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

RESPONDING FACTUM OF THE UNITED STEELWORKERS

(Motion Returnable July 24, 2013)

July 10, 2013

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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.

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Proceeding commenced at TORONTO

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Applicants

RESPONDING FACTUM OF THE UNITED STEELWORKERS

PART I - OVERVIEW

1. On May 31, 2013, the Monitor brought a motion seeking the Court's advice and direction with respect to a litigation process and schedule. Six legal issues were identified and two draft orders were presented to the Court. The first order, preferred by the Retired Executives and the United Steelworkers ("USW"), contemplated a single motion to deal with all identified legal issues. The second order, preferred by Morneau Shepell Ltd. (the "Plan Administrators"), the Superintendent, George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Debtors (the "US Trustee") and Sun Indalex, contemplated a bifurcated proceeding where two legal issues would be considered in the first motion, and, if necessary, the other four legal issues would be determined in a subsequent motion.

2. The Court determined that the parties should proceed with the 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.

3. The USW relies on and supports the submission of the Retired Executives in respect of the deemed trust issue.

4. The USW submits that the US Trustee has no claim to interest and costs in respect of the DIP Loan. The subrogation provision in the Approval and Vesting Order is

limited to the US$10.7 million paid to the DIP Lenders by Indalex US. There is no provision for the payment of interest and costs. Moreover, the US Trustee, in all prior filings before the Ontario Court of Appeal and the Supreme Court of Canada, claimed only the absolute dollar amount that was paid in respect of the guarantee and, as a result, was paid US$10.7 million in accordance with the Supreme Court of Canada decision. It was only after formal requests by counsel for the USW and for the Retired Executives were communicated to the Monitor in March of 2013 for the distribution of Estate Funds in satisfaction of the deemed trust claims that the US Trustee indicated it would seek payment of interest and costs in respect of the guarantee payment.

5. Even if this Court were to conclude that a valid claim to interest and costs may be made on the basis of the DIP Credit Agreement, the US Trustee's claim to interest and costs should fail for the following reasons:

1. The US Trustee sought recovery of the amount paid under the DIP Loan guarantee at both the Court of Appeal and Supreme Court of Canada without seeking costs and interest. A decision has been rendered on the issue. Therefore, the US Trustee is estopped from obtaining payment under this motion.

2. The US Trustee failed to assert a claim for interest and costs under the Claims Procedure and is therefore barred from asserting the claim at this time.

3. A subrogated claim can only succeed if the guarantor comes to the arrangement with "clean hands". The US Trustee fills the shoes of Indalex US in respect of this claim and has, in the US Chapter 7 bankruptcy proceeding, admitted and asserted that Indalex US violated law, *inter alia,* in approving a 2007 dividend distribution, in negotiating and administering a Management Services Agreement that paid millions of dollars to the Sun group of companies with no corresponding consideration, that the directors of Indalex US breached their duties of loyalty to the company and, in doing so, caused the insolvency of the entire group of Indalex companies. The guarantee with respect to the draw of funds by the Applicants came only after the illegal actions of Indalex US significantly increased the liabilities of the Applicants. It cannot be said that Indalex US comes

to this claim with clean hands. As a result, the subrogation should be given no effect.

4. Chief Executive Officer Timothy Stubbs described the Applicants' business as "fully integrated with, and mutually interdependent with, the larger North American enterprise ...". In his own words, it was "not an independent, standalone operation".[1] The evidence filed in the US Chapter 7 proceeding supports piercing the corporate veil as it can be readily concluded that (i) failure to do so would be unfair and lead to a result "flagrantly opposed to justice"; (ii) Indalex US facilitated acts that can be characterized as illegal or for an improper purpose; and (iii) the activities undertaken and the evidence demonstrates that Indalex US was merely acting as the controlling shareholder's (Sun Indalex's) agent.

5. The three-pronged test for equitable subordination has been satisfied. Indalex US (i) engaged in inequitable conduct; (ii) the misconduct injured the Applicants, the beneficiaries of the Retirement Plan for Salaried Employees of Indalex and Associated Companies (the "Salaried Plan") and the Retired Executives; and (iii) the application of equitable subordination is within the scope of this Court's authority under the *Companies' Creditors Arrangement Act* ("CCAA")[2] and should be applied to defeat any priority claim to interest and costs.

PART II - THE FACTS

6. The USW relies on the facts as set out in the Twenty-First Report of the Monitor dated June 21, 2013 supplemented by the following.

7. On July 30, 2010, the US Trustee filed a complaint in the U.S. Chapter 7 proceeding against Sun Capital Partners, Inc., a number of its affiliates, senior officers, founders, and employees of the Sun group of companies and several of the directors, officers and employees in the Indalex group of companies, including directors and officers of the Applicants. The complaint alleges, *inter alia,* that the Sun representatives and Indalex directors and officers entered into fraudulent transactions with the intent to

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[1] Affidavit of Timothy Stubbs (hereinafter referred to as Stubbs Affidavit), sworn April 3, 2009, USW Responding Motion Record, Tab A, para. 20

[2] *Companies' Creditors Arrangement Act,* R.S.C., 1985, c. C-36, s. 11

hinder, delay and defraud creditors; that these transactions occurred when Indalex was insolvent or had the effect of rendering Indalex insolvent; that Sun orchestrated fraudulent and preferential transfers; that Sun received post-petition payments that should be returned to the Indalex US estate; that payments made by Sun Indalex to Indalex US in 2008 should be characterized as equity infusions as opposed to term loans; and that, as a result of the inequitable conduct of Sun and/or Sun Indalex, any claims of Sun and/or Sun Indalex under the Chapter 7 proceeding should be subordinated to the claims of all unsecured creditors.[3]

8. The US Trustee has filed extensive evidence in the US proceeding to support the above allegations, which implicates Indalex Holdings Finance, Inc., the parent company of Indalex US, and its directors and officers in a series of agreements and transactions with related parties which collectively rendered the Indalex group of companies insolvent.

