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 GEORGE L. MILLER, THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES OF THE US INDALEX DEBTORS

(Monitor's motion for advice and directions returnable July 24, 2013)

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1. This Reply Factum will respond to the arguments raised by the USW[1], the Retired Executives, FSCO, and the Pension Administrators (who have adopted the written submissions of FSCO) (collectively the "**Opposing Parties**") in opposing the US Trustee's claim to recover interest and costs in respect of the DIP Loan in priority to all claims, other than any claims secured by the Directors' Charge (up to a maximum of US$1.0 million). The opposing arguments can be summarized as follows:

(a) the claim is barred pursuant to the terms of the Claims Procedure Order, as the US Trustee did not file a proof of claim with the Monitor prior to the claims bar date of August 28, 2009 (the "**Claims Bar Date**");

(b) the US Trustee cannot rely on the DIP Lenders Charge as the US Trustee and Indalex Holding Corp. ("**Indalex US**") are not included in the definitions of "DIP

[1] All capitalized terms used and not otherwise defined herein shall have the meanings ascribed to such terms in the Twenty-First Report of the Monitor dated June 21, 2013 ("**Twenty-First Report**").

Agent" and "DIP Lenders" under the Amended Amended and Restated Initial Order;

(c) the doctrines of cause of action estoppel, issue estoppel, and abuse of process prohibit the US Trustee from recovering interest and costs;

(d) the US Trustee should not be subrogated to the rights and remedies of the DIP Lenders as Indalex US does not have "clean hands";

(e) the doctrine of equitable subordination should be applied to subordinate the US Trustee's claim to recover interest and costs to the deemed trust claims of the Retired Executives and the USW; and

(f) paragraph 14 of the Approval and Vesting Order limits the subrogated claim of Indalex US to the amount actually paid by Indalex US to the DIP Lenders, and as such precludes any claim to recover interest and costs.

A. The Claims Procedure Order Does Not Apply to the US Trustee's Claim

2. The Claims Procedure Order was granted by Justice Morawetz in the CCAA Proceedings on July 30, 2009. The Claims Procedure Order provides that a person wishing to assert a claim against the Applicants was required to file a proof of claim with the Monitor by the Claims Bar Date, failing which the person would be forever barred from asserting or enforcing such a claim against the Applicants. Paragraphs 7 and 8 of the Claims Procedure Order state:

> 7. THIS COURT ORDERS that any Person that wishes to assert a Claim must file a Proof of Claim, together with all relevant supporting documentation in respect of such Claim, so that such Proof of Claim is received by the Monitor by no later than the Claims Bar Date.
>
> 8. THIS COURT ORDERS that any Person who does not deliver a Proof of Claim in respect of a Claim to the Monitor by the Claims Bar Date shall be forever barred from asserting or enforcing such Claim against the Applicants and the Applicants shall not have any liability whatsoever in respect of such Claim and such Claim shall be extinguished.

Motion Record of the Retirees, Tab 3 – Claims Procedure Order dated July 30, 2009.

3. The Opposing Parties take the position that, as the US Trustee did not file a proof of claim prior to the Claims Bar Date, the US Trustee's claim is barred and leave should not be granted by the CCAA Court to permit the US Trustee to file a late claim.

4. The US Trustee submits that the Claims Procedure Order does not preclude its recovery of interest and costs since it is a claim secured by a Court-ordered charge.

5. The term "Claim" is defined in the Claims Procedure Order to specifically exclude any claim that is secured by a Court-ordered charge granted in the CCAA Proceedings. Paragraph 2(b) of the Claims Procedure Order states:

> "Claim" means any right or claim, other than any claim secured by the Charges created by the Initial Order, of any Person, against any of the Applicants, whether or not asserted, in connection with any indebtedness, liability or obligation of any kind, that exists as at the Filing Date, or which has arisen subsequent to the Filing Date and constitutes a claim for damages or has arisen as a result of the termination or repudiation of an executory contract (including employment contracts), pension plans, or lease by the Applicants...
>
> **Motion Record of the Retirees, Tab 3 – Claims Procedure Order dated July 30, 2009.**

6. The US Trustee's claim to recover interest and costs arises as a result of the amount paid by Indalex US to the DIP Lenders under its guarantee. The US Trustee's claim is based on Indalex US' right to be subrogated to all of the DIP Lenders' rights, benefits and securities against the Applicants, which includes the DIP Lenders Charge. As the US Trustee's subrogated claim is secured by a Court-ordered charge, it does not fall within the definition of "Claim" under the Claims Procedure Order, and thus the Claims Procedure Order does not apply.

