

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**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**

**RESPONDING FACTUM OF THE UNITED STEELWORKERS  
(Motion Returnable August 28, 2009)**

August 27, 2009

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**FACTUM OF THE MOVING PARTY UNITED STEELWORKERS  
(Motion Returnable August 28, 2009)**

**PART I - OVERVIEW**

1. Altering priorities by entering into a voluntary assignment in bankruptcy to enforce the rights of third party creditors is a legitimate purpose. However, Indalex US is wearing two hats. It is now the operating mind of Indalex Limited ("Indalex Canada") and therefore assumes the fiduciary and statutory obligations imposed not only under the *Pension Benefits Act* but also under the *Canada Business Corporations Act*. By acting in the interest of US creditors to the detriment of Canadian creditors where there is a clear statutory and fiduciary obligation to do otherwise, the motion to lift the stay to allow for an assignment in bankruptcy constitutes an improper purpose.

**PART II - THE FACTS**

2. On March 20, 2009, the Applicants' U.S. based affiliates (collectively, "Indalex US") commenced reorganization proceedings under Chapter II of Title 11 of the United States Code. On April 3, 2009, the Applicants commenced parallel proceedings and filed for and obtained protection from their creditors under the

Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36. as amended (the "CCAA"). pursuant to an order of the Honourable Justice Morawetz (as amended, the "Initial Order").

Affidavit of Keith Cooper, sworn August 24, 2009 ["Cooper Affidavit"], at paras. 4-5

3. On April 8, 2009, the Court authorized Indalex Limited to borrow funds (the 'DIP Borrowings') pursuant to a debtor-in-possession credit agreement (as amended, the "DIP Credit Agreement") among Indalex US, the Applicants and a syndicate of lenders (the "DIP Lenders") for which JPMorgan Chase Bank, N.A. is administrative agent (the DIP Agent"). The Applicants' obligation to repay the DIP Borrowings was guaranteed by Indalex US subject to a Monitor's reserve.

Cooper Affidavit, at paras. 7-10

Order of the Honourable Mr. Justice Morawetz, April 8, 2009 re Indalex Limited et al. ["Amended and Restated Initial Order"], at para. 32

Order of the Honourable Justice Campbell, July 20, 2009 re Indalex Limited et al. ["Approved and Vesting Order"], at para. 14

4. The primary negotiator of the DIP Credit Agreement on behalf of the Indalex Group of Companies was Mr. Keith Cooper, the Senior Managing Director of FTI Consulting Inc. FTI Consulting Inc. and the Monitor are affiliated entities.

Cooper Affidavit, at paras. 1, 6

Cross-Examination on the Cooper Affidavit, at para. 7

5. After a Court-approved marketing process, the Court approved the sale of the Applicants' assets as a going concern to SAPA Holding AB (including any assignees, "SAPA"), and ordered that upon closing of the SAPA transaction, the proceeds of sale (the "Canadian Sale Proceeds") were to be paid to the Monitor. The Monitor was directed to make a distribution to the DIP Lenders,

from the Canadian Sale Proceeds, in satisfaction of the Applicants' obligations to the DIP Lenders subject to a reserve that the Monitor considered to be appropriate in the circumstances (the "Undistributed Proceeds") .

Cooper Affidavit, at paras. 7, 10

6. The USW has asserted that a deemed trust applies to the sale proceeds in an amount equal to the deficiency in the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies, (Restated and Amended as at January 1, 2003) (the "Salaried Plan"). The Monitor has retained an amount of \$6.75 million as part of the Undistributed Proceeds to satisfy the deemed trust claim of the USW as well as a claim remitted on behalf of members of the Executives Pension Plan.

Cooper Affidavit, at paras. 21-22, 28

7. The July 20<sup>th</sup> Approval and Vesting Order subrogates Indalex to the rights of the DIP Lenders subject to the Monitor's Reserve.

Order of the Honourable Justice Campbell, July 20, 2009 re Indalex Limited et al. ["Approved and Vesting Order"], at para. 14

8. On July 31, 2009 all directors of Indalex Limited ("Indalex") resigned. Between July 31, 2009 and August 12, 2009, there was no corporate governance of Indalex. On August 12, 2009, a Unanimous Shareholder Declaration was executed. Pursuant to that Declaration, Mr. Keith Cooper was appointed to direct the affairs of all Indalex entities.

Cooper Affidavit, at para. 33

Cross-examination on the Cooper Affidavit, at paras. 16, 80

Unanimous Shareholder Declaration, August 12, 2009

9. A claims procedure has been commenced within the CCAA with a cut-off date for submission of proofs of claim of August 28, 2009.

Order of the Honourable Mr. Justice Morawetz, July 30, 2009 re Indalex et al.  
["Claims Procedure Order"], at paras. 2, 7

10. During cross-examination on the Affidavit of Keith Cooper, Mr. Cooper indicated that he and his staff act as the de facto administrator of the Indalex Canada pension plans but also thought the Monitor sat in that role.