9. In 2005, Indalex was owned by Honeywell International Inc. On February 2, 2006, Indalex was purchased from Honeywell for US$425 million in a highly leveraged buyout.[4] At the time of the purchase, Indalex was number one in market share in North America in the soft alloy market and was number two in North American market share in the extrusion market.[5] It owned or held interests in 15 manufacturing facilities and two

[3] Affidavit of Hershel Bradley (hereinafter referred to as the "Bradley Affidavit"), sworn July 9, 2013, USW Responding Motion Record, Tab B1, paras. 193, 199, 209, 218, 221, 233, 238
[4] Bradley Affidavit, Tab B4, para. 1.2
[5] Bradley Affidavit, Tab B3, p. 122

casting facilities, had an asset-to-debt ratio of greater than 3 to 1 and was highly profitable.[6], [7]

10. The cash outlay paid by Sun through Indalex Holding Corp. for the purchase of Indalex was less than 25% of the purchase price. Approximately US$111 million was paid in cash from Sun affiliates, US$56.8 million was advanced through a revolving credit facility and US$280 million was secured on the issuance of Senior Second-Priority Notes.[8] The debt increase resulting from this financing brought the asset-to-debt ratio of Indalex close to 1:1 at the close of the purchase.

11. Sun Indalex held 100 percent of the voting shares of Indalex Holdings Finance, Inc., the parent company of Indalex Holding Corp. at the time of the purchase and throughout the relevant period.[9]

12. Concurrent with the execution of the Share Purchase Agreement, Indalex entered into a Management Services Agreement ("MSA") with Sun Capital Management III, LP ("Sun Management"). It appears that Sun Management had no employees. Nevertheless, the MSA required Indalex to pay to Sun Management significant management and financial transaction fees. Indalex was required to remit the greater of US$1 million and 2% of earnings before income tax, depreciation and amortization ("EBITDA") per annum and 1% of the proceeds of certain financing transactions even

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[6] Bradley Affidavit, Tab B1, para. 3
[7] Bradley Affidavit, Tab B55, para. 18
[8] Bradley Affidavit, Tab B1, para. 111; note, however, that the SEC Form 10-K filing for the year-ending 2006 reported the Senior Notes as totalling $270 million (p. 46)
[9] Bradley Affidavit, Tab B2, p. 86

when those transactions were essentially internal transactions between related parties.[10] Payments continued to be made under this agreement into calendar year 2009.[11]

13. The Sun Capital Partners, Inc. expectation for return was in line with their general investment template. Projections assumed a three-year investment period with an internal rate of return of between 39.5% and 51.4%. Their equity investment could be reduced in the interim by orchestrating sale/leasebacks of Indalex property that could generate US$60 million in revenue. Leasebacks were negotiated in 2008.[12] The plan was short-term with maximum profit-taking.[13]

14. In 2006, the Salaried Plan was wound-up with an effective date of December 31, 2006. The most recent estimate of the wind-up deficit as at February 28, 2013 is approximately $5,008,100.[14]

15. Pursuant to the MSA, Sun immediately after the purchase of Indalex, began collecting management and transaction fees. As well, a dividend was declared on July 18, 2006 which resulted in a payment of US$1.375 million to Sun or its affiliate.[15] Sun and its affiliates received fees and dividends amounting to almost 5% of the cash consideration for the Indalex purchase shortly after the closing of the transaction in 2006.[16]

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[10] Bradley Affidavit, Tab B6, para. 2
[11] Bradley Affidavit, Tab B2, pp. 97-98
[12] Bradley Affidavit, Tab B1, paras. 187-188
[13] Bradley Affidavit, Tab B11, pp. 184, 188
[14] Twenty-First Report of the Monitor, June 21, 2013, para. 38. ("Monitor's Report")
[15] Bradley Affidavit, Tab B2, p. 97
[16] Bradley Affidavit, Tab B2, p. 96

16. The aluminum extrusion market tends to be a pre-cursor to market declines since it is closely linked to supplying both the automotive and the residential construction sectors. In 2006, there were clear signs of a market downturn.[17] By the end of the first quarter of 2007, CEO Stubbs was on record, both in regulatory filings and through quarterly investment briefings, stating that dividends could not be paid for the foreseeable future. Year over year data on EBITDA (first quarter 2007 compared with first quarter 2006) showed a dramatic 62% decline.[18] The Securities and Exchange Commission Form 10-K filing for fiscal year 2006 released on April 2, 2007 stated:

> We do not anticipate paying any cash dividends in the foreseeable future. Any future determination to pay dividends will be at the discretion of our board of directors and will be dependent upon then existing conditions, including our financial condition, results of operations, contractual restrictions, capital requirements, business prospects, and other factors our board of directors deems relevant. In addition, our current financing arrangements effectively prohibit us from paying cash dividends for the foreseeable future.[19]

17. Despite public assurances that there would be no dividends paid for the foreseeable future and clear indications of significant market dampening, in the same week as the release of the Form 10K noted in the above paragraph, executives from Sun and Indalex met to discuss the sale of Indalex's interest in a Hong Kong

[17] Bradley Affidavit, Tab B3, p. 128
[18] Bradley Affidavit, Tab B1, para. 155
[19] Bradley Affidavit, Tab B1, para. 146

manufacturing facility ("AAG") and the payment of the largest possible dividend from the proceeds of the sale.[20]

18. The parent company of the Monitor, FTI Consulting (US) was contacted in early May of 2007 by Sun.[21] The intent was to retain FTI to prepare a solvency opinion that would justify a substantial dividend payment to Sun and its affiliates together with certain members of the Board of Indalex Holdings Finance, Inc. Inquiries from within Sun as to whether a dividend would be paid were evidenced well before the preparation of the solvency opinion.[22]

