Court File No.12-CL-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 BÉCANCOUR SILICON INC.

Applicants

FACTUM OF J. THOMAS TIMMINS

(Motion Returnable June 4, 2012)

May 28, 2012

DAVIES WARD PHILLIPS & VINEBERG LLP
Barristers & Solicitors
44th Floor, 1 First Canadian Place
Toronto, ON M5X 1B1

Robin B. Schwill (LSUC#: 38452I)
Natasha MacParland (LSUC#: 42383G)
Chantelle T. Spagnola (LSUC#: 60620Q)

Tel: 416.863.5502
Fax: 416.863.0871

Lawyers for J. Thomas Timmins

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PART I - OVERVIEW

1. On this motion, J. Thomas Timmins, the former Chief Executive Officer of Timminco Limited ("**Timminco**" or the "**Company**", together with Mr. Timmins referred to as the "**Parties**") seeks that Timminco be ordered to comply with its post-filing obligations under a consulting agreement (the "**Consulting Agreement**") entered into between the Parties, and to remit to Mr. Timmins the monthly amounts that he is entitled to by virtue of his continued compliance with his obligations under the Consulting Agreement since the date that Timminco commenced proceedings under the *Companies' Creditors Arrangement Act* ("**CCAA**" or the "**Act**").

2. Mr. Timmins also asks that this Court deny Timminco's request to have the Consulting Agreement disclaimed in accordance with section 32 of the CCAA, as the disclaimer would not necessarily enhance the prospects of a viable arrangement being made in respect of the Company, and would objectively result in significant financial hardship to Mr. Timmins.

3. In any event, even if the Consulting Agreement is disclaimed, Timminco is not relieved of its obligation to pay the monthly fees that have and will continue to accrue from the date that Timminco commenced CCAA proceedings until the date that any such disclaimer is effective.

PART II - THE FACTS

4. Mr. Timmins is the former Chief Executive Officer of Timminco. Mr. Timmins has been associated with Timminco and its predecessor companies since the late 1950's, and has broad experience in the North American and international metal markets, having held positions in operations, sales, marketing and general management.[1]

5. Mr. Timmins resigned from his position as Timminco's CEO on May 28, 2001 but remained an active director of the Company until mid 2007, at which time he resigned from the Board and sold all of his remaining equity interests in the Company.[2]

A. The Consulting Agreement

6. On September 19, 1996, almost five years before Mr. Timmins resigned as CEO, Timminco entered into the Consulting Agreement with Mr. Timmins for the purposes outlined in the preamble thereto:

> The Consultant is an executive of the Corporation who has gained such a level of knowledge, experience and competence in the Corporation's business that it is in the

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1 Affidavit of J. Thomas Timmins, sworn April 12, 2012 ["**Timmins Affidavit**"] at para. 2, Motion Record, Tab 2, pp. 10-11.

2 Timmins Affidavit at para. 3, Motion Record, Tab 2, p. 11.

> Corporation's interest, following his retirement from employment, to ensure that the Corporation continues to have access to the Consultant for advice and consultation and the Corporation wishes to ensure that the Consultant shall not engage in activities which are competitive with the Corporation's business.[3]

7. The "consulting period", as that term is defined in section 1(b) of the Consulting Agreement, commenced on the first day of the month following Mr. Timmins resignation from his position as CEO, and only terminates on the earlier of Mr. Timmins' death or the date specified in a notice given by Timminco as a result of any breach of Mr. Timmins' obligations under the agreement.[4] There has been no alleged breach on the part of Mr. Timmins of any such obligations.

8. The "consulting fee", as that term is defined in section 1(a) of the Consulting Agreement, is a monthly amount by which $29,166.66 exceeds the monthly amount to which Mr. Timmins was entitled under any of Timminco's pension or retirement plans upon his resignation.[5]

9. Mr. Timmins' obligations under the Consulting Agreement are, "whenever from time to time requested by Timminco" and within the limits from time to time of his physical and other abilities, to consult with and advise the Company on matters relating to its business and affairs. Accordingly, it has always been incumbent upon Timminco

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3 Timmins Affidavit at para. 4, Motion Record, Tab 2, p. 11; Consulting Agreement dated September 19, 1996, Exhibit "**A**" to the Timmins Affidavit, Motion Record, Tab 2 at p. 18.

4 Timmins Affidavit at para. 5, Motion Record, Tab 2, p. 2.

5 Timmins Affidavit at para. 6, Motion Record, Tab 2, p. 3.

to request such services from Mr. Timmins, upon which he then had the obligation to provide such services pursuant to the terms of the Consulting Agreement.[6]

10. In addition to these consulting obligations, section 5 of the Consulting Agreement imposes a broad non-compete obligation on Mr. Timmins which operates to ensure that he, either personally or through the vehicle of his investment company Timmins Investments Limited, is prevented from engaging in activities which are competitive to Timminco's business. The Consulting Agreement also imposes a broad non-disclosure obligation on Mr. Timmins. Both of these obligations are neither temporally nor geographically limited in their scope.[7]

11. At the time of his resignation as CEO, Mr. Timmins entered into a letter agreement dated May 28, 2001 (the **"Resignation Agreement"**). Pursuant to the Resignation Agreement, sections 1(a) and 4 of the Consulting Agreement were amended to fix the amount of the consulting fee without further deduction to be paid on the first day of each month commencing on July 1, 2001 (the **"Monthly Consulting Fee"**). While the Resignation Agreement dealt with a number of termination of employment issues, it specifically did not amend the Consulting Agreement other than to fix the Monthly Consulting Fee; in all other respects, the Consulting Agreement was to remain in full force and effect.[8]

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6 Supplementary Affidavit of J. Thomas Timmins, sworn May 14, 2012 [**"Supplementary Timmins Affidavit"**] at paras. 6-7, Supplementary Motion Record, Tab 1, pp. 2-3.

7 Timmins Affidavit at paras. 7-8, Motion Record, Tab 2, p. 3; see also Supplementary Timmins Affidavit at para. 15, Supplementary Motion Record, Tab 1, p. 4.

