

CITATION: Timminco Limited (Re), 2012 ONSC 106
COURT FILE NO.: 12-CL-9539-00CL
DATE: 20120104

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants

BEFORE: MORAWETZ J.

COUNSEL: A. J. Taylor, M. Konyukhova and K. Esaw, for the Applicants

S. Weisz, for FTI Consulting Canada Inc.

A. Kauffman, for Investissement Quebec

HEARD &
ENDORSED: JANUARY 3, 2012

ENDORSEMENT

[1] Timminco Limited (“Timminco”) and Bécancour Silicon Inc. (“BSI”) (collectively, the “Timminco Entities”) apply for relief under the *Companies’ Creditors Arrangement Act* (the “CCAA”).

[2] Timminco produces silicon metal through Québec Silicon Limited Partnership (“QSLP”) its 51% owned production partnership with Dow Corning Corporation (“DCC”) for resale to customers in the chemical (silicones), aluminum, and electronics/solar industries. Timminco also produces solar-grade silicon through Timminco Solar, an unincorporated division of Timminco’s wholly-owned subsidiary BSI (“Timminco Solar”), for customers in the solar photovoltaic industry.

[3] The Timminco Entities are facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume long-term supply contract at below market prices, a decrease in the demand and market price for solar-grade silicon, failure to recoup their capital expenditures incurred in connection with development of their solar-grade operations, and inability to secure additional funding. The

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Timminco Entities are also facing significant pension and environmental remediation legacy costs and financial costs related to large outstanding debts. A significant portion of the legacy costs are as a result of discontinued operations relating to Timminco's former magnesium business.

[4] Counsel to the Timminco Entities submits that, as a result, the Timminco Entities are unable to meet various financial covenants set out in their Senior Secured Credit Facility and do not have the liquidity needed to meet their ongoing payment obligations. Counsel submits that, without the protection of the CCAA, a shutdown of operations is inevitable, which would be extremely detrimental to the Timminco Entities' employees, pensioners, suppliers and customers. Counsel further submits that CCAA protection will allow the Timminco entities to maintain operations while giving them the necessary time to consult with their stakeholders regarding the future of their business operations and corporate structure.

[5] The facts with respect to this application are set out in the affidavit of Mr. Peter A. M. Kalins, sworn January 2, 2012.

[6] Timminco and BSI are corporations established under the laws of Canada and Quebec respectively and, in my view, are "companies" within the definition of the CCAA.

[7] Timminco has its head office in the city of Toronto. The board of directors of Timminco authorized this application. Further, pursuant to a unanimous shareholder declaration which removed the directorial powers from the directors of BSI and consolidated the decision making with Timminco through its board of directors, the board of directors of Timminco has also authorized this filing on behalf of BSI. I am satisfied that the Applicants are properly before this court.

[8] The affidavit of Mr. Kalins establishes that the Timminco Entities do not have the liquidity necessary to meet their obligations to creditors as they become due and, further, they have failed to pay certain obligations including, among other things, the interest payment due under the secured term loan and the interest payment due under the AMG Note on December 31, 2011.

[9] The affidavit also establishes that the Timminco Entities are affiliate debtor companies with total claims against them in excess of \$89 million.

[10] The required financial statements and cash flow information are contained in the record.

[11] The CCAA applies to a "debtor company" or affiliated debtor companies where the total of claims against the debtor or its affiliates exceed \$5 million. I am satisfied that the record establishes that the Timminco Entities are insolvent and are "debtor companies" to which the CCAA applies.

[12] On an initial application in respect of a debtor company, s. 11.02(3) of the CCAA provides authority for the court to make an order on any terms that it may impose where the applicant satisfies the court that circumstances exist that make the order appropriate.

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[13] Counsel to the Applicants submits that the Timminco Entities require the protection of the CCAA to allow them to maintain operations while giving them the necessary time to consult with their stakeholders regarding the future of their business operations and corporate structure.

[14] In this case, in addition to the usual stay provisions affecting creditors of the debtor, counsel submits that, to ensure the ongoing stability of the Timminco Entities' business during the CCAA period, the Timminco Entities require the continued participation of their directors, officers, managers and employees.

[15] Under s. 11.03, the court has jurisdiction to grant an order staying any action against a director of the company on any claim against directors that arose before the commencement of CCAA proceedings and that relate to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or refused by the creditors or the court.

[16] Counsel submits that there are several directors of BSI that also serve on the board of directors of Quebec Silicon General Partner Inc. ("QSGP") and several common officers (collectively, the "QSGP/BSI Directors").

[17] Due to the intertwined nature of the Timminco Entities and QSLP's businesses and in order to allow these directors and officers to focus on the restructuring of the Timminco Entities, the Timminco Entities also seek to extend the stay of proceedings in favour of those directors and officers in their capacity as directors or officers of QSGP.

[18] Counsel to the Timminco Entities submits that circumstances exist that make it appropriate to grant a stay in favour of the QSGP/BSI directors. In support of its argument, counsel relies on *Luscar Limited v. Smokey River Coal Limited* (1999), 12 C.B.R. (4th) 94 where the court indicated that its jurisdiction includes the power to stay conduct which "could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement".

[19] In these circumstances, I am prepared to accept this argument and grant a stay in favour of the QSGP/BSI directors.

