

**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

**RESPONDING FACTUM OF GEORGE L. MILLER,
THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES
OF THE US INDALEX DEBTORS**
(Monitor's motion for advice and directions returnable July 24, 2013)

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the Chapter 7 Trustee of the
Bankruptcy Estates of the US
Indalex Debtors**

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PART I – NATURE OF MOTION

1. The Monitor¹ has brought a motion seeking the Court's advice and direction on the issue (among others) of 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 all claims, other than any claims secured by the Directors' Charge (up to a maximum of US\$1.0 million).²

Overview

2. The Applicants required DIP financing in order to support their operations while a going-concern solution was being sought. The DIP Credit Agreement provided that the obligations of the Applicants to the DIP Lenders included payment of principal, interest and costs and were to be secured by a first ranking charge and security interest in all of the property and assets of the

¹ All capitalized terms used and not otherwise defined herein shall have the meanings ascribed to such terms in the Twenty-First Report of the Monitor dated June 21, 2013 (the "**Twenty-First Report**").

² Twenty-First Report, paragraph 25.

Applicants. It was a condition of the DIP Credit Agreement that Indalex Holding Corp. (“**Indalex US**”) guarantee payment of the Applicants’ obligations to the DIP Lenders.

3. The Canadian sale proceeds available for distribution from the Sapa Transaction were insufficient to fully repay the Applicants’ obligations to the DIP Lenders. As a result, the DIP Lenders demanded payment of the deficiency from Indalex US under its guarantee. Indalex US paid the outstanding balance of US\$10,751,247.22 to the DIP Lenders.

4. The claim by the pensioners that the deemed trusts under the PBA had priority over the DIP Lenders Charge took approximately three and one-half (3.5) years to reach a conclusion, which occurred when the Supreme Court of Canada overturned the decision of the Court of Appeal for Ontario and held that the DIP Lenders Charge had priority over the provincial deemed trusts.

5. During that time period, US\$5,366,577.23 of interest accrued on the outstanding principal balance under the DIP Loan, and the US Trustee incurred US\$173,991.79 of costs in defending against the priority claim before the Court of Appeal for Ontario and the Supreme Court of Canada.

6. If the DIP Lenders had not been fully repaid by Indalex US following the closing of the Sapa Transaction, there is no dispute that the DIP Lenders would be entitled to recover all outstanding principal, interest and costs in priority to all other parties.

7. As a guarantor that paid the outstanding amount of the Applicants’ obligations under the DIP Credit Agreement to the DIP Lenders, Indalex US “stands in the shoes” of the DIP Lenders and is subrogated to all their rights, benefits and securities against the Applicants, and is entitled to recover all interest and costs in priority to all other claims. To hold otherwise would unfairly deprive the creditors of Indalex US of their lawful entitlement to unpaid interest and costs incurred since payment was made to the DIP Lenders and would provide a windfall to other creditors of the Applicants.

PART II – FACTS

DIP Credit Agreement

Obligations Owed by the Applicants to DIP Lenders Included Principal, Interest and Costs

8. On April 3, 2009, the Applicants were granted protection under the CCAA. On April 8, 2009, the Applicants obtained an Amended and Restated Initial Order which, *inter alia*, authorized Indalex to borrow approximately \$24.5 million to fund their operations.

Motion Record of the Monitor, Tab 1 - Twenty-First Report, paras. 1 and 4 and Appendix “A” – DIP Credit Agreement.

9. It was a condition to the extension of credit by the DIP Lenders to the Applicants that Indalex US guarantee payment and performance of the Applicants’ obligations to the DIP Lenders under the DIP Credit Agreement.

Twenty-First Report, Appendix “F” – Judgment of Campbell J. dated February 18, 2010, para. 5.

10. Pursuant to section 2.22 of the DIP Credit Agreement, upon termination or maturity of the DIP Credit Agreement, the DIP Lenders were entitled to immediate payment of all “Obligations”. Section 2.22 provides as follows:

Payment of Obligations. Subject to the provisions of Article VII, upon the Termination Date or upon the maturity (whether by acceleration or otherwise) of any of the Obligations under this Agreement or any other Loan Documents of the Parent Borrower, the Canadian Subsidiary Borrower and the other Loan Guarantors, the Lenders shall be entitled to immediate payment of such Obligations without further application to or order of the Bankruptcy Court or the Canadian Court.

Twenty-First Report, para. 4 and Appendix “A” – DIP Credit Agreement.

