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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

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

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

Applicants

RESPONDING FACTUM

(Opposing termination of Directors' Charge, returnable November 10, 2010)

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PART I – OVERVIEW

1. This factum is filed by the Retirees in opposition to a motion by the Monitor where it seeks a declaration that, *inter alia*, the Retirees' claims that they filed in the D&O Claims Process are not claims for which the Applicants are required to indemnify their directors. The Retirees filed two claims in the D&O Claims Process by the claims bar date. First, a claim based on their terminated supplemental pension plan benefits in the amount of $5,781,422 and second, a claim for the reductions to their Executive Plan pension benefits (in an amount to be determined). Both claims relate to the non-payment of pension benefits.

2. Paragraph 21 and 7(a) of the Amended Amended and Restated Initial Order of May 12, 2009 the ("Initial CCAA Order") expressly order the Applicants to indemnify their directors for the non-payment of pension benefits. As such, the Retirees' D&O claims fall squarely within the language of the Initial CCAA Order. The Applicants are required to indemnify their directors for such claims. The Monitor's motion as against the Retirees should be dismissed.

PART II – FACTS

3. Keith Carruthers, Leon Kozierok, Richard Benson, John Faveri, Ken Waldron, John (Jack) W. Rooney, Bertram McBride, Max Degen, Eugene D'Iorio, Richard Smith, Robert Leckie, Neil Fraser and Fred Granville are retired employees ("Retirees") of Indalex Limited and/or one of its affiliates, (collectively, "Indalex" or the "company"). During their years of employment, each of the Retirees earned an entitlement to pension benefits from Indalex to be paid to them on retirement.

Carruthers Affidavit, para 2.

4. Indalex is a federally incorporated company. Tim Stubbs, Patrick Lawlor and David McCallum were at all material times directors of Indalex Limited, Novar Inc., 6326765 Canada Inc., Indalex Holdings (B.C.) Ltd. and Indalex.

Carruthers affidavit, para. 5.

The Directors' Charge is put into place to cover claims against the directors

5. In the Pre-Filing Report to the Court dated April 3, 2009 prepared by FTI Consulting Inc. ("FTI"), the proposed Monitor at the time, reported that the Applicants would seek a Charge to cover claims against the directors and officers ("D&O Charge") of Indalex in the amount of $3.3 million (US). FTI reported to the Court that it was of the view that the D&O Charge is reasonable in relation to the quantum of the estimated potential liabilities of the directors.

Carruthers affidavit para. 5.

6. Further, Tim Stubbs, the CEO of Indalex, in his affidavit sworn April 3, 2009 that was filed in support of the company's application for CCAA protection, also supported the establishment of a Directors Charge to cover the potential liabilities of Indalex's directors. At paragraph 74 and 75 of his affidavit, Mr. Stubbs states that:

> 74. In order to carry on business during these proceedings, the Applicants require its directors and officers (together with the Company's former directors and officers, the "directors") to remain committed. Although the Applicants intend to comply with the applicable laws with respect to matters affecting it, including, without limitation, the payment of wages, employee source deductions, vacation pay, GST, provincial sales tax and regulatory deemed trust requirement, the failure to successfully complete a Restructuring Process may result in significant personal liabilities for Directors.

> 75. As such, the Applicants intend to indemnify the Directors for such potential liabilities, and request a charge ("Directors Charge") in the amount of $3.3,000,000.00 to indemnify the Directors in respect of any such liabilities as they may incur in these proceedings.
>
> Carruthers affidavit, para.7.

7. On April 3, 2010, Justice Morawetz issued an Initial Order which included a charge on the property of the Applicants not to exceed $3.3 million (US) as security for the indemnity provided in paragraph 21 of the Initial Order to the Applicant's directors and officers.

8. Sections 7(a) and 21 of the Initial Order expressly refer to the directors' charge as indemnifying the directors for claims based on the non-payment of *pension benefits*.

9. During their employment years with the company, the Retirees earned an entitlement to pension benefits from Indalex under the "Supplemental Retirement Plan for Executive Employees of Indalex Limited and Associated Companies" (the "Supplemental Plan"). These benefits are to be paid to them on their retirement for their lifetimes. The Supplemental Plan is a defined benefit pension plan sponsored by the company. It does not have a separate pension trust fund. The benefits are required to be paid by the company.

