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

FACTUM OF SUN INDALEX FINANCE, LLC

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I. OVERVIEW

1. A group of retired executives fought all the way to the Supreme Court of Canada on the issue of their entitlement to a deemed trust under section 57(4) of the *Pension Benefits Act* over the proceeds of the sale of the Applicants' assets being held in a reserve fund by the Monitor. They lost. This Court determined, and the Supreme Court of Canada agreed, that no deemed trust applied to the funds being held by the Monitor because the pension plan in which the executives participated had not been wound up as at the date of the sale. The issue is *res judicata*. It is an abuse of the process of this Court for the funds held by the Monitor to be depleted by relitigation of an issue that has already been determined by the country's highest court.

II. FACTS

A. Parties

2. The Applicants, Indalex Limited and its wholly owned Canadian subsidiaries (collectively "Indalex"), obtained an Initial Order from Justice Morawetz granting them protection under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "CCAA") on April 3, 2009.

> Twenty-first Report to the court of FTI Consulting Canada ULC in its Capacity as Monitor ("Monitor's 21st Report"), para. 1

3. Indalex's parent company, Indalex Holding Corp., and its parent, Indalex Holdings Finance, Inc. (collectively, "the U.S. Debtors"), commenced proceedings under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court, District of Delaware (the "U.S. Court"), on March 20, 2009. The proceedings were converted to Chapter 7 proceedings in October, 2009 and George L. Miller was appointed as bankruptcy trustee (the "U.S. Trustee").

> Monitor's 21st Report, paras. 2, 11

4. This factum is filed by Sun Indalex Finance, LLC ("Sun"), the principal secured creditor of Indalex and of the U.S. Debtors. Sun filed a Proof of Claim with the Monitor in which it claims approximately $38 million owing under the Amended and Restated Credit Agreement dated as of May 21, 2008, as amended, and the Canadian Security Agreement dated as of

February 2, 2006, as amended, among Indalex Holding Corp., Indalex, and JPMorgan Chase Bank, N.A, as Administrative Agent (the "Canadian Security Agreement"). Sun claims priority for its claim based on the Canadian Security Agreement.

Monitor's 21st Report, para. 20(d)

5. The Monitor has previously reported to this Honourable Court that it has conducted an independent review of Sun's secured claim and is of the view that Sun holds a valid secured claim against Indalex although it has yet to review the quantum of Sun's claim. Sun was an appellant in the Supreme Court of Canada. Cromwell J. found as follows:

> The appellant Sun Indalex is a pre-CCAA secured creditor of both Indalex and the U.S. debtors.
> ...
> The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims.

Sun Indalex Finance, LLC v. United Steelworkers, 2013 SCC 6 at paras. 95, 96

Twelfth Report of the Monitor dated April 28, 2010, paras. 23-29

B. Sale of Assets

6. Following a marketing process based on a "stalking horse" bid, Justice Campbell granted an order dated July 20, 2009 (the "Approval and Vesting Order") approving the sale of substantially all of the assets and business of the Applicants and the U.S. Debtors to Sapa Holding AB pursuant to an Asset Purchase Agreement dated as of June 16, 2009 and ordering a partial distribution of proceeds. The U.S. Court approved the transaction on the same date.

Monitor's 21st Report, paras. 6-8

7. At the sale approval motion, counsel for 14 retired executives of Indalex (the "Retired Executives") who are members of the Retirement Plan for the Executive Employees of Indalex Canada and Associated Companies (the "Executive Plan") and counsel for the USW, on behalf of seven (7) members of the salaried pension plan, reserved their clients' rights to assert deemed trust claims in respect of their estimates of the underfunded deficiencies in the pension plans.

Consequently, the Court ordered the Monitor to retain a reserve from the sales proceeds (expressly including any adjustments to the purchase price) pending determination of claims.

Monitor's 21st Report, para. 46

8. On March 15, 2013, the Monitor paid the US Trustee approximately US$10.7 million pursuant to the Approval and Vesting Order. The Monitor is currently holding the remaining sales proceeds of approximately US$900,000 and CAD$4.2 million for distribution to creditors.

