

**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 June 4, 2012)**

**(Re Consulting Agreement between Timminco Limited and J. Thomas  
Timmins)**

Dated: May 30, 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 for an order declaring that Timminco's obligations under the Agreement (as defined below) constitute pre-filing obligations which are stayed by the Initial Order.

## PART II - THE FACTS<sup>1</sup>

### *Background*

3. The Applicants' primary business, the production and sale of silicon, is carried on principally through BSI, a Québec-based wholly-owned subsidiary of Timminco. BSI purchases silicon metal produced by Québec Silicon Limited Partnership ("QSLP") for resale to customers in the chemical (silicones), aluminum, and electronics/solar industries. QSLP is a production partnership between BSI and Dow Corning Corporation, of which BSI owns 51%. BSI also produced solar grade silicon for customers in the solar photovoltaic industry through its unincorporated division, Timminco Solar. Timminco Solar ceased active production of its solar grade silicon in January 2010. Timminco also formerly operated a magnesium business through its unincorporated division, Timminco Metals. The Ontario-based manufacturing operations of Timminco Metals were discontinued in June 2008.

May 7 Affidavit, Motion Record, Tab 2, at para. 3.

4. The Timminco Entities were facing severe liquidity issues and significant pension and environmental legacy costs and financial costs related to large outstanding debts.

May 7 Affidavit, Motion Record, Tab 2, at para. 4.

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<sup>1</sup> Capitalized terms used but not defined herein have the meanings ascribed to them in the affidavit of Peter A.M. Kalins sworn May 7, 2012 (the "May 7 Affidavit").

5. As a result, the Timminco Entities were unable to meet various financial covenants set out in their senior secured credit facility and did not have the liquidity needed to meet their ongoing payment obligations. Without the protection of the CCAA, a shut-down of operations was inevitable, which would be extremely detrimental to the Timminco Entities' stakeholders.

May 7 Affidavit, Motion Record, Tab 2, at para. 5.

6. The Timminco Entities were granted protection from their creditors under the CCAA pursuant to the Initial Order on January 3, 2012.

May 7 Affidavit, Motion Record, Tab 2, at para. 6.

7. The Timminco Entities, in consultation with the Monitor, determined that it was in the best interests of the Timminco Entities and their stakeholders to commence a marketing process for the potential sale of all or substantially all of their assets. Pursuant to the Order of Justice Morawetz dated March 9, 2012, the Timminco Entities commenced and completed the marketing process with respect to all or substantially all of their assets.

May 7 Affidavit, Motion Record, Tab 2, at para. 7.

8. The Timminco Entities received bids to purchase the assets of BSI only and an auction was conducted on April 24-25, 2012. There were no bids made to purchase any of the assets of Timminco. The assets of Timminco continue to be marketed separately.

May 7 Affidavit, Motion Record, Tab 2, at para. 8.

*The 1996 Agreement and the Letter Agreement*

9. Mr. Timmins was the Chief Executive Officer of Timminco for at least two decades until his retirement in 2001. Mr. Timmins was also Chairman of Timminco's board of directors and a member of several committees thereof. He was also a significant shareholder of Timminco, through his affiliate Timmins Investments Limited, holding approximately 46% of Timminco's outstanding shares at the time of his retirement.

May 7 Affidavit, Motion Record, Tab 2, at para. 10.

10. On September 19, 1996, Timminco entered into an agreement with Mr. Timmins (the "1996 Agreement") pursuant to which Timminco agreed to pay Mr. Timmins a "monthly amount by which \$29,166.66 exceeds the monthly amount to which [Mr. Timmins] is entitled on [Mr. Timmins'] retirement under any pension or retirement plans of [Timminco]". The monthly payments were to commence on the first day of the month following Mr. Timmins' retirement and terminate only on Mr. Timmins' death (subject to earlier termination due to any breach of obligations by Mr. Timmins).

May 7 Affidavit, Motion Record, Tab 2, at para. 11.

