

**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 May 14, 2013)**

**(Re Stay Extension to July 15, Extension of CRO Agreement and Transfer of  
Tycos Property)**

Dated: May 10, 2013

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**FACTUM OF THE APPLICANTS  
(Motion returnable March 5, 2013)  
(Re Stay Extension to July 15, Extension of CRO Agreement and Transfer of  
Tycos Property)**

**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:

(a) An Order:

- (i) Extending the Stay Period (as defined below) until July 15, 2013 (the “**Stay Extension**”);
  - (ii) Extending the term of the CRO Agreement (as defined below) pursuant to the terms of the Third CRO Extension agreement (as defined below); and
- (b) Approving the agreement of purchase and sale (the “**Tycos Agreement**”) between Timminco and Ehrlich Samuel Properties Inc. (the “**Purchaser**”) providing for the transfer of the Tycos Property (as defined below), and authorizing and directing the Timminco Entities and the Monitor (as defined below) to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transaction contemplated by the Tycos Agreement (the “**Tycos Transaction**”).

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

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

May 7 Affidavit at para. 3.

4. Due to a number of factors, the Timminco Entities were facing severe liquidity issues and were unable to meet their ongoing payment obligations. As such, the Timminco Entities were granted protection from their creditors under the CCAA

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<sup>1</sup> Capitalized terms used herein but not defined have the meaning as defined in the Affidavit of Sean Dunphy dated May 7, 2013 Applicants’ Motion Record, Tab 2 (the “**May 7 Affidavit**”).

pursuant to the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012 (the “**Initial Order**”). FTI Consulting Canada Inc. was appointed as the monitor (the “**Monitor**”) pursuant to the Initial Order.

May 7 Affidavit at para. 4.

#### **MEMPHIS PROPERTY**

5. Paragraphs 15 to 28 of the May 7 Affidavit describe the Memphis Property, which is owned by Timminco Properties Inc. (“**TPI**”), a wholly-owned subsidiary of Timminco Holdings Inc. (“**THI**”). THI is itself a wholly-owned subsidiary of Timminco. THI and TPI are inactive and have no operations, and the Memphis Property is now a vacant lot. The Memphis Property is subject to the Right of First Refusal (discussed at paragraphs 22 and 25 of the May 7 Affidavit). Pursuant to a purchase agreement dated April 22, 2013 (the “**Memphis Agreement**”), approximately 30 acres of the Memphis Property (the “**Severed Lot**”) are to be sold following severance from the balance of the Memphis Property. The CRO intends to upstream the proceeds of the sale of the Severed Lot to Timminco upon receipt but will require additional time in order to do so.

May 7 Affidavit at paras. 15-28.

#### **THE TYCOS PROPERTY**

6. The Timminco Entities continue to own real property located at 90 Tycos Drive in Toronto, Ontario (the “**Tycos Property**”). The Tycos Property is subject to a long-term lease in favour of 2113721 Ontario Inc. (the “**Tenant**”). The lease is dated January

1, 2007 for a fifteen year term, renewable for further five years at a fixed rent (\$4,375 plus GST) with the tenant covering all ownership expenses. The rent is below market rates.

May 7 Affidavit at paras. 33-34.

7. During prior operations on the site, there was a spill of a solvent which has necessitated the installation of a series of wells and pumps to collect groundwater to mitigate migration of the chemicals and to facilitate the dispersal via an air stripper. Timminco is operating under a Certificate of Approval issued by the MOE and the property requires on-going monitoring and compliance costs to pump and treat ground water tainted from a spill associated with industrial activities that a Timminco predecessor formerly carried on at the site.

May 7 Affidavit at paras. 35-36.

8. Currently, net of expenses of remediation/compliance under the Certificate of Approval, Timminco is deriving approximately \$25,000 per year of net revenue from the Tycos Property. This amount varies depending upon, among other things, timing of testing and reporting obligations and changing costs of these as well as the need to replace some equipment from time to time.

May 7 Affidavit at para. 38.

9. The Timminco Entities have ceased operations and, as a direct result of such cessation, have no further use for the Tycos Property and, therefore, attempted to market and sell it.