11. The term “Obligations” is defined in section 1.01 of the DIP Credit Agreement to mean “collectively, the U.S. Obligations and the Canadian Obligations.” The term “Canadian Obligations” is defined in section 1.01 of the DIP Credit Agreement to include all unpaid principal, interest and costs owed by Indalex to the DIP Lenders. Section 1.01 provides as follows:

“Canadian Obligations” means (a) all unpaid principal of and accrued and unpaid interest on Loans made to the Canadian Subsidiary Borrower, (b) all L/C Exposure in respect of Letters of Credit deemed issued, pursuant to Section 2.04(a), for the account of the Canadian Subsidiary Borrower and the Foreign Subsidiaries and (c) all accrued and unpaid fees and all expenses, reimbursements, indemnities and other obligations of the Canadian Subsidiary Borrower and the Foreign Subsidiary Loan Parties owed to the Lenders or to any Lender, the Administrative Agent, the Issuing Bank or any indemnified party arising under the Loan Documents (including the Guarantees provided by the Loan Guarantors pursuant to Article X) [emphasis added].

Twenty-First Report, Appendix “A” – DIP Credit Agreement.

12. Pursuant to section 2.12 of the DIP Credit Agreement, loans made to the Applicants bore interest at the “Canadian Base Rate” plus the “Applicable Rate”. The rate of interest under the DIP Credit Agreement was calculated to be 13.5% per annum (the “Canadian Base Rate” of 4.50% and the “Applicable Rate” of 9.00 %).

Twenty-First Report, Appendix “A” – DIP Credit Agreement; Responding Motion Record of the US Trustee, Tab 1 - Affidavit of Sam Rappos sworn July 5, 2013 (“Rappos Affidavit”), para. 7.

13. The applicable rates of interest under the DIP Credit Agreement, and the US Trustee’s calculation of accrued interest, have not been challenged.

14. Pursuant to section 9.03(iv) of the DIP Credit Agreement, as a “Borrower”, Indalex is required to reimburse or to pay the costs incurred by the DIP Lenders in connection with the enforcement, collection or protection of the their rights in connection with the “Loan Documents”. Section 9.03 provides as follows:

...(iv) all out-of-pocket expenses incurred by the Administrative Agent, the Issuing Bank or any Lender, including the reasonable fees, charges and disbursements of one counsel for the Administrative Agent, the Issuing Bank and the Lenders (in addition to one local counsel in each relevant jurisdiction, including Canadian legal counsel) and such counsel’s financial advisor, in connection with the enforcement, collection or protection of its rights in connection with the Loan Documents...

Twenty-First Report, Appendix “A” – DIP Credit Agreement.

Security for Obligations

(i) DIP Charge

15. Pursuant to section 2.21(b) of the DIP Credit Agreement, the “Secured Obligations”³ under the DIP Credit Agreement were to be “at all times secured by a valid, binding, continuing, enforceable and, subordinate only to the CCAA Charges, fully perfected first priority security interest in, and first ranking court-ordered charge” on all of the property and assets of Indalex and the other Applicants.

Twenty-First Report, Appendix “A” – DIP Credit Agreement.

16. As contemplated under the DIP Credit Agreement, in the Amended and Restated Initial Order the Court granted the DIP Charge in favour of the DIP Agent and the DIP Lenders:

39. THIS COURT ORDERS that the DIP Agent and the DIP Lenders shall be entitled to the benefit of and is hereby granted a charge (the “**DIP Lenders Charge**”) on the Property, which charge shall not exceed the aggregate amount owed to the DIP Lenders under the DIP Documents. The DIP Lenders Charge shall have the priority set out in paragraphs 42 and 45 hereof.

Twenty-First Report, para. 74; Rappos Affidavit, Exhibit “B” – Amended Amended and Restated Order.

17. Pursuant to paragraph 45 of the Amended and Restated Order, the DIP Lenders Charge

...shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, “Encumbrances” in favour of any Person. [emphasis added])

Rappos Affidavit, Exhibit “B” – Amended Amended and Restated Order.

(ii) *DIP Security Documents*

18. As required by the DIP Credit Agreement, the Applicants signed various security documents in favour of the DIP Lenders, including the Canadian Security Agreement dated as of April 8, 2009 (the “**Canadian Security Agreement**”). Pursuant to section 3.01(a) of the

³ Secured Obligations” is defined in section 1.01 of the DIP Credit Agreement to mean “all Obligations, Swap Obligations permitted hereunder and Banking Services Obligations.”

Canadian Security Agreement, the Applicants granted a security interest in all of their personal property in favour of the Administrative Agent as security for payment and performance of the Secured Obligations under the DIP Credit Agreement. The DIP Lenders took steps to register and perfect the security documents granted by the Applicants in all provinces where registrations were required.