> Carruthers affidavit, para. 9.

Company assured Retirees that their supplemental benefits were secure and would be paid

10. During the time the Retirees were active employees of the company and accruing their entitlement to benefits under the Supplemental Plan, concerns were expressed by them regarding the security of their benefits. To alleviate their concerns, the company sent a letter dated January 13, 2003 confirming that the company was "absolutely committed to meeting

all such obligations as they fall due". The letter also states that "your peace of mind with respect to your future retirement income is important to us".

Carruthers affidavit, para. 12.

11. Based on that assurance from the company, as well as the terms of the Supplemental Plan, it was the expectation of the Retirees that their Supplemental Plan benefits were secure and would be paid to them during their retirement years. This expectation was entirely reasonable.

Carruthers affidavit, para. 13.

The Retirees' supplemental pension benefits are terminated post-CCAA

12. By letter dated April 9, 2009, six days after obtaining CCAA protection, the company informed the Retirees that it was stopping payment of their supplemental pension benefits.

Carruthers affidavit, para. 10.

13. The Retirees brought a motion requesting an order requiring the company to reinstate payment of their supplemental pension benefits. On July 2, 2009, Justice Morawetz dismissed the motion and released an Endorsement on July 24, 2009. A motion was filed for leave to appeal that decision to the Ontario Court of Appeal. The Ontario Court of Appeal dismissed the motion for leave to appeal. The Retirees' supplemental pension benefits have been permanently terminated.

Carruthers affidavit, para. 11.

Retirees' registered pension plan benefits are reduced 35% post-CCAA

14. The Retirees are also entitled to receive pension benefits from a registered pension plan entitled the "Retirement Plan for the Executive Employees of Indalex Limited and Associated Companies" (the "Executive Plan"). The Executive Plan is a defined benefit pension plan sponsored by Indalex. The monthly benefits from the Executive Plan are paid from a separate trust fund for the Plan. The company is required under the terms of the plan and the provisions of the *Ontario Pension Benefits Act* to adequately contribute to the fund of the Executive Plan so that it will pay the promised benefits to all members of the Executive Plan.

Carruthers affidavit, para. 14.

15. As of January 1, 2008, the actuary retained by the company reported that the Executive Plan was underfunded on a wind-up basis by approximately $2.9 million. The wind-up deficit has since worsened to approximately $3.2 million. A wind-up deficit means that on the wind-up of the Executive Plan, there are not enough funds to pay all the pension benefits to the members. The evidence is incontrovertible that since the company obtained CCAA protection on April 3, 2009, it did nothing to address or fund the wind-up deficit in the Executive Plan. The Executive Plan is now being wound up in an underfunded state, and the Retirees' pension benefits have been cut by 35%.

Carruthers affidavit, para. 15.

16. On July 2, 2009, the company moved for a court order approving a bidding process for the sale of its assets and deeming a bid by a company called SAPA A.B. ("SAPA") as the

stalking horse bid. The bidding process required any interested parties to submit bids to the Monitor effectively 11 days later, by 10:00 a.m. July 14, 2009. According to the Monitor's 7th Report (paras. 18-20) no qualified bids were received in that timeframe. As a result, no auction was held.

Carruthers affidavit, para. 16.

17. On July 20, 2009, the company moved for an order approving the sale of its assets to SAPA, and approval of a distribution of the sale proceeds to the DIP Agent. The Retirees opposed the motion because the company was not taking any steps to address or fund the wind-up deficit in the Executive Plan, and because the Monitor's liquidation analysis indicated a better recovery for creditors from a liquidation of the company than the proposed sale. The Retirees also argued that the statutory deemed trust for unpaid pension plan contributions under section 57(4) of the Ontario *Pension Benefits Act* applied to require the amount of the wind-up deficit in the Executive Plan be paid to the Executive Plan ahead of any distribution to the DIP Agent or other creditors.

Carruthers affidavit, para. 17.

18. On July 20, 2009, Justice Campbell approved the sale of the company's assets to SAPA but directed the Monitor to reserve $3.2 million representing the wind-up deficit in the Executive Plan pending the hearing of the Retirees' deemed trust motion.

Carruthers affidavit, para. 18.

