

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

**Indalex Limited  
Indalex Holdings (B.C.) Ltd.  
6326765 Canada Inc. and  
Novar Inc.**

**NINETEENTH REPORT OF THE MONITOR**

**May 30, 2013**

**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.

**NINETEENTH REPORT TO THE COURT  
SUBMITTED BY FTI CONSULTING CANADA ULC  
IN ITS CAPACITY AS MONITOR**

**INTRODUCTION**

1. On April 3, 2009, Indalex Limited (“**Indalex**”), Indalex Holdings (B.C.) Ltd. (“**Indalex BC**”), 6326765 Canada Inc. (“**632**”) and Novar Inc. (“**Novar**”) (collectively, the “**Applicants**”) made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) and an Initial Order (the “**Initial Order**”) was made by the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) granting, *inter alia*, a stay of proceedings against the Applicants until May 1, 2009 (the “**Stay Period**”), and appointing FTI Consulting Canada ULC as monitor (the “**Monitor**”). The proceedings commenced by the Applicants under the CCAA will be referred to herein as the “**CCAA Proceedings**”.

2. Indalex's parent is Indalex Holding Corp. ("**Indalex Holding**"), which is a wholly-owned subsidiary of Indalex Holdings Finance, Inc. ("**Indalex Finance**"). Indalex BC, 632 and Novar are wholly owned subsidiaries of Indalex. On March 20, 2009, Indalex Holding, Indalex Finance, Indalex Inc., Caradon Lebanon, Inc. and Dolton Aluminum Company, Inc. (collectively, the "**US Debtors**") commenced proceedings (the "**Ch.11 Proceedings**") under chapter 11 of the United States Bankruptcy Code (the "**USBC**") in the United States Bankruptcy Court, District of Delaware (the "**US Court**"). The case was assigned to Judge Walsh.
3. On April 8, 2009, Justice Morawetz granted the Amended and Restated Initial Order which, *inter alia*, approved the DIP Credit Agreement (as defined in paragraph 33 of the Amended and Restated Initial Order). The Amended and Restated Order was further amended on May 12, 2009, to correct certain references and typographical errors in the Amended and Restated Initial Order, and on June 12, 2009, to increase the Canadian sub-facility borrowing limit.
4. The Stay Period has been extended a number of times and currently expires on June 28, 2013.
5. On April 22, 2009, Justice Morawetz granted an Order which, *inter alia*, approved the Marketing Process to identify a Stalking Horse bid for Indalex's assets.
6. On July 2, 2009, Justice Morawetz granted an Order which approved the Stalking-Horse Bid of Sapa Holding AB ("**Sapa**") as a "Qualified Bid" under the Stalking Horse Process and the Bidding Procedures.

7. No additional Qualified Bids were received in connection with the Stalking Horse Process prior to the Bidding Deadline and on July 20, 2009, the sale of substantially all of the assets and business of the Applicants and the US Debtors pursuant to the terms of the Asset Purchase Agreement dated as of June 16, 2009 by and among the US Debtors and the Applicants (other than Novar), as sellers, and Sapa, on its own behalf and on behalf of one or more Canadian Purchasers to be named (the “**Sapa Transaction**”) was approved by the Court pursuant to the Order of Justice Campbell (the “**Approval and Vesting Order**”). The US Court approved the Sapa Transaction on the same date.
8. On July 30, 2009, a procedure for the submission, evaluation and adjudication of claims against the Applicants and for the submission of claims, if any, against the directors and officers of the Applicants (the “**Claims Procedure**”) was approved pursuant to the Order of Justice Morawetz (the “**Claims Procedure Order**”).
9. The Sapa Transaction closed in Canada and the U.S. on July 31, 2009. On the same date, all of the Applicants’ directors and officers resigned.
10. On the closing of the Sapa Transaction, \$17,041,392 of the Canadian Cash Purchase Price was paid to the DIP Lender. The remainder of the Canadian DIP Loan, being US\$10,751,247.22 (the “**DIP Guarantee Payment**”) was satisfied by the US Debtors pursuant to the guarantee granted by the US Debtors to the DIP Lenders. Pursuant to the Approval and Vesting Order, the US Debtors is entitled to be subrogated to the rights of the Agent and the DIP Lenders under the DIP Lenders Charge to the extent of the DIP Guarantee Payment (the “**Subrogated DIP Claim**”).

