

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

**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 SUPERINTENDENT OF FINANCIAL
SERVICES ON EXECUTIVE PLAN AND US TRUSTEE ISSUES**

(Motion Returnable July 24, 2013)

July 19, 2013

**MINISTRY OF THE ATTORNEY
GENERAL FOR THE PROVINCE OF
ONTARIO**

Financial Services Commission of
Ontario

Legal Services Branch

5160 Yonge Street, Box 85

17th Floor

Toronto ON M2N 6L9

Mark Bailey LSUC #380961

Tel: 416-590-7555

Fax: 416-590-7556

Counsel for the Superintendent
of Financial Services

TO: THE SERVICE LIST

1. This factum is filed in reply to the Responding Factum of George L. Miller, the Chapter 7 the Chapter 11 Trustee of the Bankruptcy Estates of the Indalex US Debtors in respect of the US Trustee's priority claim for interest and costs in respect of amounts paid under the DIP loan guarantee. The Superintendent has two submissions in reply.

2. First, the US Trustee relies on the common law and statutory right of subrogation under the *Mercantile Law Amendment Act*, R.S.O. 1990 c. M.10. Whatever the scope of subrogation under these sources, they do not define the extent of subrogation under the DIP Lenders Charge and determine if the US Trustee can claim priority under that charge. The DIP Charge is a court-ordered charge and the scope of the charge itself and the extent of subrogation rights under the charge are both within the discretion of the Court. In this case, the Court has exercised that discretion in paragraph 14 of the Approval and Vesting Order and determined that any priority under the DIP Charge does not include interest and costs.

3. Second, US Trustee attempts to reserve, in the alternative, its right to argue that it is entitled to recover costs and interests in priority to all other creditors as a result of the DIP security documents. The US Trustee concedes that he has not placed the appropriate material before the Court to substantiate this claim but suggests that it "should be dealt with in the subsequent motion contemplated by the May 31 Order". The Superintendent disagrees and submits that the US Trustee's claim for cost and interest should be dismissed in its entirety with no further reservation of rights. The US Trustee specifically argued for the early hearing of its claim as set out in the May 31 Order and it has had ample opportunity to particularize its claims. Leaving the claims

open will further complicate the resolution of the various issues between the parties whether by way of settlement or litigation and should not be permitted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of July, 2013.

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a long, sweeping horizontal line that ends in a small upward curve.

Mark Bailey

Counsel for the Superintendent of Financial
Services

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, 1985,
R.S.C. c. C-36, AS AMENDED

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at **Toronto**

**REPLY FACTUM OF THE SUPERINTENDENT
OF FINANCIAL SERVICES ON EXECUTIVE
PLAN AND US TRUSTEE ISSUES
(MOTION RETURNABLE JULY 24, 2013)**

**MINISTRY OF THE ATTORNEY GENERAL
FOR THE PROVINCE OF ONTARIO**
Financial Services Commission of Ontario
Legal Services Branch
5160 Yonge Street, Box 85
17th Floor
Toronto ON M2N 6L9

Mark Bailey LSUC#: 38096I
Email: mark.bailey@fsco.gov.on.ca
Tel: 416-590-7555
Fax: 416-590-7556

Lawyers for The Superintendent of Financial
Services