19. On July 31, 2009, the sale to SAPA closed. According to the Monitor, a payment of $17,041,391.80 (US) was made from the Canadian sale proceeds by the Monitor, on behalf of

Indalex, to the DIP Agent. This resulted in a shortfall of $10,751,247.22 (US) in respect of the DIP loan. The DIP Agent then called on the guarantee granted to the DIP Lenders by Indalex US for the shortfall. Indalex US paid the shortfall amount pursuant to the guarantee. Indalex then sought, and continues to seek, a distribution of the proceeds being held in reserve by the Monitor and to defeat the Retirees' claims.

Carruthers affidavit, para. 19.

20. According to the affidavit of Keith Cooper, the Chief Restructuring Officer of Indalex, sworn on August 24, 2009 (paragraph 33) all the Indalex directors resigned after the sale closed on July 31, 2009. Within a week or so, the same directors had senior management jobs with SAPA. Indalex was left as an insolvent shell. Indalex abandoned the underfunded Executive Plan.

Carruthers affidavit, para. 21.

21. On August 28, 2009, the Retirees motion proceeded before Justice Campbell. On February 18, 2010 Justice Campbell released a decision dismissing the motion. The Retirees moved for leave to appeal to the Ontario Court of Appeal. The Ontario Court of Appeal granted leave to appeal. The appeal is currently scheduled to be heard on November 23 and 24, 2010.

Carruthers affidavit, para. 20.

22. On November 5, 2009, given that the company had neither been administering nor funding the Executive Plan, the Ontario Superintendent of Financial Services appointed the

actuarial firm of Morneau Sobeco Limited Partnership to take over the administration of the abandoned Executive Plan.

Carruthers affidavit, para. 22.

23. Morneau reported that it would declare a wind-up date of September 30, 2009 for the Executive Plan. Morneau reported to the Retirees that due to the underfunding of the Executive Plan for the past several years, the pension benefits being paid to the Retirees would be immediately cut by 35%:

> ***As you may be aware, the [Executive] Plan has been underfunded for several years.*** Based on the most recent actuarial valuation as of January 1, 2008, prepared by the prior actuary for the Plan, there were insufficient assets to fully satisfy the benefit entitlements of all members and pensioners. ***We have reviewed the current status of the Plan and have determined that there are only sufficient assets to pay approximately 65% of the benefits for Plan members, and pensioner and beneficiaries.*** [emphasis added]
>
> Carruthers affidavit, para. 23.

24. With the total loss of their Supplemental Plan benefits and the 35% reduction of their Executive Plan benefits, the Retirees have suffered very substantial losses to their monthly pension benefits during their retirement years. The following chart summarizes the Retirees' entitlements under the Supplemental Plan and Executive Plan and the amount that they are actually receiving today.

Retiree	**SERP Entitlement (per month)**	**Eliminated SERP Payment (current)**	**Registered Plan Entitlement (per month)**	**Reduced Registered Plan Payment (per month)**	**Total Pension Entitlement (per month)**	**Current Actual Payment (per month)**	**% of loss of pension benefits**
Leon Kozierok	$4,326.00	0.00	$3,600.14	$2,340.09	$7,926.14	$2,340.09	70%

Eugene D'Iorio	$2,249.33	0.00	$1,583.33	$1,029.16	$3,832.66	$1,029.16	73%
John Faveri	$329.17	0.00	$4,158.12	$2,702.78	$4,487.29	$2,702.78	40%
Ken Waldron	$1,483.12	0.00	$597.76	$388.54	$2,080.88	$388.54	81%
Neil Fraser	$2,893.97	0.00	$1,722.22	$1,119.44	$4,616.19	$1,119.44	76%
Jack Rooney	$134.42	0.00	$1,426.56	$927.26	$1,560.98	$927.26	41%
Fred Granville	$108.00	0.00	$741.52	$481.99	$849.52	$481.99	43%
Bertram McBride	$2,082.92	0.00	$5,833.33	$3,791.66	$7,916.25	$3,791.66	52%
Richard Benson	$1,466.17	0.00	$3,248.13	$2,111.28	$4,714.30	$2,111.28	55%
Keith Carruthers	$3,570.50	0.00	$3,958.35	$2,572.93	$7,528.85	$2,572.93	67%
Max Degen	$645.59	0.00	$3,981.98	$2,588.29	$4,627.57	$2,588.29	44%
Bob Leckie	$2,394.45	0.00	$944.45	$771.76	$3,338.90	To be commenced	77%
Dick Smith	$3,831.74	0.00	$1,364.02	$886.61	$5,195.76	$1,364.02	74%

