Court File No. CV-12-9539-00CL

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 TIMMINCO LIMITED AND BECANCOUR SILICON INC.

Applicants

FACTUM OF THE RESPONDENTS, THE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

February 3, 2012

CaleyWray
Labour/Employment Lawyers
1600 - 65 Queen Street West
Toronto ON M5H 2M5

Douglas Wray
(18023C)
wrayd@caleywray.com
Tel: 416-775-4673

Jesse B. Kugler
(55269V)
kuglerj@caleywray.com
Tel: 416-775-4677
Fax: 416-366-3763

Lawyers for the Respondent,
Communications, Energy and
Paperworkers Union of Canada

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IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 as amended

AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement with respect to Timminco Limited and Becancour Silicon Inc.

(the "Applicants")

FACTUM OF THE RESPONDENTS, THE COMMUNICATIONS, ENERGY, & PAPERWORKERS UNION OF CANADA, LOCAL 184

(Comeback Motion Returnable January 27 , 2012)

PART I – INTRODUCTION

1. The Communications, Energy and Paperworkers Union of Canada, Local 184 (the "**Respondent CEP**"), is the bargaining agent for the unionized employees at the Applicants' plants located in Bécancour, Québec. The Respondent CEP represents active and retired unionized workers that are beneficiaries under the Bécancour Union Pension Plan[1] and the Québec Silicon Union Pension Plan to which the Applicants are required to make contributions pursuant to the terms of those Plans, the Collective Agreement between the Respondent CEP and the Applicants, and the Québec *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1 (the "**SPPA**").

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[1] Unless otherwise defined, the terms used herein have the meanings ascribed to them in the Applicants' materials.

2. The within motion is brought by the Applicants seeking an Order for, *inter alia*, the following:

   (a) Approving the DIP Facility and granting a charge over the Property of the Applicants in favour of the DIP Lender securing the Timminico Entities' obligations under the DIP Facility.

3. The Respondent CEP respectfully requests that the relief being sought by the Applicants above be dismissed.

PART II – FACTS

BACKGROUND

4. On January 3, 2012, the Applicants applied to this Honourable Court for relief under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") without notice to its creditors including the Respondent CEP or the Respondent CEP's members of the Pension Plan Committee. The requested relief was granted by an Order dated January 3, 2012 (the "**Initial Order**").

5. The Initial Order granted, *inter alia*, Administration Charges and D&O Charges on the assets of the Applicants, but those charges ranked only after "other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the Ontario *Pension Benefits Act* or the Quebec *Supplemental Pension Plans Act* (collectively, the "**Encumbrances**"). The Initial Order permitted the beneficiaries of the

charges to bring a come-back motion on proper notice to the applicable stakeholders and seek priority over the Encumbrances.

Initial Order, dated January 3, 2012, para. 40, Applicant's Comeback Motion Affidavit, Exhibit A, Tab 2.

6. Pursuant to a motion brought by the Applicants that was returnable January 13, 2012, the Applicants sought, and were granted, an order approving a super-priority in favour of the Administration Charges and the D&O Charges over the assets of the Applicants in priority to the Encumbrances. The aforesaid order had the effect of rendering the interests of the Pension Plans subordinate to Charges. The Respondent CEP opposed the relief sought by the Applicants.

7. In the within motion, which was returnable on January 27, 2012, the Applicants sought an order approving the DIP Facility and granting a charge over the assets of the Applicants in favour of the DIP Lender in priority of the Encumbrances. The draft Order originally circulated by the Applicants on the Service List provided that a party, including the Respondent CEP, was entitled to bring a motion to vary or amend the order. The Respondent CEP prepared to respond to the relief being sought by the Applicants as outlined in their original draft order.

8. On January 26, 2012, the day before the motion was to be heard, the Applicants circulated an amended order which, if granted, would have precluded the Respondent CEP from bringing a motion to vary or amend the order at a later date.

9. The Applicants' motion was argued in part on January 27, 2012. In accordance with the direction of this Honourable Court, the parties scheduled a further date on which the Respondent CEP could make argument in response to the Applicants' motion.