11. Under the 1996 Agreement, Mr. Timmins was to consult with Timminco "within the limits from time to time of his physical and other abilities...; provided, however, that consultation and advice shall never occupy [Mr. Timmins'] time to such an extent as shall prevent him from devoting the greater portion of his time to other activities".

May 7 Affidavit, Motion Record, Tab 2, at para. 12.

12. Mr. Timmins retired as Chief Executive Officer of Timminco effective May 28, 2001. Effective the same day, the 1996 Agreement was amended by letter agreement (the "**Letter Agreement**").

May 7 Affidavit, Motion Record, Tab 2, at para. 13

13. Pursuant to the Letter Agreement, Timminco agreed to pay Mr. Timmins a monthly amount of \$20,833.33 without further deduction except as may be required by law commencing on July 1, 2001.

May 7 Affidavit, Motion Record, Tab 2, at para. 14.

14. Under the Letter Agreement, payment of \$20,833.33 is to be made on a monthly basis irrespective of whether the services of Mr. Timmins' had been engaged or are foreseen to be engaged in the future.

May 7 Affidavit, Motion Record, Tab 2, at para. 16.

15. The Letter Agreement also provided that Timminco would terminate various employment benefits of Mr. Timmins (such as car lease and parking) and would cease to provide Mr. Timmins with office space and secretarial assistance after September 30, 2001. For all intents and purposes, the Letter Agreement concluded whatever employment relationship remained between Mr. Timmins and Timminco.

May 7 Affidavit, Motion Record, Tab 2, at para. 17.

16. In connection with the Letter Agreement and his retirement from Timminco, Mr. Timmins executed a Release and Indemnity which provides, in part, as follows:

*WHEREAS I have agreed to retire voluntarily as Chief Executive Officer and an employee of Timminco Limited and as a director and/or officer of any subsidiaries of Timminco Limited (hereinafter referred to collectively as "Timminco") effective immediately;*

*AND WHEREAS I have agreed to accept the consideration described in the attached letter to me from Timminco dated May 28, 2001 and in the agreement between Timminco and me dated as of September 19, 1996 (collectively, the "Retirement Agreement"), in full settlement of any and all claims I may have relating to my employment with Timminco or the termination thereof;*

...

*I UNDERSTAND AND AGREE that the consideration described above satisfies all obligations of Timminco, arising from or out of my employment with Timminco or the termination of my employment with Timminco, including without limitation obligations pursuant to the Employment Standards Act (Ontario) and the Human Rights Code (Ontario). For the said consideration, I covenant that I will not file any claims or complaints under the Employment Standards Act (Ontario) or the Human Rights Code (Ontario);*

[Emphasis in bold added]

May 7 Affidavit, Motion Record, Tab 2, at para. 18.

### *Mr. Timmins' Involvement with Timminco Following His Retirement*

17. Following his retirement in May 2001, Mr. Timmins remained a member of Timminco's board of directors until October 2007 and served as a member of several board committees until that time, including the Strategic Committee of the board from June 2003 until October 2007. Mr. Timmins received director fees and was reimbursed for his expenses in connection with his services as a member of the board of directors of Timminco and its various committees.

May 7 Affidavit, Motion Record, Tab 2, at para. 20.

18. To the knowledge of the following individuals, Timminco has not sought or received any consulting services from Mr. Timmins following his retirement:

- (a) Mr. Peter A.M. Kalins, Timminco's General Counsel and Corporate Secretary since September 2007;
- (b) Mr. Tim Pretzer, Timminco's President and Chief Operating Officer from April 2003 until August 2005 and President - Magnesium Division from September 2005 to August 2007;
- (c) Mr. Keith D'Souza, who has held various officer positions with Timminco, including Corporate Secretary & Director - Human Resources from May 2001 and Vice-President and Secretary from June 2004 until May 2007;
- (d) Dr. Heinz C. Schimmelbusch, who has been Chairman of Timminco's board of directors since April 2003, and served as Chief Executive Officer from April 2003 until September 2005 and again from August 2007 until August 2011;
- (e) Mr. Arthur R. Spector, who has been a member of Timminco's board of directors since April 2003, served as Vice-chairman of the board from March 2004 until December 2008, Interim Chief Financial Officer from October 2004 until April 2005, and a member of the Strategic Committee of the board from June 2003 until October 2007; and
- (f) Mr. Mickey M. Yaksich, who has been a member of Timminco's board of directors since 1998.



