

**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 THE MONITOR
(Motion Returnable November 10, 2010)**

November 8, 2010

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TO: **THE SERVICE LIST**

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1. In its factum, in addressing the D&O Claims of the Retirees and the USW related to the deficiencies in the Executive Plan and the Salaried Plan (together, the "Plans"), the Monitor highlighted the fact that the Applicants had made all required contributions to both plans, including special payments, and no amounts were due or owing to the Plans as of July 31, 2009, the effective date of the directors' and officers' resignations.

2. Based on those facts, the Monitor argued that there could not be a "failure of the Applicants, after the date [of the Initial Order], to make payments" in respect of the Plans and therefore the indemnity obligations in paragraph 21 of the Initial Order could not be triggered.

3. In their facta the Retirees and the USW argue that the indemnity is triggered because they have oppression claims against the directors of Indalex (and in the case of the USW's D&O Claim, Mr. Keith Cooper, the Chief Restructuring Officer of the US Debtors) on the basis that the Plans are being wound up in a deficit position which will result in a failure to pay 100% of future pension benefits.

Applicants Not Liable to Pay Pension Benefits

4. Although paragraph 7(a), which is one of the paragraphs referenced in the indemnity language set out in paragraph 21 of the Initial Order, does refer to "pension benefits", the Retirees' and the USW's arguments ignore a number of important facts which undermine their validity:

- (a) At all times prior to the resignation of the directors, and in fact at all times prior to June 2010, the Retirees were paid 100% of their pension benefits under the Executive Plan.
- (b) At all times prior to the resignation of the directors, the members of the Salaried Plan were paid 100% of their pension benefits under the Salaried Plan. The Monitor understands that the members of the Salaried Plan continue to receive 100% of their pension benefits to this day, but was unable to confirm this information prior to the filing of this factum.
- (c) The indemnity applies to claims related to the failure of the Applicants to make certain payments. The indemnity is not triggered by the failure of a third party to make payments.
- (d) Neither the Applicants nor the directors and officers are responsible for paying pension benefits under the Plans.

- (e) Pursuant to the *Pension Benefits Act* (the “PBA”), Indalex’s obligations with respect to the Plans were:
- (i) To remit the required contributions to the Plans in the prescribed manner and at the prescribed times;
 - (ii) Ensure that all contributions were paid by Indalex qua employer when due; and
 - (iii) If a contribution was not paid when due, notify the Superintendent in the prescribed manner and within the prescribed period.
- (f) Pursuant to the PBA, there is no obligation on the Applicants or the directors and officers to ensure that the Plans are sufficiently funded to ensure payment in full of all future pension benefits. That is an obligation of the “pension plan”. “Pension plan” is defined in the PBA to mean “a plan organized and administered to provide pensions for employees...”; it does not include an employer or an administrator of the plan.

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1, 55 and 56.

5. In summary, there was no failure to pay 100% of the pension benefits payable under the Plans during the time that the directors held office, neither the Applicants or the directors and officers were responsible for paying the pension benefits under the Plans, and all required current service contributions and special payments were made during the time that the directors held office. Therefore, the indemnity provision in paragraph 21 could not be triggered.

Interpretation of the Initial Order

6. Pursuant to paragraph 7(a) of the Initial Order the Applicants are authorized, but not required, to make:

all outstanding and future wages and salaries (for greater certainty wages and salaries shall not include severance or termination pay), employee and pension benefits, current service contributions to pension plans (which for greater certainty shall not include special payments), vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements [Emphasis added]

7. Where the terms of an order are clear and unambiguous, the Court should interpret the order in accordance with its plain meaning. Where a provision is ambiguous or there is a gap or omission, the Court should adopt a liberal interpretation and consider the purpose of the CCAA, attempt to balance the interests of the parties and consider what would be a commercially reasonable interpretation of the order.

Afton Food Group Ltd. (Re), [2006] O.J. No. 1950 (S.C.J. [Comm. List]) at para. 23, Supplementary Book of Authorities of the Monitor, Tab 1.