7. The USW and the Retired Executives have referred to case law that sets out the factors that a court is to take into account when considering a party's request for leave to file a late claim following the expiry of a claims bar date. The US Trustee submits that the issue of whether the US Trustee is entitled to file a claim in the Claims Procedure is not before the Court on this motion. The US Trustee has not brought a motion for leave to file a claim, as its position is that its claim to recover interest and costs is not a "Claim" under the Claims Procedure Order. As a

result, the US Trustee will not be addressing the arguments and case law put forth by the USW and the Retired Executives on late filed claims.

B. The US Trustee is Subrogated to the Rights of the DIP Lenders

8. The USW, FSCO and the Pension Administrators argue that the US Trustee cannot rely on the DIP Lenders Charge in support of its claim as the US Trustee and Indalex US are not included in the definitions of DIP Agent and DIP Lenders in the Amended Amended and Restated Initial Order.

9. The US Trustee submits that this position has no merit and should be dismissed as it fails to recognize that the US Trustee's claim to recover interest and costs in priority to other creditors and rely on the DIP Lenders Charge is based on Indalex US' legal right of subrogation to "stand in the shoes" of the DIP Lenders in recovering the DIP Loan from the Applicants.

10. As explained in paragraphs 29 through 38 of the US Trustee's responding factum, the US Trustee is entitled, through the doctrine of subrogation and pursuant to the *Mercantile Law Amendment Act*, to stand in the shoes of the DIP Lenders and to receive all rights, benefits and securities held by the DIP Lenders in connection with the DIP Loan, which includes the DIP Lenders Charge.

11. As a result, the fact that the US Trustee and Indalex US are not included in the definitions of DIP Agent and DIP Lenders is to be expected and does not prevent the US Trustee from asserting a subrogated claim for interest and costs as secured by the DIP Lenders Charge.

C. The US Trustee is not Estopped from Claiming to Recover Interest and Costs

12. The Retired Executives and the USW take the position that the US Trustee is estopped from recovering interest and costs as it did not claim interest or costs in any of the prior proceedings that culminated in the SCC Decision. The Opposing Parties refer to documents filed by the US Trustee in connection with the appeals before the Court of Appeal for Ontario (the "**Court of Appeal**") and the Supreme Court of Canada (the "**Supreme Court**") and argue that such documents limit the US Trustee's claim to only the "Guarantee Payment" under the Approval and Vesting Order. The Opposing Parties have also claimed that the US Trustee had

the opportunity to raise the issue of interest and costs in the appeals, and is barred from doing so now as a result of the doctrines of cause of action estoppel, issue estoppel, and abuse of process.

13. The US Trustee submits that it is not estopped from claiming to recover interest and costs and that the doctrines of cause of action estoppel, issue estoppel, and abuse of process are not applicable to the case at bar for the following reasons:

(a) the issues before the courts did not include the quantum of the claim of the US Trustee;

(b) cause of action estoppel is not applicable as the US Trustee's claim to recover interest and costs is separate and distinct from, and did not properly belong among, the priority issues previously determined by the courts;

(c) issue estoppel is not applicable as the question as to the quantum of the claim of the US Trustee was not before the CCAA Court, the Court of Appeal or the Supreme Court; and

(d) abuse of process is not applicable as the US Trustee has not brought multiple proceedings to obtain the same relief.

(a) Issues Before the Courts did Not Include Quantum of the Claim of the US Trustee

14. The order appealed by the Opposing Parties to the Court of Appeal stems from the Applicants' motion returnable before the CCAA Court on July 20, 2009 seeking an order approving the Sapa Transaction, vesting the assets in the purchaser, and approving an interim distribution of sale proceeds to the DIP Lenders.