May 7 Affidavit, Motion Record, Tab 2, at paras. 21-27.

19. No correspondence or reports with respect to any consulting advice from Mr. Timmins following his retirement in May 2001 have been located in Timminco's records.

May 7 Affidavit, Motion Record, Tab 2, at para. 28.

*Payments Made to Mr. Timmins by Timminco Following His Retirement*

20. Since the execution of the Letter Agreement, Timminco paid Mr. Timmins approximately \$2,625,000.

May 7 Affidavit, Motion Record, Tab 2, at para. 29.

21. The payments under the Letter Agreement constitute the entirety of Mr. Timmins' entitlements from Timminco following his retirement as Chief Executive Officer. Mr. Timmins is not entitled to and is not receiving any other pension, retirement or severance payments from Timminco following his retirement.

May 7 Affidavit, Motion Record, Tab 2, at para. 15.

22. Timminco filed Statements of Pension, Retirement, Annuity, and Other Income ("**T4A Form**") and/or Statements of Amounts Paid or Credited to Non-Residents of Canada ("**NR4 Forms**") with the Canada Revenue Agency in connection with the payments made by Timminco to Mr. Timmins in each year from 2002 through to 2011.

Supplementary Affidavit of Peter A.M. Kalins, sworn May 23, 2012, at para. 3

["Supplementary Affidavit"].

23. The T4A Forms and NR4 Forms filed by Timminco with respect to Mr. Timmins in each of those years list amounts paid to Mr. Timmins under the category of "*Retiring Allowances*".

Supplementary Affidavit at para. 4.

24. Timminco is not aware of any requests from Mr. Timmins to amend or re-file any of the T4A Forms or NR4 Forms filed by Timminco since 2002.

Supplementary Affidavit at para. 5.

### PART III - ISSUES

25. The issue on this motion is whether Timminco's obligations under the Agreement constitute pre-filing obligations which are stayed by the Initial Order.

### PART IV - LAW AND ARGUMENT

26. The benefits conferred on Mr. Timmins under the 1996 Agreement, as amended by the Letter Agreement (the "**Agreement**") are unsecured pre-filing obligations of Timminco which are stayed and suspended by the Initial Order.

(1) *The Benefits Conferred on Mr. Timmins Under the Agreement are in Substance Unsecured Termination and/or Retirement Benefits*

27. The benefits conferred on Mr. Timmins under the Agreement are in substance unsecured termination and/or retirement benefits. The proper characterization of the Agreement is apparent from, among other things, the following attributes or characteristics:

- (a) the amount of Mr. Timmins' monthly fee under the 1996 Agreement was essentially a "top up" to any other retirement and pension benefits that Mr. Timmins would receive from Timminco;
- (b) the "consulting" term of the 1996 Agreement was to commence the first day of the month following Mr. Timmins' retirement;
- (c) under the Agreement, Mr. Timmins is not entitled to and is not receiving any retirement or pension benefits from Timminco following his retirement other than the payments;
- (d) neither the 1996 Agreement nor the Letter Agreement provide for any minimum amount of consulting to be provided by Mr. Timmins in order to be entitled to receive the monthly payments under the Agreement;
- (e) all other employment benefits and provision of services to enable Mr. Timmins to provide employment services to Timminco were terminated by the Letter Agreement; and
- (f) Mr. Timmins has not provided any consulting services to Timminco following his retirement as Chief Executive Officer.

May 7 Affidavit, Motion Record, Tab 2, at para. 30.