Monitor's 21st Report, para. 13

C. Determination of The Retired Executives' Claims

9. The Retired Executives brought a motion on August 28, 2009 for, among other things:

(a) a Declaration that the amount of $3.2 million representing the wind up liability owing to the Executive Plan by the Applicants that is currently held in reserve by the Monitor is subject to a deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the PBA to be paid into the fund of the Executive Plan in accordance with the PBA, and that such amounts are not distributable to other creditors of the Applicants and that such declarations survive any bankruptcy of the Applicants;

(b) an Order, if necessary, directing the Applicants to proceed with the wind up process of the Executive Plan in accordance with section 68 of the PBA;

(c) in the alternative, an Order directing the Monitor to pay the $3.2 million it is holding in reserve to the fund of the Executive Plan;

(d) an Order, in the alternative, directing the Ontario Superintendent of Financial Services to appoint an administrator over the Executive Plan to proceed with the wind up process under section 71 of the PBA;

(e) an Order, if necessary, lifting the stay of proceedings to allow any of the foregoing Orders to be made; [emphasis added]

...

Monitor's 21st Report, para. 49

10. The Retired Executives' factum in support of the motion before Campbell J. stated the issue in question as follows:

> Does the deemed trust in section 57(4) of the PBA apply to the $3.2 million currently held in reserve by the Monitor and rendering such funds not distributable to other creditors, should that amount be paid to the Executive Plan and should such orders and declarations survive any bankruptcy of the Applicants?

Monitor's 21st Report, para. 50 and Appendix H, para. 22

11. The Retired Executives' reply factum on the motion stated:

> This motion involves a dispute between the Pensioners of the Executive Plan and the Applicants over $3.2 million of the proceeds of the sale of the Applicants' Canadian assets to SAPA. The Executive Plan is underfunded on a wind up basis by approximately $3.2 million. The Pensioners assert a deemed trust over those amounts under section 57(4) of the Ontario *Pension Benefits Act* (PBA). The deemed trust in the PBA has priority over secured creditors under section 30(7) of the Ontario *Personal Property Security Act.*

Monitor's 21st Report, para. 51 and Appendix I, para. 2

12. Justice Campbell stated that the first issue before him was:

> 1. Do the deemed trust provisions of s. 57 and s. 75 of the *PBA* apply to the funds currently held in reserve by the Monitor in respect of:

a. The Executive Plan;

b. The Salaried Plan?

Re Indalex, 2010 ONSC 1114 at para. 20

13. It is a mischaracterization to refer to the motion heard on August 28, 2009 as simply a contest between the pensioners and the DIP lender. The U.S. estate was not yet in Chapter 7 proceedings and thus Mr. Miller was not yet U.S. Trustee asserting its subrogated DIP claim as distinct from Sun's secured claims. Rather, the motion, as set out in the Notice of Motion and as recited by Campbell J., was an assertion of a deemed trust by the Retired Executives against the funds held in reserve by the Monitor pure and simple. Indalex's counsel opposed, ostensibly asserting the interests of its U.S. parent as DIP subrogee. Sun opposed, asserting its Canadian security and its U.S. security (which makes it first in line to receive funds paid to the U.S. Debtors as DIP subrogee). There was no discrete one-on-one priority contest between two parties and no other. Rather, the Retired Executives asserted a deemed trust over the reserve fund held by the Monitor. They claimed, expressly, that they were entitled to the funds held by the Monitor in priority to *all* other creditors. The issue was "Is there a deemed trust for the Executive Plan over the proceeds of sale ordered to be held by the Monitor?". The answer was "No".

14. Although it was contemplated, prior to the sale approval motion, that the Executive Plan would be wound up in accordance with the PBA, the Executive Plan had not been wound up at the date of the sale approval motion (July 20, 2009), the date the Sapa transaction closed (July 31, 2009) or the date of the hearing of the Retired Executives' motion (August 28, 2009).

Monitor's 21st Report, para. 53

15. Justice Campbell found that: "There are no deficiencies in payments under the Executive Plan as of July 20, 2009. The Executive Plan is not wound up...I see no basis for a deemed trust

of any amount at this time in respect of the Executive Plan." His Order states that "the motion is dismissed."

Order dated February 18, 2010, Monitor's 21st Report, Appendix F

Re Indalex, 2010 ONSC 1114 at para. 24

16. The Executive Plan was wound up by order of the Superintendent of Financial Services dated August 27, 2010, effective as of September 30, 2009.