10. This factum constitutes the Respondent CEP's response.

THE PENSION PLANS

11. The Applicants operate two manufacturing facilities in Bécancour, Québec. The Respondent CEP and Bécancour Silicon Inc. ("**BSI**") and Québec Silicon Limited Partnership ("**QSLP**") are parties to a collective agreement which expires in April 2013 (the "**Collective Agreement**"). The Collective Agreement governs the terms and conditions of employment of the BSI's and QSLP's unionized employees.

Affidavit of Jean Simoneau sworn January 10, 2012; Respondent CEP's Motion Record, Tab 1, Para. 5.

12. The Collective Agreement provides that BSI and QSLP are required to provide and fund pension plans on behalf of their active and retired unionized employees and/or their beneficiaries.

13. Specifically, BSI sponsors the Regime de rentes pour les employes syndiques de Silicium Becancour Inc. (Quebec Registration Number 32063) (the "**Becancour Union Pension Plan**"). The Becancour Union Pension Plan is an on-going defined benefit pension plan with 3 active members and 98 retired and deferred vested members (including surviving spouses). The most recently filed actuarial

valuation performed for funding purposes was performed on September 30, 2010. As at September 30, 2010, the solvency deficiency in the Becancour Union Pension Plan was $7,939,500. In 2011, normal cost contributions owing to the plan totalled approximately $7,083 per month and special payments owing to the plan totalled approximately $95,300 per month.

Affidavit of Peter A.M. Kalins sworn January 2, 2012, para. 90(c).

14. In addition, QSLP sponsors the Regime de rentes pour les employes syndiques de Silicium Quebec Societe en commandite (Quebec Registration Number 32160) (the "**Quebec Silicon Union Pension Plan**" or, together with the "**Becancour Union Pension Plan**", the "**Union Pension Plans**"). The Quebec Silicon Union Pension Plan was established as a spinoff to the Becancour Union Pension Plan and coincided with the sale of certain assets to QSLP effective as of October 1, 2010. The Quebec Silicon Union Pension Plan is an ongoing pension plan with 110 active members as of September 30, 2010. As at September 30, 2010, the solvency deficit in the Quebec Silicon Union Pension Plan was $3,684,100. Normal cost contributions owing to the plan starting January 2012 total approximately $51,227 per month. Special payments owing to the plan starting January 2012 total approximately $47,743 per month.

Affidavit of Peter A.M. Kalins sworn January 2, 2012, para. 93.

15. While the Applicants do not, in the ordinary course, contribute to the Quebec Silicon Union Pension Plan, BSI is required to make additional contributions to

the plan to the extent that QSLP is unable to fully satisfy its payment obligations out of its cash flows.

Affidavit of Peter A.M. Kalins sworn January 2, 2012, para. 93.

PENSION GOVERNANCE DURING THE CCAA PROCEEDINGS

16. As noted above, the Applicants sponsor the Becancour Union Pension Plan which, as at September 30, 2010, was underfunded. The Applicants are required to provide and fund the Becancour Union Pension Plan in accordance with the Collective Agreement and the SPPA.

17. The Applicants have certain limited obligations to fund the Quebec Silicon Union Pension Plan which, as at September 30, 2010, was underfunded. The obligation to fully fund the Quebec Silicon Union Pension Plan is set out in the Collective Agreement and the SPPA.

18. Pursuant to section 147 of the SPPA, the Union Pension Plans are administered by a pension committee.

19. Pursuant to section 158 of the SPPA, no member of a pension committee may exercise his or her powers in his own interest or in the interest of a third person nor may they place themselves in a conflict of interest. Further, section 151 of the SPPA requires members a pension committee to act with honesty and loyalty in the best interest of the members or beneficiaries of the pension plan(s).

20. The Applicants have appointed the following individuals to act as Employer Representatives of the Union Pension Plans pension committee: Rene Boisvert

(President and Chief Executive Officer of QSLP), Carl Rivard (Director of Human Resources of QSLP and BSI), and Maria Spensieri (Vice President Finance of QSLP and BSI).

Affidavit of Jean Simoneau sworn January 10, 2012; Respondent CEP's Motion Record, Tab 1, Para. 9.

21. Given the solvency deficits in the Union Pension Plans, the beneficiaries of the plans are particularly vulnerable. In such circumstances, compliance with the statutory obligation of the pension committee to act in the best interests of the beneficiaries and members is of increased importance.

