

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

IN THE MATTER OF the *Companies' Creditors
Arrangement Act*, R.S.C. 1985, c. C-36, as amended

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

Applicants

**FACTUM OF THE APPLICANTS
(Motion returnable July 20, 2009)**

July 16, 2009

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

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PART I – OVERVIEW

1. The Applicants seek approval of a sale transaction (the "Sapa Transaction") with Sapa Canada Inc. (the "Purchaser" or "Stalking Horse Bidder") pursuant to the terms of an Asset Purchase Agreement (as amended and restated the "APA").¹
2. The APA represents the highest and best offer for the assets and business of Indalex and resulted from a fair and transparent marketing process. This process was developed by the Applicants, Indalex U.S. and their professional advisors. It was carried out under the supervision of this Court pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") and the supervision of the U.S. Bankruptcy Court for the District of Delaware (the "US Bankruptcy Court") pursuant to Chapter 11 of the U.S. Bankruptcy Code (the "US Code").
3. The Sapa Transaction is the best possible outcome for a broad cross-section of stakeholders and will provide for:
 - the continuation of the Applicants' business as a going concern;

¹ The APA is dated June 16, 2009 and is by and among Indalex Holdings Finance, Inc., Indalex Holding Corp., Indalex Inc., Caradon Lebanon, Inc., Dolton Aluminum Company, Inc. (collectively, the "Indalex U.S.", and together with the Applicants, "Indalex"), the Applicants (with the exception of Novar Inc.), as sellers, and Sapa Holding AB (who has assigned all of its rights and obligations thereunder to Sapa Canada Inc.).

- the preservation of approximately 750 jobs across four Canadian provinces and preservation of approximately 1,000 jobs in the United States;
 - minimal disruption to the Applicants' customer base;
 - stable, reliable ongoing business for the Applicants' suppliers; and
 - sale proceeds that will be available for timely distributions to creditors in accordance with the requisite priorities.
4. The Sapa Transaction represents a successful restructuring of the Applicants' business by way of a going concern sale and is the best outcome achievable, in light of the alternatives available to the Applicants. It thus fulfils the broad remedial purpose of the CCAA and is consistent with the principles of international comity and cooperation frequently espoused and approved by this Court.

PART II – FACTS

Background

5. The Applicants are part of a group of companies known as “Indalex”, which is one of the world’s largest aluminum extrusion companies and the only such organization providing coast-to-coast coverage across North America. Indalex’s Canadian and U.S. operations are not stand alone operations and are operated as a fully integrated and interdependent enterprise.

Affidavit of Fred Fazio sworn June 29, 2009 at para. 7 [the “Fazio Affidavit”]

6. On March 20, 2009, Indalex U.S. commenced proceedings under the Bankruptcy Code in the U.S. Court. On April 3, 2009, the Applicants filed for and obtained protection from their creditors under the CCAA, pursuant to an order (the “Initial Order”) of the Honourable Mr. Justice Morawetz. Pursuant to the Initial Order, FTI Consulting Canada ULC was appointed as Monitor of the Applicants.

Seventh Report of the Monitor FTI Consulting Canada ULC dated July 15, 2009 [the “Seventh Report”] at para. 6
Fazio Affidavit at para. 7

7. The stated reason for the filing was set out in the initial affidavit sworn by Indalex's Chief Executive Officer: "In the view of the Applicants, these proceedings present the best opportunity for the Applicants to maximize value for their stakeholders and seek a viable going concern solution."

Affidavit of Timothy R.J. Stubbs sworn April 3, 2009 at para. 7 [the "Stubbs Affidavit"]

8. On April 8, 2009, the Initial Order was amended and restated (the "Amended and Restated Initial Order") to, *inter alia*, authorize the Applicants to exercise certain restructuring powers and authorize Indalex Limited to borrow funds pursuant to a debtor-in-possession credit agreement among the Applicants, the U.S. Debtors and a syndicate of lenders (the "DIP Lenders") for which JPMorgan Chase Bank, N.A. is administrative agent (the "DIP Credit Agreement").

Fazio Affidavit, at para. 8.

