] Section 57(4) deems an employer to hold in trust an amount equal to the contributions "accrued to the date of wind up but not yet due under the plan or regulations". The question is: what employer contributions are caught by s. 57(4) and, thus, are subject to the deemed trust?

[96] The introductory words of s. 57(4) refer to where a pension plan is "wound up". Therefore, to answer this question, one must refer to the wind up regime created by the *PBA* and Regulations, a summary of which is set out above.

[97] It will be recalled that when a pension plan is wound up, an actuarial calculation is made of the assets and liabilities, as of the wind up date. Because the plan liabilities relate to service that was provided up to the wind up date and not beyond, it is clear that all plan liabilities are accrued as of the wind up date. Put another way, no additional liability can accrue following the wind up because all events crystallize on the windup date – all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind up date. For the same reason, the amounts that s. 75 requires an employer to contribute to the pension fund, on wind up, are accrued to the date of wind up. The required contributions are the amounts that an employer must make to the pension fund so that the accrued pension benefits of the plan members can be paid.

---

[4] *Bell ExpressVu Limited Partnership v. Rex.*, [2002] 2 S.C.R. 559, at para. 26.

[98] It will be further recalled that s. 31 of the Regulations gives the employer up to five years in which to make all of the required s. 75 contributions. However, the fact that an employer is given time in which to pay the requisite contributions into the pension fund does not change the fact that the liabilities accrued by the wind up date.

[99] This point is reinforced when one distinguishes amounts that are "accrued" from amounts that are "not yet due". In *Hydro-Electric Power Commission (Ontario) v. Albright* (1922), 64 S.C.R. 306, at para. 23, the Supreme Court of Canada explains that money is "due" when there is a legal obligation to pay it, whereas payments are "accrued" when the rights or obligations are constituted and the liability to pay exists, even if the payment does not need to be made until a later date (*i.e.* is not "due" until a later date).

[100] Thus, just as s. 57(4) contemplates, while the amounts that the employer must contribute to the pension fund pursuant to s. 75 "accrued to the date of wind up", because of s. 31 those contributions are "not yet due under the ... regulations".

[101] There is nothing in the wording of s. 57(4) to suggest that its scope is confined to the amounts payable under only s. 75(1)(a), as the respondents contend. On the contrary, the words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to

s. 75. In short, the words "employer contributions accrued to the date of wind up but not yet due" in s. 57(4) include all amounts owed by the employer on the wind up of its pension plan.

[102] This interpretation accords with a contextual analysis of s. 57(4).

[103] As these appeals demonstrate, during the five-year "grace" period permitted by s. 31 of the Regulations, the rights of plan beneficiaries are at risk. Sections 57(4) and (5) provide some protection to the plan beneficiaries during that period. The employees' interest is in receiving their full pension entitlements. For that to happen, all s. 75 employer contributions must be made into the pension fund. The employer, on the other hand, has an interest in having a reasonable period of time within which to make the requisite s. 75 contributions. Section 31 of the Regulations gives the employer up to five years to make the contributions, during which time the deemed trust in s. 57(4) and the lien and charge in s. 57(5) provide a measure of protection for the employees over the amount of the unpaid employer contributions, contributions that had *accrued* to the date of wind up *but [were] not yet due under the regulations*.

[104] Further, this interpretation is consistent with the overall purpose of the *PBA*, which is to establish minimum standards,[5] safeguard the rights of pension plan beneficiaries,[6]

---

[5] *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, at para. 13, relying on *Gencorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503.

[6] *Ibid.*

and ensure the solvency of pension plans so that pension promises will be fulfilled.[7] As the Supreme Court of Canada said in *Monsanto*, at para. 38:

> The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (citations omitted).

[105] Much reference has been made to the two cases in which s. 57(4) has been discussed: *Re Ivaco* (2005), 12 C.B.R. (5th) 213 (Ont. S.C.), aff'd (2006), 83 O.R. (3d) 108 (C.A.), and *Toronto-Dominion Bank v. Usarco* (1991), 42 E.T.R. 235 (Ont. Ct. (Gen. Div.)). In my view, these decisions are of little assistance in deciding this issue.

[106] Factually, *Ivaco* and *Usarco* differ from the present case. In *Ivaco* and *Usarco*, the prospect of bankruptcy was firmly before the court whereas in this case, at its highest, there is a motion to lift the stay and file for bankruptcy.

[107] Moreover, there are conflicting statements in *Ivaco* and *Usarco* regarding the applicability of the deemed trust to wind up deficiencies. In *Usarco*, a bankruptcy petition had been filed but no steps had been taken to proceed with the petition. The company was not under *CCAA* protection. In that context, Farley J., the motion judge, held that the deemed trust provision referred only to the regular contributions together

---

[7] *Bourdon v. Stelco Inc.*, [2005] S.C.R. 279, at para. 24.

with special contributions that were to have been made but had not been.[8] In *Ivaco*, the major financers and creditors wished to have the *CCAA* proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. The case was focused primarily on whether there was a reason to defeat the bankruptcy petition. In *Ivaco,* Farley J. took a different view of the scope of the s. 57(4) deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities.[9] On appeal, although this court indicated that it thought that Farley J.'s statement in *Usarco* was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the *PBA*.

[108] The *CCAA* judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully, I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(a). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(b).

[109] Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the *PBA*, was subject to a deemed trust. The *CCAA* judge erred in holding that no deemed trust existed with respect to that

---

[8] At para. 26.
[9] At para. 11.

deficiency as at July 20, 2009. The consequences that flow from this conclusion are explored in the section below on how the Reserve Fund is to be distributed.

[110] Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument – the introductory words of the provision speak to "where a pension plan is wound up". In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

[111] Having said this, I am troubled by the notion that Indalex can rely on its own inaction to avoid the consequences that flow from wind up. In its letter of July 13, 2009, counsel for the Monitor confirmed that the Executive Plan would be wound up. Indeed, the *CCAA* judge acknowledged that the material filed with the court showed an intention on the part of the Applicants to wind up the plan. If the deemed trust does not extend to the Executive Plan, in the circumstances of this case, it appears that the result would be a triumph of form over substance.

[112] In the end, however, the question that drives these appeals is whether the Monitor should be directed to distribute the Reserve Fund to the Plans. As I explain below in the section on how the Reserve Fund should be distributed, in my view, such an order should be made. Consequently, it becomes unnecessary to decide whether the deemed trust

applies to the deficiency in the Executive Plan and I decline to do so. It is a question that is best decided in a case where the result depends on it and a fuller record would enable the court to appreciate the broader implications of such a determination.

DID INDALEX BREACH ITS FIDUCIARY OBLIGATION?

[113] The appellants say that Indalex, as administrator of the Plans, owed a fiduciary duty to the Plans' members and beneficiaries. Both appellants list a number of actions that Indalex took or failed to take during the *CCAA* proceedings that they say amounted to breaches of its fiduciary obligation. They contend that the appropriate remedy for those breaches is an order requiring the Reserve Fund to be paid into the Plans.

[114] The Monitor acknowledges that pension plan administrators have both a statutory and common law duty to act in the best interests of the plan beneficiaries and to avoid conflicts of interest, and that these duties are "fiduciary in nature". However, the Monitor contends that Indalex took all of the impugned actions in its role as employer and, therefore, could not have breached the fiduciary duties it owed to the Plans' beneficiaries as administrator. In any event, the Monitor adds, the issue is moot because any such breaches would merely give rise to an unsecured claim outside the ambit of the deemed trusts created by the *PBA*.

[115] Sun Indalex echoes the Monitor's latter argument and says that the allegations of breach of fiduciary duty are irrelevant in these appeals. Its submission on this issue is summarized in para. 79 of its factum:

> [79] There is no provision in the PBA that creates a deemed trust in respect of any claim for damages based on an alleged breach of fiduciary duty by an employer and there is no basis in the PBA for conferring a priority with respect to such a claim. If a claim for breach of fiduciary duty on the part of Indalex exists, it is merely an unsecured claim outside the ambit of the deemed trusts created by the PBA that does not have priority over Sun's secured claim or the super-priority DIP Lenders Charge.

[116] For the reasons that follow, I accept the appellants' submission that Indalex breached its fiduciary obligations as administrator during the *CCAA* proceedings. I deal with the question of what flows from that finding when deciding the issue of remedy.

[117] It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries.[10] These obligations arise both at common law and by virtue of s. 22 of the *PBA*.

[118] The common law governing fiduciary relationships is well known. A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests.[11] The key factual characteristics of a fiduciary relationship are: the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and, a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power.[12]

---

[10] *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273, at paras. 39-41.
[11] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at para. 32.
[12] *Ibid.*, at para. 30; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 646.

[119] It is readily apparent that these characteristics exist in the relationship between the pension plan administrator and the plan members and beneficiaries. The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. And, as these appeals demonstrate, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, Indalex as the Plans' administrator owed a fiduciary duty to the Plans' members and beneficiaries to act in their best interests.

[120] Section 22 of the *PBA* also imposes a fiduciary duty on the administrator in the administration of the plan and fund. As well, it expressly prohibits the administrator from knowingly permitting its interest to conflict with its duties in respect of the pension fund. The relevant provisions in s. 22 read as follows:

> **Care, diligence and skill**
>
> **22.** (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> **Special knowledge and skill**
>
> (2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the

> administrator's profession, business or calling, ought to possess.
>
> ...
>
> **Conflict of interest**
>
> (4) An administrator ... shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

[121] In Ontario, an employer is expressly permitted to act as the administrator of its pension plan: see ss. 1 and 8 of the *PBA*.[13] It is self-evident that the two roles can conflict from time to time. In *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 (*Imperial Oil*), the Pension Commission of Ontario (PCO) grappled with this statutorily sanctioned conflict in roles.

[122] In that case, the employer Imperial Oil was the administrator of two employee pension plans. Imperial Oil sought to file amendments to the pension plans with the PCO. Prior to the amendments, a plan member with 10 or more years of service with Imperial Oil whose employment was terminated for efficiency reasons was entitled to an enhanced early retirement annuity (the enhanced benefit). The effect of the amendments was to deny such an employee the enhanced benefit unless the employee would have been able to retire within five years of termination. Put another way, after the amendments, in addition to the other requirements, an employee had to be 50 years of age

---

[13] In contrast, Quebec legislation requires that plan administration be entrusted to a pension committee of at least three persons, including a representative of each of the active and inactive members of the plan and an independent member. See *Supplemental Pension Plans Act*, R.S.Q. c. R-15.1, s. 147.

or older at the time his or her employment was terminated for efficiency reasons in order to receive the enhanced benefit.

[123] The Superintendent accepted the amendments for registration.

[124] Some six months after the amendments were passed, Imperial Oil terminated the employment of a large number of employees for efficiency reasons. A number of the affected employees had 10 or more years of service but, because they had not reached the age of 50, they were denied the enhanced benefit.

[125] A group of former employees (the Entitlement 55 Group) objected to the registration of the amendments. They brought an application to the PCO, seeking a declaration that the amendments were void and an order compelling Imperial Oil to administer the pension plans according to the terms of the plans in place before the amendments were passed.

[126] Among other things, the Entitlement 55 Group argued that when Imperial Oil amended the plans, it was acting in both its capacity as employer and its capacity as administrator of the plans. Thus, they contended, Imperial Oil placed itself in a conflict of interest situation prohibited by s. 22(4) of the *PBA* because in its role as employer it wished to reduce pension fund liabilities but in its role as administrator it had a duty to protect the interests of the beneficiaries who had reached the 10 year service qualification and thereby "qualified" for the enhanced benefit.

[127] The PCO dismissed the application. In so doing, it rejected the submission that Imperial Oil had contravened s. 22(4) by passing the amendments. It held that Imperial Oil had acted solely in its capacity as employer when it passed the amendments.

[128] The PCO acknowledged that the *PBA* allows an employer to wear "two hats" – one as employer and the other as administrator. However, at para. 33 of its reasons, the PCO explained that an employer plays a role in respect of the pension plan that is distinct from its role as administrator:

> Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters around the exercise of a power of amendment.

[129] The "two hats" analogy in *Imperial Oil* assists in understanding the parameters of the dual roles of an employer who is also the administrator of its pension plan. The employer, when managing its business, wears its corporate hat. Although the employer *qua* corporation must treat all stakeholders fairly when their interests conflict, the directors' ultimate duty is to act in the best interests of the corporation: see *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, at paras. 81-84. On the other hand, when

acting as the pension plan administrator, the employer wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries.

[130] The question raised by these appeals is whether, as the respondents contend, Indalex wore only its corporate hat during the *CCAA* proceedings. In my view, it did not. As I will explain, during the *CCAA* proceedings, in the unique circumstances of this case, Indalex wore both its corporate and its administrator's hats.

[131] I begin from the position that Indalex had the right to make the decision to commence *CCAA* proceedings wearing solely its corporate hat. That decision is not part of the administration of the pension plan or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan. For example, an employer might sell its business under *CCAA* protection, with the purchaser agreeing to continue the pension plan. In that situation, there should be no effect on the payment of pension benefits. Similarly, if the pension plan were fully funded, *CCAA* proceedings should have no effect on pension entitlements.

[132] However, just because the initial decision to commence *CCAA* proceedings is solely a corporate one that does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. In the circumstances of this case, Indalex could not simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection. Shortly after initiating *CCAA* proceedings, Indalex moved to obtain DIP financing, in which it agreed to give the DIP lenders a super-priority charge. At the

same time, Indalex knew that the Plans were underfunded and that unless more funds were put into the Plans, pensions would have to be reduced. The decisions that Indalex was unilaterally making had the potential to affect the Plans beneficiaries' rights, at a time when they were particularly vulnerable. The peculiar vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the *CCAA* proceedings, had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered – much less protected – during the DIP negotiations.

[133] In concluding that Indalex was subject to its fiduciary duties as administrator as well as its corporate obligations during the *CCAA* proceedings, two points need to be made.

[134] First, it is significant that Indalex is unclear as to what it thinks happened to its role as administrator during the *CCAA* proceedings. When cross-examined on this matter, Mr. Cooper gave various responses as to whom he believed filled that role: Indalex, a combination of him and the Monitor, and a combination of him and his staff. This confusion is understandable, given the number of roles that Mr. Cooper played in these proceedings. It will be recalled that prior to the commencement of the *CCAA* proceedings, he became the Chief Restructuring Officer for Indalex U.S., a position which included responsibility for the Canadian group of Indalex companies. In this position, he served as Indalex's primary negotiator of the DIP credit agreement. But, at the same time, he worked for FTI Consulting Inc. The Monitor is a wholly-owned

subsidiary of FTI Consulting Inc. This blending of roles no doubt contributed to the apparent disregard for the obligations owed by the Plans' administrator.

[135] In any event, it is not apparent to me that Indalex could ignore its role as administrator or divest itself of those obligations without taking formal steps through the Superintendent, plan amendment, the courts, or some combination thereof, to transfer that role to a suitable person. However, I will not consider this particular question further because it was not squarely raised and argued by the parties and, in any event, even if Mr. Cooper became the administrator, through his various roles, including as Chief Restructuring Officer for Indalex U.S., he is so clearly allied in interest with Indalex that the following analysis remains applicable.

[136] Second, the respondents' submission that Indalex wore only its corporate hat during the proceedings is implicitly premised on the notion that an employer will wear its corporate hat or its administrator's hat, but never both. I do not accept this premise. Nor do I accept that the reasoning in *Imperial Oil*, which the respondents rely on, supports this submission.

[137] In *Imperial Oil*, the PCO had to decide whether certain acts taken in respect of a pension plan were those of the employer or the administrator. Because the provision of pension plans is voluntary in Canada, the employer has the right to decide questions of plan design, including whether to offer a pension plan and, if it does, whether to end it. In part because of the wording of s. 14 of the *PBA* and in part because the amendments at

issue in *Imperial Oil* were a matter of plan design, the PCO concluded that the employer was found to be acting solely in its corporate role when it passed the amendments. There is nothing in *Imperial Oil* to suggest that an employer cannot find itself in a position where it is wearing both hats at the same time.

[138] I turn next to the question of breach.

[139] As previously noted, when Indalex commenced *CCAA* proceedings, it knew that the Plans were underfunded and that unless additional funds were put into the Plans, pensions would be reduced. Indalex did nothing in the *CCAA* proceedings to fund the deficit in the underfunded Plans. It took no steps to protect the vested rights of the Plans' beneficiaries to continue to receive their full pension entitlements. In fact, Indalex took active steps which undermined the possibility of additional funding to the Plans. It applied for *CCAA* protection without notice to the Plans' beneficiaries. It obtained a *CCAA* order that gave priority to the DIP lenders over "statutory trusts" without notice to the Plans' beneficiaries. It sold its assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans.[14] It moved to obtain orders approving the sale and distributing the sale proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. And, Indalex U.S. directed Indalex to bring its bankruptcy motion with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to it. In short, Indalex did nothing to protect the

[14] On advice of counsel, Mr. Cooper refused to answer questions about what, if any, steps were taken to have the purchaser take over the Plans.

best interests of the Plans' beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator.

[140] Further, in my view, Indalex was in a conflict of interest position. As has been mentioned, Indalex's corporate duty was to treat all stakeholders fairly when their interests conflicted, but its ultimate duty was to act in the best interests of the corporation. Indalex's duty as administrator was to act in the Plans' beneficiaries best interests. It is apparent that in the circumstances of this case, these duties were in conflict.

[141] The common law prohibition against conflict of interest is not confined to situations where the fiduciary's personal interest conflicts with those of the beneficiaries. It also precludes the fiduciary from placing itself in a position where it acts for two parties who are adverse in interest: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2nd) 599 (C.A.), at para. 8. In *Davey*, a solicitor who acted for both sides of a business transaction was found to be in breach of his fiduciary obligations. Wilson J.A., writing for this court, explained that the conflict arose because the solicitor could not fulfill his duties in respect of both clients at the same time. At para. 18, she concluded that the solicitor was bound to refuse to act for the plaintiff in the circumstances.

[142] The prohibition against a fiduciary being in a position of conflicting duties governs the situation in which Indalex found itself in during the *CCAA* proceedings.

[143] Indalex was not at liberty to resolve the conflict in its duties by simply ignoring its role as administrator. A fiduciary relationship does not end simply because it becomes

impossible of performance. At the point where its duty to the corporation conflicted with its duties as administrator, it was incumbent on Indalex to take steps to address the conflict.

[144] Even if I am in error in concluding that Indalex was in breach of its common law fiduciary obligations, I would find that its actions amounted to a breach of s. 22(4) of the *PBA*. Section 22(4) prohibits an administrator from knowingly permitting its interest to conflict with its duties and powers in respect of the pension fund. Under s. 57(5) of the *PBA*, as administrator, Indalex had a lien and charge on its assets for the amount of the deemed trust. Any steps that it might have taken pursuant to s. 57(5), as administrator, would have been in respect of the pension fund. Thus, if nothing else, Indalex's actions during the *CCAA* proceedings demonstrate that it permitted its corporate interests to conflict with the administrator's duties and powers that flow from the lien and charge.

[145] Having found that Indalex breached its fiduciary obligations to the Plans' beneficiaries, the question becomes: what flows from such a finding? I address that question below when considering the issue of how to distribute the Reserve Fund. At that time I will return to the arguments of the Monitor and Sun Indalex to the effect that such a finding is largely irrelevant in these proceedings.

DOES THE COLLATERAL ATTACK RULE BAR THE DEEMED TRUST MOTIONS?

[146] The U.S. Trustee submits that even if the *PBA* creates a deemed trust for any wind up deficiencies in the Plans, the appeals should be dismissed because the underlying motions are an impermissible collateral attack on previous orders made in the *CCAA* proceedings. His argument runs as follows.

[147] The Initial Order, the June 12, 2009 order and the Sale Approval order (the "Court Orders") are all valid, enforceable court orders. The Court Orders gave super-priority rights to the DIP lenders and Indalex U.S. is subrogated to those rights. None of the Court Orders were appealed and no party sought to have them set aside or varied. As the appellants' motions seek to alter the priorities established by the Court Orders, they should be barred because they are an impermissible collateral attack on those orders.

[148] I do not accept this submission for three reasons, the first two of which can be shortly stated.

[149] First, this submission is an attack on the underlying motions. As such, it ought to have been raised below. The Former Executives say that the collateral attack doctrine was raised for the first time on appeal. Certainly, if it was raised below, the *CCAA* judge makes no reference to it. As a general rule, it is not appropriate to raise an issue for the first time on appeal. The exceptions to this general rule are very limited and do not apply in this case: see *Cusson* v. *Quan*, [2009] 3 S.C.R. 712, at paras. 36-37.

[150] Second, the USW and the Former Executives raised the matter of the deemed trusts in the *CCAA* proceedings. The *CCAA* judge designed a process by which their claims would be resolved. They followed that process. The USW and Former Executives can scarcely be faulted for complying with a court-designed process. Further, the Sale Approval order acknowledged the deemed trust issue in that it required the Monitor to hold funds in reserve that were sufficient to satisfy the deemed trust claims. That acknowledgment is inconsistent with a subsequent claim of impermissible collateral attack.

[151] Third, as I will now explain, an appreciation of the *CCAA* regime makes it apparent that the collateral attack rule does not apply in the circumstances of this case.

[152] The collateral attack rule rests on the need for court orders to be treated as binding and conclusive unless they are set aside on appeal or lawfully quashed. Court orders may not be attacked collaterally. That is, a court order may not be attacked in proceedings other than those whose specific object is the reversal, variation, or nullification of the order. See *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at para. 8.

[153] The fundamental policy behind the rule against collateral attacks is "to maintain the rule of law and to preserve the repute of the administration of justice": see *R. v. Litchfield*, [1993] 4 S.C.R. 333, at para. 22. If a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from

circumventing the effect of a decision rendered against it: see *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, at para. 72.

[154] The *CCAA* regime is designed to deal with all matters during an insolvent company's attempt to reorganize. The court-ordered stay of proceedings ensures that there is only one forum where parties can put forth their arguments and claims. By pre-empting other legal proceedings, the stay gives a corporation breathing space, which promotes the opportunity for reorganization.

[155] The *CCAA* regime is a flexible, judicially supervised reorganization process that allows for creative and effective decisions: see *Century Services Ltd.* v. *Canada (Attorney General)*, [2010] 3 S.C.R. 379, at para. 21. The *CCAA* judge is accorded broad discretion because the proceedings are a fact-based exercise that requires ongoing monitoring and because there is often a need for the court to act quickly. There is an underlying assumption, however, that the *CCAA* proceedings will provide an opportunity for affected persons to participate in the proceedings.

[156] This assumption finds voice in para. 56 of the Initial Order, as amended, which permits any interested party to apply to the *CCAA* court to vary or amend the Initial Order (the come-back clause). That is precisely what the appellants did. As interested parties, they went to the *CCAA* court to ask that the super-priority charge be varied or amended so that their claims could be properly recognised.

[157] Moreover, I do not accept that the appellants failed to act promptly in asserting their claims. It was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court.

[158] The U.S. Trustee's argument that the Court Orders were never appealed is not persuasive. In *Algoma Steel Inc. Re* (2001), 147 O.A.C. 291, at paras. 7-9, this court stated that it is premature to grant leave to appeal from an initial order – brought on an urgent basis to deal with seemingly desperate circumstances – when the order specifically opens the proceeding to all interested parties and invites dissatisfied parties to bring their concerns to the court on a timely basis using a come-back provision.

[159] As the Former Executives point out, had the appellants sought to advance their deemed trust claims by bringing a motion challenging the paragraph of the Initial Order that established the DIP super-priority charge, it is likely that they would have been met by a response that their motions were premature. Depending on the amount paid for the company and/or the arrangements made in respect of the Plans, the interests of the Plans' beneficiaries might not have been affected by a sale. Indeed, on July 2, 2009, when Indalex brought a motion to have the bidding procedures approved for the asset sale and the Former Executives objected because of concerns that the Plans were underfunded, the

CCAA judge endorsed the record as follows: "The issues can be raised by the retirees on any application to approve a transaction – but that is for another day."

[160] The appellants followed that direction. When Indalex moved to have the sale transaction approved and the jeopardy to the appellants' interests became apparent, they went to the *CCAA* court and raised the deemed trust issue.[15]

[161] Thus, as I have said, I do not view the deemed trust motions as collateral attacks on the Court Orders. The motions were raised in a timely manner in the same court in which the orders were made. They can scarcely be termed attempts to circumvent decisions rendered against the USW and the Former Executives when no decision had ever been rendered in which their claims had been squarely raised and addressed. The process the USW and the Former Executives followed is exactly that which is contemplated in *CCAA* proceedings and, specifically, the come-back clause.

[162] Even if the collateral attack rule were applicable, however, this is not a case for its strict application.

[163] In *Litchfield*, the Supreme Court of Canada recognized that there will be situations in which the collateral attack rule should not be strictly applied. In that case, a physician had been charged with a number of counts of sexual assault on his patients. On motion, a judge (not the trial judge) ordered that the counts be severed and divided and three

---

[15] To the extent that the U.S. Trustee suggests that the Former Executives raised the deemed trust issue at the motion heard on June 12, 2010, I reject this submission. As explained in the background portion of these reasons, the Former Executives' reservation of rights on June 12, 2010, was to obtain time to confirm that the motion related solely to an increase in the DIP loan amount.

different trials be held. After one trial, the physician was acquitted. The Crown appealed. One of the grounds of appeal related to the pre-trial severance order. The question arose as to whether the Crown's challenge to the validity of the severance order violated the collateral attack rule.

[164] At paras. 16-19 of *Litchfield*, Iacobucci J., writing for the majority, explains that "some flexibility" is needed in the application of the rule against collateral attacks. Strictly applied, the rule would prevent the trial judge from reviewing the severance order because the trial was not a proceeding whose specific object was the reversal, variation or nullification of the severance order. However, Iacobucci J. noted, the rule is not intended to immunize court orders from review. He reiterated the powerful rationale behind the rule: to maintain the rule of law and preserve the repute of the administration of justice. This promotes certainty and finality, key aspects of the orderly and functional administration of justice. However, he concluded that flexibility was warranted because permitting a collateral attack on the severance order did not offend the underlying rationale for the rule.

[165] Similarly, in *R. v. Domm* (1996), 31 O.R. (3d) 540, at para. 31, Doherty J.A., writing for this court, states that if a collateral attack can be taken without harm to the interests of the rule of law and the repute of the administration of justice, the rule should be relaxed. At para. 36 of *Domm*, he says that the rule must yield where a person has "no other effective means" of challenging the order in question.

[166] I acknowledge that certainty and finality are necessary to the proper functioning of the legal system. And, I recognize that permitting the appellants' motions to proceed has generated some degree of uncertainty as to the priorities established by the Court Orders. However, in the circumstances of this case, there was no other effective means by which the appellants could assert their claims to a deemed trust. As has been mentioned, it was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court. By permitting their motions to be heard, the *CCAA* judge did not damage the repute of the administration of justice. On the contrary, he strengthened it. He enabled the sale to proceed while ensuring that the competing claims to the Reserve Fund would be decided on the merits and expeditiously.

[167] Nor can it be said, for the reasons already given about the nature of *CCAA* proceedings, that the deemed trust motions jeopardize the rule of law. Given the nature of a *CCAA* proceeding, the court must often make orders on an urgent and expedited basis, with little or no notice to creditors and other interested parties. Its processes are sufficiently flexible that it can accommodate situations such as the one that arose here. A strict application of the rule would preclude the appellants from having the opportunity to meaningfully challenge the super-priority charge in the Initial Order, as amended. In my view, that result would be a fundamental flaw in the *CCAA* process, one in which

procedure triumphed over substance. As Iacobucci J. said in *Litchfield*, at para. 18, such a result cannot be accepted.

[168] Accordingly, in my view, while the collateral attack rule does not apply, even if it did, there are compelling reasons in this case to relax its strict application.

DO THE PRINCIPLES OF CROSS-BORDER INSOLVENCIES APPLY?

[169] The U.S. Trustee also submits that the principles of cross-border insolvencies should be applied when deciding these appeals. He contends that notwithstanding that separate proceedings were commenced in Canada and the U.S., those principles apply because the Applicants were direct and indirect subsidiaries of certain of the U.S. debtors, who commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in March 2009. Further, the U.S. Trustee contends that if the appellants' claims were to succeed, it would seriously undermine the basic principles underlying cross-border insolvencies and the confidence of foreign creditors and courts in the Canadian insolvency system.

[170] While this argument provides context for the U.S. Trustee's collateral attack submission, I do not see it as disclosing any legal grounds relevant to these appeals. By order dated May 12, 2009, Morawetz J. approved a cross-border protocol in these proceedings that stipulates that the U.S. and Canadian courts retain exclusive jurisdiction over the proceedings in their respective jurisdictions. Furthermore, there is no evidence to support the U.S. Trustee's claim that allowing these appeals would impair future

lending practices by U.S. companies. Finally, nothing has been raised which supports the notion that upholding valid provincial law in the circumstances of these appeals will undermine the principles of cross-border insolvencies.

HOW IS THE RESERVE FUND TO BE DISTRIBUTED?

The Salaried Plan

[171] Having concluded that a deemed trust exists with respect to the deficiency in the Salaried Plan as at July 20, 2009, the question becomes whether the Monitor should be ordered to pay the amount of that deficiency, from the Reserve Fund, into the Salaried Plan.

[172] The USW argues, on behalf of the beneficiaries of the Salaried Plan, that the deemed trust ranks in priority to all secured creditors and, therefore, the order should be made. Its argument rests on s. 30(7) of the *PPSA*, which reads as follows:

> **30. (7) A security interest** in an account or inventory and its proceeds **is subordinate to the interest of a person who is the beneficiary of a deemed trust** arising under the Employment *Standards Act* or **under the *Pension Benefits Act.*** [emphasis added]

[173] The USW contends that as s. 30(7) gives priority to the *PBA* deemed trust and no finding of paramountcy was made in these proceedings, it must be given effect.

[174] The respondents argue that the super-priority charge has priority over any deemed trusts and, therefore, the Reserve Fund should be paid to Sun Indalex, as the principal secured creditor of Indalex U.S. They point to well-established law that authorizes the

court to grant super-priority to DIP lenders in *CCAA* proceedings and argue that without such a charge, DIP lenders will no longer provide financing to companies under *CCAA* protection. Without DIP funding they say, many companies under *CCAA* protection will be unable to continue in business until a compromise or arrangement has been worked out. Consequently, companies will file for bankruptcy where deemed trusts have no priority. This, they say, will frustrate the very purpose of the *CCAA*, which is to facilitate the making of compromises or arrangements between insolvent debtor companies and their creditors.

[175] There is a great deal of force to the respondents' submissions. Indeed, in general, I agree with them. 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. Nonetheless, in the circumstances of this case, it is my view that the Monitor should be ordered to pay the amount of the deficiency, from the Reserve Fund, into the Salaried Plan.

[176] The *CCAA* court has the authority to grant a super-priority charge to DIP lenders in *CCAA* proceedings.[16] I fully accept that the *CCAA* judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the *PBA*. I also accept that without such a charge, DIP lenders may be unwilling to provide financing to companies under *CCAA* protection. However, this does not mean that the

---

[16] See, for example, *InterTAN Canada Ltd.(Re),* (2009), 49 C.B.R. (5th) 232 (Ont. S.C.). And, the granting of super-priority charges is referred to with approval in *Century Services*, at para. 62.

super-priority charge in question has the effect of overriding the deemed trust. To decide whether it does, one must turn to the doctrine of paramountcy.

[177] Valid provincial laws continue to apply in federally regulated bankruptcy and insolvency proceedings absent an express finding of federal paramountcy. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the federal and provincial laws are incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law: see *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 75 and *Nortel Networks Corp. (Re)* (2009), 99 O.R. (3d) 708 (C.A.), at para. 38, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 531.

[178] In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including "regulatory deemed trust requirements".

[179] While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.

[180] Does this conclusion thwart the purpose of the *CCAA* regime, which is to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidation? It does not appear that would have happened in the present case. The granting of a stay in a *CCAA* proceeding provides a company with breathing space so that it can restructure. In this case, the stay of proceedings gave Indalex the breathing space it needed to effect a sale of its business. Recall that this was a "liquidating CCAA" from the outset. There was no restructuring of the company. There was no plan of compromise or arrangement prepared and presented to creditors. Within days of obtaining *CCAA* protection, Indalex began a marketing process to sell itself. Very shortly thereafter, it sold its business as a going-concern. There is nothing in the record to suggest that giving the deemed trust priority would have frustrated Indalex's efforts to sell itself as a going-concern business.

[181] What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in *CCAA* proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be

made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the *CCAA* judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. But, this depends on the applicant clearly raising the issue of paramountcy, which will alert affected parties to the risks to their interests and put them in a position where they can take steps to protect their rights. That, however, is not this case.

[182] Nor am I persuaded by the argument that if the deemed trust is given effect in the unique circumstances of this case, companies will file for bankruptcy instead of moving for *CCAA* protection. This argument suggests that companies will act based on the desire to avoid their pension obligations. That motivation does not conform with the obligations that directors owe to the corporation. The obligation to act in the best interests of the corporation suggests that companies will choose the route that maximizes recovery for creditors. As the respondents point out, Indalex sought a going-concern sale for exactly that reason. In addition, by selling its business as a going concern, Indalex preserved value for suppliers and customers who can continue to do business with the purchaser and preserved approximately 950 jobs for its former employees. Surely the desire to maximize recovery for their creditors – along with those other considerations – would have prevailed had Indalex known it would have to satisfy the deemed trust when considering whether to pursue bankruptcy or *CCAA* proceedings. In this regard, it is worth recalling that consideration for the sale exceeded $151 million, all DIP lenders

were repaid in full, the Reserve Fund consists of undistributed proceeds, and the total deficiencies in the Plans appear to be approximately $6.75 million.

[183] As for the suggestion that Indalex will pursue its bankruptcy motion in order to defeat the deemed trust, I would simply echo the comments of the *CCAA* judge that a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation. I would add this additional consideration: it is inappropriate for a *CCAA* applicant with a fiduciary duty to pension plan beneficiaries to seek to avoid those obligations to the benefit of a related party by invoking bankruptcy proceedings when no other creditor seeks to do so.

[184] There is also the matter of Indalex U.S.'s apparent reliance on the super-priority charge when it gave the Guarantee. As explained more fully above, Indalex U.S. was fully aware of Indalex's obligations to the Plans when it entered into the Guarantee. Again as explained more fully above, there were a number of different steps that Indalex could have taken to deal with these obligations. It chose not to. This is not a case in which the secured creditor is an arm's length third party taken by surprise by the claims of the Plans' beneficiaries.

[185] A final consideration that must be addressed at this stage arises from the recent decision of the Supreme Court of Canada in *Century Services*, which was released after the oral hearing of the appeals. The parties were invited to make written submissions on

the impact of *Century Services*, if any, on these appeals. I am grateful for the excellence of those submissions, which mirrors the quality of the original submissions.

[186] *Century Services* deals with conflicting provisions in two pieces of federal legislation: s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, which gives the federal Crown a deemed trust for unpaid GST, and s. 18.3(1) (now s. 37) of the *CCAA*, which expressly excludes deemed trusts in favour of the Crown from applying in *CCAA* proceedings. Deschamps J., for the majority, conducted a comprehensive analysis of the two conflicting sections and held that s. 18.3(1) of the *CCAA* prevails. In sum, *Century Services* stands for the proposition that s. 18.3(1) of the *CCAA* excludes the deemed trust for unpaid GST created by s. 222 of the *Excise Tax Act* from applying in a *CCAA* proceeding.

[187] It will be readily apparent that *Century Services* is distinguishable from the present case in a number of ways. Three significant differences between it and the present appeals are worthy of note.

[188] First, in *Century Services*, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The *CCAA* proceedings in the present case, on the other hand, were successful – they resulted in the sale of Indalex's assets and the continuation of the business, albeit through another entity. It is not a situation in which

transition to the bankruptcy regime was inevitable because efforts under the *CCAA* had failed.

[189] Second, *Century Services* deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a *CCAA* proceeding. Significantly, unlike the situation in *Century Services,* there is nothing in the *CCAA* that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in *CCAA* proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the *CCAA* judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the *CCAA* proceeding. Moreover, it is difficult to see how a finding of paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements.[17]

[190] Third, no issue of fiduciary duty arose in *Century Services*. In the present case, as discussed previously and again below, the impact of fiduciary duties during the *CCAA* proceeding plays a significant role.

---

[17] See para. 178 of these reasons.

[191] The respondents contend that *Century Services* is crucial in the disposition of these appeals because it stands for the proposition that federal priorities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) apply in *CCAA* proceedings. If *Century Services* stood for that proposition, I would agree. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the *BIA*: see, for example, *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24.

[192] However, in my view, *Century Services* does not stand for that unqualified proposition. In *Century Services*, Deschamps J. explains that the *CCAA* and *BIA* are to be read in an integrated fashion but she is at pains to say that the *BIA* scheme of liquidation and distribution is the backdrop for what happens *if a CCAA reorganization is unsuccessful*.[18] Here, as I have noted, the *CCAA* proceedings were successful.

[193] Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the *BIA* is "characterized by a rules-based approach"[19] whereas the *CCAA* "offers a more flexible mechanism with greater judicial discretion".[20] Permitting the *PBA* deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key features of the *CCAA* proceedings – greater flexibility and greater judicial discretion on the part of the *CCAA* court. This flexibility and discretion on the part of the *CCAA* court

---

[18] See, for example, para. 23.
[19] At para. 13, for example.
[20] See, for example, para. 14.

enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J. at para. 70 of *Century Services*.

[194] The respondents point to paras. 47, 48 and 76 of *Century Services*, in which Deschamps J. notes the "strange asymmetry" that would occur if the *ETA* Crown priority were interpreted differently in *CCAA* proceedings than in *BIA* proceedings. She says this would encourage forum shopping in cases where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims. No "strange asymmetry" would occur in cases such as the present appeals. If the *CCAA* judge found that recognition of the *PBA* deemed trust would frustrate the purpose of the *CCAA* proceeding and paramountcy had been invoked, the *CCAA* judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the *CCAA* court with greater flexibility and the ability to be "cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees".[21]

[195] In para. 70 of her reasons, Deschamps J. exhorts the *CCAA* courts to be "mindful that chances for successful reorganizations are enhanced where participants achieve common ground and *all stakeholders are treated as advantageously and fairly as the circumstances permit*" [emphasis added]. The Plans' beneficiaries are stakeholders. And, once the deemed trust claims are recognized, they are not to be treated as mere unsecured creditors. If, as the respondents contend based on *Century Services*, the deemed trusts are automatically overridden, there will be no incentive for companies that

---

[21] *Century Services*, at para. 60.

are similarly situated to Indalex to attempt to deal with their underfunded pension plans. There will be no incentive to treat pension plan beneficiaries "as advantageously and fairly as the circumstances permit". The incentive will be to do as Indalex did – go to court without notice to the affected pension plan beneficiaries and negotiate as if the pension obligations did not exist.

[196] Justice Deschamps also says that no "gap" should exist between the *BIA* and the *CCAA* and approves of Laskin J.A.'s reasoning to that effect at paras. 62-63 of *Ivaco*.[22] She explains that the gap is a situation "which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy". When the facts of the present case are considered carefully, it can be seen that a gap of this sort will not occur should the appeals be allowed. As I see it, the deemed trusts continued to exist during the *CCAA* proceedings although no steps could be taken to enforce them during the proceedings because of the stay. By the time of the Sale Approval Order, the *CCAA* court had become aware of the deemed trust claims. It dealt with the deemed trust claims as part of the *CCAA* proceedings, by deciding whether the undistributed sales proceeds held by the Monitor should go to Indalex U.S. or to the Plans' beneficiaries. Thus, rather than being a situation in which property interests that would be lost in bankruptcy were enforced at the conclusion of the *CCAA* proceedings, the property interests were dealt with as part of the *CCAA* proceedings.

---

[22] At para. 78.

[197] However, even if I am wrong in concluding that the deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation.

[198] It is important to keep in mind that the contest over the Reserve Fund is not a fight between the DIP lenders and the pensioners. The DIP lenders have been paid in full. The dispute is between the pensioners and Sun Indalex, the principal secured creditor of Indalex U.S. It is in that context that the court must consider the competing equities.