Retirees file D&O Claims against directors of Indalex

25. Pursuant to the Claims Procedure Order dated July 30, 2009, the Monitor solicited claims from creditors against the directors and officers of Indalex with a claims bar date of August 28, 2009. The Retirees submitted Proofs of Claim by that date based on the following:

(a) the loss of their Supplemental Plan benefits in the total claim amount of $5,781.422; and

(b) the loss of a portion of their Executive Plan benefits, (which at the time of the Proof of Claim filing was an undetermined amount because the wind-up process had not yet commenced and the amount of their losses could not yet be quantified.)

Carruthers affidavit, para. 25.

26. The three directors identified in the Retirees' Proof of Claim forms are Tim Stubbs, Patrick Lawlor and David McCallen. As noted above, these individuals were identified through corporate searches as directors of Indalex.

Carruthers affidavit, para. 26.

27. The Monitor did not issue any Notice of Dispute or Disallowance of the Retirees' D&O claims. Nor did the Monitor proceed further with a D&O claims process, or any process whatsoever for the adjudication of the Retirees' claims.

Carruthers affidavit, para. 27.

28. Paragraph 20 of the Order of this court dated July 30, 2009 states that following receipt of D&O claims, the Monitor is entitled to bring a motion for approval of a procedure for the "evaluation and adjudication of any D&O claims filed in accordance with the claims procedure..." The Monitor has not brought any such motion.

Order of Justice Campbell, July 30, 2009, para.20.

29. Counsel to the Retirees has indicated in discussions with Monitor's counsel that the Retirees' claims against the directors include claims based on the oppression remedy pursuant to section 241 of the *Canada Business Corporations Act*.

Carruthers affidavit, para. 28.

30. The Monitor instead brings the motion herein to terminate the Directors Charge and release the amount held to indemnify the directors to the general pool of assets of the company.

PART III – THE ISSUE

31. Do the claims filed by the Retirees in the D&O Claims Process constitute claims for which the Applicants are required to indemnify their directors pursuant to paragraph 21 of the Initial CCAA Order?

Answer: **Yes**

PART IV – LAW

The scheme of the Directors' Charge

32. Under the Initial CCAA Order, all proceedings against the directors are stayed. Paragraph 20 contains the stay which is very broad:

> [20] THIS COURT ORDERS that during the stay period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of an Applicant with respect to any claim against the directors or officers that arose before or after the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under ***any law*** should be liable in their capacity as

> directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicant, if one is filed in respect of the Applicant, is sanctioned by this court or is refused by the relevant creditors or this court. [emphasis added]

33. Despite the stay of all proceedings against directors while the company is under CCAA protection, the creation of a Directors' and Officers' Charge clearly contemplates that the Directors could be involved in acts or omissions during the CCAA proceedings that could make them liable personally.

34. Section 11.51(1) of the current CCAA expressly refers to the creation of a directors charge "to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act".

> CCAA, section 11.51(1)

35. The purpose of a directors charge is to protect directors from claims being advanced against them personally. It covers all claims at law that can be made against directors:

> I am satisfied that the purpose of the Directors and Officers Indemnification Charge and the definition of a D&O claim was to protect Directors and Officers from claims that could be made at law against them and to provide for a fund which would allow the directors and officers to continue to assist the Petitioners without running the risk that their personal assets would be available to creditors ... A D&O Claim only includes those claims which were available at law against directors and officers.
>
> *Redcorp Aventures Ltd.* [2010] B.C.J. 279 (B.C. S.C), para 35

36. In this case, paragraph 21 of the Initial CCAA Order creates the Directors' and Officers' Indemnification and Charge. Under this paragraph, the court orders the Applicants to indemnify their Directors and Officers from "all claims...relating to the failure of the

Applicants, after the date of [the Initial Order], to make payments of ***[pension benefits].*** The full text of paragraph 21 is set out below:

> [21] THIS COURT ORDERS that ***the Applicants shall indemnify their respective directors and officers from all claims, costs, charges and expenses relating to the failure of the Applicants, after the date hereof, to make payments of the nature referred to in subparagraphs 7(a),*** 9(a), 9(b), 9(c), and 9(d) of this Order which they sustain or incur by reason of or in relation to their respective capacities as directors and/or offciers of the Applciants except to the extend that, with respect to any officer or director, such officer or director has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilfull misconduct. [emphasis added]

