

**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.

the Applicants

**FACTUM OF THE APPLICANTS
WITH RESPECT TO DIP FINANCING
(Returnable April 8, 2009)**

April 8, 2009

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Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
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NOVAR INC.

Applicants

FACTUM OF THE APPLICANTS WITH RESPECT TO DIP FINANCING

1. This factum is filed in support of the Applicants' application for: (i) the approval by the Court of debtor-in-possession financing (the "**DIP Financing**") pursuant to a Credit Agreement (the "**DIP Credit Agreement**") among the Applicants, their U.S. parent and its affiliates (collectively, "**Indalex U.S.**", and together with the Applicants, collectively, the "**Indalex Group**") and JP Morgan Chase Bank N.A., ("**JPMorgan**"), in its capacity as administrative agent for the lenders thereto (collectively, the "**DIP Lenders**") substantially in the form of Exhibit "C" to the Affidavit of Patrick Lawlor dated April 8, 2009 and filed with this Court (the "**April 8 Affidavit**"); and (ii) the approval of a secured guarantee granted by the Applicants in favour of the DIP Lenders, guaranteeing the obligations of Indalex US under the DIP Credit Agreement (the "**Post-Filing Guarantee**").

PART I - OVERVIEW

2. The Indalex Group is in financial distress. The Indalex Group seeks to restructure its business and financial affairs, through the filing of a plan of compromise and arrangement and/or a going concern sale process. The purpose of these CCAA proceedings is to preserve value for the Applicants' broad cross-section of stakeholders including their employees, customers, business partners, suppliers and secured and other creditors. In order to accomplish this goal, the Applicants need stable and reliable access to debtor-in-possession financing. One of the pre-conditions to obtaining such financing is that the Applicants provide a guarantee (the "**Post-Filing Guarantee**") of the obligations of Indalex U.S. Indalex US is currently subject to proceedings pursuant to Chapter 11 of the U.S. Bankruptcy Code (the "**Chapter 11 Proceedings**").

3. The Applicants submit that the authorizing the DIP Financing and the Post-Filing Guarantee is reasonable, appropriate and justified in the circumstances. The DIP Financing is necessary to preserve the opportunity to seek a viable going concern solution and sufficient safeguards are in place to protect the pre-filing collateral position of the Applicants' unsecured creditors and any potential prejudice in connection with the granting of the Post-Filing Guarantee is substantially outweighed by the potential benefit to stakeholders, derived from the DIP Financing.

PART II - THE FACTS

4. The relevant facts, in support of the relief requested hereunder, are set out in detail in the Affidavit of Timothy Stubbs dated April 3, 2009 (the "**April 3 Affidavit**") and filed with this Court, the April 8 Affidavit and the First Report dated April 8, 2009 of FTI Consulting Canada

ULC, in its capacity as Court-appointed monitor in these proceedings (the “**Monitor**”). The relevant facts can be summarized as follows:

- (a) The Indalex Group comprises the second largest aluminum extruder in the United States and Canada. Indalex Limited is the operating entity in Canada (“**Indalex Canada**”). Indalex Canada is not a stand alone entity. It is part of a larger, integrated, cross border enterprise with shared infrastructure, management functions, logistics and financial resources, from which it and its stakeholders derive tangible benefits.
- (b) The Applicants have granted security (the “**Pre-Filing Security**”) to secure their obligations under a credit agreement (the “**Amended Credit Agreement**”) dated May 21, 2008, among the Applicants, Indalex US, JPMorgan in its capacity as administrative agent (the “**Pre-Filing Administrative Agent**”) for certain secured lenders (the “**Revolving Lenders**”). That Pre-Filing Security (other than the guarantee given by Indalex Canada pre-filing) has been reviewed by independent counsel to FTI Consulting Canada, ULC in its capacity as Court-appointed Monitor in these proceedings (the “**Monitor**”). The conclusions of the security review were that, subject to the assumptions and qualifications contained in their opinion, the Pre-Filing Security is valid and enforceable.
- (c) Under the Amended Credit Agreement, Indalex Canada had access to an operating line of credit, that consisted of a sub-facility of the line of credit provided by the Revolving Lenders to its “Parent Borrower” (the “**Revolving Credit Facility**”).
- (d) Although the Applicants did not initially guarantee the obligations of Indalex US under the Amended Credit Agreement, the Applicants granted a guarantee of the obligations of Indalex US under the Revolving Credit Facility, in connection with a forbearance agreement (the “**Forbearance Agreement**”) entered into on March 6, 2009. The Forbearance Agreement allowed the Applicants to access greater availability and preserve Indalex Canada as a going concern entity.
- (e) As a result of decrease in the demand for their product, a collapse in the price of aluminum and general market decline, the Applicants faced an immediate liquidity crisis. The Applicants needed relief under the CCAA to prevent precipitous creditor action and to give the Applicants the opportunity to secure additional financing and identify a going concern solution in a structured, coordinated manner, with Indalex U.S.
- (f) DIP Financing is critical in order to allow Indalex Canada to meet its post-filing obligations and preserve an opportunity to complete a successful restructuring of its business and operations.