19. AAG was the sole asset of Indalex UK Limited. Indalex UK Limited was a subsidiary of Indalex Limited (one of the Applicants). On May 15, 2007, Indalex UK Limited sold its interest in AAG for US$153,150,000.[23] FTI Consulting (US) was retained to prepare an opinion on the contemplated dividend transaction. Numerous exchanges between Sun, Indalex US and FTI ensued with respect to the basis upon which numbers were derived and supplied to FTI for use in the solvency analysis and the FTI adjustments to the modelling that were necessitated due to their inadequacy.[24]

20. At 1:43 a.m. on May 31, 2007, Indalex's attorney transmitted unanimous consents via email approving of a dividend distribution dated May 31, 2007 to the Boards of Directors of Indalex Holding Corp. and Indalex Holdings Finance. No Board meeting was held to discuss the transaction. The consents purported to authorize the

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[20] Bradley Affidavit, Tab B26, p. 348
[21] Bradley Affidavit, Tab B29
[22] Bradley Affidavit, Tab B30
[23] Bradley Affidavit, Tab B31, p. 371
[24] Bradley Affidavit, Tabs B32-B34

payment of a dividend to Indalex Holdings Finance's shareholders of $76.6 million. Although the FTI solvency opinion was referenced in the consent materials, the FTI opinion was not provided concurrent with the consents and, in fact, was revised after the consents had been executed.

21. A subsequent legal opinion provided to the directors of Indalex UK Limited concludes that the payment of the dividend was in violation of the *UK Companies Act of 1985.*[25] The proceeds of the AAG sale were paid to Indalex Limited (one of the Applicants). To the extent that the dividend was illegal, the opinion concludes that Indalex Limited was liable for repayment and, if unable, Indalex UK would be entitled to bring a claim against the personal assets of the directors of Indalex Limited, on the basis that the directors breached their fiduciary duties by paying the dividends unlawfully. Thus, the dividend declaration imposed by the US parent company had the immediate effect of dramatically increasing the Applicants' liabilities. This led Indalex US to transfer US$31 million to Indalex Limited under the revolving credit facility, which undoubtedly would affect inter-company accounting of obligations and ultimately what liabilities are attributed to the US and Applicants' estates.[26]

22. Although Indalex Limited received the proceeds of the sale, it was Indalex Inc. (US) that paid the US$76.6 milllion to Indalex shareholders (not Indalex Finance Holdings nor Indalex Holding Corp.). A resolution to distribute the dividend was never executed by the Board of Directors of Indalex Inc.

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[25] Bradley Affidavit, Tab B46
[26] Bradley Affidavit, Tab B48

23. FTI issued what it considered to be its "final" report later in the day on May 31, 2007.[27] Both Sun and legal counsel for Sun sought to have FTI amend the conclusions contained in the "final" report. Steven Liff, Managing Director at Sun Capital Partners, Inc. stated in an email to FTI, "... If we can't make this change, we will want to go down a different path and get another opinion and scratch this one. ... This is important for us to get this done by tomorrow morning, so please advise if this is doable. If not, we should discuss our fees as we'll need to get another opinion done..."[28]

24. On June 1, 2007, Sun's attorney at Kirkland wrote to FTI providing an overview of why wording changes were required to ensure that the dividend test under Delaware law would be satisfied. The email request attached a mark-up of the opinion with a request that the report be finalized as early as possible the next day.[29] It is clear from internal Sun communications that there was concern as to Indalex's ability to justify the dividend payment, particularly given the liberal allocation of goodwill on the balance sheet. Despite this, there was no sign of re-consideration of the dividend, only adjustments to the opinion that could be used to justify it.[30]

25. FTI issued a revised version of its letter on June 1, 2007 concluding that the fair market value of Indalex's assets exceeded its liabilities by $115,000, that Indalex would be able to pay its debts as they became due and the payment of the dividend would not leave Indalex with unreasonably small capital.[31]

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[27] Bradley Affidavit, Tab B36
[28] Bradly Affidavit, Tab B37
[29] Bradley Affidavit, Tab B40
[30] Bradley Affidavit, Tab B38
[31] Bradley Affidavit, Tab B41

26. The US Trustee retained Alan Schachter to assess whether Indalex was solvent at the time of the declaration of the dividend. He concluded:

a. Under the "balance sheet test", it is my opinion that Indalex was insolvent as of the valuation date because the present fair saleable value of Indalex assets was less than the value of Indalex liabilities (including recorde and contingent liabilities).

b. Under the "cash flow test", it is my opinion that Indalex was insolvent as of the valuation date because the Company was unable to meet its debt obligations as they became due and matured.

c. Under the "adequacy of capital test", it is my opinion that Indalex was insolvent as of the valuation date because the Company had unreasonably small capital.[32]

27. By June 1, 2007, as a result of the management fees paid under the MSA and two declarations of dividends, Sun had recovered over 81% of its initial investment, despite full knowledge of the severe market decline in the industry.[33] Moreover, there was not a single disinterested director on the Indalex Boards when the declaration of dividends was resolved.[34] In 2008, Sun Indalex continued to collect transaction and management fees such that, by the end of 2008, 85% of its initial investment had been recovered.[35] The US Trustee also alleges that Sun and/or its affiliates received US$5.8 million of post-petition payments in 2009 and 2010 that should be returned to the Indalex US estate.[36]

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[32] Bradley Affidavit, Tab B55, p. 600
[33] Bradley Affidavit, Tab B2, pp. 13-14; Tab 2A
[34] Bradley Affidavit, Tab B2, pp. 13-14; Tab 2A, para. 171
[35] Bradley Affidavit, Tab B2, pp. 97-98
[36] Bradley Affidavit, Tab B1, para. 218

