

**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

MOTION RECORD

**(re Authorization and Direction to Enter into the Stalking Horse Agreement,
Approval of the Bidding Procedures and DIP Amendment, and Postponement of
the Annual Meeting of Shareholders)**

(Returnable March 9, 2012)

March 2, 2012

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TAB 1

**ONTARIO
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Applicants

NOTICE OF MOTION

**(re Authorization and Direction to Enter into the Stalking Horse Agreement,
Approval of the Bidding Procedures and DIP Amendment, and Postponement of
the Annual Meeting of Shareholders)**

(Returnable March 9, 2012)

Timminco Limited and Bécancour Silicon Inc. (together, the "Timminco Entities") will make a motion to a judge presiding over the Commercial List on Friday, March 9, 2012 at 10:00 a.m. or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING:

The motion is to be heard orally.

THE MOTION IS FOR:

1. An Order, substantially in the form attached to the Motion Record at Tab 3:
 - (a) authorizing and directing the Timminco Entities to enter into the Stalking Horse Agreement (as defined below);
 - (b) approving certain protections granted to the Stalking Horse Bidder (as defined below) pursuant to the Stalking Horse Agreement;
 - (c) approving the Bidding Procedures (as defined below);
 - (d) approving the DIP Amendment (as defined below);

- (e) providing that Timminco shall not be required to hold any meeting of its shareholders during the Stay Period (as these terms are defined below);
- (f) approving the Third and Fourth Reports of the Monitor (as defined below) and the activities described therein; and
- (g) such further and other relief as this Court deems just.

THE GROUNDS FOR THE MOTION ARE:

2. Timminco produces silicon metal through its 51%-owned production partnership with Dow Corning Corporation and produces solar grade silicon through Timminco Solar, an unincorporated division of BSI.
3. The Timminco Entities are facing severe liquidity issues, are unable to meet various financial covenants set out in their senior secured credit facility and do not have the liquidity needed to meet their ongoing payment obligations.
4. 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.
5. The Timminco Entities have successfully negotiated a DIP Agreement with QSI Partners Ltd. (the "DIP Lender" or the "Stalking Horse Bidder") dated January 18, 2010 (the "DIP Agreement") pursuant to which the DIP Lender agreed to provide the Timminco Entities a DIP facility (the "DIP Facility") in the maximum amount of US\$4,250,000.
6. On March 2, 2012, subject to Court approval, the Timminco Entities and the DIP Lender entered into amendment to the DIP Agreement (the "DIP Amendment").
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 forthwith.

8. Following negotiations with the Stalking Horse Bidder, on March 2, 2012, the Timminco Entities entered into an Agreement of Purchase and Sale (the "**Stalking Horse Agreement**") with the Stalking Horse Bidder, as purchaser, and Globe Specialty Metals Inc., a corporation incorporated under the laws of Delaware, as guarantor, (the "**Guarantor**"), subject to Court approval.

9. In consideration for the Stalking Horse Bidder's expenditure of time and money and agreement to act as the initial bidder and the preparation of the Stalking Horse Agreement, the Stalking Horse Bidder shall be entitled to an expense reimbursement for its legal and other costs incurred in connection with the Stalking Horse Bid in an amount of C\$500,000 (the "**Expense Reimbursement**"), payable only by the Timminco Entities to the Stalking Horse Bidder in the event that a bid other than the Stalking Horse Bid is accepted and the transaction contemplated thereby is completed. The Expense Reimbursement shall be payable to the Stalking Horse Bidder out of the sale proceeds derived from and upon completion of the alternative bid.

10. The Timminco Entities, in consultation with the Monitor and the Stalking Horse Bidder, also developed bidding procedures which are proposed to govern the Timminco Entities' sales process relating to solicitation by the Timminco Entities of one or more superior bid(s) for their assets to that contemplated by the Stalking Horse Agreement (the "**Bidding Procedures**"). The deadlines under the Bidding Procedures provide for: first round of bids to be submitted by March 26, 2012; second round of bids by April 16, 2012; an auction to take place on April 24, 2012; and seeking Court approval of and closing (if approved) the successful bid by June 20, 2012.

11. It is impractical for Timminco to call and hold an annual meeting of shareholders during the stay period.

12. Section 11 and other provisions of the CCAA and the inherent and equitable jurisdiction of this Court.

13. Rules 2.03, 3.02 and 37 of the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended and section 137 of the *Ontario Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended.

14. Such further and other grounds as counsel may advise and this court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- 1) the Affidavit of Peter A.M. Kalins sworn March 2, 2012, and the exhibits attached thereto;
- 2) the Fourth Report of the Monitor, to be filed; and
- 3) such further and other materials as counsel may advise and this Court may permit.

March 2, 2012

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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 BÉCANCOUR SILICON INC.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**NOTICE OF MOTION
(RETURNABLE MARCH 9, 2012)**

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TAB "A"

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

Applicants

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TAB 2

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

(Applicants)

**AFFIDAVIT OF PETER A.M. KALINS
(Sworn March 2, 2012 re Authorization and Direction to Enter into the
Stalking Horse Agreement, Approval of the Bidding Procedures and
DIP Amendment, and Postponement of the Annual Meeting of
Shareholders)**

I, PETER A.M. KALINS, of the City of Toronto, in the Province of Ontario,
MAKE OATH AND SAY:

1. I am the President, General Counsel and Corporate Secretary of the Applicant Timminco Limited ("**Timminco**") and the President, General Counsel and Corporate Secretary, as well as a director of the Applicant Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**" or the "**Applicants**") and as such have knowledge of the matters to which I hereinafter depose, except where otherwise stated.
2. This affidavit is sworn in support of a motion brought by the Timminco Entities seeking an order, substantially in the form of the draft order included with the Motion Record (a) authorizing and directing the Timminco Entities to enter into the Stalking Horse Agreement (as defined below), (b) approving certain protections granted to the DIP Lender pursuant to the Stalking Horse Agreement, (c) approving the Bidding Procedures (as defined below), (d) approving the DIP Amendment (as defined below), and (e) providing that Timminco shall not be required to hold any meeting of its

shareholders during the Stay Period (as these terms are defined below), and for certain ancillary relief.

BACKGROUND

3. Timminco produces silicon metal through its 51%-owned production partnership with Dow Corning Canada, an indirect subsidiary of Dow Corning Corporation (“**Dow Corporation**”), for resale to customers in the chemical, aluminum, and electronics/solar industries. Timminco also produces solar grade silicon through Timminco Solar, an unincorporated division of Timminco’s wholly-owned subsidiary BSI, for customers in the solar photovoltaic industry.

4. As described in greater detail in the affidavit (the “**Initial Order Affidavit**”) sworn by me on January 2, 2012, in support of the Timminco Entities’ application under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”), the Timminco Entities are facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume long-term supply contract at below market prices, a decrease in the demand and market price for solar grade silicon, failure to recoup their capital expenditures incurred in connection with development of their solar grade operations, and inability to secure additional funding. The Timminco Entities are also facing significant pension and environmental remediation legacy costs and financial costs related to large outstanding debts. A significant portion of the legacy costs are as a result of discontinued operations relating to Timminco’s former magnesium business.

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.

6. The Timminco Entities were granted protection from their creditors under 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 the CCAA proceedings. A copy of the Initial Order is attached hereto as **Exhibit “A”** and is available, together with all other filings in the CCAA proceedings, on the Monitor’s website (the “**Monitor’s Website**”) at: <http://cfcanada.fticonsulting.com/timminco>.

7. Further details regarding the background to this CCAA proceeding are set out in the Initial Order Affidavit and, unless relevant to the present motion, are not repeated herein. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Initial Order Affidavit.

STATUS OF CCAA PROCEEDINGS

Communications with Stakeholders

8. The Timminco Entities, the Monitor, and their respective counsel continue to have regular discussions with Investissement Québec (“**IQ**”), Bank of America, N.A. (“**Bank of America**”), Dow Corporation, their suppliers and other creditors, employees and retirees, major customers, and parties potentially interested in acquiring some or all of the business of the Timminco Entities.