Monitor's 21st Report, paras. 39, 53 and Appendix D

17. The Court of Appeal granted leave to appeal Campbell J.'s order and the appeal was heard on November 23 and 24, 2010.

Monitor's 21st Report, para. 58

18. In their Court of Appeal factum, the Retired Executives described the motion they had brought before Justice Campbell on August 28, 2009 as follows:

> A motion by the Retirees for a declaration that the amount representing the wind up liability owing to the Executive Plan is subject to a deemed trust under section 57(4) of the Ontario *Pension Benefits Act,* R.S.O. 1990, c, P.8 ("PBA") for the benefit of the beneficiaries of the Executive Plan and is to be paid to the fund of the Executive Plan. The Retirees also argued that the company had breached its fiduciary duty to the Retirees;

Monitor's 21st Report, para. 60 and Appendix J, para. 3

19. They stated that the appeal raised the following issues:

(a) Did the CCAA judge err by not giving effect to the wind up deemed trust?

(b) Did the company breach its fiduciary duty to the Retirees of the Executive Plan?

(c) Are wind up payments that are owing to the Executive Plan subject to the wind up deemed trust?

(d) Did the CCAA judge err by not applying the priority rule in the PPSA that explicitly gives priority to the PBA deemed trust over secured creditors?

Monitor's 21st Report, para. 61 and Appendix J, para. 30

20. The Retired Executives did not seek to adduce fresh evidence in the Court of Appeal that the Executive Plan had in fact been wound up before the hearing of the appeal. In fact, without seeking leave to adduce fresh evidence, they included in their factum a recital that the Superintendent had appointed an administrator to wind up the Executive Plan in November 2009 and had, in March 2010, issued a Notice of Proposal to wind up the Executive Plan effective as of September 30, 2009.

Monitor's 21st Report, Appendix J. para. 29

21. Instead of adducing fresh evidence, the retired Executives attacked Campbell J.'s interpretation of section 57(4) of the PBA, arguing that his conclusion that no deemed trust arose because the wind up had not occurred at the time of the sale was incorrect.

Monitor's 21st Report, Appendix J., paras. 36-40

22. Gillese J.A., writing for the Court of Appeal, stated that she found it "difficult to accept" the argument that the unpaid liability payments owing to the Executive Plan were subject to the section 57(4) deemed trust: on the plain wording of the section, wind up of the pension plan appeared to be a requirement for section 57(4) to apply, and no deemed trust could arise unless and until a plan wind up occurred. She noted that the Executive Plan had not been wound up at the relevant time, which she had previously identified as the sale date, July 20, 2009. However, as she determined that the funds held in reserve by the Monitor should be distributed to the pension plans on other grounds, she declined to decide whether the deemed trust applied to the deficiency in the Executive Plan.

Re Indalex, 2011 ONCA 265 at paras. 109-110, 112

Monitor's 21st Report, para. 63

23. The Supreme Court of Canada overruled the Court of Appeal's decision.

24. With respect to the Executive Plan, Deschamps J., delivering the reasons of herself and Moldaver J., found that:

> At the time of the sale, the Executive Plan was in the process of being, but had not yet been, wound up. Consequently, the deemed trust provision does not apply to the employer's wind-up deficiency payments in respect of that plan.
>
> ... the interests of the Executive Plan's members are not protected by the deemed trust...
>
> *Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6 at paras. 46, 61

25. Cromwell J., delivering the reasons of McLachlin C.J., Rothstein J. and himself, stated that:

> I agree with my colleagues that there can be no deemed trust for the executive plan, because that plan had not been wound up at the relevant date.
>
> *Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6 at para. 118

26. LeBel J., delivering the dissenting reasons of himself and Abella J., nevertheless agreed with the other judges on the deemed trust point. He stated that:

> Like my colleagues, I conclude that no deemed trust could arise under s. 57(4) of the *Pension Benefits Act,* R.S.O. 1990, c. P.8 (*"PBA"*), in the case of the Executive Plan because this plan had not been wound up when the *CCAA* proceedings were initiated.
>
> *Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6 at para. 265