> **Responding Motion Record of the US Trustee, Tab 1 - Affidavit of Sam Rappos sworn July 5, 2013 ("Rappos Affidavit"), Exhibit "F" – Motion Record of the Applicants dated June 18, 2009.**

15. At the July 20, 2009 hearing, the Retired Executives and the USW asserted PBA deemed trust claims over the Canadian sale proceeds from the Sapa Transaction in priority to any claim secured by the DIP Lenders Charge. Justice Campbell approved the sale transaction, ordered the

Monitor to retain a reserve with respect to the deemed trust claims, and ordered an expedited hearing process on the deemed trust claims asserted by the Retired Executives and the USW.

Motion Record of the Monitor, Tab 2, Twenty-First Report, Appendix "F" – February 18 Decision, paras. 8-16.

16. The July 20, 2009 motion did not involve a determination of the amount the DIP Lenders were entitled to be paid with respect to the DIP Loan.

17. There were three motions argued before Justice Campbell on August 28, 2009. One of the motions was brought by the Applicants for a lifting of the CCAA stay to permit the Applicants to file assignments in bankruptcy. That motion is not relevant to the current motion before the CCAA Court. The second motion was the motion of the Retired Executives for:

> 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; and
>
> 5. An Order, if necessary, lifting the stay of proceedings to allow any of the foregoing Orders to be made.

Twenty-First Report, para. 49.

18. The third motion was a motion by the USW seeking:

> (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;".

Twenty-First Report, para. 55.

19. In the February 18 Decision, Justice Campbell summarized the issues before the CCAA Court as follows:

> 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*?

Twenty-First Report, Appendix "F" – February 18 Decision.

20. The February 18 Decision was appealed by the Retired Executives and the USW to the Court of Appeal. In the CA Decision, Justice Gillese stated that:

> 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…
>
> The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

Twenty-First Report, Appendix "K" – CA Decision, paras. 76 and 79.

21. The CA Decision was appealed by the US Trustee, the Monitor and Sun Indalex to the Supreme Court. In the SCC Decision, Justice Deschamps identified the following four issues as being raised in the appeal:

> 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?

Twenty-First Report, Appendix "L" – SCC Decision, para. 25.

22. Justice Cromwell identified the issues before the Supreme Court as follows:

> 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?
>
> 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?
>
> 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?
>
> D. Fourth Issue: Did the Court of Appeal Err in its Cost Endorsement Respecting the USW?

Twenty-First Report, Appendix "L" – SCC Decision, paras. 115-116, 178-179, and 240-242.

23. The US Trustee submits that the issue of the amount owed by the Applicants to Indalex US on account of its payment to the DIP Lenders under its guarantee was in no way before the CCAA Court on the motions returnable on July 20, 2009 and August 28, 2009, or in the appeals before the Court of Appeal and the Supreme Court.

(b) Cause of Action Estoppel is Not Applicable to the US Trustee's Claim

24. The Retired Executives and the USW argue that the US Trustee's claim is barred by the doctrine of cause of action estoppel. These parties argue that cause of action estoppel extends to every point which properly belonged to the subject of the litigation or could have been decided had they been brought before the court.

25. The US Trustee submits that cause of action estoppel does not apply to its claim to recover interest and costs. The US Trustee is in no way attempting to re-open prior litigation. As set out above, the issues previously litigated dealt with the scope and priority of deemed trusts under the PBA and the priority between the deemed trusts and the DIP Lenders Charge. The Supreme Court ultimately held that the DIP Lenders Charge had priority over the PBA deemed trusts, to the extent they existed.

26. The issue of the scope and priority of the deemed trusts and the priority dispute between the deemed trusts and the DIP Lenders Charge is separate and distinct from the issue of the quantum of the claims of the creditors, and did not properly belong to the subject of the priority dispute between competing claims.

