

**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

REPLY FACTUM OF SUN INDALEX FINANCE, LLC

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Lawyers for Sun Indalex Finance, LLC

I. OVERVIEW

1. This Reply Factum, is delivered on behalf of Sun Indalex Finance, LLC (“Sun”) in response to elements of the facta delivered on behalf of a group of retired executives of the Canadian Indalex companies (the “Retired Executives”) and the USW. Sun disputes the arguments and positions of the Retired Executives and the USW in full although Sun feels it necessary and desirable to respond only briefly to a very few points in this Reply Factum.

II. THE RETIRED EXECUTIVES ARE BOUND BY RES JUDICATA, ISSUE ESTOPPEL AND ABUSE OF PROCESS

2. The Retired Executives inaptly try to argue that the funds in dispute are not the same funds that they sought previously and that the parties and issues differ. None of these arguments is correct. In paragraph 20 of their Factum, they recite the first two issues noted by the Supreme Court of Canada and highlight only the second issue. In their argument, they ignore the first issue recited by the Supreme Court of Canada:

- (i) Does the deemed trust provided for in s. 57(4) of the PBA apply to wind-up deficiencies?

Sun Indalex Finance, LLC v. United Steelworkers, 2013 SCC 6 at para. 25

3. On that issue, the Supreme Court held that while deemed trusts do apply to wind-up deficiencies, the Retired Executives did not succeed because they do not have a deemed trust. That is, they failed on a requisite element of the cause of action that they asserted and that was an expressly recognized issue. That issue has been determined and cannot be re-litigated. Any effort by the Retired Executives to enforce a deemed trust necessarily involves a re-litigation of the issue of whether they have a deemed trust over the funds held in reserve by the Monitor that has already been decided against them.

4. In their Notice of Motion, the Retired Executives sought payment of \$3.2 million from the funds held by the Monitor. There is no difference between what the Retired Executives sought in 2009 in seeking to enforce deemed trusts against the amounts held in reserve by the Monitor and what they seek today. The Monitor held then and holds today only sale proceeds received from SAPA as contemplated in the Approval and Vesting Order dated July 20, 2009.

5. As foreshadowed in paragraph 13 of Sun's earlier Factum in this motion, the Retired Executives baldly and wrongly assert that the motion that was heard in 2009 and appeal to the Supreme Court of Canada was a bilateral dispute between only themselves and the DIP Lender. They ignore that their own Notice of Motion sought payment of funds held in reserve by the Monitor ahead of the claims of all other creditors and not just the DIP Lender. As noted at paragraph 33 of Sun's prior Factum, the Retired Executives continue to ignore that the Supreme Court of Canada expressly recognized Sun's interest on the priority issue.

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

6. Finally, the Retired Executives refer to the *Ivaco* case to argue that claims are determined at the end of a CCAA proceeding. First, were this correct, one would then question how the Retired Executives brought their motion for priority over the Reserve fund in the first place. The Court need not consider that question because the argument is a mischaracterization of the Court of Appeal's decision. The Court of Appeal in *Ivaco* expressly rejects the outcome now sought by the Retired Executives. In *Ivaco*, the pension parties tried unsuccessfully to enforce a deemed trust under the CCAA before their provincially legislated claim was rendered inoperative by a subsequent bankruptcy of the debtor. The Court of Appeal held that there is **no** basis for a claim at the end of a CCAA proceeding alone as that would lead to an unacceptable gap before a seamless transition into bankruptcy proceedings.