8 Timmins Affidavit at para. 9, Motion Record, Tab 2, p. 3; Supplementary Timmins Affidavit at paras. 16-17, Supplementary Motion Record, Tab 1, pp.4-5.

12. There were no pension or retirement benefits for Mr. Timmins to forgo at the time he entered into the Resignation Agreement, as the pension plan in which he had participated prior to his resignation was terminated and wound up in 1998 with a lump sum entitlement having been paid out.[9]

13. The Resignation Agreement also required Mr. Timmins to execute a release and indemnity (the "**Release**"). The Release required the Parties to keep the terms of the Resignation Agreement, and the terms of the settlement and the discussion leading up to it, completely confidential (with the exception that Mr. Timmins is permitted to disclose such information to his family and his professional, financial or legal advisors).[10] Timminco has since consented to the disclosure of the Resignation Agreement in the context of these proceedings.

14. Up to the date of the filing of the present motion, Mr. Timmins has fulfilled all contractual obligations imposed on him by the Consulting Agreement. He, either personally or through the vehicle of his investment company, Timmins Investments Limited, has refrained (for 11 years now) and continues to refrain from engaging in activities which are competitive to Timminco's business. He continues to maintain his confidentiality obligations. Mr. Timmins has also always been prepared to provide his consulting services to Timminco, as required by the Consulting Agreement, whenever from time to time requested by the Company. Mr. Timmins actively provided such consulting services to Timminco after May 28, 2001 up until his resignation as a director

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9 Supplementary Timmins Affidavit at para. 17, Supplementary Motion Record, Tab 1, p. 5.

10 Timmins Affidavit at para. 10, Motion Record, Tab 2, p. 3.

of the Company in 2007, whether or not he was formally requested to do so by Timminco.[11]

15. By way of example, Mr. Timmins had a number of private conversations with Dr. Heinz C. Schimmelbusch, who has served as Chairman of Timminco's Board since April 2003, and served as the Company's CEO from April 2003 until September 2005, and again from August 2007 until August 2011. These conversations, which took place primarily during the early period of Dr. Schimmelbusch's term as CEO, addressed topics ranging from organization and personnel matters, competition and pricing aspects, marketing, and research and development initiatives.[12]

16. Mr. Timmins also introduced Dr. Schimmelbusch to a major outside shareholder over lunch in June 2003 in Toronto and, in July 2003, accompanied him to Saltzgitter, Germany to introduce him to senior executives of Saltzgitter A.G., a large German steel manufacturer that was then working on a pioneering project for the production of flat-rolled magnesium sheet. Saltzgitter A.G. was a significant potential customer for Timminco at that time.[13]

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11 Timmins Affidavit at para. 11, Motion Record, Tab 2, p. 4; Supplementary Timmins Affidavit at para. 9, Supplementary Motion Record, Tab 1, p. 3.

12 Supplementary Timmins Affidavit at para. 10, Supplementary Motion Record, Tab 1, p. 3.

13 Supplementary Timmins Affidavit at para. 11, Supplementary Motion Record, Tab 1, p. 3.

17. Mr. Timmins also travelled to Philadelphia and Toronto a number of times to meet with Dr. Schimmelbusch to discuss a considerable variety of issues related to Timminco's business and affairs.[14]

B. The CCAA Proceedings and the DIP Agreement

18. Timminco complied with its obligations under the Consulting Agreement to pay the Monthly Consulting Fee to Mr. Timmins until December 2011. Pursuant to the Consulting Agreement, the payment for January 2012 was due and payable on January 1, 2012 (being the first day of the month) although the first business day of that month was Tuesday, January 3, 2012.[15]

19. Timminco was granted protection and an initial order (the "**CCAA Order**") under the *Companies' Creditors Arrangement Act* (the "**CCAA**" or the "**Act**") on Tuesday, January 3, 2012 with the CCAA Order effective as of 12:01 a.m. on that date.[16]

20. Since January 2012, Timminco has not paid the Monthly Consulting Fee to Mr. Timmins as required by the Consulting Agreement. No breach of the Consulting Agreement has been alleged, nor has any other termination event under the Consulting Agreement occurred. Mr. Timmins was not provided with any prior notice that delivery of the Monthly Consulting Fee was to be ceased, and Timminco did not make any effort to contact Mr. Timmins at any time after its CCAA filing, notwithstanding the fact that the

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14 Supplementary Timmins Affidavit at para. 12, Supplementary Motion Record, Tab 1, p. 4.

15 Timmins Affidavit at para. 12, Motion Record, Tab 2, p. 4.

16 Timmins Affidavit at para. 13, Motion Record, Tab 2, p. 4; *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36.

Company was clearly aware of its continuing obligation to pay the Monthly Consulting Fee under the Consulting Agreement.[17]

21. Further, even though Timminco ceased making the required monthly payments, Mr. Timmins' name does not appear on the List of Creditors as at January 4, 2012, which list was posted on the Monitor's website.[18]

22. On February 8, 2012, the Court approved an agreement for debtor-in possession financing (the "**DIP Agreement**") entered into between Timminco and QSI Partners Ltd. ("**QSI**" or the "**DIP Lender**").[19] Mr. Timmins was not served with notice of the motion to approve the DIP Agreement, and it was approved without this knowledge.[20]

23. On or about February 8, 2012, Mr. Timmins formally retained Canadian counsel with respect to Timminco's non-payment of the Monthly Consulting Fee for the months of January and February 2012. Mr. Timmins' counsel wrote a letter to Timminco's counsel regarding this matter on February 17, 2012, and received a response dated March 9, 2012. This was the first communication of any type that

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17 Timmins Affidavit at para. 12, 14-15, Motion Record, Tab 2, pp. 4-5; Affidavit of Peter A.M. Kalins, sworn January 2, 2012 at para. 89 ["**Kalins Affidavit**"].

18 Timmins Affidavit at para. 15, Motion Record, Tab 2, p. 5; Timminco Limited and Bécancour Silicon Inc. – List of Creditors as at January 4, 2012, Exhibit "**C**" to the Timmins Affidavit, Motion Record, Tab 2, p. 24.