May 7 Affidavit at para. 39.

*The Tycos Agreement*

10. The Tycos Property was a difficult one to market due to the long term, low-rent lease and the perceived environmental risk associated with ownership. The Timminco Entities attempted to negotiate a proceeds-sharing agreement with the Tenant to permit a marketing of the property clear of the lease without success as the tenant was unwilling to contemplate moving at this time.

May 7 Affidavit at paras. 40-41.

11. After considering proposals from other agents, Cushman Wakefield was retained pursuant to a sale agent and listing agreement signed December 17, 2012. Due to the unique nature of property, a flat fee commission of \$25,000 was agreed to be payable from the proceeds of a successful sale.

May 7 Affidavit at para. 42.

12. There was some interest from potential buyers shown in January, 2013, but only two parties made offers to purchase the Tycos Property. One of these parties made a conditional offer to purchase the Tycos Property at a price of \$500,000. Although this price was higher than the price offered by Purchaser, after consultation with the Monitor, the CRO determined not to pursue this offer for the following reasons:

(a) The proposed purchaser had conducted no environmental due diligence and had no known experience in dealing with "brownfield" sites. In the CRO's view, it was important to have an owner who could assume the obligations under the Certificate of Approval and work with the Ministry of the Environment;

(b) The proposed purchaser had not met the Tenant and its proposal was conditional upon reaching an agreement with the Tenant. As the CRO had already attempted without success to reach a joint marketing arrangement with the Tenant to enable the property to be considered by the market clear of some or all of the overhang of the lease obligation, the CRO was concerned this condition could not be met; and

(c) The price appeared to bear little relationship to the economic value of a property subject to a long term lease with net income of approximately \$25,000 per year. Given the highly conditional nature of the proposed transaction, the CRO feared that the estate of Timminco was at risk of having the property tied up for an extended period of time in favour of a purchaser who would very likely seek to renegotiate the price before agreeing to waive conditions.

13. The Purchaser submitted an offer to purchase the Tycos Property and the parties entered into the Tycos Agreement, which is dated January 31, 2013. Under the Tycos Agreement, the Purchaser will pay a purchase price of \$250,000. The Tycos Agreement contemplates a closing three days following court approval of the Tycos Transaction.

May 7 Affidavit at paras. 45-46.

#### **STAY EXTENSION TO JULY 15, 2013**

14. As described at paragraphs 49 to 53 of the May 7 Affidavit and as is expected to be described in the Twentieth Report of the Monitor (to be filed, the “**Twentieth Report**”), the Timminco Entities continue to work diligently to complete the winding down of their businesses within the CCAA proceedings. The Timminco Entities continue to review outstanding Claims for the value and benefit of their creditors and to obtain a ruling in Quebec with respect to the priority claims.

May 7 Affidavit at para. 50.

#### **EXTENSION OF THE CRO AGREEMENT TO JULY 15, 2013**

15. In order to permit the Timminco Entities to continue instructing legal counsel, consulting with the Monitor with respect to the completion of these CCAA Proceedings, dealing with the remaining assets of the Timminco Entities and authorizing other mechanisms necessary for a successful wind up of the Timminco Entities’ estates after the resignation of the Board of Directors and remaining officers of each of the Timminco Entities, the Timminco Entities sought and received approval of



Russell Hill's appointment as CRO and the approval of the engagement letter dated July 24, 2012 (the "CRO Agreement") between the Timminco Entities and Russell Hill by order of the Court dated August 17, 2012.

May 7 Affidavit at paras. 54-55.

16. The term of the CRO Agreement was set to expire on January 31, 2013 and was extended by Court order to March 15, 2013 pursuant to an extension agreement between the CRO and the Monitor. The term of the CRO Agreement was further extended to May 15, 2013 by a second extension agreement.

May 7 Affidavit at para. 55.

17. The Timminco Entities are seeking a third extension of the CRO Agreement on the terms set out in the agreement between the CRO and the Monitor dated February 28, 2013 to coincide with the extension of the Stay Period to allow for further steps to be taken toward the completion of the outstanding issues.