January 16, 2012 Order Suspending Special Payments and Granting Increased Priority

9. On January 12, 2012, the Applicants brought a motion for an Order, *inter alia*: (a) suspending the Timminco Entities’ obligations to make certain pension contributions with respect to their pension plans, (b) approving certain key employee retention plans and a charge to secure the Timminco Entities’ obligations thereunder, (c) granting increased priority to the Administration Charge and the D&O Charge (as these terms are defined in the Initial Order), and (d) sealing the Confidential Supplement to the Monitor’s report containing the unredacted copies of the key employee retention plans.

10. On January 16, 2012, Justice Morawetz granted the motion brought by the Applicants with reasons to follow (the "**January 16 Decision**"). On February 2, 2012, Justice Morawetz released his Reasons for Decision in connection with the Applicants' motion. A copy of the Reasons for Decision is attached hereto as **Exhibit "B"**.

11. The Communications, Energy and Paperworkers Union of Canada local 184, known locally as La Section Locale 184 De Syndicate Canadien des Communications, de L'Energie et du Papier (the "**CEP**") and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union (the "**USW**") delivered Notices of Motion for Leave to Appeal the January 16 Decision on February 23, 2012 and February 24, 2012, respectively.

CEP Grievances

12. On February 3, 2012, the CEP filed the following two grievances (the "**Grievances**") against QSLP:

- (a) Grievance #794-12 demanding that QSLP maintain in force the group insurance plan with respect to post-retirement benefits for all former employees of BSI and assume the cost of the premiums in connection with this insurance plan retroactively to January 1, 2012; and
- (b) Grievance #795-12 demanding that QSLP maintain in force BSI's pension plan for its current and former unionized employees, the Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (Québec Registration Number 32063) (the "**BSI Union Pension Plan**"), and make the special payments, as balance contributions, to the BSI Union Pension Plan retroactively to January 1, 2012.

DIP Financing

13. The Timminco Entities attempted to secure debtor-in-possession (DIP) financing prior to commencing the CCAA proceeding, but were unable to do so. In light of the Timminco Entities' precarious cash position, it was imperative that the Timminco Entities secure DIP financing as soon as possible after commencement of the CCAA proceeding.

14. As a result of their efforts to secure DIP financing, the Timminco Entities successfully negotiated a DIP Agreement with QSI Partners Ltd. ("QSI" or the "DIP Lender") dated January 18, 2012 (the "DIP Agreement") pursuant to which the DIP Lender agreed to extend to the Timminco Entities a DIP facility in the maximum amount of US\$4,250,000 (the "Maximum Amount").

15. On January 27, 2012, the Applicants brought a motion for an Order: (a) approving the DIP Agreement, and (b) granting a super-priority charge in favour of the DIP Lender. The hearing of the motion was concluded on February 6, 2012.

16. On February 8, 2012, Justice Morawetz granted the motion brought by the Applicants with reasons to follow (the "February 8 Decision"). On February 9, 2012, Justice Morawetz released his Reasons for Decision in connection with the Applicants' motion. A copy of the Reasons for Decision is attached hereto as **Exhibit "C"**.

17. The CEP and the USW delivered Notices of Motion for Leave to Appeal the February 8 Decision on February 23, 2012 and February 24, 2012, respectively.

18. On February 23, 2012, the DIP Lender deposited the Maximum Amount into a segregated interest bearing account of the Monitor (the "Monitor Account"). On February 24, 2012 and March 1, 2012, the Timminco Entities delivered drawdown certificates in accordance with the provisions of the DIP Agreement. On February 27, 2012, the Monitor disbursed a DIP advance in the amount of \$750,000 to the Timminco Entities.

19. On March 2, 2012, subject to Court approval, the Timminco Entities and the DIP Lender entered into the DIP Amendment (as defined and described in greater detail below).

Extension of the Stay Period

20. By Order dated January 27, 2012, Justice Morawetz extended the stay of proceedings granted under the Initial Order (the "Stay Period") to and including April 30, 2012.

Motions by Plaintiff in the Pennyfeather v. Timminco Limited, et al. Action

21. St. Clair Pennyfeather is the Plaintiff in the action *Pennyfeather v. Timminco Limited, et al.*, Court File No. CV-09-378701-00CP (the "Class Action"), in which he asserts various common law causes of action against Timminco and other defendants (collectively, the "Defendants") for alleged misrepresentations in Timminco's public disclosures from March 17, 2008 to November 11, 2008. In the Statement of Claim, the Plaintiff also mentioned an intention to obtain leave to commence an action asserting a cause of action under Part XXIII.1 of the *Ontario Securities Act*, but leave has not yet been obtained.

22. Mr. Pennyfeather has delivered two motion records seeking orders, inter alia, (1) lifting the stay of proceedings provided by the Initial Order to permit Mr. Pennyfeather to continue the Class Action against the Defendants; and (2) relieving the Plaintiff from the deemed undertaking rule in the Class Action with respect to certain insurance policies disclosed to the Plaintiff in the Class Action. The Plaintiff had also advised of its intent to bring a motion to compel my cross-examination on the affidavit I swore in support of the Initial Order. The motions were scheduled to be heard on February 27 and March 26, 2012.

23. On February 16, 2012, the Court of Appeal for Ontario released a decision in the Class Action. The Defendants had appealed a lower court decision which found that

the limitation period for the Plaintiff to commence an action under Part XXIII.1 of the Securities Act was suspended on the issuance of a Statement of Claim in May 2009, which mentioned an intention to seek leave to commence an action under Part XXIII.1. In its decision, the Court of Appeal granted the appeal and found that the limitation period to commence an action under Part XXIII.1 was not suspended but in fact continues to run until leave is obtained and a Statement of Claim asserting the Part XXIII.1 action is issued. Section 138.14 of the Securities Act provides that the Statement of Claim asserting such a statutory claim must be issued within three years of the alleged misrepresentation. Over three years have passed since any misrepresentation alleged by the Plaintiff in the Class Action and leave has not been obtained.

24. Following the Court of Appeal's decision, counsel for the Plaintiff withdrew the motions scheduled for February 27, 2012, and indicated that they would be filing additional materials in respect of the motion to lift the stay currently returnable March 26, 2012, to reflect the decision of the Court of Appeal. As at the date of this affidavit, no additional materials in respect of this motion have been delivered.

Postponement of Annual Meeting of Shareholders

25. As noted in my Initial Order Affidavit, Timminco is a public company continued under the *Canada Business Corporations Act* (the "CBCA"). Timminco's common shares were listed and publicly traded on the Toronto Stock Exchange ("TSX"). On February 6, 2012, the TSX delisted the shares of Timminco.

26. Pursuant to section 133(1)(b) of the CBCA, Timminco is required to call an annual meeting of its shareholders by no later than June 30, 2012, being six months after the end of its preceding financial year which ended December 31, 2011. Timminco's last annual meeting was held on May 18, 2011.

27. The management of Timminco is presently devoting its efforts to these CCAA proceedings and the implementation of a successful going concern sale of the Timminco Entities' businesses.

28. Preparing proxy materials required for an annual meeting of shareholders and holding the annual meeting of shareholders would divert attention of senior management of Timminco away from such tasks, would require significant resources and could impede the Timminco Entities' ability to achieve a successful result under the CCAA. In addition, the costs of completing such tasks are not provided for in the cash flows approved by the DIP Lender.

29. Under section 106(6) of the CBCA, if directors of Timminco are not elected at an annual meeting, the incumbent directors will continue to hold office until their successors are elected.

30. Financial and other information is and will continue to be available to the public through the Timminco Entities' court filings which are easily accessible on the Monitor's Website (<http://cfcanda.fticonsulting.com/timminco>). Timminco also continues to issue press releases in respect of all material developments.