11. The Salaried Plan was wound up prior to the commencement of the CCAA proceedings. On August 27, 2010, the Superintendent of Financial Services wound up the Executive Plan effective September 30, 2009. Morneau Sobeco Limited Partnership (now Morneau Shepell Ltd.) was appointed as the administrator of each plan (the “**Salaried Plan Administrator**” and the “**Executive Plan Administrator**” respectively and collectively the “**Pension Administrators**”).
12. On October 14, 2009, Judge Walsh of the US Court granted an order converting the Ch.11 Proceedings to proceedings under Chapter 7 of the USBC (the “**Ch.7 Proceedings**”). George L. Miller was appointed as the Chapter 7 Trustee of the Bankruptcy Estates of the U.S. Indalex Debtors (the “**US Trustee**”).
13. On October 27, 2009, the Court granted an order (the “**Monitor’s Powers Order**”) increasing the Monitor’s powers in order to facilitate the orderly completion of the CCAA Proceedings and the winding up of the Applicants’ estates, including:
  - (i) Completing the Claims Procedure;
  - (ii) Completing the working capital calculation and any related purchase price adjustment pursuant to the Sapa Transaction. The working capital adjustment and the final purchase price were settled between the Applicants, the US Debtor, Sapa, Sun Indalex Finance, LLC (“**Sun**”) and the Monitor in July, 2010. As a result, the Monitor received a total of US\$4,485,000 in additional proceeds;
  - (iii) Responding to the leave to appeal motion of the Retired Executives in connection with the SERP Motion and any resulting appeal. The Retired Executives’ motion for leave to appeal was dismissed by the Court of Appeal on March 24, 2010; and

- (iv) Responding to any matters resulting from the decision of Justice Campbell in relation to the Deemed Trust Motions (defined below) and the Bankruptcy Leave Motion (defined below), including the filing of or responding to any appeal therefrom and the filing of any assignment in bankruptcy of any Applicant.
14. On August 28, 2009, the Retired Executives and certain members of the United Steelworkers Union (the “**USW**”) brought motions seeking declarations, *inter alia*, that the property of the Applicants is subject to deemed trusts under the Pension Benefits Act (the “**PBA**”) in favour of the beneficiaries of the “Executive Pension Plan” and the “Salaried Pension Plan”, respectively and that the wind-up deficiencies in those Plans should be paid in priority to all other creditors (the “**Deemed Trust Motions**”).
  15. On the same date, the Applicants brought a motion for leave to lift the stay of proceedings for the purpose of allowing one or more of the Applicants to file an assignment in bankruptcy (the “**Bankruptcy Leave Motion**”).
  16. The Deemed Trust Motions and the Bankruptcy Leave Motion were heard by Justice Campbell on August 28, 2009. On February 18, 2010, Justice Campbell released written reasons dismissing the Deemed Trust Motions, holding that no deemed trusts arose with respect to wind up deficiencies under either the Executive Pension Plan or the Salaried Pension Plan (the “**Deemed Trust Decision**”). Based on the Deemed Trust Decision, Justice Campbell concluded that it was unnecessary to deal with the Bankruptcy Leave Motion.
  17. Leave to appeal the Deemed Trust Decision was granted by the Court of Appeal for Ontario on May 20, 2010 and the appeal was heard on November 23 and 24, 2010 (the “**Pension Appeal**”).

18. On April 7, 2011, the Court of Appeal for Ontario allowed the Pension Appeal and ordered the Monitor to pay from the Reserve fund into each of the Salaried Pension Plan and the Executive Pension Plan an amount sufficient to satisfy the deficiencies in each plan (the “**CA Pension Decision**”). The Court of Appeal found that:
- (i) the PBA deemed trust applies to the wind-up deficiency of wound up pension plans (as the Salaried Pension Plan was at the time) but declined to decide whether the deemed trust applied to the wind-up deficiency of a plan that had not been wound up (as the Executive Plan was at the time);
  - (ii) the PBA deemed trust has priority over the DIP Charge;
  - (iii) Indalex breached its fiduciary duty to the plans’ beneficiaries by taking actions, including applying for CCAA protection and seeking approval of the DIP Loan and priority charge, which had the potential to adversely affect the plans’ beneficiaries; and
  - (iv) the appropriate remedy for the breach of fiduciary duty was to impose a constructive trust over the proceeds of the Sapa Transaction in respect of both the Salaried Pension Plan and the Executive Pension Plan which ranked ahead of the DIP Charge.
19. The US Trustee, Sun and the Monitor, on behalf of Indalex Limited, filed applications for leave to appeal the CA Pension Decision to the Supreme Court of Canada (the “**SCC Leave Applications**”). The SCC Leave Applications were granted by the Supreme Court of Canada on December 1, 2011.
20. The appeal of the CA Pension Decision was heard by the Supreme Court of Canada on June 5, 2012.