[199] The *CCAA* was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the result to the pensioners of a failure to inject additional funds. It was Indalex who advised the *CCAA* court that it intended to comply with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

[200] I do not accept the respondents' argument that a finding that Indalex breached its fiduciary obligation is irrelevant because it would merely give rise to an unsecured claim and there is no basis for conferring a priority for such a claim. This view fundamentally misunderstands the rights of the pension plan beneficiaries. Even if there is no deemed trust, the Plans' beneficiaries are not mere unsecured creditors. They are unsecured creditors to whom Indalex owed a fiduciary duty by virtue of its role as the Plans' administrator. There is a significant difference, in my view, between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed.

[201] Further, the Supreme Court has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice: see, for example, *Canson Enterprises v. Boughton* & Co., [1991] 3 S.C.R. 534, at para. 86 and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 34.

[202] In *Soulos*, at para. 36, McLachlin J. (as she then was) writing for the majority, held that constructive trusts may be imposed where "good conscience requires" it. She went on to identify two different types of cases in which constructive trusts may be ordered: 1) those in which property is obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; and, 2) those in which there may not have been a wrongful act, but where there has been unjust enrichment. While the second type of case – one in which there is unjust enrichment – is not relevant to these appeals, the first is.

[203] At para. 45 of *Soulos*, McLachin J. sets out four conditions that should "generally be satisfied" if a constructive trust based on wrongful conduct is to be ordered:

> (1) the defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his or her hands;
>
> (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;
>
> (3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
>
> (4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[204] As I have already explained, in the circumstances of this case, Indalex's fiduciary obligations as administrator were engaged in relation to the *CCAA* proceedings and it is those proceedings that gave rise to the asset (*i.e.* the Reserve Fund) (condition 1). The assets that would flow to Indalex U.S., absent the constructive trust, are directly connected to the process in which Indalex committed its breaches of fiduciary obligation (condition 2). Without the proprietary remedy, the Plans' beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who

are also the administrators of their pension plans to remain faithful to their duties (condition 3). And, because Indalex U.S. is not an arm's length innocent third party, imposing a constructive trust in favour of the Plans' beneficiaries is not unjust (condition 4).

The Executive Plan

[205] As I explained above, it is not clear to me that a deemed trust arose in respect of the underfunded amounts in the Executive Plan because it had not been wound up at the time of sale. However, based on the breaches of fiduciary duty, the court is entitled to consider the equities of the parties competing for the Reserve Fund. For the reasons given in respect of the Salaried Plan in respect of those equities, I would make the same order in respect of the Executive Plan, namely, that the Monitor pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

[206] In light of this conclusion, I find it unnecessary to deal with the Former Executives' submission that the doctrine of equitable subordination applies to remedy Indalex's breaches of fiduciary duty. In any event, I would decline to decide that issue as it was not argued below. It offends the general rule that appellate courts are not to entertain new issues on appeal.

DISPOSITION

[207] Accordingly, I would allow the appeals and declare that the claims of the USW and the Former Executives take priority over the claim asserted by Indalex U.S./Sun Indalex. I would order the Monitor to pay from the Reserve Fund into each of the Salaried Plan and the Executive Plan an amount sufficient to satisfy the deficiencies in each plan. I understand that the Reserve Fund is sufficient to satisfy the Deficiencies but if this proves problematic, the parties may return to the court for direction on that matter.

[208] If the parties are unable to agree on costs, they may make brief written submissions on that matter. The appellants, Morneau and the Superintendent shall file their submissions within fifteen days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

RELEASED: JGM APR 07 2011

E.E. Gillese J.A.

I agree. J.C. MacPherson J.A.

I agree R.G. Juriansz J.A.

Schedule "A"

***Pension Benefits Act,* R.S.O. 1990, c. P.8, ss. 1(1), 8, 14(1), 22, 57(1) – (5), 70(1), 74(1), 75(1), (2), 76**

Definitions

1. (1) In this Act, ...

"administrator" means the person or persons that administer the pension plan; ...

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

Administrator

Requirement

8. (0.1) A pension plan must be administered by a person or entity described in subsection (1).

Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan.

Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(a) the employer or, if there is more than one employer, one or more of the employers;

(b) a pension committee composed of one or more representatives of,

> (i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and
>
> (ii) members of the pension plan;

(c) a pension committee composed of representatives of members of the pension plan;

(d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;

(f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;

(g) a person appointed as administrator by the Superintendent under section 71; or

(h) such other person or entity as may be prescribed.

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Interpretation

(3) For the purposes of clause (1) (b), "employer" includes the following persons and entities:

1. Affiliates within the meaning of the *Business Corporations Act* of the employer.

2. Such other persons or entities, or classes of persons or entities, as may be prescribed.

Reduction of benefits

14. (1) An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

Care, diligence and skill

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

Special knowledge and skill

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

Member of pension committee, etc.

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

Conflict of interest

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

Employment of agent

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

Trustee of pension fund

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

Responsibility for agent

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

Employee or agent

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

Trust property

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.

Money withheld

(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.

Accrued contributions

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

Wind Up

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

Lien and charge

(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).

Wind up report

70. (1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

(a) the assets and liabilities of the pension plan;

(b) the benefits to be provided under the pension plan to members, former members and other persons;

(c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and

(d) such other information as is prescribed.

Combination of age and years of employment

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

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

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

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

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

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

Liability of employer on wind up

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

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

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

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

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

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

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

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed.

Schedule "B"

***Pension Benefits Act,* Regulation 909, R.R.O. 1990, s. 31(1), (2) and (3)**

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30(2)(b) and (c).

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

APPENDIX "L"

2013 CarswellOnt 733, 2013 SCC 6, D.T.E. 2013T-97, J.E. 2013-185

H

2013 CarswellOnt 733, 2013 SCC 6, D.T.E. 2013T-97, J.E. 2013-185

Indalex Ltd., Re

Sun Indalex Finance, LLC, Appellant and United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents

George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors, Appellant and United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents

FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited, Appellant and United Steelworkers, Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Neil Fraser, Richard Smith, Robert Leckie and Fred Granville, Respondents

United Steelworkers, Appellant and Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership) and Superintendent of Financial Services, Respondents and Superintendent of Financial Services, Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers Association, Interveners

Supreme Court of Canada

McLachlin C.J.C., LeBel J., Deschamps J., Abella J., Rothstein J., Cromwell J., Moldaver J.

Heard: June 5, 2012
Judgment: February 1, 2013
Docket: 34308

Proceedings: Reversed, 2011 CarswellOnt 2458, 89 C.C.P.B. 39, 2011 C.E.B. & P.G.R. 8433, 331 D.L.R. (4th) 352, 276 O.A.C. 347, 104 O.R. (3d) 641, [2011] W.D.F.L. 2503, [2011] W.D.F.L. 2504, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 2011 ONCA 265 (Ont. C.A.); Reversed, 2010 CarswellOnt 893, 79 C.C.P.B. 301, [2010] W.D.F.L. 1374, [2010] W.D.F.L. 1375, 2010 ONSC 1114 (Ont. S.C.J. [Commercial List]); Affirmed, 2011 CarswellOnt 9077, 206 A.C.W.S. (3d) 679, 92 C.C.P.B. 277, [2011] W.D.F.L. 5203, [2011] W.D.F.L. 5204, 81 C.B.R. (5th) 165, 2011 ONCA 578 (Ont. C.A.); Additional reasons, 2011 CarswellOnt 2458, 89 C.C.P.B. 39, 2011 C.E.B. & P.G.R. 8433, 331 D.L.R. (4th) 352, 276 O.A.C. 347, 104 O.R. (3d) 641, [2011] W.D.F.L. 2503, [2011] W.D.F.L. 2504, 17 P.P.S.A.C. (3d) 194, 75 C.B.R. (5th) 19, 2011 ONCA 265 (Ont. C.A.)

Counsel: Benjamin Zarnett, Frederick L. Myers, Brian F. Empey, Peter Kolla, for Appellant, Sun Indalex Finance, LLC

Harvey G. Chaiton, George Benchetrit, for Appellant, George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors

David R. Byers, Ashley John Taylor, Nicholas Peter McHaffie, for Appellant, FTI Consulting Canada ULC, in its capacity as court-appointed monitor of Indalex Limited, on behalf of Indalex Limited

Darrell L. Brown, for Appellant / Respondent, United Steelworkers

Andrew J. Hatnay, Demetrios Yiokaris, for Respondents, Keith Carruthers, et al.

Hugh O'Reilly, Amanda Darrach, for Respondent, Morneau Shepell Ltd. (formerly known as Morneau Sobeco Limited Partnership)

Mark Bailey, Leonard Marsello, William MacLarkey, for Respondent / Intervener, Superintendent of Financial Services

Robert I. Thornton, D.J. Miller, for Intervener, Insolvency Institute of Canada

Steven Barrett, Ethan Poskanzer, for Intervener, Canadian Labour Congress

Kenneth T. Rosenberg, Andrew K. Lokan, Massimo Starnino, for Intervener, Canadian Federation of Pensioners

Éric Vallières, Alexandre Forest, Yoine Goldstein, for Intervener, Canadian Association of Insolvency and Restructuring Professionals

Mahmud Jamal, Jeremy Dacks, Tony Devir, for Intervener, Canadian Bankers Association

2013 CarswellOnt 733, 2013 SCC 6, D.T.E. 2013T-97, J.E. 2013-185

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Family; International; Insolvency; Property

Bankruptcy and insolvency

Business associations

Estates and trusts

Pensions

Personal property

Personal property security

Cases considered by *Deschamps J.*:

Burke v. Hudson's Bay Co. (2010), 406 N.R. 109, 324 D.L.R. (4th) 498, 2010 SCC 34, 2010 CarswellOnt 7450, 2010 CarswellOnt 7451, [2010] 2 S.C.R. 273, 84 C.C.P.B. 1, 60 E.T.R. (3d) 1, 2010 C.E.B. & P.G.R. 8408, D.T.E. 2010T-674, 268 O.A.C. 1 (S.C.C.) — considered

Canada (Attorney General) v. Law Society (British Columbia) (1982), [1982] 2 S.C.R. 307, 37 B.C.L.R. 145, [1982] 5 W.W.R. 289, 19 B.L.R. 234, 43 N.R. 451, 137 D.L.R. (3d) 1, 66 C.P.R. (2d) 1, 1982 CarswellBC 133, 1982 CarswellBC 743 (S.C.C.) — followed

Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1992), 5 Alta. L.R. (3d) 193, [1992] 3 S.C.R. 558, 16 C.B.R. (3d) 154, 7 B.L.R. (2d) 113, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 131 A.R. 321, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 25 W.A.C. 321, 1992 CarswellAlta 790, 97 D.L.R. (4th) 385, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 143 N.R. 321, 1992 CarswellAlta 298 (S.C.C.) — referred to

Canadian Pacific Ltd. v. Ontario (Minister of Revenue) (1998), (sub nom. *Canadian Pacific Ltd. v. M.N.R.)* 41 O.R. (3d) 606, 99 D.T.C. 5286, [2000] 2 C.T.C. 331, 1998 CarswellOnt 3537, 114 O.A.C. 217 (Ont. C.A.) — considered

Canadian Western Bank v. Alberta (2007), [2007] I.L.R. I-4622, 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, 409 A.R. 207, 402 W.A.C. 207, 49 C.C.L.I. (4th) 1, 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 362 N.R. 111, 75 Alta. L.R. (4th) 1, [2007] 8 W.W.R. 1 (S.C.C.) — followed

Crystalline Investments Ltd. v. Domgroup Ltd. (2004), 2004 SCC 3, 2004 CarswellOnt 219, 2004 CarswellOnt 220, 184 O.A.C. 33, 16 R.P.R. (4th) 1, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60,

70 O.R. (3d) 254 (note), 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513, 316 N.R. 1 (S.C.C.) — referred to

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161 (S.C.C.) — considered

Indalex Ltd., Re (2009), 2009 CarswellOnt 1998, 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]) — referred to

Indalex Ltd., Re (2009), 2009 CarswellOnt 4263 (Ont. S.C.J.) — referred to

Ontario Hydro-Electric Power Commission v. Albright (1922), 1922 CarswellOnt 134, 64 S.C.R. 306, [1923] 2 D.L.R. 578 (S.C.C.) — followed

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Cases considered by *Cromwell J.*:

AbitibiBowater Inc., Re (2009), 2009 QCCS 6459, 2009 CarswellQue 14194 (Que. S.C.) — considered

Algoma Steel Inc., Re (2001), 25 C.B.R. (4th) 194, 147 O.A.C. 291, 2001 CarswellOnt 1742 (Ont. C.A.) — referred to

B. (K.L.) v. British Columbia (2003), 2003 CarswellBC 2405, 2003 CarswellBC 2406, 2003 SCC 51, 309 N.R. 306, [2003] 2 S.C.R. 403, 18 B.C.L.R. (4th) 1, 44 R.F.L. (5th) 245, 187 B.C.A.C. 42, 307 W.A.C. 42, 38 C.P.C. (5th) 199, [2003] R.R.A. 1065, 230 D.L.R. (4th) 513, [2003] 11 W.W.R. 203, 19 C.C.L.T. (3d) 66, 2004 C.L.L.C. 210-014 (S.C.C.) — referred to

BCE Inc., Re (2008), (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 383 N.R. 119, 71 C.P.R. (4th) 303, 52 B.L.R. (4th) 1, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 301 D.L.R. (4th) 80, 2008 SCC 69, (sub nom. *BCE Inc. v. 1976 Debentureholders*) [2008] 3 S.C.R. 560, 2008 CarswellQue 12595, 2008 CarswellQue 12596 (S.C.C.) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5

W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — followed

Burke v. Hudson's Bay Co. (2008), 2008 C.E.B. & P.G.R. 8294, 40 E.T.R. (3d) 157, 236 O.A.C. 140, 67 C.C.P.B. 1, 2008 CarswellOnt 2801, 2008 ONCA 394 (Ont. C.A.) — referred to

Burke v. Hudson's Bay Co. (2010), 406 N.R. 109, 324 D.L.R. (4th) 498, 2010 SCC 34, 2010 CarswellOnt 7450, 2010 CarswellOnt 7451, [2010] 2 S.C.R. 273, 84 C.C.P.B. 1, 60 E.T.R. (3d) 1, 2010 C.E.B. & P.G.R. 8408, D.T.E. 2010T-674, 268 O.A.C. 1 (S.C.C.) — considered

Canada (Attorney General) v. Mowat (2011), 93 C.C.E.L. (3d) 1, D.T.E. 2011T-708, 337 D.L.R. (4th) 385, 26 Admin. L.R. (5th) 1, 2011 CarswellNat 4190, 2011 CarswellNat 4191, 2011 SCC 53, 422 N.R. 248, (sub nom. *C.H.R.C. v. Canada (A.G.)*) 2011 C.L.L.C. 230-043, (sub nom. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*) [2011] 3 S.C.R. 471 (S.C.C.) — considered

Canadian Pacific Ltd. v. Ontario (Minister of Revenue) (1998), (sub nom. *Canadian Pacific Ltd. v. M.N.R.)* 41 O.R. (3d) 606, 99 D.T.C. 5286, [2000] 2 C.T.C. 331, 1998 CarswellOnt 3537, 114 O.A.C. 217 (Ont. C.A.) — referred to

Donkin v. Bugoy (1985), 1985 CarswellSask 869, [1985] 2 S.C.R. 85, [1985] 6 W.W.R. 97, 21 D.L.R. (4th) 327, 61 N.R. 172, 44 Sask. R. 178, 20 E.T.R. 225, 47 R.F.L. (2d) 113, 1985 CarswellSask 213 (S.C.C.) — considered

Elder Advocates of Alberta Society v. Alberta (2011), [2011] 6 W.W.R. 191, 81 C.C.L.T. (3d) 1, 416 N.R. 198, 331 D.L.R. (4th) 257, 499 A.R. 345, 514 W.A.C. 345, (sub nom. *Alberta v. Elder Advocates of Alberta Society)* [2011] 2 S.C.R. 261, 2011 CarswellAlta 763, 2011 CarswellAlta 764, 2011 SCC 24, 2 C.P.C. (7th) 1, 41 Alta. L.R. (5th) 1 (S.C.C.) — considered

First Leaside Wealth Management Inc., Re (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — referred to

Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 316 N.R. 265, 235 D.L.R. (4th) 193, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 2004 C.L.L.C. 210-025, 184 O.A.C. 209, [2004] 1 S.C.R. 303, 70 O.R. (3d) 255 (note), 40 B.L.R. (3d) 1 (S.C.C.) — followed

Indalex Ltd., Re (2009), 2009 CarswellOnt 1998, 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]) — referred to

Indalex Ltd., Re (2009), 2009 CarswellOnt 4263 (Ont. S.C.J.) — referred to

Indalex Ltd., Re (2009), 2009 CarswellOnt 4262, 79 C.C.P.B. 101 (Ont. S.C.J. [Commercial List]) — referred to

International Corona Resources Ltd. v. LAC Minerals Ltd. (1989), 44 B.L.R. 1, 35 E.T.R. 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 69 O.R. (2d) 287, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 26 C.P.R. (3d) 97, 1989 CarswellOnt 126, 1989 CarswellOnt 965 (S.C.C.) — followed

Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services) (2009), 2009 CarswellOnt 4494, 2009 CarswellOnt 4495, 2009 SCC 39, (sub nom. *Nolan v. Ontario (Superintendent of Financial Services))* 253 O.A.C. 256, 49 E.T.R. (3d) 159, 76 C.C.E.L. (3d) 55, 76 C.C.P.B. 1, (sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee)* 102 O.R. (3d) 319, (sub nom. *Nolan v. Kerry (Canada) Inc.)* [2009] 2 S.C.R. 678, (sub nom. *Nolan v. Ontario (Superintendent of Financial Services))* 391 N.R. 234, 92 Admin. L.R. (4th) 203, (sub nom. *DCA Employees Pension Committee v. Ontario (Superintendent of Financial Services))* 309 D.L.R. (4th) 513 (S.C.C.) — followed

Marine Drive Properties Ltd., Re (2009), 2009 BCSC 145, 2009 CarswellBC 285, 52 C.B.R. (5th) 47 (B.C. S.C.) — considered

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services) (2004), 45 B.L.R. (3d) 161, 41 C.C.P.B. 106, 2004 C.E.B. & P.G.R. 8112, 242 D.L.R. (4th) 193, 324 N.R. 259, 189 O.A.C. 201, 17 Admin. L.R. (4th) 1, [2004] 3 S.C.R. 152, 75 O.R. (3d) 479 (note), 2004 CarswellOnt 3172, 2004 CarswellOnt 3173, 2004 SCC 54 (S.C.C.) — considered

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282 (Ont. C.A.) — considered

Ontario Hydro-Electric Power Commission v. Albright (1922), 1922 CarswellOnt 134, 64 S.C.R. 306, [1923] 2 D.L.R. 578 (S.C.C.) — considered

Perez v. Galambos (2009), 97 B.C.L.R. (4th) 1, [2009] 12 W.W.R. 193, (sub nom. *Galambos v. Perez)* [2009] 3 S.C.R. 247, 394 N.R. 209, 70 C.C.L.T. (3d) 167, 312 D.L.R. (4th) 220, 276 B.C.A.C. 272, 468 W.A.C. 272, 2009 CarswellBC 2787, 2009 CarswellBC 2788, 2009 SCC 48 (S.C.C.) — referred to

Peter v. Beblow (1993), [1993] 3 W.W.R. 337, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, 150 N.R. 1, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, [1993] R.D.F. 369, 1993 CarswellBC 44, 1993 CarswellBC 1258 (S.C.C.) — followed

R. v. Neil (2002), 317 A.R. 73, 284 W.A.C. 73, 168 C.C.C. (3d) 321, 6 Alta. L.R. (4th) 1, 6 C.R. (6th) 1, [2002] 3 S.C.R. 631, 2002 CarswellAlta 1301, 2002 CarswellAlta 1302, 2002 SCC 70, (sub nom. *Neil v. R.*) 218 D.L.R. (4th) 671, [2003] 2 W.W.R. 591, 294 N.R. 201 (S.C.C.) — followed

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — referred to

Ryan v. Moore (2005), 254 D.L.R. (4th) 1, 334 N.R. 355, [2005] 2 S.C.R. 53, 2005 SCC 38, 2005 CarswellNfld 157, 2005 CarswellNfld 158, 247 Nfld. & P.E.I.R. 286, 735 A.P.R. 286, 25 C.C.L.I. (4th) 1, 32 C.C.L.T. (3d) 1, [2005] R.R.A. 694, 18 E.T.R. (3d) 163 (S.C.C.) — considered

Sharbern Holding Inc. v. Vancouver Airport Centre Ltd. (2011), 5 R.P.R. (5th) 1, 331 D.L.R. (4th) 1, 416 N.R. 1, 18 B.C.L.R. (5th) 1, [2011] 2 S.C.R. 175, 306 B.C.A.C. 1, 316 W.A.C. 1, 2011 SCC 23, 2011 CarswellBC 1102, 2011 CarswellBC 1103, [2011] 7 W.W.R. 1, 81 B.L.R. (4th) 1, 82 C.C.L.T. (3d) 1 (S.C.C.) — referred to

Soulos v. Korkontzilas (1997), [1997] 2 S.C.R. 217, 212 N.R. 1, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241 (S.C.C.) — considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Timminco Ltd., Re (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

3464920 Canada Inc. v. Strother (2007), (sub nom. *Strother v. 3464920 Canada Inc.)* 2007 D.T.C. 5273 (Eng.), (sub nom. *Strother v. 3464920 Canada Inc.)* 2007 D.T.C. 5301 (Fr.), 363 N.R. 123, [2007] 2 S.C.R. 177, [2007] 7 W.W.R. 381, [2007] 4 C.T.C. 172, 29 B.L.R. (4th) 175, 399 W.A.C. 108, 241 B.C.A.C. 108, 281 D.L.R. (4th) 640, 2007 SCC 24, 2007 CarswellBC 1201, 2007 CarswellBC 1202, 67 B.C.L.R. (4th) 1, 48 C.C.L.T. (3d) 1 (S.C.C.) — followed

Cases considered by *LeBel J. (Dissenting)*:

Canson Enterprises Ltd. v. Boughton & Co. (1991), [1992] 1 W.W.R. 245, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 131 N.R. 321, 85 D.L.R. (4th) 129, 61 B.C.L.R. (2d) 1, 6 B.C.A.C. 1, 13 W.A.C. 1, [1991] 3 S.C.R. 534, 43 E.T.R. 201, 1991 CarswellBC 269, 1991 CarswellBC 925 (S.C.C.)

Elder Advocates of Alberta Society v. Alberta (2011), [2011] 6 W.W.R. 191, 81 C.C.L.T. (3d) 1, 416 N.R. 198, 331 D.L.R. (4th) 257, 499 A.R. 345, 514 W.A.C. 345, (sub nom. *Alberta v. Elder Advocates of Alberta Society)* [2011] 2 S.C.R. 261, 2011 CarswellAlta 763, 2011 CarswellAlta 764, 2011 SCC 24, 2 C.P.C. (7th) 1, 41 Alta. L.R. (5th) 1 (S.C.C.)

Perez v. Galambos (2009), 97 B.C.L.R. (4th) 1, [2009] 12 W.W.R. 193, (sub nom. *Galambos v. Perez)* [2009] 3 S.C.R. 247, 394 N.R. 209, 70 C.C.L.T. (3d) 167, 312 D.L.R. (4th) 220, 276 B.C.A.C. 272, 468 W.A.C. 272, 2009 CarswellBC 2787, 2009 CarswellBC 2788, 2009 SCC 48 (S.C.C.)

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 792, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List])

Soulos v. Korkontzilas (1997), [1997] 2 S.C.R. 217, 212 N.R. 1, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241 (S.C.C.)

Statutes considered by *Deschamps J.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, Act to amend the, S.C. 2007, c. 36

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Chapter 7 — referred to

Chapter 11 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 2(1) "secured creditor" — considered

Pension Benefits Act, 1965, S.O. 1965, c. 96

s. 22(2) — considered

s. 23a [en. 1973, c. 113, s. 6] — considered

Pension Benefits Act, 1987, S.O. 1987, c. 35

Generally — referred to

Pension Benefits Act, R.S.O. 1980, c. 373

s. 23(4)(a) [en. 1983, c. 2, s. 3] — considered

s. 23(4)(b) [en. 1983, c. 2, s. 3] — considered

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

Generally — referred to

s. 1(1) "administrator" — considered

s. 8(1)(a) — considered

s. 22(4) — considered

s. 56(1) — considered

s. 56(2) — considered

s. 57(3) — considered

s. 57(4) — considered

s. 59 — considered

s. 69(1) — considered

s. 69(1)(d) — considered

s. 75(1)(a) — considered

s. 75(1)(b) — considered

s. 75(1)(b)(i) — considered

s. 75(1)(b)(ii) — considered

s. 75(1)(b)(iii) — considered

Pension Benefits Amendment Act, 1980, S.O. 1980, c. 80

Generally — referred to

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

s. 30(7) — considered

Statutes considered by *Cromwell J.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 122(1)(a) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11(1) — considered

Pension Benefits Act, 1965, S.O. 1965, c. 96

s. 23a(1) [en. 1973, c. 113, s. 6] — considered

s. 23a(3) [en. 1973, c. 113, s. 6] — considered

Pension Benefits Act, 1987, S.O. 1987, c. 35

Generally — referred to

s. 23(4)(a) — considered

s. 23(4)(b) — considered

Pension Benefits Act, R.S.O. 1980, c. 373

Generally — referred to

s. 21(2) — considered

s. 21(2)(a) — considered

s. 23(3) — considered

s. 23(4) [en. 1983, c. 2, s. 3] — considered

s. 23(4)(a)(i) [en. 1983, c. 2, s. 3] — considered

s. 23(4)(a)(ii) [en. 1983, c. 2, s. 3] — considered

s. 23(4)(b) [en. 1983, c. 2, s. 3] — considered

s. 23(5) [en. 1983, c. 2, s. 3] — considered

s. 32 — considered

s. 32(2) — considered

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

Generally — referred to

s. 1(1) "wind up" — considered

s. 8(1)(a) — considered

s. 9 — referred to

s. 10(1) ¶ 12 — referred to

s. 12 — referred to

s. 19 — referred to

s. 20 — referred to

s. 22(1) — considered

s. 22(2) — considered

s. 22(4) — considered

s. 25 — referred to

s. 26 — referred to

s. 42 — referred to

s. 56 — considered

s. 57 — considered

s. 57(3) — considered

s. 57(4) — considered

s. 58(1) — considered

s. 58(3) — considered

s. 58(4) — considered

s. 59 — referred to

s. 68(2)(c) — considered

s. 70 — referred to

s. 70(1) — considered

s. 70(6) — considered

s. 73 — referred to

s. 74 — considered

s. 75 — considered

s. 75(1) — considered

s. 75(1)(a) — considered

s. 75(1)(b) — considered

Pension Benefits Amendment Act, S.O. 1973, c. 113

Generally — referred to

Pension Benefits Amendment Act, 1980, S.O. 1980, c. 80

Generally — referred to

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

Generally — referred to

Statutes considered by *LeBel J. (Dissenting)*:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 9 — considered

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

Generally — referred to

s. 22(4) — considered

s. 57(4) — considered

Regulations considered by *Deschamps J.*:

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

General, R.R.O. 1990, Reg. 909

s. 31 — considered

Regulations considered by *Cromwell J.*:

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

General, R.R.O. 1990, Reg. 909

s. 4(4) ¶ 3 — considered

s. 5(1)(b) — considered

s. 5(1)(e) — considered

s. 29 — referred to

s. 31 — considered

s. 31(2) — considered

***Deschamps J.* (Moldaver J. concurring):**

1 Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk. These appeals illustrate the materialization of such a risk. Although the employer in this case breached a fiduciary duty, the harm suffered by the pension plans' beneficiaries results not from that breach, but from the employer's insolvency. For the following reasons, I would allow the appeals of the appellants Sun Indalex Finance, LLC; George L. Miller, Indalex U.S.'s trustee in bankruptcy and FTI Consulting Canada ULC.

2 To improve the prospect of pensioners receiving their full benefits after a pension plan is wound up, the Ontario legislature has protected contributions to the pension fund that have accrued but are not yet due at the time of the wind up by providing for a deemed trust that supersedes all other provincial priorities over certain assets of the plan sponsor (s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*")). The parties disagree on the scope of the deemed trust. In my view, the relevant

provisions and the context lead to the conclusion that it extends to contributions the employer must make to ensure that the pension fund is sufficient to cover liabilities upon wind up. In the instant case, however, the deemed trust is superseded by the security granted to the creditor that loaned money to the employer, Indalex Limited ("Indalex"), during the insolvency proceedings. In addition, although the employer, as plan administrator, may have put itself in a position of conflict of interest by failing to give the plan's members proper notice of a motion requesting financing of its operations during a restructuring process, there was no realistic possibility that, had the members received notice and had the *CCAA* court found that they were secured creditors, it would have ordered the priorities differently. Consequently, it would not be appropriate to order an equitable remedy such as the constructive trust ordered by the Court of Appeal.

I. Facts

3 Indalex is a wholly owned Canadian subsidiary of a U.S. company, Indalex Holding Corp. ("Indalex U.S."). Indalex and its related companies formed a corporate group (the "Indalex Group") that manufactured aluminum extrusions. The U.S. and Canadian operations were closely linked.

4 In 2009, a combination of high commodity prices and the economic recession's impact on the end-user market for aluminum extrusions plunged the Indalex Group into insolvency. On March 20, 2009, Indalex U.S. filed for Chapter 11 bankruptcy protection in Delaware. On April 3, 2009, Indalex applied for a stay under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and Morawetz J. granted the stay in an initial order. He also appointed FTI Consulting Canada ULC (the "Monitor") to act as monitor.

5 At that time, Indalex was the administrator of two registered pension plans. One was for its salaried employees (the "Salaried Plan"), the other for its executives (the "Executive Plan"). Members of the Salaried Plan included seven employees for whom the United Steelworkers ("USW") acted as bargaining agent. The Salaried Plan was in the process of being wound up when the *CCAA* proceedings began. The effective date of the wind up was December 31, 2006. The Executive Plan had been closed but not wound up. Overall, the deficiencies of the pension plans' funds concern 49 persons (members of the Salaried Plan and the Executive Plan are referred to collectively as the "Plan Members").

6 Pursuant to the initial order made by Morawetz J. on April 3, 2009, Indalex obtained protection under the *CCAA*. Both plans faced funding deficiencies when Indalex filed for the *CCAA* stay. The wind-up deficiency of the Salaried Plan was estimated at $1.8 million as of December 31, 2008. The funding deficiency of the Executive Plan was estimated at $3.0 million on a wind-up basis as of January 1, 2008.

7 From the beginning of the insolvency proceedings, the Indalex Group's reorganization strategy was to sell both Indalex and Indalex U.S. as a going concern while they were under *CCAA* and Chapter 11 protection. To this end, Indalex and Indalex U.S. sought to enter into a common

agreement for debtor-in-possession ("DIP") financing under which the two companies could draw from joint credit facilities and would guarantee each other's liabilities.

8 Indalex's financial distress threatened the interests of all the Plan Members. If the reorganization failed and Indalex were liquidated under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), they would not have recovered any of their claims against Indalex for the underfunded pension liabilities, because the priority created by the provincial statute would not be recognized under the federal legislation: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). Although the priority was not rendered ineffective by the *CCAA*, the Plan Members' position was uncertain.

9 The Indalex Group solicited terms from a variety of possible DIP lenders. In the end, it negotiated an agreement with a syndicate consisting of the pre-filing senior secured creditors. On April 8, 2009, the *CCAA* court issued an Amended and Restated Initial Order ("Amended Initial Order") authorizing Indalex to borrow US$24.4 million from the DIP lenders and grant them priority over all other creditors ("DIP charge") in that amount. In his endorsement of the order, Morawetz J. made a finding that Indalex would be unable to achieve a going-concern solution without DIP financing. Such financing was necessary to support Indalex's business until the sale could be completed.

10 The Plan Members did not participate in the initial proceedings. The initial stay had been granted *ex parte*. The *CCAA* judge ordered Indalex to serve a copy of the stay order on every creditor owed $5,000 or more within 10 days of the initial order of April 3. As of April 8, when the motion to amend the initial order was heard, none of the Executive Plan's members had been served with that order; nor did any of them receive notice of the motion to amend it. The USW did receive short notice, but chose not to attend. Morawetz J. authorized Indalex to proceed on the basis of an abridged time for service. The Plan Members were given notice of all subsequent proceedings. None of the Plan Members appealed the Amended Initial Order to contest the DIP charge.

11 On June 12, 2009, Indalex applied for authorization to increase the DIP loan amount to US$29.5 million. At the hearing, the Executive Plan's members initially opposed the motion, seeking to reserve their rights. After it was confirmed that the motion was merely to increase the amount of the DIP charge (without changing the terms of the loan), they withdrew their opposition and the court granted the motion.

12 On April 22, 2009, the court extended the stay of proceedings and approved a marketing process for the sale of Indalex's assets. The Plan Members did not oppose the application to approve the marketing process. Under the approved bidding procedure, the Indalex Group solicited a wide variety of potential buyers.

13 Indalex received a bid from SAPA Holding AB ("SAPA"). It was for approximately US$30 million, and SAPA did not assume responsibility for the pension plans' wind-up deficien-

cies. According to the Monitor's estimate, the liquidation value of Indalex's assets was US$44.7 million. Indalex brought an application for an order approving a bidding procedure for a competitive auction and deeming SAPA's bid to be a qualifying bid. The Executive Plan's members opposed the application, expressing concern that the pension liabilities would not be assumed. Morawetz J. nevertheless issued the order on July 2, 2009; in it, he approved the bidding procedure for sale, noting that the Executive Plan's members could raise their objections at the time of approval of the final bid.

14 The bidding procedure did not trigger any competing bids. On July 20, 2009, Indalex and Indalex U.S. brought motions before their respective courts to approve the sale of substantially all their assets under the terms of SAPA's bid. Indalex also moved for approval of an interim distribution of the sale proceeds to the DIP lenders. The Plan Members opposed Indalex's motion. First, they argued that it was estimated that a forced liquidation would produce greater proceeds than SAPA's bid. Second, they contended that their claims had priority over that of the DIP lenders because the unfunded pension liabilities were subject to a statutory deemed trust under the *PBA*. They also contended that Indalex had breached its fiduciary obligations by failing to meet its obligations as a plan administrator throughout the insolvency proceedings.

15 The court dismissed the Plan Members' first objection, holding that there was no evidence supporting the argument that a forced liquidation would be more beneficial to suppliers, customers and the 950 employees. It approved the sale on July 20, 2009. The order in which it did so directed the Monitor to make a distribution to the DIP lenders. With respect to the second objection, however, Campbell J. ordered the Monitor to hold a reserve in an amount to be determined by the Monitor, leaving the Plan Members' arguments based on their right to the proceeds of the sale open for determination at a later date.

16 The sale to SAPA closed on July 31, 2009. The Monitor collected $30.9 million in proceeds. It distributed US$17 million to the DIP lenders, paid certain fees, withheld a portion to cover various costs and retained $6.75 million in reserve pending determination of the Plan Members' rights. At the closing, Indalex owed US$27 million to the DIP lenders. The payment of US$17 million left a US$10 million shortfall in the amount owed to these lenders. The DIP lenders called on Indalex U.S. to cover this shortfall under the guarantee contained in the DIP lending agreement. Indalex U.S. paid the amount of the shortfall. Since Indalex U.S. was, as a term of the guarantee, subrogated to the DIP lenders' priority, it became the highest ranking creditor of Indalex, with a claim for US$10 million.

17 Following the sale of Indalex's assets, its directors resigned. Indalex U.S., a part of Indalex Group, took over the management of Indalex, whose assets were limited to the sale proceeds held by the Monitor. A Unanimous Shareholder Declaration was executed on August 12, 2009; in it, Mr. Keith Cooper was appointed to manage Indalex's affairs. Mr. Cooper was an employee of FTI Consulting Inc.

18 In accordance with the right reserved by the court on July 20, 2009, the Plan Members

brought motions on August 28, 2009 for a declaration that a deemed trust equal in amount to the unfunded pension liability was enforceable against the proceeds of the sale. They contended that they had priority over the secured creditors pursuant to s. 57(4) of the PBA and s. 30(7) of the *PPSA*. Indalex, in turn, brought a motion for an assignment in bankruptcy to secure the priority regime it argued for in opposing the Plan Members' motions.

19 On October 14, 2009, while judgment was pending, Indalex U.S. converted the Chapter 11 restructuring proceeding in the U.S. into a Chapter 7 liquidation proceeding. On November 5, 2009, the Superintendent of Financial Services ("Superintendent") appointed the actuarial firm of Morneau Sobeco Limited Partnership ("Morneau") to replace Indalex as administrator of the plans.

20 On February 18, 2010, Campbell J. dismissed the Plan Members' motions, concluding that the deemed trust did not apply to the wind-up deficiencies, because the associated payments were not "due" or "accruing due" as of the date of the wind up. He found that the Executive Plan did not have a wind-up deficiency, since it had not yet been wound up. He thus found it unnecessary to rule on Indalex's motion for an assignment in bankruptcy (2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List])). The Plan Members appealed the dismissal of their motions.

21 The Ontario Court of Appeal allowed the Plan Members' appeals. It found that the deemed trust created by s. 57(4) of the *PBA* applies to all amounts due with respect to plan wind-up deficiencies. Although the court noted that it was likely that no deemed trust existed for the Executive Plan on the plain meaning of the provision, it declined to address this question, because it found that the Executive Plan's members had a claim arising from Indalex's breach of its fiduciary obligations in failing to adequately protect the Plan Members' interests (2011 ONCA 265, 104 O.R. (3d) 641 (Ont. C.A.)).

22 The Court of Appeal concluded that a constructive trust was an appropriate remedy for Indalex's breach of its fiduciary obligations. The court was of the view that this remedy did not harm the DIP lenders, but affected only Indalex U.S. It imposed a constructive trust over the reserved fund in favour of the Plan Members. Turning to the question of distribution, it also found that the deemed trust had priority over the DIP charge because the issue of federal paramountcy had not been raised when the Amended Initial Order was issued, and that Indalex had stated that it intended to comply with any deemed trust requirements. The Court of Appeal found that there was nothing in the record to suggest that not applying the paramountcy doctrine would frustrate Indalex's ability to restructure.

23 The Court of Appeal ordered the Monitor to make a distribution from the reserve fund in order to pay the amount of each plan's deficiency. It also issued a costs endorsement that approved payment of the costs of the Executive Plan's members from that plan's fund, but declined to order the payment of costs to the USW from the fund of the Salaried Plan (2011 ONCA 578, 81 C.B.R. (5th) 165 (Ont. C.A.)).

24 The Monitor, together with Sun Indalex, a secured creditor of Indalex U.S., and George L. Miller, Indalex U.S.'s trustee in bankruptcy, appeals the Court of Appeal's order. Both the Superintendent and Morneau support the Plan Members' position as respondents. A number of stakeholders are also participating in the appeals to this Court. In addition, USW appeals the costs endorsement. As I agree with my colleague Cromwell J. on the appeal from the costs endorsement, I will not deal with it in these reasons.

II. Issues

25 The appeals raise four issues:

1. Does the deemed trust provided for in s. 57(4) of the *PBA* apply to wind-up deficiencies?

2. If so, does the deemed trust supersede the DIP charge?

3. Did Indalex have any fiduciary obligations to the Plan Members when making decisions in the context of the insolvency proceedings?

4. Did the Court of Appeal properly exercise its discretion in imposing a constructive trust to remedy the breaches of fiduciary duties?

III. Analysis

A. Does the Deemed Trust Provided for in Section 57(4) of the PBA Apply to Windup Deficiencies?

26 The first issue is whether the statutory deemed trust provided for in s. 57(4) of the *PBA* extends to wind-up deficiencies. This question is one of statutory interpretation, which requires examination of both the wording and context of the relevant provisions of the *PBA*. Section 57(4) of the *PBA* affords protection to members of a pension plan with respect to their employer's contributions upon wind up of the plan. The provision reads:

> **57.** . . .
>
> (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.

27 The most obvious interpretation is that where a plan is wound up, this provision protects all contributions that have accrued but are not yet due. The words used appear to include the contribution the employer is to make where a plan being wound up is in a deficit position. This quite straightforward interpretation, which is consistent with both the historical broadening of the pro-

tection and the remedial purpose of the provision, is being challenged on the basis of a narrow definition of the word "accrued". I do not find that this argument justifies limiting the protection afforded to plan members by the Ontario legislature.

