

*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

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

Applicants

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**FACTUM OF THE  
RESPONDING PARTY, JOHN P. WALSH  
(Lift Stay Motion returnable March 26, 2012)**

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Dated: March 21, 2012

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TO: **THE SERVICE LIST**

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**I. OVERVIEW**

1. St. Clair Pennyfeather ("Pennyfeather"), the moving party and putative plaintiff in an uncertified class proceeding (the "Class Action") against Timminco Limited ("Timminco") and various of its current and former officers and directors, seeks an order lifting the stay of proceedings (the "Stay") issued by this Honourable Court in the initial order made in these proceedings on January 3, 2012 (the "Initial Order").

2. John P. Walsh is a former director, a defendant in the Class Action, and a stakeholder in these CCAA proceedings. Mr. Walsh does not oppose the relief sought, insofar as Pennyfeather seeks a lift stay to allow him to seek leave to appeal to the Supreme Court of Canada from a decision of the Court of Appeal for Ontario relating to limitation periods. However, it is premature to allow Pennyfeather to proceed any further than the application for leave to appeal.

3. Insofar as Pennyfeather seeks to lift the Stay for "any other steps in the Class Proceeding", that relief should not be granted at this time. First, Pennyfeather has nothing more than an "equity claim" as defined in the CCAA, and as such, his claim (both against the company and its directors, who in turn would have an equity claim based on indemnity rights) will be subordinated to any creditor claims. Of all the potential claims to require adjudication, presumably equity claims would be the least pressing to be adjudicated and do not become relevant until all secured and unsecured creditors' claims have been paid in full.

4. Moreover, this one contingent equity claimant should not be allowed to get a leg up on other creditors when any number of developments could arise within the CCAA proceedings that could have a material effect on the equity claims. For example, were the Company to propose a plan of arrangement, such a plan could include a release of its directors, as is permitted and common under the CCAA. Or, even if the debtor sought to liquidate through the CCAA, a discharge of liabilities to directors could also be put forward as part of the discharge of the Monitor.

5. Finally, by class counsel's own admission, the Court of Appeal's decision has had a material effect on the complexion of the Class Action. As it relates to Mr. Walsh, the only claim that remains against him is a common law misrepresentation claim where it is only alleged that Mr. Walsh sat on the board of directors – not that he made any representation at all. Moreover, limited to a common law claim, Pennyfeather will have significant hurdles in obtaining certification. Regardless, Pennyfeather has yet to reconstitute his claim sounding only in common law, and presumably will not do so until the Supreme Court denies leave to appeal.

Until he is in a position to say what he actually intends to do in the class proceeding, it is premature to lift the stay for any and all purposes.

## II. FACTS

6. Pennyfeather is a member of a proposed class of persons who acquired Timminco securities from March 17, 2008 to November 11, 2008.

Amended Statement of Claim, paras. 19-20, Exhibit "J" to the Affidavit of Victoria Paris sworn March 8, 2012, Motion Record of St. Clair Pennyfeather (the "Motion Record") Tab 2(J), pp. 154-155

7. The Class Action alleges that the Timminco made various misrepresentations in public documents and in oral statements regarding solar grade silicon for use in the manufacture of solar cells, which Pennyfeather says were false or misleading.

Amended Statement of Claim, paras. 13-19, Motion Record Tab 2(J), pp. 153-154

8. Mr. Walsh is the last of a number of individual defendants named in the Class Action. No specific allegations are made against Mr. Walsh, other than the fact that he was a member of the Board of Directors of Timminco for less than one month of the eight month class period (additional alleged misrepresentations were alleged to have been made after Mr. Walsh resigned his position). It is not alleged anywhere in the Amended Statement of Claim that Mr. Walsh uttered any of the alleged oral representations, nor that his hand penned any of the alleged written representations. It is simply alleged that the representations were made "with the authorization, permission or acquiescence of the Individual Timminco Defendants", which includes Mr. Walsh (generically described in the claim as one of the "remaining defendants").

Amended Statement of Claim, Motion Record Tab 2(J)

9. The claim seeks damages against all the defendants in the amount of \$520 million plus \$20 million in punitive damages. There is no distinction drawn between the various defendants and as such, the half-billion dollar claim is made equally against Mr. Walsh as it is Timminco.