31. Under these circumstances, I believe it is impractical for Timminco to call and hold an annual meeting of shareholders during the Stay Period.

SALES PROCESS

32. 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 forthwith.

33. It was a condition of the DIP Agreement that the DIP Lender be granted a period of exclusivity during which the Timminco Entities could not, directly or indirectly through any representative, solicit or entertain offers from, negotiate with or accept any proposal of any person other than the DIP Lender for the acquisition of substantially all of the assets of the Timminco Entities (the "Assets") until January 31, 2012 (the "Exclusivity Period") in order to provide the DIP Lender with the opportunity to prepare a "stalking horse bid" for consideration by the Timminco Entities. If the DIP

Lender submitted a “stalking horse bid” on or prior to January 31, 2012, in form and substance that the Timminco Entities were willing to consider, acting reasonably, the Exclusivity Period was to be extended one week to February 7, 2012. The Timminco Entities were not obligated to accept any such bid and failure to execute an agreement in respect of any “stalking horse bid” would have no effect on the availability of the DIP Facility.

34. The DIP Lender (or the “**Stalking Horse Bidder**”) submitted a “stalking horse bid” (the “**Stalking Horse Bid**”) on January 31, 2012 in form and substance that the Timminco Entities were willing to consider and the Exclusivity Period was extended to February 7, 2012 and again to February 13, 2012. Following expiration of the Exclusivity Period, the parties continued negotiations on a non-exclusive basis.

35. Following expiration of the Exclusivity Period, several other parties expressed interest in acquiring the Timminco Entities’ assets and, following delivery of executed non-disclosure agreements, were granted access to the on-line data room set up by the Timminco Entities for the purposes of a sales process.

Stalking Horse Agreement¹

36. Following negotiations with the Stalking Horse Bidder, on March 2, 2012, the Timminco Entities entered into an Agreement of Purchase and Sale (the “**Stalking Horse Agreement**”) with the Stalking Horse Bidder, as purchaser, and Globe Specialty Metals Inc., a corporation incorporated under the laws of Delaware, as guarantor, (the “**Guarantor**”), subject to Court approval. A copy of the Stalking Horse Agreement is attached hereto as **Exhibit “D”**.

37. Under the Stalking Horse Agreement, the aggregate purchase price (the “**Purchase Price**”) payable by the Stalking Horse Bidder to the Timminco Entities for the Purchased Assets (as defined and described below) is the sum of (a) C\$20,000,000,

¹ All capitalized terms used and not defined in this section of the Affidavit shall have the meaning ascribed to them in the Stalking Horse Agreement.

payable in cash, and (b) the assumption by the Stalking Horse Bidder of the Assumed Obligations (as defined and described below); subject to a purchase price adjustment, if any, in respect of BSI's working capital in accordance with Section 3.7 of the Stalking Horse Agreement.

38. Under the Stalking Horse Agreement, the Stalking Horse Bidder will purchase the following assets of BSI (the "**Purchased Assets**"):

- (a) all of BSI's right, title and interest, in and to those assets and rights set forth in Schedule "A" of the Stalking Horse Agreement, including the 51,000 units in the capital of QSLP and 51 Class A Shares in the capital of QSGP, the QSLP Contracts, the Silicon Metal Contracts and the ancillary assets and other property set forth in Schedule "A"; and
- (b) all of BSI's right, title and interest, in and to all of the tangible and intangible assets, properties, rights and Claims, wherever located, used, intended for use or arising in connection with BSI's currently inactive business of producing solar grade silicon through a division of BSI, Timminco Solar, but only to the extent set forth in Schedule "B" of the Stalking Horse Agreement, including the Solar Equipment and the Solar Intellectual Property.

39. The Stalking Horse Bidder will also assume and perform, discharge and pay when due the following obligations and liabilities of the Timminco Entities (the "**Assumed Obligations**") after the Closing:

- (a) all debts, liabilities and obligations under the Contracts (to the extent assigned or transferred to the Stalking Horse Bidder on Closing) for the period from and after the Closing Date and all Cure Costs (other than Post-Filing Costs);

- (b) all debts, liabilities and obligations for Transfer Taxes payable in connection with the Transaction;
- (c) all debts, liabilities and obligations for realty taxes in respect of the Purchased Assets attributable to the period from and after the Closing Date; and
- (d) all debts, liabilities and obligations arising from ownership and use of the Purchased Assets for the period from and after the Closing Date.

40. Other than the Assumed Obligations, the Stalking Horse Bidder will not assume and will not be liable, directly or indirectly, or otherwise be responsible for any debts, liabilities or other obligations of the Timminco Entities, including, without limiting the generality of the foregoing, among others, the following:

- (a) all debts, liabilities, obligations or Claims related to any Benefit Plans, Collective Agreements, Employees, Pension Plans, Post-Retirement Liabilities or any Excluded Asset;
- (b) all debts, liabilities and obligations related to any Purchased Asset (including Contracts but excluding Cure Costs) arising out of or related to the period prior to the Closing Time; and
- (c) all obligations and liabilities owing by either of the Timminco Entities to each other or any Affiliate thereof (for greater certainty other than Cure Costs excluding Post-Filing Costs).

41. The Timminco Entities are obligated to assign to the Stalking Horse Bidder all of their rights, benefits and interests in and to the Contracts and the Stalking Horse Bidder shall assume the obligations and liabilities of the Timminco Entities under the Contracts at the Closing Time (including Cure Costs but excluding Post-Filing Costs). Notwithstanding the foregoing, the Stalking Horse Agreement and any document

delivered under it does not constitute an assignment or an attempted assignment of any Purchased Asset contemplated to be assigned to the Stalking Horse Bidder under the Stalking Horse Agreement that is not assignable without the Consent and Approval of a third party unless (a) such Consent and Approval has been obtained or (b) the assignment has been ordered by the Court.

42. The sale of the Purchased Assets will be on an "as is, where is" basis as they shall exist at the Closing Time, subject to the terms of the Stalking Horse Agreement.

43. Under the terms of the Stalking Horse Agreement, effective upon entry of the Bidding Procedures Order, the Timminco Entities will be deemed to acknowledge receipt from the Stalking Horse Bidder of a deposit (the "Deposit") of 15% of the Closing Cash Purchase Price (excluding any adjustment contemplated under Section 3.7 thereof) pursuant to the credit and set off arrangement contemplated under an amendment to the DIP Agreement dated March 1, 2012 (the "DIP Amendment"). Pursuant to the DIP Amendment, the parties agreed, *inter alia*, that if either (a) the Closing takes place, or (b) the Closing does not occur solely as a result of the failure by the Stalking Horse Bidder to perform any of its obligations under the Stalking Horse Agreement, then the outstanding DIP Obligations (as defined in the DIP Agreement) owing by the Timminco Entities and the obligation of the Monitor to return the remaining balance, if any, of the Maximum Amount (as defined in the DIP Agreement) (and interest earned thereon) to the Stalking Horse Bidder on the Maturity Date (as defined in the DIP Agreement) shall be reduced by an aggregate amount equal to the Deposit. A copy of the DIP Amendment is attached hereto as Exhibit "E".

44. The Stalking Horse Agreement is subject to certain conditions being fulfilled or performed, including, but not limited to:

- (a) each Consent and Approval, including the DCC Consent, having been obtained or, in the absence of any such Consent and Approval, the Court

having approved the Assignment Order in respect of such Consent and Approval and it not having been stayed or subject to appeal;

- (b) the Bidding Procedures Order having been obtained and not having been stayed, varied, vacated or appealed (or any such appeal shall have been dismissed with no further appeal therefrom);
- (c) the Stalking Horse Agreement being the Successful Bid;
- (d) the Approval and Vesting Order having been obtained and not having been stayed, varied, vacated or appealed (or any such appeal having been dismissed with no further appeal therefrom);
- (e) no order having been issued by a Governmental Authority which restrains or prohibits the completion of the Transaction; and
- (f) no motion, action or proceedings being pending by or before a Governmental Authority to restrain or prohibit the completion of the Transaction contemplated by this Agreement.