22. Since the commencement of the CCAA proceedings, the Applicants, with the knowledge and direction of, *inter alia*, Messrs. Boisvert and Rivard, have taken the following steps on behalf of Timminico Entities that have adversely affected the Union Pension Plans:

(i) Sought, and received, an Order suspending the payment of solvency payments;

(ii) Sought, and received, an Order granting a super-priority in favour of the Administration Charge over the assets of the Timminico Entities thereby subordinating the rights of the Encumbrances, including the Union Pension Plans;

(iii) Sought, and received, an Order granting a super-priority in favour of the D & O Charge over the assets of the Timminico Entities

thereby subordinating the rights of the Encumbrances, including the Union Pension Plans; and

(iv) Sought, and received, an Order granting a super-priority in favour of the KERP Charge over the assets of the Timminico Entities thereby subordinating the right of the Encumbrances, including the Union Pension Plans.

23. All of the above actions were taken unilaterally by the Applicants without discussion or consultation with the pension committee.

24. Since the commencement of the CCAA proceedings, the Applicants' communications and discussions with the Union and the pension committee have been limited to the following:

(i) On or about January 4, 2012, a brief meeting was conducted by representatives of the Applicants with approximately 16 unionized employees to advise them that the Applicants had commenced proceedings under the CCAA. No meaningful discussion or consultation occurred regarding the Applicants' restructuring plans or how to minimize the adverse impact of such plans on the unionized employees. Moreover, representatives of the Applicants did not discuss the Union Pension Plans.

(ii) On or about January 11, 2012, a meeting of the Becancour Union Pension Plan was struck. The purpose of the meeting was to revise

the investment strategy of the pension plans by focusing the assets of the plans on more stable and conservative investments. There was no discussion regarding strategies to minimize the impact of the CCAA proceedings on the pension plans. There was no discussion regarding the suspension of special payment or negotiations of a DIP Facility and its effect on the pension plans. Representatives of the Applicants, including Mr. Rivard, were present at the aforesaid meeting of the pension committee.

(iii) On or about January 13, 2012, Mr. Rivard contacted Mr. Simoneau (President of the Respondent CEP) to advise him that the Applicants intended to suspend post-retirement benefits effective the following day. The post-retirement benefits include drug, dental and insurance benefits that are required to be maintained pursuant to the Collective Agreement and which are fundamental to the well-being of retirees. Mr. Rivard did not seek to discuss any issues with respect to the Union Pension Plans with Mr. Simoneau.

(iv) On or about January 17, 2012, a regular meeting of the labour relations committee of QSLP was convened. This meeting was scheduled prior to the commencement of the Applicants' CCAA proceedings. The meeting was centred around workplace issues unrelated to the Applicants' CCAA proceedings. Messrs. Boisvert and Rivard, both members of the pension committee, did not

address any issues with respect to the Union Pension Plans or the Applicants' intention of negotiating an agreement with a DIP Lender and its impact on the rights of the Union Pension Plans.

(v) On or about January 18, 2012, a meeting was held at the request of the Respondent CEP between representatives of the Union and representatives of the Applicants, including Messrs. Factuca, Boisvert and Rivard, for the limited purposes of discussing the suspension of post-retirement benefits. During this meeting, the Union expressed its concern with respect to the failure of the Applicants to communicate or discuss its decision to suspend post-retirement benefits in advance of unilaterally implementing same given the devastating effect of such action on the vulnerable retiree group. At no time during the meeting did Messrs. Fastuca, Boisvert or Rivard discuss the Applicants' plans with the Union Pension Plans or the ongoing negotiations regarding the DIP Facility. The agreement between the DIP Lender and the Applicants was finalized shortly thereafter. The DIP agreement was executed by Mr. Fastuca on behalf of Timminico on or before the morning of January 19, 2012.

(vi) Representatives of the Respondent CEP and the Applicants met on January 24, 2012 and have scheduled further meetings on February 14, 2012, February 21, 2012, March 12, 2012 and March

20, 2012. These meetings are unrelated to the Applicants' CCAA proceedings and are intended for the sole purposes of discussing possible amendments to the Collective Agreement in order to accommodate a new production line.

Affidavit of Jean Simoneau sworn February 1, 2012; Respondent CEP's Motion Record, Tab 2, paras. 7-14.

