

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 MOVING PARTY,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, AS REPRESENTED
BY THE MINISTER OF NORTHERN DEVELOPMENT AND MINES
Motion to be heard: June 19, 2013

June 18, 2013

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DEVELOPMENT AND MINES
(returnable June 19, 2013)

PART I — OVERVIEW

1. Her Majesty the Queen in right of Ontario as represented by the Minister of Northern Development and Mines ("**MNDM**" or the "**Crown**") brings this motion for leave to file a claim after the passage of the Claims Bar Date, as defined in the June 15, 2012 Order made in these proceedings. MNDM's claim relates to the costs of rehabilitating certain property on which Timminco Limited ("**Timminco**") once carried on mining activities, which property has since been disposed of. MNDM was not able to file its claim prior to the Claims Bar Date as Timminco only provided MNDM with the information necessary to determine that it had a claim three days prior to the passage of the Claims Bar Date. Further, extensive investigation and consultation was required before MNDM could quantify its claim. The filing of MNDM's claim after the passage of the Claims Bar Date will not cause prejudice to other creditors.

PART II — THE FACTS

A. Timminco's Closure Plan and the Financial Assurance

2. On May 1, 2006, pursuant to the Ontario *Mining Act*, R.S.O. 1990, c. M.14 and its regulations (together, the "**Act**"), MNDM acknowledged as filed Timminco's closure plan in respect of the closure of mining operations carried out on land owned by Timminco in Haley, Ontario (the "**Haley Property**"). Timminco submitted an amendment to its closure plan (together with the closure plan, the "**Closure Plan**"), which was acknowledged as filed by MNDM on July 27, 2011.

Affidavit of Sharon Dawn Spires sworn May 14, 2013 ("Spires Affidavit"), Motion Record of Her Majesty the Queen in Right of Ontario as represented by the Minister of Northern Development and Mines (the "Crown Motion Record"), Tab 2, para. 3.

3. Under the Act, Timminco was required in its Closure Plan to set out how the Haley Property was to be rehabilitated, along with estimated costs for such rehabilitation and to specify the form and amount of financial assurance that would cover the cost of rehabilitation work set out in the Closure Plan (the "**Financial Assurance**"). The Financial Assurance is intended to ensure that in the event that Timminco is unable to complete rehabilitation of the mining liabilities on the Haley Property, MNDM will have adequate funds to carry out such rehabilitation work.

Spires Affidavit, Crown Motion Record, Tab 2, paras. 4 and 5.

4. Timminco provided Financial Assurance to MNDM and certified that the amount of Financial Assurance for the Closure Plan would be adequate and sufficient to cover the costs of rehabilitation outlined in the Closure Plan.

Spires Affidavit, Crown Motion Record, Tab 2, para. 5.

5. Under the Act, if, owing to a change in the circumstances, the closure plan is no longer adequate in terms of setting out the rehabilitation required, it must be amended and the financial assurance adjusted accordingly.

Spires Affidavit, Crown Motion Record, Tab 2, paras. 8 and 9.

B. Timminco's Disclosure of Contamination on the Haley Site

6. MNDM was not made aware of any soil contamination involving hydrocarbons or any concerns relating to the potential for such contamination before or during an inspection of the Haley Property on October 29, 2010. Timminco did not provide any indication of such potential contamination when it amended its Closure Plan in July of 2011.

Spires Affidavit, Crown Motion Record, Tab 2, paras. 7 and 10.

7. On July 20, 2012, three days before the July 23, 2012 Claims Bar Date, MNDM received a report stated to have been prepared several months prior, in November 2011, by WESA Inc. for Timminco (the "**November 2011 Report**"). This report indicates that there is hydrocarbon contamination on the Haley Property. The November 2011 Report suggests that rehabilitation of the hydrocarbon contamination on the site could cost in the range of \$745,000 to \$2,300,000. The amount of Financial Assurance as of July 20, 2012 was \$995,046.