May 7 Affidavit at para. 57.

### **PART III - ISSUES**

18. The issue on this motion is whether the Court should:

- (a) Approve the Tycos Agreement and the Tycos Transaction;
- (b) Grant the Stay Extension to July 15, 2013; and
- (c) Approve the extension of the CRO Agreement to July 15, 2013.

## PART IV - LAW AND ARGUMENT

### (1) THE TYCOS AGREEMENT AND THE TYCOS TRANSACTION SHOULD BE APPROVED

*(A) The Court has the Power to Approve a Sale of Assets in CCAA Proceedings Free and Clear of any Security, Charge or Other Restriction*

19. The power to approve a sale of assets prior to the formulation of a plan is contained in section 36 of the CCAA which, prior to codification in September 2009, was a well-established common law principle.

*Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.) [Consumers Packaging], Applicants' Book of Authorities, Tab 1 at para. 9.

*Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List]), Applicants' Book of Authorities, Tab 2 at paras. 30 - 32.

20. Section 36 of the CCAA sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor's sale of assets outside the ordinary course of business:

- (a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) Whether the monitor approved the process leading to the proposed sale or disposition;
- (c) Whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) The extent to which the creditors were consulted;

- (e) The effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

CCAA, s. 36(3).

*Re Canwest Publishing Inc.* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List]) [*Canwest Publishing*], Applicants' Book of Authorities, Tab 3 at para. 13.

21. In *Re White Birch Paper Holding Co.*, Justice Mongeon approved an asset sale pursuant to section 36 of the CCAA, holding that, while recovery for unsecured creditors would be low, it was not in the best interest of any of the stakeholders for him to refuse the order.

*Re White Birch Paper Holding Co.*, 2010 QCCS 4915, Applicants' Book of Authorities, Tab 4 at paras. 48, 49, 51 - 52 & 57.

*(B) The Statutory Test for Approving a Sale of Assets in a CCAA Proceeding Has Been Met.*

Section 36(3)(a): The process leading to the proposed sale was reasonable in the circumstances.

22. The Tycos Property was a difficult one to market due to the long term, low rent lease and the perceived environmental risk associated with ownership of it. Nevertheless, the process leading to the proposed sale was reasonable in the circumstances.

23. The process leading to the proposed sale has allowed ample time for eliciting interest in the Tycos Property. The Timminco Entities and the CRO have marketed the

property to find a purchaser for more than a year. The Tycos Property was included in the sales process leading to the sales transactions with Grupo Ferro Atlantica, S.A. and QSI Partners Ltd. and failed to garner any bid from prospective purchasers. Since that time, the Timminco Entities and the CRO have attempted to market and/or negotiate a solution to the environmental liabilities that would make the properties marketable without success.

May 7 Affidavit at para. 47.

24. The CRO has taken reasonable steps to conclude a sale of the Tycos Property. After efforts to negotiate a proceeds-sharing agreement with the Tenant were unsuccessful, the CRO retained a real estate agent and listed the property for sale on December 17, 2012. Since that time, although some potential buyers showed interest in the Tycos Property in January, 2013, only two parties made offers to purchase the Tycos Property. The Tycos Property has remained listed for sale despite the conditional agreement with the Purchaser since January 31, 2013 and no further offers have been received.

May 7 Affidavit at paras. 41-43, 47.

Section 36(3)(b): The Monitor approved the process leading to the proposed sale or disposition.

25. The Monitor has filed a report in which it states its approval of the process leading to the proposed sale. Moreover, the CRO has consulted with the Monitor as appropriate throughout the process leading to the proposed sale.

May 7 Affidavit at para. 44.

Section 36(3)(c): The Monitor has filed with the Court a report stating that in its opinion the sale is more beneficial to the creditors than a sale or disposition under a bankruptcy.

26. The Monitor has filed a report in which it states that, in its opinion, the sale is more beneficial to the creditors than a sale or disposition under a bankruptcy.

Twentieth Report of the Monitor dated May 10, 2013.