27. The Supreme Court of Canada heard the appeals of Sun, the US Trustee and Indalex on June 5, 2012. By judgment dated February 1, 2013, the S.C.C. ordered that: "The orders of Campbell J. dated February 18, 2010 are restored." That is, the Supreme Court of Canada expressly re-instated the dismissal of the Retired Executive's motion for:

(a) a Declaration that the amount of $3.2 million representing the wind up liability owing to the Executive Plan by the Applicants that is currently held in reserve by the Monitor is subject to a deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the PBA to be paid into the fund of the Executive Plan in accordance with the PBA, and that such amounts are not distributable to other creditors of the Applicants and that such declarations survive any bankruptcy of the Applicants"

Monitor's 21st Report, Appendix L

28. The Retired Executives again asserted their claim for a deemed trust over the funds being held by the Monitor. They did not challenge the relevant date found by Gillese J.A. They did not seek to introduce as fresh evidence the fact that the Executive Plan had been wound up for almost two years by the time of the hearing in Ottawa. They were unsuccessful in the appeal. They have had their day in Court. Yet, they now purport to continue to assert a deemed trust over the funds being held by the Monitor. The Supreme Court of Canada ruled against them on that very issue.

III. ISSUES AND ARGUMENT

A. Issue estoppel applies as the same question has been finally decided amongst the same parties or their privies

29. The law seeks finality to litigation and, in advancing that objective, requires litigants to put their best foot forward to establish their case when first called upon to do so. "A litigant, to use the vernacular, is only entitled to one bite at the cherry." The Retired Executives, having sought a declaration that they were entitled to a deemed trust over the proceeds of the sale of Indalex's assets, pursued their claim all the way to the Supreme Court of Canada, and lost, cannot now relitigate the issue.

Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460 at para. 18

30. The Retired Executives are barred by the principle of issue estoppel, which applies where:

(a) the same question has been decided;

(b) the judicial decision which is said to create the estoppel was final; and

(c) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Angle v. M.N.R., [1975] 2 S.C.R. 248 at 254

31. Issue estoppel extends to "the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of the 'issue' in the prior proceeding."

Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460 at para. 54

32. There is no question that the same parties were involved in the earlier proceeding. The Retired Executives brought the motion seeking a declaration that they had a deemed trust and that their claim had priority over all other creditors. They argued in their factum that the deemed trust gave them priority over "secured creditors", and pointed out in their reply factum that if their deemed trust claim was defeated, the funds held by the Monitor would be used "to pay the claims of U.S. creditors" such as Sun. That is, they recognized that Sun had the economic interest adverse to their claim. Sun's counsel attended and opposed the motion.

Monitor's 21st Report, para. 52, Appendix H, paras. 41-42, and Appendix I, para. 6

33. Sun and the Monitor were the respondents in the appeal, asking that the appeal be dismissed and the funds held in reserve be paid to Sun. Mr. Miller had by that time been appointed US Trustee and intervened in the appeal. The Retired Executives expressly identified as the fourth issue on the appeal the issue of whether Campbell J. erred by not applying the priority rule in the PPSA that explicitly gives priority to the PBA deemed trust over "secured creditors." Finally, Sun, the Monitor, and the U.S. Trustee were the appellants in the Supreme

Court of Canada. Justice Cromwell described the "main question" in the appeal as being the resolution of the priority over the reserve fund as between Sun and the pensioners.

Re Indalex, 2011 ONCA 265, paras. 22-24

Monitor's 21st Report, Appendix J, para. 30(d)

Sun Indalex Finance, LLC v. United Steelworkers, 2013 SCC 6 at para. 24

34. It is also clear that the same question was decided:

(a) The Retired Executives sought a "Declaration that the amount of $3.2 million representing the wind up liability owing to the Executive Plan by the Applicants that is currently held in reserve by the Monitor is subject to a deemed trust for the benefit of the beneficiaries of the Executive Plan under section 57(4) of the PBA...."

(b) Justice Campbell stated that the issue before him on the motion was whether "the deemed trust provisions of s. 57 and s. 75 of the *PBA* apply to the funds currently held in reserve by the Monitor in respect of [t]he Executive Plan...."

(c) Justice Campbell determined, in an order upheld by the Supreme Court of Canada, that the deemed trust provisions of the *PBA* do not apply in respect of the Executive Plan to the sale proceeds held in reserve by the Monitor.