27. In *Hoque v. Montreal Trust Co. of Canada*, Justice Cromwell, writing for the Nova Scotia Court of Appeal, determined that the language used in cases on cause of action estoppel to the effect that any matter which the parties had the opportunity to raise will be barred was "too wide", and held that:

> The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct

> causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

***Hoque v. Montreal Trust Co. of Canada*, 1997 CarswellNS 427 (C.A.), para. 38.**

28. The Applicants' motion on July 20, 2009 was seeking authorization to make an interim (not final) distribution to the DIP Lenders. Due to the reserves that the Monitor was required to maintain, the interim distribution was for an amount that was insufficient to pay the Applicants' principal obligations to the DIP Lenders, let alone to pay interest and costs. The final amount payable to the DIP Lenders was not before the Court, and its (or the US Trustee as subrogee) right to interest and costs was not a matter raised or required to be raised at that time.

(c) Issue Estoppel is Not Applicable to the US Trustee's Claim

29. The Retired Executives take the position that the US Trustee's claim is barred by the doctrine of issue estoppel. The Retired Executives cite the three preconditions for issue estoppel identified by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, which are set out in the decision as follows:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

***Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, para. 25.**

30. The Retired Executives argue that all three preconditions are satisfied in the case at bar.

31. The US Trustee submits that the first precondition is not satisfied. The current motion deals with the quantum of the US Trustee's claim against the Applicants. At no time was the quantum of the US Trustee's claim at issue before the CCAA Court, the Court of Appeal or the Supreme Court. The issues before the Court of Appeal and Supreme Court were whether the PBA deemed trusts applied to the wind-up deficiencies, and, if so, whether the DIP Lenders Charge should stand in priority to the PBA deemed trusts.

32. The Retired Executives also argue that on this motion the CCAA Court does not have jurisdiction to determine whether the US Trustee is entitled to costs, as the Supreme Court held that all parties were to bear their own costs in the appeals before the Court of Appeal and the Supreme Court. The US Trustee submits that the finding of the Supreme Court on costs does not preclude the US Trustee as subrogee from recovering interest and costs from the Applicants under the DIP Documents. The Amended Amended and Restated Initial Order provides that the amounts secured by the DIP Lenders Charge is the amount owed to the DIP Lenders under the DIP Documents, which includes principal, interest, and fees. Paragraphs 38 and 39 of the Amended Amended and Restated Initial Order state:

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

Rappos Affidavit, Tab 2 – Amended Amended and Restated Initial Order.

33. As a result, the US Trustee submits that the doctrine of issue estoppel is not applicable to the case at bar and that the CCAA Court has jurisdiction to determine whether the US Trustee is entitled to recover interest and costs from the Applicants as subrogee of the DIP Lenders rights, benefits and securities under the DIP Documents and the DIP Lenders Charge.

(d) The US Trustee's Claim is Not an Abuse of Process

34. The Retired Executives take the position that the US Trustee's claim should be denied as it is an abuse of process to not raise the issue of its entitlement to recover interest and costs prior to April 2013. The Retired Executives cite the decision of Justice Henry in *Heather's House of Fashion Inc.* in support of its abuse of process argument.

35. The US Trustee submits that the facts in *Heather's House of Fashion Inc.* are distinguishable, as the trustee in that case was bringing multiple proceedings in an attempt to obtain the same result, i.e. that a debenture be declared void as against the trustee.

36. The US Trustee submits that the issues before the CCAA Court, the Court of Appeal and the Supreme Court in no way dealt with the quantum of the US Trustee's claim, and so this is not a situation where a party has brought multiple proceedings to obtain the same relief. The doctrine of abuse of process has no application to the case at bar.

D. The "Clean Hands" Doctrine Does Not Apply

37. The USW takes the position that Indalex US as guarantor should not be entitled to be subrogated to the rights, remedies and securities of the DIP Lenders against the Applicants as the doctrine of subrogation is an equitable doctrine that is only available to a party that comes to court with "clean hands".

38. The USW argues that Indalex US was forced to guarantee the obligations of the Applicants under the DIP Credit Agreement as a result of its "illegal actions surrounding the ongoing administration of the MSA and the dividend payments to Sun and its affiliates." The USW also argues that "[i]t is not open to the US Trustee to deny in a CCAA proceeding what it has actively asserted as improper behavior in the US proceeding." In support of its argument, the USW puts forth a complaint issued by the US Trustee and a memorandum of law and exhibits filed by the US Trustee in response to the defendants' motion for summary judgment.