Spires Affidavit, Crown Motion Record, Tab 2, paras. 13 and 14.

8. The November 2011 Report also indicates that WESA Inc. had conducted an initial investigation of the hydrocarbon soil contamination on the Haley Site from November 15 to November 17, 2010, only a few weeks after MNDM's October 2010 site inspection. The November 2011 Report further indicates that in February 2011, WESA Inc. prepared its first report to Timminco regarding concerns about hydrocarbon contamination on the Haley Property (the "**February 2011 Report**"). After review of the November 2011 Report, MNDM contacted Timminco's Chief Restructuring Officer, Sean Dunphy, (the "**CRO**") and requested a copy of the February 2011 Report.

Spires Affidavit, Crown Motion Record, Tab 2, para. 15.

9. The November 2011 Report indicates that WESA Inc. installed groundwater wells on the Haley Property in July of 2011. Under the Closure Plan, Timminco was required to carry out soil and water sampling to detect any forms of contamination. Under the Act, if such contamination were found, Timminco's Closure Plan would need to set out rehabilitation measures for any such contamination. This would affect the adequacy of the Financial Assurance, as it did not take into account the cost of rehabilitating contaminated soil or ground water, and would be a matter requiring Timminco to provide

a notice of material change to MNDM. The installation of groundwater wells is used to determine, among other things, the extent of hydrocarbon contamination and the boundaries of such contamination.

Spires Affidavit, Crown Motion Record, Tab 2, para. 16.

10. MNDM did not receive any reports or information from Timminco regarding hydrocarbon contamination prior to July 20, 2012, when it received the November 2011 Report. This was:

- (a) nearly two years after MNDM's October, 2010 inspection of rehabilitation work on the Haley Property;
- (b) nearly two years after WESA Inc. appears to have been engaged by Timminco to investigate potential hydrocarbon contamination on the site;
- (c) over one and a half years after Timminco received the February 2011 Report indicating that there was such contamination on the Haley Property;
- (d) approximately six months after bringing its application for relief under the CCAA; and
- (e) three days prior to the Claims Bar Date.

Spires Affidavit, Crown Motion Record, Tab 2, para. 17.

C. MNDM's Efforts to Determine the Nature of and Quantify its Claim

11. Further investigation and updated information from Timminco regarding the rehabilitation proposed by WESA Inc. in the November 2011 Report was required by MNDM in order to determine the extent of contamination and the anticipated costs of its rehabilitation. Towards this end, MNDM staff participated in teleconference calls with the CRO and representatives of the Ministry of the Environment (the "MOE") to receive updates on the condition of the Haley Property and to inquire further into the issues associated with the site.

Spires Affidavit, Crown Motion Record, Tab 2, paras. 18 and 19.

12. During teleconferences with the CRO, hydrocarbon contamination on the Haley Property was discussed, as well as MNDM's concern that there was insufficient

Financial Assurance to cover the mining liabilities associated with the Haley Property since hydrocarbon contamination was not adequately addressed in the Closure Plan. Additionally, MNDM asked the CRO to set up technical discussions between WESA Inc., MNDM and MOE regarding the Haley Property. The technical conversations were held on December 17, 2012. MNDM also visited the Haley Property on December 6, 2012.

Spires Affidavit, Crown Motion Record, Tab 2, para. 21.

13. In December of 2012, MNDM became aware that there is also a possibility of groundwater contamination on the site, which could move offsite into surrounding properties and requires immediate attention. MNDM informed the CRO on December 17, 2012 of this potential groundwater contamination associated with the Haley Property and the likelihood that the Director may have to issue an order to amend the Closure Plan, as rehabilitation of hydrocarbon and groundwater contamination were not adequately addressed in the Closure Plan, to address its various deficiencies.

Spires Affidavit, Crown Motion Record, Tab 2, paras. 24 and 25.