28 The *PBA* sets out the rules for the operation of funded contributory defined benefit pension plans in Ontario. In an ongoing plan, an employer must pay into a fund all contributions it withholds from its employees' salaries. In addition, while the plan is ongoing, the employer must make two kinds of payments. One relates to current service contributions — the employer's own regular contributions to the pension fund as required by the plan. The other ensures that the fund is sufficient to meet the plan's liabilities. The employees' interest in having the contributions made while the plan is ongoing is protected by a deemed trust provided for in s. 57(3) of the *PBA*.

29 The *PBA* also establishes a comprehensive scheme for winding up a pension plan. Section 75(1)(a) imposes on the employer the obligation to "pay" an amount equal to the total of all "payments" that are due or that have accrued and have not been paid into the fund. In addition, s. 75(1)(b) sets out a formula for calculating the amount that must be paid to ensure that the fund is sufficient to cover all liabilities upon wind up. Within six months after the effective date of the wind up, the plan administrator must file a wind-up report that lists the plan's assets and liabilities as of the date of the wind up. If the wind-up report shows an actuarial deficit, the employer must make wind-up deficiency payments. Consequently, s. 75(1)(a) and (b) jointly determine the amount of the contributions owed when a plan is wound up.

30 It is common ground that the contributions provided for in s. 75(1)(a) are covered by the wind-up deemed trust. The only question is whether it also applies to the deficiency payments required by s. 75(1)(b). I would answer this question in the affirmative in view of the provision's wording, context and purpose.

31 It is readily apparent that the wind-up deemed trust provision (s. 57(4) PBA) does not place an express limit on the "employer contributions accrued to the date of the wind up but not yet due", and I find no reason to exclude contributions paid under s. 75(1)(b). Section 75(1)(a) explicitly refers to "an amount equal to the total of all payments" that have *accrued*, even those that were not yet due as of the date of the wind up, whereas s. 75(1)(b) contemplates an "amount" that is calculated on the basis of the value of assets and of liabilities that have *accrued* when the plan is wound up. Section 75(1) reads as follows:

> **75.** (1) Where a pension plan is wound up, 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.

32 Since both the amount with respect to payments (s. 75(1)(a)) and the one ascertained by subtracting the assets from the liabilities accrued as of the date of the wind up (s. 75(1)(b)) are to be paid upon wind up as employer contributions, they are both included in the ordinary meaning of the words of s. 57(4) of the *PBA*: "amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". As I mentioned above, this reasoning is challenged in respect of s. 75(1)(b), not of s. 75(1)(a).

33 The appellant Sun Indalex argues that since the deficiency is not finally quantified until well after the effective date of the wind up, the liability of the employer cannot be said to have accrued. The Monitor adds that the payments the employer must make to satisfy its wind-up obligations may change over the five-year period within which s. 31 of the *PBA* Regulations, R.R.O. 1990, Reg. 909, requires that they be made. These parties illustrate their argument by referring to what occurred to the Salaried Plan's fund in the case at bar. In 2007-8, Indalex paid down the vast majority of the $1.6 million wind-up deficiency associated with the Salaried Plan as estimated in 2006. By the end of 2008, however, this deficiency had risen back up to $1.8 million as a result of a decline in the fund's asset value. According to this argument, the amount could not have accrued as of the date of the wind up, because it could not be calculated with certainty.

34 Unlike my colleague Cromwell J., I find this argument unconvincing. I instead agree with the Court of Appeal on this point. The wind-up deemed trust concerns "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations". Since the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date. Thus the liabilities of the employer are complete — have accrued — before the wind up. The distinction between my approach and the one Cromwell J. takes is that he requires that it be possible to perform the calculation before the date of the wind up, whereas I am of the view that the time when the calculation is actually made is not relevant as long as the liabilities are assessed as of the date of the wind up. The date at which the liabilities are *reported* or the employer's *option* to spread its contributions as allowed by the regulations does not change the legal nature of the contributions.

35 In *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306 (S.C.C.), Duff J. considered the meaning of the word "accrued" in interpreting the scope of a covenant. He found that

> the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted — and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* — a debt for example which is *debitum in praesenti solvendum in futuro*.
>
> [Emphasis added; pp. 312-13.]

36 Thus, a contribution has "accrued" when the liabilities are completely constituted, even if the payment itself will not fall due until a later date. If this principle is applied to the facts of this case, the liabilities related to contributions to the fund allocated for payment of the pension benefits contemplated in s. 75(1)(b) are completely constituted at the time of the wind up, because no pension entitlements arise after that date. In other words, no new liabilities accrue at the time of or after the wind up. Even the portion of the contributions that is related to the elections plan members may make upon wind up has "accrued to the date of the wind up", because it is based on rights employees earned before the wind-up date.

37 The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes (*Canadian Pacific Ltd. v. Ontario (Minister of Revenue)* (1998), 41 O.R. (3d) 606 (Ont. C.A.), at p. 621). The use of the word "accrued" does not limit liabilities to amounts that can be determined with precision. As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA*.

38 The legislative history supports my conclusion that wind-up deficiency contributions are protected by the deemed trust provision. The Ontario legislature has consistently expanded the protection afforded in respect of pension plan contributions. I cannot therefore accept an interpretation that would represent a drawback from the protection extended to employees. I will not reproduce the relevant provisions, since my colleague Cromwell J. quotes them.

39 The original statute provided solely for the employer's obligation to pay all amounts required to be paid to meet the test for solvency (*The Pension Benefits Act, 1965*, S.O. 1965, c. 96, s. 22(2)), but the legislature subsequently afforded employees the protection of a deemed trust on the employer's assets in an amount equal to the sums withheld from employees as contributions and sums due from the employer as service contributions (s. 23*a*, added by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6). In a later version, it protected not only contributions that were due, but also those that had accrued, with the amounts being calculated as if the plan had been wound up (*The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80).

40 Whereas *all* employer contributions were originally covered by a single provision, the legislature crafted a separate provision in 1980 that specifically imposed on the employer the obligation to fund the wind-up deficiency. At the time, it was clear from the words used in the provision that the amount related to the windup deficiency was excluded from the deemed trust protection (*The Pension Benefits Amendment Act, 1980*). In 1983, the legislature made a distinction between the deemed trust for ongoing employer contributions and the one for certain payments to be made upon wind up (ss. 23(4)(a) and 23(4)(b), added by *Pension Benefits Amendment Act, 1983*, S.O. 1983, c. 2, s. 3). In that version, the wind-up deficiency payments were still excluded from the deemed trust. However, the legislature once again made changes to the protection in 1987. The 1987 version is, in substance, the one that applies in the case at bar. In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35, a specific wind-up deemed trust was maintained, but the wind up deficiency payments were no longer excluded from it, because the limitation that had been imposed until then with respect to payments that were due or had accrued while the plan was ongoing had been eliminated. My comments to the effect that the previous versions excluded the wind-up deficiency payments do not therefore apply to the 1987 statute, since it was materially different.

41 Whereas it is clear from the 1983 amendments that the deemed trust provided for in s. 23(4)(b) was intended to include only current service costs and special payments, this is less clear from the subsequent versions of the *PBA*. To give meaning to the 1987 amendment, I have to conclude that the words refer to a deemed trust in respect of *all* "employer contributions accrued to the date of the wind up but not yet due under the plan or regulations".

42 The employer's liability upon wind up is now set out in a single section which elegantly parallels the wind-up deemed trust provision. It can be seen from the legislative history that the protection has expanded from (1) only the service contributions that were due, to (2) amounts payable calculated as if the plan had been wound up, to (3) amounts that were due and had accrued upon wind up but excluding the wind-up deficiency payments, to (4) all amounts due and accrued upon wind up.

43 Therefore, in my view, the legislative history leads to the conclusion that adopting a narrow interpretation that would dissociate the employer's payment provided for in s. 75(1)(b) of the *PBA* from the one provided for in s. 75(1)(a) would be contrary to the Ontario legislature's trend toward broadening the protection. Since the provision respecting wind-up payments sets out the amounts that are owed upon wind up, I see no historical, legal or logical reason to conclude that the wind-up deemed trust provision does not encompass all of them.

44 Thus, I am of the view that the words and context of s. 57(4) lend themselves easily to an interpretation that includes the wind-up deficiency payments, and I find additional support for this in the purpose of the provision. The deemed trust provision is a remedial one. Its purpose is to protect the interests of plan members. This purpose militates against adopting the limited scope proposed by Indalex and some of the interveners. In the case of competing priorities between creditors, the remedial purpose favours an approach that includes all wind-up payments in the

value of the deemed trust in order to achieve a broad protection.

45 In sum, the relevant provisions, the legislative history and the purpose are all consistent with inclusion of the wind-up deficiency in the protection afforded to members with respect to employer contributions upon the wind up of their pension plan. I therefore find that the Court of Appeal correctly held with respect to the Salaried Plan, which had been wound up as of December 31, 2006, that Indalex was deemed to hold in trust the amount necessary to satisfy the wind-up deficiency.

46 The situation is different with respect to the Executive Plan. Unlike s. 57(3), which provides that the deemed trust protecting employer contributions exists while a plan is ongoing, s. 57(4) provides that the wind-up deemed trust comes into existence only when the plan is wound up. This is a choice made by the Ontario legislature. I would not interfere with it. Thus, the deemed trust entitlement arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future. At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's windup deficiency payments in respect of that plan.

47 The Court of Appeal declined to decide whether a deemed trust arose in relation to the Executive Plan, stating that it was unnecessary to decide this issue. However, the court expressed concern that a reasoning that deprived the Executive Plan's members of the benefit of a deemed trust would mean that a company under *CCAA* protection could avoid the priority of the *PBA* deemed trust simply by not winding up an underfunded pension plan. The fear was that Indalex could have relied on its own inaction to avoid the consequences that flow from a wind up. I am not convinced that the Court of Appeal's concern has any impact on the question whether a deemed trust exists, and I doubt that an employer could avoid the consequences of such a security interest simply by refusing to wind up a pension plan. The Superintendent may take a number of steps, including ordering the wind up of a pension plan under s. 69(1) of the *PBA* in a variety of circumstances (see s. 69(1)(d), *PBA*). The Superintendent did not choose to order that the plan be wound up in this case.

B. Does the Deemed Trust Supersede the DIP Charge?

48 The finding that the interests of the Salaried Plan's members in all the employer's wind-up contributions to the Salaried Plan are protected by a deemed trust does not mean that part of the money reserved by the Monitor from the sale proceeds must be remitted to the Salaried Plan's fund. This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the DIP charge. Section 30(7) reads as follows:

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

Act or under the *Pension Benefits Act*.

The effect of s. 30(7) is to enable the Salaried Plan's members to recover from the reserve fund, insofar as it relates to an account or inventory and its proceeds in Ontario, ahead of all other secured creditors.

49 The Appellants argue that any provincial deemed trust is subordinate to the DIP charge authorized by the *CCAA* order. They put forward two central arguments to support their contention. First, they submit that the *PBA* deemed trust does not apply in *CCAA* proceedings because the relevant priorities are those of the federal insolvency scheme, which do not include provincial deemed trusts. Second, they argue that by virtue of the doctrine of federal paramountcy the DIP charge supersedes the *PBA* deemed trust.

50 The Appellants' first argument would expand the holding of *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

> Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

51 In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the *BIA*. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

52 The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60 (S.C.C.), at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

53 The Appellants' second argument is that an order granting priority to the plan's members on

the basis of the deemed trust provided for by the Ontario legislature would be unconstitutional in that it would conflict with the order granting priority to the DIP lenders that was made under the *CCAA*. They argue that the doctrine of paramountcy resolves this conflict, as it would render the provincial law inoperative to the extent that it is incompatible with the federal law.

54 There is a preliminary question that must be addressed before determining whether the doctrine of paramountcy applies in this context. This question arises because the Court of Appeal found that although the *CCAA* court had the power to authorize a DIP charge that would supersede the deemed trust, the order in this case did not have such an effect because paramountcy had not been invoked. As a result, the priority of the deemed trust over secured creditors by virtue of s. 30(7) of the *PPSA* remained in effect, and the Plan Members' claim ranked in priority to the claim of the DIP lenders established in the *CCAA* order.

55 With respect, I cannot accept this approach to the doctrine of federal paramountcy. This doctrine resolves conflicts in the application of overlapping valid provincial and federal legislation (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at paras. 32 and 69). Paramountcy is a question of law. As a result, subject to the application of the rules on the admissibility of new evidence, it can be raised even if it was not invoked in an initial proceeding.

56 A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" (*Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation (*Husky Oil*).

57 None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.) (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

58 In the instant case, the *CCAA* judge, in authorizing the DIP charge, did not consider the fact that the Salaried Plan's members had a claim that was protected by a deemed trust, nor did he explicitly note that ordinary creditors, such as the Executive Plan's members, had not received notice of the DIP loan motion. However, he did consider factors that were relevant to the remedial objective of the *CCAA* and found that Indalex had in fact demonstrated that the *CCAA*'s purpose

would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List])):

> (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;
>
> (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
>
> (c) there is no other alternative available to the Applicants for a going concern solution;
>
> (d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;
>
> (e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is also satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;
>
> (f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;
>
> (g) the Pre-Filing Security has been reviewed by counsel to the Monitor and it appears that the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation of the Canadian guarantee set forth in the draft Amended and Restated Initial Order ...; and
>
> (h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing. [para. 9]

59 Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the *CCAA* judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12,

2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate" (2009 CanLII 37906 [2009 CarswellOnt 4263 (Ont. S.C.J.)], at paras. 7 and 8).

60 In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

C. Did Indalex Have Fiduciary Obligations to the Plan Members?

61 The fact that the DIP financing charge supersedes the deemed trust or that the interests of the Executive Plan's members are not protected by the deemed trust does not mean that Plan Members have no right to receive money out of the reserve fund. What remains to be considered is whether an equitable remedy, which could override all priorities, can and should be granted for a breach by Indalex of a fiduciary duty.

62 The first stage of a fiduciary duty analysis is to determine whether and when fiduciary obligations arise. The Court has recognized that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute (*Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273 (S.C.C.), at para. 41). It is clear that the indicia of a fiduciary relationship attach in this case between the Plan Members and Indalex as plan administrator. Sun Indalex and the Monitor do not dispute this proposition.

63 However, Sun Indalex and the Monitor argue that the employer has a fiduciary duty only when it acts as plan administrator — when it is wearing its administrator's "hat". They contend that, outside the plan administration context, when directors make decisions in the best interests of the corporation, the employer is wearing solely its "corporate hat". On this view, decisions made by the employer in its corporate capacity are not burdened by the corporation's fiduciary obligations to its pension plan members and, consequently, cannot be found to conflict with plan members' interests. This is not the correct approach to take in determining the scope of the fiduciary obligations of an employer acting as plan administrator.

64 Only persons or entities authorized by the *PBA* can act as plan administrators (ss. 1(1) and 8(1)(a)). The employer is one of them. A corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corpora-

tion also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. However, the corporate employer must be prepared to resolve conflicts where they arise. Reorganization proceedings place considerable burdens on any debtor, but these burdens do not release an employer that acts as plan administrator from its fiduciary obligations.

65 Section 22(4) of the *PBA* explicitly provides that a plan administrator must not permit its own interest to conflict with its duties in respect of the pension fund. Thus, where an employer's own interests do not converge with those of the plan's members, it must ask itself whether there is a potential conflict and, if so, what can be done to resolve the conflict. Where interests do conflict, I do not find the two hats metaphor helpful. The solution is not to determine whether a given decision can be classified as being related to either the management of the corporation or the administration of the pension plan. The employer may well take a sound management decision, and yet do something that harms the interests of the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat". What is important is to consider the consequences of the decision, not its nature.

66 When the interests the employer seeks to advance on behalf of the corporation conflict with interests the employer has a duty to preserve as plan administrator, a solution must be found to ensure that the plan members' interests are taken care of. This may mean that the corporation puts the members on notice, or that it finds a replacement administrator, appoints representative counsel or finds some other means to resolve the conflict. The solution has to fit the problem, and the same solution may not be appropriate in every case.

67 In the instant case, Indalex's fiduciary obligations as plan administrator did in fact conflict with management decisions that needed to be taken in the best interests of the corporation. Indalex had a number of responsibilities as plan administrator. For example, s. 56(1) of the *PBA* required it to ensure that contributions were paid when due. Section 56(2) required that it notify the Superintendent if contributions were not paid when due. It was also up to Indalex under s. 59 to commence proceedings to obtain payment of contributions that were due but not paid. Indalex, as an employer, paid all the contributions that were due. However, its insolvency put contributions that had accrued to the date of the wind up at risk. In an insolvency context, the administrator's claim for contributions that have accrued is a provable claim.

68 In the context of this case, the fact that Indalex, as plan administrator, might have to claim accrued contributions from itself means that it would have to simultaneously adopt conflicting positions on whether contributions had accrued as of the date of liquidation and whether a deemed trust had arisen in respect of wind-up deficiencies. This is indicative of a clear conflict between Indalex's interests and those of the Plan Members. As soon as it saw, or ought to have seen, a potential for conflict, Indalex should have taken steps to ensure that the interests of the Plan

Members were protected. It did not do so. On the contrary, it contested the position the Plan Members advanced. At the very least, Indalex breached its duty to avoid conflicts of interest (s. 22(4), *PBA*).

69 Since the Plan Members seek an equitable remedy, it is important to identify the point at which Indalex should have moved to ensure that their interests were safeguarded. Before doing so, I would stress that factual contexts are needed to analyse conflicts between interests, and that it is neither necessary nor useful to attempt to map out all the situations in which conflicts may arise.

70 As I mentioned above, insolvency puts the employer's contributions at risk. This does not mean that the decision to commence insolvency proceedings entails on its own a breach of a fiduciary obligation. The commencement of insolvency proceedings in this case on April 3, 2009 in an emergency situation was explained by Timothy R. J. Stubbs, the then-president of Indalex. The company was in default to its lender, it faced legal proceedings for unpaid bills, it had received a termination notice effective April 6 from its insurers, and suppliers had stopped supplying on credit. These circumstances called for urgent action by Indalex lest a creditor start bankruptcy proceedings and in so doing jeopardize ongoing operations and jobs. Several facts lead me to conclude that the stay sought in this case did not, in and of itself, put Indalex in a conflict of interest.

71 First, a stay operates only to freeze the parties' rights. In most cases, stays are obtained *ex parte*. One of the reasons for refraining from giving notice of the initial stay motion is to avert a situation in which creditors race to court to secure benefits that they would not enjoy in insolvency. Subjecting as many creditors as possible to a single process is seen as a way to treat all of them more equitably. In this context, plan members are placed on the same footing as the other creditors and have no special entitlement to notice. Second, one of the conclusions of the order Indalex sought was that it was to be served on all creditors, with a few exceptions, within 10 days. The notice allowed any interested party to apply to vary the order. Third, Indalex was permitted to pay all pension benefits. Although the order excluded special solvency payments, no ruling was made at that point on the merits of the creditors' competing claims, and a stay gave the Plan Members the possibility of presenting their arguments on the deemed trust rather than losing it altogether as a result of a bankruptcy proceeding, which was the alternative.

72 Whereas the stay itself did not put Indalex in a conflict of interest, the proceedings that followed had adverse consequences. On April 8, 2009, Indalex brought a motion to amend and restate the initial order in order to apply for DIP financing. This motion had been foreseen. Mr. Stubbs had mentioned in the affidavit he signed in support of the initial order that the lenders had agreed to extend their financing, but that Indalex would be in need of authorization in order to secure financing to continue its operations. However, the initial order had not yet been served on the Plan Members as of April 8. Short notice of the motion was given to the USW rather than to all the individual Plan Members, but the USW did not appear. The Plan Members were quite simply not represented on the motion to amend the initial stay order requesting authorization to grant the DIP charge.

73 In seeking to have a court approve a form of financing by which one creditor was granted priority over all other creditors, Indalex was asking the *CCAA* court to override the Plan Members' priority. This was a case in which Indalex's directors permitted the corporation's best interests to be put ahead of those of the Plan Members. The directors may have fulfilled their fiduciary duty to Indalex, but they placed Indalex in the position of failing to fulfil its obligations as plan administrator. The corporation's interest was to seek the best possible avenue to survive in an insolvency context. The pursuit of this interest was not compatible with the plan administrator's duty to the Plan Members to ensure that all contributions were paid into the funds. In the context of this case, the plan administrator's duty to the Plan Members meant, in particular, that it should at least have given them the opportunity to present their arguments. This duty meant, at the very least, that they were entitled to reasonable notice of the DIP financing motion. The terms of that motion, presented without appropriate notice, conflicted with the interests of the Plan Members. Because Indalex supported the motion asking that a priority be granted to its lender, it could not at the same time argue for a priority based on the deemed trust.

74 The Court of Appeal found a number of other breaches. I agree with Cromwell J. that none of the subsequent proceedings had a negative impact on the Plan Members' rights. The events that occurred, in particular the second DIP financing motion and the sale process, were predictable and, in a way, typical of reorganizations. Notice was given in all cases. The Plan Members were represented by able counsel. More importantly, the court ordered that funds be reserved and that a full hearing be held to argue the issues.

75 The Monitor and George Miller, Indalex U.S.'s trustee in bankruptcy, argue that the Plan Members should have appealed the Amended Initial Order authorizing the DIP charge, and were precluded from subsequently arguing that their claim ranked in priority to that of the DIP lenders. They take the position that the collateral attack doctrine bars the Plan Members from challenging the DIP financing order. This argument is not convincing. The Plan Members did not receive notice of the motion to approve the DIP financing. Counsel for the Executive Plan's members presented the argument of that plan's members at the first opportunity and repeated it each time he had an occasion to do so. The only time he withdrew their opposition was at the hearing of the motion for authorization to increase the DIP loan amount after being told that the only purpose of the motion was to increase the amount of the authorized loan. The *CCAA* judge set a hearing date for the very purpose of presenting the arguments that Indalex, as plan administrator, could have presented when it requested the amendment to the initial order. It cannot now be argued, therefore, that the Plan Members are barred from defending their interests by the collateral attack doctrine.

D. Would an Equitable Remedy Be Appropriate in the Circumstances?

76 The definition of "secured creditor" in s. 2 of the *CCAA* includes a trust in respect of the debtor's property. The Amended Initial Order (at para. 45) provided that the DIP lenders' claims ranked in priority to all trusts, "statutory or otherwise". Indalex U.S. was subrogated to the DIP lenders' claim by operation of the guarantee in the DIP lending agreement.

77 Counsel for the Executive Plan's members argues that the doctrine of equitable subordination should apply to subordinate Indalex U.S.'s subrogated claim to those of the Plan Members. This Court discussed the doctrine of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 (S.C.C.), but did not endorse it, leaving it for future determination (p. 609). I do not need to endorse it here either. Suffice to say that there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct, and no party has contested the validity of Indalex U.S.'s payment of the US$10 million shortfall.

78 This leaves the constructive trust remedy ordered by the Court of Appeal. It is settled law that proprietary remedies are generally awarded only with respect to property that is directly related to a wrong or that can be traced to such property. I agree with my colleague Cromwell J. that this condition is not met in the case at bar. I adopt his reasoning on this issue.

79 Moreover, I am of the view that it was unreasonable for the Court of Appeal to reorder the priorities in this case. The breach of fiduciary duty identified in this case is, in substance, the lack of notice. Since the Plan Members were allowed to fully argue their case at a hearing specifically held to adjudicate their rights, the *CCAA* court was in a position to fully appreciate the parties' positions.

80 It is difficult to see what gains the Plan Members would have secured had they received notice of the motion that resulted in the Amended Initial Order. The *CCAA* judge made it clear, and his finding is supported by logic, that there was no alternative to the DIP loan that would allow for the sale of the assets on a going-concern basis. The Plan Members presented no evidence to the contrary. They rely on conjecture alone. The Plan Members invoke other cases in which notice was given to plan members and in which the members were able to fully argue their positions. However, in none of those cases were plan members able to secure any additional benefits. Furthermore, the Plan Members were allowed to fully argue their case. As a result, even though Indalex breached its fiduciary duty to notify the Plan Members of the motion that resulted in the Amended Initial Order, their claim remains subordinate to that of Indalex U.S.

IV. Conclusion

81 There are good reasons for giving special protection to members of pension plans in insolvency proceedings. Parliament considered doing so before enacting the most recent amendments to the *CCAA*, but chose not to (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36, in force September 18, 2009, SI/2009-68; see also Bill C-501, *An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*, 3rd Sess., 40th Parl., March 24, 2010 (subsequently amended by the Standing Committee on Industry, Science and Technology, March 1, 2011)). A report of the Standing Senate Committee on Banking, Trade and Commerce gave the following reasons for this choice:

> Although the Committee recognizes the vulnerability of current pensioners, we do not believe that changes to the BIA regarding pension claims should be made at this time. Current pensioners can also access retirement benefits from the Canada/Quebec Pension Plan, and the Old Age Security and Guaranteed Income Supplement programs, and may have private savings and Registered Retirement Savings Plans that can provide income for them in retirement. The desire expressed by some of our witnesses for greater protection for pensioners and for employees currently participating in an occupational pension plan must be balanced against the interests of others. As we noted earlier, insolvency — at its essence — is characterized by insufficient assets to satisfy everyone, and choices must be made.
>
> The Committee believes that granting the pension protection sought by some of the witnesses would be sufficiently unfair to other stakeholders that we cannot recommend the changes requested. For example, we feel that super priority status could unnecessarily reduce the moneys available for distribution to creditors. In turn, credit availability and the cost of credit could be negatively affected, and all those seeking credit in Canada would be disadvantaged.
>
> *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at p. 98; see also p. 88.)

82 In an insolvency process, a *CCAA* court must consider the employer's fiduciary obligations to plan members as their plan administrator. It must grant a remedy where appropriate. However, courts should not use equity to do what they wish Parliament had done through legislation.

83 In view of the fact that the Plan Members were successful on the deemed trust and fiduciary duty issues, I would not order costs against them either in the Court of Appeal or in this Court.

I would therefore allow the main appeals without costs in this Court, set aside the orders made by the Court of Appeal, except with respect to orders contained in paras. 9 and 10 of the judgment of the Court of Appeal in the former executive members' appeal and restore the orders of Campbell J. dated February 18, 2010. I would dismiss USW's costs appeal without costs.

***Cromwell J.* (McLachlin C.J.C., Rothstein J. concurring):**

I. Introduction

84 When a business becomes insolvent, many interests are at risk. Creditors may not be able to recover their debts, investors may lose their investments and employees may lose their jobs. If the business is the sponsor of an employee pension plan, the benefits promised by the plan are not immune from that risk. The circumstances leading to these appeals show how that risk can materialize. Pension plans and creditors find themselves in a zero-sum game with not enough money to go around. At a very general level, this case raises the issue of how the law balances the interests of pension plan beneficiaries with those of other creditors.

85 Indalex Limited, the sponsor and administrator of employee pension plans, became insolvent and sought protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Although all current contributions were up to date, the company's pension plans did not have sufficient assets to fulfill the pension promises made to their members. In a series of court-sanctioned steps, which were judged to be in the best interests of all stakeholders, the company borrowed a great deal of money to allow it to continue to operate. The parties injecting the operating money were given a super priority over the claims by other creditors. When the business was sold, thereby preserving hundreds of jobs, there was a shortfall between the sale proceeds and the debt. The pension plan beneficiaries thus found themselves in a dispute about the priority of their claims. The appellant, Sun Indalex Finance LLC, claimed it had priority by virtue of the super priority granted in the *CCAA* proceedings. The trustee in bankruptcy of the U.S. Debtors (George Miller) and the Monitor (FTI Consulting) joined in the appeal. The plan beneficiaries claimed that they had priority by virtue of a statutory deemed trust under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), and a constructive trust arising from the company's alleged breaches of fiduciary duty.

86 The Ontario Court of Appeal sided with the plan beneficiaries and Sun Indalex, the trustee in bankruptcy and the Monitor all appeal. The specific legal points in issue are:

A. Did the Court of Appeal err in finding that the statutory deemed trust provided for in s. 57(4) of the *PBA* applied to the salaried plan's wind-up deficiency?

B. Did the Court of Appeal err in finding that Indalex breached the fiduciary duties it owed to the pension plan beneficiaries as the plans' administrator and in imposing a constructive trust as a remedy?

C. Did the Court of Appeal err in concluding that the super priority granted in the *CCAA* proceedings did not have priority by virtue of the doctrine of federal paramountcy?

D. Did the Court of Appeal err in its cost endorsement respecting the United Steelworkers ("USW")?

87 My view is that the deemed trust does not apply to the disputed funds, and even if it did, the super priority would override it. I conclude that the corporation failed in its duty to the plan beneficiaries as their administrator and that the beneficiaries ought to have been afforded more procedural protections in the *CCAA* proceedings. However, I also conclude that the Court of Appeal erred in using the equitable remedy of a constructive trust to defeat the super priority ordered by the *CCAA* judge. I would therefore allow the main appeals.

II. Facts and Proceedings Below

A. Overview

88 These appeals concern claims by pension fund members for amounts owed to them by the plans' sponsor and administrator which became insolvent.

89 Indalex Limited is the parent company of three non-operating Canadian companies. I will refer to both Indalex Limited individually and to the group of companies collectively as "Indalex", unless the context requires further clarity. Indalex Limited is the wholly owned subsidiary of its U.S. parent, Indalex Holding Corp. which owned and conducted related operations in the U.S. through its U.S. subsidiaries which I will refer to as the "U.S. debtors".

90 In late March and early April of 2009, Indalex and the U.S. debtors were insolvent and sought protection from their creditors, the former under the Canadian *CCAA*, and the latter under the United States Bankruptcy Code, 11 U.S.C., Chapter 11. The dispute giving rise to these appeals concern the priority granted to lenders in the *CCAA* process for funds advanced to Indalex and whether that priority overrides the claims of two of Indalex's pension plans for funds owed to them.

91 Indalex was the sponsor and administrator of two registered pension plans relevant to these proceedings, one for salaried employees and the other for executive employees. At the time of seeking *CCAA* protection, the salaried plan was being wound up (with a wind-up date of December 31, 2006) and was estimated to have a wind-up deficiency (as of the end of 2007) of roughly $2.252 million. The executive plan, while it was not being wound up, had been closed to new members since 2005. It was estimated to have a deficiency of roughly $2.996 million on wind up. At the time the *CCAA* proceedings were started, all regular current service contributions had been made to both plans.

92 Shortly after Indalex received *CCAA* protection, the *CCAA* judge authorized the company to enter into debtor in possession ("DIP") financing in order to allow it to continue to operate. The court granted the DIP lenders, a syndicate of banks, a "super priority" over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise": initial order, at para. 35 (joint A.R., vol. I, at pp. 123-24). Repayment of these amounts was guaranteed by the U.S. debtors.

93 Ultimately, with the approval of the *CCAA* court, Indalex sold its business; the purchaser did not assume pension liabilities. A reserve fund was established by the *CCAA* Monitor to answer any outstanding claims. The proceeds of the sale were not sufficient to pay back the DIP lenders and so the U.S. debtors, as guarantors, paid the shortfall and stepped into the shoes of the DIP lenders in terms of priority.

94 The appellant Sun Indalex is a pre-*CCAA* secured creditor of both Indalex and the U.S. debtors. It claims the reserve fund on the basis that the US$10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. debtors in the U.S. bankruptcy proceedings. The respondent plan beneficiaries claim the reserve fund on the basis that they have a wind-up deficiency which is covered by a deemed trust created by s. 57(4) of the *PBA*. This deemed trust includes "an amount of money equal to employer contributions *ac-*

crued to the date of the wind up but not yet due under the plan or regulations" (s. 57(4)). They also claim the reserve fund on the basis of a constructive trust arising from Indalex's failure to live up to its fiduciary duties as plan administrator.

95 The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims.

96 The judge at first instance rejected the plan beneficiaries' deemed trust arguments and held that, with respect to the wind-up deficiency, the plan beneficiaries were unsecured creditors, ranking behind those benefitting from the "super priority" and secured creditors (2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List])). The Court of Appeal reversed this ruling and held that pension plan deficiencies were subject to deemed and constructive trusts which had priority over the DIP financing and over other secured creditors (2011 ONCA 265, 104 O.R. (3d) 641 (Ont. C.A.)). Sun Indalex, the trustee in bankruptcy and the Monitor appeal.

B. Indalex's CCAA Proceedings

(1) The Initial Order (Joint A.R., vol. I, at p. 112)

97 As noted earlier, Indalex was in financial trouble and, on April 3, 2009, sought and obtained protection from its creditors under the *CCAA*. The order (which I will refer to as the initial order) also contained directions for service on creditors and others: paras. 39-41. The order also contained a so-called "comeback clause" allowing any interested party to apply for a variation of the order, provided that that party served notice on any other party likely to be affected by any such variation: para. 46. It is common ground that the plan beneficiaries did not receive notice of the application for the initial order but the *CCAA* court nevertheless approved the method of and time for service. Full particulars of the deficiencies in the pension plans were before the court in the motion material and the initial order addressed payment of the employer's current service pension contributions.

(2) The DIP Order (Joint A.R., vol. I, at p. 129)

98 On April 8, 2009, in what I will refer to as the DIP order, the *CCAA* judge, Morawetz J., authorized Indalex to borrow funds pursuant to a DIP credit agreement. The judge ordered among many other things, the following:

- He approved abridged notice: para. 1;

- He allowed Indalex to continue making current service contributions to the pension plans, but not special payments: paras. 7(a) and 9(b);

- He barred all proceedings against Indalex, except by consent of Indalex and the Monitor or

leave of the court, until May 1, 2009: para. 15;

• He granted the DIP lenders a so-called super priority:

> 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, trust, liens, charges and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person.
>
> [Emphasis added; para. 45.]

• He required Indalex to send notice of the order to all known creditors, other than employees and creditors to which Indalex owed less than $5,000 and stated that Indalex and the Monitor were "at liberty" to serve the Initial Order to interested parties: paras. 49-50.

99 In his endorsement for the DIP order, Morawetz J. found that "there is no other alternative available to the Applicants [Indalex] for a going concern solution" and that DIP financing was necessary: (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]), at para. 9(c). He noted that the Monitor in its report was of the view that approval of the DIP agreement was both necessary and in the best interests of Indalex and its stakeholders, including its creditors, employees, suppliers and customers: paras. 14-16.

100 The USW, which represented some of the members of the salaried plan, was served with notice of the motion that led to the DIP order, but did not appear. Morawetz J. specifically ordered as follows with regard to service:

> THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof. [DIP order, at para. 1]

(3) The DIP Extension Order (Joint A.R., vol. I, at p. 156)

101 On June 12, 2009, Morawetz J. heard and granted an application by Indalex to allow them to borrow approximately $5 million more from the DIP lenders, thus raising the allowed total to US$29.5 million.

102 Counsel for the former executives received the motion material the night before. Counsel for USW was also served with notice. At the motion, the former executives (along with second priority secured noteholders) sought to "reserve their rights with respect to the relief sought": 2009 CanLII 37906 [2009 CarswellOnt 4263 (Ont. S.C.J.)], at para. 4. Morawetz J. wrote that any "reservation of rights" would create uncertainty for the DIP lenders with regard to priority, and may prevent them from extending further advances. Moreover, the parties had presented no al-

ternative to increased DIP financing, which was both "necessary and appropriate" and would, it was to be hoped, "improve the position of the stakeholders": paras. 5-9.

(4) The Bidding Order ((2009), 79 C.C.P.B. 101 (Ont. S.C.J. [Commercial List]))

103 On July 2, 2009, Indalex brought a motion for approval of proposed bidding procedures for Indalex's assets. Morawetz J. decided that a stalking horse bid by SAPA Holding AB ("SAPA") for Indalex's assets could count as a qualifying bid. Counsel on behalf of the members of the executive plan appeared, with the concern that "their position and views have not been considered in this process": para. 8. In his decision, Morawetz J. decided that these arguments could be dealt with later, at a sale approval motion: para. 10. The judge said:

> The position facing the retirees is unfortunate. The retirees are currently not receiving what they bargained for. However, reality cannot be ignored and the nature of the Applicants' insolvency is such that there are insufficient assets to meet its liabilities. The retirees are not alone in this respect. The objective of these proceedings is to achieve the best possible outcome for the stakeholders.
>
> [Emphasis added; para. 9.]

(5) The Sale Approval Order (Joint A.R., vol. I, at p. 166)

104 On July 20, 2009, Indalex brought two motions before Campbell J.

105 The first motion sought approval for the sale of Indalex's assets as a going concern to SAPA. SAPA was not to assume any pension liabilities. Campbell J. granted an order approving this sale.

106 The second motion sought approval for an interim distribution of the sale proceeds to the DIP lenders. Counsel on behalf of the executive plan members and the USW, representing some of the salaried employees, objected to the planned distribution of the sale proceeds on grounds that a statutory deemed trust applied to the deficiencies in their plans and that Indalex had breached fiduciary duties that it owed to them. Campbell J. ordered the Monitor to pay the DIP agent from the sale proceeds, but also ordered the Monitor to set up a reserve fund in an amount sufficient to answer, among other things, the claims of the plan beneficiaries pending resolution of those matters. Campbell J. ordered that the U.S. debtors be subrogated to the DIP lenders to the extent that the U.S. debtors were required under the guarantee to satisfy the DIP lenders' claims: para. 14.

(6) The Sale and Distribution of Funds

107 SAPA bought Indalex's assets on July 31, 2009. Taking the reserve fund into account, the sale did not produce sufficient funds to repay the DIP lenders in full and so the U.S. debtors paid US$10,751,247 as guarantor to the DIP lenders: C.A. reasons, at para. 65.

(7) The Order Under Appeal

108 On August 28, 2009, Campbell J. heard claims by the USW (appearing on behalf of some members of the salaried plan) and counsel appearing on behalf of the executive plan members that the wind-up deficiency was subject to a deemed trust. He rejected these claims in a written decision on February 18, 2010. He decided that the s. 57(4) *PBA* deemed trust did not apply to wind-up deficiencies. The executive plan had not been wound up, and therefore there was no wind-up deficiency to be the subject of the deemed trust. As for the salaried plan, Campbell J. held that the windup deficiency was not an obligation that had "accrued to the date of the wind up" and as a result did not fall within the terms of the s. 57(4) deemed trust.

109 Indalex had asked for the stay granted under the initial order to be lifted so that it could assign itself into bankruptcy. Because he did not find a deemed trust, Campbell J. did not feel that he needed to decide on the motion to lift the stay.

(8) The Decision of the Ontario Court of Appeal

110 The Ontario Court of Appeal allowed an appeal from the decision of Campbell J.

111 Writing for a unanimous panel, Gillese J.A. decided that the s. 57(4) deemed trust is applicable to wind-up deficiencies. She took the view that s. 57(4)'s reference to "employer contributions accrued to the date of the wind up but not yet due" included all amounts that the employer owed on the wind-up of its pension plan: para. 101. In particular, she concluded that the deemed trust applied to the wind-up deficiency in the salaried plan. Gillese J.A. declined, however, to decide whether the deemed trust also applied to deficiencies in the executive plan, which had not been wound up by the relevant date: paras. 110-12. A decision on this latter point was unnecessary given her finding on the applicability of a constructive trust in this case.

112 Gillese J.A. found that the super priority provided for in the DIP order did not trump the deemed trust over the salaried plan's wind-up deficiency. Morawetz J. had not "invoked" the issue of paramountcy or made an explicit finding that the requirements of federal law required that the provincially created deemed trust must be overridden: paras. 178-79. Gillese J.A. also took the view that this Court's decision in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), did not mean that provincially created priorities that would be ineffective under the *Bankruptcy and Insolvency* Act, R.S.C. 1985, c. B-3 ("BIA"), were also ineffective under the *CCAA*: paras. 185-96. The deemed trust therefore ranked ahead of the DIP security.

113 In addition to her findings regarding deemed trusts, Gillese J.A. granted the plan beneficiaries a constructive trust over the amount of the reserve fund on the ground that Indalex, as pension plan administrator, had breached fiduciary duties that it owed to the plan beneficiaries during the *CCAA* proceedings.