19 DIP Agreement entered into between Timminco and QSI dated January 18, 2012 as at January 20, 2012.

20 Supplementary Timmins Affidavit at para. 18, Supplementary Motion Record, Tab 1, p. 5.

Mr. Timmins received respecting the Company's non-payment of the Monthly Consulting Fee.[21]

C. Timminco's Eventual Notice of Disclaimer of the Consulting Agreement

24. On Friday, March 30, 2012, counsel for Timminco sent a letter to Mr. Timmins' counsel which enclosed a formal notice of disclaimer of the Consulting Agreement pursuant to section 32 of the CCAA. According to the correspondence, the Consulting Agreement was to be disclaimed effective April 30, 2012.[22]

25. Even if the Consulting Agreement was disclaimed effective April 30, 2012, Timminco is not relieved of its obligation to make the required monthly payments to Mr. Timmins for the months of January, February, March and April 2012 in the aggregate amount of CDN $83,333.32, plus accrued interest. These monthly payments to Mr. Timmins are post-filing obligations that Timminco was, and is still, required to satisfy under the continuing Consulting Agreement.[23]

26. In the event that this Court grants Timminco's request to disclaim the Consulting Agreement effective at a date later than April 30, 2012, the approximate value of Mr. Timmins proven claim as a result of the disclaimer should be at least $2.5 million. The value of this claim is based on a quote obtained by Mr. Timmins from

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21 Timmins Affidavit at para. 17, Motion Record, Tab 2, p. 5; Various Correspondence between Counsel to Timminco and Counsel to Mr. Timmins, Exhibit "**D**" to the Timmins Affidavit, Motion Record, Tab 2, pp. 30-35.

22 Timmins Affidavit at para. 18, 24, Motion Record, Tab 2, p. 5, 7; Letter from Counsel to Timminco enclosing Formal Notice of Disclaimer, Exhibit "**E**" to the Timmins Affidavit, Motion Record, Tab 2, pp. 37-39.

23 Timmins Affidavit at para. 24, Motion Record, Tab 2, p. 7.

Manulife Investments for the value of an annuity which would pay out the equivalent Monthly Consulting Fee (before tax) from June 1, 2012 until the date of Mr. Timmins' death.[24] This estimate is only representative of the value of Mr. Timmins' proven claim at the time the annuity quote was received, and in the event the Consulting Agreement is disclaimed, an updated quote would need to be obtained.

PART III - ISSUES

27. There are four issues before the Court on this Motion:

(a) Was Timminco entitled to stop paying the Monthly Consulting Fee to Mr. Timmins, notwithstanding the fact that these payments are post-filing obligations under the ongoing Consulting Agreement between the Parties?

(b) Should Timminco be entitled to disclaim the Consulting Agreement notwithstanding that: (i) the Company's ongoing obligations under the agreement have not impeded its ability to effect a successful sale of its assets; and (ii) the disclaimer would result in significant financial hardship to Mr. Timmins?

(c) In the event that Timminco was not entitled to stop paying the Monthly Consulting Fee, is Mr. Timmins entitled to payments for the period from January 1, 2012 up until the effective date (if any) of the disclaimer?

(d) In the event that Timminco is entitled to disclaim the Consulting Agreement, what should the effective date of that disclaimer be?

PART IV - LAW AND ARGUMENT

A. The Consulting Agreement is Clear and Unambiguous

28. Timminco argues that it is not obliged to pay the Monthly Consulting Fee to Mr. Timmins for the period from January 1, 2012 to the effective date (if any) of the disclaimer because these amounts constitute a pre-filing claim, and as such

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[24] Immediate Annuity Quote prepared by Manulife Investments dated April 12, 2012, Exhibit "**A**" to the Supplementary Timmins Affidavit, Supplementary Motion Record, Tab A.

Mr. Timmins lost any entitlement to these payments when the Company was granted protection under the CCAA.

29. Describing the unpaid Monthly Consulting Fees as a pre-filing claim inappropriately mischaracterizes the nature of the Consulting Agreement entered into between the Parties. These amounts can only be characterized as a pre-filing claim if Mr. Timmins earned the right to be paid an amount during his employment with Timminco which amount was then to be paid out to him over time after the termination of his employment, without any further obligations owing from Mr. Timmins to the Company thereafter. That is clearly not the case here. The Monthly Consulting Fees do not constitute compensation deferred from a prior employment agreement between the Parties, and the fees cannot be said to be owing for employment services previously performed by Mr. Timmins.

30. The purpose and effect of the Consulting Agreement is clear and unambiguous on its face – (i) to ensure that Mr. Timmins' advice remains available to Timminco; (ii) to ensure that he or his investment company do not engage, at any point during the consulting period, in activities which are competitive to Timminco's business; and (iii) to ensure that Mr. Timmins does not disclose or otherwise use confidential information. Mr. Timmins' and Timminco's obligations under the Consulting Agreement are ongoing post-filing obligations, and as such cannot be stayed and suspended in the CCAA proceedings.

31. It is a fundamental principle of the law of contractual interpretation that sophisticated commercial parties should be held to the bargains they have negotiated.

Parties to a written agreement are entitled to proceed on the basis that the words chosen by them to express their bargain will be respected and adhered to, regardless of whatever subjective understandings one of the parties is alleged to have had at the time the agreement in question was executed.[25]

32. The primacy of the words used by sophisticated commercial parties to express their bargain has been articulated by the Supreme Court of Canada in *Eli Lilly & Co. v. Novapharm Ltd.* In *Eli Lilly*, the trial judge held (in error) that in interpreting an agreement it was open to the trier of fact to admit extrinsic evidence as to the subjective intentions of the parties at the time they entered into the contract. Speaking on behalf of a unanimous Supreme Court, Mr. Justice Iacobucci stated the correct (and governing) principle:

> The trial judge appeared to take *Consolidated-Bathurst* to stand for the proposition that the ultimate goal of contractual interpretation should be to ascertain the true intent of the parties at the time of entry into the contract, and that, in undertaking this inquiry, it is open to the trier of fact to admit extrinsic evidence as to the subjective intentions of the parties at that time. In my view, this approach is not quite accurate. **The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.**[26] [emphasis added]

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25 *Eli Lilly & Co. v. Novapharm Ltd.*, [1998] S.C.J. No. 59 at paras. 54-56 (QL) [***Eli Lilly***]; *Dumbrell v. The Regional Group of Companies Inc.*, [2007] O.J. No. 298 at paras. 48-50 (C.A.) (QL); *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, [1998] O.J. No. 4368 at paras. 24-27 (C.A.) (QL); *Allarco Entertainment 2008 Inc. v. Rogers Communications Inc.*, [2011] O.J. No. 4686 at paras. 116-119 (S.C.J.) (QL).