9. The DIP Credit Agreement contains certain milestones with respect to the sale of the assets of Indalex. Pursuant to the milestones, Indalex was required to execute and deliver an asset purchase agreement on or before June 16, 2009 and close a sale of the assets by July 21, 2009.

Fazio Affidavit, at para. 9.
DIP Credit Agreement, s. 5.14
Seventh Report at para. 34(a)

The Marketing Process

10. Indalex retained Jefferies & Company, Inc. ("Jefferies") to assist with a marketing process and began marketing the Indalex business on March 18, 2009 by identifying and making contact with 54 potential purchasers. A confidential information memorandum ("CIM") was circulated to 36 parties by Jefferies. The CIM contained a detailed overview of the Indalex business, its facilities, operations and business strategies, market share and financial data, and analysis of the aluminum extrusion industry.

Fazio Affidavit, at para. 11

11. On April 22, 2009, the Court granted an Order which, *inter alia*, approved the marketing process (the "Marketing Process").

Seventh Report at para. 4

12. The purpose of the Marketing Process was to identify a bid – known as a stalking horse – for the Applicants' assets that would establish a base line bid that could then be used to solicit higher and better offers (the "Stalking Horse Process").

Fazio Affidavit, at para. 10

13. The marketing of the Indalex business is described in the Fazio Affidavit at paragraphs 13-22, and can be summarized as follows:
 - (i) On or before April 30, 2009, 13 preliminary indications of interest were received by Jefferies with initial valuations of the Indalex business ranging from \$65 million to \$120 million. Based on an evaluation of these preliminary bids, seven buyers were invited to continue to the second round of the Stalking Horse Process.
 - (ii) In the second round of the Stalking Horse Process, management presentations were made and potential purchasers were given an opportunity to meet with the Indalex management team and conduct site visits of the Indalex facilities. In addition, an electronic data room was set up by Jefferies which contained detailed financial disclosure, copies of material contracts, and extensive additional diligence information. Following the second round, two potential purchasers declined to submit stalking horse bids. The remaining five potential purchasers were provided with a template APA (including draft disclosure schedules), as well as draft bidding procedures and instructed to submit bids on or before June 4, 2009.
 - (iii) Jefferies received bids from 4 of the potential purchasers for all or substantially all of the Indalex business; although the template APA allowed bidders to submit bids on a facility-by-facility basis if they so wished. Copies of all bids were promptly provided to the Monitor.
 - (iv) On June 10, 2009, the Board of Directors of the Applicants, after consultation with Jefferies, the U.S. Chief Restructuring Officer and the Monitor, voted unanimously to approve the bid submitted by the Stalking Horse Bidder. The U.S. Debtors' board approved the bid by the

Stalking Horse Bidder on June 11, 2009. Legal counsel to Indalex was then instructed to finalize the APA with the Stalking Horse Bidder.

14. On July 2, 2009, the Court approved bidding procedures to solicit higher and better offers for Indalex's business and assets (the "Bidding Procedures") and deemed the APA as a "Qualified Bid" under the Bidding Procedures. Despite efforts to solicit Qualified Bids, no further bids were received by the deadline set out in the Bidding Procedures and therefore there are no bids, other than the APA. Accordingly, the Applicants are seeking approval of and authority to consummate the proposed sale to the Purchaser as contemplated by the APA.

Seventh Report at paras. 18 and 19

The Sapa Transaction

15. The APA allocates \$31,700,000 of the aggregate cash purchase price to the Applicants' assets, subject to certain adjustments. The APA provides that all post-filing payables relating to the assets to be acquired by the Purchaser will be assumed by the Purchaser. The Purchaser will also be assuming Indalex's collective agreements and all unionized members will continue their employment with the Purchaser. The Purchaser will also extend offers to substantially all of Indalex's non-unionized employees. Additionally, the Purchaser will assume certain liabilities, including certain priority obligations. The APA is not subject to any financing or due diligence conditions. Other key terms of the APA are set out in the Fazio Affidavit at paragraphs 26 to 52.
16. The Monitor has prepared a preliminary liquidation analysis (the "Liquidation Analysis") based on certain information provided by the Applicants and independent appraisals obtained for the Applicants' inventory, machinery and equipment and real property assets between February and June 2009. Although the analysis indicates greater monetary proceeds may be obtained by way of a piecemeal liquidation of the Applicants' assets, as set out in the Seventh Report of the Monitor, such analysis is inherently speculative, is based on a number of untested assumptions, and is subject to a number of material qualifications. A liquidation would also result in a significant loss of long term value for

a number of the Applicants' key stakeholders, including employees, suppliers and customers.