114 She held that as a plan administrator who was also an employer, Indalex had fiduciary duties both to the plan beneficiaries and to the corporation: para. 129. In her view, Indalex was subject to both sets of duties throughout the *CCAA* proceedings and it had breached its duties to the plan beneficiaries in several ways. While Indalex had the right to initiate *CCAA* proceedings, this action made the plan beneficiaries vulnerable and therefore triggered its fiduciary obligations as plan administrator: paras. 132-33. Gillese J.A. enumerated the many ways in which she thought Indalex subsequently failed as plan administrator: it did nothing in the *CCAA* proceedings to fund the deficit in the underfunded plans; it applied for *CCAA* protection without notice to the beneficiaries; it obtained DIP financing on the condition that DIP lenders be granted a super priority over "statutory trusts"; it obtained this financing without notice to the plan beneficiaries; it sold its assets knowing the purchaser was not taking over the plans; and it attempted to enter into voluntary bankruptcy, which would defeat any deemed trust claims the beneficiaries might have asserted: para. 139. Gillese J.A. also noted that throughout the *CCAA* proceedings Indalex was in a conflict of interest because it was acting for both the corporation and the beneficiaries.

115 Indalex's failure to live up to its fiduciary duties meant that the plan beneficiaries were entitled to a constructive trust over the amount of the reserve fund: para. 204. Since the beneficiaries had been wronged by Indalex, and the U.S. debtors were not, with respect to Indalex, an "arm's length innocent third party" the appropriate response was to grant the beneficiaries a constructive trust: para. 204. Her conclusion on this point applied equally to the salaried and executive plans.

III. Analysis

A. First Issue: Did the Court of Appeal Err in Finding That the Deemed Statutory Trust Provided for in Section 57(4) of the PBA Applied to the Salaried Plan's Wind-up Deficiency?

(1) Introduction

116 The main issue addressed here concerns whether the statutory deemed trust provided for in s. 57(4) of the *PBA* applies to wind-up deficiencies, the payment of which is provided for in s. 75(1)(b).

117 The deemed trust created by s. 57(4) applies to "employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations". Thus, to be subject to the deemed trust, the pension plan must be wound up and the amounts in question must meet three requirements. They must be (1) "employer contributions", (2) "accrued to the date of the wind-up" and (3) "not yet due". A wind-up deficiency arises "[w]here a pension plan is wound up": s. 75(1). I agree with my colleagues that there can be no deemed trust for the executive plan, because that plan had not been wound up at the relevant date. What follows, therefore, is relevant only to the salaried plan.

118 The wind-up deficiency payments are "employer contributions" which are "not yet due"

as of the date of wind-up within the meaning of the *PBA*. The main issue before us, therefore, boils down to the narrow interpretative question of whether the wind-up deficiency described in s. 75(1)(b) is "accrued to the date of the windup".

119 Campbell J. at first instance found that it was not, while the Court of Appeal reached the opposite conclusion. In essence, the Court of Appeal reasoned that the deemed trust in s. 57(4) "applies to all employer contributions that are required to be made pursuant to s. 75", that is, to "all amounts owed by the employer on the wind-up of its pension plan": para. 101.

120 I respectfully disagree with the Court of Appeal's conclusion for three main reasons. First, the most plausible grammatical and ordinary sense of the words "accrued to the date of the wind up" is that the amounts referred to are precisely ascertained immediately before the effective date of the plan's wind-up. The wind-up deficiency only arises upon wind-up and it is neither ascertained nor ascertainable on the date fixed for wind-up. Second, the broader statutory context reinforces this view: the language of the deemed trusts in s. 57(3) and (4) is virtually exactly repeated in s. 75(1)(a), suggesting that both deemed trusts refer to the liability on wind-up referred to in s. 75(1)(a) and not to the further and distinct wind-up deficiency liability created under s. 75(1)(b). Finally, the legislative evolution and history of these provisions show, in my view, that the legislature never intended to include the wind-up deficiency in a statutory deemed trust.

121 Before turning to the precise interpretative issue, it will be helpful to provide some context about the employer's wind-up obligations and the deemed trust provisions that are the subject of this dispute.

(2) Employer Obligations on Wind Up

122 A "wind up" means that the plan is terminated and the plan assets are distributed: see *PBA*, s. 1(1), definition of "wind up". The employer's liability on wind-up consists of two main components. The first is provided for in s. 75(1)(a) and includes "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". This liability applies to contributions that were due as at the wind-up date but does *not* include payments required by s. 75(1)(b) that arise as a result of the wind up: A. N. Kaplan, *Pension Law* (2006), at pp. 541-42. This second liability is known as the wind-up deficiency amount. The employer must pay all additional sums to the extent that the assets of the pension fund are insufficient to cover the value of all immediately vested and accelerated benefits and grow-in benefits: Kaplan, at p. 542. Without going into detail, there are certain statutory benefits that may arise only on wind-up, such as certain benefit enhancements and the potential for acceleration of pension entitlements. Thus, wind-up will usually result in additional employer liabilities over and above those arising from the obligation to pay all benefits provided for in the plan itself: see, e.g., ss. 73 and 74; Kaplan, at p. 542. As the Court of Appeal concluded, the payments provided for under s. 75(1)(a) are those which the employer had to make while the plan was ongoing, while s. 75(1)(b) refers to the employer's obligation to make up for any wind-up deficiency: paras. 90-91.

123 For convenience, the provision as it then stood is set out here.

> **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.

124 While a wind up is effective as of a fixed date, a wind up is nonetheless best thought of not simply as a moment or a single event, but as a process. It begins by a triggering event and continues until all of the plan assets have been distributed. To oversimplify somewhat, the wind-up process involves the following components.

125 The assets and liabilities of the plan as of the wind-up date must be determined. As noted earlier, the precise extent of the liability, while *fixed as of that date*, will not be ascertained or ascertainable *on that date*. The extent of the liability may depend on choices open to plan beneficiaries under the plan and on the exercise by them of certain statutory rights beyond the options that would otherwise have been available under the plan itself. The plan members must be notified of the wind-up and have their entitlements and options set out for them and given an opportunity to make their choices. The plan administrator must file a wind-up report which includes a statement of the plan's assets and liabilities, the benefits payable under the terms of the plan, and the method of allocating and distributing the assets including the priorities for the payment of benefits: *PBA*, s. 70(1), and R.R.O. 1990, Reg. 909, s. 29 (the "*PBA* Regulations").

126 Benefits to members may take the form of "cash refunds, immediate or deferred annuities, transfers to registered retirement saving plans, [etc.] ... In principle, the value of these benefits is

the present value of the benefits accrued to the date of plan termination": The *Mercer Pension Manual* (loose-leaf), vol. 1, at p. 10-41. That present value is an actuarial calculation performed on the basis of various assumptions including assumptions about investment return, mortality and so forth.

127 If, when the assets and liabilities are calculated, the assets are insufficient to satisfy the liabilities, the employer (i.e. the plan sponsor) must make up for any wind-up deficiency: *PBA*, s. 75(1)(b). An employer can elect to space these payments out over the course of five years: *PBA* Regulations, s. 31(2). Because these payments are based on the extent to which there is a deficit between assets in the pension plan and the benefits owed to beneficiaries, their amount varies with the market and other assumed elements of the calculation over the course of the permitted five years.

128 To take the salaried plan as an example, at the time of wind-up, all regular current service contributions had been made: C.A. reasons, at para. 33. The wind-up deficiency was initially estimated to be $1,655,200. Indalex made special wind-up payments of $709,013 in 2007 and $875,313 in 2008, but as of December 31, 2008, the wind-up deficiency was $1,795,600 — i.e. higher than it had been two years before, notwithstanding that payments of roughly $1.6 million had been made: C.A. reasons, at para. 32. Indalex made another payment of $601,000 in April 2009: C.A. reasons, at para. 32.

(3) The Deemed Trust Provisions

129 The *PBA* contains provisions whose purpose is to exempt money owing to a pension plan, and which is held or owing by the employer, from being seized or attached by the employer's other creditors: Kaplan, at p. 395. This is accomplished by creating a "deemed trust" with respect to certain pension contributions such that these amounts are held by the employer in trust for the employees or pension beneficiaries.

130 There are two deemed trusts that we must examine here, one relating to employer contributions that are *due but have not been paid* and another relating to employer contributions *accrued but not due*. This second deemed trust is the one in issue here, but it is important to understand how the two fit together.

131 The deemed trust relating to employer contributions "due and not paid" is found in s. 57(3). The *PBA* and *PBA* regulations contain many provisions relating to contributions required by employers, the due dates for which are specified. Briefly, the required contributions are these.

132 When a pension is ongoing, employers need to make regular current service cost contributions. These are made monthly, within 30 days after the month to which they relate: *PBA* Regulations, s. 4(4)3. There are also special payments, which relate to deficiencies between a pension plan's assets and liabilities. There are "going-concern" deficiencies and "solvency" deficiencies, the distinction between which is unimportant for the purposes of these appeals. A plan

administrator must regularly file actuarial reports, which may disclose deficiencies: *PBA* Regulations, s. 14. Where there is a going-concern deficiency the employer must make equal monthly payments over a 15-year period to rectify it: *PBA* Regulations, s. 5(1)(b). Where there is a solvency deficiency, the employer must make equal monthly payments over a five-year period to rectify it: *PBA* Regulations, s. 5(1)(e). Once these regular or special payments become due but have not been paid, they are subject to the s. 57(3) deemed trust.

133 I turn next to the s. 57(4) deemed trust, which gives rise to the question before us. The subsection provides that "[w]here a pension plan is wound up ... 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."

134 When a pension plan is wound up there will be an interrupted monthly payment period, which is sometimes referred to as the stub period. During this stub period regular and special liabilities will have accrued but not yet become due. Section 58(1) provides that money that an employer is required to pay "accrues on a daily basis". Because the amounts referred to in s. 57(4) are not yet due, they are not covered by the s. 57(3) deemed trust, which applies only to payments that are *due*. The two provisions, then, operate in tandem to create a trust over an employer's unfulfilled obligations, which are "due and not paid" as well as those which have "accrued to the date of the wind up but [are] not yet due".

(4) The Interpretative Approach

135 The issue we confront is one of statutory interpretation and the well-settled approach is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26. Taking this approach it is clear to me that the sponsor's obligation to pay a wind-up deficiency is not covered by the statutory deemed trust provided for in s. 57(4) of the *PBA*. In my view, the deficiency neither "accrued", nor did it arise within the period referred to by the words "to the date of the wind up".

(a) Grammatical and Ordinary Sense of the Words "Accrued" and "to the Date of the Wind Up"

136 The Court of Appeal failed to take sufficient account of the ordinary and grammatical meaning of the text of the provisions. It held that "the deemed trust in s. 57(4) applies *to all employer contributions that are required to be made pursuant to s. 75*": para. 101 (emphasis added). However, the plain words of the section show that this conclusion is erroneous. Section 75(1)(a) refers to liability for employer contributions that "*are due* ... and that have not been paid". These amounts are thus *not* included in the s. 57(4) deemed trust, because it addresses only amounts that have "accrued to the date of the wind up *but [are] not yet due*". Amounts "due" are covered by the

s. 57(3) deemed trust and not, as the Court of Appeal concluded by the deemed trust created by s. 57(4). The Court of Appeal therefore erred in finding, in effect, that amounts which "are due" could be included in a deemed trust covering amounts "not yet due".

137 In my view, the most plausible grammatical and ordinary sense of the phrase "accrued to the date of the wind up" in s. 57(4) is that it refers to the sums that are ascertained immediately before the effective wind-up date of the plan.

138 In the context of s. 57(4), the grammatical and ordinary sense of the term "accrued" is that the amount of the obligation is "fully constituted" and "ascertained" although it may not yet be payable. The amount of the wind-up deficiency is not fully constituted or ascertained (or even ascertainable) before or even on the date fixed for wind up and therefore cannot fall under s. 57(4).

139 Of course, the meaning of the word "accrued" may vary with context. In general, when the term "accrued" is used in relation to legal rights, its common meaning is that the right has become fully constituted even though the monetary implications of its enforcement are not yet known or knowable. Thus, we speak of the "accrual" of a cause of action in tort when all of the elements of the cause of action come into existence, even though the extent of the damage may well not be known or knowable at that time: see, e.g., *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.). However, when the term is used in relation to a sum of money, it will generally refer to an amount that is at the present time either quantified or exactly quantifiable but which may or may not be due.

140 In some contexts, a liability is said to accrue when it becomes due. An accrued liability is said to be "properly chargeable" or "owing on a given day" or "completely constituted": see, e.g., *Black's Law Dictionary* (9th ed. 2009), at p. 997, "accrued liability"; D.A. Dukelow, *The Dictionary of Canadian Law* (4th ed. 2011), at p. 13, "accrued liability"; *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306 (S.C.C.).

141 In other contexts, an amount which has accrued may not yet be due. For example, we speak of "accrued interest" meaning a precise, quantified amount of interest that has been earned but may not yet be payable. The term "accrual" is used in the same way in "accrual accounting". In accrual method accounting, "transactions that give rise to revenue or costs are recognized in the accounts when they are earned and incurred respectively": B. J. Arnold, *Timing and Income Taxation: The Principles of Income Measurement for Tax Purposes* (1983), at p. 44. Revenue is earned when the recipient "substantially completes performance of everything he or she is required to do as long as the amount due is ascertainable and there is no uncertainty about its collection": P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (7th ed., 2010), at s. 6.5(b); see also Canadian Institute of Chartered Accountants, *CICA Handbook — Accounting*, Part II, s. 1000, at paras. 41-44. In this context, the amount must be ascertained at the time of accrual.

142 The *Hydro-Electric Power Commission* case offers a helpful definition of the word "accrued" in this sense. On a sale of shares, the vendor undertook to provide on completion "a sum

estimated by him to be equal to sinking fund payments [on the bonds and debentures] *which shall have accrued but shall not be due* at the time for completion": p. 344 (emphasis added). The bonds and debentures required the company to pay on July 1 of each year a fixed sum for each electrical horsepower sold and paid for during the preceding calendar year. A dispute arose as to what amounts were payable in this respect on completion. Duff J. held that in this context accrued meant "completely constituted", referring to this as a "well recognized usage": p. 312. He went on:

> Where ... a lump sum is made payable on a specified date and where, having regard to the purposes of the payment or to the terms of the instrument, this sum must be considered to be made up of an accumulation of sums in respect of which the right to receive payment is completely constituted before the date fixed for payment, then it is quite within the settled usage of lawyers to describe each of such accumulated parts as a sum accrued or accrued due before the date of payment: p. 316.

Thus, at every point at which a liability to pay a fixed sum arose under the terms of the contract, that liability accrued. It was fully constituted even though not yet due because the obligation to make the payment was in the future. In reaching this conclusion, Duff J. noted that the bonds and debentures used the word "accrued" in contrast to "due" and that this strengthened the interpretation of "accrued" as an obligation fully constituted but not yet payable. Similarly in s. 57(4), the word "accrued" is used in contrast to the word "due".

143 Given my understanding of the ordinary meaning of the word "accrued", I must respectfully disagree with my colleague, Justice Deschamps' position that the wind-up deficiency can be said to have "accrued" to the date of wind up. In her view, "[s]ince the employees cease to accumulate entitlements when the plan is wound up, the entitlements that are used to calculate the contributions have all been accumulated before the wind-up date" (para. 34) and "no new liabilities accrue at the time of or after the wind up" (para. 36). My colleague maintains that "[t]he fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes" (para. 37 referring to *Canadian Pacific Ltd. v. Ontario (Minister of Revenue)* (1998), 41 O.R. (3d) 606 (Ont. C.A.)).

144 I cannot agree that no new liability accrues on or after the wind up. As discussed in more detail earlier, the wind-up deficiency in s. 75(1)(b) is made up of the difference between the plan's assets and liabilities calculated as of the date of wind up. On wind up, the *PBA* accords statutory entitlements and protections to employees that would not otherwise be available: Kaplan, at p. 532. Wind up therefore gives rise to new liabilities. In particular, on wind up, and only on wind up, plan beneficiaries are entitled, under s. 74, to make elections regarding the payment of their benefits. The plan's liabilities cannot be determined until those elections are made. Contrary to what my colleague Justice Deschamps suggests, the extent of the wind-up deficiency depends on employee rights that arise only upon wind up and with respect to which employees make elections only after wind up.

145 Moreover, the wind-up deficiency will vary after wind up because the amount of money necessary to provide for the payment of the plan sponsor's liabilities will vary with the market. Section 31 of the *PBA* Regulations allows s. 75 payments to be spaced out over the course of five years. As we have seen, the amount of the wind-up deficiency will fluctuate over this period (I set out earlier how this amount in fact fluctuated markedly in the case of the salaried plan in issue here). Thus, while estimates are periodically made and reported after the wind up to determine how much the employer needs to pay, the precise amount of the wind-up deficiency is not ascertained or ascertainable on the date of the wind up.

146 I turn next to the ordinary and grammatical sense of the words "to the date of the wind up" in s. 57(4). In my view, these words indicate that only those contributions that accrue before the date of wind up, and not those amounts the liability for which arises only on the day of wind up — that is, the wind-up deficiency — are included.

147 Where the legislature intends to include the date of wind up, it has used suitable language to effect that purpose. For example, the English version of a provision amending the *PBA* in 2010 (c. 24, s. 21(2)), s. 68(2)(c), indicates which trade unions are entitled to notice of the wind up:

> (2) If the employer or the administrator, as the case may be, intends to wind up the pension plan, the administrator shall give written notice of the intended wind up to,
>
> . . . . .
>
> (c) each trade union that represents members of the pension plan or that, on the date of the wind up, represented the members, former members or retired members of the pension plan;

In contrast to the phrase "to the date of wind up", "on the date of wind up" clearly includes the date of wind up. (The French version does not indicate a different intention.) Similarly, s. 70(6), which formed part of the *PBA* until 2012 (rep. S.O. 2010, c. 9, s. 52(5)), read as follows:

> (6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

The words "on the effective date of the partial wind up" indicate that the members are entitled to those benefits from the date of the partial wind up, in the sense that members can claim their benefits beginning on the date of the wind up itself. This is how the legislature expresses itself when it wants to speak of a period of time including a specific date. By comparison, "to the date of the wind up" is devoid of language that would include the actual date of wind up. This conclusion is further supported by the structure of the *PBA* and its legislative history and evolution, to which I will turn shortly.

148 To sum up with respect to the ordinary and grammatical meaning of the phrase "accrued to the date of the wind up", the most plausible ordinary and grammatical meaning is that such amounts are fully constituted and precisely ascertained immediately before the date fixed as the date of wind up. Thus, according to the ordinary and grammatical meaning of the words, the wind-up deficiency obligation set out in s. 75(1)(b) has not "*accrued* to the date of the wind up" as required by s. 57(4). Moreover, the liability for the wind-up deficiency arises where a pension plan is wound up (s. 75(1)(b)) and so it cannot be a liability that "accrued *to the date of the wind up*" (s. 57(4)).

(b) The Scheme of the Act

149 As discussed earlier, s. 57 establishes deemed trusts over funds which must be contributed to a pension plan, including the one in s. 57(4), which is at issue here. It is helpful to consider these deemed trusts in the context of the obligations to pay funds which give rise to them. Specifically, the relationship between the deemed trust provisions in s. 57(3) and (4), on one hand, and s. 75(1), which sets out liabilities on wind up on the other. According to my colleague Justice Deschamps, s. 75(1) "elegantly parallels the wind-up deemed trust provision" (para. 42) such that the deemed trusts must include the wind-up deficiency. I disagree. In my view, the deemed trusts parallel only s. 75(1)(a), which does not relate to the wind-up deficiency. The correspondence between the deemed trusts and s. 75(1)(a), and the absence of any such correspondence with s. 75(1)(b), makes it clear that the wind-up deficiency is not covered by the deemed trust provisions.

150 I would recall here the difference between the deemed trusts created by s. 57(3) and (4). While a plan is ongoing, there may be payments which the employer is required to, but has failed to make. The s. 57(3) trust applies to these payments because they are "*due and not paid*". When a plan is wound up, however, there will be payments that are outstanding in the sense that they are fully constituted, but not yet due. This occurs with respect to the so-called stub period referred to earlier. During this stub period, regular and special liabilities will accrue on a daily basis, as provided for in s. 58(1), but may not be due at the time of wind up. While s. 57(3) cannot apply to these payments because they are not yet due, the deemed trust under s. 57(4) applies to these payments because liability for them has "accrued to the date of the wind up" and they are "*not yet due*".

151 The important point is how these two deemed trust provisions relate to the wind-up liabilities as described in ss. 75(1)(a) and 75(1)(b). The two paragraphs refer to sums of money that are different in kind: while s. 75(1)(a) refers to liabilities that accrue before wind up and that are created elsewhere in the Act, s. 75(1)(b) creates a completely new liability that comes into existence only once the plan is wound up. There is no dispute, as I understand it, that these two paragraphs refer to different liabilities and that it is the liability described in s. 75(1)(b) that is the wind-up deficiency in issue here. The parties do not dispute that s. 75(1)(a) does *not* include wind-up deficiency payments.

152 It is striking how closely the text of s. 75(1)(a) — which does not relate to the wind-up

deficiency — tracks the language of the deemed trust provisions in s. 57(3) and (4). As noted, s. 57(3) deals with "employer contributions due and not paid", while s. 57(4) deals with "employer contributions accrued to the date of the wind up but not yet due." Section 75(1)(a) includes both of these types of employer contributions. It refers to "payments that ... are due ... and that have not been paid" (i.e. subject to the deemed trust under s. 57(3)) or that have "accrued and that have not been paid" (i.e. subject to the deemed trust under s. 57(4) to the extent that these payments accrued to the date of wind up). This very close tracking of the language between s. 57(3) and (4) on the one hand and s. 75(1)(a) on the other, and the absence of any correspondence between the language of these deemed trust provisions with s. 75(1)(b), suggests that the s. 57(3) and (4) deemed trusts refer to the liability described in s. 75(1)(a) and not to the wind-up deficiency created by s. 75(1)(b). It is difficult to understand why, if the intention had been for s. 57(4) to capture the windup deficiency liability under s. 75(1)(b), the legislature would have so closely tracked the language of s. 75(1)(a) alone in creating the deemed trusts. Thus, in my respectful view, the elegant parallel to which my colleague, Justice Deschamps refers exists only between the deemed trust and s. 75(1)(a), and not between the deemed trust and the wind-up deficiency.

153 I conclude that the scheme of the *PBA* reinforces my conclusion that the ordinary grammatical sense of the words in s. 57(4) does not extend to the wind-up deficiency provided for in s. 75(1)(b).

(c) Legislative History and Evolution

154 Legislative history and evolution may form an important part of the overall context within which a provision should be interpreted. Legislative evolution refers to the various formulations of the provision while legislative history refers to evidence about the provision's conception, preparation and enactment: see, e.g., *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.), at para. 43.

155 Both the legislative evolution and history of the *PBA* show that it was never the legislature's intention to include the wind-up deficiency in the deemed trust. The evolution and history of the *PBA* are rather intricate and sometimes difficult to follow so I will review them briefly here before delving into a more detailed analysis.

156 The deemed trust was first introduced into the *PBA* in 1973. At that time, it covered employee contributions held by the employer and employer contributions that were due but not paid. In 1980, the *PBA* was amended so that the deemed trust was expanded to include employer contributions whether they were due or not. Also, new provisions were added allowing for employee elections and requiring additional payments by the employer where a plan was wound up. The 1980 amendments gave rise to confusion on two fronts: first, it was unclear whether the payments that were required on wind up were subject to the deemed trust; second, it was unclear whether a lien over some employer contributions covered the same amount as the deemed trust. In 1983, both these points were clarified. The sections were reworded and rearranged to make it clear that the wind-up deficiency was distinct from the amounts covered by the deemed trust, and that

the lien and the deemed trust covered the same amount. A statement by the responsible Minister in 1982 confirms that *the deemed trusts were never intended to cover the wind-up deficiency.*

157 My colleague, Justice Deschamps maintains that this history suggests an evolution in the intention of the legislature from protecting "only the service contributions that were due ... to all amounts due and accrued upon wind up" (para. 42). I respectfully disagree. In my view, the history and evolution of the *PBA* leading up to and including 1983 show that the legislature never intended to include the windup deficiency in the deemed trust. Moreover, legislative evolution after 1983 confirms that this intention did not change.

(i) The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

158 So far as I can determine, statutory deemed trusts were first introduced into the *PBA* by *The Pension Benefits Amendment Act, 1973*, S.O. 1973, c. 113, s. 6. Those amendments created deemed trusts over two amounts: employee pension contributions received by employers (s. 23*a*(1), similar to the deemed trust in the current s. 57(1)) and employer contributions that had fallen due under the plan (s. 23*a*(3), similar to the current s. 57(3) deemed trust for employer contributions "due and not paid"). The full text of these provisions and those referred to below, up to the current version of the 1990 Act, are found in the Appendix.

(ii) The Pension Benefits Amendment Act, 1980, S.O. 1980, c. 80

159 Ontario undertook significant pension reform leading to *The Pension Benefits Amendment Act, 1980*, S.O. 1980, c. 80; see Kaplan at pp. 54-56. I will concentrate on the deemed trust provisions and how they related to the liabilities on wind up and, for ease of reference, I will refer to the sections as they were renumbered in the 1980 consolidation: R.S.O. 1980, c. 373. The 1980 legislation expanded the deemed trust relating to employer contributions. Although far from clear, the new provisions appear to have created a deemed trust and lien over the employer contributions whether otherwise payable or not and calculated as if the plan had been wound up on the relevant date.

160 It was unclear after the reforms of 1980 whether the deemed trust applied to all employer contributions that arose on wind up. According to s. 23(4), on any given date, the trust extended to an amount to be determined "as if the plan had been wound up on that date". However, the provisions of the 1980 version of the Act did not explicitly state what such a calculation would include. Under s. 21(2) of the 1980 statute, the employer was obligated to pay on wind up "all amounts that would otherwise have been required to be paid to meet the tests for solvency ..., up to the date of such termination or winding up". Under s. 32, however, the employer had to make a payment on wind up that was to be "[i]n addition" to that due under s. 21(2). Whether the legislature intended that the trust should cover this latter payment was left unclear.

161 It was also unclear whether the lien applied to a different amount than was subject to the deemed trust. According to s. 23(3), "the members have a lien upon the assets of the employer in

such amount that in the ordinary course of business would be entered into the books of account whether so entered or not". This comes in the middle of two portions of the provision which explicitly refer to the deemed trust, but it is not clear whether the legislature intended to refer to the same amount throughout the provision.

(iii) The Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

162 The 1983 amendments substantially clarified the scope of the deemed trust and lien for employer contributions. They make clear that neither the deemed trust nor the lien applied to the wind-up deficiency; the responsible Minister confirmed that this was the intention of the amendments.

163 The new provision was amended by s. 3 of the 1983 amendments and is found in s. 23(4) which provided:

> (4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the total of,
>
> (a) all moneys that the employer is required to pay into the pension plan to meet,
>
> (i) the current service cost, and
>
> (ii) the special payments prescribed by the regulations,
>
> that are due under the pension plan or the regulations and have not been paid into the pension plan; and
>
> (b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

Section 21(2)(a) provides that on wind up, the employers must pay an amount equal to *the current service cost and the special payments* that "have accrued to and including the date of the termination winding up but, under the terms of the pension plan or the regulations, are not due on that date"; the provision adds that these amounts shall be deemed to accrue on a daily basis. These provisions make it clear that the s. 23(4) deemed trust applies only to the special payments and current service costs that have accrued, on a daily basis, up to and including the date of wind up. The deemed trust clearly does not extend to the wind-up deficiency.

164 The provision referring to the additional payments required on wind up also makes clear that those payments are not within the scope of the deemed trust. These additional liabilities were described by s. 32, a provision very similar to s. 75(1)(b). These amounts are first, the amount guaranteed by the Guarantee Fund and, second, the value of pension benefits vested under the plan

that exceed the value of the assets of the plan. Section 32(2) specifies that these amounts *are "in addition* to the amounts that the employer is liable to pay under subsection 21(2)" (which are the payments comparable to the current s. 75(1)(a) payments) and that *only the latter* fall within the deemed trust. The inevitable conclusion is that, in 1983, the wind-up deficiency was not included in the scope of the deemed trust.

165 The 1983 amendments also clarified the scope of the lien. They indicated that the scope of the lien was identical to the scope of the deemed trust. Section 23(5) specified that the lien extended only to the amounts that were deemed to be held in trust under s. 23(4) (i.e. the *current service costs and special payments that had accrued to and including the date of the wind up but are not yet due).*

166 This makes two things clear: that the lien covers the same amounts as the deemed trust, and that neither covers the wind-up deficiency.

167 A brief, but significant piece of legislative history seems to me to dispel any possible doubt. In speaking at first reading of the 1983 amendments, the Minister responsible, the Honourable Robert Elgie said this:

> The first group of today's amendments makes up the housekeeping changes needed for us to do what we set out to do in late 1980; that is, to guarantee pension benefits following the windup of a defined pension benefit plan. These amendments will clarify the ways in which we can attain that goal.
>
> In Bill 214 [i.e. the 1980 amendments] the employees were given a lien on the employer's assets for employee contributions to a pension plan collected by the employer, as well as accrued employer contributions....
>
> Unfortunately, this protection has resulted in different legal interpretations on the extent of the lien. An argument has been advanced that the amount of the lien includes an employer's potential future liability on the windup of a pension plan. This was never intended and is not necessary to provide the required protection. The amendment to section 23 clarified the intent of Bill 214.
>
> [Emphasis added.]
>
> (*Legislature of Ontario Debates: Official Report (Hansard)*, No. 99, 2nd Sess., 32nd Parl., July 7, 1982, p. 3568)

The 1983 amendments made the scope of the lien correspond precisely to the scope of the deemed trust over the employer's accrued contributions. It is thus clear from this statement that it was never the legislative intention that either should apply to "an employer's potential future liability" on wind up (i.e. the wind-up deficiency). In 1983, there is therefore, in my view, virtually irrefutable

evidence of legislative intent to do exactly the opposite of what the Court of Appeal held in this case had been done.

168 Subsequent legislative evolution shows no change in this legislative intent. In fact, subsequent amendments demonstrate a clear legislative intent to exclude from the deemed trust employer liabilities that arise only upon wind up of the plan.

(iv) Pension Benefits Act, 1987, S.O. 1987, c. 35

169 Amendments to the *PBA* in 1987 resulted in it being substantially in its current form. With those amendments, the extent of the deemed trusts was further clarified. The provision in the 1983 version of the Act combined within a single subsection a deemed trust for employer contributions that were due and not paid (s. 23(4)(a)) and employer contributions that had accrued to and including the date of wind up but which were not yet due (s. 23(4)(b), referring to s. 21(2)(a)). In the 1987 amendments, these two trusts were each given their own subsection and their scope was further clarified. Moreover, after the 1987 revision, one no longer had to refer to a separate provision (formerly s. 21(2)(a)) to determine the scope of the trust covering payments that were accrued but not yet due. Thus, while the substance of the provisions did not change in 1987, their form was simplified.

170 The new s. 58(3) (which is exactly the same as the current s. 57(3)) replaced the former s. 23(4)(a). This created a trust for employer contributions due and not paid. Section 58(4) (which is exactly the same as s. 57(4) stood at the time) replaced the former s. 23(4)(b) and part of s. 21(2)(a) and created a trust that arises on wind up and covers "employer contributions accrued *to the date of the wind up* but not yet due".

171 The 1987 amendment also shows that the legislature adverted to the difference between "to the date of the wind up" and "to and including" the date of wind up and chose the former. This is reflected in a small but significant change in the wording of the relevant provisions. The former provision, s. 23(4)(b), by referring to s. 21(2)(a) captured current service costs and special payments that "have *accrued to and including* the date of the termination or winding up." The new version in s. 58(4) deletes the words "and including", putting the section in its present form. This deletion, to my way of thinking, reinforces the legislative intent to *exclude* from the deemed trust liabilities that arise only *on* the date of wind up. Respectfully, the legislative record does not support Deschamps J.'s view that there was a legislative evolution towards a more expanded deemed trust. Quite the opposite.

172 To sum up, I draw the following conclusions from this review of the legislative evolution and history. The legislation differentiates between two types of employer liability relevant to this case. The first is the contributions required to cover current service costs and any other payments that are either due or have accrued on a daily basis up to the relevant time. These are the payments referred to in the current s. 75(1)(a), that is, payments due or accrued but not paid. The second relates to additional contributions required when a plan is wound up which I have referred to as the

wind-up deficiency. These payments are addressed in s. 75(1)(b). The legislative history and evolution show that the deemed trusts under s. 57(3) and (4) were intended to apply only to the former amounts and that it was never the intention that there should be a deemed trust or a lien with respect to an employer's potential future liabilities that arise once the plan is wound up.

(d) The Purpose of the Legislation

173 Excluding the wind-up deficiency from the deemed trust is consistent with the broader purposes of the legislation. Pension legislation aims at important protective purposes. These protective purposes, however, are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 (S.C.C.), at paras. 13-14.

174 In this instance, the legislature has created trusts over contributions that were due or accrued to the date of the wind up in order to protect, to some degree, the rights of pension plan beneficiaries and employees from the claims of the employer's other creditors. However, there is also good reason to think that the legislature had in mind other competing objectives in not extending the deemed trust to the wind-up deficiency.

175 First, if there were to be a deemed trust over all employer liabilities that arise when a plan is wound up, much simpler and clearer words could readily be found to achieve that objective.

176 Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

177 While I agree that the protection of pension plans is an important objective, it is not for this Court to decide the extent to which that objective will be pursued and at what cost to other interests. In her conclusion, Justice Deschamps notes that although the protection of pension plans is a worthy objective, courts should not use the law of equity to re-arrange the priorities that Parliament has established under the *CCAA*. This is a matter of policy where courts must defer to legislatures (reasons of Justice Deschamps, at para. 82). In my view, my colleague's comments on this point are equally applicable to the policy decisions reflected in the text of the *PBA*. The decision as to the level of protection that should be provided to pension beneficiaries is one to be left to the Ontario legislature. Faced with the language in the *PBA*, I would be slow to infer that the broader protective purpose, with all its potential disadvantages, was intended. In short, the inter-

pretation I would adopt is consistent with a balanced approach to protection of benefits which the legislature intended.

178 For these reasons, I am of the respectful view that the Court of Appeal erred in finding that the s. 57(4) deemed trust applied to the wind-up deficiency.

B. Second Issue: Did the Court of Appeal Err in Finding That Indalex Breached the Fiduciary Duties it Owed to the Pension Beneficiaries as the Plans' Administrator and in Imposing a Constructive Trust as a Remedy?

(1) Introduction

179 The Court of Appeal found that during the *CCAA* proceedings Indalex breached its fiduciary obligations as administrator of the pension plans: para. 116. As a remedy, it imposed a remedial constructive trust over the reserve fund, effectively giving the plan beneficiaries recovery of 100 cents on the dollar in priority to all other creditors, including creditors entitled to the super priority ordered by the *CCAA* court.

180 The breaches identified by the Court of Appeal fall into three categories. First, Indalex breached the prohibition against a fiduciary being in a position of conflict of interest because its interests in dealing with its insolvency conflicted with its duties as plan administrator to act in the best interests of the plans' members and beneficiaries: para. 142. According to the Court of Appeal, the simple fact that Indalex found itself in this position of conflict of interest was, of itself, a breach of its fiduciary duty as plan administrator. Second, Indalex breached its fiduciary duty by applying, without notice to the plans' beneficiaries, for *CCAA* protection: para. 139. Third, Indalex breached its fiduciary duty by seeking and/or obtaining various relief in the *CCAA* proceedings including the "super priority" in favour of the DIP lenders, approval of the sale of the business knowing that no payment would be made to the underfunded plans over the statutory deemed trusts and seeking to be put into bankruptcy with the intention of defeating the deemed trust claims: para. 139. As a remedy for these breaches of fiduciary duty the court imposed a constructive trust.

181 In my view, the Court of Appeal took much too expansive a view of the fiduciary duties owed by Indalex as plan administrator and found breaches where there were none. As I see it, the only breach of fiduciary duty committed by Indalex occurred when, upon insolvency, Indalex's corporate interests were in obvious conflict with its fiduciary duty as plan administrator to ensure that all contributions were made to the plans when due. The breach was not in failing to avoid this conflict — the conflict itself was unavoidable. Its breach was in failing to address the conflict to ensure that the plan beneficiaries had the opportunity to have representation in the *CCAA* proceedings as if there were independent plan administrators. I also conclude that a remedial constructive trust is not available as a remedy for this breach.

182 This part of the appeals requires us to answer two questions which I will address in turn:

(i) What fiduciary duties did Indalex have in its role as plan administrator and did it breach them?

(ii) If so, was imposition of a constructive trust an appropriate remedy?

(2) What Fiduciary Duties did Indalex Have in its Role as Plan Administrator and Did it Breach Those Duties?

(a) Legal Principles

183 The appellants do not dispute that Indalex, in its role of administrator of the plans, had fiduciary duties to the members of the plan and that when it is acting in that role it can only act in the interests of the plans' beneficiaries. It is not necessary for present purposes to decide whether a pension plan administrator is a *per se* or *ad hoc* fiduciary, although it must surely be rare that a pension plan administrator would not have fiduciary duties in carrying out that role: *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273 (S.C.C.) , at para. 41, aff'g 2008 ONCA 394, 67 C.C.P.B. 1 (Ont. C.A.), at para. 55.

184 However, the conclusion that Indalex as plan administrator had fiduciary duties to the plan beneficiaries is the beginning, not the end of the inquiry. This is because fiduciary duties do not exist at large, but arise from and relate to the specific legal interests at stake: *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.)

2011 , at para. 31. As La Forest J. put it in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.):

> The obligation imposed [on a fiduciary] may vary in its specific substance depending on the relationship ... [N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty.... It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded.
>
> [Emphasis added; pp. 646-47.]

185 The nature and scope of the fiduciary duty must, therefore, be assessed in the legal framework governing the relationship out of which the fiduciary duty arises: see, e.g., *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175 (S.C.C.), at para. 141; *Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.), at paras. 36-37; *B. (K.L.) v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403 (S.C.C.), at para. 41. So, for example, as a general rule, a fiduciary has a duty of loyalty including the duty to avoid conflicts of interest: see, e.g., *3464920 Canada Inc. v. Strother*, 2007 SCC 24, [2007] 2 S.C.R. 177 (S.C.C.), at para. 35; *Lac Minerals*, at pp. 646-47. However, this general rule may have to be modified in light of the legal framework within which a particular fiduciary duty must be exercised. In my re-

spectful view, this is such a case.

(b) The Legal Framework of Indalex's Dual Role as a Plan Administrator and Employer

186 In order to define the nature and scope of Indalex's role and fiduciary obligations as a plan administrator, we must examine the legal framework within which the administrator functions. This framework is established primarily by the plan documents and the relevant provisions of the *PBA*. It is to these sources, first and foremost, that we look in order to shape the specific fiduciary duties owed in this context.

187 Turning first to the plan documents, I take the salaried plan as an example. Under it, the company is appointed the plan administrator: art. 13.01. The term "Company" is defined to mean Indalex Limited and any reference in the plan to actions taken or discretion to be exercised by the Company means Indalex acting through the board of directors or any person authorized by the board for the purposes of the plan: art. 2.09. Article 13.01 provides that the "Management Committee of the Board of Directors of the Company will appoint a Pension and Benefits Committee to act on behalf of the Company in its capacity as administrator of the Plan. The Pension and Benefits Committee will decide conclusively all matters relating to the operation, interpretation and application of the Plan." Thus, the Pension and Benefits Committee is to act on behalf of the company and by virtue of art. 2.09 its acts are considered those of the company. Article 13.02 sets out the duties of the Pension and Benefits Committee which include the "performance of all administrative functions not performed by the Funding Agent, the Actuary or any group annuity contract issuer": art. 13.02(1).

188 The plan administrator also has statutory powers and duties by virtue of the *PBA*. Section 22 lists the general duties of plan administrators, three of which are particularly relevant to these appeals:

> **22.** (1) [Care, diligence and skill] The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> (2) [Special knowledge and skill] The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.
>
> . . . . .
>
> (4) [Conflict of interest] An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

189 Not surprisingly, the powers and duties conferred on the administrator by the legislation are administrative in nature. For the most part they pertain to the internal management of the pension fund and to the relationship among the pension administrator, the beneficiaries, and the Superintendent of Financial Services ("Superintendent"). The list includes: applying to the Superintendent for registration of the plan and any amendments to it as well as filing annual information returns: ss. 9, 12 and 20 of the *PBA*; providing beneficiaries and eligible potential beneficiaries with information and documents: ss. 10(1)12 and 25; ensuring that the plan is administered in accordance with the *PBA* and its regulations and plan documents: s. 19; notifying beneficiaries of proposed amendments to the plan that would reduce benefits: s. 26; paying commuted value for pensions: s. 42; and filing wind-up reports if the plan is terminated: s. 70.