D. The Crown's Claim

14. From MNDM's review of the new information that it has collected to date and that has been made available to it after the Claims Bar Date, it is apparent that the Financial Assurance is not sufficient to cover the costs associated with rehabilitation of the Haley Property. MNDM believes that the costs associated with rehabilitation of groundwater contamination alone could be at least \$1.16 million. MNDM also believes that the costs associated with rehabilitation of hydrocarbon contamination would cost at least \$1.86 million. The buildings on the Haley Property would also need to be demolished. Some of these buildings contain asbestos, thorium (a radioactive element) and other potentially hazardous materials. MNDM believes that the cost of their demolition may be at least \$300,000. Finally, the total cost of electricity for the Haley Property, including the cost of pumping and treating water twice a year was certified by Timminco to be a total of \$9000. Based on actual electricity costs for the Haley Property MNDM estimates hydro for pumping and water treatment alone would be \$48,000 per year.

Spires Affidavit, Crown Motion Record, Tab 2, paras. 27 to 30.

E. Transfer of the Haley Property

15. By Order dated March 5, 2013, this Court authorized the transfer of the Haley Property and other property from Timminco to Timminco Silicon Holdings Limited ("**Timminco Holdings**"). The Court further authorized the CRO to sign a sole shareholder declaration authorizing the filing of an assignment in bankruptcy of Timminco Holdings.

Order dated March 5, 2013, Exhibit E to Spires Affidavit, Crown Motion Record, Tab 2(E)

16. At the return of the motion to transfer the Haley Property out of the Timminco estate, discussions were held with representatives of the Monitor and CRO. As reflected in the Endorsement of March 5, 2013, it was agreed that the transfer of the Haley Property was without prejudice to the rights of MNDM to seek leave to file its claim after the passage of the Claims Bar Date.

Endorsement of March 5, 2013
Crown Brief of Authorities, Tab 4

17. On March 14, 2013, MNDM received correspondence from Grant Thornton Limited, the Trustee in Bankruptcy of Timminco Holdings advising that the Trustee has not taken possession of the Haley Property and has abandoned it in accordance with s. 14.06(4) of the *Bankruptcy and Insolvency Act*.

March 13, 2013 correspondence from Grant Thornton, Exhibit I to Spires Affidavit, Crown Motion Record, Tab 2(I).

18. Given the transfer and abandonment of the Haley Property, there is a substantial likelihood that the Crown will be required to complete the rehabilitation of the Haley Property. On March 15, 2013, the Crown held \$1,000,241.27 in Financial Assurance. Based on the information outlined above, the Crown believes that the total cost of completing rehabilitation of the site will be approximately \$3.47 million, \$2.47 million more than the amount of Financial Assurance held by the Crown.

Spires Affidavit, Crown Motion Record, Tab 2, para. 34.

19. At all material times, MNDM proceeded in good faith to determine whether it had a claim, taking into account both the amount of Financial Assurance provided by Timminco and the new and evolving information relating to the contamination associated with the

Haley Property and the rehabilitation required. MNDM was unable to deliver a claim prior to the passing of the Claims Bar Date owing to:

- (a) the delivery of new and significant information relating to the Haley site just three days prior to the Claims Bar date; and
- (b) the need to collect further technical information pertaining to the contamination on and around the Haley Property and the time required to complete such an undertaking.

PART III – ISSUE AND THE LAW

19. The sole issue to be determined on this motion is whether leave ought to be granted to permit MNDM to file a claim after the passing of the Claims Bar Date. The test to be applied in determining whether such leave should be granted is well established:

- (a) Was the delay caused by inadvertence and, if so, did the claimant act in good faith?
- (b) What is the effect of permitting the claim in terms of the existence and impact of relevant prejudice caused by the delay?
- (c) If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
- (d) If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

Re Blue Range Resource Corp., 2000 ABCA 285 (CanLII) at para. 41.
Crown Brief of Authorities, Tab 1

A. The Late Filing is Attributable to Timminco's Non-Disclosure

20. In the context of the applicable test, "inadvertence" is unintentional action, which can include carelessness, negligence or accident.