Seventh Report at para. 24

17. The Sapa Transaction is the result of a competitive process and offers greater consideration to each of the Canadian and U.S. estates than any other bid received. It contains the fewest closing conditions and in the view of the Applicants and their professional advisors, it is in the best interest of the Applicants' broad cross-section of constituents. The APA is also satisfactory to the DIP Lenders, and satisfies the milestone requirements set out in the DIP Credit Agreement.

Seventh Report para. 20 and para 32
Fazio Affidavit at para. 22

PART III – ISSUES

18. The issue is whether this Court should approve the APA and the Sapa Transaction.

PART IV – LAW AND ARGUMENT

ASSET SALES IN CCAA PROCEEDINGS

19. The CCAA is a remedial statute that ought to be given a purposive interpretation, and its flexibility assists in achieving the CCAA's broad remedial purpose. It is well established that the court's jurisdiction extends to authorizing the sale of the debtor's business, even in the absence of a plan or creditor vote.

Re Canadian Red Cross Society (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div) at paras. 43 and 45 [*“Canadian Red Cross Society”*]

Re Consumers Packaging Inc. (2001), 27 C.B.R. (4th) 197 (Ont.C.A.) at para. 9.

Re Winnipeg Motor Express Inc. (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 39 and 41 [*“Re Winnipeg Motor”*]

20. In deciding whether to approve the sale of the Applicants' business, the following are the duties of the Court when making such a decision:

- (a) to consider whether the debtor has made a sufficient effort to obtain the best price and has not acted improvidently;
- (b) to consider the efficacy and integrity of the process by which offers have been obtained;
- (c) to consider whether there has been unfairness in the working out of the process; and
- (d) to consider the interest of the parties

Royal Bank v. Soundair (1991), 7 C.B.R. (3d) 1 (Ont.C.A.) at para. 16
 [“Soundair”]
Canadian Red Cross Society at para. 47.

(A) Best Price Possible

21. The Applicants adopted a reasonable and effective marketing process to sell their business which was approved by the Court. The comprehensive and exhaustive process summarized above and in the Fazio Affidavit provided the market with the opportunity to determine the best available price for the Indalex business, and the market has conclusively spoken.

22. While the Liquidation Analysis suggests there is a potential for a greater return to unsecured creditors in a liquidation, this Court has held that the highest monetary bid is not necessarily the best bid, and in any event, the Liquidation Analysis is not a bid. The Sapa Transaction is an actuality; the Liquidation Analysis is merely a speculation. Liquidation analysis are commonly used to set a benchmark when there is insufficient time or it is otherwise impractical to fully expose assets to the market on a going concern basis. The Applicants assets have been fully exposed to the market and value has been determined. The Sapa Transaction is a “bird in the hand”.

Re Hunjan International Inc. (2005), 18 C.B.R. (5th) 89 (Ont. Sup.Ct. J.) at para. 9
 Seventh Report at paras. 32 and 33
Re Indalex Limited (02 July 2009), Toronto CV-09-8122-00CL (Ont. Sup. Ct. J.) at para. 6 [the “July 2, 2009 Endorsement”]

23. The Sapa Transaction is the best realizable option available to the Applicants. The price obtained is market value and the deal provides certainty and a timely recovery for creditors and other stakeholders.

(B) Integrity of the Process

24. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a CCAA debtor and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of that CCAA debtor. Persons who enter into agreements with CCAA debtors, following an appropriate court-approved sale process, should expect that their bargain will be confirmed by the court.

Soundair at paras. 46 and 69

25. The process is very important and should be vigilantly protected. The Applicants have made it very clear that the purpose of the within proceeding was to locate a going concern sale and sought and obtained relief from this Court on that basis and sought and obtained approval of a process to achieve that goal.