190 Of special relevance for this case are two additional provisions. Under s. 56, the administrator has a duty to ensure that pension payments are made when due and to notify the Superintendent if they are not and, under s. 59, the administrator has the authority to commence court proceedings when pension payments are not made.

191 The fiduciary duties that employer-administrators owe to plan beneficiaries relate to the statutory and other tasks described above; these are the "specific legal interests" with respect to which the employer-administrator's fiduciary duties attach.

192 Another important aspect of the legal context for Indalex's fiduciary duties as a plan administrator is that it was acting in the dual role of an employer-administrator. This dual role is expressly permitted under s. 8(1)(a) of the *PBA*, but this provision creates a situation where a single entity potentially owes two sets of fiduciary duties (one to the corporation and the other to the plan members).

193 This was the case for Indalex. As an employer-administrator, Indalex acted through its board of directors and so it was that body which owed fiduciary duties to the plan members. The board of directors also owed a fiduciary duty to the company to act in its best interests: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122(1)(*a*); *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.), at para. 36. In deciding what is in the best interests of the corporation, a board may look to the interests of shareholders, employees, creditors and others. But where those interests are not aligned or may conflict, it is for the directors, acting lawfully and through the exercise of business judgment, to decide what is in the overall best interests of the corporation. Thus, the board of Indalex, as an employer-administrator, could not always act exclusively in the interests of the plan beneficiaries; it also owed duties to Indalex as a corporation.

(c) Breaches of Fiduciary Duty

194 Against the background of these legal principles, I turn to consider the Court of Appeal's findings in relation to Indalex's breach of its fiduciary duties as administrator of the plans. As noted, they fall into three categories: being in a conflict of interest position; taking steps to reduce

pension obligations in the *CCAA* proceedings; and seeking bankruptcy status.

(i) Conflict of Interest

195 The questions here are first what constitutes a conflict of interest or duty between Indalex as business decision-maker and Indalex as plan administrator and what must be done when a conflict arises?

196 The Court of Appeal in effect concluded that a conflict of interest arises whenever Indalex makes business decisions that have "the potential to affect the Plans beneficiaries' rights" (para. 132) and that whenever such a conflict of interest arose, the employer-administrator was immediately in breach of its fiduciary duties to the plan members. Respectfully, this position puts the matter far too broadly. It cannot be the case that a conflict arises simply because the employer, exercising its management powers in the best interests of the corporation, does something that has the potential to affect the plan beneficiaries.

197 This conclusion flows inevitably from the statutory context. The existence of apparent conflicts that are inherent in the two roles being performed by the same party cannot be a breach of fiduciary duty because those conflicts are specifically authorized by the statute which permits one party to play both roles. As noted earlier, the *PBA* specifically permits employers to act as plan administrators (s. 8(1)(a)). Moreover, the broader business interests of the employer corporation and the interests of pension beneficiaries in getting the promised benefits are almost always at least potentially in conflict. Every important business decision has the potential to put at risk the solvency of the corporation and therefore its ability to live up to its pension obligations. The employer, within the limits set out in the plan documents and the legislation generally, has the authority to amend the plan unilaterally and even to terminate it. These steps may well not serve the best interests of plan beneficiaries.

198 Similarly, the simple existence of the sort of conflicts of interest identified by the Court of Appeal — those inherent in the employer's exercise of business judgment — cannot of themselves be a breach of the administrator's fiduciary duty. Once again, that conclusion is inconsistent with the statutory scheme that expressly permits an employer to act as plan administrator.

199 How, then, should we identify conflicts of interest in this context?

200 In *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 (S.C.C.), Binnie J. referred to the *Restatement Third, The Law Governing Lawyers* (2000), at § 121, to explain when a conflict of interest occurs in the context of the lawyer-client relationship: para. 31. In my view, the same general principle, adapted to the circumstances, applies with respect to employer-administrators. Thus, a situation of conflict of interest occurs when there is a substantial risk that the employer-administrator's representation of the plan beneficiaries would be materially and adversely affected by the employer-administrator's duties to the corporation. I would recall here, however, that the employer-administrator's obligation to represent the plan beneficiaries extends only to those

tasks and duties that I have described above.

201 In light of the foregoing, I am of the view that the Court of Appeal erred when it found, in effect that a conflict of interest arose whenever Indalex was making decisions that "had the potential to affect the Plans beneficiaries' rights": para. 132. The Court of Appeal expressed both the potential for conflict of interest or duty and the fiduciary duty of the plan administrator much too broadly.

(ii) Steps in the CCAA Proceedings to Reduce Pension Obligations and Notice of Them

202 The Court of Appeal found that Indalex breached its fiduciary duty simply by commencing *CCAA* proceedings knowing that the plans were underfunded and by failing to give the plan beneficiaries notice of the proceedings: para. 139. As I understand the court's reasons, the decision to commence *CCAA* proceedings was solely the responsibility of the corporation and not part of the administration of the pension plan: para. 131. The difficulty which the Court of Appeal saw arose from the potential of the *CCAA* proceedings to result in a reduction of the corporation's pension obligations to the prejudice of the beneficiaries: paras. 131-32.

203 I respectfully disagree. Like Justice Deschamps, I find that seeking an initial order protecting the corporation from actions by its creditors did not, on its own, give rise to any conflict of interest or duty on the part of Indalex (reasons of Justice Deschamps, at para. 72).

204 First, it is important to remember that the purpose of *CCAA* proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:

> ... the purpose of the *CCAA* ... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

For this reason, I would be very reluctant to find that, simply by virtue of embarking on *CCAA* proceedings, an employer-administrator breaches its duties to plan members.

205 Second, the facts of this case do not support the contention that the interests of the plan

beneficiaries and the employer were in conflict with respect to the decision to seek *CCAA* protection. It cannot seriously be suggested that some other course would have protected more fully the rights of the plan beneficiaries. The Court of Appeal did not suggest an alternative to seeking *CCAA* protection from creditors, nor did any of the parties. Indalex was in serious financial difficulty and its options were limited: either make a proposal to its creditors (under the *CCAA* or under the *BIA*), or go bankrupt. Moreover, the plan administrator's duty and authority do not extend to ensuring the solvency of the corporation and an independent administrator could not reasonably expect to be consulted about the plan sponsor's decision to seek *CCAA* protection. Finally, the application for *CCAA* proceedings did not reduce pension obligations other than to temporarily relieve the corporation of making special payments and it was the only step with any prospect of the pension funds obtaining from the insolvent corporation the money that would become due. There was thus no conflict of duty or interest between the administrator and the employer when protective action was taken for the purpose of preserving the *status quo* for the benefit of all stakeholders.

206 The Court of Appeal also found that it was a breach of fiduciary duty not to give the plan beneficiaries notice of the initial application for *CCAA* protection. Again, here, I must join Deschamps J. in disagreeing with the Court of Appeal's conclusion. Section 11(1) of the *CCAA* as it stood at the time of the proceedings, provided that parties could commence *CCAA* proceedings without giving notice to interested persons:

> **11.** (1) 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.

207 This provision was renumbered but not substantially changed when the Act was amended in September of 2009 (S.C. 2005, c. 47, s. 128, in force Sept. 18, 2009, SI/2009-68). Although it is not appropriate in every case, *CCAA* courts have discretion to make initial orders on an *ex parte* basis. This may be an appropriate — even necessary — step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 ("*Rescue!*"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 7. The respondents did not challenge Morawetz J.'s decision to exercise his discretion to make an *ex parte* order in this case.

208 This is not to say, however, that *ex parte* initial orders will always be required or acceptable. Without attempting to be exhaustive or to express any final view on these issues, I simply note that there have been at least three ways in which courts have mitigated the possible negative effect on creditors of making orders without notice to potentially affected parties. First, courts have been reluctant to grant *ex parte* orders where the situation of the debtor company is not urgent. In *Rescue!*, Janis Sarra explains that courts are increasingly expecting applicants to have given notice before applying for a stay under the *CCAA*: p. 55. An example is *Marine Drive*

Properties Ltd., Re, 2009 BCSC 145, 52 C.B.R. (5th) 47 (B.C. S.C.), a case in which Butler J. held that "[i]nitial applications in *CCAA* proceedings should not be brought without notice merely because it is an application under that Act. The material before the court must be sufficient to indicate an emergent situation": para. 27. Second, courts have included "come-back" clauses in their initial orders so that parties could return to court at a later date to seek to set aside some or all of the order: *Rescue!*, at p. 55. Note that such a clause was included in the initial order by Morawetz J.: para. 46. Finally, courts have limited their initial orders to the issues that need to be resolved immediately and have left other issues to be resolved after all interested parties have been given notice. Thus, in *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]), Morawetz J. limited the initial *CCAA* order so that priorities were only granted over the party that had been given notice. The discussion of suspending special payments or granting creditors priority over pension beneficiaries was left to a later date, after the parties that would be affected had been given notice. A similar approach was taken in the case of *AbitibiBowater Inc., Re*, 2009 QCCS 6459 (Que. S.C.). In his initial *CCAA* order, Gascon J. put off the decision regarding the suspension of past service contributions or special payments to the pension plans in question until the parties likely to be affected could be advised of the applicant's request: para. 7.

209 Failure to give notice of the initial *CCAA* proceedings was not a breach of fiduciary duty in this case. Indalex's decision to act as an employer-administrator cannot give the plan beneficiaries any greater benefit than they would have if their plan was managed by a third party administrator. Had there been a third party administrator in this case, Indalex would not have been under an obligation to tell the administrator that it was planning to enter *CCAA* proceedings. The respondents are asking this Court to give the advantage of Indalex's knowledge as employer to Indalex as the plan administrator in circumstances where the employer would have been unlikely to disclose the information itself. I am not prepared to blur the line between employers and administrators in this way.

210 I conclude that Indalex did not breach its fiduciary duty by commencing *CCAA* proceedings or by not giving notice to the plan beneficiaries of its intention to seek the initial *CCAA* order.

211 I turn next to the Court of Appeal's conclusion that seeking and obtaining the DIP orders without notice to the plan beneficiaries and seeking and obtaining the sale approval order constituted breaches of fiduciary duty.

212 To begin, I agree with the Court of Appeal that "just because the initial decision to commence *CCAA* proceedings is solely a corporate one ... does not mean that all subsequent decisions made during the proceedings are also solely corporate ones": para. 132. It was at this point that Indalex's interests as a corporation came into conflict with its duties as a pension plan administrator.

213 The DIP orders could easily have the effect of making it impossible for Indalex to satisfy

its funding obligations to the plan beneficiaries. When Indalex, through the exercise of business judgment, sought *CCAA* orders that would or might have this effect, it was in conflict with its duty as plan administrator to ensure that all contributions were paid when due.

214 I do not think, however, that the simple existence of this conflict of interest and duty, on its own, was a breach of fiduciary duty in these circumstances. As discussed earlier, the *PBA* expressly permits an employer to be a pension administrator and the statutory provisions about conflict of interest must be understood and applied in light of that fact. Moreover, an independent plan administrator would have no decision-making role with respect to the conduct of *CCAA* proceedings. So in my view, the difficulty that arose here was not the existence of the conflict itself, but Indalex's failure to take steps so that the plan beneficiaries would have the opportunity to have their interests protected in the *CCAA* proceedings as if the plans were administered by an independent administrator. In short, the difficulty was not the existence of the conflict, but the failure to address it.

215 Despite Indalex's failure to address its conflict of interest, the plan beneficiaries, through their own efforts, were represented at subsequent steps in the *CCAA* proceedings. The effect of Indalex's breach was therefore mitigated, a point which I will discuss in greater detail when I turn to the issue of the constructive trust.

216 Nevertheless, for the purposes of providing some guidance for future *CCAA* proceedings, I take this opportunity to briefly address what an employer-administrator can do to respond to these sorts of conflicts. First and foremost, an employer-administrator who finds itself in a conflict must bring the conflict to the attention of the *CCAA* judge. It is not enough to include the beneficiaries in the list of creditors; the judge must be made aware that the debtor, as an administrator of the plan is, or may be, in a conflict of interest.

217 Given their expertise and their knowledge of particular cases, *CCAA* judges are well placed to decide how best to ensure that the interests of the plan beneficiaries are fully represented in the context of "real-time" litigation under the *CCAA*. Knowing of the conflict, a *CCAA* judge might consider it appropriate to appoint an independent administrator or independent counsel as *amicus curiae* on terms appropriate to the particular case. Indeed, there have been cases in which representative counsel have been appointed to represent tort claimants, clients, pensioners and non-unionized employees in *CCAA* proceedings on terms determined by the judge: *Rescue!*, at p. 278; see, e.g., *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]); *Nortel Networks Corp., Re* (2009), 75 C.C.P.B. 206 (Ont. S.C.J. [Commercial List]). In other circumstances, a *CCAA* judge might find that it is feasible to give notice directly to the pension beneficiaries. In my view, notice, though desirable, may not always be feasible and decisions on such matters should be left to the judicial discretion of the *CCAA* judge. Alternatively, the judge might consider limiting draws on the DIP facility until notice can be given to the beneficiaries: *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), at para. 24. Ultimately, the appropriate response or combination of responses should be left to the discretion of the *CCAA* judge in a particular case. The point, as well expressed by the Court of

Appeal, is that the insolvent corporation which is also a pension plan administrator cannot "simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection": para. 132.

218 I conclude that the Court of Appeal erred in finding that Indalex breached its fiduciary duties as plan administrator by taking the various steps it did in the *CCAA* proceedings. However, I agree with the Court of Appeal that it breached its fiduciary duty by failing to take steps to ensure that the plan beneficiaries had the opportunity to be as fully represented in those proceedings as if there had been an independent plan administrator.

(iii) The Bankruptcy Motion

219 At the same time Indalex applied for the sale approval order, it also applied to lift the *CCAA* stay so that it could file an assignment into bankruptcy. As Campbell J. put it, this was done "to ensure the priority regime [it] urged as the basis for resisting the deemed trust": para. 52. The Court of Appeal concluded that this was a breach of Indalex's fiduciary duties because the motion was brought "with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to [the U.S. debtors]": para. 139. I respectfully disagree.

220 It was certainly open to Indalex as an employer to bring a motion to voluntarily enter into bankruptcy. A pension plan administrator has no responsibility or authority in relation to that step. The problem here is not that the motion was brought, but that Indalex failed to meaningfully address the conflict between its corporate interests and its duties as plan administrator.

221 To sum up, I conclude that Indalex did not breach any fiduciary duty by undertaking *CCAA* proceedings or seeking the relief that it did. The breach arose from Indalex's failure to ensure that its pension plan beneficiaries had the opportunity to have their interests effectively represented in the insolvency proceedings, particularly when Indalex sought the DIP financing approval, the sale approval and the motion for bankruptcy.

(3) Was Imposing a Constructive Trust Appropriate in This Case?

222 The next issue is whether a remedial constructive trust is, as the Court of Appeal concluded, an appropriate remedy in response to the breach of fiduciary duty.

223 The Court of Appeal exercised its discretion to impose a constructive trust and its exercise of this discretion is entitled to deference. Only if the discretion has been exercised on the basis of an erroneous principle should the order be overturned on appeal: *Donkin v. Bugoy*, [1985] 2 S.C.R. 85 (S.C.C.), cited in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para. 54, by Sopinka J. (dissenting, but not on this point). In my respectful view, the Court of Appeal's erroneous conclusions about the scope of a plan administrator's fiduciary duties require us to examine the constructive trust issue anew. Moreover, the Court of Appeal, in my respectful opinion, erred in principle in finding that the asset in this case resulted from the breach of fiduciary duty such that it

would be unjust for the party in breach to retain it.

224 As noted earlier, the Court of Appeal imposed a constructive trust in favour of the plan beneficiaries with respect to funds retained in the reserve fund equal to the total amount of the wind-up deficiency for both plans. In other words, upon insolvency of Indalex, the plan beneficiaries received 100 cents on the dollar as a result of a judicially imposed trust taking priority over secured creditors, and indeed over other unsecured creditors, assuming there was no deemed trust for the executive plan.

225 I have explained earlier why I take a different view than did the Court of Appeal of Indalex's breach of fiduciary duty. In light of what I conclude was the breach which could give rise to a remedy, my view is that the constructive trust cannot properly be imposed in this case and the Court of Appeal erred in principle in exercising its discretion to impose this remedy.

226 I part company with the Court of Appeal with respect to several aspects of its constructive trust analysis; it is far from clear to me that any of the conditions for imposing a constructive trust were present here. However, I will only address one of them in detail. As I will explain, a remedial constructive trust for a breach of fiduciary duty is only appropriate if the wrongdoer's acts give rise to an identifiable asset which it would be unjust for the wrongdoer (or sometimes a third party) to retain. In my view, Indalex's failure to meaningfully address conflicts of interest that arose during the *CCAA* proceedings did not result in any such asset.

227 As the Court of Appeal recognized, the governing authority concerning the remedial constructive trust outside the domain of unjust enrichment is *Soulos*. In *Soulos*, McLachlin J. (as she then was) wrote that a constructive trust may be an appropriate remedy for breach of fiduciary duty: paras. 19-45. She laid out four requirements that should generally be satisfied before a constructive trust will be imposed: para. 45. Although, in *Soulos*, McLachlin J. was careful to indicate that these are conditions that "generally" must be present, all parties in this case accept that these four conditions must be present before a remedial constructive trust may be ordered for breach of fiduciary duty. The four conditions are these:

> (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
>
> (4) There must be no factors which would render imposition of a constructive trust unjust in all

> the circumstances of the case; e.g., the interests of intervening creditors must be protected. [para. 45]

228 My concern is with respect to the second requirement, that is, whether the breach resulted in an asset in the hands of Indalex. A constructive trust arises when the law imposes upon a party an obligation to hold specific property for another: D. W. M. Waters, M. R. Gillen and L. D. Smith, *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 454 ("*Waters*"). The purpose of imposing a constructive trust as a remedy for a breach of duty or unjust enrichment is to prevent parties "from retaining property which in 'good conscience' they should not be permitted to retain": *Soulos* , *at* para. 17. It follows, therefore, that while the remedial constructive trust may be appropriate in a variety of situations, the wrongdoer's conduct toward the plaintiff must generally have given rise to assets in the hands of the wrongdoer (or of a third party in some situations) which cannot in justice and good conscience be retained. That cannot be said here.

229 The Court of Appeal held that this second condition was present because "[t]he assets [i.e. the reserve fund monies] are directly connected to the process in which Indalex committed its breaches of fiduciary obligation": para. 204. Respectfully, this conclusion is based on incorrect legal principles. To satisfy this second condition, it must be shown that the breach *resulted in* the assets being in Indalex's hands, not simply, as the Court of Appeal thought, that there was a "connection" between the assets and "the process" in which Indalex breached its fiduciary duty. Recall that in *Soulos* itself, *the defendant's acquisition of the disputed property was a direct result of his breach of his duty of loyalty* to the plaintiff: para. 48. This is not our case. As the Court observed, in the context of an unjust enrichment claim in *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 995;

> ... for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution.

230 While cases of breach of fiduciary duty are different in important ways from cases of unjust enrichment, La Forest J. (with Lamer J. concurring on this point) applied a similar standard for proprietary relief in *Lac Minerals*, a case in which wrongdoing was the basis for the constructive trust: p. 678, quoted in *Waters'*, at p. 471. His comments demonstrate the high standard to be met in order for a constructive trust to be awarded:

> The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy.... [A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. [p. 678]

231 The relevant breach in this case was the failure of Indalex to meaningfully address the conflicts of interest that arose in the course of the *CCAA* proceedings. (The breach that arose with respect to the bankruptcy motion is irrelevant because that motion was not addressed and therefore could not have given rise to the assets.) The "assets" in issue here are the funds in the reserve fund

which were retained from the proceeds of the sale of Indalex as a going concern. Indalex's breach in this case did not give rise to the funds which were retained by the Monitor in the reserve fund.

232 Where does the respondents' claim of a procedural breach take them? Taking their position at its highest, it would be that the DIP approval proceedings and the sale would not have been approved. This position, however, is fatally flawed. Turning first to the DIP approval, there is no evidence to support the view that, had Indalex addressed its conflict in the DIP approval process, the DIP financing would have been rejected or granted on different terms. The *CCAA* judge, being fully aware of the pension situation, ruled that the DIP financing was "required", that there was "no other alternative available to the Applicants for a going concern solution", and that "the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing": endorsement of Morawetz J., April 8, 2009, at paras. 6 and 9. In effect, the respondents are claiming funds which arose only because of the process to which they now object. Taking into account that there was an absence of any evidence that more favourable financing terms were available, that the judge's decision was made with full knowledge of the plan beneficiaries' claims, and that he found that the DIP financing was necessary, the respondents' contention is not only speculative, it also directly contradicts the conclusions of the *CCAA* judge.

233 Turning next to the sale approval and the approval of the distribution of the assets, it is clear that the plan beneficiaries had independent representation but that this did not change the result. Although, perhaps with little thanks to Indalex, the interests of both plans were fully and ably represented before Campbell J. at the sale approval and interim distribution motions in July of 2009.

234 The executive plan retirees, through able counsel, objected to the sale on the basis that the liquidation values set out in the Monitor's seventh report would provide greater return for unsecured creditors. The motions judge dismissed this objection "on the basis *that there was no clear evidence to support the proposition and in any event the transaction as approved did preserve value for suppliers, customers and preserve approximately 950 jobs":* trial reasons of Campbell J., at para. 13 (emphasis added). Both the executive plan retirees and the USW, which represented some members of the salaried plan, objected to the proposed distribution of the sale proceeds. In response to this objection, it was agreed that those objections would be heard promptly and that the Monitor would retain sufficient funds to satisfy the pensioners' claims if they were upheld: trial reasons of Campbell J., at paras. 14-16.

235 There is no evidence to support the contention that Indalex's breach of its fiduciary duty as pension administrator resulted in the assets retained in the reserve fund. I therefore conclude that the Court of Appeal erred in law in finding that the second condition for imposing a constructive trust — i.e. that the assets in the defendant's hands must be shown to have resulted from the defendant's breaches of duty to the plaintiff — had been established.

236 I would add only two further comments with respect to the constructive trust. A major

concern of the Court of Appeal was that unless a constructive trust were imposed, the reserve funds would end up in the hands of other Indalex entities which were not operating at arm's length from Indalex. The U.S. debtors claimed the reserve fund because it had paid on its guarantee of the DIP loans and thereby stepped into the shoes of the DIP lender with respect to priority. Sun Indalex claims in the U.S. bankruptcy proceedings as a secured creditor of the U.S. debtors. The Court of Appeal put its concern this way: "To permit Sun Indalex to recover on behalf of [the U.S. debtors] would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed": para. 199.

237 There are two difficulties with this approach, in my respectful view. The U.S. debtors paid real money to honour their guarantees. Moreover, unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected. Neither the parties nor the Court of Appeal advanced such a reason.

238 Finally, I would note that imposing a constructive trust was wholly disproportionate to Indalex's breach of fiduciary duty. Its breach — the failure to meaningfully address the conflicts of interest that arose during the *CCAA* process — had no adverse impact on the plan beneficiaries in the sale approval process which gave rise to the "asset" in issue. Their interests were fully represented and carefully considered before the sale was approved and the funds distributed. The sale was nonetheless judged to be in the best interests of the corporation, all things considered. In my respectful view, imposing a $6.75 million penalty on the other creditors as a remedial response to this breach is so grossly disproportionate to the breach as to be unreasonable.

239 A judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for commercial affairs and which is particularly important in financing a workout for an insolvent corporation. To impose a constructive trust in response to a breach of fiduciary duty to ensure for the plan beneficiaries some procedural protections that they in fact took advantage of in any case is an unjust response in all of the circumstances.

240 I conclude that a constructive trust is not an appropriate remedy in this case and that the Court of Appeal erred in principle by imposing it.

C. Third Issue: Did the Court of Appeal Err in Concluding That the Super Priority Granted in the CCAA Proceedings Did Not Have Priority by Virtue of the Doctrine of Federal Paramountcy?

241 Although I disagree with my colleague Justice Deschamps with respect to the scope of the s. 57(4) deemed trust, I agree that if there was a deemed trust in this case, it would be superseded by the DIP loan because of the operation of the doctrine of federal paramountcy: paras. 48-60.

D. Fourth Issue: Did the Court of Appeal Err in its Cost Endorsement Respecting the USW?

(1) Introduction

242 The disposition of costs in the Court of Appeal was somewhat complex. Although the costs appeal relates only to the costs of the USW, it is necessary in order to understand their position to set out the costs order below in full.

243 With respect to the costs of the appeal to the Court of Appeal, no order was made for or against the Monitor due to its prior agreement with the former executives and the USW. However, the court ordered that the former executives and the USW, as successful parties, were each entitled to costs on a partial indemnity basis fixed at $40,000 inclusive of taxes and disbursements from Sun Indalex and the U.S. Trustee, payable jointly and severally: costs endorsement, 2011 ONCA 578, 81 C.B.R. (5th) 165 (Ont. C.A.), at para. 7.

244 Morneau Shepell Ltd., the Superintendent, and the former executives reached an agreement with respect to legal fees and disbursements and the Court of Appeal approved that agreement. The former executives received full indemnity legal fees and disbursements in the amount of $269,913.78 to be paid from the executive plan attributable to each of the 14 former executives' accrued pension benefits, allocated among the 14 former executives in relation to their pension entitlement from the executive plan. In other words, the costs would not be borne by the other three members of the executive plan who did not participate in the proceedings: C.A. costs endorsement, at para. 2. The costs of the appeal payable by Sun Indalex and the U.S. Trustee were to be paid into the fund of the executive plan and allocated among the 14 former executives in relation to their pension entitlement from the executive plan.

245 USW sought an order for payment of its costs from the fund of the salaried plan. However, the Court of Appeal declined to make such an order because the USW was in a "materially different position" than that of the former executives: costs endorsement, at para. 3. The latter were beneficiaries to the pension fund (14 of the 17 members of the plan), and they consented to the payment of costs from their individual benefit entitlements. Those who had not consented would not be affected by the payment. In contrast, the USW was the bargaining agent (not the beneficiary) for only 7 of the 169 beneficiaries of the salaried plan, none of whom was given notice of, or consented to, the payment of legal costs from the salaried plan. Moreover, the USW sought and seeks an order that its costs be paid out of the fund. This request is significantly different than the order made in favour of the former executives. The former executives explicitly ensured that their choice to pursue the litigation would not put at risk the pension benefits of those members who did not retain counsel even though of course those members would benefit in the event the litigation was successful. The USW is not proposing to insulate the 162 members whom it does not represent from the risk of litigation; it seeks an order requiring all members to share the risk of the litigation even though it represents only 7 of the 169. The proposition advanced by the USW was thus materially different from that advanced on behalf of the executive plan and approved by the court.

(2) Standard of Review

246 In *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39, [2009] 2 S.C.R. 678 (S.C.C.), Rothstein J. held that "costs awards are quintessentially discretionary": para. 126. Discretionary costs decisions should only be set aside on appeal if the court below "has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

(3) Analysis

247 I do not see any basis to interfere with the Court of Appeal's costs endorsement in this case. In my view, the USW's submissions are largely based on an inaccurate reading of the Court of Appeal's costs endorsement. Contrary to what the USW submits, the Court of Appeal did *not* require the consent of plan beneficiaries as a prerequisite to ordering payment of costs from the fund. Nor is it correct to suggest that the costs endorsement would "restrict recovery of beneficiary costs to instances when there is a surplus in the pension trust fund" or "preclude financing of beneficiary action when a fund is in deficit": USW factum, at paras. 71 and 76. Nor would I read the Court of Appeal's brief costs endorsement as laying down a rule that a union representing pension beneficiaries cannot recover costs from the fund because the union itself is not a beneficiary.

248 The premise of the USW's appeal appears to be that it was entitled to costs because it met what it refers to in its submissions as the Costs Payment Test and that if the executive plan members got their costs out of their pension fund, the union should get its costs out of the salaried employees' pension fund. Respectfully, I do not accept the validity of either premise.

249 The decision whether to award costs from the pension fund remains a discretionary matter. In *Nolan*, Rothstein J. surveyed the various factors that courts have taken into account when deciding whether to award a litigant its costs out of a pension trust. The first broad inquiry considered in *Nolan* was into whether the litigation concerned the due administration of the trust. In connection with this inquiry, courts have considered the following factors: (1) whether the litigation was primarily about the construction of the plan documents; (2) whether it clarified a problematic area of the law; (3) whether it was the only means of clarifying the parties' rights; (4) whether the claim alleged maladministration; and (5) whether the litigation had no effect on other beneficiaries of the trust fund: *Nolan*, at para. 126.

250 The second broad inquiry discussed in *Nolan* was whether the litigation was ultimately adversarial: para. 127. The following factors have been considered: (1) whether the litigation included allegations by an unsuccessful party of a breach of fiduciary duty; (2) whether the litigation only benefited a class of members and would impose costs on other members if successful; and (3) whether the litigation had any merit.

251 I do not think that it is correct to elevate these two inquiries (which constitute the Costs Payment Test articulated by the USW) to a test for entitlement to costs in the pension context. The

factors set out in *Nolan* and other cases cited therein are best understood as highly relevant considerations guiding the exercise of judicial discretion with respect to costs.

252 The litigation undertaken here raised novel points of law with all of the uncertainty and risk inherent in such an undertaking. The Court of Appeal in essence decided that the USW, representing only 7 of 169 members of the plan, should not without consultation be able to in effect impose the risks of that litigation on all of the plan members, the vast majority of whom were not union members. Whatever arguments might be raised against the Court of Appeal's decision in light of the success of the litigation and the sharing by all plan members of the benefits, the failure of the litigation seems to me to leave no basis to impose the cost consequences of taking that risk on all of the plan members of an already underfunded plan.

253 The second premise of the USW appeal appears to be that if the executive plan members have their costs paid out of the fund, so too should the salaried plan members. Respectfully, however, this is not an accurate statement of the order made with respect to the executive plan.

254 The Court of Appeal's order with respect to the executive plan meant that only the pension fund attributable to those members of the plan who actually supported the litigation — the vast majority I would add — would contribute to the costs of the litigation even though all members of the plan would benefit in the case of success. As the Court of Appeal noted:

> The individual represented Retirees, who comprise 14 of 17 members of the Executive Plan, have consented to the payment of costs from their individual benefit entitlements. Those who have not consented will not be affected by the payment. [Costs endorsement, at para. 3]

255 The Court of Appeal therefore approved an agreement as to costs which did not put at further risk the pension funds available to satisfy the pension entitlements of those who did not support the litigation. Thus, the Court of Appeal did not apply what the USW refers to as the Costs Payment Test to the executive plan because the costs order was the product of agreement and did not order payment of costs out of the fund as a whole.

256 In the case of the USW request, there was no such agreement and no such limitation of risk to the supporters of the litigation.

257 I see no error in principle in the Court of Appeal's refusal to order the USW costs to be paid out of the pension fund, particularly in light of the disposition of the appeal to this Court. I would dismiss the USW costs appeal but without costs.

IV. Disposition

258 I would allow the Sun Indalex, FTI Consulting and George L. Miller appeals and, except as noted below, I would set aside the orders of the Ontario Court of Appeal and restore the February 18, 2010 orders of Campbell J.

259 With respect to costs, I would set aside the Court of Appeal's orders with respect to the costs of the appeals before that court and order that all parties bear their own costs in the Court of Appeal and in this Court.

260 I would not disturb paras. 9 and 10 of the order of the Court of Appeal in the former executives' appeal so that the full indemnity legal fees and disbursements of the former executives in the amount of $269,913.78 shall be paid from the fund of the executive plan attributable to each of the 14 former executives' accrued pension benefits, and specifically such amounts shall be allocated among the 14 former executives in relation to their pension entitlement from the executive plan and will not be borne by the other three members of the executive plan.

261 I would dismiss the USW costs appeal, but without costs.

***LeBel J. (Dissenting)* (Abella J. concurring):**

I. Introduction

262 The members of two pension plans set up by Indalex Limited ("Indalex") stand to lose half or more of their pension benefits as a consequence of the insolvency of their employer and of the arrangement approved by the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Court of Appeal for Ontario found that the members were entitled to a remedy. For different and partly conflicting reasons, my colleagues Justices Deschamps and Cromwell would hold that no remedy is available to them. With all due respect for their opinions, I would conclude, like the Court of Appeal, that the remedy of a constructive trust is open to them and should be imposed in the circumstances of this case, for the following reasons.

263 I do not intend to summarize the facts of this case, which were outlined by my colleagues. I will address these facts as needed in the course of my reasons. Before moving to my areas of disagreement with my colleagues, I will briefly indicate where and to what extent I agree with them on the relevant legal issues.

264 Like my colleagues, I conclude that no deemed trust could arise under s. 57(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*"), in the case of the Executive Plan because this plan had not been wound up when the *CCAA* proceedings were initiated. In the case of the Salaried Employees Plan, I agree with Deschamps J. that a deemed trust arises in respect of the wind-up deficiency. But, like her, I accept that the debtor-in-possession ("DIP") super priority prevails by reason of the application of the federal paramountcy doctrine. I also agree that the costs appeal of the United Steelworkers should be dismissed.

265 But, with respect for the opinions of my colleagues, I take a different view of the nature and extent of the fiduciary duties of an employer who elects to act as administrator of a pension

plan governed by the *PBA*. This dual status does not entitle the employer to greater leniency in the determination and exercise of its fiduciary duties or excuse wrongful actions. On the contrary, as we shall see below, I conclude that Indalex not only neglected its obligations towards the beneficiaries, but actually took a course of action that was actively inimical to their interests. The seriousness of these breaches amply justified the decision of the Court of Appeal to impose a constructive trust. To that extent, I propose to uphold the opinion of Gillese J.A. and the judgment of the Court of Appeal (2011 ONCA 265, 104 O.R. (3d) 641 (Ont. C.A.)).

II. The Employer as Administrator of a Pension Plan: Its Fiduciary Duties

266 Before entering into an analysis of the obligations of an employer as administrator of a pension plan under the *PBA*, it is necessary to consider the position of the beneficiaries. Who are they? At what stage are they in their lives? What are their vulnerabilities? A fiduciary relationship is a relationship, grounded in fact and law, between a vulnerable beneficiary and a fiduciary who holds and may exercise power over the beneficiary in situations recognized by law. Any analysis of such a relationship requires careful consideration of the characteristics of the beneficiary. It ought not stop at the level of a theoretical and detached approach that fails to address how, very concretely, this relationship works or can be twisted, perverted or abused, as was the situation in this case.

267 The beneficiaries were in a very vulnerable position relative to Indalex. They did not enjoy the protection that the existence of an independent administrator might have given them. They had no say and no input in the management of the plans. The information about the plans and their situation came from Indalex in its dual role as employer and manager of the plans. Their particular vulnerability arose from their relationship with Indalex, acting both as their employer and as the administrator of their retirement plans. Their vulnerability was substantially a consequence of that specific relationship (*Perez v. Galambos*, 2009 SCC 48, [2009] 3 S.C.R. 247 (S.C.C.), at para. 68, *per* Cromwell J.). The nature of this relationship had very practical consequences on their interests. For example, as Gillese J.A. noted in her reasons (at para. 40) the consequences of the decisions made in the course of management of the plan and during the *CCAA* proceedings signify that the members of the Executive Plan stand to lose one-half to two-thirds of their retirement benefits, unless additional money is somehow paid into the plan. These losses of benefits are, in all probability, permanent in the case of the beneficiaries who have already retired or who are close to retirement. They deeply affect their lives and expectations. For most of them, what is lost is lost for good. No arrangement will allow them to get a start on a new life. We should not view the situation of the beneficiaries as regrettable but unavoidable collateral damage arising out of the ebbs and tides of the economy. In my view, the law should give the members some protection, as the Court of Appeal intended when it imposed a constructive trust.

268 Indalex was in a conflict of interest from the moment it started to contemplate putting itself under the protection of the *CCAA* and proposing an arrangement to its creditors. From the corporate perspective, one could hardly find fault with such a decision. It was a business decision. But the trouble is that at the same time, Indalex was a fiduciary in relation to the members and

retirees of its pension plans. The "two hats" analogy offers no defence to Indalex. It could not switch off the fiduciary relationship at will when it conflicted with its business obligations or decisions. Throughout the arrangement process and until it was replaced by an independent administrator (Morneau Shepell Ltd.) it remained a fiduciary.

269 It is true that the *PBA* allows an employer to act as an administrator of a pension plan in Ontario. In such cases, the legislature accepts that conflicts of interest may arise. But, in my opinion, nothing in the *PBA* allows that the employer *qua* administrator will be held to a lower standard or will be subject to duties and obligations that are less stringent than those of an independent administrator. The employer remains a fiduciary under the statute and at common law (*PBA*, s. 22(4)). The employer is under no obligation to assume the burdens of administering the pension plans that it has agreed to set up or that are the legacy of previous decisions. However, if it decides to do so, a fiduciary relationship is created with the expectation that the employer will be able to avoid or resolve the conflicts of interest that might arise. If this proves to be impossible, the employer is still "seized" with fiduciary duties, and cannot ignore them out of hand.

270 Once Indalex had considered the *CCAA* process and decided to proceed in that manner, it should have been obvious that such a move would trigger conflicts of interest with the beneficiaries of the pension plans and that these conflicts would become untenable, as per the terms of s. 22(4) of the *PBA*. Given the nature of its obligations as administrator and fiduciary, it was impossible to wear the "two hats". Indalex had to discharge its corporate duties, but at the same time it had to address its fiduciary obligations to the members and beneficiaries of the plans. I do not fault it for applying under the *CCAA*, but rather for not relinquishing its position as administrator of the plans at the time of the application. It even retained this position once it engaged in the arrangement process. Other conflicts and breaches of fiduciary duties and of fundamental rules of procedural equity in the Superior Court flowed from this first decision. Moreover, Indalex maintained a strongly adversarial attitude towards the interest of the beneficiaries throughout the arrangement process, while it was still, at least in form, the administrator of the plans.

271 The option given to employers to act as administrators of pension plans under the *PBA* does not constitute a licence to breach the fiduciary duties that flow from this function. It should not be viewed as an invitation for the courts to whitewash the consequences of such breaches. The option is predicated on the ability of the employer-administrator to avoid the conflicts of interests that cause these breaches. An employer deciding to assume the position of administrator cannot claim to be in the same situation as the Crown when it discharges fiduciary obligations towards certain groups in society under the Constitution or the law. For those cases, the Crown assumes those duties because it is obligated to do so by virtue of its role, not because it chooses to do so. In such circumstances, the Crown must often balance conflicting interests and obligations to the broader society in the discharge of those fiduciary duties (*Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.), at paras. 37-38). If Indalex found itself in a situation where it had to balance conflicting interests and obligations, as it essentially argues, it could not retain the position of administrator that it had willingly assumed. The solution was not to place its function as administrator and its associated fiduciary duties in abeyance. Rather, it had to

abandon this role and diligently transfer its function as manager to an independent administrator.

272 Indalex could apply for protection under the *CCAA*. But, in so doing, it needed to make arrangements to avoid conflicts of interests. As nothing was done, the members of the plans were left to play catch up as best they could when the process that put in place the DIP financing and its super priority was initiated. The process had been launched in such a way that it took significant time before the beneficiaries could effectively participate in the process. In practice, the United Steelworkers union, which represented only a small group of the members of the Salaried Employees Plan, acted for them after the start of the procedures. The members of the Executive Plan hired counsel who appeared for them. But, throughout, there were problems with notices, delays and the ability to participate in the process. Indeed, during the *CCAA* proceedings, the Monitor and Indalex seemed to have been more concerned about keeping the members of the plans out of the process rather than ensuring that their voices could be heard. Two paragraphs of the submissions to this Court by Morneau Shepell Ltd., the subsequently appointed administrator of the plan, aptly sums up the behaviour of Indalex and the Monitor towards the beneficiaries, whose representations were always deemed to be either premature or late:

> When counsel for the Retirees again appeared at a motion to approve the bidding procedure, his objections were considered premature:
>
> > In my view, the issues raised by the retirees do not have any impact on the Bidding Procedures. The issues can be raised by the retirees on any application to approve a transaction — but that is for another day. [(2009), 79 C.C.P.B. 101 (Ont. S.C.J.), at para. 10, *per* Morawetz J.]
>
> Only when counsel appeared at the sale approval motion, as directed by the motions judge, were the concerns of the pension plan beneficiaries heard. At that time, the Appellants complain, the beneficiaries were too late and their motion constituted a collateral attack on the original DIP Order. However, it cannot be the case that stakeholder groups are too early, until they are too late. [Factum, at paras. 54-55]

273 I must also mention the failed attempt to assign Indalex in bankruptcy once the sale of its business had been approved. One of the purposes of this action was essentially to harm the interests of the members of the plans. At the time, Indalex was still wearing its two hats, at least from a legal perspective. But its duties as a fiduciary were clearly not at the forefront of its concerns. There were constant conflicts of interest throughout the process. Indalex did not attempt to resolve them; it brushed them aside. In so acting, it breached its duties as a fiduciary and its statutory obligations under s. 22(4) *PBA*.