- (g) The Indalex Group engaged in substantial arm's length negotiations with the Revolving Lenders for the provision of DIP Financing. The DIP Credit Agreement provides that in both the U.S. and Canada, availability under the DIP Credit Agreement will increase as post-filing cash receipts are applied to reduce the outstanding pre-filing indebtedness of the Parent Borrower (the "**US Revolving Exposure**") and Indalex Canada under the Revolving Credit Facility. It is contemplated that upon issuance of the Final Order by the U.S. Bankruptcy Court, finally approving the DIP Financing in the Chapter 11 Proceedings (anticipated to be 30 days after the Interim Order approving the DIP Financing) all obligations of Indalex U.S. outstanding under its Revolving Credit Facility under the Amended Credit Agreement will be deemed to be advances under its new facility under the DIP Financing.
- (h) A condition for the provision of DIP Financing was that the Applicants provide the Post-Filing Guarantee.
- (i) The Indalex Group was unable to obtain an alternate proposal for DIP Financing on better terms that had a substantial likelihood of closing in the required timeframe, and which did not require a cross-guarantee.
- (j) In order to ensure that the collateral position of the unsecured creditors of the Applicants is not potentially prejudiced as a result of the Post-Filing Guarantee from the position they currently occupy, the DIP Lenders have agreed that the Amended and Restated Initial Order will provide that the Post-Filing Guarantee and the security provided in connection therewith, as it relates to the amounts of DIP Financing advances up to the amount of the reduction of the U.S. Revolving Exposure shall not be valid and enforceable only to the extent the Pre-Filing Guarantee given by the Applicants under the Forbearance Agreement and/or the security granted in support of that Pre-Filing Guarantee, is found by this Court to be voidable, not valid, not binding, or not enforceable.
- (k) Although the DIP Advances to the Parent Borrower over and above the reduction of the US Revolving Exposure will not be subject to the same qualification, the Monitor has concluded that (i) given the nature of the borrowing base restrictions it is unlikely the Post-Filing Guarantee will ever be drawn, because the Parent Borrower will likely be able to meet its own obligations without the need for the DIP Lenders to call on the Post-Filing Guarantee, and (ii) the benefits of the DIP Financing substantially outweigh the associated risks.

PART III – ARGUMENT AND LAW

DIP Financing Generally

5. The Court has broad discretionary powers to make an order authorizing DIP financing. This involves a balancing of prejudices between the parties which is inherent in such situations.

Skydome Corp., Re, 1998 CarswellOnt 5922 (Ont. Gen.Div.(Comm. List))

6. For the Court to authorize super-priority DIP financing, the Courts have held that the following factors should be considered:

- (a) in order for DIP financing with super-priority status to be authorized pursuant to the CCAA, there must be cogent evidence that the benefit of such financing clearly outweighs the potential prejudice to secured creditors;
- (b) the DIP financing ought to be restricted to what is reasonably necessary to meet the debtor's urgent needs while a plan of arrangement or compromise is being developed; and
- (c) there must be a reasonable prospect that the debtor will be able to make an arrangement with its creditors and rehabilitate itself.

Simpson's Island Salmon Ltd., Re (2005), 2005 CarswellNB 781 (N.B. Q.B.).

United Used Auto & Truck Parts Ltd., Re, 1999 CarswellBC 2673, (B.C. S.C. [In Chambers]); affirmed 2000 CarswellBC 414, (B.C. C.A.); leave to appeal granted 2000 CarswellBC 2132 (S.C.C.), but appeal dismissed

7. In *Re Intertan Canada Ltd. and Tourmalet Corporation*, Justice Morawetz held that, “in considering whether it is appropriate to approve such a facility, the Court “takes into account a number of factors which include the benefit the Applicants will receive from the DIP Facility and the collateral that is charged under the DIP Lenders’ Charge.”