Soundair at para. 70
Stubbs Affidavit at para. 7

(C) Unfairness in working out the process

26. The Marketing Process has been diligently adhered to and executed in good faith by Indalex. The Monitor (the eyes and ears of the Court) is satisfied that the Marketing Process was fair, transparent and reasonable in the circumstances and was provided with full access to information and was consulted during the conduct of the Marketing Process. Additionally, the Honourable Mr. Justice Morawetz noted in his endorsement dated July 2, 2009 that “[i]n my view, the Applicants have adhered to the Court approved process”.

Seventh Report at para. 17
July 2, 2009 Endorsement at para 9.

27. If the Sapa Transaction is not approved, it would amount to an unfairness in the working out of the process to the Purchaser, and would interfere with the efficacy and integrity of the process and prejudice a broad cross-section of stakeholders.

Re Tiger Brand Knitting (2005), 9 C.B.R. (5th) 315 (Ont. Sup.Ct. J.) at para. 37
Soundair at para. 68

(D) Interests of the Parties

28. The purpose of the CCAA has been characterized by many courts as involving a broad balancing of a plurality of stakeholder interests. The CCAA was designed to serve a broad constituency of investors, creditors, employees and the public at large.

Uniforet inc., Re (2003), 44 C.B.R. (4th) 158 (Q.C.C.A.) at para. 19
Re Air Canada (2004), 47 C.B.R. (4th) 189 (Ont. S.C.) at para. 27
Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at paras. 56 and 59

29. One of the purposes of the CCAA is to preserve the going concern value of debtor companies, avoid liquidation and reduce the social evil of devastating unemployment. There is an overarching policy concern favouring the possibility of a going concern solution and the potential of a long-term upside value for a broad constituency of stakeholders.

Chef Ready Foods Ltd. v. HongKong Bank of Canada, [1990] B.C.J. no. 2384 (B.C.C.A.) at 5.
Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.) at 16
Canadian Red Cross Society at para. 50
Re Residential Warranty Co. of Canada Inc. (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78

30. While the Court should take into account the opinion of all creditors, if the Court decides that the Applicants have acted properly and providently, views of any single creditor or group of creditors should not be determinative. The Court must also consider the broad constituency of stakeholders who stand to benefit from the transaction.

Royal Bank v. Fracmaster Ltd. (1999), 245 A.R. 138 (Alta Q.B.) at paras. 39 and 40
Soundair at para. 63

31. For many unsecured creditors of the Applicants, a going concern solution will provide the greatest long term value.
32. If the Sapa Transaction is not approved, key stakeholders will be uniquely prejudiced. The DIP Lenders could have liquidated the Applicants' business from the outset, but instead chose to increase the exposure to their collateral base and fund a process that would allow the Applicants to find a cross-border going concern solution. DIP funds

were used to pay required expenses of Indalex including payroll, pension contributions and goods and services. The DIP Lenders funded on the basis and expectation that DIP milestones would be satisfied. The DIP Lenders have delivered value for the Applicants and their stakeholders and are entitled to the benefit of their bargain which is also consistent with the long term best interests of the majority of the Applicants' constituents.

33. Employees would also be uniquely prejudiced if the Sapa Transaction is not approved. If approved, the employees would retain their full employment and benefits. If later terminated, the employees would likely be able to have any claim for termination or severance satisfied in full by the Purchaser. In a liquidation, employees would lose their jobs and benefits and receive only a fraction of the severance and termination pay to which they would be entitled. The effect on employees would be immediate, disproportionate and unfairly prejudicial. Indeed, in the CCAA proceedings of Med-Chem Health Care Ltd., Justice Gans stated "one of my highest concerns is and has always been to preserve jobs throughout the course of the CCAA proceedings".

CCFL Subordinated Debt Fund & Co. v. Med-Chem Health Care Ltd.
(1999), 8 C.B.R. (4th) 171 (Ont. Gen. Div.) at para. 16

34. In determining whether to approve the Sapa Transaction, the Court must try to balance the interest of all involved, weighing the advantages and inconveniences flowing from the requested relief and must try to provide consistency and certainty for those involved or affected. If the Sapa Transaction is not approved, uncertainty will ensue.