Section 36(3)(d): Creditors were adequately consulted.

27. The Applicants have provided periodical updates to the Court and to creditors, including through the filing of its reports, and has consulted with creditors as appropriate throughout these CCAA Proceedings.

Section 36(3)(e): The effects of the proposed sale on creditors and other interested parties are positive.

28. A sale of the Tycos Property will benefit creditors and other interested parties. Not only will the proposed sale dispose of an asset for which the Timminco Entities have no further use, it will relieve the Timminco Entities of the obligation to conduct costly monitoring and compliance activities in respect of the environmental contamination at the Tycos Property. Moreover, the proceeds of the proposed sale will be distributable to creditors.

May 7 Affidavit at paras. 34-39.

Section 36(3)(f): The consideration to be received for the Tycos Property is reasonable and fair.

29. The consideration to be received for the Tycos Property is reasonable and fair because it is the result of an open sale process and of arm's length negotiations between the Purchaser and the CRO, all of which were undertaken with the benefit of advice

from an experienced real estate agent with knowledge of the local real estate market and with input from the Monitor.

May 7 Affidavit at paras. 42, 43 and 47.

30. Although the CRO received a conditional offer (the “**Conditional Offer**”) to purchase the Tycos Property at a higher price than the purchase price offered by the Purchaser, the CRO, after consultation with the Monitor, determined not to pursue the Conditional Offer for a number of reasons, as described in paragraph 17 above. No other offers for the Tycos Property were received although the Tycos Property remains listed for sale.

May 7 Affidavit at paras. 43, 44 and 47.

31. The proposed purchase price represents a reasonable valuation of the Tycos Property given limited net revenue from the property, an existing lease with about nine years remaining on the term (and subject to further renewal options) at a low, fixed rate of rent and risk of environmental compliance costs increasing over the life of the lease with the effect of further reducing net income derivable from the property.

May 7 Affidavit at para. 47.

Additional criteria for approval under section 36 of the CCAA.

32. In addition to the factors set out in subsection 36(3), discussed above, subsection 36(7) of the CCAA sets out the following restrictions on disposition of assets within CCAA proceedings:

36 (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

CCAA, s. 36(7).

33. Justice Pepall considered subsection 36(7) of the CCAA in *Canwest Global Communications Corp. (Re)* where (although she held that section 36 was not applicable to the facts of that case) she was satisfied by confirmation by counsel for the debtors of compliance with subsection 36(7).

*Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 7169 (Sup. Ct. (Comm. List)), Book of Authorities, Tab 5 at para 42.

34. The Applicants intend to pay the amounts contemplated in subsections 6(4) or 6(5)(a) of the CCAA. The additional factors and restrictions under section 36(4) and (5) of the CCAA are not applicable in this case as the Purchaser and the Timminco Entities are not related persons within the meaning of the CCAA.

CCAA, s. 6(5)(a).

*Bankruptcy and Insolvency Act*, R.S.C. 1985, B-3, as amended [BIA] ss. 81.3, 81.4 and 136(1)(d).

## **(2) THE STAY EXTENSION SHOULD BE GRANTED**

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

35. 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)

36. In *Century Services Inc. v. Canada (Attorney General)*, 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. . . .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]*

CCAA s. 11.

*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, Applicants' Book of Authorities, Tab 6 at paras. 70-71.

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

*Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), Applicants' Book of Authorities, Tab 7.



*(B) The Court Ought to Grant the Stay Extension*

38. The Initial Order granted a stay of proceedings to February 2, 2012 which has been extended from time to time, most recently to May 15, 2013 by Order dated March 5, 2013 (the "Stay Period"). An extension of the Stay Period to July 15, 2013, is necessary to give the Timminco Entities sufficient time to substantially effect the winding up of their estates, including to allow the Timminco Entities to continue to review outstanding Claims for the value and benefit of their creditors and to obtain a ruling in Quebec with respect to the priority claims.

May 7 Affidavit at paras. 49-50.