28. In connection with the Letter Agreement and his retirement from Timminco, Mr. Timmins also executed a Release and Indemnity wherein, in consideration of the payments to be received under the Agreement, he released any and all claims he may have had relating to his employment with Timminco or the termination thereof and agreed that the consideration described in the Agreement satisfies all obligations of

Timminco, arising from or out of his employment with Timminco or the termination of his employment with Timminco.

May 7 Affidavit, Motion Record, Tab 2, at para. 19.

29. Releases and indemnities in respect of claims relating to the employee's employment and termination are standard provisions for settlement agreements in respect of an individual's termination of employment granted by former employees in exchange for payments over and above those required by statute.

May 7 Affidavit, Motion Record, Tab 2, at para. 19.

30. The filings made by Timminco with the Canada Revenue Agency with respect to, and with the implicit consent of, Mr. Timmins constitute further evidence of the payments made to Mr. Timmins under the Agreement being in substance unsecured termination and/or retirement benefits.

31. Mr. Timmins' implicit agreement with characterizing the payments as "*Retiring Allowances*" on filings made with the Canada Revenue Agency also creates a strong *prima facie* case against him claiming that the payments were something different from "*Retiring Allowances*".

32. Canadian Courts have held that evidence of earnings as disclosed in tax returns is very strong evidence against any claimant who would contend that the income was in fact higher.

*Bush v. Air Canada*, [1992] N.S.J. No. 17 (N.S.C.A.), Applicants' Book of Authorities, Tab 1, at para. 27.

*Kiani v. Minto Developments*, [1997] O.J. No. 920 (Gen. Div.), Applicants' Book of Authorities, Tab 2, at paras 47-50.

33. Claiming that the information contained on tax returns was dishonest also undermines the credibility of the party making such claim. In *Legault v. Brock Shopping Centre Ltd.*, the British Columbia Supreme Court stated, *inter alia*, as follows:

*Any claimant in his position has to overcome the contradiction of his trial testimony by his filed income tax return, which expressly requires a certification that it is correct, complete and full disclosure and reminds the filer that it is a serious offence to make a false return. The dilemma facing the plaintiff in this case is that he must ask the court to accept as a fact that he was dishonest on an annual basis in filing many false returns, and then he must persuade the court that his evidence at trial should be accepted, notwithstanding undermining his personal credibility.*

*Legault v. Brock Shopping Centre Ltd.*, 2010 BCSC 687, Applicants' Book of Authorities, Tab 3, at para. 52.

34. Based on the foregoing, the Timminco Entities respectfully submit that the benefits conferred on Mr. Timmins under the Agreement are in substance unsecured termination and/or retirement benefits.

**(2) *Termination and Retirement Benefits are Pre-Filing Obligations That Are Stayed Under the Initial Order***

35. The court's power to stay pre-filing obligations is integral to allowing an insolvent debtor company to successfully complete a CCAA process for the benefit of its stakeholders:

*The acknowledged purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. The primary procedural instrument used to achieve that goal is the ability of the court to issue a broad stay of proceedings under Section 11 of the CCAA.*

*The powers vested in the court under Section 11 of the CCAA to achieve these goals include the ability to stay past debts; and the ability to require the continuance of present obligations to the debtor. [Citations omitted]*

*Nortel*, Applicants' Book of Authorities, Tab 5 at paras. 47-48.

36. Canadian courts have repeatedly found that termination and/or retirement benefits are pre-filing unsecured obligations of debtor companies undergoing CCAA proceedings.

*Indalex Ltd. (Re) (2009)*, 55 C.B.R. (5th) 64 (Ont. S.C.J. [Comm. List]) ["Indalex"], Applicants' Book of Authorities, Tab 4 at paras. 9-11

*Nortel*, Applicants' Book of Authorities, Tab 5 at paras. 10, 12, 67

*Fraser Papers Inc. (Re) (2009)*, 55 C.B.R. (5th) 217 (Ont. S.C.J. [Comm. List]), Applicants' Book of Authorities, Tab 6 at paras. 18-19.