45. In consideration for the Stalking Horse Bidder's expenditure of time and money and agreement to act as the initial bidder through the Stalking Horse Bid and the preparation of the Stalking Horse Agreement, the Stalking Horse Bidder shall be entitled to an expense reimbursement for its legal and other costs incurred in connection with the Stalking Horse Bid in an amount of C\$500,000 (the "Expense Reimbursement"), payable only by the Timminco Entities to the Stalking Horse Bidder in the event that a Successful Bid other than the Stalking Horse Bid is accepted and the transaction contemplated thereby is completed. The Expense Reimbursement shall be payable to the Stalking Horse Bidder out of the sale proceeds derived from and upon completion of the Successful Bid.

46. Under the terms of the Stalking Horse Agreement, the Guarantor irrevocably and unconditionally guaranteed the timely and complete performance of, and compliance with, certain of the Stalking Horse Bidder's obligations under the Stalking Horse Agreement (as described in greater detail in Section 8.1 thereof).

47. The Timminco Entities are seeking authorization and direction to enter into the Stalking Horse Agreement for the purposes of creating a "stalking horse" sales process and auction with a view to maximizing the purchase price to be obtained for their assets. If no other bidder submits a superior bid of the assets subject to the Stalking Horse Agreement the Stalking Horse Bidder will be selected as the Successful Bid (as defined and described below), and the Timminco Entities will return to Court to seek approval thereof.

48. The Timminco Entities' management is of the view that the Stalking Horse Agreement presents the best alternative in the circumstances as it provides a going concern outcome for the Timminco Entities, creates a "floor" purchase price and delineates the majority of the assets for sale. Management is also of the view that the quantum of the Expense Reimbursement is reasonable in light of the amount of the proposed purchase price under the Stalking Horse Agreement and the Stalking Horse Bidder's expenditure of time and money in the preparation of the Stalking Horse Agreement and Bidding Procedures (as defined and described below).

49. The Monitor support the Timminco Entities entering into the Stalking Horse Agreement.

Bidding Procedures

50. The Timminco Entities, in consultation with the Monitor and the Stalking Horse Bidder, also developed bidding procedures which are proposed to govern the Timminco Entities' sales process relating to solicitation by the Timminco Entities of one or more superior bid(s) for their Stalking Horse Assets to that contemplated by the

Stalking Horse Agreement (the “**Bidding Procedures**”). The deadlines under the Bidding Procedures provide for: first round of bids to be submitted by March 26, 2012; second round of bids by April 16, 2012; an auction to take place on April 24, 2012; and seeking Court approval of and closing (if approved) the successful bid by June 20, 2012.

51. The Bidding Procedures (substantially in the form attached to the Stalking Horse Agreement as Schedule “D”) set out the following requirements and deadlines:

- (a) To participate in the process detailed by these Bidding Procedures, an interested party must submit an initial Bid (a “**Phase I Bid**”) on or before March 26, 2012 (the “**Phase I Bid Deadline**”);
- (b) To be a “**Qualified Phase I Bidder**”, the Phase I Bidder must submit a bid that (as described in greater detail in the Bidding Procedures):
 - (i) contains an executed confidentiality and standstill agreement (the “**Confidentiality Agreement**”) in form and substance acceptable to the Timminco Entities;
 - (ii) contains written evidence upon which the Timminco Entities may reasonably conclude that the Phase I Bidder has the necessary financial ability to close the contemplated transaction and provide adequate assurance of future performance of all obligations to be assumed in such contemplated transaction; and
 - (iii) the Timminco Entities, with the assistance of their advisors and the Monitor, determine is reasonably likely to submit a binding bona fide offer that would result in greater value being received for the Stalking Horse Assets than under the Stalking Horse Agreement and would be able to consummate a sale if selected as a Successful Bidder (defined below);

- (c) A party who does not wish to purchase all or substantially all of the Stalking Horse Assets (a "**Portion Bidder**") may submit a Bid (a "**Portion Bid**") in respect of a smaller subset of such assets and shall constitute a Qualified Phase I Bidder if such Portion Bid satisfies the Participant Requirements (as defined in the Bidding Procedures);
- (d) Parties that execute the Confidentiality Agreement will be eligible to receive due-diligence access or additional non-public information;
- (e) Any Qualified Phase I Bidder wishing to continue in the sales process, must submit by April 16, 2012 (the "**Phase II Bid Deadline**") a Bid (a "**Phase II Bid**") that is determined to satisfy, *inter alia*, the following conditions (a "**Qualified Phase II Bid**") (as described in greater detail in the Bidding Procedures):
 - (i) The Bid must contain an executed mark-up of the Stalking Horse Agreement (a "**Modified APA**") reflecting proposed changes to the Stalking Horse Agreement and a written and binding commitment that they intend to close on the terms and conditions set forth therein;
 - (ii) The Bid must be irrevocable until (A) June 20, 2012; or (B) in the event the Phase II Bid is determined to be the Back-up Bid, July 20, 2012;
 - (iii) The Bid may not be conditional on obtaining financing or any internal approval or on the outcome or review of due diligence and any other contingencies may not, in the aggregate, be more burdensome than those set forth in the Stalking Horse Agreement;

- (iv) The Bid must contain written evidence of a commitment for financing or other evidence of the ability to consummate the sale satisfactory to the Timminco Entities;
- (v) The Bid may not request or entitle the Qualified Phase I Bidder, other than the Stalking Horse Bidder, to any break-up fee, expense reimbursement or similar type of payment;
- (vi) The Bid must be accompanied by a deposit (the "**Good Faith Deposit**") equal to the amount of 15% of the total purchase price contemplated by the Modified APA. The Good Faith Deposits will be either applied to the purchase price or returned to the Bidders in accordance with the Bidding Procedures following completion of the sales process; and
- (vii) The aggregate consideration in a Phase II Bid must have a cash purchase price of at least C\$20 million, plus the Expense Reimbursement of C\$500,000, plus C\$250,000 for a total minimum consideration of C\$2,750,000 (the "**Minimum Overbid**");
- (f) Any Portion Bidder shall not be subject to the Minimum Overbid requirement set out above; however, any combination of Portion Bids that do not overlap for the Stalking Horse Assets sought to be purchased (an "**Aggregated Bid**") shall be subject to the Minimum Overbid;
- (g) If a Qualified Phase II Bid (other than the Stalking Horse Bid) is received by the Phase II Bid Deadline, the Timminco Entities shall conduct an auction (the "**Auction**") to determine the highest and/or best bid with respect to the Stalking Horse Assets. The Auction shall commence on April 24, 2012, at 10:00 a.m. (Eastern Time); at the offices of Stikeman

Elliott LLP, 199 Bay Street, 5300 Commerce Course West, Toronto, Ontario, M5L 1B9;

- (h) If no Qualified Phase II Bid is received by the Phase II Bid Deadline, then the Auction will be cancelled;
- (i) The Auction shall be conducted according to the following procedures (as described in greater detail in the Bidding Procedures):
 - (i) Only a Qualified Phase II Bidder that has submitted a Qualified Phase II Bid (including any or all Portion Bidders and the Stalking Horse Bidder) is eligible to participate at the Auction;
 - (ii) During the Auction, bidding shall begin initially with the highest Qualified Phase II Bid (the “**Opening Bid**”) (as determined by the Timminco Entities with the assistance of the Monitor in accordance with the Bidding Procedures and which may be an Aggregated Bid);
 - (iii) The bidding shall continue in increments of at least C\$250,000 (or such lower amount (not to be less than C\$100,000) as the Timminco Entities determine in order to facilitate the Auction) (the “**Minimum Overbid Increment**”);
 - (iv) All subsequent bids (the “**Overbids**”) shall be made and received on an open basis, and all material terms of each Overbid shall be fully disclosed to all other Qualified Phase II Bidders;
 - (v) Except as modified in the Bidding Procedures, an Overbid must comply with the conditions for a Qualified Phase II Bid set forth above, provided, however, that the Bidding Deadline shall not apply;