Re Intertan Canada Ltd. and Tourmalet Corporation, (January 23, 2009), 08-CL-7841 (S.C.J. (Comm.List))

8. The Alberta Court of Queen's Bench has held that

“I am satisfied that in this case, [the debtor] requires the protection of the CCAA if there is to be any possibility that it will be able to continue in business for the benefit of its creditors, employees and other stakeholders. I am also satisfied that granting a limited DIP Charge to take the company through the first crucial weeks of the process is necessary and in the best interests of the company’s stakeholders generally.”

Re Temple City Housing Inc. (2007), 2007 CarswellAlta 1806; appeal dismissed
Minister of National Revenue v. Temple City Housing Inc. (2008), 2008
CarswellAlta 2 (Alta. C.A.)

The Post-Filing Guarantee

9. In *Re A & M Cookie Co. Canada*, the Ontario Superior Court of Justice granted an initial CCAA order that also approved an interim financing agreement. The Court was concerned that the debtor had agreed to guarantee obligations of an affiliated U.S. entity that had concurrently filed for Chapter 11 protection in the U.S. In considering whether approval should be granted, the Court observed that if there was a shortfall on the realization of U.S. assets, up to US\$5 million of assets of the Canadian debtor would not be available to the current creditors of the Canadian debtor. On balance, Justice Morawetz concluded that the agreement, combined with the breathing space afforded by CCAA protection, would have the greatest potential in an attempt to preserve value for stakeholders of the debtor, including the prospect of preserving over 350 manufacturing jobs, as well as the preservation of the business for customers and suppliers. As a result, the interim financing structure was approved.

Re A & M Cookie Co. Canada, 2008 CarswellOnt 7136 (Ont. S.C.J. [Commercial List]).

10. In *Re Smurfit-Stone Container Canada Inc.*, Justice Pepall of the Ontario Superior Court approved DIP financing where it required a guarantee by the Canadian debtor of the U.S. debtor's obligations, where:

- (a) the evidence was that the DIP lenders were unwilling to extend the DIP facility to the Canadian debtor absent the guarantee;
- (b) the business of the U.S. and Canadian debtors was fully integrated, making it impracticable in the current credit environment to secure alternative financing on a stand-alone basis;

- (c) the guarantee was contingent, and the DIP financing had been negotiated on the basis of full recovery of all U.S. obligations out of the U.S. assets, without the need to call on the Canadian guarantee; and
- (d) the funding was required in order to enable day to day operations to continue and provide an opportunity to restructure that would result in the business continuing as a going concern.

Re Smurfit-Stone Container Canada Inc., (January 27, 2009), CV-09-7966-00CL (S.C.J. (Comm. List))

11. In *Re Pliant Corporation of Canada Ltd. et al*, the Canadian debtor had agreed, in order to secure DIP financing, to guarantee the obligations of the U.S. debtor under that DIP financing, though no such guarantee had existed of the pre-filing primary obligations of the U.S. debtor. However, the DIP lender (which was not, in that case, the pre-filing lender) and the Canadian debtor agreed to limit the guarantee by the Canadian debtor of the U.S. debtor's obligations to the amount by which the Canadian debtor had, pre-filing, guaranteed obligations owing to the pre-filing lender by certain foreign subsidiaries, which were being paid out by the proposed DIP financing. In considering the issue, Justice Wilton-Siegel held that, based on the evidence presented and the report of the Information Officer:

- (a) the Canadian debtor was not able to be sold independently as a going concern given the nature of its relationship with its U.S. parent;
- (b) the liquidation value of the Canadian debtor was not sufficient to pay the direct liabilities of the Canadian debtor to the secured lenders in full; and
- (c) the circumstances of unsecured creditors were unchanged relative to their circumstances prior to the commencement of the CCAA proceedings, apart from the termination of the foreign subsidiaries' own guarantees, as a result of guarantee by the Canadian debtor of the DIP financing obligations.

12. As a result, the re-payment of the pre-filing indebtedness of the debtor with advances made under the post-filing DIP financing facility, and the post-filing limited guarantee of the obligations of the U.S. debtor by the Canadian debtor, was approved.