[20] The Applicants have also requested that the stay of proceedings be extended with respect to the QSLP Agreements. Mr. Kalins' affidavit establishes that BSI's viability is directly related to its relationship with QSLP and that the relationship is governed by the QSLP Agreements. The QSLP Agreements provide for certain events to be deemed to have taken place, for certain modification of rights, and to entitle DCC, QSLP, and/or QSGP to take certain steps for the termination of certain QSLP Agreements in the event BSI becomes insolvent or commences proceedings under the CCAA. Counsel submits that due to the highly intertwined nature of the businesses of BSI and QSLP and BSI's high dependence on QSLP, it is imperative for the Timminco Entities and for the benefit of their creditors that BSI's rights under the QSLP Agreements not be modified as a result of its seeking protection under the CCAA.

[21] For the purposes of this initial hearing, I am prepared to accept this argument and extend the stay as requested.

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[22] The Applicants also request an Administration Charge and a D&O Charge.

[23] The requested Administration Charge on the assets, property and undertaking of the Timminco Entities (the "Property") is in the maximum amount of \$1 million to secure the fees and disbursements in connection with services rendered by counsel to the Timminco Entities, the Monitor and the Monitor's counsel (the "Administration Charge").

[24] The Timminco Entities request that the Administration Charge rank ahead of the existing security interest of Investissement Quebec ("IQ") but behind all 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 *Québec Supplemental Pension Plans Act* (collectively, the "Encumbrances") in favour of any persons that have not been served with notice of this application.

[25] IQ has been served and does not object to the requested charge, other than to adjust priorities such that the first-ranking charge should be the Administration Charge to a maximum of \$500,000 followed by the D&O Charge to a maximum of \$400,000 followed by the Administration Charge to a maximum amount of \$500,000. This suggested change is agreeable to the Timminco Entities and has been incorporated into the draft order.

[26] Section 11.52 of the CCAA provides statutory jurisdiction to grant such a charge. Under s. 11.52, factors that the court will consider include: the size and complexity of the business being restructured; the proposed role of the beneficiaries of the charge; whether there is unwarranted duplication of roles; whether the quantum of the proposed charge appears to be fair and reasonable; the position of the secured creditors likely to be affected by the charge; and the views of the monitor. *Re Canwest Publishing Inc.* (2010), 63 C.B.R. (5th) 115.

[27] In this case, counsel submits that the Administration Charge is appropriate considering the following factors:

- (a) the Timminco Entities operate a business which includes numerous facilities in Ontario and Quebec, several ongoing environmental monitoring and remediation obligations, three defined benefit plans and an intertwined relationship with QSLP;
- (b) the beneficiaries of the Administration Charge will provide essential legal and financial advice throughout the Timminco Entities' CCAA proceedings;
- (c) there is no anticipated unwarranted duplication of roles;
- (d) IQ was advised of the return date of the application and does not object; and
- (e) the Administration Charge does not purport to prime any secured party or potential beneficiary of a deemed trust who has not received notice of this application.

[28] The proposed monitor has advised that it is supportive of the Administration Charge.

[29] I accept these submissions and find that it is appropriate to approve the requested Administration Charge. In doing so, I note that the Timminco Entities have stated that they

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intend to return to court and seek an order granting super-priority ranking to the Administration Charge ahead of the Encumbrances including, *inter alia*, any deemed trust created under provincial pension legislation on the comeback motion.

[30] With respect to the D&O Charge, the Timminco Entities seek a charge over the property in favour of the Timminco Entities' directors and officers in the amount of \$400,000 (the "D&O Charge"). The directors of the Timminco Entities have stated that, due to the significant personal exposure associated with the Timminco Entities' aforementioned liabilities, they cannot continue their service with the Timminco Entities unless the Initial Order grants the D&O Charge.

[31] The CCAA has codified the granting of directors' and officers' charges on a priority basis in s. 11.51.

[32] In *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 at para. 48, Pepall J. applied s. 11.51 noting that the court must be satisfied that the amount of the charge is appropriate in light of obligations and liabilities that may be incurred after commencement of proceedings.

[33] Counsel advises that the Timminco Entities maintain directors' and officers' liability insurance ("D&O Insurance") for its directors and officers and the current D&O Insurance provides a total of \$15 million in coverage. Counsel advises that it is expected that the D&O Insurance will provide coverage sufficient to protect the directors and officers and the proposed order provides that the D&O Charge shall only apply to the extent that the D&O Insurance is not adequate.

[34] The proposed monitor has advised that it is supportive of the D&O Charge.

[35] The Timminco Entities have also indicated their intention to return to court and seek an order granting super priority ranking to the D&O Charge ahead of the Encumbrances.

[36] In these circumstances, I accept the submission that the requested D&O Charge is reasonable given the complexity of the Timminco Entities business and the corresponding potential exposure of the directors and officers to personal liability. The D&O Charge will also provide assurances to the employees of the Timminco Entities that obligations for accrued wages and termination and severance pay will be satisfied. The D&O Charge is approved.

[37] In the result, CCAA protection is granted to the Timminco Entities and the stay of proceedings is extended in favour of the QSGP/BSI directors and with respect to the QSLP Agreements.

[38] Further, the Administration Charge and the D&O Charge are granted in the amounts requested.

[39] FTI Consulting Canada Inc., having filed its consent to act, is appointed as Monitor.

[40] It is specifically noted that the comeback motion has been scheduled for Thursday, January 12, 2012.

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[41] The Stay Period shall be until February 2, 2012.

[42] The Applicants acknowledge that the only party that received notice of this application was IQ. Counsel to the Applicants advised that this step was necessary in order to preserve the operations of the Timminco Entities.

[43] For the purposes of the initial application, this matter was treated as being an *ex parte* application. Accordingly, the comeback motion on January 12, 2012 will provide any interested party with the opportunity to make submissions on any aspect of the Initial Order. A total of three hours has been set aside for argument on that date.



MORAWETZ J.

Date: January 4, 2012