- (vi) Each Portion Bidder entitled to participate in the Auction shall be entitled to submit an Overbid (in a minimum increment to be determined by the Timminco Entities) with respect to the Assets it is bidding on without being required to submit an Overbid with respect to all Assets subject to the Stalking Horse APA or the applicable Opening Bid. As part of any Overbid, the Stalking Horse Bidder shall be entitled to make a Portion Bid;
- (vii) If at the end of any round of bidding a Qualified Phase II Bidder (other than a Portion Bidder or the Qualified Phase II Bidder that submitted the then highest and/or best Bid) fails to submit an Overbid, then such Qualified Phase II Bidder shall not be entitled to continue to participate in the next round of the Auction;
- (viii) The Timminco Entities reserve the right to make one or more adjournments in the Auction and to adopt rules for the Auction at or prior to the Auction that will better promote the goals of the Auction and that are not inconsistent with any of the provisions of the Bidding Procedures;
- (ix) The Timminco Entities shall direct and preside over the Auction and shall maintain a transcript of the Opening Bid and all Overbids made and announced at the Auction, including the Successful Bid and the Back-up Bid;
- (x) Upon conclusion of the bidding, the Auction shall be closed, and the Timminco Entities shall, with the assistance of their advisors and the Monitor, (A) immediately review the final Overbid of each Qualified Phase II Bidder on the basis of financial and contractual terms and the factors relevant to the sale process, and (B) identify the highest and/or best Bid or Aggregated Bids (the “Successful

Bid” and the entity or entities submitting such Successful Bid, the **“Successful Bidder”**), and the next highest and/or best Bid or Aggregated Bids after the Successful Bid (the **“Back-up Bid”** and the entity or entities submitting such Back-up Bid, the **“Back-Up Bidder”**), and advise the Qualified Phase II Bidders of such determination;

- (xi) In the event that the Successful Bidder is not the Stalking Horse Bidder and the transactions contemplated by the Successful Bid are completed, the Stalking Horse Agreement shall be terminated pursuant to the Stalking Horse Agreement, and the Expense Reimbursement (in the amount of C\$500,000) shall be immediately paid to the Stalking Horse Bidder from the proceeds received upon closing of the Successful Bid.

52. If a Qualified Phase II Bidder submits an investment bid involving a restructuring, recapitalization or other form of reorganization of the business and affairs of the Timminco Entities, which the Timminco Entities, after consultation with the Monitor, consider would result in a greater value being received for the benefit of the Timminco Entities’ creditors than the Qualified Phase II Bids, then the Timminco Entities may consider such investment bid a Qualified Phase II Bid and allow such Qualified Phase II Bidder to participate in the Auction.

53. The Timminco Entities shall complete the sale transaction(s) with the Successful Bidder following approval of the Successful Bid by the Court.

54. The sale of the Assets shall be on an “as is, where is” basis.

55. The Bidding Procedures may be modified or amended only upon the express written consent of the Timminco Entities, after consultation with the Monitor, and, if

such modification or amendment materially deviates from these Bidding Procedures, with the written consent of the Stalking Horse Bidder, or by order of the Court.

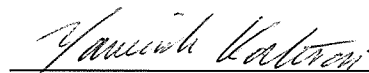
56. The Bidding Procedures were designed to provide a fair and efficient process for maximizing the value of the Assets for the benefit of all of the Timminco Entities' stakeholders. The Bidding Procedures preserve flexibility for the Timminco Entities to consider and accept Portion Bids or investment bids. In the view of the Timminco Entities' management, the Bidding Procedures and the Stalking Horse Agreement represent the best alternative in the circumstances.

57. I understand the Monitor support the approval of the Bidding Procedures.

58. As stated above, in preparation for the commencement of the sales process (subject to obtaining Court approval), the Timminco Entities have set up and populated an on-line data room, compiled, with the assistance of the Monitor, a list of potential bidders, and engaged in discussions with certain such potential bidders.

59. This affidavit is sworn in support of the Timminco Entities' motion for the relief described in paragraph 2 hereof and for no improper purpose.

SWORN BEFORE ME at the City of Toronto, Province of Ontario, on March 2, 2012.



Commissioner for Taking Affidavits



Peter A.M. Kalins

Yusuf Yannick Katirai, a
Commissioner etc., Province of Ontario,
while a student-at-law.
Expires April 12, 2013.

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

Court File No. CV12-9539-00CL

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**AFFIDAVIT OF PETER A.M. KALINS
(SWORN MARCH 2, 2012)**

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

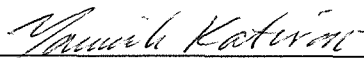
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Lawyers for the Applicants

THIS IS EXHIBIT "A", referred to in the Affidavit of Peter A.M. Kalins, sworn on March 2, 2012.



Commissioner for Taking Affidavits

**Yusuf Yannick Katirai, a
Commissioner etc., Province of Ontario,
while a student-at-law.
Expires April 12, 2013.**

APPENDIX "A"

Court File No. 12-CL- 9539-000L

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.)	TUESDAY, THE 3RD
)	
JUSTICE MORAWETZ)	DAY OF JANUARY, 2012

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

INITIAL ORDER

THIS APPLICATION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Peter A.M. Kalins sworn January 2, 2012 and the Exhibits attached thereto (the "**Kalins Affidavit**"), and on being advised that Investissement Québec ("**IQ**") was given notice of this application, and on hearing the submissions of counsel for the Timminco Entities and FTI Consulting Canada Inc. and on reading the consent of FTI Consulting Canada Inc. to act as the Monitor (the "**Monitor**"),

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Timminco Entities are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that one or both of the Timminco Entities shall have the authority to file and may, subject to further order of this Court, file with this Court a plan or plans of compromise or arrangement (hereinafter referred to as the "Plan").

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Timminco Entities shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property"). Subject to further Order of this Court, the Timminco Entities shall continue to carry on business in a manner consistent with the preservation of their business (the "Business") and Property. The Timminco Entities shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, the "Assistants") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the Timminco Entities shall be entitled to continue to utilize the central cash management system currently in place as described in the

Kalins Affidavit or replace it with another substantially similar central cash management system (the “Cash Management System”) and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Timminco Entities of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Timminco Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. **THIS COURT ORDERS** that, notwithstanding anything to the contrary contained herein, the Timminco Entities are authorized and empowered to continue to negotiate discounts on their invoices with customers in exchange for early payment at discount rates consistent with rates previously provided by the Timminco Entities ~~as~~ ^{and} as approved by the Monitor or the Court and is authorized and empowered to continue to accept such discounted amounts in full satisfaction of the associated gross amount owing by such customer.

7. **THIS COURT ORDERS** that the Timminco Entities shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

- a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses, and similar amounts owed to any Assistants, payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

- b) the fees and disbursements of any Assistants retained or employed by the Timminco Entities in respect of these proceedings, at their standard rates and charges.

8. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Timminco Entities shall be entitled but not required to pay all reasonable expenses incurred by the Timminco Entities in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

- a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and
- b) payment for goods or services actually supplied to the Timminco Entities following the date of this Order.

9. **THIS COURT ORDERS** that the Timminco Entities shall remit, in accordance with legal requirements, or pay:

- a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) income taxes;
- b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Timminco Entities in connection with the sale of goods and services by the Timminco Entities, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the

date of this Order but not required to be remitted until on or after the date of this Order, and

- c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Timminco Entities.