PART III - THE ISSUES

A. The Executive Plan Deemed Trust

28. The Court has been asked to provide direction as to 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.*

> **USW Answer -** The August 28, 2009 deemed trust motions, the Court of Appeal and the Supreme Court of Canada decisions considered whether a deemed trust under s. 57(4) of the *Pension Benefits Act* could take priority over Indalex US' subrogated right as a guarantor under a Court-ordered DIP Loan which granted the lenders a superpriority over other secured creditors. The DIP Loan was fully repaid in July 2009. The subrogated claim was fully repaid in March 2013 pursuant to the Supreme Court of Canada decision. The contest today is between secured creditor claims post-satisfaction of the DIP Loan obligation and therefore is a priority contest between the Salaried and Executive Plan deemed trusts and the non-DIP priority claims. The doctrine of *res judicata* has no application to the current issue since this issue was not considered in the originating motion and appellate proceedings. The USW relies on the legal argument of the Retired Executives on this issue.

B. The US Trustee's Claim to Interest and Costs

29. The Court has been asked to provide direction as to 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.

30. The USW submits that the US Trustee has no claim to interest and costs in respect of the DIP Loan for the reasons summarized at paragraphs 4 and 5 of this factum, namely:

a. The subrogation provision of the Approval and Vesting Order is limited to the Guaranteed Amount and does not contemplate payment of interest and costs.

b. Even if entitled to interest and costs pursuant to the DIP Credit Agreement, such payment should not be ordered on the basis of any of the following: (i) cause of action estoppel/*res judicata;* (ii) failure to claim for interests and costs under the Claims Procedure; (iii) Indalex US is not a guarantor with "clean hands" and should therefore be precluded from exercising subrogation rights; (iv) protecting the interests of innocent third party beneficiaries warrants piercing the corporate veil; and (v) the three-pronged test for equitable subordination has been satisfied thereby enabling this Court to subordinate the Indalex US claim to interests and costs in favour of the Plan beneficiaries deemed trust claims.

PART IV - ARGUMENT

A. The Guarantor has no right to interest and costs under the DIP Loan

31. On April 8, 2009, Justice Morawetz granted the Amended and Restated Initial Order which approved the DIP Credit Agreement. The DIP Credit Agreement was secured by a Court-ordered super-priority charge (the "DIP Lenders Charge") as follows:

> 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. ...[37] (emphasis in original)

32. The definition of "DIP Lenders" as defined in paragraph 33 of the Amended Amended and Restated Initial Order refers only to the "lenders party" and does not

[37] Monitor's Report, June 21, 2013, paras. 71, 74

include the Applicants, Indalex Holdings Finance, Inc., Indalex Holding Corp. and other non-Applicant affiliates.[38]

33. Under paragraph 14 of the Approval and Vesting Order, Indalex US is subrogated to the rights of the DIP Lender only for the amount of the actual payment under the guarantee:

> ...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.[39] (emphasis added)

34. Since Indalex US was repaid the US$10.7 million on March 15, 2013, there is no outstanding claim that can be asserted under the super priority charge.

B. The US Trustee is estopped from claiming interest and costs

35. The US Trustee did not claim interest or costs in any of the prior proceedings.

36. In the US Trustee's Notice of Motion to intervene in the Ontario Court of Appeal proceeding, the US Trustee described its subrogation right as "to the extent of such payment", meaning to the extent of the payment triggered by the guarantee.[40] The US Trustee expressly referred to the $US10.7 million dollars paid by Indalex US when it described its super-priority rights as extending only "for that amount".[41]

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[38] Amended Amended and Restated Initial Order, May 12, 2009, US Trustee Responding Motion Record, Tab B, para. 33
[39] Approval and Vesting Order, paragraph 14, Monitor's Report, June 21, 2013, Appendix B
[40] Notice of Motion, Monitor's Report, June 21, 2013, Appendix M, para. 8
[41] *Supra.*, Appendix M, para. 10

37. In the facta filed by the US Trustee in the Court of Appeal leave application and in the Court of Appeal proceeding, the US Trustee consistently described its subrogation right as being restricted to the express amount paid in respect of the guarantee (US$10.7 million) without reference to interest and costs.[42] This position was also reinforced in a letter sent to counsel dated October 29, 2010, wherein the US Trustee stated it had a "subrogated claim for the amount paid".[43]

38. The doctrine of cause of action estoppel is based on the premise that, where the legal rights or liabilities of the parties have been determined in a prior action, they should not be re-litigated. Cause of action estoppel applies not only to points on which the court has pronounced but to every point which properly belonged to the subject of the litigation.[44]

39. The doctrine is clearly set out in a recent decision of the Ontario Superior Court of Justice:

> [26] Cause of action estoppel precludes a party from bringing an action against another when the same cause of action has been determined in earlier proceedings by a court of competent jurisdiction.[21] The leading modern case on cause of action estoppel remains the decision of the Supreme Court in *Grandview (Town) v. Doering*, 1975 CanLII 16 (SCC), [1976] 2 S.C.R. 621, which adopted the following oft-quoted passage from Henderson v. Henderson (1843) 3 Hare 100 at 114 (P.C.):
>
> > In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes a subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which was not brought forward, only because they

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[42] Factum of George L. Miller, the Chapter 7 Trustees of the Bankruptcy Estates of the US Indalex Debtors, paragraph 13 and 15, Monitor's Report, June 21, 2013, Appendix N; Factum of George L. Miller, the Chapter 7 Trustees of the Bankruptcy Estates of the US Indalex Debtors dated November 16, 2010, paragraphs 3 and 15, Monitor's Report, June 21, 2013, Appendix P

[43] Letter dated October 29, 2010 from counsel for the US Trustee, Monitor's Report, June 21, 2013, Appendix O