21. On February 1, 2013, the Supreme Court of Canada released its decision (the “**SCC Decision**”), allowing the appeals of the US Trustee, Sun and the Monitor. The Supreme Court of Canada found that the deemed trust provision contained in the PBA does not apply to the wind-up deficit of a pension plan that has not been wound up (as the Executive Pension Plan was at the time). With respect to wound up pension plans (as the Salaried Pension Plan was at the time), the majority of the Court determined that the PBA deemed trust applies to the wind-up deficiency as set out in the PBA. However, the SCC found that the DIP Charge granted by the CCAA judge trumped the provincial PBA deemed trust.
22. The Supreme Court of Canada also determined that Indalex, as the employer-administrator of both the Salaried Pension Plan and the Executive Pension Plan, had breached its fiduciary duty to plan members when it sought approval of the DIP Loan and DIP Charge without taking steps to ensure that its pension plan beneficiaries had the opportunity to have their interests effectively represented. Indalex did not breach its fiduciary duties by considering, seeking or obtaining CCAA protection (or by failing to give notice of the initial CCAA application), nor did it breach its duties by making a bankruptcy application. However, the majority of the Supreme Court of Canada agreed that the outcome of the restructuring would have been no different had the members been represented by a third party or been given notice of the DIP approval motion and determined that the imposition of a constructive trust was not appropriate. As a result, the Supreme Court of Canada reversed the decision of the Court of Appeal with respect to the constructive trust.
23. On March 15, 2013, having first notified the stakeholders of its intent to do so, the Monitor paid the US Trustee US\$10,751,247.22 pursuant to the Approval and Vesting Order in settlement of the Subrogated DIP Claim.



## PURPOSE OF REPORT

24. The Monitor has filed reports on various matters relating to the CCAA Proceedings. This, the Monitor's Nineteenth Report, is filed in support of the Monitor's motion for advice and directions in respect of certain matters that, absent a negotiated settlement, must be determined prior to any distribution of Estate Funds (as hereinafter defined) to creditors.
25. In preparing this report, the Monitor has relied upon unaudited financial information, other information available to the Monitor and, where appropriate, the Applicants' books and records and discussions with various parties (collectively, the "**Information**").
26. Except as described in this Report:
  - (i) The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the Canadian Institute of Chartered Accountants Handbook; and
  - (ii) The Monitor has not examined or reviewed financial forecasts and projections referred to in this report in a manner that would comply with the procedures described in the Canadian Institute of Chartered Accountants Handbook.
27. Future oriented financial information reported or relied on in preparing this report is based on assumptions regarding future events; actual results may vary from forecast and such variations may be material.

28. The Monitor has prepared this Report in connection with the motion described in the Monitor's Notice of Motion dated May 29, 2013, returnable May 31, 2013 (the "**May 31 Motion**"). The Report should not be relied on for other purposes. Expressly, this report is not intended to be used as evidence in the motions described herein in respect of which the Monitor now seeks advice and directions.
29. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars. Capitalized terms not otherwise defined herein have the meanings defined in the previous reports of the Monitor, the Initial Order or other Orders issued in the CCAA Proceedings.

#### **FUNDS AVAILABLE FOR DISTRIBUTION AND CLAIMS OF THE PARTIES**

30. The Monitor currently holds the amounts of US\$918,090.72 and C\$4,228,629.54, which amounts are available for distribution to the creditors of the estate, subject to the payment of the legal and professional costs to complete the estate (the "**Estate Funds**").
31. A number of parties are asserting priority claims to the Estate Funds. These claims, as the Monitor understands them, are summarized as follows:
- (i) The US Trustee claims interest and fees accruing on the Subrogated DIP Claim, estimated to be in the amount of approximately US\$5.4 million (the "**US Trustee Claim**"). The US Trustee asserts priority for the US Trustee Claim under the DIP Charge and the DIP Security Agreements. The Monitor has not agreed to the amount of the US Trustee Claim;

- (ii) The Salaried Plan claims the amount of the wind-up deficit of the Salaried Plan, estimated by the Salaried Plan Administrator to be approximately \$5,008,100 as at February 18, 2013 (the “**Salaried Plan Claim**”). Priority for the Salaried Plan Claim is asserted based on the deemed trust and lien and charge provisions of the PBA. The Monitor has not agreed to the amount of the Salaried Pension Plan Claim;
- (iii) The Executive Plan claims the amount of the wind-up deficit of the Executive Plan, estimated by the Executive Plan Administrator to be approximately \$3,305,500 as at February 18, 2013 (the “**Executive Plan Claim**”). Priority for the Executive Plan Claim is asserted based on the deemed trust and lien and charge provisions of the PBA. The Monitor has not agreed to the amount of the Executive Pension Plan Claim; and
- (iv) Sun claims the amount of approximately US\$38,049,926.54 owing pursuant to the Amended and Restated Credit Agreement dated as of May 21, 2008, as amended, and the Canadian Security Agreement dated as of February 2, 2006, as amended (the “**Sun Claim**”). Sun claims priority for the Sun Claim based on the Canadian Security Agreement, as amended. The Monitor has not agreed to the amount of the Sun Claim.