25. Since the commencement of the Applicants' CCAA proceedings, the Respondent CEP and the pension committee have been excluded from all aspects of the Applicants' restructuring activities.

Affidavit of Jean Simoneau sworn February 1, 2012; Respondent CEP's Motion Record, Tab 2, para. 15.

NEGOTIATION OF THE DIP AGREEMENT

26. Following the issuance of the Initial Order and the grant of the stay of proceedings, the Timminico Entities, with the assistance of the Monitor, intensified their efforts to secure DIP financing. The Timminico Entities and the Monitor were also contacted by a number of parties to inquire as to the possibility of purchasing some or all of the Timminico Entities' business and/or providing DIP financing.

Affidavit of Peter A.M. Kalins sworn January 20, 2012, paragraph 26.

27. The Timminico Entities pursued the arrangement of a DIP Facility with each of these parties. Five parties submitted indicative terms for a DIP Facility. Following

further discussions and negotiations with these parties, the Timminico Entities successfully negotiated a DIP Agreement with QSI Partners Ltd. ("**QSI**" or the "**DIP Lender**").

28. Neither the pension committee nor the Respondent CEP were consulted during the negotiation of the DIP Agreement. The Applicants' have not disclosed the specific reasons for electing not to pursue negotiations with any of the other parties that expressed interest in entering into a DIP Agreement. The Applicants have not disclosed whether any of the other parties who submitted DIP term sheet had the same negative covenants, specifically as it relates to the Union Pension Plans. Moreover the Applicants have not provided any facts in support of their position that the "financial terms of the DIP Agreement are better or not materially worse than those proposed in the competing term sheets."

Affidavit of Peter A.M. Kalins sworn January 20, 2012, paras. 28 and 29

29. In the opinion of the Applicants' management, including Mr. Boisvert who is a member of the pension committee, the QSI DIP Agreement, which includes terms that adversely affect the pension plans, was the best available option.

30. The DIP Agreement includes a number of negative covenants prohibiting the Timminico Entities from taking certain actions without the priori written consent of the DIP Lender or an Order of the Court, including making any payments to the Union Pension Plans other than normal cost contributions.

Affidavit of Peter A.M. Kalins sworn January 20, 2012, para. 35.

31. Further, the DIP Agreement that was negotiated is conditional upon the issuance of a Court order approving the DIP Facility and granting the DIP Lender a priority charge in favour of the DIP Lender over all of the assets, property and undertaking of the Timminco Entities ranking ahead of all encumbrances, including the rights of the Union Pension Plans.

Affidavit of Peter A.M. Kalins sworn January 20, 2012, para. 36.

32. Neither the pension committee nor the Respondent have been privy to the negotiations over the terms of the DIP Agreement.

33. The Applicants advise that the DIP Lender was specifically *asked* whether it would advance under the DIP Facility if the DIP Lender's charge is not granted priority over the Encumbrances, including the Union Pension Plans. In response to the question, the DIP Lender advised it would not. This appears to be the extent of the negotiations conducted by the Applicants as it relates to the Union Pension Plans.

Affidavit of Peter A.M. Kalins sworn January 20, 2012, para. 36.

34. The Monitor has described the terms of the DIP Agreement, including specifically the provision granting the DIP Lender's Charge priority over all Encumbrances, including the rights of the Union's Pension Plan, as "customary for this type of financing."

Third Report of the Monitor dated January 23, 2012, para. 26

35. In addition, the DIP Agreement provides the DIP Lender with an Exclusivity Period in order to provide the DIP Lender with an opportunity to submit a "stalking horse bid" for consideration of the Applicants and Monitor.

36. Based on the foregoing, it is apparent that the Applicants have taken significant steps in these proceedings that are prejudicial to the Union Pension Plans while failing or refusing to engage in discussions or negotiations with the pension committee and Union over such issues.

37. In the Respondent CEP's submission, the Applicants' conduct, and specifically its governance of the Union Pension Plans, has been inconsistent with its statutory and common law fiduciary duties and amounts to a complete abdication of its duty to act in the best interests of the Union Pension Plans beneficiaries.

PART III – ISSUES

38. The issue in this motion is as follows:

    (a) Should this Court approve the DIP Facility and grant the DIP Lender's Charge?