[44] *Murphy v. National Bank of Canada*, 2012 ONSC 1360, para. 31

> have, from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, in which the parties, exercising reasonable diligence, might have brought forward at the time.
>
> [27] The traditional criteria for cause of action estoppel, drawn from the decisions in *Angle v. Minister of National Revenue*, 1974 CanLII 168 (SCC), [1974] 2 S.C.R. 248 and *Grandview (Town) v. Doering*, *supra* are:
>
> > 1) there must be a final decision of a court of competent jurisdiction in the prior action;
> >
> > 2) the parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action;
> >
> > 3) the cause of action in the prior action must not be separate and distinct;
> >
> > 4) the basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.[22]
>
> [28] Thus, cause of action estoppel will bar a party from asserting not only issues that were raised before the court on the previous proceeding, but also issues that could have been decided had they been brought before that court.[23][45]

40. The US Trustee had ample opportunity to raise the issue of interest and costs from the time it sought intervention in the appellate proceeding in November of 2010 through to the conclusion of the Supreme Court appeal in the matter. It was only after the beneficiaries of the respective Plans sought to have their deemed trusts honoured through the distribution of Estate Funds in March of 2013 that the US Trustee

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[45] *Elguindy v. The Warden of Warkworth Institution*, 2011 ONSC 4670, paras. 26–28

intervened to raise this issue. The issue could have been decided during the appellate proceedings had the US Trustee put the issue before the Court. The traditional criteria necessary to invoke cause of action estoppel are present in this instance and should be applied to estop the US Trustee from asserting the claim to interest and costs.

C. The US Trustee failed to file a claim in the Claims Procedure respecting interest and costs

41. On July 30, 2009, Justice Morawetz granted an order approving of a Claims Procedure (the "Claims Procedure Order"). The claims bar dated under the Claims Procedure Order was August 28, 2009 (the "Claims Bar Date"). In accordance with the Claims Procedure Order, failure to file a Claim by the Claims Bar Date forever bars the claimant from asserting or enforcing the Claim and dispenses with liability of the Applicants in respect of unfiled Claim.[46]

42. David L. Miller was not appointed as the US Trustee in the Chapter 7 proceeding until October 30, 2009 and, therefore, could not have filed a Claim under the Claims Procedure in a timely fashion respecting interest and costs. While the USW accepts that a CCAA Judge may exercise discretion to admit late claims, there are a number of factors that are considered in assessing a late claim.

43. In *Enron Canada Corp. v. National Oil-Well Canada Ltd.*, 2000 ABCA 285, 193 D.L.R. (4th) 314 (*Enron*), Justice Wittmann, writing for the court, enunciated four criteria applicable when a court must determine whether to permit the late filing of a claim under the CCAA:

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[46] Monitor's Report, June 21, 2013, paras. 10, 14

1. Was the delay caused by inadvertence and, if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?[47]

44. In the context of the criteria, Justice Wittmann held that "inadvertent" includes "carelessness, negligence, accident, and is unintentional" (at para. 27). The late claimant must have acted in good faith and must not be attempting to circumvent the CCAA process (para. 14). Justice Wittmann further held that in assessing "prejudice" two elements are relevant: (i) the timing of the proceedings is a key element and (ii) materiality is also relevant.[48]

45. In *Re Noma Company*, Justice Cameron declined to allow the claim of a former employee for damages for harassment where she failed to file a proof of claim before the claims bar date. Justice Cameroon applied the criteria in *Enron*, finding that the former employee's delay was neither inadvertent nor in good faith, where she waited for more than 17 months before bringing her motion and raised no immediate inquiries upon receiving a notice that she had failed to file her claim before the claims bar date.

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[47] *Enron Canada Corp. v. National Oil-Well Canada Ltd.*, 2000 ABCA 285, 193 D.L.R. (4th) 314, para. 26

[48] *Supra.*, paras. 36–37

Moreover, Justice Cameron gave significant weight to the fact that the creditors had already approved the plan of reorganization and it had been court-sanctioned.[49]

46. There has been no attempt by the US Trustee to file a proof of claim with respect to the interest and costs. The US Trustee appears to have assumed that it can rely on the DIP Credit Agreement to assert a super-priority charge, despite the clear indication in the relevant Court Orders that the super-priority does not attach to the interest and cost claim and the prior indications in its own submissions that its claim was restricted to the absolute dollar amount of the Guarantee Payment.

47. The USW submits that (i) the interest and costs claim are not covered by the super-priority charge; (ii) to assert a claim in respect of the interest and costs, the US Trustee should have sought the Court's approval to admit a late claim at the earliest possible opportunity, yet to this date has yet to seek Court approval to file a late claim; and (iii) to admit the claim at this stage would be highly prejudicial to the Plan beneficiaries given that the quantum of the claim would be in excess of the remaining Estate assets, thereby leaving the Plan beneficiaries with no further distribution. Based on the *Re Noma* and *Enron* criteria, the late attempt by the US Trustee to assert its claim does not meet the exceptional circumstances criteria that would lead a CCAA Court to accept the late Claim.