Monitor's 21st Report, para. 55

Re Indalex, 2011 ONSC 1114 at paras. 20, 24

35. The issue before Justice Campbell was precisely the same issue the Retired Executives wish to raise now, namely whether or not the sale proceeds held by the Monitor are subject to a deemed trust under the *PBA* for the benefit of the Retired Executives. The fact that they are now raising the same issue in an (arguably) different context does not prevent issue estoppel from applying.

> When a question is litigated, the judgment of the court is a final determination as between the parties and their privies. Any right, question or fact distinctly put in issue and directly determined by a court of

> competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]
>
> *McIntosh v. Parent,* [1924] O.J. No. 59 at para. 13 (Ont. S.C.A.D.)
>
> The principle is well settled that in civil actions the doctrine of *res judicata* is applicable not merely when the ultimate adjudications by the court in successive proceedings are or might be identical, but that it is applicable also in a wider sense to the finality of the determination in the first action of all issues of fact or law which were essential to the earlier conclusion [citations omitted]. [Emphasis added.]
>
> *R. v. Sweetman,* [1939] O.R. 131 at 137 (C.A.) (p. 5 of QL print-out)

36. The finality of a decision which determines a specific issue amongst creditors in CCAA proceedings has been recognized for the purpose of issue estoppel, as has the fact that the estoppel extends to all issues that are necessarily bound up with or fundamental to the determination of the issue decided.

> Re Cliffs Over Maple Bay Investments Ltd., [2011] B.C.J. No. 677 at paras. 34-36

37. The issue the Retired Executives put to Campbell J. was whether the PBA deemed trust applied in favour of the Retired Executives to the sale proceeds held in reserve by the Monitor such that those funds were not distributable to other creditors of the Applicants. That is the same issue they seek to put before the Court again today. The issue of the date by which the Executive Plan had to be wound up in order for a deemed trust to arise was fundamental to the determination whether a deemed trust existed. *Prima facie,* any deemed trust had to exist as of the date on which the sale of assets closed. The order approving the sale, dated July 20, 2009 (the "Approval and Vesting Order") provided that "all Claims ... shall attach to the Sale Proceeds *with the same priority as they had* with respect to the Canadian Acquired Assets *immediately prior to the sale...*" [Emphasis added.] "Claims" was explicitly defined to include

deemed trusts. "Sale Proceeds" was explicitly defined to include any adjustments to the purchase price.

Monitor's 21st Report, Appendix B, paras. 3, 11

38. The Retired Executives were well aware of the significance of the wind up date. They devoted a section of their factum on the motion before Campbell J. to the issue, in which they noted that the Superintendent had discretion to set the wind up date and that where a wind up stems from a specific event such as a purchase and sale of the business, the wind up date could not be earlier than the date of the specific event. They sought orders directing the Applicants to proceed with the wind up or, in the alternative, directing the Superintendent to appoint an administrator over the Executive Plan to proceed with the wind up. In their reply factum, the Retired Executives specifically responded to the argument that, since the wind up process for the Executive Plan had not yet begun, the deemed trust had not arisen; they replied that it was inevitable that a wind up would occur and that there would be a shortfall and that the prospective language of section 57(4) captured the projected $3.2 million shortfall.

Monitor's 21st Report, para. 49 and Appendix H, paras. 32-36, Appendix I, paras. 12, 15-16

39. The Retired Executives' arguments did not prevail. Campbell J. determined that no deemed trust existed as of the date of sale:

> There are no deficiencies in payments under the Executive Plan as of July 20, 2009. The Executive Plan is not wound up. ... I see no basis for a deemed trust of any amount at this time in respect of the Executive Plan.

Re Indalex, 2010 ONSC 1114 at para. 24

40. The Court of Appeal also considered that the existence of a deemed trust was to be determined as at July 20, 2009. The Court determined that a deemed trust existed at that date with respect to the Salaried Plan, but declined to decide whether the deemed trust applied to the deficiency in the Executive Plan.

Re Indalex, 2011 ONCA 265 at paras. 109-110, 112

41. In the Supreme Court of Canada, Deschamps J. found that the interests of the Executive Plan members were not protected by a deemed trust as the Plan had not been wound up "at the time of the sale." Cromwell J., writing a concurring judgment, found that there was no deemed trust because the Plan had not been wound up at the relevant date. LeBel J., though dissenting in the result, also concluded that no deemed trust could arise in the case of the Executive Plan, because it had not been wound up when the CCAA proceedings were initiated (a date even earlier than the sale date).