7. *Ivaco* therefore does not help the Retired Executives. It says nothing about the doctrines of *res judicata*, issue estoppel and abuse of process in this case. At best, if *Ivaco* applies, then priorities are to be determined in a bankruptcy proceeding for Indalex, in which case the deemed trust would be defeated by paramountcy and the sextet of Supreme Court of Canada cases (including *Indalex*) that make clear that provincial deemed trusts claims are not recognized in bankruptcy proceedings.¹ As stated by Laskin J.A. in *Ivaco*:

[64] Where a creditor seeks to petition a debtor company into bankruptcy at the end of CCAA proceedings, any claim under a

¹ All three decisions of the Supreme Court of Canada in *Indalex* recite and accept the premise that the provincial deemed trust is defeated in bankruptcy proceedings. See: DesChamps J. at para 71, Cromwell J. at para 115 (reciting the decision of Gillese J.A. to the same effect), and at paras 181, 220 and LeBel J. at para. 274

provincial deemed trust must be dealt with in bankruptcy proceedings.

Ivaco Inc., Re, (2006) 83 OR (3d) 108; 275 DLR (4th) 132; 26 BLR (4th) 43; 25 CBR (5th) 17 (CA) at para 63 to 65

8. The Retired Executives are not entitled to bring repeated proceedings or to change positions. They are bound by the positions they take; the evidence they submit (or do not submit); the arguments they raise (or strategically refrain from raising) and the outcome of their proceedings. As Muldoon J. has stated in the Federal Court:

Should a party choose to drop certain issues for reasons of tactics, strategies, or otherwise, the party seals its fate with regard to those decisions. Parties must bring forward their whole case, and will not be permitted to litigate by instalments in piecemeal fashion.

Apotex Inc. v. Merck & Co., [1999] F.C.J. No. 575 at para. 25 (T.D.)

9. In all, the Retired Executives cannot avoid the fact that the issue of whether a deemed trust exists against the funds held by the Monitor has been determined against them by this Honourable Court and the Supreme Court of Canada. They are bound by the doctrines of *res judicata* and issue estoppel. It would be an abuse of process for the Retired Executives to try to re-litigate the issue.

III. THE USW MISUNDERSTANDS THE ALLEGATIONS IN THE US BANKRUPTCY PROCEEDINGS AND CANNOT USE THEM AS EVIDENCE

10. The USW has sought to put into evidence, by an Ontario solicitor's affidavit, a selective bundle of material delivered in the US bankruptcy proceedings of the parent company of the Canadian Indalex debtors. It is submitted that the US material is not admissible in this proceeding for the truth of its content.

Rules of Civil Procedure, Rule 4.06(2)

11. In any event, the USW has utterly misapprehended the US proceeding. The US Trustee has brought proceedings on behalf of the US estate and its creditors against a number of people and companies. The US Trustee has not sued or alleged any wrongdoing at all against the

Indalex US estate on whose behalf it seeks relief. The proceedings by the US Trustee are not an admission of any wrongdoing *by* Indalex US to Indalex Canada or anyone else. The defense of the US proceedings is not before this Honourable Court and is being vigorously pursued in the US.

IV. ORDER SOUGHT

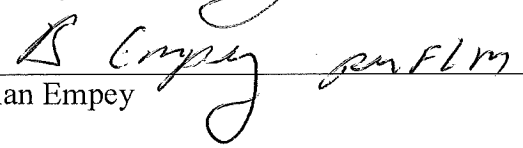
12. Sun respectfully requests a declaration that the Retired Executives are not entitled to assert a deemed trust over any proceeds of sale of the Applicants' assets being held in reserve by the Monitor and its costs of this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 19, 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** *Ivaco Inc., Re*, (2006) 83 OR (3d) 108; 275 DLR (4th) 132; 26 BLR (4th) 43; 25 CBR (5th) 17 (CA) at para 63 to 65
- 3** *Apotex Inc. v. Merck & Co.*, [1999] F.C.J. No. 575 at para. 25 (T.D.)

SCHEDULE "B"

STATUTORY INSTRUMENTS

RULES OF CIVIL PROCEDURE, R.R.O. 1990, Regulation 194, under the Courts of Justice Act, Rule 4.06(2)

4.06 - AFFIDAVITS

(2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.

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

ONTARIO SUPERIOR COURT OF JUSTICE
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Proceeding commenced at Toronto

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