#### **MATTERS REQUIRING DETERMINATION PRIOR TO ANY DISTRIBUTION**

32. It is possible that the relevant stakeholders may come to an agreement regarding how the Estate Funds should be distributed and negotiations among the stakeholders has commenced in that regard. The Monitor, after consultation with the stakeholders, has identified a number of issues that would require determination prior to the distribution of the Estate Funds if a settlement is not reached, including:

- (i) Whether or not the beneficiaries of the Executive Plan are precluded from asserting a deemed trust over any accounts or inventory of Indalex Limited and the proceeds thereof as a result of the doctrine of *res judicata*;
- (ii) Whether the US Trustee is entitled to claim interest and costs in respect of the DIP Loan and whether such claim is entitled to priority over the claims of the other stakeholders, other than any claims secured by the Directors' Charge (up to a maximum of US\$1.0 million);
- (iii) Whether the deemed trust claimed by the Executive Plan arising from the wind up order dated August 27, 2010, with an effective date of September 30, 2009, is enforceable against any accounts or inventory of Indalex Limited and the proceeds thereof;
- (iv) What the effect of a bankruptcy order on the existence, enforceability and priority of the deemed trust in favour of the Salaried Plan and the deemed trust asserted by the Executive Plan members would be;
- (v) Whether the beneficiaries of the Salaried Plan or the Executive Plan are "secured creditors" of Indalex Limited for purposes of the *Bankruptcy and Insolvency Act* and, if so, what would the priority of such claims be in a bankruptcy;
- (vi) Whether the Salaried Plan Administrator and the Executive Plan Administrator are "secured creditors" of Indalex Limited for purposes of the *Bankruptcy and Insolvency Act* and, if so, what would the priority of such claims be in a bankruptcy;
- (vii) Whether accounts or inventory that were located outside of Ontario and the proceeds thereof are covered by the deemed trust created pursuant to section 57(4) of the PBA;

- (viii) Whether members of the Salaried Plan and the Executive Plan that are not Ontario residents are entitled to the benefit of the deemed trust created pursuant to section 57(4) of the PBA;
- (ix) What is the actual amount of the windup deficiency of the Salaried Plan or the Executive Plan under the PBA;
- (x) What amount of the funds held by the Monitor is proceeds of accounts and inventory as referenced in section 30(7) of the Ontario PPSA; and
- (xi) Whether the Sun Claim is valid and enforceable and has priority.

### **REQUEST FOR ADVICE AND DIRECTIONS**

33. Following a number of 9:30 Appointments with the Court, the Monitor communicated with the stakeholders in order to attempt to obtain a consensus on which matters should be brought to the Court for determination at this time, the process for doing so and the timetable for the filing of materials.
34. It has been agreed among the stakeholders that:
- (i) If possible, a negotiated settlement between the stakeholders of how the Estate Funds should be distributed is preferable to extended litigation; and
  - (ii) In order to avoid the expenditure of resources addressing matters that may be moot, a motion for advice and directions at this time should focus on the legal issues set forth in paragraphs 32(a) - (f) above and leave any factual issues for determination at a later time, if necessary.

35. The stakeholders have been unable to agree on whether all of the legal issues should be heard in one motion or whether they should be heard in two motions. The one motion approach is favoured by the Former Executives and the USW. The two motion approach is favoured by the Plan Administrators, the Superintendent of Financial Services and Sun. The Monitor takes no positions on which approach should be adopted.
36. The Monitor and the stakeholders have agreed on schedules for each scenario, with the process being that a motion (or motions) will be brought by the Monitor and the stakeholders will each be entitled to file responding materials. Once the responding materials have been filed, the stakeholders will be entitled to file reply materials in respect of the matters raised in the responding materials.
37. Accordingly, the Monitor has served a motion seeking advice and directions from the Court on the issues set forth in paragraphs 32(a) – (f). The motion includes two draft orders, one order that has all issues being resolved together in one motion and a second order that divides the issues into two motions.

The Monitor respectfully submits to the Court this, its Nineteenth Report.

Dated this 30<sup>th</sup> day of May, 2013.

FTI Consulting Canada ULC  
in its capacity as the Monitor of  
Indalex Limited, Indalex Holdings (B.C.) Ltd.,  
6326765 Canada Inc. and Novar Inc.  
and not in its personal or corporate capacity



Nigel D. Meakin  
Senior Managing Director