39. The US Trustee, as the legal representative of the creditors of the US Debtors, commenced a complaint in Delaware against certain shareholders, former officers, directors and employees of the US Debtors (collectively, the "**US Defendants**") in July 2010. The US

Debtors are not defendants under the complaint. The US Trustee's complaint against the US Defendants:

(a) seeks to recover dividends that were issued on June 1, 2007, almost two (2) years prior to the commencement of the CCAA Proceedings, on the basis that they constituted fraudulent transfers;

(b) seeks to recover amounts representing certain management fees, transaction fees and expense reimbursements paid in 2007 and 2008, on the basis that they were fraudulent and/or preferential transfers;

(c) requests the return of certain payments made to certain Sun entities post-petition;

(d) requests that certain funds received by the US Debtors from certain Sun entities be re-characterized as equity instead of debt;

(e) requests that the claims of certain Sun entities be subordinated to the claims of the unsecured creditors of the US Debtors; and

(f) claims that certain actions of certain of the US Defendants constituted breaches of fiduciary duty and the duty of loyalty.

40. The complaint filed by the US Trustee does not in any way:

(a) allege wrongdoing on the part of the US Debtors;

(b) seek any relief against the US Debtors;

(c) make any reference to the DIP Credit Agreement or the DIP Loan; and

(d) draw any connection between the alleged improper activities of the US Defendants and the granting of the DIP Credit Agreement and the guarantee of Indalex US with respect to the Applicants' obligations under the DIP Credit Agreement.

41. The USW cites the cases of *Gerrow v. Dorais* and *N'Amerix Logistics Inc. (Re)* in support of the principle that the right of a party to the equitable doctrine of subrogation will depend on whether the party comes to court with clean hands.

42. In *Gerrow v. Dorais*, Manderscheid J. considers the decision of the British Columbia Court of Appeal in *De Jesus v. Shariff* and the conduct of a party that would justify a Court refusing to apply the doctrine of subrogation. Manderscheid J. cited the following passage from *The Principles of Equitable Relief*, which was cited by the B.C. Court of Appeal:

> ...it must be shown, in order to justify a refusal of relief, that there is such an "immediate and necessary relation" between the relief sought and the delinquent behaviour in question that it would be unjust to grant that particular relief. ... So it was once emphasised "that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which the transaction took place, and must have given rise to this contract"[emphasis added].

***Gerrow v. Dorais*, 2010 ABQB 560, para. 18.**

43. The decision in *Gerrow v. Dorais* clearly states that subrogation will only be refused if there is "immediate and necessary relation between the relief sought and the delinquent behavior". Manderscheid J. also cited the principle that "under the doctrine of subrogation, all of the circumstances must be balanced, and the Court must be satisfied that no injustice will be done through the substitution of one party of another via a subrogation arrangement".

***Gerrow v. Dorais*, 2010 ABQB 560, para. 19.**

44. In *N'Amerix Logistics Inc. (Re)*, the trustee in bankruptcy of N'Amerix sought a declaration that any interest of Express Business Funding of Canada ("**EBF**") in the accounts receivable of the bankrupt were subordinate to the trustee's interest as EBF had failed to perfect its security interest properly under the PPSA. EBF took the position that it was entitled to be subrogated to the perfected position of the bankrupt's bank as a result of EBF's loan being used to repay the bankrupt's indebtedness to the bank. The trustee argued that subrogation was an

equitable right and the person asserting the right must have clean hands, and EBF did not have clean hands as a result of certain actions it took to collect accounts receivable. Justice Spence held that:

> It would seem reasonable in principle to say that EBF should not be able to request the court to grant the equitable remedy of subrogation if that would put the debtor in a position that would be worse by reason of improper conduct on the part of EBF...On the submissions, I am not satisfied there is any claim that that has happened. If there is such a claim and it is supported then, in principle, it would be proper to require any accounts so collected to be reimbursed or set-off against the amount otherwise payable under the subrogation claim.

