

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 UNITED STEELWORKERS  
(Motion Returnable July 24, 2013)**

July 19, 2013

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	<b>Page</b>
PART I - US Trustee Reservation of Rights should be Disregarded .....	1
PART II - The US Trustee's Claim to Interest and Costs is an Abuse of Process .....	2
PART III - Order Requested .....	3

## PART I - US TRUSTEE RESERVATION OF RIGHTS SHOULD BE DISREGARDED

1. Pursuant to the Monitor's motion on May 31, 2013, this Court determined that the parties should proceed with a bifurcated proceeding where the present motion is to consider:

- a. whether the beneficiaries of the Retirement Plan for Executive Employees of Indalex Canada and Associated Companies (the "Executive Plan") are precluded from asserting a deemed trust because 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 a claim is entitled to priority over all claims, other than any claims secured by the Director's Charge.

2. At paragraph 40 of the US Trustee's Responding Factum, the US Trustee states:

In the event that the CCAA court determines that the US Trustee is not entitled to recover interest and costs in priority to the claims of all other creditors through the DIP Lenders Charge, the US Trustee reserves its right to argue that it is entitled to recover interest and costs in priority to the claims of all other creditors as a result of the DIP security documents that were granted in connection with the DIP Credit Agreement. However, this issue cannot be properly dealt with based on the record before the Court for the July 24 Motion and should be dealt with in the subsequent motion contemplated by the May 31 Order.

3. It is clear from the May 31 Order that the US Trustee is to put its entire argument on costs and interests forward for this Court's consideration at the July 24<sup>th</sup> motion. Those parties that supported the bifurcated approach to dealing with the identified legal issues argued that the US Trustee's claim to interest and costs should be considered prior to the other issues, since the US Trustee would, if successful in its claim for interest and costs, be entitled to the remainder of the Indalex Estate Funds (subject to priority charges). The basis upon which the bifurcated approach was endorsed was, in

part, to avoid unnecessary additional costs associated with arguing legal issues that may not be relevant if the US Trustee were to succeed in its costs and interest claim.

4. A reservation on the part of the US Trustee to present further arguments on the interest and costs claim at a subsequent motion is contrary to the May 31<sup>st</sup> direction from the Court and is clearly an abuse of process, which should not be permitted by this Court.

## **PART II - THE US TRUSTEE'S CLAIM TO INTEREST AND COSTS IS AN ABUSE OF PROCESS**

5. The US Trustee had ample opportunity to claim interest and costs in the prior proceedings including proceedings at the Court of Appeal and the Supreme Court of Canada. It was only after the USW and the Former Executives sought to enforce their claims of deemed trusts over the remaining estate assets that the US Trustee raised this issue. Even if this Court were to conclude that estoppel does not apply to this issue, the USW submits that the US Trustee claim should be barred as an abuse of process.

6. In *Tanar Industries Ltd. v. Outokumpu Ecoenergy, Inc.*, Justice Lee considered the doctrine of abuse of process, citing with favour the comments of O'Leary J.A.:

In *Solomon v. Smith*, [1988] 1 W.W.R. the Manitoba Court of Appeal struck out an action on the ground that it was an abuse of process in circumstances where estoppel by res judicata was not applicable. In language apt to the case at Bar, Lyon J.A. said at p. 421:

I agree... that a plea of issue estoppel is not available. However to permit the statement of claim to proceed would be an abuse of process and that is the principle applicable. In considering this doctrine, it seems to me prudent to avoid hard and fast, institutionalized rules such as those which attach to the plea of issue estoppel. By

encouraging the determination of each case on its own facts against the general principle of the plea of abuse, serious prejudice to either party as well as the proper administration of justice can best be avoided... we must be vigilant to ensure that the system does not become unnecessarily clogged with repetitious litigation of the kind here attempted. There should be an end to this litigation. To allow the plaintiff to retry the issue of misrepresentation would be a classic example of abuse of process - a waste of time and resources of litigants and the court and an erosion of the principle of finality so crucial to the proper administration of justice.<sup>1</sup>

7. It is not open to the US Trustee to re-litigate an issue that has previously been decided in the same court or in any equivalent court having jurisdiction in the matter. The only exception to this principle is where there is an overriding question of fairness that requires a rehearing. Evidence in support of a fairness exception must demonstrate that there was fraud, collusion, misconduct or fresh decisive evidence unascertainable at the time of the first proceeding which, by the exercise of reasonable diligence by the US Trustee, could not have been adduced at the earlier proceeding.<sup>2</sup>

8. The US Trustee has not introduced any evidence as to why it has not claimed interest and costs at any time prior to this motion. Consequently, there is no basis to invoke a fairness exception upon which a finding of abuse of process may be set aside.

### **PART III - ORDER REQUESTED**

9. As stated in our responding factum, the USW requests that this Honourable Court grant an order dismissing the US Trustee's claim for costs and interest in respect

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<sup>1</sup> *Tanar Industries Ltd. v. Outokumpu Ecoenergy, Inc.*, 1999 ABQB 597, para. 56

<sup>2</sup> *Supra.* paras. 57 – 58

of the DIP Loan. In addition, the USW requests its costs in respect of this motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

July 19, 2013

  
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**SCHEDULE "A"**

**List of Authorities**

TAB

1. *Tanar Industries Ltd. v. Outokumpu Ecoenergy, Inc.*, 1999 ABQB 597

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Proceeding commenced at TORONTO

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