37. Paragraph 7, which is referred to in paragraph 21, states:

> [7] THIS COURT ORDERS that subject to the terms of the DIP Documents (as defined below), the Applicants ***shall be entitled to but not required to pay the following expenses*** whether incurred prior to or after this Order:
>
> (a) all outstanding and future wages and salaries (for greater certainty wages and salaries shall not include severance or termination pay), employee and ***pension benefits***, current service contributions to pension plans (which for greater certainty shall not include special payments) vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and [emphasis added]

38. On a plain reading, there is no doubt that based on paragraphs 21 and 7(a), the Applicants are required to indemnify their directors for claims based on the failure of the Applicants ***to make payment of pension benefits***. The Retirees' D&O claims are based exactly on the non-payment of pension benefits. The Directors' and Officers' Indemnification and Charge applies to the claims of the Retirees.

The Monitor's arguments are untenable

39. As noted above, the Retirees have claims against the directors in the D&O Claims Process based on two distinct losses:

(a) a claim based on the termination of supplemental pension benefits; and

(b) a claim based on the reductions to their Executive Plan benefits.

40. With respect to the Retirees' claim for the loss of their supplemental pension benefits, the Monitor points to paragraph 11 of Justice Morawetz's Endorsement of July 24, 2009 to argue that since Justice Morawetz found that the *company* is "not authorized" to pay the monthly supplemental pension benefits payments, the *directors* therefore cannot be liable. The Monitor's argument is a misinterpretation of Justice Morawetz's Endorsement.

41. In paragraph 11 of Justice Morawetz's Endorsement, His Honour is referencing the language in paragraph 8 of the Initial CCAA Order which gives the company discretion to pay expenses (such as supplemental pension benefits) while it carries on business under the CCAA protection:

> 8 THIS COURT ORDERS that, except as otherwise provided to the contrary herein and pursuant to the terms and conditions of the DIP documents, ***the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course*** after the date of this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:...

42. Justice Morawetz found that the payment of supplemental pension benefits to the Retirees was not required for the company's "carrying on the business in the ordinary course

after the date of this Order". He thus relieved the company from making the supplemental pension (i.e. SERP) payments.

43. However, Justice Morawetz did not extinguish the liability that arises from the termination of the SERP benefits. He went on to expressly hold that the non-payment of the SERP benefits gives rise to valid claims against the company. Justice Morawetz held: "A breach of the SERP payment obligations gives rise to an unsecured claim of the SERP group against the Indalex Applicants."

44. Furthermore, Justice Morawetz did not make any decision, nor was the issue even before him, that the non-payment of the SERP payments relieved the *directors* of liability for the SERP payments, nor that the Retirees' claims in the D&O Claims Process were not covered by the D&O Charge.

45. The essence of the Monitor's untenable argument is: since Justice Morawetz issued an Initial CCAA Order that gave the company discretion to cease paying supplemental pension benefits on the basis that such payments were not required for the company to carry on business while it was under CCAA protection, and which the company ceased paying, then such a finding should also be interpreted as extending to relieve the *directors* of any liability relating to the non-payment of the SERP benefits. This is wrong. Such an argument would essentially stand for the proposition that any non-payment of an expense by a company during CCAA proceedings that would independently give rise to a claim at law against directors would be extinguished against the directors. For example, applying the Monitor's argument, if a company did not pay wages, which paragraph 8 of the Initial CCAA Order would allow it not to pay (as well as paragraph 7), then the directors would be relieved of liability for wages

under the corporation's statutes. That cannot be correct. Despite Justice Morawetz's decision relieving the company from paying the supplemental pension benefits, the Retirees' claims against the directors based on the non-payment are not extinguished. They remain covered by the Directors' Charge which expressly covers claims for the non-payment of pension benefits.

Claim for reductions to Executive Plan benefits

46. The second claim submitted by the Retirees in the D&O Claims Process is based on the reduction to their pension benefits from the Executive Plan.