39. A Stay Extension up to and including July 15, 2013, would advance the policy objectives underlying the CCAA by allowing the Timminco Entities to continue working diligently towards assessing claims for the benefit of their creditors and continue to wind down their business in an orderly manner.

May 7 Affidavit at para. 52.

40. The Timminco Entities have sufficient funds on hand and with the Monitor to cover their greatly reduced costs, the Monitor supports an extension of the Stay Period to July 15, 2013 and the Timminco Entities do not believe that any creditor will suffer any material prejudice if the Stay Period is extended as requested

May 7 Affidavit at paras. 51 and 53.

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

May 7 Affidavit at paras. 50-53.

42. For the reasons described above, the Stay Period should be extended to July 15, 2013.

### **(3) THE CRO EXTENSION SHOULD BE APPROVED**

#### *(A) The Court has the Jurisdiction to Approve the CRO Extension*

43. Section 11 of the CCAA allows a CCAA Court to make any order it considers appropriate in the circumstances. As discussed above, "appropriateness" is to be considered in light of the underlying purposes of the CCAA, which includes effecting the sale, winding up or a liquidation of a debtor company and its assets. Courts have approved the appointment of CROs in CCAA proceedings where it is appropriate to do so, including in the Timminco Entities' CCAA proceedings.

*Re Prizm Income Fund* 2011 ONSC 2061, Applicants' Book of Authorities, Tab 8 at paras. 40 and 45.

*Re Northstar Aerospace Inc.*, 2012 ONSC 3974, Applicants' Book of Authorities, Tab 9 at paras 11 and 12.

#### *(B) The Court Ought to Approve the CRO Extension*

44. As described above, the Timminco Entities have remaining steps to take before their estates are successfully wound up. An extension of the CRO Agreement to

coincide with the extension of the Stay Period will allow for completion of the outstanding issues surrounding the Timminco Entities' CCAA Proceedings.

May 7 Affidavit at paras. 56.

45. While it is not necessary to obtain court approval for the extension of the CRO Agreement to July 15, 2013, in an abundance of care, the Timminco Entities are seeking the Court's approval of a further extension of the CRO Agreement. The Monitor supports the extension of the CRO Agreement.

May 7 Affidavit at paras. 57-58.

46. For the reasons described above, the CRO Agreement should be extended to May 15, 2013.

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

47. For the foregoing reasons, it is respectfully submitted that it is appropriate for this Court to approve the Tycos Agreement and the Tycos Transaction, to extend the Stay Period and to approve the extension of the CRO Agreement.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 10<sup>th</sup> day of May, 2013.

STIKEMAN ELLIOTT LLP  
Stikeman Elliott LLP

Lawyers for the Applicants

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

1. *Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.).
2. *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List])
3. *Re Canwest Publishing Inc.* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List])
4. *Re White Birch Paper Holding Co.*, 2010 QCCS 4915
5. *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 7169 (Sup. Ct. (Comm. List))
6. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
7. *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List])
8. *Re Prizm Income Fund* 2011 ONSC 2061
9. *Re Northstar Aerospace Inc.* 2012 ONSC 3974

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

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

**General power of court**

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

...

**Stays, etc. – other than initial application**

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

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**Burden of proof on application**

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

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

**Restriction**

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

...

**Restriction – certain powers, duties and functions**

11.08 No order may be made under section 11.02 that affects

(a) the exercise or performance by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act;

(b) the exercise or performance by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the Canada Deposit Insurance Corporation Act; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the Winding-up and Restructuring Act.

...

**Meaning of “regulatory body”**

11.1 (1) In this section, “regulatory body” means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

**Regulatory bodies – order under section 11.02**

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body’s investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

**Exception**

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court’s opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

#### **Declaration – enforcement of a payment**

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

#### **Restriction on disposition of business assets**

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

#### **Notice to creditors**

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

#### **Factors to be considered**

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

#### **Additional factors – related persons**

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

#### **Related persons**

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

#### **Assets may be disposed of free and clear**

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

#### **Restriction – employers**

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.



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

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

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

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

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS  
(RETURNABLE MAY 14, 2013)  
(RE TRANSFER OF TYCOS ROPERTY)**

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