***N'Amerix Logistics Inc. (Re)*, 2001 CanLII 28082 (ON SC), para. 55.**

45. The USW has failed to put forth any evidence that establishes any connection between the matters at issue in the US Trustee's complaint and the granting of the guarantee by Indalex US with respect to the Applicants' obligations to the DIP Lenders. The USW's factum contains bald allegations based on the complaint, which does not include any allegation of misconduct against Indalex US and makes no reference to the DIP Credit Agreement or the granting of the guarantee in connection thereto.

46. The US Trustee further submits that no injustice will be done through the substitution of the US Trustee to the rights of the DIP Lenders against the Applicants as a result of the payment made under the guarantee. The Opposing Parties do not challenge the entitlement of the DIP Lenders to recover interest and costs under the DIP Documents and the DIP Lenders Charge. As a result, if the US Trustee is subrogated to the rights, remedies and securities of the DIP Lenders, the Applicants will owe no more to the US Trustee than would have been owed to the DIP Lenders under the DIP Documents.

47. To the contrary, the US Trustee submits that if its ability to recover costs and interest from the Applicants is denied, it would create an injustice to the creditors of Indalex US, as it would deprive them of the full benefit of the rights, remedies and securities that Indalex US should be entitled to with respect to the amount paid by Indalex US to the DIP Lenders in July 2009. Conversely, the result would be a windfall to the Applicants, as they would be in a better position relative to US Indalex as guarantor than to the DIP Lenders.

E. Equitable Subordination is Not Applicable to the Case At Bar

48. The USW argues that the doctrine of equitable subordination is satisfied by the facts in the case at bar and should be applied to defeat any priority claim by the US Trustee to recover interest and costs.

49. The US Trustee submits that the doctrine of equitable subordination is not applicable to the case at bar as Justice Deschamps directly addressed the applicability of the doctrine in the SCC Decision and held that there was no evidence that the DIP Lenders committed a wrong or engaged in inequitable conduct and no party contested the validity of the payment made by Indalex US. At Paragraph 76 of the SCC Decision, Justice Deschamps stated:

> 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 CanLII 49 (SCC), [1992] 3 S.C.R. 558, 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.

Twenty-First Report, Appendix "L" – SCC Decision.

F. The Approval and Vesting Order Does Not Prevent the US Trustee from Recovering Interest and Costs

50. The Opposing Parties argue that paragraph 14 of the Approval and Vesting Order is a complete answer to the US Trustee's claim to recover interest and costs on the basis that the paragraph provides that the subrogated claim of Indalex US is to the extent of the amount paid to the DIP Lenders under its guarantee. FSCO, the Pension Administrators and the Retired Executives also argue that the US Trustee's claim is an impermissible collateral attack on the Approval and Vesting Order.

51. Paragraph 14 of the Approval and Vesting Order states:

> 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 Guarantee 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.

Twenty-First Report, para. 79 and Appendix "B" – Approval and Vesting Order.

52. The US Trustee submits that paragraph 14 does not preclude Indalex US from making a claim to recover interest and costs since:

(a) on its face the language in paragraph 14 does not preclude recovery of interest and costs;

(b) the language in paragraph 14 does not purport to, and should not be interpreted to, take away Indalex US' statutory and common law subrogation rights that exist independent of the order;

(c) the Opposing Parties have failed to put forward any evidence that supports their argument that the intent of paragraph 14 was to take away Indalex US' right to recover interest and costs;

(d) the Opposing Parties have failed to put forward any evidence in support of their contention that Indalex US effectively waived its right to recover interest and costs as subrogee under the DIP Documents; and

(e) the doctrine of collateral attack does not apply to the case at bar.

(a) Language in Paragraph 14 Does Not Preclude Recovery of Interest and Costs

53. Paragraph 14 states that Indalex US shall be entitled to be subrogated to the extent of the Guarantee Payment and receive distributions in an amount up to the Guarantee Payment. The Approval and Vesting Order does not state, as the Opposing Parties imply, that Indalex US is entitled to be subrogated "**[*only*]** to the extent of such Guarantee Payment".