26 *Eli Lilly*, *supra* at para 54-56.

33. In *Toronto Railway v. Toronto (City)*, the Supreme Court of Canada explained the duty of a court in construing a contract in the following manner:

> In construing an instrument in writing, the court is to consider what the facts were in respect to which the instrument was framed, and the object as appearing from the instrument, and taking all these together it is to see what is the intention appearing from the language when used with reference to such facts and with such an object, and **the function of the court is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably admit of. Its duty is to interpret, not to enact. It may be that those who are acting in the manner, or who either framed or assented to the wording of the instrument, were under the impression that its scope was wider and that it afforded protection greater than the court holds to be the case. But such considerations cannot properly influence the judgment of those who have to judicially interpret an instrument. The question is not what may be supposed to have been intended, but what was said. More complete effect might in some cases be given to the intentions of the parties if violence were done to the language in which the instrument has taken shape; but such a course would on the whole be quite as likely to defeat as to further the object which was in view.**[27] [emphasis added]

34. The purpose of the Consulting Agreement is clear and unambiguous on its face, and was succinctly set out in the preamble thereto:

> The Consultant is an executive of the Corporation who had gained such a level of knowledge, experience and competence in the Corporation's business that **it is in the Corporation's interest**, following his retirement from employment, **to ensure that the Corporation continues to have access to the Consultant for advice and consultation and the Corporation also wishes to ensure that the Consultant shall not engage in activities which are competitive with the Corporation's business.** [emphasis added]

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[27] *Toronto Railway v. Toronto (City)* (1906), 37 S.C.R. 430 at 3-4.

35. Specifically, the Consulting Agreement (as amended) provides for the payment of the Monthly Consulting Fee by Timminco to Mr. Timmins in return for the obligations imposed on him to be available to provide advice to the Company on matters relating to its business and affairs, not to ever compete with the Company and not to ever disclose certain confidential information about the Company.

36. Timminco is correct in that the Consulting Agreement does not provide for any minimum amount of consulting to be provided by Mr. Timmins in order to be entitled to receive the Monthly Consulting Fee. Indeed, it has always been incumbent upon Timminco to request such services from Mr. Timmins, upon which he then had the obligation to provide such services pursuant to the terms of the Consulting Agreement.[28]

37. At the time the Consulting Agreement was entered into in 1996, almost five years before Mr. Timmins resigned as CEO, the Company clearly viewed it as beneficial to agree to pay him the Monthly Consulting Fee in return for his being readily available to provide (and to provide, if so requested) ongoing business advice to Timminco, whether or not such services were actually requested, and further to not ever compete with Timminco. The fact that Timminco may not have historically made the most effective use of the Consulting Agreement cannot be grounds to argue that Mr. Timmins is now not entitled to his end of the bargain. In any event, Mr. Timmins did actively provide consulting services to Timminco from 2001 up until his resignation as a director of the Company in 2007, as detailed above.

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[28] Supplementary Timmins Affidavit at paras. 6-7, Supplementary Motion Record, Tab 1, pp. 2-3.

38. Further, the term of the Consulting Agreement is also clear and unambiguous. Section 1(b) of states as follows:

> **"consulting period"** means the period from the first day of the month coincident with or next following the Consultant's retirement until:
>
> (i) the Consultant's death; or
>
> (ii) the date specified in a notice given by the Corporation in accordance with the provisions of paragraph 7
>
> whichever shall first occur.

39. There is nothing in the definition of consulting period as set out above to indicate that the Parties intended that they would be relieved of their respective obligations under the Consulting Agreement if the Company was granted protection under the CCAA. Mr. Timmins was therefore entitled to assume, as he did, that his obligations under the agreement continued notwithstanding the commencement of CCAA proceedings. Indeed, the stay in the CCAA Order prohibited him from ceasing to perform his obligations.[29]

40. If, for some reason, Mr. Timmins did not provide business advice when requested to by Timminco, or if Mr. Timmins breached the non-compete or non-disclosure provisions of the Consulting Agreement, then by its terms Timminco would no longer have any obligation to continue paying him. Accordingly, it cannot be said that Mr. Timmins earned his rights to payment during his employment because if he breached his continuing and ongoing obligations, then Timminco would no longer have the obligation to pay him. Mr. Timmins earned his right to payments under the

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[29] Initial Order dated January 3, 2012 at para. 21.

Consulting Agreement every day after the effective date of such agreement as a result of continuing to comply with his obligations under it.

41. While Timminco may now say that it is no longer in its benefit to uphold the bargain struck between the Parties given its existing circumstances, the proper way to deal with this in the context of a CCAA proceeding was for the Company to comply with the provisions of section 32 of the Act at the time it entered into CCAA protection, as discussed further below, not to simply cease performing as it did.

B. The Consulting Agreement is Not an Agreement Relating to Termination, Retirement or Pension Benefits

42. Contrary to the claim made at paragraph 10 and elsewhere in Timminco's Notice of Cross-Motion, the Consulting Agreement is not "in substance" an agreement relating to termination, retirement or pension benefits. Instead, the Parties executed a clear and unambiguous Consulting Agreement that includes, as one of its terms, a perpetual non-compete clause. While Mr. Timmins did sign a Release, that Release was included as a provision in the separate and distinct Resignation Agreement, which was entered into almost five years after the execution of the Consulting Agreement. Viewed objectively, the Consulting Agreement is an agreement relating to the provision of consulting services by Mr. Timmins to Timminco, and requiring Mr. Timmins to adhere to permanent and ongoing non-compete and confidentiality obligations and, in any event, there is a distinct Resignation Agreement which deals explicitly with issues relating to Mr. Timmins' resignation from the Company.