39. In order to resolve this issue, the Respondent CEP submits that consideration must be given to whether the evidentiary record discloses that the DIP Agreement is the result of a negotiation process that was fair and reasonable

and that satisfies the Applicants' statutory and common law obligations to act in the best interests of the Union Pension Plans and their beneficiaries.

PART IV – LAW & ARGUMENT

BREACH OF FIDUCIARY DUTY

40. The Timminico Entities are seeking approval of the DIP Facility in the amount of $4,250,000. Further, the Timminico Entities are seeking the granting of the DIP Lender's Charge securing the DIP Facility ranking immediately behind the Administration Charge and the KERP Charge.

41. Section 11 of the CCAA provides the Court with general powers to approve the DIP Facility if it considers it appropriate to do so in the circumstances. Further, section 11.2 of the CCAA provides the Court with express jurisdiction to grant a DIP financing charge. Sub-section 11.2(4) sets out the factors to be considered by the Court in deciding whether to grant a DIP financing charge:

> **11.2(4) Factors to be Considered**
>
> In deciding whether to make an order, the court is to consider, *among other things*,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;

> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

42. In the Respondent CEP's submission, in addition to the factors listed above, it is incumbent upon this Honourable Court to consider whether the Applicants, as members of the pension committee, have satisfied their fiduciary duties to the Union Pension Plans both under statute and at common law during the negotiation of the DIP Agreement. A failure of the Applicants in this regard would render the DIP Agreement itself unfair and unreasonable and the product of an unlawful process in which the Applicants breached their duties to the Union Pension Plans. In the Respondent CEP's submission, in such circumstances it would not be appropriate to approve the DIP Agreement.

43. It is clear that the Applicants, as members of the pension committee, are subject to fiduciary obligations in respect of the plan members and beneficiaries. These obligations arise both at common law and by virtue of the SPPA:

> **Standard of Ethics**
>
> 151. The pension committee shall exercise the prudence, diligence and skill that a reasonable person would exercise in similar circumstances; it must also act with honesty and loyalty in the best interest of the members or beneficiaries.
>
> **Use of Knowledge and Skills**

> The members of the pension committee shall use in the administration of the pension plan all relevant knowledge or skill that they possess or, but reason of their profession or business, ought to possess.
>
> ...
>
> **Conflicts of Interest**
>
> 158. No member of a pension committee may exercise his powers in his own interest or in the interest of a third person nor may he place himself in a situation of conflict between his personal interest and the duties of his office.

44. In addition, pursuant to their obligations as plan sponsor and administrator of the Haley Pension Plan, the Applicants have fiduciary obligations in respect of the members and plan beneficiaries by virtue of the *Pension Benefits Act* (the "PBA"):

> **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.
>
> ...
>
> **Conflict of Interest**
>
> (4) An administrator...shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

45. The Applicants also have fiduciary obligations to the pension plan members and beneficiaries under the common law. A fiduciary relationship will be held to exist

where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests. The key factual characteristics of a fiduciary relationship are: the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and, a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power.

***Re Indalex*, 2011 ONCA 265 (CanLII), at para. 118.**

46. It is readily apparent that these fiduciary characteristics exist in the relationship between the Applicants, as members of the pension committee and plan sponsor, and the plan members and beneficiaries of the Union Pension Plans. The Applicants have the power to make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the Union Pension Plans and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the Applicants to ensure that the plan and fund are properly administered. And, particularly in the present circumstances, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, the Applicants owe the plans' members and beneficiaries a fiduciary duty to act in their best interests.

***Re Indalex*, 2011 ONCA 265 (CanLII), at para. 119.**

47. The Applicants, however, wear "two hats" – one as the employer and the other as administrator of the pension plans. The Applicants, when managing their business, wears their corporate hat. On the other hand, when acting as administrator of the pension plans, the Applicants wear their fiduciary hat and must act in the best interest of the plan's members and beneficiaries.

***Re Indalex*, 2011 ONCA 265 (CanLII), at para. 129.**

48. The Applicants, wearing their corporate hat, were certainly entitled to make the decision to commence CCAA proceedings. That decision is not part of the administration of the Union Pension Plans or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan.