> *Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6 at paras. 46, 61, 118, 265

42. There is no room in these decisions for a suggestion that the Retired Executives could apply for a redetermination of their entitlement to a deemed trust over the proceeds of sale if the Executive Plan was wound up as of a date subsequent to the date of sale. Moreover, as noted above, it is not correct to distinguish the earlier motion on the basis that it affected only the DIP lender. Sun was there, *qua* secured creditor, and the Retired Executives noted their adversity to secured creditors in their original Notice of Motion and on appeal. Cromwell J. found that the *lis* between Sun and the pensioners was the "main question" in the appeal. Even if there was only a more limited contest before the Court in 2009, since one of the issues that was involved and was resolved in that contest was the existence of a deemed trust over the funds held by the Monitor, that issue cannot be relitigated in any event. The issue has been decided adverse to the Retired Executives.

B. The estoppel extends to matters that might have been raised but were not

43. As the relevant date for determining whether a deemed trust over the sale proceeds existed was the date of sale, and no deemed trust existed at that date, the fact that the Executive Plan was subsequently wound up is simply irrelevant.

44. The Retired Executives are in any event barred from putting forward at this stage a new fact they claim is relevant to the determination of the issue and which they could have introduced as fresh evidence before the Court of Appeal. The Superintendent wound up the Executive Plan by order dated August 27, 2010, effective as of September 30, 2009. The Court of Appeal heard the appeal from Campbell J.'s decision on November 23 and 24, 2010. The Retired Executives

did not introduce evidence that the Executive Plan had, at that point, been wound up, choosing instead to attack Campbell J.'s interpretation of section 57(4) of the PBA and to assert that Indalex had breached its fiduciary duty by taking no steps to wind up the Executive Plan. Neither did they introduce any such evidence in the Supreme Court of Canada. Neither did they challenge the relevant date as found by the Court of Appeal.

Monitor's 21st Report, paras. 39, 53, 58 and Exhibit J, paras. 36-40, 45(i)

45. Where an issue has been determined, issue estoppel extends to all matters relating to the issue which might have been put forward or have since been discovered.

> So long as any point of fact or law was put in issue—whether pleaded or not—and was tried in the former action in which the present parties were on opposing sides, it matters not that the decision on those points may not be sound or was reached on insufficient or false evidence, or on erroneous views of the law, or because of some matter omitted which might have been supplied or has since been discovered—so long as that decision or judgment stands on the records un-attacked or unappealed from, it stands with all that is necessarily involved and included in it—as *res judicata*—as matter finally and conclusively settled between these parties and their privies. [Emphasis added.]

Johanesson v. Canadian Pacific Railway, [1922] M.J. No. 31 at para. 17 (K.B.), aff'd [1922] M.J. No. 35 (C.A.)

> The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances [citation omitted]. And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings.

Fidelitas Shipping Co. Ltd. v. V/O Exportchleb, [1966] 1 Q.B. 630 at 640 (C.A.)

46. This includes matters which could have been raised as fresh evidence on appeal. Diplock L.J., specifically referred to that possibility in the leading English case *Fidelitas*:

> Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence... [Emphasis added.]

Fidelitas Shipping Co. Ltd. v. V/O Exportchleb, [1966] 1 Q.B. 630 at 642 (C.A.)

47. This Court, citing *Fidelitas,* has confirmed that issue estoppel extends to all points which could have been raised in an earlier, interlocutory proceeding.

Ward v. Dana G. Colson, [1994] O.J. No. 533 at paras. 4, 12-19 (Gen. Div.), aff'd, [1994] O.J. No. 2792 (C.A.)

48. Furthermore, this Court has found that issue estoppel applied where a party had made no attempt to introduce by way of fresh evidence on appeal the allegedly new facts on which it sought to rely to defeat an issue estoppel.