Amended Statement of Claim, para. 2(f-g), Motion Record Tab 2(J), p. 149

10. Since the Class Action was launched in May 2009 (originally with an individual named Ravinder Sharma as the representative plaintiff), class counsel have engaged in various motions and activities, none of which related to an application for leave to commence a secondary market class action. First there was a carriage motion. Then there was a motion to obtain insurance policies. Then there were demands for particulars which were never answered until Justice Perell compelled the plaintiffs to answer. Then there was approximately one year where the case went dormant, at least from Walsh's perspective (there had been settlement discussions that had taken place without Walsh's knowledge).

Paris Affidavit, paras. 9-15, Motion Record Tab 2, pp. 8-10

11. At no time did the plaintiff meaningfully advance any leave application: all that existed was a statement of intent in his Statement of Claim, to the effect that at some point in the future, he would seek leave to commence the secondary market claim under Part XXIII.1 of the *Securities Act*.

12. Ultimately, the plaintiff sought a motion for an order to "suspend" the operation of the limitation period under the *Securities Act* or alternatively to grant "conditional leave" to

commence the secondary market claim. While Perell J. rejected most formulations of relief sought by the plaintiff, he did effectively declare that the limitation period under the *Securities Act* was tolled after the Class Action had been commenced, because the pleading had merely "mentioned" the fact of the secondary market claim.

Reasons of Perell J. dated March 31, 2011, Exhibit "I" to the Paris Affidavit, Motion Record Tab 2(I)

13. On February 16, 2012, the Court of Appeal reversed that decision. Applying ordinary principles of statutory interpretation, the Court of Appeal ruled that the limitation period, which is tolled only upon the "commencement" of a class proceeding, is not tolled in relation to a secondary market claim, because leave of the court is required before such a proceeding is "commenced".

Reasons of the Court of Appeal, Exhibit "O" to the Paris Affidavit, Motion Record, Tab 2(O)

14. Pennyfeather has not indicated what, if anything, he intends to do in the Class Action other than to seek leave to appeal to the Supreme Court of Canada (it should be cautioned that various of the statements made by Ms. Paris in her affidavit about the importance of the decision will be the very issue before the Supreme Court of Canada on the leave application, and Mr. Walsh does not agree with those statements).

15. In terms of next steps in the Class Action, Ms. Paris testified only that "it is also probable that some or all of the defendants will take steps within the Class Action as a result of the Court of Appeal decision. The stay needs to be lifted to provide the plaintiffs with a fair opportunity to deal with the ramifications of the Court of Appeal decision in the context of the Class Action."

It goes without saying that the Stay issued by this Honourable Court applies equally to the defendants, including Mr. Walsh, as much as it applies to Pennyfeather. This is therefore not a valid reason for a lift stay.

16. Notwithstanding the lack of any meaningful direction as it relates to the Class Action, in this motion, Pennyfeather seeks a full lift stay. The relief sought is for "an order lifting the stay of proceedings ... and permitting Mr. Pennyfeather to continue the class action against Timminco Limited ("Timminco"), Dr. Heinz Schimmelbusch, Robert Dietrich, Rene Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich and John P. Walsh."

Notice of Motion, Motion Record Tab 1, p. 1.

### **III. LAW AND ARGUMENT**

#### **A. Lift Stays**

17. A stay of proceedings in a CCAA proceeding is designed to preserve the status quo among the creditors of the debtor company. The stay prevents "manoeuvres for positioning" among creditors and prevents one creditor from getting a "leg up" on others.

*Canadian Airlines Corp. (Re.)* (2000), 19 C.B.R. (4<sup>th</sup>) 1 (Alta. Q.B.) at paras. 17-19

18. The Model CCAA Interim Order developed by the Commercial List Users Committee, which was utilized in this case, extends the stay of proceedings to not just the debtor, but also its directors (past and present). There are two reasons for why the stay extends to directors: (1) current directors should have their time and attention devoted to a restructuring, not to lawsuits; and (2) both current and former directors (such as Mr. Walsh) would have indemnity claims



against the debtor for most if not all such lawsuits, and the stay prevents some creditors from gaining potential advantages by pursuing directors when such claims could not be pursued against the company directly.

Commercial List Users Committee Model Order

*CCAA*, s. 11.03

19. Lifting a stay is a discretionary decision. The party seeking a lift stay faces "a very heavy onus" in obtaining a lift stay. In considering whether to grant a lift stay, the court should consider whether there are sound reasons for lifting the stay consistent with the objectives of the *CCAA*, including considering the balance of convenience, relative prejudice to the parties and where relevant, the merits of the proposed action.

*Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5<sup>th</sup>) 200 (S.C.J.)

*NFC Acquisition GP Inc. (Re.)*, 2012 ONSC 1244 at para. 11

20. The following factors, set out first by Professor R.H. McLaren but adopted by this Honourable Court on a number of occasions, have been identified in determining whether or not to grant a lift stay:

1. When the plan is likely to fail.
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
9. It is in the interests of justice to do so.

*Canwest Global, supra* at para. 33

*NFC Acquisition, supra* at para. 11

21. The Court regularly denies applications to lift stays of proceedings, particularly where the creditor or other stakeholder seeks to have their claims adjudicated in class proceedings or would gain an advantage over other creditors generally in the CCAA proceedings. Except in circumstances where it can be clearly demonstrated that the claim can be dealt with more expeditiously than through a claims process, such motions are usually dismissed.

*Canadian Red Cross Society (Re.)* (1999), 12 C.B.R. (4<sup>th</sup>) 194 (Ont. S.C.J.)

*Air Canada (Re.)* (2004), 47 C.B.R. (4<sup>th</sup>) 177 (Ont. S.C.J.)

22. The decision on whether to grant a lift stay is not an "all-or-nothing" proposition. In the past, this Honourable Court has granted lift stays for limited purposes, such as to bring a single

motion. Just as the court may fashion a stay of proceedings "on any terms that it may impose", so too may the court grant a lift stay on such terms as it deems appropriate.

*Companies' Creditors Arrangement Act* (the "CCAA"), R.S.C. 1985, c. C-36, s. 11.02

*Georgian Windpower Corp. v. Stelco*, 2005 CanLII 23317 (Ont. S.C.J.) [granting a lift stay only to bring a R21 motion]

See also discussion in *PSINet Ltd. (Re.)* (2002), 30 C.B.R. (4<sup>th</sup>) 226 (Ont. S.C.J.) [re lifting stays for sole purpose of filing liens and similar relief] at para. 6 [but dismissing lift stay motion to file bankruptcy petition]

## **B. The Lift Stay Should Not Be Granted**

23. Pennyfeather has submitted no reasons that are in any way consistent with the CCAA or the concerns for the debtor which would give reason to grant a lift stay at all, let alone the sweeping lift stay requested. At the highest, it could be said that Pennyfeather could rely on point #5 of Professor McLaren's article, insofar as he seeks to protect a right that could be lost by the passing of time. It is possible that Pennyfeather could argue that the time to appeal the Court of Appeal's decision will elapse absent a lift stay, although even that is not clear because if the Class Action is stayed, that would presumably stay the time period for appealing to the Supreme Court of Canada.

24. But beyond that one limited purpose, there is no basis for granting a sweeping lift stay, allowing the Class Action to proceed unabated. Timminco is not proposing any plan at the present time, let alone one that is "doomed to fail". No hardship has been alleged, much less proved, by Pennyfeather, through the continued operation of the stay. There is no "necessity of payment" allegation here, nor any proof or even assertion of significant prejudice. No loan will

become unsecured through the afflux of time. No rights need to be perfected. And in the circumstances, it is difficult to see how it is in the interests of justice to lift the stay.

25. Moreover, the interests of justice would appear to militate heavily in favour of *denying* a lift stay. Pennyfeather's claim fits squarely within the definition of an "equity claim" under the new provisions of the *CCAA*. Those provisions define an "equity claim" as "a claim that is in respect of an equity interest, including a claim for, among others, ... (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest..." That is all that Pennyfeather has asserted in the Class Action.

*CCAA*, s. 2, "equity claim"

26. As an equity claimant, Pennyfeather has no right to vote in this *CCAA*, and no payment can be made to Pennyfeather or other members of the shareholder class within a compromise or arrangement unless all creditors are paid in full. In other words, equity claims are structurally subordinated to creditor claims and cannot be paid unless all creditors are paid in full. There is no basis to believe that all secured and unsecured creditors will be paid in full in this *CCAA* proceeding.

*CCAA*, ss. 6(1), 6(8)

27. It is not consistent with the purposes of the *CCAA* to allow one creditor, particularly a creditor holding nothing more than an equity claim, to get out ahead of all other contingent claims, before a claims process has been designed, let alone run. There is also no basis to conclude at this time that such a claim could not be expeditiously dealt within the confines of the *CCAA* proceeding, just as any other contingent claim would be.