Boutique Euphoria Inc., [2008] Q.J. No. 14592 (Qc. Sup. Ct.) at para. 58

35. If the Sapa Transaction is not approved, the Applicants will be in default under the DIP Credit Agreement and the Applicants will face an immediate liquidity crisis which will likely result in the forced liquidation of the Applicants' business. 750 Canadians will be unemployed and will not have access to the benefits offered to them by the Purchaser. Customers will be required to locate alternate supply of goods, and suppliers will lose the Applicants' business. Finally, a forced liquidation does not offer a guaranteed returned to creditors on a timely basis. This result is not in the best interest of stakeholders or the Canadian economy, nor does it promote the purposes and the objectives of the CCAA.

COMITY AND COOPERATION

36. As a condition of closing, the Sapa Transaction must be approved by both this Court and the U.S. Court. Thus, approval of the Sapa Transaction by this Court also preserves long term value and jobs in the U.S., as well as in Canada. Given the interdependent nature of the business, this is a critical factor.
37. Canadian courts have emphasized the need for comity with respect to orders of foreign courts, in the interests of facilitating international commerce in an increasingly global economy. While the principles of comity and reciprocity have been traditionally considered in the context of recognition of foreign orders and proceedings, this need for comity and reciprocity has been particularly emphasized in the context of foreign insolvency proceedings and should have equal resonance in connection with the coordination of cross-border asset sales involving two separate main proceedings.
38. Modern states cannot live in “splendid isolation”. In a global economy, parties own assets and carry on business in several jurisdictions. Although the Court’s primary concern is and should be the preservation of employment in Canada and the preservation of value to Canadian stakeholders, in an integrated sales process, the impact of a decision in this jurisdiction on jobs and stakeholders in the U.S. is a valid consideration for this Court. Without a predictable and efficient coordination of cross border sales, constituents in both countries may become subject to general uncertainty, hardship and prejudice.

Roberts v. Picture Butte Municipal Hospital (1998), 23 C.P.C. (4th) 300 (Alta Q.B.) at paras. 19 and 20

PART V – RELIEF SOUGHT

39. For the foregoing going reasons, the Applicants request that the Court grant an Order, *inter alia*, approving the Sapa Transaction and vesting in the Purchaser the Applicants’ right, title and interest in and to the Applicants’ assets.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 16, 2009



LINC ROGERS/KATHERINE MCEACHERN
Counsel for the Applicants

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div).
2. *Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 197 (O.C.A.).
3. *Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.).
4. *Royal bank v. Soundair* (1991), 7 C.B.R. (3d) 1 (O.C.A.).
5. *Re Hunjan International Inc.* (2005), 18 C.B.R.(5th) 89 (Ont. Sup.Ct. J.).
6. *Re Indalex Limited* (02 July 2009), Toronto CV-09-8122-00CL (Ont. Sup. Ct. J.).
7. *Re Tiger Brand Knitting* (2005), 9 C.B.R. (5th) 315 (Ont. Sup.Ct. J.).
8. *Uniforet inc., Re* (2003), 44 C.B.R. (4th) 158 (Q.C.C.A.).
9. *Re Air Canada* (2004), 47 C.B.R. (4th) 189 (Ont. S.C.).
10. *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.).
11. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. no. 2384 (B.C.C.A.).
12. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.).
13. *Re Residential Warranty Co. of Canada Inc.* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.).
14. *Royal Bank v. Fracmaster Ltd.* (1999), 245 A.R. 138 (Atla Q.B.).
15. *CCFL Subordinated Debt Fund & Co. v. Med-Chem Health Care Ltd.* (1999), 8 C.B.R. (4th) 171 (Ont. Gen. Div.).
16. *Boutique Euphoria Inc.*, [2008] Q.J. No 14592 (Qc Sup. Ct.).
17. *Roberts v. Picture Butte Municipal Hospital* (1998), 23 C.P.C. (4th) 300 (Alta Q.B.).

SCHEDULE "B"
LIST OF STATUTES

Legislation

18. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

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