43. Further, the Monthly Consulting Fee does not serve to replace or create any retirement plan or pension benefits that Mr. Timmins was entitled to. In fact,

Mr. Timmins was not entitled to *any* retirement or pension benefits at the time of his resignation, as the pension plan in which he had participated prior to his resignation was terminated and wound up in 1998 with a lump sum entitlement having been paid out.

44. The Consulting Agreement is also not akin to a pension as is alleged, as pension benefits characteristically provide for a right of survivorship.[30] The Consulting Agreement includes no term providing for any such rights to Mr. Timmins. The Consulting Agreement also did not provide for any payment to be made out in the event that Mr. Timmins died shortly after his resignation.

45. Additionally, the fact that Timminco chose to record the Monthly Consulting Fee as a retirement allowance in its 2002 T4A statement is not relevant to the objective interpretation and characterization of the Consulting Agreement at the time that it was executed. As noted by the Supreme Court in *Eli Lilly*, evidence of one party's subjective intention respecting the intent of the parties at the time of contracting has no place in the objective interpretation of agreements entered into between sophisticated commercial parties.[31]

46. All of Mr. Timmins' business and personal tax matters were and continue to be dealt with by his professional tax advisors. He provided his tax advisors with all of his tax related documentation, including the tax documents that he received from Timminco, in the context of their dealing with all of his business and personal tax matters. Mr. Timmins' tax advisors never raised any issues with him concerning the

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30 See for example *Pension Benefits Act*, R.S.O. 1990 P.8, s. 44(1).

31 See *Eli Lilly*, *supra* at paras. 54-56.

manner in which Timminco chose to record the Monthly Consulting Fee in its company tax filings.[32]

47. Mr. Timmins had no control over, and was not involved in discussions about, the manner in which Timminco chose to record the Monthly Consulting Fee in its company tax filings. At no time was there an agreement between the Parties as to the way in which the Monthly Consulting Fee would be recorded for tax purposes.[33]

48. Timminco's recording of the Monthly Consulting Fee is entirely subjective and is not reflected in the language used by the parties in the Consulting Agreement. As such, the categorization of the payments in the Company's tax forms cannot be determinative of the issue before this Court.

49. Had the Parties intended to execute an agreement, the purpose of which was to provide Mr. Timmins with termination, retirement or pension benefits as is alleged by Timminco, they had the ability to do so. They also had the ability to do so subsequently in the context of the Resignation Agreement. However, in the absence of any language whatsoever indicating that such was the intention of the Parties at the time of contracting, it is reasonable to assume that these sophisticated commercial parties made the deliberate choice to execute a consulting agreement (and deliberately not to amend it other than for payment terms at the time of the Resignation Agreement) and intended the consequences flowing therefrom. The Parties were entirely capable of

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32 Second Supplementary Affidavit of J. Thomas Timmins sworn May ■, 2012 ["**Second Supplementary Timmins Affidavit**"] at para. 3, Second Supplementary Motion Record, Tab 1, p. 2.

33 Second Supplementary Timmins Affidavit at para. 4, Second Supplementary Motion Record, Tab 1, p. 2.

inserting language into their agreement that would in some way indicate that its purpose was to provide for termination, retirement or pension benefits. They did not do so. Absent an indication of contrary intention in the terms of the agreement itself, this Court should interpret the Consulting Agreement in accordance with the cardinal presumption that the Parties "intended what they said".[34]

C. The CCAA Order Does Not Preclude Mr. Timmins' Claim for the Unpaid Monthly Consulting Fees

50. Contrary to the assertion at paragraph 1 of the Notice of Cross-Motion and elsewhere in Timminco's materials, Timminco's obligations under the Consulting Agreement do not "constitute pre-filing obligations which are stayed by the [CCAA Order]". The CCAA Order not only permits Timminco to make such payments, but also precludes Mr. Timmins from discontinuing performance of his obligations under the Consulting Agreement.

i. The CCAA Order Does Not Stay Pre-Filing Obligations

51. The terms of the CCAA Order do not stay pre-filing obligations as is alleged in Timminco's Cross-Motion.

52. Paragraph 18 of the CCAA Order deals with the staying of legal proceedings against the Company, and states that during the designated period "no proceeding or enforcement process in any court or tribunal shall be commenced or continued against or in respect of [Timminco]" during the Stay Period (as that term is defined in the CCAA Order). This paragraph does not refer, nor does it apply to, the

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[34] *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, [2007] O.J. No. 1083 at para. 24 (C.A.) (QL).

staying of Timminco's "pre-filing obligations". In fact, there is no language in the CCAA Order, in paragraph 18 or otherwise, providing for a stay of Timminco's pre-filing obligations.

53. In any event, as was previously noted, any Monthly Consulting Fees due on and after January 3, 2012 are post-filing obligations and would therefore not be impacted by a paragraph purporting to stay pre-filing obligations, if such a paragraph existed in the CCAA Order (which it does not).

ii. Timminco is Not Precluded from Paying the Unpaid Monthly Consulting Fees

54. The CCAA Order does not contain any provision that would operate to preclude Timminco from paying the unpaid Monthly Consulting Fees to Mr. Timmins. To the contrary, the Company is expressly permitted to make such payments pursuant to a number of paragraphs in the CCAA Order.

55. For example, paragraph 4 of the CCAA Order states:

> ... The Timminco Entities shall be authorized and empowered to **continue to retain and employ the** employees, **consultants**, agents, experts, accountants, counsel and such other persons (collectively, the **"Assistants") currently retained or employed by them** ... [emphasis added]

56. Paragraph 7 of the CCAA Order further states:

> THIS COURT ORDERS that the Timminco Entities shall be entitled but not required to pay the following expenses **whether incurred prior to or after this Order:**
>
> (a) all outstanding **and future wages, salaries**, employee and pension benefits, vacation pay and expenses,

> **and similar amounts** owed to any Assistants [which is defined to include consultants] **payable on or after the date of this Order**, in each case incurred in the ordinary course of business and **consistent with existing compensation policies and arrangements** ... [emphasis added]

57. Finally, paragraph 8 of the CCAA Order provides that Timminco shall be entitled to pay for services supplied to it following the date of the CCAA Order.