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[49] *Re Noma Company,* 2004 CanLII 45450 (ON SC), paras. 53-55, 71

D. The Guarantor has not come to the arrangement with "clean hands"

48. A subrogated right is not exercisable if the guarantor comes to the arrangement with dirty hands. In *Gerrow v. Dorais*, Justice Manderscheid explained the clean hands issue as follows:

> [18] The right of a party to seek equitable relief is always subject to the equitable maxim of "He who comes into equity must come with clean hands". The equitable doctrine of subrogation is no exception. In *De Jesus* v. *Shariff*, 2010 BCCA 121, 284 B.C.A.C. 243, Finch C.J.B.C., in discussing the conduct of a party that would justify a refusal by the Court of equitable relief cited I.C.F. Spry in *The Principles of Equitable Remedies*, (6th ed.) (at pp. 169-170) (UK: Sweet & Maxwell, 2001) at para. 86:
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> > ...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".
>
> [19] Furthermore, "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 in the place of another via a subrogation arrangement", *Alberta (Treasury Branches) v. Alberta (Public Trustee)*, at para. 50, Cairns J., quoting *Brown v. McLean*, (1889), 18 O.R. 533 (H.C.J.), at 536.[50]

49. The clean hands doctrine was elaborated upon in *N'Amerix Logistix Inc. (Re)*:

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[50] *Gerrow v. Dorais*, 2010 ABQB 560, paras. 18-19

> [55] In the materials on subrogation provided by counsel, a distinction is sometimes made between rights and remedies. The point was not pursued in submissions. 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, for example, the collection by it of receivables not included in the BNS security and intended to be available to EBF. ...[51]

50. The US Trustee has tendered extensive evidence in the US Chapter 7 proceeding, a small sampling of which has been included in the USW Responding Motion Record and summarized in the Facts section of this factum. Through its own submissions and evidence, the US Trustee demonstrated that the Boards of Indalex Finance Holdings, Inc. and Indalex Holding Corp. acted as mere conduits for Sun Capital Partners, Inc. and its affiliates. The Boards facilitated the execution of an unconscionable MSA that siphoned funds from Indalex operations both before and after insolvency for no consideration.[52] The Boards also proceeded to implement a dividend declaration that was illegal under US and UK law, that significantly increased the Applicants' liabilities and that required, in addition to the withdrawal of AAG sale proceeds from Indalex, a significant draw on the revolving credit facility, the combined effect of which ensured the insolvency of Indalex.[53]

51. The illegality of the US$76.6 million dividend declaration created a substantial liability for the Canadian estate. Indalex Limited was the parent company Indalex UK. It received the proceeds of the AAG sale, only to pass it along for purposes of distribution to Sun and its affiliates and to satisfy noteholder redemptions of its US parent. The net

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[51] *N'Amerix Logistix Inc. (Re)*, 2001 CanLII 28082 (ON SC), para. 55
[52] Bradley Affidavit, Tab B6, section 2, p. 154; Tabs B31–B46
[53] Bradley Affidavit, Tabs B46, B48

effect was to increase Indalex Limited's liabilities (since under UK law it was required to repay the illegal dividend) while draining the Indalex group of a substantial asset.[54]

52. The failure to use a portion of the AAG proceeds to pay down the burgeoning amount of debt under the revolving credit facility and the immediate step by Indalex US, after receipt of the dividend, to increase borrowings under the facility, undermined the relationship with the lender group. By the time the CCAA application was filed in April 2009, there was no alternative but to have Indalex US participate in the DIP Credit Agreement as a guarantor, since Indalex was in default of its revolving credit facility obligations[55] – a default that was directly attributable to above-noted improper conduct.

53. The Forbearance Agreement required the Applicants to guarantee the obligations of Indalex US under the Amended Credit Agreement (the "Pre-Filing Guarantee"). This is inconsistent with section 9.02 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.[56]

54. Indalex Limited CEO Timothy Stubbs also stated that "[n]one of the Applicants are borrowers under the [Sun Indalex] Term Loans and neither of the Term Loans are

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[54] Bradley Affidavit, Tab B46
[55] Stubbs Affidavit, Tab 1, para. 27; see also the downgrading of Indalex by Moody's, S&P and JP Morgan Chase, Tabs B28, B50
[56] Monitor's Report, pp. 26-27

guaranteed by the Applicants"[57], a position that appears at odds with the Canadian estate claims of Sun Indalex.

55. Indalex US was forced to guarantee the post-filing credit facility directly as a result of its illegal actions surrounding the ongoing administration of the MSA and the dividend payments to Sun and its affiliates. As was concluded in *N'Amerix Logistix Inc. (Re)*, it is reasonable in principle to say that the US Trustee, standing in the shoes of Indalex, should not be able to gain the benefit of 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 Indalex US. It 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.

56. The USW submits that this Court should exercise its equitable jurisdiction to ensure that the US Trustee, as a stand-in for Indalex US, should not be granted the benefit of the equitable remedy of subrogation.

E. This case warrants piercing the corporate veil to protect the Plan beneficiaries

57. CEO Timothy Stubbs deposed that the Indalex group of companies operated as a single, integrated unit.[58] The evidence presented by the US Trustee in the Chapter 7 proceeding takes this assertion one step further by demonstrating that, in fact, Indalex was operated at the behest of Sun Capital and its affiliates to, first and foremost,

[57] Stubbs Affidavit, Tab A, para. 50
[58] Stubbs Affidavit, Tab A, para. 20

achieve Sun's investment objectives even when doing so would irreparably harm Indalex.[59]

58. In *White v. E.B.F. Manufacturing Limited,* the Nova Scotia Court of Appeal proposed that there are three situations that can warrant the lifting of the corporate veil:

> [49] At the hearing before us counsel for the appellant and intervenor urged that the corporate veil ought not to be lifted except in the most serious of cases where fraud, or deceit, or use of a corporation for an improper purpose is both pleaded and proved. With respect, I think that submission invites a far too restrictive approach, implying that only the most egregious or criminally unlawful circumstance will entitle a court to lift the corporate veil. I do not understand that to be the law.
>
> ...
>
> [51] In *Le Car GmbH v. Dusty Roads Holdings Ltd.*, 2004 CarswellNS 138 (S.C.), Murphy, J. accurately identified three situations where courts have lifted the corporate veil:
>
> (a) where failure to do so would be unfair and lead to a result "flagrantly opposed to justice";
>
> (b) where representations are made or activities undertaken for a fraudulent or other objectionable, illegal or improper purpose to facilitate doing something that would be illegal or improper for an individual to do personally; and
>
> (c) where the corporation is merely acting as the controlling shareholder's agent.
>
> [52] Courts will often pierce the corporate veil where the company is an agent or the mere alter-ego of the controlling shareholder or parent company. There was certainly evidence before McDougall, J. to support a conclusion that FENCE was merely the alter-ego of Bryson and EBF. In *Aluminum Co. of Canada v. Toronto (City)*, 1944 CarswellOnt 71 (S.C.C.), at ¶ 15-16, Rand, J., referred to the Court's earlier decision in the case of *Toronto v. Famous Players Canadian Corp.*, [1936] 2 D.L.R. 129 as having:

[5959] Bradley Affidavit, Tabs B2, pp. 96-98; Tabs B20, B27, B37, B38, , B40, B44, B45

> 15 . . . settled that the business of one company can embrace the apparent or nominal business of another company where the conditions are such that it can be said that the second company is in fact the puppet of the first; when the directing mind and will of the former reaches into and through the corporate façade of the latter and becomes, itself, the manifesting agency.
>
> . . .
>
> 16 The question, then, in each case, apart from formal agency which is not present here, is whether or not the parent company is in fact in such an intimate and immediate domination of the motions of the subordinate company that it can be said that the latter has, in the true sense of the expression, no independent functioning of its own.[60]

59. In *Tirecraft Group Inc. v. High Park Holdings ULC,* Justice Yaumachi elaborated on the above principles:

> [21] When will a court find the corporation to be a "sham, cloak or alter ego" and pierce the corporate veil? Courts have found the following factors to be significant:
>
> > (a) the shareholder treats itself and the corporation interchangeably, *Yang v. Overseas Investments (1986) Ltd.* (1995), 26 Alta. L.R. (3d) 223 (Q.B.);
> >
> > ...
> >
> > (d) the shareholder treats corporate property as though it belongs to the shareholders without regard for the interests of those dealing with the corporation, K.P. McGuinness, *The Law and Practice of Canadian Business Corporations* (Toronto: Butterworths, 1999) as reproduced in *Pelliccione* at para. 97.

[60] 2005 NSCA 167 (CanLII), paras. 49-52

> [22] Other cases have found further factors that might be significant when a court assesses whether a corporation is merely the agent or alter ego of its shareholder:
>
> > (a) whether the corporation was independent from its shareholders, *Shillingford* at para. 28; *Frankel Structural Steel Ltd. v. Goden Holdings Ltd.*, [1971] S.C.R. 250 at para. 11; ...[61]

60. Although the US Trustee is seeking recovery of assets from the directors personally and from the Sun group of companies in its Chapter 7 complaint, from the perspective of the Plan beneficiaries, the liability not only rests with the directors and shareholders, but also with Indalex US. As is clearly stated in *Clarkson Co. Ltd. v. Zhelka (1967)*, 64 D.L.R. (2d) 457 at paras. 83-84 (Ont. H.C.), as quoted in the *Tirecraft* case at paragraph 19:

> 83 If a company is formed for the express purpose of doing a wrongful or unlawful act, or, if when formed, those in control expressly direct a wrongful thing to be done, the individuals as well as the company are responsible to those to whom liability is legally owed. [emphasis added][62]

61. Indalex US controlled and directed the actions of the Applicants for an improper purpose, which ultimately resulted in the insolvency and, for the beneficiaries of the Salaried Plan, a significant loss in benefit entitlement. Even if this Court were to conclude that contractually, Indalex US, has a subrogated right to interest and costs, given the facts presented by the US Trustee, the payment of interest and costs to Indalex US would be unfair and lead to a result flagrantly opposed to justice. The facts justify a piercing of the corporate veil to ensure that the remaining Estate Funds of the Applicants are applied to satisfy the deemed trust claims.

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[61] *Tirecraft Group Inc. v. High Park Holdings ULC*, 2010 ABQB 653, 2010 ABQB 653 (CanLII), paras. 21-22
[62] *Tirecraft Group Inc. v. High Park Holdings ULC*, 2010 ABQB 653, 2010 ABQB 653 (CanLII), para. 19

F. The US Trustee's claim should be subordinated to the deemed trust claims

62. The Supreme Court of Canada opened the door for the application of equitable subordination in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank.* Although the Court declined to determine whether the doctrine of equitable subordination should be formally adopted into Canadian law because it was not applicable to the facts, it provided some guidance regarding the criteria for applying the doctrine in the appropriate circumstances. In doing so, the Court noted the three requirements for a successful claim for equitable subordination under U.S. law, namely: (i) the claimant must have engaged in some type of inequitable conduct; (ii) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (iii) equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.[63]

63. The above-noted principles have been applied in a series of Canadian cases both inside and outside of insolvency proceedings. In *Blue Range Resource Corp.,* a CCAA proceeding, Romaine J., for the Alberta Court of Queen's Bench, held that the doctrine of equitable subordination applied to a shareholder's claim for damages in the context of a proceeding under the CCAA. Justice Romaine stated:

> [55] American cases are particularly useful in the areas of commercial and insolvency law given that the larger economy in the United States generates a wider variety of issues that are adjudicated by the courts. There is precedent for the use of such cases: Laskin, J. in Central Capital Corp. (supra) used the analysis set out in American case law on whether preferred shareholders can claim as creditors in an insolvency to help him reach his conclusion.