47. Those pension benefits have been reduced by 35%. The Retirees' claims filed in the D&O Claims Process are again based on the non-payment of pension benefits. Accordingly, the claims are precisely based on a "failure of the Applicants, after the date [of the Initial Order] to make payments of ***...["pension benefits"].*** The indemnity obligation of the Applicants in paragraph 21 of the Initial CCAA Order applies.

48. In paragraph 37 of its factum, the Monitor argues that since the Applicants made payment of their going-concern contributions and special payments to the Executive Plan that they were required to make, the D&O Charge does not cover the loss of pension benefits claim of the Retirees. The Monitor's argument is a misinterpretation of the language of the Initial CCAA Order. The Monitor confuses the distinction between *contributions to a pension plan fund* versus the *payment of pension benefits* to Retirees. As described above, paragraphs 21 and 7(a) of the Initial CCAA Order operate to indemnify directors for any non-payment of pension benefits. Here, the Retirees' claims are based on the non-payment of their pension benefits. Their claims clearly fall within coverage of the Directors' Charge.

49. The Retirees have claims against both the company and its directors. They are independent claims. All proceedings are stayed by the Initial CCAA Order against both the company and its directors. The Retirees are proceeding under the D&O Claims Process for their claims against the directors. This has nothing to do with, as the Monitor puts it in paragraph 38 of its factum "allowing the Retired Executives to obtain indirectly what they were not permitted to obtain directly through the Deemed Trust Motion. The claims against the directors are an independent claim at law. The Retirees are entitled to advance their claims against the directors concurrently with their claims against the company.

The Retirees have a claim at law against the directors for oppression, which is covered by the D&O Charge

50. The Retirees have a claim at law against the directors for oppression under section 241 of the *Canada Business Corporations Act*.

Canada Business Corporations Act, R.S., 1985, c. C-44, section 241

51. The courts have held that the oppression remedy is available for complainants against directors. Further, the courts have held that former employees can claim oppression against directors for unpaid deferred compensation.

Walls v. Lewis (2009) 61 B.L.R. (4th) 143 (Ont. S.C.J.)

52. There are only three exclusions to the D&O indemnity under paragraph 21 of the Initial CCAA Order. The three exclusions to coverage are where a director or officer:

(a) has actively participated in the breach of any related fiduciary duty;

(b) has been grossly negligent; or

(c) is guilty of wilful misconduct.

There is no exclusion under paragraph 21 for claims against directors based on oppression.

53. If a claim for the oppression has "any air of reality to it," a court should not dismiss such a claim simply based on the interpretation of documents. In *Maynes* v. *Med-Eng Systems Inc.*, the court refused to dismiss an oppression remedy claim against directors on a summary judgment motion. Further, the court held that even if a corporation proceeds strictly in accordance with the letter of the agreements, this does not necessarily insulate it from a finding of oppression.

> 18 ...even if the corporation had proceeded strictly in accordance with the letter of the agreements it would not necessarily insulate it from a finding of oppression. Given that the Supreme Court has declined to catalogue situations where a reasonable expectation may arise, it follows that if a claim for an oppression remedy has any air of reality to it, it will be difficult to dismiss such a claim at the summary judgment stage based on interpretation of documents.
>
> ...
>
> 22 I conclude that summary judgment is not appropriate given the facts that are in issue. The knowledge of the directors and officers at various points in time is relevant to the question of oppression and to remedy...
>
> *Maynes v. Med-Eng Systemts Inc.* [2010] O.J. No. 3819, [OSCJ], paras. 18 and 22.

54. It is settled law that unfair disregard is sufficient to establish a claim for oppression. It is not necessary to show that the corporation or its directors acted dishonestly or in bad faith.

> In oppression cases it is not necessary to show that the corporation or its directors acted dishonestly or in bad faith.
>
> ...
>
> The Ontario Court of Appeal confirmed that it was not necessary for the creditor to prove bad faith or dishonesty by the corporation or its sole director. Rather, the creditor need only prove that the director caused the company to do or omit to do something that oppressed or unfairly prejudiced the creditor, or unfairly disregarded the creditor's interest.

Directors Liability in Canada, Ronald Davis, (Specialty Technical Publishers), at page 11/28.