Rappos Affidavit, paras. 5-6 and Exhibit “D” – Canadian Security Agreement dated as of April 8, 2009 and Exhibit “E”.

Indalex U.S. Guaranteed Payment of Secured Obligations

19. Pursuant to section 10.01 of the DIP Credit Agreement, Indalex U.S. is a “Loan Guarantor” and guaranteed to the DIP Lenders “...prompt payment when due, whether at stated maturity, upon acceleration or otherwise, and at all times thereafter, of the Secured Obligations and all costs and expenses...” owed by the Applicants to the DIP Lenders.

Twenty-First Report, para. 75 and Appendix “A” – DIP Credit Agreement.

Approval of Sapa Transaction

20. On July 20, 2009, the Applicants brought a motion seeking approval of the Sapa Transaction, which provided for the going-concern sale of substantially all of the assets and business of the Applicants and the US Debtors. In addition to seeking approval of the Sapa Transaction, the Applicants sought authorization to make an interim distribution of the sale proceeds to the DIP Lenders.

Twenty-First Report, para. 43.

21. The approval motion was opposed by certain retirees and employees, who asserted deemed trust claims over the Canadian sale proceeds in respect of underfunded pension liabilities and requested that an amount representing the estimate of such liabilities be included in the amount retained by the Monitor from the Canadian sale proceeds.

Twenty-First Report, Appendix “F” – Judgment of Campbell J. dated February 18, 2010, paras. 8-10.

22. The Approval and Vesting Order was granted by Justice Campbell on July 20, 2009. Pursuant to paragraph 14 of the Approval and Vesting Order, the Monitor was required to maintain a reserve from the Canadian sale proceeds. Additionally, Indalex US was subrogated by Court order to the rights of the DIP Lenders:

Twenty-First Report, para. 79 and Appendix “B” – Approval and Vesting Order.

Demand on Guarantee and Payment by US Debtors

23. The Sapa Transaction closed on July 31, 2009. As a result of the reserve that the Monitor was required to maintain from the Canadian sale proceeds (including in respect of the underfunded pension liabilities), the remaining Canadian sale proceeds were insufficient to fully repay the obligations of the Applicants to the DIP Lenders under the DIP Credit Agreement.

Twenty-First Report, para. 78.

24. Following the interim distribution, the DIP Lenders were owed US\$10,751,247.22 by the Applicants under the DIP Credit Agreement. As a result, the DIP Lenders demanded payment from Indalex US under the guarantee, and such amount was paid by Indalex US to the DIP Lenders.

Twenty-First Report, para. 78.

Appointment of US Trustee

25. On October 14, 2009, the US Court entered an Order converting the US Debtors’ Ch.11 Proceedings to Ch.7 Proceedings. On October 30, 2009, the US Trustee was appointed.

Twenty-First Report, para. 11

Payment to the US Trustee and Claim for Interest and Costs

26. On March 15, 2013, following the release of the SCC Decision confirming the priority of the DIP Lenders Charge, the Monitor paid the US Trustee the amount of US\$10,751,247.22 out of the reserve held by the Monitor, being the amount demanded and paid by Indalex US to the DIP Lenders. No amount was paid in respect of interest and costs.

27. The total amount of interest and costs (up to February 28, 2013) claimed by the US Trustee is US\$5,366,577.23. Of this amount, US\$5,192,585.44 is the amount of interest that accrued under the terms of the DIP Credit Agreement on the amount of US\$10,751,247.22 from August 1, 2009 to March 15, 2013. The balance, being US\$173,991.79, represents the US Trustee's costs as of February 28, 2013 incurred in connection with the appeals of the deemed trust priority claim to the Court of Appeal for Ontario and the Supreme Court of Canada. The cost amount does not include legal fees and expenses that continue to accrue.

Rappos Affidavit, paras. 4, 7 and 8 and Exhibit "A".

Claims to the Reserve

28. The US Trustee is not aware of any competing claims to the Reserve, other than the secured claim of Sun Indalex and the pensioners' claims in respect of the deficiencies in the pension plans. Other than the Directors' Charge (up to a maximum of US\$1.0 million), the US Trustee is not aware of any claim that ranks in priority to the DIP Lenders Charge.

PART III – ISSUES

- (a) Is the US Trustee entitled to claim interest and costs in respect of the DIP Loan?;
and
- (b) If the answer to (a) is yes, is such claim entitled to priority over all claims, other than any claims secured by the Directors' Charge (up to a maximum of US\$1.0 million)?