10. **THIS COURT ORDERS** that until a real property lease or a lease with respect to use of a portable structure is assigned, disclaimed or resiliated in accordance with the CCAA, the Timminco Entities shall pay all amounts constituting rent or payable as rent under real property leases or a lease with respect to use of portable structure (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Timminco Entities and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

11. **THIS COURT ORDERS** that, except as specifically permitted herein, the Timminco Entities are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Timminco Entities to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

12. **THIS COURT ORDERS** that Québec Silicon Limited Partnership ("QSLP") and Québec Silicon General Partner Inc. ("QSGP") shall provide access to the Timminco Entities or permit the Timminco Entities to make, retain and take away copies of books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of QSLP, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "QSLP Records") and grant to the Timminco Entities unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 12 or in paragraph 13 of this Order shall require the delivery of QSLP Records, or the granting of access to QSLP Records, which may not be disclosed or provided to the Timminco Entities due to privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

13. **THIS COURT ORDERS** that QSLP and QSGP shall provide access to the Timminco Entities or permit the Timminco Entities to make, retain and take away copies of books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of BSI, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "BSI Records") and grant to the Timminco Entities unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 13 or in paragraph 12 of this Order shall require the delivery of BSI Records, or the granting of access to BSI Records, which may not be disclosed or provided to the Timminco Entities due to privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

14. **THIS COURT ORDERS** that if any QSLP Records or BSI Records are stored or otherwise contained on a computer or other electronic system of information storage,

whether by independent service provider or otherwise, all individuals, firms, corporations, or any other entities in possession or control of such QSLP Records or BSI Records shall forthwith give unfettered access to the Timminco Entities for the purpose of allowing the Timminco Entities to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Timminco Entities deem expedient, and shall not alter, erase or destroy any QSLP Records or BSI Records without the prior written consent of the Timminco Entities. Further, for the purposes of this paragraph, all Persons shall provide the Timminco Entities with all such assistance in gaining immediate access to the information in the records as the Timminco Entities may require including providing the Timminco Entities with instructions on the use of any computer or other system and providing the Timminco Entities with any and all access codes, account names and account numbers that may be required to gain access to the information.

RESTRUCTURING

15. **THIS COURT ORDERS** that the Timminco Entities shall, subject to such requirements as are imposed by the CCAA, have the right to:

- a) permanently or temporarily cease, downsize or shut down any of its business or operations and to dispose of redundant or non-material assets not exceeding \$100,000 in any one transaction or \$1,000,000 in the aggregate,
- b) terminate the employment of such of its employees or Assistants or temporarily lay off such of its employees or Assistants as it deems appropriate, and
- c) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

- d) all of the foregoing to permit the Timminco Entities to proceed with an orderly restructuring of the Business (the "**Restructuring**").

16. **THIS COURT ORDERS** that the Timminco Entities shall provide each of the relevant landlords with notice of the Timminco Entities' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Timminco Entities' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Timminco Entities, or by further Order of this Court upon application by the Timminco Entities on at least two (2) days' notice to such landlord and any such secured creditors. If the Timminco Entities disclaim or resiliate the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the Timminco Entities' claim to the fixtures in dispute.

17. **THIS COURT ORDERS** that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Timminco Entities and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Timminco Entities in respect of such lease or leased premises and such landlord shall be entitled to notify the Timminco Entities of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers

advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE TIMMINCO ENTITIES OR THE PROPERTY

18. **THIS COURT ORDERS** that until and including February 2, 2012, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Timminco Entities or the Monitor, or affecting the Business or the Property, except with the written consent of the Timminco Entities and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Timminco Entities or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

19. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Timminco Entities or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Timminco Entities and the Monitor, or leave of this Court, provided that nothing in this Order shall (a) empower the Timminco Entities to carry on any business which the Timminco Entities are not lawfully entitled to carry on, (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (c) prevent the filing of any registration to preserve or perfect a security interest, or (d) prevent the registration of a claim for lien.

20. **THIS COURT ORDERS** that, without limiting anything contained in paragraphs 19 and 21 hereof, any and all rights, remedies, modifications of existing rights and events deemed to occur pursuant to the QSLP Agreements (as defined in the paragraph 23 of the Kalins Affidavit) upon or as a result of (a) an Act of Insolvency (as

that term is used in the Kalins Affidavit) occurring with respect to BSI, (b) any default or non-performance by the Timminco Entities, (c) the making or filing of these proceedings, or (d) any allegation, admission or evidence in these proceedings, are hereby stayed and suspended except with the written consent of the Timminco Entities and the Monitor, or leave of this Court. Without limiting the foregoing, the operation of any provision of any QSLP Agreement that purports to (y) effect or cause a cessation of any rights of the Timminco Entities, or (z) to accelerate, terminate, discontinue, alter, interfere with, repudiate, cancel, suspend or modify such agreement or arrangement as a result of any default or non-performance by or the insolvency of the Timminco Entities, the making or filing of these proceedings, or any allegation, admission or evidence in these proceedings, is hereby stayed and restrained and any steps or actions purported to be taken by any counterparty to any of the QSLP Agreements and any event that is deemed to have occurred in respect of the QSLP Agreements shall be null and void and of no effect.

NO INTERFERENCE WITH RIGHTS

21. **THIS COURT ORDERS** that during the Stay Period, no Person having oral or written agreements with the Timminco Entities shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform or provide any right, renewal right, contract, agreement, licence, permit or access right in favour of or held by the Timminco Entities, including without limitation, access rights held by BSI with respect to the Quebec Silicon Real Property and the Becancour Properties (as these terms are defined in the Kalins Affidavit), except with the written consent of the Timminco Entities and the Monitor, or leave of this Court.

CONTINUATION OF SUPPLY

22. **THIS COURT ORDERS** that during the Stay Period, all Persons, including QSLP and QSGP, having oral or written agreements with the Timminco Entities or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services,

centralized banking services, payroll services, insurance, transportation services, utility, customs clearing or other services to the Business or the Timminco Entities, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Timminco Entities, and that the Timminco Entities shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Timminco Entities in accordance with normal payment practices of the Timminco Entities or such other practices as may be agreed upon by the supplier or service provider and each of the Timminco Entities and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

23. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Timminco Entities. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

24. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Timminco Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Timminco Entities whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or

arrangement in respect of the Timminco Entities, if one is filed, is sanctioned by this Court or is refused by the creditors of the Timminco Entities or this Court.

25. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors of QSGP serving as BSI's nominated or appointed representatives on the Board of Directors of QSGP or any of the former, current or future officers of the Timminco Entities also serving as officers of QSGP (collectively, the "QSGP/BSI Directors") with respect to any claim against the QSGP/BSI Directors that arose before the date hereof and that relates to any obligations of QSGP or QSLP whereby the QSGP/BSI Directors are alleged under any law to be liable in their capacity as directors or officers of QSGP for the payment or performance of such obligations, until a compromise or arrangement in respect of the Timminco Entities, if one is filed, is sanctioned by this Court or is refused by the creditors of the Timminco Entities or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

26. **THIS COURT ORDERS** that the Timminco Entities shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Timminco Entities after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

27. **THIS COURT ORDERS** that the directors and officers of the Timminco Entities shall be entitled to the benefit of and are hereby granted a charge (the "D&O Charge") on the Property, which charge shall not exceed an aggregate amount of \$400,000, as security for the indemnity provided in paragraph 26 of this Order. The D&O Charge shall have the priority set out in paragraphs 38 and 40 herein.

28. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the D&O Charge, and (b) the Timminco Entities' directors and officers shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 26 of this Order.

APPOINTMENT OF MONITOR

29. **THIS COURT ORDERS** that FTI Consulting Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Timminco Entities with the powers and obligations set out in the CCAA or set forth herein and that the Timminco Entities and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Timminco Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

30. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Timminco Entities' receipts and disbursements;
- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) advise the Timminco Entities in the development of the Plan and any amendments to the Plan;

- (d) assist the Timminco Entities, to the extent required by the Timminco Entities, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;
- (e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Timminco Entities, to the extent that is necessary to adequately assess the Timminco Entities' business and financial affairs or to perform its duties arising under this Order;
- (f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;
- (g) hold and administer funds in connection with arrangements made among the Timminco Entities, any counter-parties, and the Monitor, or by Order of this Court; and
- (h) perform such other duties as are required by this Order or by this Court from time to time.

31. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

32. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or

other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Civil Code of Québec, the Québec *Environment Quality Act*, the *Ontario Mining Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

33. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Timminco Entities with information provided by the Timminco Entities in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Timminco Entities is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Timminco Entities may agree.

34. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

35. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Timminco Entities shall be paid their reasonable fees and disbursements, in each

case at their standard rates and charges, by the Timminco Entities as part of the costs of these proceedings. The Timminco Entities are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Timminco Entities on a weekly basis and, in addition, the Timminco Entities are hereby authorized and directed to pay to the Monitor, counsel to the Monitor, and counsel to the Timminco Entities, retainers in the amounts of \$75,000, \$30,000 and \$100,000, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

36. **THIS COURT ORDERS** that ~~at the request of the Timminco Entities, any party of interest, or this Court,~~ the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

37. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, if any, and the Timminco Entities' counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of \$1 million, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 38 and 40 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

38. **THIS COURT ORDERS** that the priorities of the Administration Charge and the D&O Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First - the Administration Charge (to the maximum amount of \$500,000);

Second - the D&O Charge (to the maximum amount of \$400,000); and

Third - the Administration Charge (to the maximum amount of \$500,000) ranking behind all Encumbrances (as defined below) pending return of the Comeback Motion (as defined below).

39. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

40. **THIS COURT ORDERS** that, the Charges shall constitute a charge on the Property and the D&O Charge and the Administration Charge to a maximum amount of \$500,000 shall rank ahead in priority to the existing security interests of IQ, but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the Ontario *Pension Benefits Act* or the Quebec *Supplemental Pension Plans Act* (collectively, the “Encumbrances”) in favour of any Persons that have not been served with notice of this application. The Applicants and the beneficiaries of the Charges shall be entitled to seek priority ahead of the Encumbrances on notice to those parties likely to be affected by such priority (it being the intention of the Timminco Entities to seek priority for the Charges ahead of all such Encumbrances at the Comeback Motion.

41. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Timminco Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Timminco Entities also obtain the prior written consent of the Monitor and the beneficiaries of the D&O Charge and the Administration Charge, or further Order of this Court.

42. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the

Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Timminco Entities, and notwithstanding any provision to the contrary in any Agreement:

- (a) the creation of the Charges shall not create or be deemed to constitute a breach by the Timminco Entities of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and
- (c) the payments made by the Timminco Entities pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

43. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Timminco Entities' interest in such real property leases.

SERVICE AND NOTICE

44. **THIS COURT ORDERS** that the Monitor shall (a) without delay, publish in *The Globe and Mail*, National Edition, and *La Presse*, in French, once a week for two weeks a notice containing the information prescribed under the CCAA, and (b) within five

business days after the date of this Order (i) make this Order publicly available in the manner prescribed under the CCAA, (ii) send, in the prescribed manner, a notice to every known creditor who has a claim against the Timminco Entities of more than \$1,000, and (iii) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the names and addresses of individuals who are creditors publicly available.

45. **THIS COURT ORDERS** that the Timminco Entities and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Timminco Entities' creditors or other interested parties at their respective addresses as last shown on the records of the Timminco Entities and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

46. **THIS COURT ORDERS** that the Timminco Entities, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor may post a copy of any or all such materials on its website at <http://cfcanada.fticonsulting.com/timminco>.

47. **THIS COURT ORDERS** that the Timminco Entities are authorized to ~~serve~~ ^{serve} their court materials with respect to the comeback motion expected to be heard ~~the week of~~ ^{on} January 12, 2012 (the "Comeback Motion") by forwarding a copy of this Order and any additional materials to be filed with respect to the Comeback Motion by electronic transmission, where available, or by courier to the parties likely to be affected by the

relief to be sought on the Comeback Motion at such parties' respective addresses as last shown on the records of the Timminco Entities as soon as practicable. The Timminco Entities shall serve the beneficiaries of the BSI Non-Union Pension Plan, the BSI Union Pension Plan and the Haley Pension Plan by serving in the manner described above the pension plan committees for the BSI Non-Union Pension Plan and the BSI Union Pension Plan, Financial Services Commission of Ontario, and the Régie Des Rentes Du Québec.

GENERAL

48. **THIS COURT ORDERS** that the Timminco Entities or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Timminco Entities, the Business or the Property.

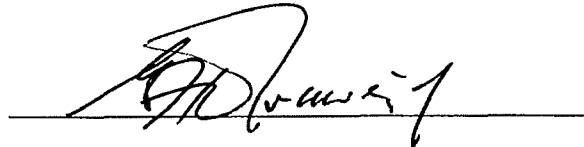
50. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Timminco Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Timminco Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Timminco Entities and the Monitor and their respective agents in carrying out the terms of this Order.

51. **THIS COURT ORDERS** that each of the Timminco Entities and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order

and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

52. **THIS COURT ORDERS** that any interested party (including the Timminco Entities and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

53. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.



REGISTERED AT / INSCRIT À TORONTO
BOOK NO:
LE / DANS LE REGISTRE NO.:

JAN 3 2012

FILED AT:



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

Court File No. 12-CL-9539-001

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

(Applicants)

ONTARIO
SUPERIOR COURT OF JUSTICE COMMERCIAL
LIST

Proceeding commenced at Toronto

INITIAL ORDER

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Lawyers for the Monitor

THIS IS EXHIBIT "B", referred to in the Affidavit of Peter A.M. Kalins, sworn on March 2, 2012.



Commissioner for Taking Affidavits

Yusuf Yannick Katirai, a
Commissioner etc., Province of Ontario,
while a student-at-law.
Expires April 12, 2013.

APPENDIX "B"

CITATION: Timminco Limited (Re), 2012 ONSC 506
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120202

SUPERIOR COURT OF JUSTICE -- ONTARIO
(COMMERCIAL LIST)

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

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

BEFORE: MORAWETZ J.

COUNSEL: A. J. Taylor, M. Konyukhova and K. Esaw, for the Applicants

D.W. Ellickson, for Communications, Energy and Paperworkers' Union of
Canada

C. Sinclair, for United Steelworkers' Union

K. Peters, for AMG Advance Metallurgical Group NV

M. Bailey, for Superintendent of Financial Services (Ontario)

S. Weisz, for FTI Consulting Canada Inc.

A. Kauffman, for Investissement Quebec

HEARD: January 12, 2012

RELEASED: January 16, 2012

REASONS: February 2, 2012

ENDORSEMENT

[1] This motion was heard on January 12, 2012. On January 16, 2012, the following endorsement was released:

Motion granted. Reasons will follow. Order to go subject to proviso that the Sealing Order is subject to modification, if necessary, after reasons provided.

[2] These are those reasons.

Background

[3] On January 3, 2012, Timminco Limited ("Timminco") and Bécancour Silicon Inc. ("BSI") (collectively, the "Timminco Entities") applied for and obtained relief under the *Companies' Creditors Arrangement Act* (the "CCAA").

[4] In my endorsement of January 3, 2012, (*Timminco Limited (Re)*, 2012 ONSC 106), I stated at [11]: "I am satisfied that the record establishes that the Timminco Entities are insolvent and are 'debtor companies' to which the CCAA applies".

[5] On the initial motion, the Applicants also requested an "Administration Charge" and a "Directors' and Officers' Charge" ("D&O Charge"), both of which were granted.

[6] The Timminco Entities requested that the Administration Charge rank ahead of the existing security interest of Investissement Quebec ("IQ") but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the *Ontario Pension Benefit Act* (the "PBA") or the *Quebec Supplemental Pensions Plans Act* (the "QSPPA") (collectively, the "Encumbrances") in favour of any persons that have not been served with this application.

[7] IQ had been served and did not object to the Administration Charge and the D&O Charge.