Cross-examination on the Cooper Affidavit, August 26, 2009, at para. 25

### **PART III - ARGUMENT**

11. The voluntary assignment is a discretionary order. The court has discretion to refuse the order if the motion has been made for an improper purpose. All directors have resigned from Indalex. Pursuant to a Unanimous Shareholder Declaration dated August 12, 2009, the shareholders have appointed Mr. Cooper to manage Indalex Canada. When questioned as to what would happen if the funds currently held on reserve by the Monitor pursuant to the USW and Executive Plan Member motions are paid to Indalex US under *BIA* proceedings, Mr. Cooper indicated that the funds would be distributed to creditors based in the United States.

Unanimous Shareholder Declaration, August 12, 2009

Cross-examination of Keith Cooper on his Affidavit dated August 20<sup>th</sup>, 2009,  
at paras. 87, 88

12. Mr. Cooper asserts that he is now the administrator of the Indalex pension plans. Mr. Cooper, as the controlling mind of Indalex, has made an active choice to avoid statutory and fiduciary obligations owed to the Salaried Plan beneficiaries in Canada and to seek voluntary assignment in bankruptcy to ensure that the funds on reserve will be paid over to US creditors of Indalex US. No Canadian creditor has sought to petition Indalex into bankruptcy. Mr.

Cooper's actions constitute, at the least, a conflict of interest given his role in managing Indalex US compared with his management obligations with respect to Indalex Canada, and a breach of statutory and fiduciary duty owed to Salaried Plan beneficiaries. The proposed motion for leave to use the bankruptcy procedure to nullify the deemed trust should be defeated on the basis that it was filed for an improper purpose.

*Froese v. Montreal Trust Co. of Canada*, [1996] B.C.J. No. 1091 (C.A.), at paras. 59-60

*Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 22

13. Under the current governance structure of the Indalex group of companies, there is no mechanism to resolve conflicts of interest between affiliated entities. However, Mr. Cooper, in his capacity as director of Indalex Canada, continues to have a statutory duty of care under the *Canada Business Corporations Act*. That duty requires him to act honestly and in good faith with a view to the best interests of the corporation and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The filing for voluntary assignment in bankruptcy will defeat a statutory and fiduciary obligation for the sole purpose of diverting funds to the US parent. Mr. Cooper is acting in the best interest of Indalex US, but to the detriment of Indalex Canada.

*Canada Business Corporations Act*, R.S.C. 1985, c. C.44, s. 122

14. In *BCE Inc.* the Supreme Court of Canada described the nature of a directors duties. It emphasized that the director must ensure that the corporation meets its statutory obligations.

“...At a minimum, it [the director's fiduciary duty] requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements. In any event, the fiduciary duty owed by directors is mandatory; directors must look to what is in the best interests of the corporation.”



*BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, at para. 38

15. In paragraph 19 of the Applicants Factum, the Applicants assert that the facts of this case are “strikingly similar to those in *Re Ivaco Inc.* In *Re Ivaco Inc.*, there were a substantial number of third party creditors with significant claims. One of the larger creditors, the Bank of Nova Scotia sought to petition one of the related companies to assert its security interest. The overall pension liability relative to the collective creditor claims was significant thereby posing a threat to the secured creditor’s recovery. Further, the pension plan in question in *Re Ivaco Inc.* was ongoing and therefore subject to subsection 57(3), not wound up as is the case with the Salaried Plan. In the current case, there is no evidence of creditors seeking to petition Indalex into bankruptcy. A claims process is about to be completed. The voluntary assignment will have the result of benefiting US creditors to the detriment of Canadian creditors.

*Re Ivaco Inc.* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 28-31

16. In paragraphs 22, 24 of the Applicants Factum it is implied that a voluntary assignment in bankruptcy will support Indalex duties “to a broad section of stakeholders” considering “a broad plurality of legitimate interests”. The Affidavit of Keith Cooper expanded upon in his cross-examination confirms that the sole purpose of the assignment is to divert assets from the Canadian distribution pool to the US distribution pool. The intent is to defeat the claims of beneficiaries under which Indalex Canada owes a clear statutory and fiduciary duty in favour of Indalex US.

Cooper Affidavit, at paras. 30-31

Cross-examination of Keith Cooper on the Affidavit sworn August 24, 2009, sworn August 26, 2009, at para. 20

17. When faced with a conflict of interest, a fiduciary is obligated to act in the best interest of its beneficiaries even if that results in a detriment to the fiduciary on other grounds.

"A fiduciary duty imposes the highest duty in law on the party holding the duty - the fiduciary - to act altruistically for the sole benefit of the beneficiary, to the fiduciary's own detriment if necessary."

*Ben-Israel v. Vitacare Medical Products Inc.*, [1997] O.J. No. 4540 (Gen. Div.), varied in [1999] O.J. No. 2272 (C.A.), at para. 39

18. In paragraph 27 of the Applicants Factum, *Re General Chemical Canada Ltd.* ("General Chemical") is cited as support for the voluntary assignment Indalex seeks to obtain. There are significant differences in the facts underlying *General Chemical* compared to the case at hand. In *General Chemical*, the secured creditor seeking enforcement of its rights was not the director of *General Chemical* acting on behalf of *General Chemical*. It was a third party creditor. Moreover, the proceedings were under the *Bankruptcy and Insolvency Act* (BIA) when the distribution was contemplated. The subsection 57(4) deemed trust is enforceable under CCAA proceedings subject to any stay orders issued. It is not enforceable under BIA proceedings.