PART IV – LAW AND ARGUMENT

The US Trustee is Subrogated to Right of DIP Lenders to Recover Interest and Costs

29. It is submitted that the US Trustee is entitled to recover interest and costs in respect of the US\$10,751,247.22 paid by the US Debtors to the DIP Lenders pursuant to their guarantee on the basis of the doctrine of subrogation and the provisions of the *Mercantile Law Amendment Act*.

30. The term "subrogation" has been defined as:

The substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor. For example, a surety who had paid a debt is, by subrogation, entitled to any security for the debt held by the creditor and the benefit of any judgment the creditor has against the debtor, and may proceed against the debtor as the creditor would.

Black's Law Dictionary, 7th Edition.

31. The doctrine of subrogation is commonly applied in the context of guarantees and sureties. As the authors of *The Law of Restitution* note:

Upon payment of the debt, or portion thereof, which the surety has guaranteed, the surety will be entitled to stand in the shoes of the creditor so as to take advantage of any secured interest or other preference that the latter may have against the principal debtor in relation to the debt, or the portion thereof, thereby satisfied.

Peter D. Maddaugh & John D. McCamus, *The Law of Restitution* (Aurora: Canada Law Book Inc., 1990) at 166.

32. The doctrine of subrogation in the context of sureties and guarantees has long been recognized under the common law and in equity. In *The Law of Guarantee*, Kevin Patrick McGuinness notes that:

A surety who is called upon to perform the principal's obligation is subrogated to the full rights to which the creditor is entitled against the debtor. For instance, a surety who pays a judgment in respect of the guaranteed debt is entitled to an assignment of the judgment and also any securities held in respect of the guaranteed obligation...

It is an ancient principle, founded upon the equitable doctrine of marshalling, that unless otherwise agreed on payment or performance by the surety of the guaranteed obligation, the surety has the right to the benefit of all securities that the creditor has received from the principal debtor in respect of the debt in order to enable the surety to obtain satisfaction for what he has paid.

Kevin Patrick McGuinness, *The Law of Guarantee*, 2nd ed. (Scarborough: Carswell, 1996) at 7.11 and 7.14.

33. The doctrine of subrogation in the context of guarantees is well established. In *Canadian Financial Co. v. First Federal Construction Ltd.*, the Ontario Court of Appeal held that:

Upon paying a guaranteed mortgage debt, but not before doing so, a guarantor is entitled to an assignment of the security held by the creditor relating to that debt, and to be subrogated to the rights of the creditor against the principal debtor under the security. The purpose of the subrogation is to enable the guarantor to utilize the security to recover from the principal debtor the amount he has paid, to the end that the guarantor may obtain indemnification from the principal debtor for the payment made by him. The governing principle is that, subject to the paramount right of the creditor to have the debt that is owed to him paid, the guarantor who has paid a mortgage debt should have available to him all the remedies of the creditor in order that the ultimate burden of the debt may fall upon the principal debtor as the person primarily liable for it. The essence of the subrogation is that the guarantor has a right to be *reimbursed*, rather than a right to pay the debt so that he may then take over the security

***Canadian Financial Co. v. First Federal Construction Ltd.* 1982 CarswellOnt 115 (C.A.) at para. 18.**

34. In *Alberta Treasury Branches v. Weatherlok Canada Ltd.*, the Alberta Court of Appeal held:

If a guarantor pays the creditor the debt guaranteed (not merely the payor's proportionate share of it), the paying guarantor becomes subrogated to the rights of the creditor so paid: Goff & Jones, *The Law of Restitution*, paras 3-009, 3-025 (7th ed 2007); Maddaugh & McCamus, *The Law of Restitution*, 8-1, 8-2 (2d ed 2004); Fridman, *Restitution*, 403 (2d ed, 1992); *Royal Bank v. Fox* (1975), [1976] 2 S.C.R. 2 (S.C.C.), 7, (1975), 6 N.R. 382, 59 D.L.R. (3d) 258 (S.C.C.) .

That subrogation gives the paying guarantor every remedy, every security, and every means of payment which the creditor had against the other guarantors. That subrogation is automatic, and does not depend in any way on contracts, such as an assignment. See Fridman, *op cit. supra* at 402-03; Goff and Jones, *op cit. supra* at paras 3-025 and 3-027; *Brown v. Coughlin* (1914), 50 S.C.R. 100 (S.C.C.), 104; cf *Royal Trust Corp. of Canada v. Rick Holdings Ltd.*, 1999 ABCA 187, 250 A.R. 156 (Alta. C.A.), (para 2).