58. As can be seen by the plain language of the aforementioned paragraphs, Timminco is expressly permitted to continue to retain Mr. Timmins' services and to pay any Monthly Consulting Fees accrued on or after the date of the CCAA Order.

59. Further support for this contention can be found in paragraph 11 of the CCAA Order which sets out those payments that Timminco was specifically directed to stop making. Payments in the nature of the Monthly Consulting Fee are not referred to in this paragraph.

iii. Mr. Timmins is Bound to Continue Performing His Obligations Under the Consulting Agreement

60. Finally, the terms of the CCAA Order actually require that Mr. Timmins continue to perform his obligations under the Consulting Agreement during the applicable Stay Period. Paragraph 21 states:

> THIS COURT ORDERS that during the Stay Period, no Person having oral or written agreements with the Timminco Entities shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform or provide any right, renewal right, contract, agreement, license, permit or access right in favour of or held by the Timminco Entities ...

61. By operation of paragraph 21, Mr. Timmins was, and still is for the duration of the Stay Period, required to provide his consulting services to Timminco if so

requested, and to adhere to the continuing non-compete and non-disclosure obligations imposed on him by the Consulting Agreement. It would be inherently unfair for the CCAA Order to both compel Mr. Timmins to continue to perform his obligations under the Consulting Agreement, and at the same time permit Timminco to receive the benefit of these obligations for several months after the effective date of the CCAA Order without remitting payment of any kind.

D. The Consulting Agreement Should Not Be Disclaimed

62. The Consulting Agreement should not be disclaimed because the Company's ongoing obligations under the agreement have not impeded its ability to effect a successful sale of its assets, and the disclaimer would objectively result in significant financial hardship to Mr. Timmins.

63. Section 32(4) of the CCAA sets out the factors to be considered by a court in determining whether to approve a proposed disclaimer:

> 32(4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

64. It is of note that these factors are not exhaustive, and section 32 does not purport to set out a list of criteria that are required to be met in order to grant the Company's request.

i. The Monitor has Approved the Disclaimer

65. With respect to subsection (a), it is acknowledged that the Monitor has approved the proposed disclaimer.

ii. The Disclaimer Would Not Necessarily Enhance the Prospects of a Viable Arrangement Being Made

66. Contrary to the assertions made at paragraphs 34-40 of the Kalins Affidavit filed on the Cross-Motion, disclaimer of the Consulting Agreement would not necessarily enhance the prospects of a viable compromise or arrangement being made in respect of the Company.

67. There is no evidence that the continuing existence of the Consulting Agreement has impeded, or would in the future impede, Timminco's ability to effect a successful sale of its assets for the benefit of its stakeholders. Indeed, there has been a successful auction for all of the assets of Timminco's wholly owned operating subsidiary Bécancour Silicon Inc., and the Company has brought motions seeking approval of related sales, all of which has occurred notwithstanding the Company's continuing obligations under the Consulting Agreement.

68. Further, it is inappropriate for Timminco to support its request for disclaimer of the Consulting Agreement by claiming that payment of the Monthly Consulting Fee would result in default under the DIP Agreement, as Mr. Timmins was not provided with notice of the motion to approve the DIP Agreement and therefore did not have an opportunity to argue that the Monthly Consulting Fee should be included in the weekly cash flow projections. It would be inherently unfair to allow Timminco to rely

on its potential default under the DIP Agreement as support for its request that the disclaimer be granted, when such alleged default flows directly from the Company's own decision not to provide Mr. Timmins with proper notice of the motion to approve the DIP Agreement.

69. In any event, there is nothing in the DIP Agreement which would preclude Timminco from paying the Monthly Consulting Fee to Mr. Timmins. Pursuant to section 13(c) of the DIP Agreement, Timminco is permitted to use the DIP Facility for certain specified purposes, and these purposes clearly contemplate payment of the Monthly Consulting Fee. Specifically, section 13(c) states that the DIP Facility may be used to fund:

> ... the Borrower's operating costs, **expenses and liabilities (including, without limitation, wages,** bonuses, vacation pay, active employee benefits and current service contributions to all registered pension plans, but specifically excluding any special payments in respect of pension plans and payments relating to post-retirement benefits) in accordance with the Cash Flow Projections ...

70. The language of this section, particularly the use of the phrase "without limitation" is broad and inclusive, and clearly contemplates payment of the Monthly Consulting Fee.

71. Further, pursuant to section 6 of the DIP Agreement, Timminco was required to provide weekly cash flow projections to the DIP Lender at the time that the DIP Agreement was executed. Section 6 further states, however, that the Company is required to "keep the DIP Lender apprised on a weekly basis of its cash flow requirements by providing subsequent cash flow projections".

72. The cash flow projections appended to the DIP Agreement have been amended, and the subsequent cash flow projections have varied materially from the initial forecasts, including those projections respecting Timminco's operating costs.[35] Therefore, in order for Timminco to pay the Monthly Consulting Fee in a manner that complies with the DIP Agreement, it would simply have to include payment of this amount in its subsequent cash flow projections.

73. Considering the fact that Mr. Timmins was not notified of the motion to approve the DIP Agreement, that the terms of the DIP Agreement do not preclude payment of the Monthly Consulting Fee, and that Timminco's subsequent cash flow projections have varied materially from its initial forecasts, there is simply no reasonable basis on which Timminco can claim that payment of the Monthly Consulting Fee would result in a breach of the DIP Agreement.

iii. The Disclaimer Will Objectively Result in Significant Financial Hardship to Mr. Timmins

74. Disclaimer of the Consulting Agreement would objectively result in significant financial hardship to Mr. Timmins.

75. Mr. Timmins has admitted in the context of these proceedings that if the test of whether the disclaimer of an agreement that pays a party $250,000 per year will cause "significant financial hardship to that party" depends on the individual

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35 Second Supplementary Timmins Affidavit at paras. 5-6, Second Supplementary Motion Record, Tab 1, pp. 2; Comparison of the forecast presented in the DIP Agreement to the "May 7th Forecast" presented in the Monitor's Report, Exhibit "**A**", Second Supplementary Motion Record, Tab A.

characteristics and circumstances of that party, disclaimer of the Consulting Agreement will not cause significant financial hardship to Mr. Timmins.