III. Procedural Fairness in CCAA Proceedings

274 The manner in which this matter was conducted in the Superior Court was, at least partially, the result of Indalex disregarding its fiduciary duties. The procedural issues that arose in that

court did not assist in mitigating the consequences of these breaches. It is true that, in the end, the beneficiaries obtained, or were given, some information pertaining to the proceedings and that counsel appeared on their behalf at various stages of the proceedings. However, the basic problem is that the proceedings were not conducted according to the spirit and principles of the Canadian system of civil justice.

275 I accept that those procedures are often urgent. The situation of a debtor requires quick and efficient action. The turtle-like pace of some civil litigation would not meet the needs of the application of the *CCAA*. However, the conduct of proceedings under this statute is not solely an administrative process. It is also a judicial process conducted according to the tenets of the adversarial system. The fundamentals of such a system must not be ignored. All interested parties are entitled to a fair procedure that allows their voices to be raised and heard. It is not an answer to these concerns to say that nothing else could be done, that no other solution would have been better, that, in substance, hearing the members would have been a waste of time. In all branches of procedure whether in administrative law, criminal law or civil action, the rights to be informed and to be heard in some way remain fundamental principles of justice. Those principles retain their place in the *CCAA*, as some authors and judges have emphasized (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 55-56; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]), at para. 5, *per* Farley J.). This was not done in this case, as my colleagues admit, while they downplay the consequences of these procedural flaws and breaches.

IV. Imposing a Constructive Trust

276 In this context, I see no error in the decision of the Court of Appeal to impose a constructive trust (paras. 200-207). It was a fair decision that met the requirements of justice, under the principles set out by our Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.). The remedy of a constructive trust was justified in order to correct the wrong caused by Indalex (*Soulos*, at para. 36, *per* McLachlin J. (as she then was)). The facts of the situation met the four conditions that generally justify the imposition of a constructive trust (*Soulos*, at para. 45), as determined by Justice Gillese in her reasons, at paras. 203 and 204: (1) the defendant was under an equitable obligation in relation to the activities giving rise to the assets in his or her hands; (2) the assets in the hands of the defendant were shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff; (3) the plaintiff has shown a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendants remain faithful to their duties; and (4) there are no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, such as the protection of the interests of intervening creditors.

277 In crafting such a remedy, the Court of Appeal was relying on the inherent powers of the courts to craft equitable remedies, not only in respect of procedural issues, but also of substantive questions. Section 9 of the *CCAA* is broadly drafted and does not deprive courts of their power to

fill in gaps in the law when this is necessary in order to grant justice to the parties (G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law, 2007* (2008), 41, at pp. 78-79).

278 The imposition of the trust did not disregard the different corporate personalities of Indalex and Indalex U.S. It properly acknowledged the close relationship between the two companies, the second in effect controlling the first. This relationship could and needed to be taken into consideration in order to determine whether a constructive trust was a proper remedy.

279 For these reasons, I would uphold the imposition of a constructive trust and I would dismiss the appeal with costs to the respondents.

Appendix

The Pension Benefits Amendment Act, 1973, S.O. 1973, c. 113

6. The said Act is amended by adding thereto the following sections:

> 23*a*. — (1) Any sum received by an employer from an employee pursuant to an arrangement for the payment of such sum by the employer into a pension plan as the employee's contribution thereto shall be deemed to be held by the employer in trust for payment of the same after his receipt thereof into the pension plan as the employee's contribution thereto and the employer shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.
>
> (2) For the purposes of subsection 1, any sum withheld by an employer, whether by payroll deduction or otherwise, from moneys payable to an employee shall be deemed to be a sum received by the employer from the employee.
>
> (3) Any sum required to be paid into a pension plan by an employer as the employer's contribution to the plan shall, when due under the plan, be deemed to be held by the employer in trust for payment of the same into the plan in accordance with the plan and this Act and the regulations as the employer's contribution and the employer shall not appropriate or convert any part of the amount required to be paid to the fund to his own use or to any use not authorized by the terms of the pension plan.

Pension Benefits Act, R.S.O. 1980, c. 373

21. . . .

(2) Upon the termination or winding up of a pension plan filed for registration as required by section 17, the employer is liable to pay all amounts that would otherwise have been required

to be paid to meet the tests for solvency prescribed by the regulations, up to the date of such termination or winding up, to the insurer, administrator or trustee of the pension plan.

. . . . .

23. — (1) Where a sum is received by an employer from an employee under an arrangement for the payment of the sum by the employer into a pension plan as the employee's contribution thereto, the employer shall be deemed to hold the sum in trust for the employee until the sum is paid into the pension plan whether or not the sum has in fact been kept separate and apart by the employer and the employee has a lien upon the assets of the employer for such amount that in the ordinary course of business would be entered in books of account whether so entered or not.

. . . . .

(3) Where an employer is required to make contributions to a pension plan, he shall be deemed to hold in trust for the members of the plan an amount calculated in accordance with subsection (4), whether or not,

(a) the employer contributions are payable into the plan under the terms of the plan or this Act; or

(b) the amount has been kept separate and apart by the employer,

and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.

(4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

. . . . .

32. In addition to any amounts the employer is liable to pay under subsection 21 (2), where a defined benefit pension plan is terminated or wound up or the plan is amended so that it is no longer a defined benefit pension plan, the employer is liable to the plan for the difference between,

(a) the value of the assets of the plan; and

(b) the value of pension benefits guaranteed under subsection 31 (1) and any other pension benefit vested under the terms of the plan,

and the employer shall make payments to the insurer, trustee or administrator of the pension

plan to fund the amount owing in such manner as is prescribed by regulation.

Pension Benefits Amendment Act, 1983, S.O. 1983, c. 2

2. Subsection 21 (2) of the said Act is repealed and the following substituted therefor:

(2) Upon the termination or winding up of a registered pension plan, the employer of employees covered by the pension plan shall pay to the administrator, insurer or trustee of the pension plan,

(a) an amount equal to,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that have accrued to and including the date of the termination or winding up but, under the terms of the pension plan or the regulations, are not due on that date; and

(b) all other payments that, by the terms of the pension plan or the regulations, are due from the employer to the pension plan but have not been paid at the date of the termination or winding up.

(2a) For the purposes of clause (2) (a), the current service cost and special payments shall be deemed to accrue on a daily basis.

3. Section 23 of the said Act is repealed and the following substituted therefor:

23. — (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension plan as the employee's contribution to 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 plan.

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

(3) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (1).

(4) An employer who is required by a pension plan to contribute to the pension plan shall be deemed to hold in trust for the members of the pension plan an amount of money equal to the

total of,

(a) all moneys that the employer is required to pay into the pension plan to meet,

(i) the current service cost, and

(ii) the special payments prescribed by the regulations,

that are due under the pension plan or the regulations and have not been paid into the pension plan; and

(b) where the pension plan is terminated or wound up, any other money that the employer is liable to pay under clause 21 (2) (a).

(5) The administrator or trustee of the pension plan has a lien and charge upon the assets of the employer in an amount equal to the amount that is deemed to be held in trust under subsection (4).

(6) Subsections (1) and (4) apply whether or not the moneys mentioned in those subsections are kept separate and apart from other money.

. . . . .

8. Sections 32 and 33 of the said Act are repealed and the following substituted therefor:

32. — (1) The employer of employees who are members of a defined benefit pension plan that the employer is bound by or to which the employer is a party and that is partly or wholly wound up shall pay to the administrator, insurer or trustee of the plan an amount of money equal to the amount by which the value of the pension benefits guaranteed by section 31 plus the value of the pension benefits vested under the defined benefit pension plan exceeds the value of the assets of the plan allocated in accordance with the regulations for payment of pension benefits accrued with respect to service in Ontario.

(2) The amount that the employer is required to pay under subsection (1) is in addition to the amounts that the employer is liable to pay under subsection 21 (2).

(3) The employer shall pay the amount required under subsection (1) to the administrator, insurer or trustee of the defined benefit pension plan in the manner prescribed by the regulations.

Pension Benefits Act, 1987, S.O. 1987, c. 35

58. — (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.

. . . . .

(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.

. . . . .

59. — (1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . . . .

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

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

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

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

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

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership con-

tinued to that date.

. . . . .

76. — (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 Commission 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 40 (3) (50 per cent rule) and section 75,

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.

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

57. (1) [Trust property] 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) [Money withheld] 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) [Accrued contributions] 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) [Wind up] 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 bene-

ficiaries 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.

. . . . .

58. (1) [Accrual] Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) [Interest] Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

. . . . .

74. (1) [Activating events] This section applies if a person ceases to be a member of a pension plan on the effective date of one of the following activating events:

1. The wind up of a pension plan, if the effective date of the wind up is on or after April 1, 1987.

2. The employer's termination of the member's employment, if the effective date of the termination is on or after July 1, 2012. However, this paragraph does not apply if the termination occurs in any of the circumstances described in subsection (1.1).

3. The occurrence of such other events as may be prescribed in such circumstances as may be specified by regulation.

(1.1) [Same, termination of employment] Termination of employment is not an activating event if the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer or if the termination occurs in such other circumstances as may be prescribed.

(1.2) [Exceptions, election by certain pension plans] This section does not apply with respect to a jointly sponsored pension plan or a multi-employer pension plan while an election made under section 74.1 for the plan and its members is in effect.

(1.3) [Benefit] A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least 55 on the effective date of the activating event has the right to receive,

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

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

of,

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

(ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date; or

(c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date.

(2) [Part year] In determining the combination of age plus employment or membership, one-twelfth credit shall be given for each month of age and for each month of continuous employment or membership on the effective date of the activating event.

(3) [Member for 10 years] Bridging benefits offered under the pension plan to which a member would be entitled if the activating event had not occurred and if his or her membership were continued shall be included in calculating the pension benefit under subsection (1.3) of a person who has at least 10 years of continuous employment with the employer or has been a member of the pension plan for at least 10 years.

(4) [Prorated bridging benefit] For the purposes of subsection (3), if the bridging benefit offered under the pension plan is not related to periods of employment or membership in the pension plan, the bridging benefit shall be prorated by the ratio that the member's actual period of employment bears to the period of employment that the member would have to the earliest date on which the member would be entitled to payment of pension benefits and a full bridging benefit under the pension plan if the activating event had not occurred.

(5) [Notice of termination of employment] Membership in a pension plan that is wound up includes the period of notice of termination of employment required under Part XV of the *Employment Standards Act, 2000*.

(6) [Application of subs. (5)] Subsection (5) does not apply for the purpose of calculating the amount of a pension benefit of a member who is required to make contributions to the pension fund unless the member makes the contributions in respect of the period of notice of termination of employment.

(7) [Consent of employer] For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

(7.1) [Consent of administrator, jointly sponsored pension plans] For the purposes of this section, where the consent of the administrator of a jointly sponsored pension plan is an eligibility requirement for entitlement to receive an ancillary benefit, the administrator shall be deemed to have given the consent.

(8) [Use in calculating pension benefit] A benefit described in clause (1.3) (a), (b) or (c) for which a member has met all eligibility requirements under this section shall be included in calculating the member's pension benefit or the commuted value of the pension benefit.

. . . . .

75. (1) [Liability of employer on wind up] Where a pension plan is wound up, 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.

END OF DOCUMENT

APPENDIX "M"

Court File No.: C52187
Court File No.: C52346
Superior Court File No.: CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO

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

NOTICE OF MOTION

THE PROPOSED INTERVENOR, GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS (the "US Chapter 7 Trustee"), will bring a motion before the Associate Chief Justice on Monday, November 15, 2010 at 9:30 a.m. at Osgoode Hall, 130 Queen Street West, in Toronto, Ontario..

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

THE MOTION IS FOR:

1. An Order granting leave to the US Chapter 7 Trustee to intervene in these appeals, including the right to file a factum and make oral argument;

2. Costs of the motion payable by the Appellants; and

3. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

Summary of Procedural History

1. On March 20, 2009, the parent company of Indalex Limited (**"Indalex"**) and certain US affiliates (collectively, the **"US Debtors"**) commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court, District of Delaware (the **"US Bankruptcy Court"**).

2. On April 3, 2009, Indalex, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (collectively, the **"Canadian Debtors"**) made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the **"CCAA"**). The application was granted and FTI Consulting Canada ULC was appointed as monitor (the **"Monitor"**).

3. On April 8, 2009, Justice Morawetz granted the Amended and Restated Initial Order, which, *inter alia*, authorized Indalex to borrow funds pursuant to a debtor-in-possession (**"DIP"**) credit agreement among the US Debtors, the Canadian Debtors and a syndicate of lenders. The Amended and Restated Initial Order was subsequently amended to correct certain references and typographical errors and to increase the Canadian sub-facility borrowing limit (collectively, the **"Initial Order"**).

4. The Initial Order provides that the Canadian Debtors' obligation to repay their DIP loan is secured by a super-priority charge (the **"DIP Charge"**) in favour of the lenders (the **"DIP Lenders"**). The Initial Order provides that the DIP Charge has priority over all liens and encumbrances, expressly including deemed trusts and statutory liens.

5. The Canadian Debtors' obligation to repay their DIP loan was guaranteed by the US Debtors.

6. The Canadian Debtors and US Debtors jointly sold substantially all of their assets to SAPA Holdings AB in a going concern transaction (the **"Sale Transaction"**) that was approved by an Order made by Justice Campbell dated July 20, 2009 (the **"Approval and Vesting Order"**).

7. The Approval and Vesting Order required that the proceeds of sale from the Sale Transaction be paid to the Monitor. It also directed the Monitor to make a distribution to the DIP Lenders subject to a reserve that the Monitor considered to be appropriate in the circumstances.

8. The Approval and Vesting Order also provided that, to the extent that any indebtedness owing by the Canadian Debtors to the DIP Lenders was satisfied by any of the US Debtors or their affiliates under their guarantee, the US Debtors are subrogated to the rights of the DIP Lenders under the DIP Charge to the extent of such payment.

9. The Sale Transaction closed on July 31, 2009.

10. The available Canadian sale proceeds (net of the Monitor's reserve) were insufficient to re-pay the DIP loan in full. Accordingly, the US Debtors paid US$10,751,247.22 to satisfy the obligations of the Canadian Debtors to the DIP Lenders. Pursuant to the Approval and Vesting Order, the US Debtors are subrogated to the super-priority rights of the DIP Lenders under the DIP Charge for that amount.

Motion Before Justice Campbell

11. At the Court hearing to approve the Sale Transaction, certain retired executives of Indalex (the **"Retirees"**) asserted a deemed trust claim pursuant to the Ontario *Pension Benefits Act* (the **"PBA"**) over the Canadian sale proceeds and requested that $3.2 million, an amount representing an estimate of the wind up deficit in their pension plan (the **"Executive Plan"**), be held in reserve by the Monitor. The United Steelworkers Union (the **"USW"** and together with the Retirees, the **"Appellants"**) reserved its rights with respect to any deemed trust claim it might assert with respect to its members' pension plan (the **"Salaried Plan"** and together with the executive Plan, the **"Plans"**).

12. The Monitor retained in excess of $6.75 million from the proceeds of sale of the assets of the Canadian Debtors, which the Appellants assert are covered by the alleged deemed trusts in priority to the DIP Charge, notwithstanding the terms of the Initial Order which expressly provide that the DIP Charge has priority over all liens and encumbrances, expressly including deemed trusts and statutory liens.

13. The Appellants brought motions asserting their claims for alleged deemed trusts (the **"Deemed Trust Motions"**), which were heard by Justice Campbell on August 28, 2009.

14. Pursuant to Reasons released on February 18, 2010, Justice Campbell dismissed the Deemed Trust Motions.

005

Appointment of the US Chapter 7 Trustee

15. On October 14, 2009, approximately 2 months after the Deemed Trust Motions were argued, the US Bankruptcy Court entered an Order converting the US Debtors' bankruptcy cases from Chapter 11 of the United States Bankruptcy Code to Chapter 7. On October 30, 2009, the US Chapter 7 Trustee was appointed.

These Appeals

16. These appeals raise the issue (among others) of whether deemed trusts arising under provincial legislation (the PBA), if proven, apply to funds held in reserve by the monitor of an insolvent company in priority to claims of secured creditors, contrary to the scheme of priorities established under federal legislation (the *Bankruptcy and Insolvency Act* and the CCAA), and contrary to orders of the court having jurisdiction over the CCAA proceedings.

17. The US Chapter 7 Trustee has the right to assert and to rely upon the super-priority of the DIP Charge under the Initial Order and the subrogation provisions of the Approval and Vesting Order.

18. Had the US Chapter 7 Trustee been appointed by the time of the Deemed Trust Motions, clearly it would have been made a respondent to the motions as a proper or necessary party, and would have had the opportunity to participate fully as a party thereto.

006

Leave to Intervene Should Be Granted

19. If the Appellants are successful on these appeals, there will be insufficient funds available to repay the US Chapter 7 Trustee in full as subrogee and beneficiary of the DIP Charge.

20. Accordingly, the US Chapter 7 Trustee has a direct, substantial and genuine interest in these appeals.

21. The US Chapter 7 Trustee's intervention will not delay or prejudice the determination of the rights of the parties to the appeal. The US Chapter 7 Trustee has confirmed to the other parties that it is prepared to proceed on the basis of the record as it currently exists, that it will file a factum forthwith, and that the time for its oral argument (limited to a maximum of 20 minutes) shall come out of the time allotted to the Respondents.

22. The Respondents are consenting to this motion.

23. The Appellants have already consented to leave to intervene being granted to two other persons in these appeals:

    a. the Superintendent of Financial Services; and

    b. Morneau Sobeco Limited Partnership, as administrator of the Plans.

24. Rules 13.01 and 13.03 of the *Rules of Civil Procedure*.

25. Such further and other grounds as counsel may advise and this Honourable Court may permit.

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

1. Affidavit of Amy Casella sworn November 8, 2010.

2. Such further and other materials as Counsel may advise and this Honourable Court may permit.

CHAITONS LLP
5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

Harvey Chaiton
Tel: 416-218-1129
Fax: 416-218-1849
Email: harvey@chaitons.com

George Benchetrit
Tel: 416-218-1141
Fax: 416-218-1841
Email: george@chaitons.com

Lawyers for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

TO: KOSKIE MINSKY LLP
20 Queen Street West Suite 900, Box 52
Toronto, ON M5H 3R3

Andrew Hatnay
Tel: (416) 595-2083
Fax: (416) 204-2877
Email: ahatnay@kmlaw.ca

Demetrios Yiokaris
Tel: (416) 595-2130
Fax (416) 204 2180
Email: dyiokaris@kmlaw.ca

Lawyers for Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser and Fred Granville

APPENDIX "N"

Court File No.: C52187
Court File No.: C52346
Superior Court File No.: CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO

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 GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS
(Motion for Leave to Intervene)

CHAITONS LLP
Barristers & Solicitors
5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

Harvey Chaiton
Tel: 416-218-1129
Fax: 416-218-1849
Email: harvey@chaitons.com

George Benchetrit
Tel: 416-218-1141
Fax: 416-218-1841
Email: george@chaitons.com

Lawyers for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

Court File No.: C52187
Court File No.: C52346
Superior Court File No.: CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO

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 GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS
(Motion for Leave to Intervene)

PART I - OVERVIEW

1. These appeals raise the issue (among others) of whether deemed trusts arising under provincial legislation (the Ontario *Pension Benefits Act*), if proven, apply to funds held in reserve by the monitor of an insolvent company in priority to claims of secured creditors, contrary to the scheme of priorities established under federal legislation (the *Bankruptcy and Insolvency Act* (the **"BIA"**) and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the **"CCAA"**)), and contrary to orders of the court having jurisdiction over the CCAA proceedings.

2. The US Chapter 7 Trustee (as defined below) brings this motion seeking leave to intervene on these appeals. It clearly has a direct, substantial and genuine interest in these appeals.

3. The US Chapter 7 Trustee was appointed approximately 2 months after the argument of the motion giving rise to these appeals. Had it been appointed prior to those motions, there is no question that it would have been made a respondent to the motions as a proper or necessary party and would have had the opportunity to participate fully as a party thereto.

4. The US Chapter 7 Trustee's intervention will not delay or prejudice the determination of the rights of the parties to the appeal. The US Chapter 7 Trustee has confirmed to the other parties that it is prepared to proceed on the basis of the record as it currently exists, that it will file a factum forthwith, and that the time for its oral argument (limited to a maximum of 20 minutes) shall come out of the time allotted to the Respondents.

5. The US Chapter 7 Trustee clearly meets the test for intervention under the *Rules of Civil Procedure*, and accordingly, this motion should be granted on such terms as the Court deems appropriate.

PART II – THE FACTS

Summary of Procedural History

6. On March 20, 2009, the parent company of Indalex Limited (**"Indalex"**) and certain US affiliates (collectively, the **"US Debtors"**) commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court, District of Delaware (the **"US Bankruptcy Court"**).

*Affidavit of Keith Cooper swum August 24, 2009 (**"Cooper Affidavit"**) at para. 4, Exhibit A to Affidavit of Amy Casella sworn November 8, 2010 (**"Casella Affidavit"**)*

7. On April 3, 2009, Indalex, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (collectively, the **"Canadian Debtors"**) made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the **"CCAA"**). The application was granted and FTI Consulting Canada ULC was appointed as monitor (the **"Monitor"**).

Cooper Affidavit at paras. 5 and 6

8. On April 8, 2009, Justice Morawetz granted the Amended and Restated Initial Order, which, *inter alia*, authorized Indalex to borrow funds pursuant to a debtor-in-possession (**"DIP"**) credit agreement among the US Debtors, the Canadian Debtors and a syndicate of lenders. The Amended and Restated Initial Order was subsequently amended to correct certain references and typographical errors and to increase the Canadian sub-facility borrowing limit (collectively, the **"Initial Order"**).

Cooper Affidavit at paras. 7 and 12

9. The Initial Order provides that the Canadian Debtors' obligation to repay their DIP loan is secured by a super-priority charge (the **"DIP Charge"**) in favour of the lenders (the **"DIP Lenders"**). The Initial Order provides that the DIP Charge has priority over all liens and encumbrances, expressly including deemed trusts and statutory liens.

Cooper Affidavit at para. 8

10. The Canadian Debtors' obligation to repay their DIP loan was guaranteed by the US Debtors.

Cooper Affidavit at paras. 10

11. The Canadian Debtors and US Debtors jointly sold substantially all of their assets to SAPA Holdings AB in a transaction (the **"Sale Transaction"**) that was approved by an Order made by Justice Campbell dated July 20, 2009 (the **"Approval and Vesting Order"**).

Cooper Affidavit at para. 16

12. The Approval and Vesting Order required that the proceeds of sale from the Sale Transaction be paid to the Monitor. It also directed the Monitor to make a distribution to the DIP Lenders subject to a reserve that the Monitor considered to be appropriate in the circumstances.

Cooper Affidavit at paras. 16 and 18

13. The Approval and Vesting Order also provided that, to the extent that any indebtedness owing by the Canadian Debtors to the DIP Lenders was satisfied by any of the US Debtors or their affiliates under their guarantee, the US Debtors are subrogated to the rights of the DIP Lenders under the DIP Charge to the extent of such payment.

Cooper Affidavit at paras. 16 and 18; Approval and Vesting Order at para 14, Exhibit B to the Casella Affidavit

14. The Sale Transaction closed on July 31, 2009.

Cooper Affidavit at para. 24

15. The available Canadian sale proceeds (net of the Monitor's reserve) were insufficient to re-pay the DIP loan in full. Accordingly, the US Debtors paid US$10,751,247.22 to satisfy the obligations of the Canadian Debtors to the DIP Lenders. Pursuant to the Approval and Vesting Order, the US Debtors are subrogated to the super-priority rights of the DIP Lenders under the DIP Charge for that amount.

Cooper Affidavit at paras. 23 and 24

Motion Before Justice Campbell

16. At the court hearing to approve the Sale Transaction, certain retired executives of Indalex (the **"Retirees"**) asserted a deemed trust claim over the Canadian sale proceeds and requested that $3.2 million, an amount representing an estimate of the wind up deficit in their pension plan (the **"Executive Plan"**), be held in reserve by the Monitor. The United Steelworkers Union (the **"USW"** and together with the Retirees, the **"Appellants"**) reserved its rights with respect to any deemed trust claim it might assert with respect to its members' pension plan (the **"Salaried Plan"** and together with the executive Plan, the **"Plans"**).

Cooper Affidavit at paras. 17, 19 and 21

17. The Monitor retained in excess of $6.75 million from the proceeds of sale of the assets of Indalex, which the Appellants assert are covered by the alleged deemed trusts in priority to the DIP Charge, notwithstanding the terms of the Initial Order which expressly provide that the DIP Charge has priority over all liens and encumbrances, expressly including deemed trusts and statutory liens.

Cooper Affidavit at para. 22

18. The Appellants brought motions asserting their claims for alleged deemed trusts (the **"Deemed Trust Motions"**), which were heard by Justice Campbell on August 28, 2009.

Cooper Affidavit at paras. 27 and 33

19. Pursuant to Reasons released on February 18, 2010, Justice Campbell dismissed the Deemed Trust Motions.

Reasons of Justice Campbell, Exhibit C to the Casella Affidavit

Appointment of the US Chapter 7 Trustee

20. On October 14, 2009, approximately 2 months after the Deemed Trust Motions were argued, the US Bankruptcy Court entered an Order converting the US Debtors' bankruptcy cases from Chapter 11 of the United States Bankruptcy Code to Chapter 7. On October 30, 2009, the US Chapter 7 Trustee was appointed.

Order of the U.S. Bankruptcy Court dated October 14, 2009, Exhibit D to the Casella Affidavit

Leave to Intervene

21. The US Chapter 7 Trustee has notified the other parties to this appeal that it seeks leave to intervene on the appeal, and that it is prepared to proceed on the basis of the record as it currently exists, that it will file a factum forthwith, and that the time for its oral argument (limited to a maximum of 20 minutes) shall come out of the time allotted to the Respondents.

Letter from Chaitons LLP to other counsel dated October 29, 2010, Exhibit E to Casella Affidavit

22. The Respondents are consenting to this motion.

23. The Appellants have already consented to leave to intervene being granted to two other persons in these appeals:

a. the Superintendent of Financial Services; and

b. Morneau Sobeco Limited Partnership, as administrator of the Plans.

PART III – LAW AND ARGUMENT

24. Rule 13 of the *Rules of Civil Procedure* provides as follows:

> **LEAVE TO INTERVENE AS ADDED PARTY**
>
> 13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that the person may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
>
> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.
>
> **LEAVE TO INTERVENE AS FRIEND OF THE COURT**
>
> 13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.
>
> **LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL**
>
> 13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.
>
> (2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

25. The US Chapter 7 Trustee seeks to intervene as an "added party" pursuant to Rule 13.01.

26. The relief sought by the Appellants includes:

a. declarations that the alleged deemed trusts have priority over all secured creditor claims;

b. orders requiring the Monitor to remit the sale proceeds to then Plans, notwithstanding the DIP Charge, the super-priority ranking thereof under the Initial Order and the subrogation provisions of the Approval and Vesting Order.

27. The US Chapter 7 Trustee has the right to assert and to rely upon the super-priority of the DIP Charge under the Initial Order and the subrogation provisions of the Approval and Vesting Order.

28. Had the US Chapter 7 Trustee been appointed by the time of the Deemed Trust Motions, clearly it would have been made a respondent to the motions as a proper and necessary party and would have had the opportunity to participate fully as a party thereto.

29. If the Appellants are successful on these appeals, there will be insufficient funds available to repay the US Chapter 7 Trustee in full, as subrogee and beneficiary of the DIP Charge.

30. The US Chapter 7 Trustee clearly therefore has a direct, substantial and genuine interest in these appeals, and will be adversely affected if the appeals are successful.

31. The US Chapter 7 Trustee's intervention will not delay or prejudice the determination of the rights of the parties to the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 9th day of November, 2010.

CHAITONS LLP

Lawyers for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

SCHEDULE "A" – LIST OF AUTHORITIES

Rule 13 of the *Rules of Civil Procedure*

LEAVE TO INTERVENE AS ADDED PARTY

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

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.

Court File No.: C52187
Court File No.: C52346
Superior Court File No.: CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDINGS COMMENCED AT TORONTO

FACTUM OF GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS

(MOTION FOR LEAVE TO INTERVENE)

CHAITONS LLP
Barristers and Solicitors
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton
Tel: 416-218-1129
Fax: 416-218-1849
George Benchetrit
Tel: (416) 218-1141
Fax: (416) 218-1841

Lawyers for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

APPENDIX "O"

5000 YONGE STREET, 10TH FLOOR, TORONTO, CANADA, M2N 7E9
www.chaitons.com

086

REPLY TO: HARVEY G. CHAITON
FILE NO.: 38760
DIRECT: 416-218-1129
FAX: 416-218-1849
EMAIL: harvey@chaitons.com

October 29, 2010

VIA EMAIL

Andrew Hatnay
Demetrios Yiokaris
Koskie Minsky LLP

Darrell Brown
Sack Goldblat Mitchell

Mark Bailey
Financial Services Commission of Ontario

Fred Myers
Brian Empey
Goodmans LLP

Ashley Taylor
Stikeman Elliott

Re: ***Indalex Limited et al – CCAA***
Leave to Intervene

Dear Counsel,

We are lawyers for George L. Miller (the "US Trustee"), the Chapter 7 Trustee of the bankruptcy estates of the US Indalex Debtors (the "US Debtors"), who was appointed by the United States Trustee on October 30, 2009, several months after the pension deemed trust motions were argued.

As you are aware, approximately $10.7M of the DIP loan was paid by the US Debtors which, pursuant to paragraph 14 of the Approval and Vesting Order, have a subrogated claim for the amount paid, secured by the DIP Lenders Charge against the assets of the Canadian Debtors.

We understand that the appeal from the decision of Justice Campbell is scheduled to be heard by the Ontario Court of Appeal on November 23 and 24, 2010. Mr. Taylor has kindly provided us with copies of the facta filed by the Appellants, from which it appears that the Appellants are not only seeking to have the Ontario Court of Appeal determine that the proceeds of sale from the property of the Canadian Debtors is subject to a deemed trust under the *Pension Benefits Act* (Ontario), but also that such deemed trust has priority over the DIP Lenders Charge notwithstanding the terms of the Initial Order.

It is obvious that the US Trustee has a substantial economic interest in the outcome of the appeal and has therefore instructed us to seek leave to intervene on the appeal. We can

Chaitons

assure you that the US Trustee's proposed intervention will not delay the appeal and we are prepared to do so on the basis that the US Trustee will take the record as it is, and will have the right to file a factum and to make oral argument, the time for which shall come out of the time allotted to the Respondents. I would not expect to need more than 15 to 20 minutes.

Please seek instructions and confirm your clients will consent to an Order granting the US Trustee leave to intervene on the appeal. Thank you in advance for your anticipated co-operation.

Yours truly,
CHAITONS LLP

Harvey G. Chaiton
PARTNER

HGC/mg

cc: George L. Miller
Peter Hughes
George Benchetrit

APPENDIX "P"

Court File No.: C52187
Court File No.: C52346
Superior Court File No.: CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO

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 GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS

CHAITONS LLP
Barristers & Solicitors
5000 Yonge Street, 10th Floor
Toronto, Ontario M2N 7E9

Harvey Chaiton
Tel: 416-218-1129
Fax: 416-218-1849
Email: harvey@chaitons.com

George Benchetrit
Tel: 416-218-1141
Fax: 416-218-1841
Email: george@chaitons.com

Lawyers for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

Court File No.: C52187
Court File No.: C52346
Superior Court File No.: CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO

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 GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS

PART I - OVERVIEW

1. These appeals raise the issues (among others) of whether the Ontario *Pension Benefits Act* (the **"PBA"**) creates deemed trusts on the proceeds of sale of the property of the Applicants in respect of any wind-up deficiencies under the Plans[1], and if so, whether any such deemed trusts have priority over the DIP Charge, contrary to:

   a. orders made in the CCAA court proceedings which were never appealed, set aside or varied; and

   b. the scheme of priorities and intent under federal legislation (the *Bankruptcy and Insolvency Act* (the **"BIA"**) and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the **"CCAA"**)) and established jurisprudence.

[1] All capitalized terms not defined in this Factum are used as defined in the Factum of Consulting Canada ULC in its capacity as CCAA monitor of the Applicants (the **"Monitor"**).

2. This Factum is submitted on behalf of George L. Miller, the trustee of the bankruptcy estates of the parent company of Indalex Limited (**"Indalex"**) and certain US affiliates (collectively, the **"US Debtors"**) appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the **"US Chapter 7 Trustee"**).

3. Pursuant to the Initial Order and the Approval and Vesting Order, the US Debtors are subrogated to the super-priority rights of the DIP Lenders under the DIP Charge for the amount of US$10,751,247.22 paid by the US Debtors to the DIP Lenders to satisfy the obligations of the Applicants.

4. The US Chapter 7 Trustee's position on these appeals is that even if the PBA creates a deemed trust for any wind-up deficiency under the Plans, these appeals should nevertheless be dismissed. The Initial Order, the Approval and Vesting Order and the June 12, 2009 Order (as defined below) all represent valid and enforceable orders of the court, which properly exercised its discretion in making these orders. None of these orders were ever appealed and no party sought to have them set aside or varied. In reliance upon the super-priority of the DIP Charge (pursuant to the Initial Order and reinforced by the June 12, 2009 Order), approximately US$29 million was advanced by the DIP Lenders to the Applicants as part of the restructuring process, which ultimately resulted in a going-concern sale for the benefit of their stakeholders. Based on the subrogation right approved pursuant to the Approval and Vesting Order, the US Debtors paid approximately US$10.75 million to the DIP Lenders. The Appellants' requested *ex-post facto* alteration of the priority of the DIP Charge constitutes an impermissible attack on these orders, and if permitted, would make a mockery of the orders and would also seriously undermine the integrity and reputation of the Canadian insolvency system.

PART II – THE FACTS

5. The US Chapter 7 Trustee adopts and relies upon the facts as set out in the Factum of the Monitor, and also relies upon the facts set out in paragraphs 6 to 15 below.

The Initial Order

6. In granting the Initial Order and super-priority status to the DIP Charge, Justice Morawetz carefully considered the Applicants' circumstances before determining that the DIP Financing (including the DIP Charge) should be approved pursuant to the DIP Credit Agreement. After weighing the evidence, Justice Morawetz held (*inter alia*) as follows[2]:

> **[9] In this case, I am satisfied that the Applicants have established the following:**
>
> **the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;**
>
> **there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;**
>
> **there is no other alternative available to the Applicants for a going concern solution; ...**
>
> **the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants; ...**
>
> **the balancing of the prejudice weighs in favour of the approval of the DIP Financing."**

7. Justice Morawetz also made the following observations:

> **[14] The Monitor has also referenced that maintaining business operations is in the interests of all stakeholders as it will afford the Applicants the opportunity to develop a viable restructuring plan designed to maximize recoveries for all stakeholders and furthermore, maintaining operations continues the employment of approximately 750 people as well as providing ongoing business for suppliers and customers. The Monitor has also reported that if the Applicants' request for approval of the DIP Agreement was to be denied, the Applicants would be unable to**

[2] Endorsement of Justice Morawetz dated April 17, 2009, Tab 1 of Compendium of US Chapter 7 Trustee.

> **continue operations, both likely resulting in the forced liquidation of the assets to the detriment of creditors, employees, suppliers and customers...**
>
> **[16] The Monitor concludes its Report by noting that it is of the view that approval of the DIP Agreement is in the best interests of the Applicants and their stakeholders and recommends approval of the DIP Agreement and the granting of the DIP Charge.**

8. Justice Morawetz then concluded as follows:

> **[17] I am satisfied that the Applicants have established that the granting of DIP Financing is necessary and that the structure of the DIP Credit Agreement is reasonable in the circumstances. DIP Financing pursuant to DIP Credit Agreement is accordingly approved.**

9. The Initial Order was never appealed, nor did any party ever rely on the 'come-back clause' to seek to have it set aside or varied.

The June 12, 2009 Hearing

10. On June 12, 2010, Justice Morawetz heard a motion by the Applicants for approval of an amendment to the DIP Credit Agreement to increase the Applicants' borrowings from US$24.36 million to US$29.5 million. Counsel for the Retirees initially sought to reserve certain rights in connection with the motion, but subsequently indicated that they were no longer insisting on a reservation of rights.

11. The motion was granted. In his Endorsement dated June 15, 2009[3], Justice Morawetz held as follows:

> **[2] The motion was short served with the Applicants citing urgency. Counsel to the Applicants and counsel to the Monitor both indicated that additional availability on the DIP Financing is required (1) so that overdue payables can be satisfied; (2) to support ongoing operations; and (3) to support the Marketing Process.**
>
> ...
>
> **[4] 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.**

[3] Endorsement of Justice Morawetz dated June 15, 2009, Tab 2 of Compendium of US Chapter 7 Trustee.

> **[5] 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 was to be increased with a reservation of rights, uncertainty would prevail if such a reservation was also granted. Would it cause the DIP Lender to withhold advances? or, if advances were made - would they have priority?**
>
> **[6] Second, neither the retirees nor the Noteholders put forth any alternative.**
>
> **[7] In the face of no alternative suggestions or proposal — uncertainty would again prevail. At this stage of the CCAA proceedings additional uncertainly does not represent a positive development.**
>
> **[8] Having reviewed the record and having heard submissions, I am satisfied that the requested relief is necessary and appropriate.**
>
> ...
>
> **[10] Counsel to the retirees subsequently advised that, having had the opportunity, during a recess, to discuss this matter with counsel to the Applicants and his clients, his clients were no longer insisting on a reservation of rights.**

12. The Order of Justice Morawetz dated June 12, 2009 (the **"June 12, 2009 Order"**) was never appealed, nor did any party ever seek to have it set aside or varied.

The Approval and Vesting Order

13. By motion returnable July 20, 2009, the Applicants sought approval for the Sapa Transaction and for an interim distribution of proceeds of sale to the agent of the DIP Lenders. The motion, which was opposed on certain grounds by the Retirees, was granted. Paragraph 14 of the Approval and Vesting Order provided as follows:

> THIS COURT ORDERS AND DIRECTS that on Closing the Sale Proceeds shall be paid to the Monitor on behalf of the Canadian Sellers and on or following the Closing, subject to the Monitor on behalf of the Canadian Sellers, maintaining a reserve of the Sale Proceeds in an amount satisfactory to the Monitor (the "Reserve"), the Monitor on behalf of the Canadian Sellers is hereby authorized and directed, without further Order of the Court, to make one or more distributions (the "Distributions") to JPMorgan Chase Bank, in its capacity as administrative agent (the "Agent") for and on behalf of the DIP Lenders (as defined in the Amended Amended Restated Initial Order dated May 12, 2009, as further amended, the "Initial Order") in an amount up to the aggregate amount of all primary indebtedness, liabilities and obligations now or hereafter owing by the Canadian Sellers to the DIP Lenders

> (the "Canadian Obligations"). **To the extent that any Canadian Obligations are satisfied by any of the Canadian Sellers' affiliated entities resident in the United States (collectively, "Indalex US") (the "Guarantee Payment") Indalex US shall be entitled to be subrogated to the rights of the Agent and the DIP Lenders under the DIP Lenders Charge (as defined in the Initial Order) to the extent of such Guaranteed Payment and following indefeasible payment in full of the Canadian Obligations, Indalex US shall be entitled to receive any Distributions, pursuant to Indalex US' subrogation rights under the DIP Lenders Charge, in an amount up to the Guarantee Payment, subject to the Reserve.**[4]
>
> (Emphasis Added)

14. The Approval and Vesting Order was never appealed, nor did any party ever seek to have it set aside or varied.

15. The Canadian sale proceeds available for distribution were insufficient to re-pay the DIP loan in full. Accordingly, the US Debtors paid US$10,751,247.22 to satisfy the obligations of the Applicants to the DIP Lenders, and claims the benefit of the DIP Charge to secure repayment of that amount[5].