Re Blue Range Resource Corp., 2000 ABCA 285 (CanLII) at para. 27.
Crown Brief of Authorities, Tab 1

21. MNDM's failure to file a claim prior to the Claims Bar Date was not intentional. MNDM's failure to file a proof of claim prior to the Claims Bar Date is attributable to the

fact that it did not know that it had a claim owing to Timminco's breach of its duty under the Act to advise MNDM of the contamination on the Haley Property and that its Closure Plan was inadequate. Timminco did not disclose that there was potential hydrocarbon contamination on the Haley Property until three days prior to the Claims Bar Date, even though such information appears to have been known to Timminco about two years prior. MNDM did not become aware of the groundwater contamination on the property until well after the passing of the Claims Bar Date. Further, MNDM could not deliver a claim until it had an opportunity to investigate the state of the Haley Property, engage in technical discussions with the appropriate parties, determine what was required to rehabilitate the Haley Property and determine the potential cost of same. For these reasons, MNDM was precluded from filing its claim by the Claims Bar Date even though it proceeded in good faith.

22. In circumstances where the late filing is caused in part by the actions of the debtor corporation, leave to file a claim after the claims bar date ought to be granted.

Ivorylane Corporation, 2004 CanLII 846 (ON SC) at para. 49.
Crown Brief of Authorities, Tab 2

Re Blue Range Resource Corp., 2000 ABCA 285 (CanLII) at para. 29.
Crown Brief of Authorities, Tab 1

B. Late Filing will Not Prejudice Other Creditors

23. As noted by Newbould J., relevant prejudice to other creditors cannot be simply due to the fact that if the moving party is granted leave, there will be greater claims against whatever funds are available. Rather, to establish prejudice, clear evidence is required that a party acted to its detriment on the failure of the moving party to file its proof of claim prior to the claims bar date.

Re Polywheels Inc., 2009 CanLII 25317 (ON SC) at para. 49.
Crown Brief of Authorities, Tab 3

24. There is no evidence that other parties to this proceeding based their actions on the fact that MNDM did not file a claim within the time prescribed. The potential for a claim relating to the rehabilitation of the Haley Property was noted at the outset of these proceedings. Parties to this proceeding have been aware of MNDM's potential claim in this restructuring from the time of the hearing of the Initial Application. At the March 5, 2013 motion brought in these proceedings relating in part to the transfer of the Haley Property, the CRO and the Monitor agreed that the Haley Property would be transferred

to Timminco Holdings without prejudice to the Crown's rights with respect to this motion. Granting leave to MNDM will not cause prejudice to other creditors.

Affidavit of Peter A.M. Kalins, sworn January 2, 2012, Initial Application Record, Tab 2, paras. 97 to 100.

25. Further, it is apparent that the delivery of MNDM's proof of claim will not prejudice the claims process. The Applicants are seeking to extend the stay of proceedings to, amongst other things, review the proofs of claim delivered to date.

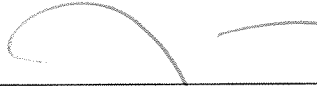
Affidavit of Sean Dunphy sworn June 13, 2013, Motion Record of the Applicants, para. 25.

PART IV — RELIEF SOUGHT

26. MNDM respectfully requests that this Court grant leave to permit MNDM to file a proof of claim in these proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

June 18, 2013



Ronald Carr and Lisa Brost
Counsel for Her Majesty in Right of Ontario, As Represented by the
Minister of Northern Development and Mines

Schedule A – List of Authorities

1. *Re Blue Range Resource Corp.*, 2000 ABCA 285 (CanLII)
2. *Ivorylane Corporation*, 2004 CanLII 846 (ON SC)
3. *Re Polywheels Inc.*, 2009 CanLII 25317 (ON SC)

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PROCEEDING COMMENCED AT TORONTO

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