76. There is no case law describing the type of evidence that is required to show "significant financial hardship" for the purpose of section 32 of the CCAA. This Court can take guidance, however, from jurisprudence concerning the type of evidence required to show "material prejudice" for purposes of both the CCAA and the *Bankruptcy and Insolvency Act* (the "**BIA**").[36]

77. In seeking to have a court ordered stay lifted in the context of ongoing CCAA or BIA proceedings, a creditor is required to demonstrate that, *inter alia*, it will suffer "material prejudice" if the stay in question is not lifted. Courts have consistently held that in this context, a creditor is required to show *objective* prejudice as opposed to *subjective* prejudice.

78. As stated by Farley J. in *Re Cumberland Trading Inc.*:

> I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one – i.e., it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *qua* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause.[37]

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36 R.S.C., 1985, c. B-3.

37 [1994] O.J. No. 132 at para 11 (Gen. Div. (Comm. List)) (QL). While Farley J.'s statements were made in the context of the BIA, they have been subsequently adopted in cases considering the phrase "material prejudice" for purposes of the CCAA, see for example *Scanwood Canada Ltd. (Re)*, [2011] N.S.J. No. 447 at para 21 (S.C) (QL).

79. Farley J.'s comments are equally apposite when considering the evidence that should be required to establish "significant financial hardship" under section 32 of the CCAA. Were it otherwise, it would be impossible for "big creditors" to ever succeed in opposing requests to disclaim agreements to which they are parties, regardless of the circumstances surrounding the proposed disclaimer.

80. In the present case, Mr. Timmins stands to lose approximately $250,000 per year if the Consulting Agreement is disclaimed. This is an objectively large amount of money for any party to lose, including Mr. Timmins. Whether or not the loss of this money causes significant financial hardship to a party, taking into account that party's individual characteristics and circumstances, should be irrelevant.

81. For all of the above reasons, this Court should not grant the Company's request to disclaim the Consulting Agreement.

E. Timminco Should Have Disclaimed the Consulting Agreement at the Outset of its CCAA Proceedings

82. In any event, if Timminco had a desire to disclaim the Consulting Agreement, the appropriate time to do so was at the time the Company was granted CCAA protection or forthwith thereafter given a debtor's obligation to act with due diligence and good faith.

83. Section 32 of the CCAA, in force and effect as a result of the 2009 amendments to the Act, provides a clear statutory process for the unilateral termination of agreements by a debtor involved in a CCAA proceeding, subject to specific limitations. Section 32(1) states as follows:

> 32. (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

84. The rationale for the enactment of section 32 was to provide a statutory procedure which would enable debtor companies who have commenced proceedings under the CCAA to be freed from "unwanted and burdensome agreements that make up part of the financial distress experienced by [them]."[38]

85. Section 32 affords debtor companies involved in CCAA proceedings with exceptional relief from their ordinary private law obligations. In the ordinary course, parties would be required to negotiate (either at the time of contracting or at some point thereafter) for a clause in their agreement which specifically grants a right of unilateral termination in specified circumstances to one or both parties. There is no such clause in the Consulting Agreement.

86. Practically speaking, section 32 would have no effect if debtors could simply choose not to perform their ongoing contractual obligations while under the court's protection. In light of the 2009 amendments to the CCAA, if a debtor files and is granted protection under the CCAA, then it must continue to honour its ongoing contractual obligations unless such obligations are first disclaimed in the manner prescribed by section 32.

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[38] Corporate and Insolvency Law Policy, "Bill C-55: Clause by Clause Analysis", online: Industry Canada <http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00825.html>.

87. In circumstances such as in the present case where a company becomes insolvent, primary secured creditors have a number of realization avenues available to them: private receivership; court appointed receivership; application for a bankruptcy order; or a consensual CCAA proceeding. Each avenue has its advantages and disadvantages as to expediency and degree of insulation from liabilities such as successor employer and environmental liabilities. In this case, the debtor-in-possession lender and stalking horse bidder, QSI, has chosen to run a sales process via a cooperative CCAA proceeding with Timminco.

88. In the present case, the primary secured creditor is benefiting from the implementation of a realization process by means of a liquidating CCAA proceeding. This was an avenue chosen by Timminco and QSI working cooperatively. Such a process has its obligations as well as its benefits. One of those obligations is to either disclaim ongoing contracts in accordance with section 32, or to otherwise continue to honour any obligations flowing from them.

89. Accordingly, if Timminco was of the opinion that there was no utility in continuing to hold Mr. Timmins to his continuing obligations under the Consulting Agreement upon being granted CCAA protection, then it should have provided a disclaimer notice to him upon or shortly after filing. It did not. The Company simply stopped paying Mr. Timmins without providing any notice and without otherwise releasing him from his own obligations thereunder.

F. Even if the Consulting Agreement is Disclaimed, Timminco is Still Required to Pay its Post-Filing Obligations Accrued Before the Effective Date of the Disclaimer

i. Timminco is Still Required to Pay the Post-Filing Obligations Owing to Mr. Timmins

90. However, even if the Consulting Agreement is disclaimed, Timminco is not relieved of the obligation to pay all post-filing obligations which have and will continue to accrue until the date that any such disclaimer is effective.

91. Generally speaking, the case law indicates that a creditor is entitled to payment of all post-filing obligations that are accrued under an ongoing agreement up until the date that the agreement in question is disclaimed by the debtor.

92. For example, in *Re Budget Waste Inc.*,[39] a decision of the Alberta Court of Queen's Bench, the debtor operated a waste disposal company and it had a fleet of vehicles, most of which were on lease from various lessors. The debtor filed for CCAA protection on March 4, 2009. In the course of the next eight months, the debtor and the monitor reviewed its operations and concluded that certain of the vehicle leases were uneconomical as the vehicles were no longer being used by the debtor company. On November 11, 2009, the debtor applied to the Court for permission to terminate the leases and the question arose as to whether the lessors were entitled to payment in full for unpaid rents which had accrued since the date of the filing. Lo Vecchio J. held that the debtor controlled the process, in the sense that it could have minimized the lessors' claims by an early disclaimer and that, having failed to move quickly, it should be required to pay the post-filing amounts accrued.