PART III – LAW AND ARGUMENT

16. To avoid repetition, the US Chapter 7 Trustee in this Factum will not be addressing the following points, on which it agrees with and adopts the submissions of the Monitor and Sun Indalex Finance, LLC: (a) there were no amounts due or payable by Indalex under either of the Plans, and therefore no deemed trusts arose under the PBA; (b) the deemed trusts created under the PBA do not apply to wind up deficiencies; and (c) there was no breach of fiduciary duty by Indalex.

---

[4] Approval and Vesting Order, Tab 9 of the Monitor's Compendium.

[5] Affidavit of Keith Cooper sworn August 24, 2009, paras. 23-25, Tab 9 of the Monitor's Compendium.

The Appellants' Claim to Priority over the DIP Charge is a Collateral Attack on Previous Orders of the Court

17. The jurisdiction of the courts to approve DIP financing and super-priority charges, even before the recent amendments to the BIA and CCAA which now expressly authorize such financing and priority, is well-established and is not contested by the Appellants[6].

18. In paragraph 71 of the Retirees' Factum, they argue, without any supporting facts or findings, that "the record indicates that the PPSA priority of the deemed trust over the DIP Lender would not have frustrated the Company's liquidation efforts and thus would not have frustrated the purpose of the CCAA."

19. To the contrary, Justice Morawetz clearly considered the relevant facts before exercising his discretion under the CCAA to authorize the DIP Charge and super-priority over all liens and encumbrances, expressly including deemed trusts. The "record" in this respect includes unappealed findings of fact that the DIP Financing was necessary in order to support operations while a going concern solution was sought to save jobs and maximize recovery for all stakeholders, that there was no other alternative available to the Applicants for a going concern solution, and that the benefit to stakeholders and creditors of the DIP Financing outweighed any potential prejudice that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants.

20. As described above, when the Applicants sought an increase in the availability of funds under the DIP Credit Agreement from US$24.36 million to US$29.5 million on June 12, 2009, the Retirees expressly withdrew their request for a reservation of rights in connection with such

[6] *Janis Sarra*, "Rescue! The Companies' Creditors Arrangement Act" (2007 Thomson Canada Limited), at pp. 95-98, Tab 1 of the US Chapter 7 Trustee's (**"USC7's"**) Book of Authorities; *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C.S.C. [In Chambers]), affirmed (2000), 16C.B.R. (4th) 141 (B.C.C.A.), Tab 2 of the USC7's Book of Authorities

relief. Accordingly, the super-priority of the additional advances under the DIP Financing pursuant to the June 12, 2009 Order was accepted below and cannot now be the subject of challenge.

21. Pursuant to the Approval and Vesting Order, the US Debtors were expressly granted the right to be subrogated to and assert the DIP Lenders' super-priority under the DIP Charge in the event that the US Debtors made payment under their guarantee. In reliance on that super-priority and the court-approved subrogation right, the US Debtors paid approximately US$10.75 million to the DIP Lenders.

22. The Appellants' motions before Justice Campbell and these appeals amount to an impermissible collateral attack on the Initial Order, the Approval and Vesting Order and the June 12, 2009 Order.

23. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal. Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial reviews).[7]

24. The Appellants' claims for priority over the DIP Charge violate the fundamental policy behind the rule against collateral attack, which is to "maintain the rule of law and to preserve the repute of the administration of justice". If a party can avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system.[8]

---

[7] *I. Waxman & Sons Ltd. (Re)* (2010), 100 O.R. (3d) 561, at paras. 23 – 32, Tab 3 of the USC7's Book of Authorities

[8] *Wilson v. The Queen* [1983] 2 S.C.R. 594, Tab 4 of the USC7's Book of Authorities

Principles Governing Cross-Border Insolvencies

25. In this case, the principles governing cross-border insolvencies apply notwithstanding that separate proceedings were commenced in Canada and the U.S. The Applicants were direct and indirect subsidiaries of certain of the US Debtors, which commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in March 2009.

26. As has been frequently noted by Canadian courts, it is commonplace for commercial enterprises to operate in and have assets in multiple jurisdictions. In recognition of this modern reality, the courts and governments of many industrialized countries, and in particular Canada and the U.S., have accepted the need to promote greater efficiency, certainty and consistency in cross-border insolvency proceedings, in the interest of international co-operation and comity, and in the interests of developing certainty in international business and commerce.[9]

27. In 2009, Parliament enacted Part IV of the CCAA (entitled "Cross-Border Insolvencies") to largely adopt the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvencies, aimed at advancing the fair and efficient administration of cross-border insolvencies[10]. The stated purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote:

a. cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

b. greater legal certainty for trade and investment;

c. the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

---

[9] Babcock & Wilcox Canada Ltd. (Re) [2000] O.J. No. 786 (O.S.C.J.), Tab 5 of the USC7's Book of Authorities
[10] Houlden, Morawetz & Sarra, The 2011 Annotated BIA, pp. 1223-1227, Tab 6 of the USC7's Book of Authorities

d. the protection and the maximization of the value of debtor company's property; and

e. the rescue of financially troubled businesses to protect investment and preserve employment.

28. In the various reported cases involving secured guarantees by Canadian debtors of their U.S. affiliates' DIP obligations, Canadian courts have been careful to ensure that the creditors of the Canadian debtors are not unduly prejudiced. In this case, U.S. creditors have funded the Canadian debtors under the express protection of Canadian court orders granting security for their advances on a super-priority basis. Comity demands that these arrangements be upheld.[11]

29. The Appellants' requested *ex-post facto* alteration of the various orders made in this proceeding, which established the financing framework to facilitate a going-concern solution for the benefit of all stakeholders, and upon which foreign creditors justifiably relied in advancing and subsequently repaying the DIP Facility, would seriously undermine the basic principles underlying cross-border insolvencies and the confidence of foreign creditors and courts in the Canadian insolvency system.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 16th day of November, 2010.

CHAITONS LLP

Lawyers for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

[11] *A&M Cookie Co. Canada*, Re, 49 C.B.R. (5th) 188, Tab 7 of the USC7's Book of Authorities; *InterTAN Canada Ltd.*, Re, 49 C.B.R. (5th) 248, Tab 8 of the USC7's Book of Authorities; *Smurfit-Stone Container Canada Inc.* (January 27, 2009, CV-09-7966-00CL), Tab 9 of the USC7's Book of Authorities; *Pliant Corporation of Canada Ltd.*, Re (March 24, 2009, 09-CL-8007, S.C.J.), Tab 10 of the USC7's Book of Authorities

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Janis Sarra*, "Rescue! The Companies' Creditors Arrangement Act" (2007 Thomson Canada Limited)
2. *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C.S.C. [In Chambers]), affirmed (2000), 16C.B.R. (4th) 141 (B.C.C.A.)
3. *I. Waxman & Sons Ltd. (Re)* (2010), 100 O.R. (3d) 561
4. *Wilson v. The Queen* [1983] 2 S.C.R. 594
5. *Babcock & Wilcox Canada Ltd.* (Re) [2000] O.J. No. 786 (O.S.C.J. – Comm List)
6. *Houlden, Morawetz & Sarra*, The 2011 Annotated BIA, pp. 1223-1227
7. *A&M Cookie Co. Canada; Re,* 49 C.B.R. (5th) 188
8. *InterTAN Canada Ltd., Re*, 49 C.B.R. (5th) 248
9. *Smurfit-Stone Container Canada Inc.* (January 27, 2009, CV-09-7966-00CL)
10. *Pliant Corporation of Canada Ltd., Re* (March 24, 2009, 09-CL-8007, S.C.J.)

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.

Court File No.: C52187
Court File No.: C52346
Superior Court File No.: CV-09-8122-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDINGS COMMENCED AT TORONTO

FACTUM

CHAITONS LLP
Barristers and Solicitors
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton
Tel: 416-218-1129
Fax: 416-218-1849
George Benchetrit
Tel: (416) 218-1141
Fax: (416) 218-1841

Lawyers for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

Schedule "2"

PROOF OF CLAIM

IN RESPECT OF CLAIMS AGAINST
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,
6326765 CANADA INC. AND NOVAR INC.
(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c., C-36, as amended

A. PARTICULARS OF CREDITOR

1. Full Legal Name of Creditor: FREDERICK JOHN GRANVILLE (the "Creditor").
   *(Full legal or Corporate name should be the name of the original Creditor. **Do not file separate Proofs of Claim by division of the same Creditor.**)*

2. Full Mailing Address of the Creditor:

   c/o KOSKIE MINSKY LLP
   20 QUEEN ST. W.
   SUITE 900, BOX 52
   TORONTO, ON, CANADA M5H3R3

3. Telephone Number of Creditor: 416. 595. 2150 [1]

4. Facsimile Number of Creditor: 416. 204. 2874 [1]

5. Attention (Contact Person): ANDREA MCKINNON [1]

6. Email address: amckinnon@kmlaw.ca [1]

7. Has the Claim been sold or assigned by Creditor to another party?
   Yes___ No X (If yes please complete section D)

---

[1] **IN ORDER TO ENSURE ALL CLAIMS ARE PROCESSED IN AN EXPEDITED MANNER YOU MUST PROVIDE ONE (1) OR MORE OF YOUR TELEPHONE NUMBER, FAX NUMBER OR EMAIL ADDRESS.**

B. **PROOF OF CLAIM:** (on behalf of Frederick John Granville)

I, KOSKIE MINSKY LLP [Name of Creditor or Representative of the Creditor], do hereby certify:

A) that I am (please check one):

X the Creditor; or
___ hold the following position of _____ of the Creditor

and have personal knowledge of all the circumstances connected with the Claim described herein;

B) The Creditor is owed as follows:

Secured Claim $2000.00 Cdn on a secured basis, (priority charge)
I have valued my security at $2,022.02 (this will be the amount at which you value your secured claim, the difference between the secured claim amount and the value of your security will be the amount of your unsecured claim)

Unsecured Claim (1) $20,422.00 Cdn on an unsecured basis (2) Value TBD by actuary in respect of a reduction in benefits to Executive Plan

Note: Claims in a foreign currency are to be converted to Canadian dollars at the exchange rate of the Bank of Canada as at the Filing Date, April 3, 2009. For example, the U.S. to Canadian Dollar exchange rate conversion on such date was U.S.$1 = CDN$0.8056).

C. **PARTICULARS OF CLAIM:**

Name of the entity and the amount for each entity which owes the amount claimed:

		Secured	Unsecured	
☒	Indalex Limited	(1) $2,000.00	$20,422.00	(2) TBD- See above
☒	Indalex Holdings (B.C.) Ltd.	(1) $2000.00	$20,422.00	(2) TBD- See above
☒	6326765 Canada Inc.	(1) $2000.00	$20,422.00	(2) TBD- See above
☒	Novar Inc	(1) $2000.00	$20,422.00	(2) TBD- See above.

Description of transaction, agreement or event giving rise or relating to the Claim:

(1) Ceased supplemental pension benefit payments.
(2) Underfunded registered pension to be wound up in deficit.

If the Claim is contingent or unliquidated, state the basis and provide evidence upon which the Claim has been valued:

A reduction to the monthly pension benefits will occur due to the wind-up of the Indalex registered pension plan in its state of deficit. An actuarial calculation of this loss will be prepared once the loss is finalized.

Description of security, if any, granted to the Creditor or assigned by Creditor in respect of the Claim:

Pension/Wage superpriority charge

Estimated value of security outlined above as at the date of the Claim:

$2000.00.

IF CLAIMANTS REQUIRE ADDITIONAL SPACE THEN PROVIDED HEREIN, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS

A DETAILED, COMPLETE STATEMENT OF ACCOUNT MUST BE ATTACHED TO THE PROOF OF CLAIM WHICH MUST SHOW THE DATE, THE NUMBER AND THE AMOUNT OF EACH INVOICE OR CHARGE, TOGETHER WITH THE DATE, THE NUMBER AND THE AMOUNT OF ALL CREDITS, COUNTERCLAIMS, DISCOUNTS, PAYMENTS, ETC., TO WHICH THE APPLICANTS ARE ENTITLED.

D. PARTICULARS OF ASSIGNEE(S) (IF ANY):

1. Full Legal Name of Assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

(the "Assignee(s)")

Amount of Total Claim Assigned $_____
Amount of Total Claim Not Assigned $_____

Total Amount of Claim $_____
(should equal "Total Claim" as entered on Section B)

2. Full Mailing Address of Assignee(s):

3. Telephone Number of Assignee(s): _____
4. Facsimile Number of Assignee(s): _____
5. Email address of Assignee(s): _____
6. Attention (Contact Person): _____

E. FILING OF CLAIMS:

The duly completed Proof of Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm (Eastern Daylight Savings Time) on August 28, 2009, to the following email address, address or facsimile:

Failure to file your Proof of Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a Claim against the Applicants.

This Proof of Claim must be delivered by email, facsimile transmission, personal delivery, courier or prepaid mail at the following address:

Address of Monitor:

Indalex Limited and/or
Indalex Holdings (B.C.) Ltd. and/or
6326765 Canada Inc. and/or
Novar Inc.
c/o FTI Consulting Canada ULC,
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, Ontario M5J 2S1

Attention: Ms. Rachel Gillespie

Telephone: (416)-572-2476
Facsimile: (416)-572-4068
E-mail: rachel.gillespie@fticonsulting.com

DATED at Toronto this 28 day of August, 2009.

(Signature of Witness)

DESI SKORCOVA
(Please print name)

(Signature of individual completing this form)

Andrea Mckinnon
(Please print name)

Schedule "2"

PROOF OF CLAIM

IN RESPECT OF CLAIMS AGAINST
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,
6326765 CANADA INC. AND NOVAR INC.
(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c., C-36, as amended

A. PARTICULARS OF CREDITOR

1. Full Legal Name of Creditor: RICHARD NELSON BENSON (the "Creditor").
   (Full legal or Corporate name should be the name of the original Creditor. Do not file separate Proofs of Claim by division of the same Creditor.)

2. Full Mailing Address of the Creditor:

   C/O KOSKIE MINSKY LLP
   20 QUEEN ST. W.
   SUITE 900, BOX 52
   TORONTO, ON, CANADA, M5H 3R3

3. Telephone Number of Creditor: 416. 595. 2150 [1]

4. Facsimile Number of Creditor: 416. 204. 2874 [1]

5. Attention (Contact Person): ANDREA MCKINNON [1]

6. Email address: amckinnon@kmlaw.ca [1]

7. Has the Claim been sold or assigned by Creditor to another party?
   Yes___ No X **(If yes please complete section D)**

---

[1] **IN ORDER TO ENSURE ALL CLAIMS ARE PROCESSED IN AN EXPEDITED MANNER YOU MUST PROVIDE ONE (1) OR MORE OF YOUR TELEPHONE NUMBER, FAX NUMBER OR EMAIL ADDRESS.**

B. **PROOF OF CLAIM:** (on behalf of Richard Nelson Benson)

I, KOSKIE MINSKY LLP [Name of Creditor or Representative of the Creditor], do hereby certify:

A) that I am (please check one):

X the Creditor; or
___ hold the following position of _____ of the Creditor

and have personal knowledge of all the circumstances connected with the Claim described herein;

B) The Creditor is owed as follows:

Secured Claim $2000.00 Cdn on a secured basis, (priority charge)
I have valued my security at $2,000.00. (this will be the amount at which you value your secured claim, the difference between the secured claim amount and the value of your security will be the amount of your unsecured claim)

Unsecured Claim (1) $283,737.00 Cdn on an unsecured basis (2) Value TBD by actuary in resp of reduction in benefits from Executive Plan.

Note: Claims in a foreign currency are to be converted to Canadian dollars at the exchange rate of the Bank of Canada as at the Filing Date, April 3, 2009. For example, the U.S. to Canadian Dollar exchange rate conversion on such date was U.S.$1 = CDN$0.8056).

C. **PARTICULARS OF CLAIM:**

Name of the entity and the amount for each entity which owes the amount claimed:

		Secured	Unsecured	
☒	Indalex Limited	(1) $2,000.00	$283,787.00.	(2) TBD - See ab
☒	Indalex Holdings (B.C.) Ltd.	(1) $2,000.00.	$283,737.00.	(2) TBD - See ab
☒	6326765 Canada Inc.	(1) $2,000.00	$283,737.00.	(2) TBD - See ab
☒	Novar Inc	(1) $2,000.00	$283,737.00.	

Description of transaction, agreement or event giving rise or relating to the Claim:

(1) Ceased supplemental pension benefit payments
(2) underfunded registered pension to be wound up in deficit.

If the Claim is contingent or unliquidated, state the basis and provide evidence upon which the Claim has been valued:

A reduction to the monthly pension benefits will occur due to the wind-up of the Indalex registered pension plan in its state of deficit. An actuarial calculation of its loss will be prepared once the loss is finalized.

Description of security, if any, granted to the Creditor or assigned by Creditor in respect of the Claim:

pension/wage superpriority charge.

Estimated value of security outlined above as at the date of the Claim:

$2,000.00.

IF CLAIMANTS REQUIRE ADDITIONAL SPACE THEN PROVIDED HEREIN, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS

A DETAILED, COMPLETE STATEMENT OF ACCOUNT MUST BE ATTACHED TO THE PROOF OF CLAIM WHICH MUST SHOW THE DATE, THE NUMBER AND THE AMOUNT OF EACH INVOICE OR CHARGE, TOGETHER WITH THE DATE, THE NUMBER AND THE AMOUNT OF ALL CREDITS, COUNTERCLAIMS, DISCOUNTS, PAYMENTS, ETC., TO WHICH THE APPLICANTS ARE ENTITLED.

D. PARTICULARS OF ASSIGNEE(S) (IF ANY):

1. Full Legal Name of Assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

_____

(the "Assignee(s)")

Amount of Total Claim Assigned $_____
Amount of Total Claim Not Assigned $_____

Total Amount of Claim $_____
(should equal "Total Claim" as entered on Section B)

2. Full Mailing Address of Assignee(s):

_____

_____

_____

_____

3. Telephone Number of Assignee(s): _____
4. Facsimile Number of Assignee(s): _____
5. Email address of Assignee(s): _____
6. Attention (Contact Person): _____

E. FILING OF CLAIMS:

The duly completed Proof of Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm (Eastern Daylight Savings Time) on August 28, 2009, to the following email address, address or facsimile:

Failure to file your Proof of Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a Claim against the Applicants.

This Proof of Claim must be delivered by email, facsimile transmission, personal delivery, courier or prepaid mail at the following address:

Address of Monitor:

Indalex Limited and/or
Indalex Holdings (B.C.) Ltd. and/or
6326765 Canada Inc. and/or
Novar Inc.
c/o FTI Consulting Canada ULC,
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, Ontario M5J 2S1

Attention: Ms. Rachel Gillespie

Telephone: (416)-572-2476
Facsimile: (416)-572-4068
E-mail: rachel.gillespie@fticonsulting.com

DATED at Toronto this 28 day of August, 2009.

(Signature of Witness)

Desi Skerlevski
(Please print name)

(Signature of individual completing this form)

Andrea McKinnon
(Please print name)

Schedule "2"

PROOF OF CLAIM

IN RESPECT OF CLAIMS AGAINST
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,
6326765 CANADA INC. AND NOVAR INC.
(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c., C-36, as amended

A. **PARTICULARS OF CREDITOR**

1. Full Legal Name of Creditor: LEON KOZIEROK. (the "Creditor").
   *(Full legal or Corporate name should be the name of the original Creditor. **Do not file separate Proofs of Claim by division of the same Creditor.**)*

2. Full Mailing Address of the Creditor:

   C/O KOSKIE MINSKY LLP
   20 QUEEN ST. W.
   SUITE 900, BOX 52
   TORONTO, ON, CANADA, M5H 3R3

3. Telephone Number of Creditor: 416. 595. 2150 [1]

4. Facsimile Number of Creditor: 416. 204. 2874 [1]

5. Attention (Contact Person): ANDREA MCKINNON [1]

6. Email address: amckinnon@kmlaw.ca [1]

7. Has the Claim been sold or assigned by Creditor to another party?
   Yes___ No X **(If yes please complete section D)**

[1] **IN ORDER TO ENSURE ALL CLAIMS ARE PROCESSED IN AN EXPEDITED MANNER YOU MUST PROVIDE ONE (1) OR MORE OF YOUR TELEPHONE NUMBER, FAX NUMBER OR EMAIL ADDRESS.**

B. **PROOF OF CLAIM:** (on behalf of Leon Kozierok)

I, KOSKIE MINSKY LLP [Name of Creditor or Representative of the Creditor], do hereby certify:

A) that I am (please check one):

X the Creditor; or
___ hold the following position of _____ of the Creditor

and have personal knowledge of all the circumstances connected with the Claim described herein;

B) The Creditor is owed as follows:

Secured Claim $2000.00 Cdn on a secured basis, (priority charge)
I have valued my security at $2,000,000 (this will be the amount at which you value your secured claim, the difference between the secured claim amount and the value of your security will be the amount of your unsecured claim)

Unsecured Claim (1) $984,869.00 Cdn on an unsecured basis (2) Value TBD by actuary in respect of reduction in benefits from Executive Plan

Note: Claims in a foreign currency are to be converted to Canadian dollars at the exchange rate of the Bank of Canada as at the Filing Date, April 3, 2009. For example, the U.S. to Canadian Dollar exchange rate conversion on such date was U.S.$1 = CDN$0.8056).

C. **PARTICULARS OF CLAIM:**

Name of the entity and the amount for each entity which owes the amount claimed:

		Secured	Unsecured	
☒	Indalex Limited	(1) $2,000.00	$984,869.00	(1) TBD by actuary
☒	Indalex Holdings (B.C.) Ltd.	(2) $2,000.00	$984,869.00	(2) TBD by actuary
☒	6326765 Canada Inc.	(2) $2,000.00	$984,869.00	(2) TBD by actuary
☒	Novar Inc	(2) $2,000.00	$984,869.00	(2) TBD by actuary.

Description of transaction, agreement or event giving rise or relating to the Claim:

(1) Ceased supplemental pension benefit payments.
(2) underfunded registered pension to be wound up in deficit.

If the Claim is contingent or unliquidated, state the basis and provide evidence upon which the Claim has been valued:

A reduction to the monthly pension benefits will occur due to the wind up of the Indalex registered pension plan in its state of deficit. An actuarial calculation of this loss will be prepared once the loss is finalized.

Description of security, if any, granted to the Creditor or assigned by Creditor in respect of the Claim:

Pension/wage superpriority charge

Estimated value of security outlined above as at the date of the Claim:

$2,000.00

IF CLAIMANTS REQUIRE ADDITIONAL SPACE THEN PROVIDED HEREIN, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS

A DETAILED, COMPLETE STATEMENT OF ACCOUNT MUST BE ATTACHED TO THE PROOF OF CLAIM WHICH MUST SHOW THE DATE, THE NUMBER AND THE AMOUNT OF EACH INVOICE OR CHARGE, TOGETHER WITH THE DATE, THE NUMBER AND THE AMOUNT OF ALL CREDITS, COUNTERCLAIMS, DISCOUNTS, PAYMENTS, ETC., TO WHICH THE APPLICANTS ARE ENTITLED.

D. **PARTICULARS OF ASSIGNEE(S) (IF ANY):**

1. Full Legal Name of Assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

(the "Assignee(s)")

Amount of Total Claim Assigned $_____
Amount of Total Claim Not Assigned $_____

Total Amount of Claim $_____
(should equal "Total Claim" as entered on Section B)

2. Full Mailing Address of Assignee(s):

3. Telephone Number of Assignee(s):
4. Facsimile Number of Assignee(s):
5. Email address of Assignee(s):
6. Attention (Contact Person):

E. FILING OF CLAIMS:

The duly completed Proof of Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm (Eastern Daylight Savings Time) on August 28, 2009, to the following email address, address or facsimile:

Failure to file your Proof of Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a Claim against the Applicants.

This Proof of Claim must be delivered by email, facsimile transmission, personal delivery, courier or prepaid mail at the following address:

Address of Monitor:

Indalex Limited and/or
Indalex Holdings (B.C.) Ltd. and/or
6326765 Canada Inc. and/or
Novar Inc.
c/o FTI Consulting Canada ULC,
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, Ontario M5J 2S1

Attention: Ms. Rachel Gillespie

Telephone: (416)-572-2476
Facsimile: (416)-572-4068
E-mail: rachel.gillespie@fticonsulting.com

DATED at Toronto this 28 day of August, 2009.

(Signature of Witness)

Desi Skokleva
(Please print name)

(Signature of individual completing this form)

Andrea Mkinnon
(Please print name)

Schedule "2"

PROOF OF CLAIM

IN RESPECT OF CLAIMS AGAINST
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,
6326765 CANADA INC. AND NOVAR INC.
(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c., C-36, as amended

A. PARTICULARS OF CREDITOR

1. Full Legal Name of Creditor: KEITH BURTON CARRUTHERS (the "Creditor").
   (Full legal or Corporate name should be the name of the original Creditor. Do not file separate Proofs of Claim by division of the same Creditor.)

2. Full Mailing Address of the Creditor:

   C/O KOSKIE MINSKY LLP
   20 QUEEN ST. W.
   SUITE 900, BOX 52
   TORONTO, ON. CANADA M5H 3R3

3. Telephone Number of Creditor: 416.595.2150 [1]

4. Facsimile Number of Creditor: 416.204.2874 [1]

5. Attention (Contact Person): ANDREA MCKINNON [1]

6. Email address: amckinnon@kmlaw.ca [1]

7. Has the Claim been sold or assigned by Creditor to another party?
   Yes___ No X **(If yes please complete section D)**

---

[1] **IN ORDER TO ENSURE ALL CLAIMS ARE PROCESSED IN AN EXPEDITED MANNER YOU MUST PROVIDE ONE (1) OR MORE OF YOUR TELEPHONE NUMBER, FAX NUMBER OR EMAIL ADDRESS.**

B. **PROOF OF CLAIM:** (on behalf of Keith Burton Carruthers)

I, KOSKIE MINSKY LLP [Name of Creditor or Representative of the Creditor], do hereby certify:

A) that I am (please check one):

X the Creditor; or
___ hold the following position of _____ of the Creditor

and have personal knowledge of all the circumstances connected with the Claim described herein;

B) The Creditor is owed as follows:

r priority charge

Secured Claim $2000.00 Cdn on a secured basis,
I have valued my security at $2000.00 (this will be the amount at which you value your secured claim, the difference between the secured claim amount and the value of your security will be the amount of your unsecured claim)

Unsecured Claim (1) $707,521.00 Cdn on an unsecured basis (2) Value TBD by actuary in respect of reduction in benefits from Executive Plan

Note: Claims in a foreign currency are to be converted to Canadian dollars at the exchange rate of the Bank of Canada as at the Filing Date, April 3, 2009. For example, the U.S. to Canadian Dollar exchange rate conversion on such date was U.S.$1 = CDN$0.8056).

C. **PARTICULARS OF CLAIM:**

Name of the entity and the amount for each entity which owes the amount claimed:

		Secured	Unsecured	
☒	Indalex Limited	(1) $2000.00	$707,521.00	(2) TBD - See abr
☒	Indalex Holdings (B.C.) Ltd.	(1) $2000.00	$707,521.00	(2) TBD - See ab
☒	6326765 Canada Inc.	(1) $2000.00	$707,521.00	(2) TBD - See ab
☒	Novar Inc	(1) $2000.00	$707,521.00	(2) TBD - See abr

Description of transaction, agreement or event giving rise or relating to the Claim:

(1) Ceased supplemental pension benefit payments.
(2) underfunded registered pension to be wound up in deficit.

If the Claim is contingent or unliquidated, state the basis and provide evidence upon which the Claim has been valued:

A reduction to the monthly pension benefits will occur due to the wind-up of the Indalex registered pension plan in its state of deficit. An actuarial calculations of this loss will be prepared once the loss is finalized.

Description of security, if any, granted to the Creditor or assigned by Creditor in respect of the Claim:

Pension/wage superpriority charge.

Estimated value of security outlined above as at the date of the Claim:

$2,000.00

IF CLAIMANTS REQUIRE ADDITIONAL SPACE THEN PROVIDED HEREIN, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS

A DETAILED, COMPLETE STATEMENT OF ACCOUNT MUST BE ATTACHED TO THE PROOF OF CLAIM WHICH MUST SHOW THE DATE, THE NUMBER AND THE AMOUNT OF EACH INVOICE OR CHARGE, TOGETHER WITH THE DATE, THE NUMBER AND THE AMOUNT OF ALL CREDITS, COUNTERCLAIMS, DISCOUNTS, PAYMENTS, ETC., TO WHICH THE APPLICANTS ARE ENTITLED.

D. **PARTICULARS OF ASSIGNEE(S) (IF ANY):**

1. Full Legal Name of Assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

_____

(the "Assignee(s)")

Amount of Total Claim Assigned $_____
Amount of Total Claim Not Assigned $_____

Total Amount of Claim $_____
(should equal "Total Claim" as entered on Section B)

2. Full Mailing Address of Assignee(s):

_____

_____

_____

_____

3. Telephone Number of Assignee(s): _____
4. Facsimile Number of Assignee(s): _____
5. Email address of Assignee(s): _____
6. Attention (Contact Person): _____

E. **FILING OF CLAIMS:**

The duly completed Proof of Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm (Eastern Daylight Savings Time) on August 28, 2009, to the following email address, address or facsimile:

Failure to file your Proof of Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a Claim against the Applicants.

This Proof of Claim must be delivered by email, facsimile transmission, personal delivery, courier or prepaid mail at the following address:

Address of Monitor:

Indalex Limited and/or
Indalex Holdings (B.C.) Ltd. and/or
6326765 Canada Inc. and/or
Novar Inc.
c/o FTI Consulting Canada ULC,
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, Ontario M5J 2S1

Attention: Ms. Rachel Gillespie

Telephone: (416)-572-2476
Facsimile: (416)-572-4068
E-mail: rachel.gillespie@fticonsulting.com

DATED at Toronto this 28 day of August, 2009.

(Signature of Witness)

Desi Skoklevska
(Please print name)

(Signature of individual completing this form)

Andrea M Kinnon
(Please print name)

Schedule "2"

PROOF OF CLAIM

IN RESPECT OF CLAIMS AGAINST
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,
6326765 CANADA INC. AND NOVAR INC.
(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c., C-36, as amended

A. **PARTICULARS OF CREDITOR**

1. Full Legal Name of Creditor: ROBERT B. LECKIE (the "Creditor").
   (Full legal or Corporate name should be the name of the original Creditor. Do not file separate Proofs of Claim by division of the same Creditor.)

2. Full Mailing Address of the Creditor:

   c/o KOSKIE MINSKY LLP
   20 QUEEN ST. W.
   SUITE 900, BOX 52
   TORONTO, ON, CANADA M5H 3R3

3. Telephone Number of Creditor: 416.595.2150 [1]

4. Facsimile Number of Creditor: 416.204.2874 [1]

5. Attention (Contact Person): ANDREA MCKINNON [1]

6. Email address: amckinnon@kmlaw.ca [1]

7. Has the Claim been sold or assigned by Creditor to another party?
   Yes___ No X **(If yes please complete section D)**

---

[1] **IN ORDER TO ENSURE ALL CLAIMS ARE PROCESSED IN AN EXPEDITED MANNER YOU MUST PROVIDE ONE (1) OR MORE OF YOUR TELEPHONE NUMBER, FAX NUMBER OR EMAIL ADDRESS.**

B. **PROOF OF CLAIM:** (on behalf of Robert B. Leckie)

I, KOSKIE MINSKY LLP [Name of Creditor or Representative of the Creditor], do hereby certify:

A) that I am (please check one):

X the Creditor; or
___ hold the following position of _____ of the Creditor

and have personal knowledge of all the circumstances connected with the Claim described herein;

B) The Creditor is owed as follows:

Secured Claim $2000.00 Cdn on a secured basis, (priority charge)
I have valued my security at $2000.00. (this will be the amount at which you value your secured claim, the difference between the secured claim amount and the value of your security will be the amount of your unsecured claim)

Unsecured Claim (1) $371,638.00 Cdn on an unsecured basis (2) Value TBD by actuary in respect of a reduction in benefits from Executive Plan.

Note: Claims in a foreign currency are to be converted to Canadian dollars at the exchange rate of the Bank of Canada as at the Filing Date, April 3, 2009. For example, the U.S. to Canadian Dollar exchange rate conversion on such date was U.S.$1 = CDN$0.8056).

C. **PARTICULARS OF CLAIM:**

Name of the entity and the amount for each entity which owes the amount claimed:

		Secured	Unsecured	
☒	Indalex Limited	(1) $2,000.00	$371,638.00.	(2) TBD- See above
☒	Indalex Holdings (B.C.) Ltd.	(1) $2,000.00	$371,638.00.	(2) TBD- See above
☒	6326765 Canada Inc.	(1) $2,000.00	$371,638.00.	(2) TBD- See above
☒	Novar Inc	(1) $2,000.00	$371,638.00.	(2) TBD- See above

Description of transaction, agreement or event giving rise or relating to the Claim:

(1) Ceased supplemental pension benefit payments.
(2) Underfunded registered pension to be wound up in deficit.

If the Claim is contingent or unliquidated, state the basis and provide evidence upon which the Claim has been valued:

A reduction to the monthly pension benefits will occur due to the wind-up of the Indalex registered pension plan in its state of deficit. An actuarial calculation of this loss will be prepared once the loss is finalize

Description of security, if any, granted to the Creditor or assigned by Creditor in respect of the Claim:

Pension/Wage superpriority charge

Estimated value of security outlined above as at the date of the Claim:

$ 21000.00

IF CLAIMANTS REQUIRE ADDITIONAL SPACE THEN PROVIDED HEREIN, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS

A DETAILED, COMPLETE STATEMENT OF ACCOUNT MUST BE ATTACHED TO THE PROOF OF CLAIM WHICH MUST SHOW THE DATE, THE NUMBER AND THE AMOUNT OF EACH INVOICE OR CHARGE, TOGETHER WITH THE DATE, THE NUMBER AND THE AMOUNT OF ALL CREDITS, COUNTERCLAIMS, DISCOUNTS, PAYMENTS, ETC., TO WHICH THE APPLICANTS ARE ENTITLED.

D. **PARTICULARS OF ASSIGNEE(S) (IF ANY):**

1. Full Legal Name of Assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

(the "Assignee(s)")

Amount of Total Claim Assigned $_____
Amount of Total Claim Not Assigned $_____

Total Amount of Claim $_____
(should equal "Total Claim" as entered on Section B)

2. Full Mailing Address of Assignee(s):

3. Telephone Number of Assignee(s):
4. Facsimile Number of Assignee(s):
5. Email address of Assignee(s):
6. Attention (Contact Person):

E. FILING OF CLAIMS:

The duly completed Proof of Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm (Eastern Daylight Savings Time) on August 28, 2009, to the following email address, address or facsimile:

Failure to file your Proof of Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a Claim against the Applicants.

This Proof of Claim must be delivered by email, facsimile transmission, personal delivery, courier or prepaid mail at the following address:

Address of Monitor:

Indalex Limited and/or
Indalex Holdings (B.C.) Ltd. and/or
6326765 Canada Inc. and/or
Novar Inc.
c/o FTI Consulting Canada ULC,
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, Ontario M5J 2S1

Attention: Ms. Rachel Gillespie

Telephone: (416)-572-2476
Facsimile: (416)-572-4068
E-mail: rachel.gillespie@fticonsulting.com

DATED at Toronto this 28 day of August, 2009.

(Signature of Witness)

Desi Skokleva
(Please print name)

(Signature of individual completing this form)

Andrea McKinnon
(Please print name)

Schedule "2"

PROOF OF CLAIM

IN RESPECT OF CLAIMS AGAINST
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,
6326765 CANADA INC. AND NOVAR INC.
(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c., C-36, as amended

A. PARTICULARS OF CREDITOR

1. Full Legal Name of Creditor: MAX DEGEN. (the "Creditor").
(Full legal or Corporate name should be the name of the original Creditor. Do not file separate Proofs of Claim by division of the same Creditor.)

2. Full Mailing Address of the Creditor:
c/o KOSKIE MINSKY LLP.
20 Queen St. W.
Suite 900, Box 52
Toronto, ON, CANADA M5H 3R3.

3. Telephone Number of Creditor: 416. 595. 2150. [1]

4. Facsimile Number of Creditor: 416. 204. 2874. [1]

5. Attention (Contact Person): Andrea McKinnon [1]

6. Email address: amckinnon@kmlaw.ca. [1]

7. Has the Claim been sold or assigned by Creditor to another party?
Yes___ No X (If yes please complete section D)

---

[1] **IN ORDER TO ENSURE ALL CLAIMS ARE PROCESSED IN AN EXPEDITED MANNER YOU MUST PROVIDE ONE (1) OR MORE OF YOUR TELEPHONE NUMBER, FAX NUMBER OR EMAIL ADDRESS.**

B. **PROOF OF CLAIM:**

I, KOSKIE MINSKY LLP (on behalf of Max Degen). [Name of Creditor or Representative of the Creditor], do hereby certify:

A) that I am (please check one):

X the Creditor; or
___ hold the following position of _____ of the Creditor

and have personal knowledge of all the circumstances connected with the Claim described herein;

B) The Creditor is owed as follows: (priority chart.

Secured Claim $ 2,000.00 Cdn on a secured basis,
I have valued my security at $ 2,000.00 (this will be the amount at which you value your secured claim, the difference between the secured claim amount and the value of your security will be the amount of your unsecured claim)

Unsecured Claim (1) $ 169,161.00 Cdn on an unsecured basis (2) Value TBD by actuary - in respe of a reducti in benefits to the Execut Plan.

Note: Claims in a foreign currency are to be converted to Canadian dollars at the exchange rate of the Bank of Canada as at the Filing Date, April 3, 2009. For example, the U.S. to Canadian Dollar exchange rate conversion on such date was U.S.$1 = CDN$0.8056).

C. **PARTICULARS OF CLAIM:**

Name of the entity and the amount for each entity which owes the amount claimed:

		Secured	Unsecured	
☒	Indalex Limited	(1) $ 2,000.00	$ 169,161.00	(2) See above TBD
☒	Indalex Holdings (B.C.) Ltd.	(1) $ 2,000.00	$ 169,161.00	(2) See above TBD
☒	6326765 Canada Inc.	(1) $ 2,000.00	$ 169,161.00	(2) See above TBD
☒	Novar Inc	(1) $ 2,000.00	$ 169,161.00	(2) See above TBD.

Description of transaction, agreement or event giving rise or relating to the Claim:

(1) Ceased supplemental pension benefit payments.
(2) Underfunded registered pension to be wound up in deficit.

If the Claim is contingent or unliquidated, state the basis and provide evidence upon which the Claim has been valued:

A reduction to the monthly pension benefits will occur due to the wind-up of the Indalex registered pension plan in its state of deficit. An actuarial calculation of this loss will be prepared once the loss is finalized.

Description of security, if any, granted to the Creditor or assigned by Creditor in respect of the Claim:

Pension/Wage superannuity charge

Estimated value of security outlined above as at the date of the Claim:

$2,000.00 .

IF CLAIMANTS REQUIRE ADDITIONAL SPACE THEN PROVIDED HEREIN, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS

A DETAILED, COMPLETE STATEMENT OF ACCOUNT MUST BE ATTACHED TO THE PROOF OF CLAIM WHICH MUST SHOW THE DATE, THE NUMBER AND THE AMOUNT OF EACH INVOICE OR CHARGE, TOGETHER WITH THE DATE, THE NUMBER AND THE AMOUNT OF ALL CREDITS, COUNTERCLAIMS, DISCOUNTS, PAYMENTS, ETC., TO WHICH THE APPLICANTS ARE ENTITLED.

D. **PARTICULARS OF ASSIGNEE(S) (IF ANY):**

1. Full Legal Name of Assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

(the "Assignee(s)")

Amount of Total Claim Assigned $_____
Amount of Total Claim Not Assigned $_____

Total Amount of Claim $_____
(should equal "Total Claim" as entered on Section B)

2. Full Mailing Address of Assignee(s):

3. Telephone Number of Assignee(s):
4. Facsimile Number of Assignee(s):
5. Email address of Assignee(s):
6. Attention (Contact Person):

E. FILING OF CLAIMS:

The duly completed Proof of Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm (Eastern Daylight Savings Time) on August 28, 2009, to the following email address, address or facsimile:

Failure to file your Proof of Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a Claim against the Applicants.

