

**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 14, 2012)**  
**(Re Stay Extension and Claims Process Approval)**

Date: June 13, 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 Orders included with the Motion Record:

a. extending the Stay Period (as defined below) until September 30, 2012;

and

- b. approving the proposed Claims Procedure (as defined below).

## 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 ("**Québec Silicon**") for resale to customers in the chemical (silicones), aluminum, and electronics/solar industries. Québec Silicon is a production partnership between BSI and Dow Corning Corporation, for resale to BSI's customers, of which BSI owns 51%. BSI also produces 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. The Ontario-based manufacturing operations of Timminco Metals were discontinued in June 2008.

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

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

## STATUS OF THE CCAA PROCEEDINGS

### *Sales Process*

4. The Timminco Entities, with assistance from the Monitor, have carried out a court-approved sales process, which resulted in a Successful Bid made up of a bid by Grupo FerroAtlantica, S.A. ("**Ferro**") and QSI Partners Limited ("**QSI**"), which together comprise substantially all of the Timminco Entities' assets. The Court approved the transactions contemplated by the bids of each of Ferro (the "**Ferro Transaction**") and QSI (the "**QSI Transaction**") by orders dated May 22, 2012 and June 1, 2012, respectively.

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

5. The Timminco Entities continue to work diligently to close the Ferro Transaction and the QSI Transaction.

June 7 Affidavit at paras. 15-17, Motion Record, Tab 2.

6. Based on the purchase price contemplated to be paid under each of the QSI Transaction and the Ferro Transaction, it appears there may be adequate proceeds to fund distributions to unsecured creditors.

June 7 Affidavit at para. 34, Motion Record, Tab 2.

*Subsequent DIP Amendment*

7. On June 1, 2012, this Court approved amending agreement number 2 dated May 9, 2012 between the Timminco Entities and QSI, which provides for an increase in the DIP Facility, as that term is defined in the Order of Justice Morawetz dated February 8, 2012 (the "**DIP Order**"), of up to \$2.5 million ("**Tranche B**"), and certain consequential amendments to the DIP Order (the "**Subsequent DIP Amendment**").

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

8. Under the Subsequent DIP Amendment, the maturity date of the DIP Facility has been extended to July 4, 2012. Tranche B is repayable by the Timminco Entities on or before the closing date of the QSI Transaction, or within two Business Days of the termination of the QSI Agreement.

June 7 Affidavit at para. 22, Motion Record, Tab 2.

**REQUEST FOR EXTENSION OF THE STAY PERIOD**

9. The Initial Order granted a stay of proceedings up to and including February 2, 2012, which was extended to April 30, 2012 and again to June 20, 2012 (the "**Stay Period**") by orders of this Court on January 27 and April 27, 2012 respectively.

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

10. Since the commencement of the CCAA proceedings, the Timminco Entities have continued operating their business as a going concern, with the goal of selling their

business for the benefit of their stakeholders. An extension of the Stay Period to September 30, 2012 is necessary to give the Timminco Entities sufficient time to complete the QSI Transaction and the Ferro Transaction, and to carry out the proposed Claims Procedure. The Timminco Entities have acted and continue to act in good faith and with due diligence. Such an extension would not materially prejudice any creditor, is critical to enabling the Timminco Entities to distribute proceeds of the sales process to unsecured creditors, and is supported by the Monitor.

June 7 Affidavit at paras. 29-33, Motion Record, Tab 2.

11. In its Eleventh Report (the "**Eleventh Report**"), the Monitor opined that the Timminco Entities have sufficient funding from proceeds of sale available for the extension of the Stay Period to September 30, 2012.

Seventh Report

Eleventh Report, para. 29.

## **THE PROPOSED CLAIMS PROCEDURE**

12. In order to be in a position to distribute the potential sales proceeds in excess of secured debt and the Court-ordered charges, the Timminco Entities have developed a procedure (the "**Claims Procedure**") to identify claims which may be entitled to distributions.

June 7 Affidavit at para. 34, Motion Record, Tab 2.

13. The proposed Claims Procedure is set out in detail in paragraphs 34-52 of the June 7 Affidavit.

### PART III - ISSUES

14. The issues on this motion are as follows:

- (a) Should this Court extend the Stay Period up to and including September 30, 2012?
- (b) Should this Court approve the proposed Claims Procedure?

### PART IV - LAW AND ARGUMENT

#### *The Court should Extend the Stay Period to September 30, 2012*

15. 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.

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

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

*. . . Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying*

*the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA – 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. . . .*

*It is well-established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure". However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court. [Citations omitted]*

*Leroy Trucking [Century Services Inc.] (Re)*, 2010 SCC 60 at paras. 70-71, Applicants' Book of Authorities, Tab 1.

17. In *Lehndorff General Partner Ltd. (Re)*, Justice Farley described the CCAA as a statute intended to “*facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy*” and, as such, is “*remedial legislation entitled to a liberal interpretation*”. Justice Farley stated, *inter alia*:

*The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA.*

*Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 [“*Lehndorff*”] at para. 6 (Ont. Gen. Div. [Comm. List]), Applicants' Book of Authorities, Tab 2.

18. Justice Farley also expressly recognized one of the purposes of the CCAA to be the facilitation of ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. He stated:

*The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.*



*...It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally.*

*Lehndorff* at para. 7, Applicants' Book of Authorities, Tab 2.

19. The Stay Period expires on June 20, 2012. An extension of the Stay Period up to and including September 30, 2012 would advance the policy objectives underlying the CCAA by allowing the Timminco Entities to complete the sale transactions with respect to substantially all of their assets, carry out the proposed Claims Procedure and to continue dealing with other issues with respect to their creditors.