8. As there is no obligation on an employer or an administrator under the PBA to pay the pension benefits payable under a registered pension plan, it is a commercially reasonable interpretation of the Initial Order that in referring to “employee and pension benefits” in paragraph 7(a) of the Initial Order the Court was not referring to pension benefits payable under registered pension plans such as the Plans. Rather, it is reasonable to interpret paragraph 7(a) as referring to situations involving contractual pension obligations, such as a SERP. Further, it is a reasonable interpretation that the reference to “current service contributions to pension plans” relates to registered pension plans.

9. Therefore, it is a commercially reasonable interpretation of the Initial Order that a failure to pay the pension benefits payable under the Plans (which actually did not occur during the time that the directors held office) does not trigger the indemnity obligations under paragraph 21 of the Initial Order.

No Reasonable Expectation of Payment in Full

10. In their facta, the Retirees and the USW argue that they have an oppression claim against the directors on the basis that:

- (a) The Retirees and the USW had a reasonable expectation that they would be paid their “full” pension benefits under the Plans;
- (b) The Retirees had a reasonable expectation that they would be paid their “full” pension benefits under the SERP; and
- (c) That their reasonable expectations were violated by conduct of the directors (and Mr. Cooper) which was oppressive, unfairly prejudicial or which unfairly disregarded the interests of the Retirees and the USW.

11. On the contrary, it would be manifestly unreasonable for the Retirees or the USW to expect that the Executive Plan, the Salaried Plan or the SERP would be fully funded in a situation where the Plans were wound up while in a deficient position or where Indalex became insolvent.

12. Both the Executive Plan and the Salaried Plan provide that Indalex had the right at any time to discontinue the plan either in whole or in part. Further, both plans expressly contemplate that in the event that the plan is wound up the obligation on Indalex to make contributions to the pension fund is limited to amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund. Neither plan provides for payment of any

deficiency. Lastly, both plans expressly contemplate that in the event that the plan is wound up and the assets are not sufficient to pay all the benefits under the plan then the benefits payable will be reduced. The language of the Executive Plan is set forth below. The language of the Salaried Plan is identical.

ARTICLE 14 - RIGHT TO AMEND OR TERMINATE THE PLAN

14.1 Continuation of the Plan

The Employer intends to maintain the Plan indefinitely but reserves the right to amend or discontinue the Plan either in whole or in part at any time.

14.3 Termination of the Plan

- (a) If the Plan is wound up, in whole or in part, the assets of the Fund will first be allocated for provision of benefits in accordance with the terms of the Plan, Applicable Pension Legislation, the Income Tax Act and any other applicable legislation.
- (b) If the Plan is wound up, in whole or in part, the Employer will not make further contributions to the Fund in respect of the Plan or the portion of the Plan being wound up, as applicable, except for amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation.
- (c) Subject to the application of the Pension Benefits Guarantee Fund (Ontario), if the Plan is wound up, in whole or in part, and the assets in the Fund are not sufficient to pay all the benefits under the Plan or the portion of the Plan being wound up, as applicable, the benefits payable will be reduced in the manner prescribed by Applicable Pension Legislation. [Emphasis added]

13. Further, Indalex was not obligated to fund any of the benefits payable under the Supplemental Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the “SERP”) and benefits were paid from the general revenues of Indalex. It is unreasonable to assume that in a situation of insolvency the benefits would be paid in full.

4.1 Status of Plan

(1) Plan is Not Funded

The Company is not obligated to fund any of the benefits provided under the Supplemental Retirement Plan. The benefits under the Supplemental Retirement Plan may be paid out of the general revenues of the Employer.

Retirees’ and USW’s Complaint is that Not Preferred over Other Creditors

14. The reality of the Retirees’ and the USW’s complaint regarding the directors’ (and Mr. Cooper’s) conduct is that the directors did not take the steps necessary to prefer the interests of the Retirees and the USW over the interests of the Applicants and all of its creditors and other stakeholders.

15. With respect to oppression actions against directors, the Supreme Court of Canada has made it clear that directors are required to treat all stakeholders equitably and fairly.

The cases of oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation’s duties as a responsible corporate citizen.

Directors may find themselves in a situation where it is impossible to please all stakeholders. The “fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction”: *Maple Leaf Foods*, per Weiler J.A., at p. 192.