49. However, just because the initial decision to commence CCAA proceedings is solely a corporate one does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. The Applicants are not entitled to simply ignore their obligations to the Union Pension Plans once they decided to commence CCAA proceedings. However, in the Respondent CEP's submission, that is precisely what the Applicants have done here.

***Re Indalex*, 2011 ONCA 265 (CanLII), at para. 132**

50. At the time that Applicants initiated the CCAA proceedings, the evidence confirmed that the Union Pension Plans, and the Haley Pension Plan, was underfunded. This was clearly known to the Applicants. The decisions that the Applicants have made since the commencement of the CCAA proceedings have

the potential to affect the plan members and beneficiaries at a time when they are peculiarly vulnerable.

51. The following decisions of the Applicants have affected the plan members and beneficiaries:

(i) Sought, and received, an Order suspending the payment of solvency payments;

(ii) Sought, and received, an Order granting a super-priority in favour of the Administration Charge over the assets of the Timminico Entities thereby subordinating the rights of the Encumbrances, including the Union Pension Plans;

(iii) Sought, and received, an Order granting a super-priority in favour of the D & O Charge over the assets of the Timminico Entities thereby subordinating the rights of the Encumbrances, including the Union Pension Plans;

(iv) Sought, and received, an Order granting a super-priority in favour of the KERP Charge over the assets of the Timminico Entities thereby subordinating the rights of the Encumbrances, including the Union Pension Plans; and

(v) The Applicants are now seeking approval of a DIP Facility and the granting of a super-priority in favour of the DIP Lender thereby

subordinating the rights of the Encumbrances, including the Union Pension Plans.

52. The above-noted decisions were made unilaterally by the Applicants wearing only their corporate hat. The Applicants have failed to consider their fiduciary obligations or consider the best interests of the plan members or beneficiaries. This includes the negotiation of the DIP Agreement.

53. There is no evidence on the record to establish that the Applicants, as fiduciaries, negotiated the DIP Agreement with a view to acting in the best interests of the plan members and beneficiaries. The Applicants did nothing in the CCAA proceedings to fund the deficit in the underfunded pension plans. They took no steps to protect the vested rights of the plans' beneficiaries. In fact, the Applicants have taken active steps which undermined the possibility of additional funding to the plans, including acceptance of the DIP Agreement which specifically has the effect of subordinating deemed trust claims. In short, the Applicants have done nothing to protect the best interests of the plans' beneficiaries and, accordingly, are in breach of their fiduciary duties.

***Re Indalex*, 2011 ONCA 265 (CanLII), at para. 139**

54. In addition, the Applicants were in a conflict of interest when they negotiated DIP Agreement. The Applicants ultimate duty was to act in the best interests of the corporation. However, their concomitant duty to the pension plans was to act in the best interest of the members and beneficiaries. These duties are in

conflict. The Applicants' fiduciary duties precludes them from placing themselves in a position where they act for two parties who are adverse in interest.

***Re Indalex*, 2011 ONCA 265 (CanLII), at para. 140**

55. The Applicants were not at liberty to resolve this conflict by simply ignoring their role as fiduciary to the pension plans. A fiduciary relationship does not end simply because it becomes impossible to perform. At the point where their duty to the corporation conflicted with their fiduciary duties, including in the negotiation of the DIP Agreement, it was incumbent on the Applicants to take steps to address the conflict. The Applicants failed to do so.

***Re Indalex*, 2011 ONCA 265 (CanLII), at para. 143**

56. The CCAA was not designed to allow a company to avoid its pension obligations. To approve the DIP Agreement and the DIP Lender's Charge would be tantamount to sanctioning the Applicants' breach of fiduciary obligations. This would create an injustice. The equities are not equal. The plan beneficiaries were vulnerable to the exercise of power by the Applicants. They were not part of the negotiations for the DIP Agreement. They had no opportunity to participate in the negotiations or protect their interests. On the other hand, the Applicants were fully aware of the plans underfunding yet took no steps to protect the plan members' interests in negotiating the DIP Agreement.