28. Just as Pennyfeather's claim would be subordinated within the CCAA proceeding, his claim may also be rendered moot through a release of directors and officers of the type frequently obtained either within a plan of arrangement or through a discharge of the Monitor in a liquidating CCAA. The presence of D&O insurance does not necessarily change that result.

*Allen Vanguard Corporation (Re)*, 2011 ONSC 5017 at paras. 52-82

29. Finally, as noted above, Pennyfeather has not proposed any form of a reconstituted claim in light of the Court of Appeal's decision, and has not given any indication of what he might want to do within the Class Action now, other than to react to whatever the defendants might do (under the apparently mistaken assumption that the stay does not apply to the defendants).

30. As such, it is respectfully submitted that the interests of justice do not favour granting the relief sought by Pennyfeather. And while it is arguable that a lift stay is not even needed for the Supreme Court of Canada appeal period, Mr. Walsh is willing to consent to a limited lift stay for the sole purpose of arguing a leave to appeal application to the Supreme Court of Canada.

### **C. The "Limiting Recovery to the Insurance Proceeds" Claim is No Answer**

31. In his factum, Pennyfeather has suggested that he would consent to a condition that "any potential execution excludes Timminco's assets". Further, "this would limit recovery in the Class Action to the proceeds of the insurance proceeds..."

Pennyfeather Factum, paras. 12-13

32. This is exactly the reason why the stay of proceedings applies to directors. While Pennyfeather can limit his claim *against Timminco* all he wants, he has not similarly agreed to so

limit his claim as against the directors. For them, Pennyfeather seeks to maintain his \$540 million claim. Every one of the directors and officers who are defendants in the Class Action has a right of indemnification against Timminco, which right is definitely being asserted.

33. Therefore, simply ordering that any execution of Pennyfeather's claim would exclude Timminco's assets is no answer at all. Mr. Walsh and every one of the defendants will maintain an indemnity claim against Timminco for the full amount of any damages claimed. This issue did not appear to be present in either *Algoma Steel* or *Re Carey Canada*, both cited by Pennyfeather.

34. To the extent that Pennyfeather's argument had any merit, the limitation on his claim would have to extend to the directors as well, as each of them would maintain a claim to the assets in general through their indemnity rights.

#### **IV. ORDER REQUESTED**

35. Mr. Walsh respectfully requests an Order dismissing the motion sought by the plaintiff, with costs, except for the limited purpose of allowing the parties to the Class Action to argue a leave to appeal application to the Supreme Court of Canada from the decision of the Ontario Court of Appeal rendered February 16, 2012.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



DEREK J. BELL

Lawyers for John Walsh

**SCHEDULE "A" – AUTHORITIES CITED**

*Air Canada (Re.)* (2004), 47 C.B.R. (4<sup>th</sup>) 177 (Ont. S.C.J.)

*Allen Vanguard Corporation (Re.)*, 2011 ONSC 5017

*Canadian Airlines Corp. (Re.)* (2000), 19 C.B.R. (4<sup>th</sup>) 1 (Alta. Q.B.)

*Canadian Red Cross Society (Re.)* (1999), 12 C.B.R. (4<sup>th</sup>) 194 (Ont. S.C.J.)

*Canwest Global Communications Corp. (Re.)* (2009), 61 C.B.R. (5<sup>th</sup>) 200 (S.C.J.)

*Georgian Windpower Corp. v. Stelco*, 2005 CanLII 23317 (Ont. S.C.J.)

*NFC Acquisition GP Inc. (Re.)*, 2012 ONSC 1244

*PSINet Ltd. (Re.)* (2002), 30 C.B.R. (4<sup>th</sup>) 226 (Ont. S.C.J.)

## SCHEDULE "B" – STATUTORY REFERENCES

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

#### **Definitions**

2. (1) In this Act,

[...]

“equity claim” means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

[...]

#### **Compromises to be sanctioned by court**

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.



[...]

**Payment – equity claims**

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[...]

**Stays, etc. — initial application**

**11.02** (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;

(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.

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

(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.

RAVINDER KUMAR SHARMA  
Plaintiffs (Moving Parties)

- and -

TIMMINCO LIMITED et al.  
Defendants (Responding Parties)

Court File No. CV-09-378701-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**FACTUM OF JOHN WALSH  
(Motion returnable March 26, 2012)**

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