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[63] *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1992), 97 D.L.R. (4th) 385 (S.C.C.), p. 420

> [56] The three American cases decided on this direct issue before the 1978 statutory codification of the law of equitable subordination are not based on a doctrine of American law that is inconsistent with or foreign to Canadian common law. It is not necessary to adopt the U.S. absolute priority rule to follow the approach they espouse, which is based on equitable principles of fairness and policy. There is no principled reason to disregard the approach set out in these cases, which have application to Canadian business and economy, and I have found them useful in considering this issue.[64]

64. In *S-Marque Inc. v. Homburg Industries Ltd.*, the court relied on equitable principles to prevent a related-party creditor, which had been found guilty of inequitable conduct, from benefiting from its status as a secured creditor.[65] While *obiter,* Justice Hood was clear in stating that equitable subordination has a place in Canadian insolvency proceedings:

> The respondent has referred to some cases which appear to have applied the rules of equity but, in view of the conclusion I have reached on the first two grounds, I prefer to say no more than that it should not be inferred that there is no such jurisdiction available. I would not wish to say anything which would encourage the view that the court does not have a long arm to prevent the kind of grossly unjust results which I think would have been achieved had the appellants succeeded in the position they took.[66]

65. In *Oppenheim v. J.J. Lacey Insurance Limited,* a Newfoundland Trial Division decision, equitable subordination was applied utilizing the three-part test enunciated at paragraph 62 above. Justice Hall concluded that the application of equitable subordination was not inconsistent with the application of the bankruptcy statute. When considering the issue, he noted:

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[64] *Blue Range Resource Corp. (Re)*, 2000 ABQB 4 (CanLII), paras. 55-56
[65] *S-Marque Inc. v. Homburg Industries Ltd.*, [1998] N.S.J. No. 550 (N.S.S.C.), 1998 CanLII 4006 (NS SC), aff'd [1999] N.S.J. No. 94 (N.S.C.A.)
[66] *Supra.*, p. 51

> [52] The important question in this matter, I having found that the first two branches of the three-part CCB test have been met, is whether to allow equitable subordination in this fact situation would be inconsistent with the provisions of the BIA. Were we not dealing with an insolvency situation, I am more than satisfied that the common law of equity would subordinate the claim of Hiland to the claim of Lloyd's as against Lacey. In P.V. Baker & P. St. J. Langan, *Snell's Principles of Equity*, 29th ed. (London: Sweet & Maxwell, 1990), page 57 sets out situations where the authors explain the circumstances in which a holder of *prima facie* priority can lose it as follows:
>
> > A person with a *prima facie* claim to priority for his interest may lose it through his own misconduct. The owner of a legal interest may be postponed to a subsequent equitable interest owing to his fraud, or by estoppel, or through his gross negligence; and the owner of a prior equitable interest may be postponed if his conduct is inequitable.
> >
> > ...
>
> ... I acknowledge that there is difficulty in limiting the scope of equitable subordination but I cannot defer from finding unfair conduct simply because such conduct is generally difficult to define. In the case at bar, it is not at all difficult to find unfair, unconscionable and criminal activity on the part of Hiland, Gillingham and Lacey. Difficulty in limiting the scope of the doctrine should not stop courts from expanding the law so that the law responds to those clear cases where rightthinking persons can clearly and easily discern oppressive unfairness as having occurred.[67]

66. The evidence overwhelmingly points to impropriety in the actions of Indalex US at the direction of its controlling shareholder. Clearly, this was inequitable conduct that was to the detriment of the Applicants' creditors, including the Salaried Plan beneficiaries. Subordination of the US Trustee's claim to interest and costs, particularly when the US Trustee has received full payment in respect of the guarantee pursuant to

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[67] *Oppenheim v. J.J. Lacey Insurance Limited*, 2009 NLTD 148, paras. 52, 54

the Court Orders, would not be inconsistent with the provisions of the CCAA. Rather, it would reinforce the integrity of the proceeding.

67. The USW could seek a lifting of the stay of proceedings to assert a claim under either the *Fraudulent Conveyances Act*[68] or the *Assignments and Preferences Act*[69] to attack the transfer of funds passed through Indalex Limited to Indalex US arising from the dividend declaration. However, based on the record and the broad discretionary powers accorded the CCAA judge, it is our view that the CCAA judge has sufficient facts before him and authority to order a subordination of the US Trustee's claim within the current proceeding.

PART V - ORDER REQUESTED

1. The USW requests that this Honourable Court grant an order:

   (a) Declaring that the Executive Plan Retirees may assert a deemed trust over any accounts and inventory of Indalex; and

   (b) Dismissing the US Trustee's claim for costs and interest in respect of the DIP Loan.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 9, 2013

Darrell Brown

[68] R.S.O.990, c. F.29
[69] R.S.O. 1990, c. A.33

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SCHEDULE "A"

List of Authorities

TAB

1. *Murphy v. National Bank of Canada*, 2012 ONSC 1360
2. *Elguindy v. The Warden of Warkworth Institution*, 2011 ONSC 4670
3. *Enron Canada Corp. v. National Oil-Well Canada Ltd.*, 2000 ABCA 285, 193 D.L.R. (4th) 314
4. *Re Noma Company,* 2004 CanLII 45450 (ON SC)
5. *Gerrow v. Dorais*, 2010 ABQB 560
6. *N'Amerix Logistix Inc. (Re),* 2001 CanLII 28082 (ON SC)
7. *White v. E.B.F. Manufacturing Ltd.,* 2005 NSCA 167 (CanLII)
8. *Tirecraft Group Inc. v. High Park Holdings ULC*, 2010 ABQB 653 (CanLII)
9. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1992), 97 D.L.R. (4th) 385 (S.C.C.)
10. *Blue Range Resource Corp. (Re)*, 2000 ABQB 4 (CanLII)
11. *S-Marque Inc. v. Homburg Industries Ltd.,* [1998] N.S.J. No. 550 (N.S.S.C.), 1998 CanLII 4006 (NS SC), aff'd [1999] N.S.J. No. 94 (N.S.C.A.)
12. *Oppenheim v. J.J. Lacey Insurance Limited*, 2009 NLTD 148

SCHEDULE "B"

LIST OF AUTHORITIES

Section 11 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

General power of court

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Fraudulent Conveyances Act, R.S.O. 1990 c. F.29

Assignments and Preferences Act, R.S.O. 1990 c. A.33