This Proof of Claim must be delivered by email, facsimile transmission, personal delivery, courier or prepaid mail at the following address:

Address of Monitor:

Indalex Limited and/or
Indalex Holdings (B.C.) Ltd. and/or
6326765 Canada Inc. and/or
Novar Inc.
c/o FTI Consulting Canada ULC,
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, Ontario M5J 2S1

Attention: Ms. Rachel Gillespie

Telephone: (416)-572-2476
Facsimile: (416)-572-4068
E-mail: rachel.gillespie@fticonsulting.com

DATED at Toronto this 28 day of August, 2009.

(Signature of Witness) (Signature of individual completing this form)

Desi Skoccora (Please print name)

Andrea McKinnon (Please print name)

Schedule "2"

PROOF OF CLAIM

IN RESPECT OF CLAIMS AGAINST
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,
6326765 CANADA INC. AND NOVAR INC.
(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c., C-36, as amended

A. PARTICULARS OF CREDITOR

1. Full Legal Name of Creditor: BERTRAM GERALD ARTHUR MCBRIDE (the "Creditor").
   (Full legal or Corporate name should be the name of the original Creditor. Do not file separate Proofs of Claim by division of the same Creditor.)

2. Full Mailing Address of the Creditor:

   C/O KOSKIE MINSKY LLP
   20 QUEEN ST. W. SUITE 900, BOX 52
   TORONTO, ON, CANADA M5H3R3

3. Telephone Number of Creditor: (416) 595-2150 [1]

4. Facsimile Number of Creditor: (416) 204-2874 [1]

5. Attention (Contact Person): ANDREA MCKINNON [1]

6. Email address: amckinnon@kmlaw.ca [1]

7. Has the Claim been sold or assigned by Creditor to another party?
   Yes___ No X **(If yes please complete section D)**

[1] **IN ORDER TO ENSURE ALL CLAIMS ARE PROCESSED IN AN EXPEDITED MANNER YOU MUST PROVIDE ONE (1) OR MORE OF YOUR TELEPHONE NUMBER, FAX NUMBER OR EMAIL ADDRESS.**

B. **PROOF OF CLAIM:** (on behalf of Bertram Gerald Arthur McBride

I, KOSKIE MINSKY LLP [Name of Creditor or Representative of the Creditor], do hereby certify:

A) that I am (please check one):

X the Creditor; or
___ hold the following position of _____ of the Creditor

and have personal knowledge of all the circumstances connected with the Claim described herein;

B) The Creditor is owed as follows:

Secured Claim $2000.00 Cdn on a secured basis, ← priority charge amount
I have valued my security at $2,000.00: (this will be the amount at which you value your secured claim, the difference between the secured claim amount and the value of your security will be the amount of your unsecured claim)

Unsecured Claim (1) $482,905.00 Cdn on an unsecured basis (2) Value TBD by actuary in respect of a reduction in benefits from the Executive Plan

Note: Claims in a foreign currency are to be converted to Canadian dollars at the exchange rate of the Bank of Canada as at the Filing Date, April 3, 2009. For example, the U.S. to Canadian Dollar exchange rate conversion on such date was U.S.$1 = CDN$0.8056).

C. **PARTICULARS OF CLAIM:**

Name of the entity and the amount for each entity which owes the amount claimed:

		Secured	Unsecured	
☒	Indalex Limited	$2,000.00	$482,905.00	(2) TBD- See above
☒	Indalex Holdings (B.C.) Ltd.	$2000.00	$482,905.00	(2) TBD- See above.
☒	6326765 Canada Inc.	$2000.00	$482,905.00	(2) TBD- See above
☒	Novar Inc	$2000.00	$482,905.00	(2) TBD- See above

Description of transaction, agreement or event giving rise or relating to the Claim:

(1) Ceased supplemental pension benefit payments.
(2) Underfunded registered pension to be wound up in deficit.

If the Claim is contingent or unliquidated, state the basis and provide evidence upon which the Claim has been valued:

A reduction to the monthly pension benefits will occur due to the wind-up of the Indalex registered pension plan in its state of deficit. An actuarial calculation of this loss will be prepared once the loss is finalized

Description of security, if any, granted to the Creditor or assigned by Creditor in respect of the Claim:

Pension/Wage superpriority Charge

Estimated value of security outlined above as at the date of the Claim:

$2,150.00

IF CLAIMANTS REQUIRE ADDITIONAL SPACE THEN PROVIDED HEREIN, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS

A DETAILED, COMPLETE STATEMENT OF ACCOUNT MUST BE ATTACHED TO THE PROOF OF CLAIM WHICH MUST SHOW THE DATE, THE NUMBER AND THE AMOUNT OF EACH INVOICE OR CHARGE, TOGETHER WITH THE DATE, THE NUMBER AND THE AMOUNT OF ALL CREDITS, COUNTERCLAIMS, DISCOUNTS, PAYMENTS, ETC., TO WHICH THE APPLICANTS ARE ENTITLED.

D. PARTICULARS OF ASSIGNEE(S) (IF ANY):

1. Full Legal Name of Assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

_____

(the "Assignee(s)")

Amount of Total Claim Assigned $_____
Amount of Total Claim Not Assigned $_____

Total Amount of Claim $_____
(should equal "Total Claim" as entered on Section B)

2. Full Mailing Address of Assignee(s):

_____

_____

_____

_____

3. Telephone Number of Assignee(s): _____
4. Facsimile Number of Assignee(s): _____
5. Email address of Assignee(s): _____
6. Attention (Contact Person): _____

E. FILING OF CLAIMS:

The duly completed Proof of Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm (Eastern Daylight Savings Time) on August 28, 2009, to the following email address, address or facsimile:

Failure to file your Proof of Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a Claim against the Applicants.

This Proof of Claim must be delivered by email, facsimile transmission, personal delivery, courier or prepaid mail at the following address:

Address of Monitor:

Indalex Limited and/or
Indalex Holdings (B.C.) Ltd. and/or
6326765 Canada Inc. and/or
Novar Inc.
c/o FTI Consulting Canada ULC,
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, Ontario M5J 2S1

Attention: Ms. Rachel Gillespie

Telephone: (416)-572-2476
Facsimile: (416)-572-4068
E-mail: rachel.gillespie@fticonsulting.com

DATED at Toronto this 28 day of August, 2009.

(Signature of Witness)

DESI SKOKLEVA
(Please print name)

(Signature of individual completing this form)

Andrea McKinnon
(Please print name)

Schedule "2"

PROOF OF CLAIM

IN RESPECT OF CLAIMS AGAINST
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,
6326765 CANADA INC. AND NOVAR INC.
(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c., C-36, as amended

A. **PARTICULARS OF CREDITOR**

1. Full Legal Name of Creditor: EUGENE JOHN D'IORIO JR. (the "Creditor").
   *(Full legal or Corporate name should be the name of the original Creditor. **Do not file separate Proofs of Claim by division of the same Creditor.**)*

2. Full Mailing Address of the Creditor:

   C/O KOSKIE MINSKY LLP
   20 QUEEN ST. W.
   SUITE 900, BOX 52
   TORONTO, ON M5H 3R3

3. Telephone Number of Creditor: 416-595-2150 [1]

4. Facsimile Number of Creditor: 416-204-2874 [1]

5. Attention (Contact Person): ANDREA MCKINNON [1]

6. Email address: amckinnon@kmlaw.ca [1]

7. Has the Claim been sold or assigned by Creditor to another party?
   Yes___ No X **(If yes please complete section D)**

---

[1] **IN ORDER TO ENSURE ALL CLAIMS ARE PROCESSED IN AN EXPEDITED MANNER YOU MUST PROVIDE ONE (1) OR MORE OF YOUR TELEPHONE NUMBER, FAX NUMBER OR EMAIL ADDRESS.**

B. **PROOF OF CLAIM:** (on behalf of Eugene John D'Iorio Jr.)

I, KOSKIE MINSKY LLP [Name of Creditor or Representative of the Creditor], do hereby certify:

A) that I am (please check one):

X the Creditor; or
___ hold the following position of _____ of the Creditor

and have personal knowledge of all the circumstances connected with the Claim described herein;

B) The Creditor is owed as follows:

Secured Claim $2,000.00 Cdn on a secured basis, ← priority charge amount
I have valued my security at $2,000.00 (this will be the amount at which you value your secured claim, the difference between the secured claim amount and the value of your security will be the amount of your unsecured claim)

Unsecured Claim ① $490,696.00 Cdn on an unsecured basis ② Value TBD! actuary in respect of a reduction in benefits for the executive Plan

Note: Claims in a foreign currency are to be converted to Canadian dollars at the exchange rate of the Bank of Canada as at the Filing Date, April 3, 2009. For example, the U.S. to Canadian Dollar exchange rate conversion on such date was U.S.$1 = CDN$0.8056).

C. **PARTICULARS OF CLAIM:**

Name of the entity and the amount for each entity which owes the amount claimed:

		Secured	Unsecured
☒	Indalex Limited	① $2,000.00	$490,696.00 ② TBD see above
☒	Indalex Holdings (B.C.) Ltd.	① $2,000.00	$490,696.00 ② TBD see above
☒	6326765 Canada Inc.	① $2,000.00	$490,696.00 ② TBD - See above
☒	Novar Inc	① $2,000.00	$490,696.00 ② TBD - See above.

Description of transaction, agreement or event giving rise or relating to the Claim:

(1) Ceased supplemental pension benefit payments.
(2) Underfunded registered pension to be wound up in deficit.

If the Claim is contingent or unliquidated, state the basis and provide evidence upon which the Claim has been valued:

A reduction to the monthly pension benefits will occur due to the wind-up of the Indalex registered pension plan in its state of deficit. An actuarial calculation of this loss will be prepared once the loss is finalized.

Description of security, if any, granted to the Creditor or assigned by Creditor in respect of the Claim:

Pension Wage super priority Superpriority charge

Estimated value of security outlined above as at the date of the Claim:

$ 4000.00

IF CLAIMANTS REQUIRE ADDITIONAL SPACE THEN PROVIDED HEREIN, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS

A DETAILED, COMPLETE STATEMENT OF ACCOUNT MUST BE ATTACHED TO THE PROOF OF CLAIM WHICH MUST SHOW THE DATE, THE NUMBER AND THE AMOUNT OF EACH INVOICE OR CHARGE, TOGETHER WITH THE DATE, THE NUMBER AND THE AMOUNT OF ALL CREDITS, COUNTERCLAIMS, DISCOUNTS, PAYMENTS, ETC., TO WHICH THE APPLICANTS ARE ENTITLED.

D. **PARTICULARS OF ASSIGNEE(S) (IF ANY):**

1. Full Legal Name of Assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

(the "Assignee(s)")

Amount of Total Claim Assigned $_____
Amount of Total Claim Not Assigned $_____

Total Amount of Claim $_____
(should equal "Total Claim" as entered on Section B)

2. Full Mailing Address of Assignee(s):

3. Telephone Number of Assignee(s): _____
4. Facsimile Number of Assignee(s): _____
5. Email address of Assignee(s): _____
6. Attention (Contact Person): _____

E. FILING OF CLAIMS:

The duly completed Proof of Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm (Eastern Daylight Savings Time) on August 28, 2009, to the following email address, address or facsimile:

Failure to file your Proof of Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a Claim against the Applicants.

This Proof of Claim must be delivered by email, facsimile transmission, personal delivery, courier or prepaid mail at the following address:

Address of Monitor:

Indalex Limited and/or
Indalex Holdings (B.C.) Ltd. and/or
6326765 Canada Inc. and/or
Novar Inc.
c/o FTI Consulting Canada ULC,
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, Ontario M5J 2S1

Attention: Ms. Rachel Gillespie

Telephone: (416)-572-2476
Facsimile: (416)-572-4068
E-mail: rachel.gillespie@fticonsulting.com

DATED at Toronto this 26 day of August, 2009.

(Signature of Witness)

DESI SKORCEVA
(Please print name)

(Signature of individual completing this form)

Andrea M. Kinnon
(Please print name)

Schedule "2"

PROOF OF CLAIM

IN RESPECT OF CLAIMS AGAINST
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,
6326765 CANADA INC. AND NOVAR INC.
(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c., C-36, as amended

A. PARTICULARS OF CREDITOR

1. Full Legal Name of Creditor: JOHN WILLIAM RODNEY. (the "Creditor").
   (Full legal or Corporate name should be the name of the original Creditor. Do not file separate Proofs of Claim by division of the same Creditor.)

2. Full Mailing Address of the Creditor:

   C/O KOSKIE MINSKY LLP
   20 QUEEN ST. W.
   SUITE 900, BOX 52
   TORONTO, ON, CANADA M5H3R3

3. Telephone Number of Creditor: 416. 595. 2150 [1]

4. Facsimile Number of Creditor: 416. 204. 2874 [1]

5. Attention (Contact Person): ANDREA MCKINNON [1]

6. Email address: AMCKINNON@KMLAW.CA [1]

7. Has the Claim been sold or assigned by Creditor to another party?
   Yes___ No X **(If yes please complete section D)**

---

[1] **IN ORDER TO ENSURE ALL CLAIMS ARE PROCESSED IN AN EXPEDITED MANNER YOU MUST PROVIDE ONE (1) OR MORE OF YOUR TELEPHONE NUMBER, FAX NUMBER OR EMAIL ADDRESS.**

B. **PROOF OF CLAIM:** (on behalf of John William Rooney)

I, KOSKIE MINSKY LLP [Name of Creditor or Representative of the Creditor], do hereby certify:

A) that I am (please check one):

X the Creditor; or
___ hold the following position of _____ of the Creditor

and have personal knowledge of all the circumstances connected with the Claim described herein;

B) The Creditor is owed as follows:

Secured Claim $ 2000.00 Cdn on a secured basis, r priority charge
I have valued my security at $ 2,000.00 . (this will be the amount at which you value your secured claim, the difference between the secured claim amount and the value of your security will be the amount of your unsecured claim)

Unsecured Claim ① $ 22,933.00 Cdn on an unsecured basis ② Value TBD by actuary in respect of a reduction in benefits in the executive Plan.

Note: Claims in a foreign currency are to be converted to Canadian dollars at the exchange rate of the Bank of Canada as at the Filing Date, April 3, 2009. For example, the U.S. to Canadian Dollar exchange rate conversion on such date was U.S.$1 = CDN$0.8056).

C. **PARTICULARS OF CLAIM:**

Name of the entity and the amount for each entity which owes the amount claimed:

		Secured	Unsecured	
☒	Indalex Limited	① $2,000.00	$22,933.00 ②	TBD see above
☒	Indalex Holdings (B.C.) Ltd.	① $2,000.00	$22,933.00 ②	TBD See above.
☒	6326765 Canada Inc.	① $2,000.00	$22,933.00 ②	TBD See above.
☒	Novar Inc	① $2,000.00	$22,933.00 ②	TBD See above.

Description of transaction, agreement or event giving rise or relating to the Claim:

(1) ceased supplemental pension benefit payments.
(2) underfunded registered pension to be wound up in deficit.

If the Claim is contingent or unliquidated, state the basis and provide evidence upon which the Claim has been valued:

A reduction to the monthly pension benefits will occur due to the wind up of the Indalex registered pension plan in its state of deficit. An actuarial calculation of this loss will be prepared once the loss is finalized.

Description of security, if any, granted to the Creditor or assigned by Creditor in respect of the Claim:

Pension/Wage superpriority charge

Estimated value of security outlined above as at the date of the Claim:

2,000.00

IF CLAIMANTS REQUIRE ADDITIONAL SPACE THEN PROVIDED HEREIN, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS

A DETAILED, COMPLETE STATEMENT OF ACCOUNT MUST BE ATTACHED TO THE PROOF OF CLAIM WHICH MUST SHOW THE DATE, THE NUMBER AND THE AMOUNT OF EACH INVOICE OR CHARGE, TOGETHER WITH THE DATE, THE NUMBER AND THE AMOUNT OF ALL CREDITS, COUNTERCLAIMS, DISCOUNTS, PAYMENTS, ETC., TO WHICH THE APPLICANTS ARE ENTITLED.

D. **PARTICULARS OF ASSIGNEE(S) (IF ANY):**

1. Full Legal Name of Assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

(the "Assignee(s)")

Amount of Total Claim Assigned $_____
Amount of Total Claim Not Assigned $_____

Total Amount of Claim $_____
(should equal "Total Claim" as entered on Section B)

2. Full Mailing Address of Assignee(s):

3. Telephone Number of Assignee(s):
4. Facsimile Number of Assignee(s):
5. Email address of Assignee(s):
6. Attention (Contact Person):

E. FILING OF CLAIMS:

The duly completed Proof of Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm (Eastern Daylight Savings Time) on August 28, 2009, to the following email address, address or facsimile:

Failure to file your Proof of Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a Claim against the Applicants.

This Proof of Claim must be delivered by email, facsimile transmission, personal delivery, courier or prepaid mail at the following address:

Address of Monitor:

Indalex Limited and/or
Indalex Holdings (B.C.) Ltd. and/or
6326765 Canada Inc. and/or
Novar Inc.
c/o FTI Consulting Canada ULC,
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, Ontario M5J 2S1

Attention: Ms. Rachel Gillespie

Telephone: (416)-572-2476
Facsimile: (416)-572-4068
E-mail: rachel.gillespie@fticonsulting.com

DATED at Toronto this 28 day of August, 2009.

(Signature of Witness)

Desi Skoczora
(Please print name)

(Signature of individual completing this form)

Andrea McKinnon
(Please print name)

Schedule "2"

PROOF OF CLAIM

IN RESPECT OF CLAIMS AGAINST
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,
6326765 CANADA INC. AND NOVAR INC.
(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c., C-36, as amended

A. PARTICULARS OF CREDITOR

1. Full Legal Name of Creditor: JOHN EUGENE FAVERI · (the "Creditor").
   (Full legal or Corporate name should be the name of the original Creditor. Do not file separate Proofs of Claim by division of the same Creditor.)

2. Full Mailing Address of the Creditor:

   C/O KOSKIE MINSKY LLP
   20 QUEEN ST. W.
   SUITE 900, BOX 52
   TORONTO, ON. CANADA, M5H3R3

3. Telephone Number of Creditor: 416. 595. 2150 [1]

4. Facsimile Number of Creditor: 416. 204. 2874 [1]

5. Attention (Contact Person): ANDREA MCKINNON [1]

6. Email address: amckinnon@kmlaw.ca [1]

7. Has the Claim been sold or assigned by Creditor to another party?
   Yes___ No X **(If yes please complete section D)**

---

[1] **IN ORDER TO ENSURE ALL CLAIMS ARE PROCESSED IN AN EXPEDITED MANNER YOU MUST PROVIDE ONE (1) OR MORE OF YOUR TELEPHONE NUMBER, FAX NUMBER OR EMAIL ADDRESS.**

B. **PROOF OF CLAIM:** (on behalf of John Eugene Faveri)

I, KOSKIE MINSKY LLP [Name of Creditor or Representative of the Creditor], do hereby certify:

A) that I am (please check one):

X the Creditor; or
___ hold the following position of _____ of the Creditor

and have personal knowledge of all the circumstances connected with the Claim described herein;

B) The Creditor is owed as follows:

Secured Claim $2000.00 (priority charge) Cdn on a secured basis,
I have valued my security at $2,000.00 (this will be the amount at which you value your secured claim, the difference between the secured claim amount and the value of your security will be the amount of your unsecured claim)

Unsecured Claim (1) $51,114.00 Cdn on an unsecured basis (2) Value TBD by actuary in respect of reduction in benefits to Executive Plan.

Note: Claims in a foreign currency are to be converted to Canadian dollars at the exchange rate of the Bank of Canada as at the Filing Date, April 3, 2009. For example, the U.S. to Canadian Dollar exchange rate conversion on such date was U.S.$1 = CDN$0.8056).

C. **PARTICULARS OF CLAIM:**

Name of the entity and the amount for each entity which owes the amount claimed:

		Secured	Unsecured	
☒	Indalex Limited	$2000.00	$51,114.00	(2) TBD- See above
☒	Indalex Holdings (B.C.) Ltd.	$2000.00	$51,114.00	(2) TBD- See above
☒	6326765 Canada Inc.	$2000.00	$51,114.00	(2) TBD- See above
☒	Novar Inc	$2000.00	$51,114.00	(2) TBD- See above

Description of transaction, agreement or event giving rise or relating to the Claim:

(1) ceased supplemental pension benefit payments.
(2) underfunded registered pension to be wound up in deficit.

If the Claim is contingent or unliquidated, state the basis and provide evidence upon which the Claim has been valued:

A reduction to the monthly pension benefits will occur due to the wind-up of the Indalex registered pension plan in its state of deficit. An actuarial calculation of this loss will be prepared once the loss is finalized.

Description of security, if any, granted to the Creditor or assigned by Creditor in respect of the Claim:

Pension wage superpriority charge -

Estimated value of security outlined above as at the date of the Claim:

$2000.00

IF CLAIMANTS REQUIRE ADDITIONAL SPACE THEN PROVIDED HEREIN, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS

A DETAILED, COMPLETE STATEMENT OF ACCOUNT MUST BE ATTACHED TO THE PROOF OF CLAIM WHICH MUST SHOW THE DATE, THE NUMBER AND THE AMOUNT OF EACH INVOICE OR CHARGE, TOGETHER WITH THE DATE, THE NUMBER AND THE AMOUNT OF ALL CREDITS, COUNTERCLAIMS, DISCOUNTS, PAYMENTS, ETC., TO WHICH THE APPLICANTS ARE ENTITLED.

D. PARTICULARS OF ASSIGNEE(S) (IF ANY):

1. Full Legal Name of Assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

(the "Assignee(s)")

Amount of Total Claim Assigned $_____
Amount of Total Claim Not Assigned $_____

Total Amount of Claim $_____
(should equal "Total Claim" as entered on Section B)

2. Full Mailing Address of Assignee(s):

3. Telephone Number of Assignee(s):
4. Facsimile Number of Assignee(s):
5. Email address of Assignee(s):
6. Attention (Contact Person):

E. FILING OF CLAIMS:

The duly completed Proof of Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm (Eastern Daylight Savings Time) on August 28, 2009, to the following email address, address or facsimile:

Failure to file your Proof of Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a Claim against the Applicants.

This Proof of Claim must be delivered by email, facsimile transmission, personal delivery, courier or prepaid mail at the following address:

Address of Monitor:

Indalex Limited and/or
Indalex Holdings (B.C.) Ltd. and/or
6326765 Canada Inc. and/or
Novar Inc.
c/o FTI Consulting Canada ULC,
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, Ontario M5J 2S1

Attention: Ms. Rachel Gillespie

Telephone: (416)-572-2476
Facsimile: (416)-572-4068
E-mail: rachel.gillespie@fticonsulting.com

DATED at Toronto. this 26 day of August., 2009.

(Signature of Witness)

Desi' Skocevia
(Please print name)

(Signature of individual completing this form)

Andrea McKinnon.
(Please print name)

Schedule "2"

PROOF OF CLAIM

IN RESPECT OF CLAIMS AGAINST
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,
6326765 CANADA INC. AND NOVAR INC.
(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c., C-36, as amended

A. **PARTICULARS OF CREDITOR**

1. Full Legal Name of Creditor: RICHARD DONALD SMITH (the "Creditor").
   (Full legal or Corporate name should be the name of the original Creditor. Do not file separate Proofs of Claim by division of the same Creditor.)

2. Full Mailing Address of the Creditor:

   c/o KOSKIE MINSKY LLP
   20 QUEEN ST. W.
   SUITE 900, BOX 52
   TORONTO, ON CANADA M5H3R3

3. Telephone Number of Creditor: 416.595.2150 [1]

4. Facsimile Number of Creditor: 416.204.2874 [1]

5. Attention (Contact Person): ANDREA MCKINNAN [1]

6. Email address: amckinnon@kmlaw.ca [1]

7. Has the Claim been sold or assigned by Creditor to another party?
   Yes___ No X (If yes please complete section D)

---

[1] **IN ORDER TO ENSURE ALL CLAIMS ARE PROCESSED IN AN EXPEDITED MANNER YOU MUST PROVIDE ONE (1) OR MORE OF YOUR TELEPHONE NUMBER, FAX NUMBER OR EMAIL ADDRESS.**

B. **PROOF OF CLAIM:** (on behalf of Richard Donald Smith)

I, KOSKIE MINSKY LLP [Name of Creditor or Representative of the Creditor], do hereby certify:

A) that I am (please check one):

X the Creditor; or
___ hold the following position of _____ of the Creditor

and have personal knowledge of all the circumstances connected with the Claim described herein;

B) The Creditor is owed as follows:

Secured Claim $2000.00 Cdn on a secured basis,
I have valued my security at $2,000.00 (this will be the amount at which you value your secured claim, the difference between the secured claim amount and the value of your security will be the amount of your unsecured claim)

Unsecured Claim (1) $1,367,409.00 Cdn on an unsecured basis (2) Value TBD by actuary in respect of a reduction in benefits from Executive Plc

Note: Claims in a foreign currency are to be converted to Canadian dollars at the exchange rate of the Bank of Canada as at the Filing Date, April 3, 2009. For example, the U.S. to Canadian Dollar exchange rate conversion on such date was U.S.$1 = CDN$0.8056).

C. **PARTICULARS OF CLAIM:**

Name of the entity and the amount for each entity which owes the amount claimed:

		Secured	Unsecured
☒	Indalex Limited	(1) $2,000.00	$1,367,409.00 (2) TBD See above
☒	Indalex Holdings (B.C.) Ltd.	(1) $2,000.00	$1,367,409.00 (2) TBD See above
☒	6326765 Canada Inc.	(1) $2,000.00	$1,367,409.00 (2) TBD See above
☒	Novar Inc	(1) $2,000.00	$1,367,409.00 (2) TBD See above.

Description of transaction, agreement or event giving rise or relating to the Claim:

(1) ceased supplemental pension benefit payments
(2) underfunded registered pension to be wound up in deficit.

If the Claim is contingent or unliquidated, state the basis and provide evidence upon which the Claim has been valued:

A reduction to the monthly pension benefits will occur due to the wind-up of the Indalex registered pension plan in its state of deficit. An actuarial calculation of this loss will be prepared once the loss is finalized

Description of security, if any, granted to the Creditor or assigned by Creditor in respect of the Claim:

Pension/wage superpriority charge.

Estimated value of security outlined above as at the date of the Claim:

$2,000.00.

IF CLAIMANTS REQUIRE ADDITIONAL SPACE THEN PROVIDED HEREIN, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS

A DETAILED, COMPLETE STATEMENT OF ACCOUNT MUST BE ATTACHED TO THE PROOF OF CLAIM WHICH MUST SHOW THE DATE, THE NUMBER AND THE AMOUNT OF EACH INVOICE OR CHARGE, TOGETHER WITH THE DATE, THE NUMBER AND THE AMOUNT OF ALL CREDITS, COUNTERCLAIMS, DISCOUNTS, PAYMENTS, ETC., TO WHICH THE APPLICANTS ARE ENTITLED.

D. PARTICULARS OF ASSIGNEE(S) (IF ANY):

1. Full Legal Name of Assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

_____

(the "Assignee(s)")

Amount of Total Claim Assigned $_____
Amount of Total Claim Not Assigned $_____

Total Amount of Claim $_____
(should equal "Total Claim" as entered on Section B)

2. Full Mailing Address of Assignee(s):

_____

_____

_____

_____

3. Telephone Number of Assignee(s): _____
4. Facsimile Number of Assignee(s): _____
5. Email address of Assignee(s): _____
6. Attention (Contact Person): _____

E. FILING OF CLAIMS:

The duly completed Proof of Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm (Eastern Daylight Savings Time) on August 28, 2009, to the following email address, address or facsimile:

Failure to file your Proof of Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a Claim against the Applicants.

This Proof of Claim must be delivered by email, facsimile transmission, personal delivery, courier or prepaid mail at the following address:

Address of Monitor:

Indalex Limited and/or
Indalex Holdings (B.C.) Ltd. and/or
6326765 Canada Inc. and/or
Novar Inc.
c/o FTI Consulting Canada ULC,
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, Ontario M5J 2S1

Attention: Ms. Rachel Gillespie

Telephone: (416)-572-2476
Facsimile: (416)-572-4068
E-mail: rachel.gillespie@fticonsulting.com

DATED at Toronto this 28 day of August, 2009.

(Signature of Witness)

(Please print name)

(Signature of individual completing this form)

Andrea McKinnon
(Please print name)

Schedule "2"

PROOF OF CLAIM

IN RESPECT OF CLAIMS AGAINST
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,
6326765 CANADA INC. AND NOVAR INC.
(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c., C-36, as amended

A. PARTICULARS OF CREDITOR

1. Full Legal Name of Creditor: NEIL EDWARD FRASER (the "Creditor").
   (Full legal or Corporate name should be the name of the original Creditor. Do not file separate Proofs of Claim by division of the same Creditor.)

2. Full Mailing Address of the Creditor:

   c/o KOSKIE MINSKY LLP
   20 QUEEN ST. W.
   SUITE 900, BOX 52
   TORONTO, ON. CANADA M5H 3R3

3. Telephone Number of Creditor: 416.595.2150 [1]

4. Facsimile Number of Creditor: 416.204.2874 [1]

5. Attention (Contact Person): ANDREA MCKINNON [1]

6. Email address: amckinnon@kmlaw.ca [1]

7. Has the Claim been sold or assigned by Creditor to another party?
   Yes___ No X **(If yes please complete section D)**

---

[1] **IN ORDER TO ENSURE ALL CLAIMS ARE PROCESSED IN AN EXPEDITED MANNER YOU MUST PROVIDE ONE (1) OR MORE OF YOUR TELEPHONE NUMBER, FAX NUMBER OR EMAIL ADDRESS.**

B. **PROOF OF CLAIM:** (on behalf of Neil Edward Fraser).

I, KOSKIE MINSKY LLP [Name of Creditor or Representative of the Creditor], do hereby certify:

A) that I am (please check one):

X the Creditor; or
___ hold the following position of _____ of the Creditor

and have personal knowledge of all the circumstances connected with the Claim described herein;

B) The Creditor is owed as follows:

Secured Claim $2000.00 Cdn on a secured basis, r priority charge
I have valued my security at $2,000 (this will be the amount at which you value your secured claim, the difference between the secured claim amount and the value of your security will be the amount of your unsecured claim)

Unsecured Claim $505,879.00 Cdn on an unsecured basis (2) Value TBD by actuary in respect reduction in benefits from Executive Plan.

Note: Claims in a foreign currency are to be converted to Canadian dollars at the exchange rate of the Bank of Canada as at the Filing Date, April 3, 2009. For example, the U.S. to Canadian Dollar exchange rate conversion on such date was U.S.$1 = CDN$0.8056).

C. **PARTICULARS OF CLAIM:**

Name of the entity and the amount for each entity which owes the amount claimed:

		Secured	Unsecured
☒	Indalex Limited	(1) $2,000.00	$505,879.00 (2) TBD- See abv
☒	Indalex Holdings (B.C.) Ltd.	(1) $2,000.00	$505,879.00 (2) TBD- See abv
☒	6326765 Canada Inc.	(1) $2,000.00	$505,879.00 (2) TBD- See abv
☒	Novar Inc	(1) $2,000.00	$505,879.00 (2) TBD- See above

Description of transaction, agreement or event giving rise or relating to the Claim:

(1) Ceased supplemental pension benefit payments
(2) Underfunded registered pension to be wound up in deficit.

If the Claim is contingent or unliquidated, state the basis and provide evidence upon which the Claim has been valued:

A reduction to the monthly pension benefits will occur due to the wind-up of the Indalex registered pension plan in its state of deficit. An actuarial calculation of this loss will be prepared once the loss is finalized.

Description of security, if any, granted to the Creditor or assigned by Creditor in respect of the Claim:

Pension/Wage super priority charge.

Estimated value of security outlined above as at the date of the Claim:

$ 2,000.00 .

IF CLAIMANTS REQUIRE ADDITIONAL SPACE THEN PROVIDED HEREIN, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS

A DETAILED, COMPLETE STATEMENT OF ACCOUNT MUST BE ATTACHED TO THE PROOF OF CLAIM WHICH MUST SHOW THE DATE, THE NUMBER AND THE AMOUNT OF EACH INVOICE OR CHARGE, TOGETHER WITH THE DATE, THE NUMBER AND THE AMOUNT OF ALL CREDITS, COUNTERCLAIMS, DISCOUNTS, PAYMENTS, ETC., TO WHICH THE APPLICANTS ARE ENTITLED.

D. PARTICULARS OF ASSIGNEE(S) (IF ANY):

1. Full Legal Name of Assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

(the "Assignee(s)")

Amount of Total Claim Assigned $_____
Amount of Total Claim Not Assigned $_____

Total Amount of Claim $_____
(should equal "Total Claim" as entered on Section B)

2. Full Mailing Address of Assignee(s):

3. Telephone Number of Assignee(s): _____
4. Facsimile Number of Assignee(s): _____
5. Email address of Assignee(s): _____
6. Attention (Contact Person): _____

E. FILING OF CLAIMS:

The duly completed Proof of Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm (Eastern Daylight Savings Time) on August 28, 2009, to the following email address, address or facsimile:

Failure to file your Proof of Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a Claim against the Applicants.

This Proof of Claim must be delivered by email, facsimile transmission, personal delivery, courier or prepaid mail at the following address:

Address of Monitor:

Indalex Limited and/or
Indalex Holdings (B.C.) Ltd. and/or
6326765 Canada Inc. and/or
Novar Inc.
c/o FTI Consulting Canada ULC,
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, Ontario M5J 2S1

Attention: Ms. Rachel Gillespie

Telephone: (416)-572-2476
Facsimile: (416)-572-4068
E-mail: rachel.gillespie@fticonsulting.com

DATED at Toronto this 28 day of August, 2009.

(Signature of Witness)

Desi Skaklova
(Please print name)

(Signature of individual completing this form)

Andrea McKimon.
(Please print name)

Schedule "2"

PROOF OF CLAIM

IN RESPECT OF CLAIMS AGAINST
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD.,
6326765 CANADA INC. AND NOVAR INC.
(collectively, the "Applicants")

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c., C-36, as amended

A. PARTICULARS OF CREDITOR

1. Full Legal Name of Creditor: ROBERT KENNETH WALDRON (the "Creditor").
   (Full legal or Corporate name should be the name of the original Creditor. Do not file separate Proofs of Claim by division of the same Creditor.)

2. Full Mailing Address of the Creditor:

   c/o KOSKIE MINSKY LLP
   20 QUEEN ST. W.
   SUITE 900, BOX 52
   TORONTO, ON, CANADA M5H3R3

3. Telephone Number of Creditor: 416. 595. 2150 [1]

4. Facsimile Number of Creditor: 416. 204. 2874 [1]

5. Attention (Contact Person): ANDREA MCKINNON [1]

6. Email address: amckinnon@kmlaw.ca [1]

7. Has the Claim been sold or assigned by Creditor to another party?
   Yes___ No X **(If yes please complete section D)**

---

[1] **IN ORDER TO ENSURE ALL CLAIMS ARE PROCESSED IN AN EXPEDITED MANNER YOU MUST PROVIDE ONE (1) OR MORE OF YOUR TELEPHONE NUMBER, FAX NUMBER OR EMAIL ADDRESS.**

B. **PROOF OF CLAIM:** (on behalf of Robert Kenneth Waldron)

I, KOSKIE MINSKY LLP [Name of Creditor or Representative of the Creditor], do hereby certify:

A) that I am (please check one):

X the Creditor; or
___ hold the following position of _____ of the Creditor

and have personal knowledge of all the circumstances connected with the Claim described herein;

B) The Creditor is owed as follows:

Secured Claim $2000.00 Cdn on a secured basis, (priority charge)
I have valued my security at $2,000.00 (this will be the amount at which you value your secured claim, the difference between the secured claim amount and the value of your security will be the amount of your unsecured claim)

Unsecured Claim (1) $357,138.00 Cdn on an unsecured basis (2) Value TBD by actuary in respect of reduction benefits from executive Plan.

Note: Claims in a foreign currency are to be converted to Canadian dollars at the exchange rate of the Bank of Canada as at the Filing Date, April 3, 2009. For example, the U.S. to Canadian Dollar exchange rate conversion on such date was U.S.$1 = CDN$0.8056).

C. **PARTICULARS OF CLAIM:**

Name of the entity and the amount for each entity which owes the amount claimed:

		Secured	Unsecured	
☒	Indalex Limited	(1) $2000.00	$357,138.00	(2) Value TBD by actuary
☒	Indalex Holdings (B.C.) Ltd.	(1) $2,000.00	$357,138.00	(2) TBD- See ab
☒	6326765 Canada Inc.	(1) $2,000.00	$357,138.00	(2) TBD- See ab
☒	Novar Inc	(1) $2,000.00	$357,138.00	(2) TBD- See abo

Description of transaction, agreement or event giving rise or relating to the Claim:

(1) Ceased supplemental pension benefit payments
(2) underfunded registered pension to be wound up in deficit.

If the Claim is contingent or unliquidated, state the basis and provide evidence upon which the Claim has been valued:

A reduction to the monthly pension benefits will occur due to the wind-up of the Indalex registered pension plan in its state of deficit. An actuarial calculation of this loss will be prepared once the loss is finalized.

Description of security, if any, granted to the Creditor or assigned by Creditor in respect of the Claim:

Pension / wage Superpriority charge.

Estimated value of security outlined above as at the date of the Claim:

$ 2000.00 .

IF CLAIMANTS REQUIRE ADDITIONAL SPACE THEN PROVIDED HEREIN, PLEASE ATTACH A SCHEDULE HERETO. CLAIMANTS SHOULD ALSO PROVIDE COPIES OF ALL RELEVANT AGREEMENTS

A DETAILED, COMPLETE STATEMENT OF ACCOUNT MUST BE ATTACHED TO THE PROOF OF CLAIM WHICH MUST SHOW THE DATE, THE NUMBER AND THE AMOUNT OF EACH INVOICE OR CHARGE, TOGETHER WITH THE DATE, THE NUMBER AND THE AMOUNT OF ALL CREDITS, COUNTERCLAIMS, DISCOUNTS, PAYMENTS, ETC., TO WHICH THE APPLICANTS ARE ENTITLED.

D. PARTICULARS OF ASSIGNEE(S) (IF ANY):

1. Full Legal Name of Assignee(s) of Claim (if all or a portion of the Claim has been sold). If there is more than one assignee, please attach separate sheets with the following information:

(the "Assignee(s)")

Amount of Total Claim Assigned $_____
Amount of Total Claim Not Assigned $_____

Total Amount of Claim $_____
(should equal "Total Claim" as entered on Section B)

2. Full Mailing Address of Assignee(s):

3. Telephone Number of Assignee(s):
4. Facsimile Number of Assignee(s):
5. Email address of Assignee(s):
6. Attention (Contact Person):

E. FILING OF CLAIMS:

The duly completed Proof of Claim together with supporting documentation must be returned and received by the Monitor, no later than 5:00 pm (Eastern Daylight Savings Time) on August 28, 2009, to the following email address, address or facsimile:

Failure to file your Proof of Claim by such date will result in your claim being forever extinguished and barred and you will be prohibited from making or enforcing a Claim against the Applicants.

This Proof of Claim must be delivered by email, facsimile transmission, personal delivery, courier or prepaid mail at the following address:

Address of Monitor:

Indalex Limited and/or
Indalex Holdings (B.C.) Ltd. and/or
6326765 Canada Inc. and/or
Novar Inc.
c/o FTI Consulting Canada ULC,
TD Canada Trust Tower
161 Bay Street, 27th Floor
Toronto, Ontario M5J 2S1

Attention: Ms. Rachel Gillespie

Telephone: (416)-572-2476
Facsimile: (416)-572-4068
E-mail: rachel.gillespie@fticonsulting.com

DATED at Toronto, this 28 day of August, 2009.

(Signature of Witness)

Desi Sekelova
(Please print name)

(Signature of individual completing this form)

Andrea McKinnon
(Please print name)

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

MOTION RECORD
(RETURNABLE JULY 24, 2013 ADVICE AND DIRECTIONS)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Ontario M5L 1B9

Ashley John Taylor LSUC #: 39932E
Tel: (416) 869-5236
Lesley Mercer LSUC #: 54491E
Tel: (416) 869-6859
Fax: (416) 947-0866

Lawyers for the Monitor