13. Considering all of the foregoing, it is evident the following factors are relevant in determining the appropriateness of authorizing a guarantee in connection with a debtor-in-possession facility:

- (a) the need for additional financing by the Canadian debtor to support a going concern restructuring;
- (b) the benefit of the breathing space afforded by CCAA protection;
- (c) the availability (or lack thereof) of any financing alternatives, including the availability of alternative terms to those proposed by the DIP lender;
- (d) the practicality of establishing a stand-alone solution for the Canadian debtors;
- (e) the contingent nature of the liability of the proposed guarantee and the likelihood that it will be called on;
- (f) any potential prejudice to the creditors of the entity if the request is approved, including whether unsecured creditors are put in any worse position by the provision of a cross guarantee of a foreign affiliate than as existed prior to the filing, apart from the impact of the super-priority status of new advances to the debtor under the DIP financing;
- (g) the benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied; and
- (h) a balancing of the benefits accruing to stakeholders generally against any potential prejudice to creditors.

14. The Applicants submit that the facts set out above substantially satisfy the criteria derived from the relevant case law. In particular:


- (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring;
- (b) there is a benefit to the breathing space that will be afforded by the DIP Financing that will permit the Applicants the wherewithal to identify a going concern solution;

- (c) there is no other alternative available to the Applicants for a going concern solution, given the lack of any other viable financing alternative, whether on a stand-alone basis or together with the financing of Indalex U.S.;
- (d) a stand-alone solution is impractical given the integrated nature of the business of Indalex Canada and Indalex U.S.;
- (e) given the collateral base of Indalex U.S., the Monitor is satisfied that it is unlikely that the Post-Filing Guarantee with respect to the U.S. Additional Advances will ever be called and the Monitor is satisfied that the benefits to stakeholders far outweighs the risk associated with this aspect of the Post-Filing Guarantee;
- (f) the benefit to stakeholders and creditors of the DIP Financing that will permit a going concern restructuring outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;
- (g) the Pre-Filing Security has been reviewed and opined on by the independent counsel to the Monitor and the unsecured creditors of the Canadian debtors will be in no worse position as a result of the Post-Filing Guarantee than they were otherwise, prior to the CCAA filing, as a result of the limitation on the Canadian guarantee set forth in the draft Amended and Restated Initial Order; and
- (h) a balancing of the prejudices weighs in favour of the approval of the DIP Financing.

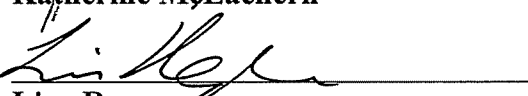
PART IV – RELIEF REQUESTED

15. The Applicants therefore request an order approving and authorizing the proposed DIP Financing, in the form as set out in the draft Initial Order filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF APRIL, 2009.



Katherine McEachern



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**Schedule "A"-
Authorities**

Tab	Document
1.	<i>Simpson's Island Salmon Ltd., Re</i> (2005), 2005 CarswellNB 781 (N.B. Q.B.)
2.	<i>United Used Auto & Truck Parts Ltd., Re</i> , 1999 CarswellBC 2673, (B.C. S.C. [In Chambers]); affirmed 2000 CarswellBC 414, (B.C. C.A.); leave to appeal granted 2000 CarswellBC 2132 (S.C.C.), but appeal dismissed
3.	<i>Skydome Corp., Re</i> , 1998 CarswellOnt 5922 (Ont. Gen.Div.(Comm. List))
4.	<i>Re Intertan Canada Ltd. and Tourmalet Corporation</i> , (January 23, 2009), 08-CL-7841 (S.C.J. (Comm.List))
5.	<i>Re Temple City Housing Inc.</i> (2007), 2007 CarswellAlta 1806; appeal dismissed <i>Minister of National Revenue v. Temple City Housing Inc.</i> (2008), 2008 CarswellAlta 2 (Alta. C.A.)
6.	<i>Re A & M Cookie Co. Canada</i> , 2008 CarswellOnt 7136 (Ont. S.C.J. [Commercial List]).
7.	<i>Re Smurfit-Stone Container Canada Inc.</i> , (January 27, 2009), CV-09-7966-00CL (S.C.J. (Comm. List))
8.	<i>Re Pliant Corporation of Canada Ltd. et al</i> , (March 24, 2009), 09-CL-8007, (S.C.J. (Comm. List))

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

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(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS
WITH RESPECT TO DIP FINANCING
(RETURNABLE APRIL 8, 2009)**

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