54. If the CCAA Court intended to limit Indalex US' recovery to principal only, clearer language should have been used in the order. Such clear language was used by Brenner C.J. in the case of *Pope & Talbot Ltd. (Re)* that is cited by the Retired Executives. Paragraph 2 of the order in that case stated:

> If the Receiver makes a payment to any person on account of any indebtedness of any of the Petitioners to such person, and such indebtedness would otherwise have constituted a Post-Filing Claim (as defined in the May 29, 2008 Order of this Court), the Receiver shall, without the need for any filing or other rights, be subrogated to the rights of such person such, and only to the extent, that the Receiver shall have a Post-Filing Claim payable from the carve-out in favour of the Post-Filing Creditors created under the DIP Loan Agreement (as those terms are defined in the May 29, 2008 Order of this Court) to the extent and in the amount of such payment [emphasis added].

***Pope & Talbot Ltd. (RE)*, (13 August 2008) Vancouver S077839 (B.C.S.C.)**

55. The order of Brenner C.J. clearly limited the subrogation right of the Receiver to the amount of payment by using the phrase "only to the extent". The Approval and Vesting Order does not use such clear and unequivocal language, and the word "only" should not be read into paragraph 14.

(b) Paragraph 14 Does Not Eliminate Legal Rights of Subrogation

56. The US Trustee submits that its right to be subrogated to the rights, remedies and securities of the DIP Lenders exist independent from the Approval and Vesting Order, and the language in paragraph 14 was not necessary for the US Trustee to be subrogated to the position of the DIP Lenders.

57. The US Trustee further submits that the Approval and Vesting Order does not purport to and should not be interpreted to take away from the US Trustee's statutory and common law

rights of subrogation as a result of the payment made to the DIP Lenders. It is a well established principle of statutory construction that legal rights cannot be removed without express language. In *Crystalline Investments Ltd. v. Domgroup Ltd.*, Justice Major, writing for the Supreme Court, noted that:

> … explicit language is required to divest persons of rights they otherwise enjoy at law.
>
> ***Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 CarswellOnt 219 (S.C.C.), para. 43.**

58. In *Devon Canada Corp. v. PE-Pittsfield LLC*, Justice Paperny, writing for the Alberta Court of Appeal, cited the Supreme Court's decision in *Crystalline Investments Ltd. v. Domgroup Ltd.*

59. The US Trustee submits that this doctrine of interpretation should be applied to the interpretation of paragraph 14 of the Approval and Vesting Order. The Approval and Vesting Order should not be interpreted to have removed and eliminated Indalex US' statutory and legal rights to be subrogated to the rights, remedies and securities of the DIP Lenders against the Applicants as set out in the DIP Documents, unless clear language was used and it was the intention of all parties to take away or limit such rights. The US Trustee submits that clear limiting language was not used in paragraph 14, and the Court should not interpret paragraph 14 in a manner as to take away Indalex US' statutory and common law rights.

(c) <u>No Evidence that Intent of Paragraph 14 was to Limit Right to Recover Interest and Costs</u>

60. It is unclear on what basis and for what purpose the language in paragraph 14 dealing with any subrogated claim by Indalex US was inserted in the Approval and Vesting Order. The US Trustee notes that:

(a) the relief sought by the Applicants on the July 20, 2009 motion did not include such relief, as is evidenced by the fact that the issue was not referenced in the Applicants' notice of motion or factum filed in support of the motion;

(b) the language in paragraph 14 of the Approval and Vesting Order was not included in the draft order that was served as part of the Applicants' motion record; and

(c) it does not appear that any submissions were made to the CCAA Court with respect to the language, as there is no reference in the CCAA Court's endorsement with respect to the Approval and Vesting Order as to why the language was included in the order and what considerations went into the CCAA Court's decision to approve such language.

Rappos Affidavit, Exhibit "F" – Applicants' Motion Record returnable July 20, 2009; Exhibit "G" – Applicants' Factum for motion returnable July 20, 2009; and Exhibit "H" – Endorsement of Justice Campbell dated July 20, 2009.

(d) No Evidence that Indalex US Waived its Right to Recover Interest and Costs

61. To accept the arguments of the Opposing Parties regarding the scope of paragraph 14 of the Approval and Vesting Order requires this Court to find that Indalex US waived its right to recover interest and costs as provided for in the Amended Amended and Restated Initial Order and the DIP Documents on any subrogated claim it may have against the Applicants.

