

**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 BÉCANCOUR SILICON INC.

Applicants

FACTUM OF THE APPLICANTS
(Motion returnable December 4, 2012)
(Re Stay Extension to January 31, 2013)

Dated: December 3, 2012

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PART I - INTRODUCTION

1. Timminco Limited ("**Timminco**") and Becancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**") were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to the initial order of the Ontario Superior Court of Justice dated January 3, 2012 (the "**Initial Order**"). FTI Consulting Canada Inc. was appointed as monitor of the Timminco Entities (the "**Monitor**") in these CCAA proceedings.

2. This motion is brought by the Timminco Entities seeking an order, substantially in the form of the draft Order included at tab 3 of the Motion Record, extending the Stay Period (as defined below) until January 31, 2013 (the "**Stay Extension**") and

approving the Monitor's reports dated November 2, 2012 (the "**Fifteenth Report**") and November 28, 2012 (the "**Sixteenth Report**").

PART II - THE FACTS¹

3. The Timminco Entities' primary business was the production and sale of silicon, which was carried on principally through BSI. BSI respectively purchased and produced silicon metal and solar grade silicon for sale to customers in the chemical (silicones), aluminum and electronics/solar industries.

November 19 Affidavit, para. 3.

4. By January, 2012, the Timminco Entities were facing severe financial difficulties and became unable to meet their liabilities as they came due. As a result, the Timminco Entities sought and obtained granted protection from their creditors under the CCAA on January 3, 2012.

November 19 Affidavit, para. 4.

Status of Proceedings

Claims Procedure and Priority Claims Process

5. By order dated June 15, 2012 (the "**Claims Procedure Order**"), the Court approved a claims process (the "**Claims Process**") for the resolution of claims against the Timminco Entities and the Directors and Officers of the Timminco Entities. By the

¹ Capitalized terms used herein but not defined have the meaning as defined in the Affidavit of Sean Dunphy dated November 19, 2012, Applicants' Motion Record, Tab 2 (the "**November 19 Affidavit**").

Claims Bar Date (as defined in the Claims Procedure Order), claims totalling approximately \$280 million and approximately \$700,000 were filed against the Timminco Entities and the Directors and Officers of the Timminco Entities, respectively. The Monitor continues to review these claims, as described in the Monitor's Sixteenth Report.

November 19 Affidavit, paras. 5-7.

Monitor's Sixteenth Report, paras. 15-19.

6. As part of its distribution to BSI's major secured creditor which had the effect of ceasing accruing interest obligations, Investissement Québec ("IQ"), the Timminco Entities entered into an agreement with IQ and the Monitor (the "**Reimbursement Agreement**") which contemplated an interim distribution of funds owing to IQ while providing that IQ would repay to BSI such portion of the distribution as may be necessary to satisfy other creditors with claims ranking in priority to IQ (a "**Priority Claim**"). Pursuant to a court-approved procedure for calling for and adjudicating potential Priority Claims, one potential Priority Claim remains to be resolved.

November 19 Affidavit, para. 6.

Working Capital Adjustment Dispute

7. QSI Partners Ltd. ("**QSI**") purchased BSI's right, title and interest in and to, *inter alia*, assets comprising effectively all of BSI's silicon metal business for a purchase price of approximately \$32 million, subject to a working capital adjustment (the "**Working Capital Adjustment**"). On July 12, 2012, QSI delivered a working capital adjustment

statement to BSI, to which BSI objected by letter dated July 19, 2012. The parties have not been able to resolve their differences regarding the Working Capital Adjustment and a motion to determine same is scheduled to be heard by the Court on December 4, 2012.

November 19 Affidavit, paras. 8-9.

The Stay Extension Request

8. The Timminco Entities have been working diligently to complete the winding down of their businesses within the CCAA proceedings. They continue to assess their options in respect of their remaining assets, including certain real property assets, in order to maximise the proceeds available to their creditors. The Timminco Entities and the Monitor continue to assess the Claims filed in accordance with the Claims Procedure Order and the outstanding potential Priority Claim.

November 19 Affidavit, paras. 13-14.