Evans v. Snieg, 2012 CarswellOnt 4397 at paras. 30 to 34

49. Similarly, where estate trustees were appointed after the conclusion of a family law trial which had an impact on the assets of the estate, but before the hearing of the appeal confirming the trial judgment, a majority of the Court of Appeal denied the estate trustees' motion to set aside the judgment on the basis that the estate had not been represented at the trial. Feldman J.A., for the majority, found that the estate trustees failed to move in a timely manner and thus did not meet the first criterion for having a proceeding reopened. Her reasoning is equally apposite here:

> While the trustees were not yet appointed at the time of the family law trial, they were in place long before the appeal of that judgment. The inference drawn by the motion judge that [estate trustee] William Gilbert

> chose to wait for the outcome of the appeal and took steps to assert a claim by the estate only after his son David Gilbert lost the appeal is an irresistible one.
>
> In my view, where the trustees sat on their potential claim while the case was *sub judice,* they do not meet the first criterion for reopening a completed proceeding.
>
> *Warren v. Gilbert Estate* (2008), 92 O.R. (3d) 241 at paras. 19-20

50. Accordingly, the August, 2010 winding up of the Executive Plan effective September, 2009 cannot now be raised to alter the previous order of this Court.

C. The proposed motion is an abuse of process

51. The doctrine of abuse of process is not constrained by the requirements of issue estoppel but is based on the same policy grounds: that there be an end to litigation, and that no one should be twice vexed by the same cause. Abuse of process has been applied where the litigation before the court is in essence an attempt to relitigate a claim which the court has already determined.

> *Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63 at paras. 37-38

52. That is precisely what the Retired Executives seek to do here. Their claim to a deemed trust over the sale proceeds has been determined, and they have had every opportunity both to challenge the finding that the relevant date for the determination was the date of sale and to introduce evidence that the Executive Plan was subsequently wound up. They did neither.

53. The doctrine of abuse of process focuses on the integrity of judicial decision making as a branch of the administration of justice. Allowing the relitigation of a claim which has already proceeded all the way to the Supreme Court of Canada, on grounds which could have been raised as soon as the matter reached the Court of Appeal, could only bring the administration of justice into disrepute.

> *Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63 at para. 43

54. As E. MacDonald J. of this Court has put it:

> A party to a proceeding, if granted a second chance to raise what was already before the court, undermines the integrity of the rules which guide
>
> the conduct of litigation. There has to be certainty and finality of the disposition of matters by the courts. Otherwise, the results would be chaotic.
>
> *Ward v. Dana G. Colson,* [1994] O.J. No. 533 at para. 16 (Gen. Div.), aff'd, [1994] O.J. No. 2792 (C.A.)

IV. ORDER SOUGHT

55. Sun respectfully requests a Declaration that the Retired Executives are estopped from asserting a deemed trust over any proceeds of the sale of the Applicants' assets, as the issue has already been determined, and its costs of this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 10, 2013

Fred Myers

Brian Empey

SCHEDULE A
LIST OF AUTHORITIES

Tab #	Authority
1	*Re Indalex,* 2010 ONSC 1114; rev'd 2011 ONCA 265; rev'd (*sub nom Sun Indalex Finance, LLC v. United Steelworkers*) 2013 SCC 6
2	*Danyluk v. Ainsworth Technologies Inc.,* [2001] 2 S.C.R. 460
3	*Angle v. M.N.R.,* [1975] 2 S.C.R. 248
4	*McIntosh v. Parent,* [1924] O.J. No. 59 (Ont. S.C.A.D.)
5	*R. v. Sweetman,* [1939] O.R. 131 (C.A.)
6	*Re Cliffs Over Maple Bay Investments Ltd.,* [2011] B.C.J. No. 677
7	*Johanesson v. Canadian Pacific Railway,* [1922] M.J. No. 31 (K.B.), aff'd [1922] M.J. No. 35 (C.A.)
8	*Fidelitas Shipping Co. Ltd. v. V/O Exportchleb*, [1966] 1 Q.B. 630 (C.A.)
9	*Ward v. Dana G. Colson,* [1994] O.J. No. 533 (Gen. Div.), aff'd, [1994] O.J. No. 2792 (C.A.)
10	*Evans v. Snieg,* 2012 CarswellOnt 4397
11	*Warren v. Gilbert Estate* (2008), 92 O.R. (3d) 241
12	*Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63

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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.

Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)
Proceeding commenced at Toronto

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