There is no principle that one set of interests – for example the interest of shareholders – should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way. [Emphasis added]

BCE Inc. v. 1976 Debentureholders, [2008] S.C.J. No. 37 at paras. 82-84, Supplementary Book of Authorities of the Monitor, Tab 2.

16. Further, in *Peoples Department Stores Inc. (Trustee of) v. Wise*, the Supreme Court of Canada cautioned that directors must not favour the interests of one group of stakeholders over any other group:

In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a “better” corporation, and not to favour the interests of any one group of stakeholders. [Emphasis added]

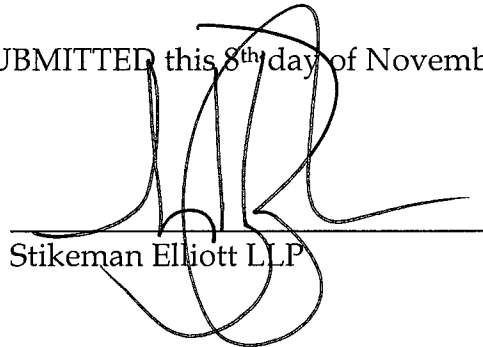
Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] S.C.J. No. 64 at para. 47, Supplementary Book of Authorities of the Monitor, Tab 3.

17. To use the language quoted by the Retirees and the USW in their facta, the oppression claims lack “any air of reality”. With respect, the Retirees’ and the USW’s D&O Claims are nothing more than the latest attempt to gain some priority for the pre-filing unsecured claims that results from the termination of the SERP and the deficiencies in the Executive Plan and the Salaried Plan.

18. For the reasons set forth in the Monitor's original factum and those outlined above, the Monitor respectfully requests that this Honourable Court grant an order:

- (a) Declaring that none of the D&O Claims received by the Monitor are claims for which the Applicants are required to indemnify their directors and officers pursuant to paragraph 21 of the Initial Order; and
- (b) Terminating, discharging and releasing the Directors' Charge from the Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of November, 2010.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Afton Food Group Ltd. (Re)*, [2006] O.J. No. 1950 (S.C.J. [Comm. List]).
2. *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37.
3. *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] S.C.J. No. 64.

SCHEDULE "B"

RELEVANT STATUTES

Pension Benefits Act, R.S.O. 1990, c. P.8

1. ...

"former member" means a person who has terminated employment or membership in a pension plan, and,

- (a) is entitled to a deferred pension payable from the pension fund,
- (b) is in receipt of a pension payable from the pension fund,
- (c) is entitled to commence receiving payment of pension benefits from the pension fund within one year after termination of employment or membership, or
- (d) is entitled to receive any other payment from the pension fund;

...

"pension fund" means the fund maintained to provide benefits under or related to the pension plan;

"pension plan" means a plan organized and administered to provide pensions for employees, but does not include,

- (a) an employees' profit sharing plan or a deferred profit sharing plan as defined in sections 144 and 147 of the Income Tax Act (Canada),
- (b) a plan to provide a retiring allowance as defined in subsection 248 (1) of the Income Tax Act (Canada),
- (c) a plan under which all pension benefits are provided by contributions made by members, or
- (d) any other prescribed type of plan;

...

CONTRIBUTIONS

Funding

55. (1) A pension plan must provide for funding sufficient to provide the pension benefits, ancillary benefits and other benefits under the pension plan in accordance with this Act and the regulations.

Payment by employers, etc.

(2) An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times,

- (a) to the pension fund; or
- (b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan.

Payment by members

(3) Members of a pension plan that provides contributory benefits shall make the contributions required under the plan in the prescribed manner and at the prescribed times.

Same, jointly sponsored pension plans

(4) Members of a jointly sponsored pension plan shall make the contributions required under the plan, including contributions in respect of any going concern unfunded liability and solvency deficiency, in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times.

Duty re payment of contributions

56.(1) The administrator of a pension plan and the agent, if any, of the administrator who is responsible for receiving contributions under the pension plan shall ensure that all contributions are paid when due.

Notice

(2) If a contribution is not paid when due, the administrator and the agent, if any, shall notify the Superintendent in the prescribed manner and within the prescribed period.

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Proceeding commenced at Toronto

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