PART III - ISSUES

9. The issue on this motion is whether the Court ought to grant the Stay Extension.

PART IV - LAW AND ARGUMENT

(1) GRANTING THE STAY EXTENSION

(A) The Court has the Jurisdiction to Grant the Stay Extension

10. Pursuant to s. 11.02 of the CCAA, the Court may extend the stay of proceedings with respect to a debtor company where: (a) circumstances exist that make the order

appropriate; and (b) the applicant has acted and is acting in good faith and with due diligence.

CCA, s. 11.02(2), 11.02(3)

11. In *Century Services Inc. v. Canada (Attorney General)*, the Supreme Court of Canada held that the appropriateness requirement in s. 11 of the CCA must be assessed in light of the policy objectives underlying the CCA:

. . . Appropriateness under the CCA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCA – avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. . . when an order is sought that does realistically advance the CCA's purposes, the ability to make it is within the discretion of a CCA court. [Citations omitted]

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 at paras. 70-71, Applicants' Book of Authorities, Tab 1.

12. A variety of purposes have been attributed to the CCA including, but not limited, to: protecting the interests of creditors and permitting an orderly administration of the debtor company's affairs, and, in appropriate circumstances, to effect a sale, winding up or a liquidation of a debtor company and its assets.

Re Lehndorff General Partner Ltd. (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), Applicants' Book of Authorities, Tab 2.

(B) The Court Ought to Grant the Stay Extension

13. The Initial Order granted a stay of proceedings to February 2, 2012 which has been extended from time to time, most recently to December 7, 2012 by Order dated

September 27, 2012 (the “**Stay Period**”). An extension of the Stay Period to January 31, 2013 is necessary to give the Timminco Entities and the Monitor sufficient time to resolve issues regarding the remaining assets, to negotiate with potential counterparties, to assess the classification and amount of claims filed, and prepare for the determination of other potential Priority Claims in accordance with the Priority Claim Adjudication Protocol Order.

November 19 Affidavit, para. 12-13.

14. The Stay Period expires on December 7, 2012. The Stay Extension up to and including January 31, 2013 would advance the policy objectives underlying the CCAA by allowing the Timminco Entities to continue working diligently towards a sale of their remaining assets for the benefit of their stakeholders.

November 19 Affidavit, para. 15.

15. In its Sixteenth Report, the Monitor notes that the Timminco Entities appear to have sufficient funding through to January 31, 2013. The Monitor supports the motion to extend the Stay Period.

November 19 Affidavit, para. 11.

Sixteenth Report at paras. 48-50.

16. On Thursday, November 29, 2012, the Timminco Entities were informed by counsel to St. Clair Pennyfeather (“**Pennyfeather**”), the representative plaintiff in a proposed class action proceeding (the “**Proposed Class Action**”) against, *inter alia*,

Timminco (Court file number CV-09-378701-00CP) that Pennyfeather would oppose the granting of the Stay Extension as it relates to the Proposed Class Action. The Timminco Entities are unaware of any other person who opposes the granting of the Stay Extension.

17. The Timminco Entities do not believe that any creditor will suffer any material prejudice if the Stay Period is extended as requested.

November 19 Affidavit, paras. 14, 16.

Sixteenth Report at paras. 49-50.

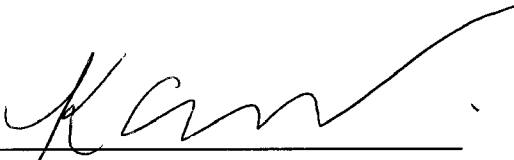
18. The Timminco Entities have acted and continue to act in good faith and with due diligence in taking steps to deal with their business and wind down in an orderly manner and assessing the claims, both for the benefit of their creditors.

November 19 Affidavit, para. 16.

PART V - ORDER REQUESTED

19. For the foregoing reasons, it is respectfully submitted that it is appropriate for this Court to order the Stay Period be extended to January 31, 2013.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of December, 2012.



Stikeman Elliott LLP

Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
2. *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List])

SCHEDULE "B"
RELEVANT STATUTES

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

General power of court

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.

...

Stays, etc. – other than initial application

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

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

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**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS
(RETURNABLE DECEMBER 4, 2012)
(RE STAY EXTENSION AND DISCLAIMER
OF BEAUHARNOIS SALE AGREEMENT)**

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