37. In *Indalex Ltd. (Re)*, Justice Morawetz found that the supplemental pension benefits payable to certain executives under Indalex Ltd.'s Supplemental Executive Retirement Plan ("SERP") were pre-filing unsecured obligations:

*SERP payments are based on services provided to Indalex prior to April 2009. These obligations are, in my view, pre-filing unsecured obligations. A breach of the SERP payment obligations gives rise to an unsecured claim of the SERP Group against the Indalex Applicants. The SERP Group is stayed from enforcing these payment obligations.*

*The SERP Group has not established that they are entitled to any priority with respect to their SERP benefits and there is, in my view, no basis in principle, to treat the SERP Group differently from any other unsecured creditors of the Indalex Applicants. The reinstatement of the SERP payments would, in my view, represent an improper re-ordering of the existing priority regime.*

...

*SERP payments are not, in my view, payments required to carry on the business and, accordingly, the Indalex Applicants are not authorized [under the Amended and Restated Order] to pay the monthly SERP payments.*

*Indalex, Applicants' Book of Authorities, Tab 4 at paras. 9-11*

38. Similarly, in *Nortel Network Corp. (Re)*, the debtor companies' obligation to make retirement, termination, severance and other related payments to unionized and non-unionized employees were held to be pre-filing obligations. Justice Morawetz stated:

*The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3 [now s. 11.01(a)]. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.*

*Nortel, Applicants' Book of Authorities, Tab 5 at paras. 10, 12, 67*

*Fraser Papers Inc. (Re) (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J. [Comm. List]), Applicants' Book of Authorities, Tab 6 at paras. 18-19.*

39. As described in greater detail above, the benefits conferred on Mr. Timmins under the Agreement are in substance unsecured termination and/or retirement benefits.

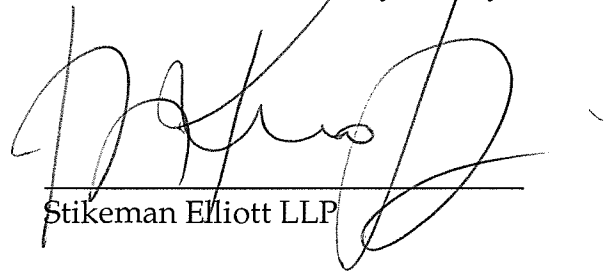
40. The Timminco Entities are insolvent and are not able to honour their obligations to all creditors. If the benefits conferred on Mr. Timmins under the Agreement are not stayed, Mr. Timmins would, in effect, receive a super-priority over other unsecured creditors which would be contrary to the scheme and purpose of the CCAA.

41. Accordingly, the Timminco Entities submit that the benefits conferred on Mr. Timmins under the Agreement are stayed by the Initial Order.

**PART V - ORDER REQUESTED**

42. The Timminco Entities therefore request an Order declaring that Timminco's obligations under the Agreement constitute pre-filing obligations which are stayed by the Initial Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 30<sup>th</sup>/day of May, 2012.

A handwritten signature in black ink, appearing to be "M. K. D.", is written over a horizontal line.

Stikeman Elliott LLP

Lawyers for the Applicants



**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

<b>TAB</b>	<b>DOCUMENT</b>
1.	<i>Bush v. Air Canada</i> , [1992] N.S.J. No. 17 (N.S.C.A.)
2.	<i>Kiani v. Minto Developments</i> , [1997] O.J. No. 920 (Gen. Div.)
3.	<i>Legault v. Brock Shopping Centre Ltd.</i> , 2010 BCSC 687
4.	<i>Indalex Ltd. (Re)</i> (2009), 55 C.B.R. (5th) 64 (Ont. S.C.J. [Comm. List])
5.	<i>Nortel Network Corp. (Re)</i> (2009), 59 C.B.R. (5th) 23 (Ont. S.C.J. [Comm. List])
6.	<i>Fraser Papers Inc. (Re)</i> (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J. [Comm. List])
7.	<i>Schneeberg v. Talon International Development Inc.</i> , 2011 ONCA 687
8.	<i>Macourtice Developments Inc. v. Clarington (Municipality)</i> , 2005 CarswellOnt 7239 (SCJ)

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