Brant Investments Ltd v. KeepRite Inc. [1991] O.J. No. 683 (Ont CA), para. 38

Sidaplex-plastic Supplier v Elta Group Inc. [1988] 40 O.R. (3d) 563 (Ont..CA)

Vallee v. Pickard [2007] O.J. No. 110, para. 10

2082825 Ontario Inc. v. Platinum Wood Finishing Inc. [2008] O.J. No. 3715 (OSCJ), para. 27

55. The Supreme Court recently held that the central objective of the oppression remedy is to "enforce not just what is legal but what is fair".

BCE Inv. v. 1976 Debentureholders, [2008], paragraph 10

56. *BCE Inv. v. 1976 Debentureholders,* the Supreme Court held that the court first must determine the reasonable expectations of the applicant in the particular circumstances. In this regard, the applicant must identify the expectations he claims have been violated and establish that the expectations were reasonably held. Secondly, the court must determine whether the reasonable expectations were violated by conduct which was oppressive, unfairly prejudicial or unfairly disregarded a relevant interest.

BCE Inv. v. 1976 Debentureholders, [2008], paras. 72 to 73

57. This court has recently held that the existence of a reasonable expectation involves a fact-finding exercise.

Tanenbaum Estate v. Tanjo Investments Ltd. [2009] O.J. No. 3792 per Campbell J., paras. 45-47

58. Even though no formal adjudication of the Retirees' D&O claims has yet occurred in this proceeding and accordingly no related fact-finding exercise, there is already ample evidence to support a finding of a oppression against the directors.

59. There is no doubt that the Retirees had a reasonable expectation that they would be paid their full pension benefits that they earned under the Executive Plan and Supplemental Plan:

(a) during their years of employment, the Retirees earned an entitlement to pension benefits under both the Executive Plan and the Supplemental Plan to be paid to them on retirement for their lifetimes; and

(b) during the time the Retirees were active employees, they expressed concerns regarding the security of their Supplemental Plan benefits. In response, they were assured by the company that it was "absolutely committed to meeting all such obligations as they fall due" and that "your peace of mind with respect to your future retirement income is important to us";

60. Tim Stubbs, the President and CEO of Indalex and a director was fully aware from the outset of the CCAA proceedings of the company's obligations to the pension plans and that the Executive Plan was underfunded. At paragraphs 59-66 of his affidavit sworn in support of the company's CCAA application, he acknowledges the company's obligations under the Executive Plan and the Supplemental Plan and expressly acknowledged (paragraph 62) that as of January 1, 2008, there was a wind-up deficiency in the Executive Plan of $2.9 million.

Carruthers affidavit, para. 31.

61. The three directors of Indalex profited personally from their appointment as senior managers of SAPA immediately following the sale of Indalex's assets to SAPA during the company's CCAA proceedings.

(i) Tim Stubbs was appointed Business Area President of SAPA. On September 8, 2010, Tim Stubbs was promoted to President and CEO of SAPA. SAPA announced that he "has been apart of SAPA's Executive Team since the acquisition of Indalex in August 2009."

Carruthers affidavit, para. 34.

(ii) Dave McCallen, was also hired by SAPA soon after the sale to SAPA closed and is reported to now be a Vice-President of SAPA Extrusions.

Carruthers affidavit, para. 35.

(iii) Patrick Lawlor joined SAPA in a senior role immediately after the sale of Indalex's assets. According to a SAPA statement, "Since 2009 [Patrick Lawlor] has been CFO and General Manager Specialty/Business Integration for SAPA Profiles North America. On September 8, 2010 Patrick Lawlor was appointed Business Area President SAPA Profiles North America reporting to the new SAPA CEO, Tim Stubbs."

Carruthers affidavit, para. 36.

62. In contrast, the Retirees have been severely prejudiced. During Indalex's CCAA proceeding, the same three directors oversaw the termination of payments under the

Supplemental Plan, and the abandonment of the Executive Plan in a underfunded state with no payments being made to fund the wind-up liability. These acts and omissions caused very significant losses to the Retirees' pension benefits and are oppressive, unfairly prejudicial and unfairly disregard the interests of the Retirees.

PART V – ORDER REQUESTED

The Retirees respectfully request an Order:

(a) dismissing the Monitor`s motion to terminate and discharge the D&O Charge in respect of the Retirees`claims; and

(b) costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31th day of October, 2010.

Andrew J. Hatnay

Demetrios Yiokaris

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at **Toronto**

RESPONDING FACTUM
(Opposing termination of Directors' Charge, returnable November 10, 2010)

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