*Bankruptcy and Insolvency Act*, 67(1)

*Re General Chemical Canada Ltd.*, 51 C.C.P.B. 297 (Ont. S.C.J.), at para. 4

19. Paragraphs 27 and 28 of the Applicants' Factum address instances where creditors sought to petition a company into bankruptcy. In *Textron Financial Canada Ltd. v. Beta Brands Ltd.*, Textron held a security interest over all of the present and future property of Beta Brands. The Applicants are correct that the facts are in line with *Re Ivaco* precisely because third party secured creditors actively sought to enforce their rights

*Textron Financial Canada Ltd. v. Beta Brands Ltd.*, 12 P.P.S.A.C. (3d) 46, 37 C.B.R. (5th) 107, at paras. 2, 46

20. The *Ted LeRoy* case more closely approximates the fact situation at hand. In *Ted LeRoy*, proceeds of the sale of assets had been received by the Monitor and restructuring efforts were at an end. While a stay was appropriate during the course of restructuring efforts, at the cessation of restructuring activities

under the CCAA, the stay was lifted. and the deemed trust enforced. Similar to the facts of the case at hand, Ted LeRoy made a voluntary assignment in bankruptcy. Third party creditors were not anxiously seeking a petition into bankruptcy. The Court recognized the enforceability of **both** a deemed trust and an express trust. Either was sufficient to lead the Court to order payment in favour of the trust prior to the onset of bankruptcy proceedings.

*Re Ted LeRoy Trucking Inc., 2009 BCCA 205, at paras. 22-23, 30*

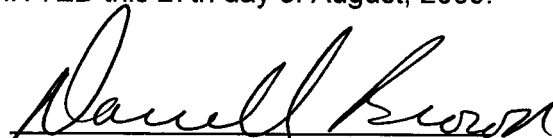
#### **PART IV – CONCLUSION**

21. Indalex Limited is now governed by the former prime advisor to the board of Indalex US. Mr. Cooper was the prime Indalex US negotiator during the negotiation of the DIP Credit Agreement. His company, FTI Consulting Inc. is affiliated with the Monitor. He is now the governing mind of both Indalex US and Indalex Canada. In the absence of an independent assessment of Indalex Canada obligations and where there is no evidence that third party creditors seek a bankruptcy proceeding, the Applicants' motion for leave to assign Indalex Canada in bankruptcy should be denied.

#### **PART V - RELIEF SOUGHT**

22. The USW asserts that a deemed trust is enforceable. The Applicants' motion to lift the stay and allow the Applicants to file a voluntary assignment in bankruptcy should be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of August, 2009.

  
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**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Froese v. Montreal Trust Co. of Canada*, [1996] B.C.J. No. 1091 (C.A.)
2. *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37
3. *Re Ivaco Inc.* (2006), 83 O.R. (3d) 108 (Ont. C.A.)
4. *Ben-Israel v. Vitacare Medical Products Inc.*, [1997] O.J. No. 4540 (Gen. Div.), varied in [1999] O.J. No. 2272 (C.A.)
5. *Re General Chemical Canada Ltd.*, 51 C.C.P.B. 297 (Ont. S.C.J.)
6. *Textron Financial Canada Ltd. v. Beta Brands Ltd.*, 12 P.P.S.A.C. (3d) 46, 37 C.B.R. (5th) 107
7. *Re Ted LeRoy Trucking Inc.*, 2009 BCCA 205

**SCHEDULE "B"**  
**RELEVANT STATUTES**

**Section 22 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8**

Care, diligence and skill

**22.(1)** The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6) No person other than a prescribed person shall be a trustee of a pension fund.

Responsibility for agent

(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

Benefit by administrator

(9) The administrator of a pension plan is not entitled to any benefit from the pension plan other than pension benefits, ancillary benefits, a refund of contributions and fees and expenses related to the administration of the pension plan and permitted by the common law or provided for in the pension plan.

Member of pension committee, etc.

(10) Subsection (9) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Payment to agent

(11) An agent of the administrator of a pension plan is not entitled to payment from the pension fund other than the usual and reasonable fees and expenses for the services provided by the agent in respect of the pension plan. R.S.O. 1990, c. P.8, s. 22.

### **Section 122 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44**

Duty of care of directors and officers

122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Duty to comply

(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.

No exculpation

(3) Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves them from liability for a breach thereof.

R.S., 1985, c. C-44, s. 122; 1994, c. 24, s. 13(F); 2001, c. 14, s. 135(E).

### **Section 67(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

Property of bankrupt

67.(1) The property of a bankrupt divisible among his creditors shall not comprise

- (a) property held by the bankrupt in trust for any other person;

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

(b.3) without restricting the generality of paragraph (b), property in a registered retirement savings plan or a registered retirement income fund, as those expressions are defined in the Income Tax Act, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy, but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the Income Tax Act in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the Family Orders and Agreements Enforcement Assistance Act, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

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

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Proceeding commenced at Toronto

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