ONTARIO

SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

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FAX COVER SHEET

Date: April 17, 2009

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FROM: **The Honourable Mr. Justice Geoffrey B. Morawetz**

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MESSAGE: **Indalex Limited et al #CV-09-8122-00CL**

COURT FILE NO.: CV-09-8122-00CL
DATE: 20090417

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **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 CANADIAN INC. AND NOVAR INC.

Applicants

BEFORE: **MORAWETZ J.**

COUNSEL: **Linc Rogers and Katherine McEachern, for the Applicants**

Wael Rostom, for JPMorgan Chase Bank (N.A.) as Pre-petition Agent and DIP Agent for the Proposed DIP Lenders

Ashley Taylor, for FTI Consulting Canada ULC, Monitor

HEARD & RELEASED: **April 8, 2009**

ENDORSEMENT

[1] On April 8, 2009, the record was endorsed as follows: "Order granted in the form presented, as amended. Brief reasons will follow." These are those reasons.

[2] The Applicants brought this motion for:

(i) the approval of debtor-in-possession financing ("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 JPMorgan Chase Bank (N.A.) ("JPMorgan"), in its capacity as Administrative Agent for the Lenders (collectively, the "DIP Lenders") and

(ii) the approval of a secured guarantee granted by the Applicants in favour of the DIP Lenders, guaranteeing the obligations of Indalex U.S. under the DIP Credit Agreement (the "Post-Filing Guarantee").

[3] Counsel to the Applicants submits that the purpose of these CCAA proceedings is to preserve value for a broad cross-section of stakeholders of the Applicants including their employees, customers, business partners, suppliers and secured and other creditors and that in order to accomplish this goal, the Applicants need stable and reliable access to DIP Financing. Counsel further submits that 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 U.S. is currently subject to Chapter 11 proceedings.

[4] Counsel to the Applicants further submits that the authorization of DIP Financing and the Post-Filing Guarantee is reasonable, appropriate and justified in the circumstances and that DIP Financing is necessary to preserve the opportunity to seek a viable growing concern solution and that 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.

[5] The relevant facts, in support of the requested relief, are set out at paragraph 4 of the factum submitted by counsel to the Applicants.

[6] The record has established, in my view, that DIP financing is required. However, prior to approving the DIP Financing pursuant to the DIP Credit Agreement, it is necessary to consider a number of factors which include the benefit the Applicants will receive from the DIP Facility and the collateral that is charged to secure the DIP Facility. See *InterTAN Canada Ltd.*, Re, (2009), 49 C.B.R. (5th) 232 (S.C.J. Commercial List). In this case, the proposed collateral being provided to the DIP Lenders includes a secured guarantee of the Applicants in favour of the DIP Lenders, guaranteeing the obligations of Indalex U.S. under the DIP Credit Agreement.

[7] The situation in which proposed DIP financing has been conditional on a guarantee by the Canadian debtor of the U.S. debtors' obligations has recently been considered by this court in *A & M Cookie Co. Canada*, Re, 49 C.B.R. (5th) 188, *InterTAN Canada Ltd.*, Re, 49 C.B.R. (5th) 248, *Smurfit-Stone Container Canada Inc.* (January 27, 2009, CV-09-7966-00CL) and *Pliant Corporation of Canada Ltd.*, Re (March 24, 2009, 09-CL-8007, S.C.J.).

[8] These cases have established that the following factors are relevant in determining the appropriateness of authorizing a guarantee in connection with a DIP 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.

[9] In this case, I am satisfied that the Applicants have established the following:

(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 would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;

(c) there is no other alternative available to the Applicants for a going concern solution;

(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 also 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 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 by counsel to the Monitor and it appears that 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 of the Canadian guarantee set forth in the draft Amended and Restated Initial Order (see [10] and [11] below); and

(h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing.

[10] The Monitor also filed a report in respect of the motion. The Monitor indicated that it was concerned that any DIP structure securing the Canadian Pre-Filing Guarantee via court-ordered charge could potentially prejudice Canadian stakeholders by pre-determining the issue of the validity and enforceability of the Canadian Pre-Filing Guarantee. As a result of the concerns raised by the Monitor, the Applicants and the Senior Secured Creditors addressed the situation, the details of which are set out at paragraph 25 of the Monitor's First Report.

[11] As stated at paragraph 26 of the Monitor's Report, the intent of the structure is for the Senior Secured Lenders to obtain the benefit of Court-ordered charges securing the DIP Financing and the cross-guarantees of the U.S. Additional Advances and the Canadian Additional Advances while maintaining the *status quo* vis-à-vis the Canadian Pre-Filing Guarantee.

[12] The Monitor's Report also summarizes the DIP Credit Agreement. The DIP Credit Agreement provides a maximum facility of up to $84.6 million and the Applicants may draw up to $24.36 million, and the U.S. Debtors are able to borrow the balance, in each case subject to margin availability under borrowing-based calculations for the Applicants and the U.S. Debtors.

[13] Counsel to the Monitor has reviewed the security of the Senior Secured Lenders, other than the Canadian Pre-Filing Guarantee and has provided an opinion to the Monitor which states that, subject to the assumptions and qualifications contained therein, the Senior Secured Lenders' security is valid and enforceable and ranks in priority to other claims with respect to accounts and inventory.

[14] The Monitor has also referenced that maintaining business operations is in the interests of all stakeholders as it will afford the Applicants the opportunity to develop a viable restructuring plan designed to maximize recoveries for all stakeholders and furthermore, maintaining operations continues the employment of approximately 750 people as well as providing ongoing business for suppliers and customers. The Monitor has also reported that if the Applicants' request for approval of the DIP Agreement was to be denied, the Applicants would be unable to continue operations, both likely resulting in the forced liquidation of the assets to the detriment of creditors, employees, suppliers and customers.

[15] The Monitor also considered the potential prejudice to creditors and reports that the likelihood of a call on the Applicants' guarantee of the U.S. Additional Advances is unlikely and that the approval of the DIP Agreement and the proposed structuring of the DIP Charge provide appropriate protection for the DIP Lenders and appropriately balances the benefits to stakeholders that will accrue from such approval with the need to protect the interests of the Canadian creditors against any potential prejudice.

[16] The Monitor concludes its Report by noting that it is of the view that approval of the DIP Agreement is in the best interests of the Applicants and their stakeholders and recommends approval of the DIP Agreement and the granting of the DIP Charge.

[17] I am satisfied that the Applicants have established that the granting of DIP Financing is necessary and that the structure of the DIP Credit Agreement is reasonable in the circumstances. DIP Financing pursuant to DIP Credit Agreement is accordingly approved.

[18] The proposed Amended and Restated Order also provides for certain restructuring powers and an agreed upon priority as between the Directors' Charge, the Administrative Charge and the DIP Lenders' Charge. In my view, these modifications are appropriate and are approved.

[19] An order shall issue in the form presented, as amended, which order I have signed.

MORAWETZ J.

DATE: April 17, 2009