57. The Applicants have negotiated the DIP Agreement wearing only their corporate hat without due regarding for their fiduciary duties to the Union Pension Plans. There was no party present during the DIP Agreement negotiations to speak on behalf of the interests of the pension plans. The Applicants have therefore breached their fiduciary duties. The breach of the fiduciary duties gives rise to a claim under the SPPA and PBA against the Applicants. However, the DIP Agreement, the negotiation of which gave rise to the claim, has the effect of subordinating the rights of the pension plan, including the fiduciary claim against the Applicants. This is not a result that "good conscience" contemplates.

58. In the circumstances, it is submitted that this Court should refuse to approve the DIP Agreement and the DIP Lender's Charge.

INSUFFICIENT EVIDENCE TO JUSTIFY ORDER

59. Valid provincial laws, including the deemed trust provisions in the SPPA and PBA, continue to apply in federally regulated bankruptcy and insolvency proceedings absent an express finding of federal paramountcy. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the federal and provincial laws are incompatible by establishing that either it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law.

***Re Indalex*, 2011 ONCA 265 (CanLII), at para. 177**

60. In the within matter, there is insufficient evidence to demonstrate that complying with the SPPA and PBA would frustrate the purpose of the restructuring.

61. Prior to making a finding that complying with provincial law would frustrate the purpose of the federal law, it is submitted that certain efforts must be undertaken to establish that there is no possibility of complying with provincial law without frustrating the purpose of the federal law. In the present case, at a minimum, it is submitted that the Applicants ought to have engaged in true negotiations with the DIP Lender in an effort to comply with minimum statutory requirements, such as compliance with the SPPA and PBA. The record establishes that the extent of the negotiations regarding the pension plans involved "asking" the DIP Lender whether it would allow advances to be used to satisfy the pension funding obligations. There is no evidence of any negotiations over the proposed subordination of the Encumbrances, including the statutory rights of the pension plans, contemplated by the DIP Agreement. In fact, the Monitor has suggested that the charge in favour of the Encumbrances, including deemed trusts under the SPPA and PBA, are "customary".

62. The onus is on the Applicants to demonstrate that there was no other reasonable alternative other than the enter into the DIP Agreement which subordinates the statutory rights of the pension plan pursuant to the SPPA and PBA. The Applicants have presented no evidence to establish same. For instance, there is no evidence regarding the terms of the other interested DIP Lenders and

whether any of those interested parties may have presented proposals that would have permitted compliance with the SPPA and PBA.

63. In the circumstances, it is submitted that the DIP Agreement and Charge ought not to be granted.

PART V – ORDER SOUGHT

64. The Respondent CEP requests that the relief sought by the Applicants be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3th day of February, 2012.

CaleyWray
Douglas J. Wray

Lawyers for the Respondent,
Communications, Energy and Paperworkers
Union of Canada, Local 184

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re Indalex*, 2011 ONCA 265 (CanLII)

SCHEDULE "B"

RELEVANT STATUTES

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(*a*) the period during which the company is expected to be subject to proceedings under this Act;

(*b*) how the company's business and financial affairs are to be managed during the proceedings;

(*c*) whether the company's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(*e*) the nature and value of the company's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

Supplemental Pension Plans Act, R.S.Q. c. R-15.1

49. Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

151. The pension committee shall exercise the prudence, diligence and skill that a reasonable person would exercise in similar circumstances; it must also act with honesty and loyalty in the best interest of the members or beneficiaries.

The members of the pension committee shall use in the administration of the pension plan all relevant knowledge or skill that they possess or, by reason of their profession or business, ought to possess.

158. No member of a pension committee may exercise his powers in his own interest or in the interest of a third person nor may he place himself in a situation of conflict between his personal interest and the duties of his office.

If the committee member is himself a member or a beneficiary of the plan, he shall exercise his powers in the common interest, considering his own interest to be the same as that of the other members or beneficiaries of the plan.

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

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.

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 TIMMINCO LIMITED AND BECANCOUR SILICON INC.

Court File No. CV-12-9539-00CL

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TORONTO

FACTUM OF THE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

CaleyWray
Labour/Employment Lawyers
1600 - 65 Queen Street West
Toronto ON M5H 2M5

Douglas Wray
(18023C)
wrayd@caleywray.com
Tel: 416-775-4673

Jesse B. Kugler
(55269V)
kuglerj@caleywray.com
Tel: 416-775-4677
Fax: 416-366-3763

Lawyers for the Respondent, Communications, Energy and Paperworkers Union of Canada