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39 [2009] A.J. No. 1456 (Q.B.) (QL) [***Budget Waste***].

93. In the present case, Mr. Timmins' obligations under the Consulting Agreement persist for the entire consulting period which is still ongoing. In fact, as of the date of the filing of this Factum, Mr. Timmins has continued to uphold his obligations under the agreement. He has at all times been prepared to provide his consulting services whenever from time to time requested by Timminco, and has continued to adhere to his non-compete and non-disclosure obligations.

94. As can be seen from the decision in *Budget Waste*, the fact that Timminco has not recently requested consulting services from Mr. Timmins is irrelevant when considering Mr. Timmins' entitlement to the amounts accrued post-filing; the relevant consideration is that Mr. Timmins continues to uphold his end of the bargain.[40] The Consulting Agreement is still in force, and until the date that the disclaimer is effective, Timminco is also required to live up to its end.

ii. The Effective Date of the Disclaimer Should Be No Earlier than the Date of this Court's Disposition on the Motion

95. Taking into consideration the factual circumstances leading up to the hearing of the present Motion, the effective date of the disclaimer should not be April 30, 2012 and in any event, should be no earlier than the date of this Court's determination on the Motion.

96. Section 32(5) of the CCAA states the following with respect to the effective date of a disclaimer:

> (5) An agreement is disclaimed or resiliated

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40 *Ibid.* at para. 27.

> (a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);
>
> (b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) **or on any later day fixed by the court**; or
>
> (c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court. [emphasis added]

97. On March 30, 2012, counsel for Timminco sent a letter to Mr. Timmins' counsel enclosing a formal notice of disclaimer which was to be effective April 30, 2012. In accordance with the time limit prescribed in section 32(2) of the CCAA, on April 13, 2012, Mr. Timmins filed his Motion objecting to the disclaimer of the Consulting Agreement. Counsel to Mr. Timmins sought to have this Motion heard in advance of April 30, but on account of scheduling considerations, the Motion was unable to be heard until June 4, 2012.

98. In these circumstances, it would be particularly appropriate for the Court to use the discretion conferred on it by section 32(5)(b) to set a later day for the effective date of the disclaimer than that requested by Timminco in its notice of disclaimer.

99. Given that the CCAA Order prohibits Mr. Timmins from ceasing to comply with his obligations under the Consulting Agreement, it is only fair that payment for such obligations should be made up until the date that this Court makes a determination on the present Motion. As previously stated, Timminco as the debtor company is required to act with due diligence and good faith. This implies an onus on the Company to hear objections expediently, or to otherwise continue to meet its ongoing obligations. It

would be unfair to have Timminco issue its notice of disclaimer, require Mr. Timmins to adhere to his obligations under the Consulting Agreement for over two months before for his Motion is heard, and then ultimately determine that he is not entitled to payment for all or a portion of that time.

PART V - ORDER SOUGHT

100. Mr. Timmins respectfully requests that: (i) Timminco be ordered to comply with its post-filing obligations under the Consulting Agreement and to forthwith remit to Mr. Timmins the amounts he is entitled to for the period from January 1, 2012 to the date of this Motion; and (ii) this Court deny Timminco's request to have the Consulting Agreement disclaimed thereby requiring Timminco to continue paying the Monthly Consulting Fees accrued after the date of this Motion for the period that the Consulting Agreement remains in force.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 28, 2012

DAVIES WARD PHILLIPS & VINEBERG LLP
4400 - 1 First Canadian Place
Toronto, ON M5X 1B1

Robin B. Schwill (LSUC#: 38452I)
Natasha MacParland (LSUC#: 42383G)
Chantelle T. Spagnola (LSUC#: 60620Q)

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Applicant,
J. Thomas Timmins

SCHEDULE "A"
LIST OF AUTHORITIES

Case Law

1. *Allarco Entertainment 2008 Inc. v. Rogers Communications Inc.*, [2011] O.J. No. 4686 (S.C.J.) (QL)

2. *Budget Waste Inc. (Re)*, [2009] A.J. No. 1456 (Q.B.) (QL)

3. *Cumberland Trading Inc. (Re)*, [1994] O.J. No. 132 (Gen. Div. (Comm. List.)) (QL)

4. *Scanwood Canada Ltd. (Re)*, [2011] N.S.J. No. 447 (S.C.) (QL)

5. *Dumbrell v. The Regional Group of Companies Inc.*, [2007] O.J. No. 298 (C.A.) (QL)

6. *Eli Lilly & Co. v. Novapharm Ltd.*, [1998] S.C.J. No. 59 (QL)

7. *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, [1998] O.J. No. 4368 (C.A.) (QL)

8. *Toronto Railway v. Toronto (City)* (1906), 37 S.C.R. 430

9. *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, [2007] O.J. No. 1083 (C.A.) (QL)

Secondary Sources

10. Corporate and Insolvency Law Policy, "Bill C-55: Clause by Clause Analysis", online: Industry Canada <http://www.ic.gc.ca/eic/site/clip-pdci.nsf/eng/cl00825.html>

Materials Previously Filed in the CCAA Proceedings

11. Initial Order dated January 3, 2012

12. DIP Agreement entered into between Timminco and BSI dated January 18, 2012 as of January 20, 2012

SCHEDULE "B"
RELEVANT STATUTES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as am.

2. *Pension Benefits Act*, R.S.O. 1990 P.8

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding Commenced at Toronto

FACTUM OF J. THOMAS TIMMINS

DAVIES WARD PHILLIPS & VINEBERG LLP
1 First Canadian Place, Suite 4400
Toronto, ON M5X 1B1

Robin B. Schwill (LSUC#: 38452I)
Natasha MacParland (LSUC#: 42383G)
Chantelle T. Spagnola (LSUC#: 60620Q)

Tel: 416.863.5502
Fax: 416.863.0871

Lawyers for J. Thomas Timmins