***Alberta Treasury Branches v. Weatherlok Canada Ltd.* 2011 CarswellAlta 1883 (C.A.) at paras. 32-33.**

35. In addition the doctrine of subrogation, the *Mercantile Law Amendment Act*, R.S.O. 1990, chapter M.10 (the “Act”) provides an express right of a guarantor to receive an assignment of security upon payment of the amount owing to the creditor. Section 2 of the Act provides as follows:

2.(1) **Right of sureties paying the principal debt, etc., to assignment** - Every person who, being surety for the debt or duty of another or being liable with another for any debt or duty, pays the debt or performs the duty is entitled to have assigned to the person or to a trustee for the person every judgment, specialty or other security that is held by the creditor in respect of the debt or duty, whether the judgment, specialty or other security is or is not deemed at law to have been satisfied by the payment of the debt or the performance of the duty.

2 (2) **Remedies on such assignment** - Such person is entitled to stand in the place of the creditor, and to use all the remedies and, on proper indemnity, to use the name of the creditor in any action or other proceeding in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, indemnification for the advances made and loss sustained by such person, and the payment or performance made by the person is not a defence to such action or other proceeding by the person.

Mercantile Law Amendment Act, R.S.O. 1990, chapter M.10, s. 2.

Canadian Financial Co. v. First Federal Construction Ltd., supra.

36. As a result of paying US\$10,751,247.22 to the DIP Lenders, Indalex US became subrogated to the full rights, remedies and securities of the DIP Lenders against the Applicants.

37. The provisions of the DIP Credit Agreement are clear and unequivocal that the obligations of the Applicants to the DIP Lenders under the DIP Credit Agreement include payment of principal, interest, and fees and expenses incurred in connection with the enforcement, collection or protection of its rights in connection with the DIP Loan.

38. As a result of Indalex US having paid US\$10,751,247.22 to the DIP Lenders on account of their guarantee, the US Trustee is entitled to stand in the shoes of the DIP Lenders and recover unpaid interest and costs.

Priority to Recover Interest and Costs

39. The US Trustee respectfully submits that its claim for interest and costs is to be paid in priority to all claims of Indalex's stakeholders as a result of the DIP Lenders Charge, other than the beneficiaries of the Directors' Charge (up to a maximum amount of \$1.0 million).

40. In the event that the CCAA court determines that the US Trustee is not entitled to recover interest and costs in priority to the claims of all other creditors through the DIP Lenders Charge,

the US Trustee reserves its right to argue that it is entitled to recover interest and costs in priority to the claims of all other creditors as a result of the DIP security documents that were granted in connection with the DIP Credit Agreement. However, this issue cannot be properly dealt with based on the record before the Court for the July 24 Motion and should be dealt with in the subsequent motion contemplated by the May 31 Order.

PART V – RELIEF REQUESTED

41. The US Trustee respectfully requests that this Honourable Court declare that it is entitled to recover interest and costs in respect of the DIP Loan in priority over all claims pursuant to the DIP Lenders Charge, other than any claims secured by the Directors' Charge (up to a maximum of US\$1.0 million).

**ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 10th day of July,
2013.**



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Chapter 7 Trustee of the Bankruptcy
Estates of the US Indalex Debtors**

SCHEDULE “A” – LIST OF AUTHORITIES

1. *Canadian Financial Co. v. First Federal Construction Ltd.* 1982 CarswellOnt 115 (C.A.)
2. *Alberta Treasury Branches v. Weatherlok Canada Ltd.* 2011 CarswellAlta 1883 (C.A.)

SCHEDULE "B" – RELEVANT STATUTES

Mercantile Law Amendment Act, R.S.O. 1990, chapter M.10, s. 2.

2.(1) **Right of sureties paying the principal debt, etc., to assignment** - Every person who, being surety for the debt or duty of another or being liable with another for any debt or duty, pays the debt or performs the duty is entitled to have assigned to the person or to a trustee for the person every judgment, specialty or other security that is held by the creditor in respect of the debt or duty, whether the judgment, specialty or other security is or is not deemed at law to have been satisfied by the payment of the debt or the performance of the duty.

2 (2) **Remedies on such assignment** - Such person is entitled to stand in the place of the creditor, and to use all the remedies and, on proper indemnity, to use the name of the creditor in any action or other proceeding in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, indemnification for the advances made and loss sustained by such person, and the payment or performance made by the person is not a defence to such action or other proceeding by the person.

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PROCEEDING COMMENCED AT
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**RESPONDING FACTUM OF
THE U.S. TRUSTEE**

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