20. In *Canwest Global Communications Corp. (Re)*, Justice Pepall granted an extension of the stay of proceedings on the basis that the extension would provide the necessary stability to allow the debtors to continue working towards a resolution that would result in the continuation of their businesses as a going concern. The factors which supported her decision were (a) the cashflow forecast indicated that the debtors had sufficient cash resources to operate throughout the extension of the stay period, (b) the monitor supported the extension, (c) there was a lack of opposition to the motion, and (d) the debtors had acted and were continuing to act in good faith and with due diligence.

*Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (Ont. S.C.J. [Comm. List]) at para. 43, Applicants' Book of Authorities, Tab 3.

21. The Monitor opined that the Timminco Entities will have sufficient funding from proceeds of sale available for the extension of the Stay Period until September 30, 2012.

June 7 Affidavit at para. 23, Motion Record, Tab 2.

Eleventh Report, para. 29.

22. The Monitor believes that the Timminco Entities have acted, and are acting, in good faith and with due diligence and that circumstances exist that make an extension of the Stay Period appropriate. The Timminco Entities are unaware of any creditor who opposes this relief being granted. It is not believed that any creditor will suffer any material prejudice if the Stay Period is extended as requested.

June 7 Affidavit at para. 32, Motion Record, Tab 2.

Eleventh Report, para. 31.

23. The Timminco Entities have acted and continue to act in good faith and have been diligently carrying out their restructuring efforts for the benefit of stakeholders.

June 7 Affidavit at paras. 30, 32, Motion Record, Tab 2.

24. For the foregoing reasons, it is respectfully submitted that the Stay Period should be extended to September 30, 2012.

***The Court should Approve the Proposed Claims Procedure***

25. Section 11 of the CCAA affords the Court the jurisdiction to make any order it considers appropriate in the circumstances, subject to the restrictions set out in the

CCAA itself, which includes the ability to approve a process to solicit and determine claims against the debtor company.

CCAA, s. 11.

26. The Court's authority to approve a process to solicit claims against a debtor company has been described as "well accepted" in Canada. In *Re ScoZinc Ltd.*, Justice Beveridge noted that, in the context of a claims procedure, "the practice has arisen for the court to create by order a claims process that is both flexible and expeditious".

*ScoZinc Ltd. (Re)* (2009), 53 C.B.R. (5th) 96 (N.S. S.C.) at paras. 23 and 25, Applicants' Book of Authorities, Tab 4.

27. The proposed Claims Procedure accords with the discretion given to the courts under the CCAA. The proposed Claims Procedure meets the purpose of claims processes generally, which is "to streamline the resolution of the multitude of claims against an insolvent debtor in the most time sensitive and cost efficient manner".

*Canwest Global Communications Corp. (Re)*, 2011 ONSC 2215, 75 C.B.R. (5th) 156 at para. 40, Applicants' Book of Authorities, Tab 5.

28. The proposed Claims Procedure is fair and efficient. It will require the Monitor to place a notice to creditors in *The Globe and Mail*, the *National Post*, and *Le Presse*. The same notice will be posted on the Monitor's website. Claimants will have at least 28 days' notice of the Claims Bar Date and of the Restructuring Claims Bar Date.

June 7 affidavit at paras. 38, 40, Motion Record, Tab 2.

29. The proposed Claims Procedure is flexible and efficient. It encourages claimants to submit claims via an electronic system but, where necessary, also allows claimants to submit claims via facsimile, personal delivery, courier or prepaid mail.

June 7 affidavit at para. 44, Motion Record, Tab 2.

30. The Claims Procedure proposed by the Timminco Entities is flexible, expeditious and provides for reasonable deadlines and procedures for submitting claims that are appropriate in the circumstances of this case. The Monitor is of the view that the proposed Claims Procedure is appropriate, fair and reasonable in the circumstances and supports its approval by the Court.

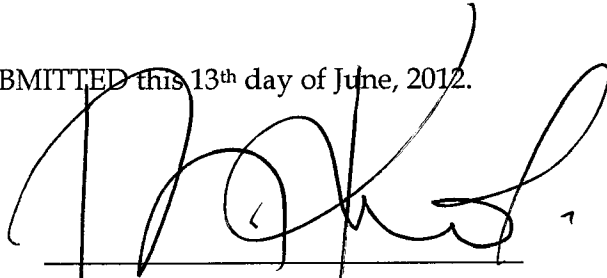
Eleventh Report, para. 24.

31. For the foregoing reasons, it is respectfully submitted that the Claims Procedure should be approved.

#### **PART V - ORDER REQUESTED**

32. The Timminco Entities therefore request an Order substantially in the form of the draft Order attached at Tabs 3 and 4 of the Timminco Entities' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of June, 2012.

A handwritten signature in black ink, appearing to be 'R. K. L.', written over a horizontal line. The signature is stylized and cursive.

Stikeman Elliott LLP

Lawyers for the Applicants

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

1. *Leroy Trucking [Century Services Inc.] (Re)*, 2010 SCC 60.
2. *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div. [Comm. List]).
3. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (Ont. S.C.J.) [Comm. List].
4. *ScoZinc Ltd. (Re)* (2009), 53 C.B.R. (5th) 96 (N.S. S.C.).
5. *Canwest Global Communications Corp. (Re)*, 2011 ONSC 2215, 75 C.B.R. (5th) 156.

**SCHEDULE "B"**  
**RELEVANT STATUTES**

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

...

**11. General power of court**

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**

11.02 (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.

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R.S.C. 1985, c. C-36, AS AMENDED

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

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LIMITED AND BECANCOUR SILICON INC.

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Proceeding commenced at Toronto

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(RETURNABLE June 14, 2012)**

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