Court File No.

COURT OF APPEAL FOR ONTARIO

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.

APPLICANTS

NOTICE OF MOTION

Communications, Energy and Paperworkers Union of Canada (the "CEP") will make a motion which will be heard by the court in writing 36 days after service of the CEP's motion record, factum and transcripts, if any, or on the filing of the CEP's reply factum, if any, whichever is earlier.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing.

THE MOTION IS FOR:

1. An order granting leave to appeal the order and endorsement of the Honourable Justice Morawetz dated February 9, 2012;

2. Costs of this motion; and

3. Such further and other relief as this Honourable Court considers just.

THE GROUNDS FOR THE MOTION ARE:

1. The Applicants sponsor three (3) pension plans: the Haley Pension Plan, the Bancancour Non-Union Pension Plan, and the Becancour Union Pension Plan.

2. The Haley Pension Plan is registered in Ontario and is governed by the Ontario *Pension Benefits Act*, R.S.O. 1990, c P.8 (the "PBA"). The Haley Pension Plan is in the process of being wound up pursuant to the PBA. As of August 1, 2010, the date of the last actuarial valuation filed, the Haley Pension Plan had a windup deficit of $3,922,700.

3. The two (2) Bacancour pension plans are registered in Quebec and are governed by the Quebec *Supplemental Pension Plans Act*, R.S.Q, c R-15.1 (the "SPPA"). As of the date of the last actuarial valuations filed, the solvency deficit in the non-union and union Becancour pension plans was $3,239,600 and $7,939,500 respectively.

4. Pursuant to the provisions of the SPPA and PBA, the Applicants are required make regular solvency payments in order to address the solvency and windup deficits in the Applicants' pension plans. Further, the SPPA and PBA create a deemed trust in respect of monies that the Applicants owe to the pension plans and impose strict duties on the Applicants, as pension plan sponsor, to act in the best interests of the beneficiaries of the pension plans and to avoid conflicts of interest in the administration of the pension plans.

5. On January 3, 2012 the Applicants were granted relief pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA") without notice to its creditors including the Communications, Energy and Paperworkers Union of Canada (the "CEP") and the applicable pension plans.

6. The Initial Order granted, *inter alia*, an Administration Charge and Directors & Officers Charge 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*, or collectively, the "Encumbrances")."

7. On January 27, 2012 the Applicants brought a motion in which they sought an order approving a Debtor in Possession ("DIP") facility and granting a charge over the assets of the Applicants in favour of the DIP Lender in priority to the Encumbrances, including the statutory obligations to the pension plans pursuant to the SPPA and the PBA. The CEP opposed the relief being sought.

8. On February 9, 2012, the Court released its decision approving the DIP Facility and granting the DIP Charge in priority to the Encumbrances, including the pension plans. In its decision, the Court invoked the doctrine of paramountcy such that the provisions of the CCAA overrode those provisions of the SPPA and the PBA. With respect, the Court erred in its application of the doctrine of paramountcy. There was no legal or factual basis for the Court to invoke the doctrine of paramountcy and to override valid and enforceable provincial legislation.

9. In its decision dated February 9, 2012, the Court made findings of fact that were not supported by the record.

10. The issues raised in this appeal are significant to the practice.

11. The issues raised in this appeal are significant to the Applicants' CCAA proceedings.

12. The issues raised in this appeal are *prima facie* meritorious.

13. The issues raised in this appeal will not unduly hinder the progress of the proceeding. The Applicants' restructuring is continuing, and this appeal can proceed in tandem with it. An appeal will not in any way interfere with the ongoing restructuring.

14. Section 14 of the CCAA.

15. Rule 61.03.1 of the *Rules of Civil Procedure*.

16. The Quebec *Supplemental Pension Plans Act*.

17. The Ontario *Pension Benefits Act*.

18. The CEP relies on such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be read in support of this motion:

1. Relevant excerpts from the record before Morawetz J.;

2. Such further and other material as counsel may advise and this Honourable Court permit.

February 23, 2012

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

Douglas J. Wray (18023C)
Email: wrayd@caleywray.com
Tel: 416-775-4673
Fax: 416-366-3763

Jesse Kugler (52532R)
Email: kuglerj@caleywray.com
Tel : 416-775-4677
Fax: 416-366-3293

Lawyers for Communications, Energy and Paperworkers Union of Canada

TO: SERVICE LIST

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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