62. In *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, the Supreme Court considered whether an insurer had waived its right to compel timely payment in accordance with the terms of an insurance policy. Justice Major, writing for the Court, summarized the doctrine of waiver as follows:

> The elements of waiver were described *in Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):
>
> > The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.
>
> Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration....

> The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.
>
> ***Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CarswellAlta 769, paras. 19-20 and 24.**

63. The Court of Appeal recently affirmed the foregoing paragraphs from the Supreme Court's decision in *Technicore Underground Inc. v. Toronto (City)*, 2012 CarswellOnt 11173.

64. The Opposing Parties have tendered no evidence to demonstrate that Indalex US made an unequivocal and conscious decision to abandon its right to claim to recover interest and costs on its subrogated guarantee claim. The Retired Executives and the USW were in a position to provide such evidence if it existed, as they appeared before Justice Campbell at the hearing of the motions on July 20, 2009 and August 28, 2009.

(e) Doctrine of Collateral Attack is Not Applicable

65. The US Trustee submits that the doctrine or rule of collateral attack does not apply to the US Trustee's claim to recover interest and costs.

66. FSCO, the Pension Administrators and the Retired Executives each cite the Supreme Court's decision in *R v. Wilson* as setting out the rule against collateral attack. Justice McIntyre, writing for the majority of the Court, held that:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally – and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation or nullification of the order or judgment.
>
> ...an order of a court which has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms.
>
> ***R. v. Wilson*, [1983] 2 S.C.R. 594, at 599 and 604.**

67. FSCO and the Pension Administrators also refer to the decision of the Supreme Court in *Garland v. Consumers' Gas Co.* In that case, Justice Iacobucci, writing for the Court, held:

> 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 the party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review).
>
> ... the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum....The fundamental policy behind the rule against collateral attack is "to maintain the rule of law and to preserve the repute of the administration of justice"...The idea is that 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.

***Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, at 661-662.**

68. The Opposing Parties further argue that the Approval and Vesting Order was never appealed nor was there any motion to have it varied or set aside, and the US Trustee did not take any such steps following its appointment in October 2009.

69. The US Trustee submits that the doctrine or rule of collateral attack does not apply in this case. The US Trustee is not seeking to invalidate, render inoperative or undermine the Approval and Vesting Order. The US Trustee is not attempting to avoid the consequences of the Approval and Vesting Order as explained above. The US Trustee's position is that the language of paragraph 14 of the Approval and Vesting Order does not limit its ability to recover interest and costs. The US Trustee submits that this does not amount to a collateral attack on the Approval and Vesting Order.

70. The issue of the interpretation of paragraph 14 of the Approval and Vesting Order only became apparent in April 2013, when the US Trustee's request for payment of interest and costs from the Monitor was opposed by the Opposing Parties. Once such opposition to the US Trustee's claim became evident, the parties entered into discussions regarding motions for advice and direction to be brought by the Monitor to address a variety of outstanding legal issues, including the U.S. Trustee's entitlement to recover interest and costs.

71. If a determination is made that paragraph 14 limits the right of the US Trustee to recover interest and costs, the US Trustee reserves its right to bring a motion to amend or vary the Approval and Vesting Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 19th day of July, 2013.

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

1. *Hoque v. Montreal Trust Co. of Canada*, 1997 CarswellNS 427 (C.A.)

2. *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460

3. *Gerrow v. Dorais*, 2010 ABQB 560

4. *N'Amerix Logistics Inc. (Re)*, 2001 CanLII 28082 (ON SC)

5. *Pope & Talbot Ltd. (RE)*, (13 August 2008) Vancouver S077839 (B.C.S.C.)

6. *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 CarswellOnt 219 (S.C.C.)

7. *Devon Canada Corp. v. PE-Pittsfield LLC*, 2008 CarswellAlta 1765 (C.A.)

8. *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CarswellAlta 769 (S.C.C.)

9. *Technicore Underground Inc. v. Toronto (City)*, 2012 CarswellOnt 11173 (C.A.)

10. *R. v. Wilson*, [1983] 2 S.C.R. 594

11. *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629

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

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SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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