[8] At [35] of my endorsement, I noted that the Timminco Entities had indicated their intention to return to court to seek an order granting super priority ranking for both the Administration Charge and the D&O Charge ahead of the Encumbrances.

[9] The Timminco Entities now bring this motion for an order:

- (a) suspending the Timminco Entities' obligations to make special payments with respect to the pension plans (as defined in the Notice of Motion);
- (b) granting super priority to the Administration Charge and the D&O Charge;
- (c) approving key employee retention plans (the "KERPs") offered by the Timminco Entities to certain employees deemed critical to a successful restructuring and a charge on the current and future assets, undertakings and properties of the Timminco Entities to secure the Timminco Entities' obligations under the KERPs (the "KERP Charge"); and
- (d) sealing the confidential supplement (the "Confidential Supplement") to the First Report of FTI Consulting Canada Inc. (the "Monitor").

[10] If granted, the effect of the proposed Court-ordered charges in relation to each other would be:

- first, the Administration Charge to the maximum amount of \$1 million;
- second, the KERP Charge (in the maximum amount of \$269,000); and

- third, the D&O Charge (in the maximum amount of \$400,000).

[11] The requested relief was recommended and supported by the Monitor. IQ also supported the requested relief. It was, however, opposed by the Communications, Energy and Paperworkers' Union of Canada ("CEP"). The position put forth by counsel to CEP was supported by counsel for the United Steelworkers' Union ("USW").

[12] The motion materials were served on all personal property security registrants in Ontario and in Quebec: the members of the Pension Plan Committees for the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan; the Financial Services Commission of Ontario; the Regie de Rentes du Quebec; the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union; and La Section Locale 184 de Syndicat Canadien des Communications, De L'Energie et du Papier; and various government entities, including Ontario and Quebec environmental agencies and federal and provincial taxing authorities.

[13] Counsel to the Applicants identified the issues on the motion as follows:

- (a) Should this court grant increased priority to the Administration Charge and the D&O Charge?
- (b) Should this court grant an order suspending the Timminco Entities' obligations to make the pension contributions with respect to the pension plans?
- (c) Should this court approve the KERPs and grant the KERPs Charge?
- (d) Should this court seal the Confidential Supplement?

[14] It was not disputed that the court has the jurisdiction and discretion to order a super priority charge in the context of a CCAA proceeding. However, counsel to CEP submits that this is an extraordinary measure, and that the onus is on the party seeking such an order to satisfy the court that such an order ought to be awarded in the circumstances.

[15] The affidavit of Peter A.M. Kalins, sworn January 5, 2012, provides information relating to the request to suspend the payment of certain pension contributions. Paragraphs 14-28 read as follows:

14. The Timminco Entities sponsor the following three pension plans (collectively, the "**Pension Plans**"):

- (a) the Retirement Pension Plan for The Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco Limited (Ontario Registration Number 0589648) (the "**Haley Pension Plan**");
- (b) the Régime de rentes pour les employés non syndiqués de Silicium Bécancour Inc. (Québec Registration Number 26042) (the "**Bécancour Non-Union Pension Plan**"); and
- (c) the Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (Québec Registration Number 32063) (the "**Bécancour Union Pension Plan**").

Haley Pension Plan

15. The Haley Pension plan, sponsored and administered by Timminco, applies to former hourly employees at Timminco's magnesium facility in Haley, Ontario.

16. The Haley Pension Plan was terminated effective as of August 1, 2008 and accordingly, no normal cost contributions are payable in connection with the Haley Pension Plan. As required by the Ontario *Pension Benefits Act* (the "PBA"), a wind-up valuation in respect of the Haley Pension Plan was filed with the Financial Services Commission of Ontario ("FSCO") detailing the plan's funded status as of the wind-up date, and each year thereafter. As of August 1, 2008, the Haley Pension Plan was in a deficit position on a wind-up basis of \$5,606,700. The PBA requires that the wind-up deficit be paid down in equal annual installments payable annually in advance over a period of no more than five years.

17. As of August 1, 2010, the date of the most recently filed valuation report, the Haley Pension Plan had a wind-up deficit of \$3,922,700. Contributions to the Haley Pension Plan are payable annually in advance every August 1. Contributions in respect of the period from August 1, 2008 to July 31, 2011 totalling \$4,712,400 were remitted to the plan. Contributions in respect of the period from August 1, 2011 to July 31, 2012 were estimated to be \$1,598,500 and have not been remitted to the plan.

18. According to preliminary estimates calculated by the Haley Pension Plan's actuaries, despite Timminco having made contributions of approximately \$4,712,400 during the period from August 1, 2008 to July 31, 2011, as of August 1, 2011, the deficit remaining in the Haley Pension Plan is \$3,102,900.

Bécancour Non-Union Pension Plan

19. The Bécancour Non-Union Pension Plan, sponsored by BSI, is an on-going pension plan with both defined benefit ("DB") and defined contribution provisions. The plan has four active members and 32 retired and deferred vested members (including surviving spouses).

20. The most recently filed actuarial valuation of the Bécancour Non-Union Pension Plan performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Non-Union Pension Plan was \$3,239,600.

21. In 2011, normal cost contributions payable to this plan totaled approximately \$9,525 per month (or 16.8% of payroll). Amortization payments owing to this plan totaled approximately \$41,710 per month. All contributions in respect of the plan were paid when due in accordance with the Québec *Supplemental Pension Plans Act* (the "QSPPA") and regulations.

Bécancour Union Pension Plan

22. The BSI-sponsored Bécancour Union Pension Plan is an on-going DB pension plan with two active members and 98 retired and deferred vested members (including surviving spouses).

23. The most recently filed actuarial valuation performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Union Pension Plan was \$7,939,500.

24. In 2011, normal cost contributions payable to the plan totaled approximately \$7,083 per month (or 14.7% of payroll). Amortization payments owing to this plan totaled approximately \$95,300 per month. All contributions in respect of the plan were paid when due in accordance with the QSPPA and regulations.

25. BSI unionized employees have the option to transfer their employment to QSLP, under the form of the existing collective bargaining agreement. In the event of such transfer, their pension membership in the Bécancour Union Pension Plan will be transferred to the Quebec Silicon Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). Also, in the event that any BSI non-union employees transfer employment to QSLP, their pension membership in the Bécancour Non-Union Pension Plan would be transferred to the Quebec Silicon Non-Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). I am advised by Andrea Boctor of Stikeman Elliott LLP, counsel to the Timminco Entities, and do verily believe that if all of the active members of the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan transfer their employment to QSLP, the Régie des rentes du Québec would have the authority to order that the plans be wound up.

Pension Plan Deficiencies and the Timminco Entities' CCAA Proceedings

26. The assets of the Pension Plans have been severely impacted by market volatility and decreasing long-term interest rates in recent years, resulting in increased deficiencies in the Pension Plans. As a result, the special payments payable with respect to the Haley Plan also increased. As at 2010, total annual special payments for the final three years of the wind-up of the Haley Pension Plan were \$1,598,500 for 2010, \$1,397,000 for 2011 and \$1,162,000 for 2012, payable in advance annually every August 1. By contrast, in 2011 total annual special payments to the Haley Pension Plan for the remaining two years of the wind-up increased to \$1,728,700 for each of 2011 and 2012.

Suspension of Certain Pension Contributions

27. As is evident from the Cashflow Forecast, the Timminco Entities do not have the funds necessary to make any contributions to the Pension Plans other than (a) contributions in respect of normal cost, (b) contributions to the defined contribution provision of the BSI Non-Union Pension Plan, and (c) employee contributions deducted from pay (together, the "Normal Cost Contributions"). Timminco currently owes

approximately \$1.6 million in respect of special payments to the Haley Pension Plan. In addition, assuming the Bécancour Non-Union Pension Plan and the Bécancour Union Pension Plan are not terminated, as at January 31, 2012, the Timminco Entities will owe approximately \$140,000 in respect of amortization payments under those plans. If the Timminco Entities are required to make the pension contributions other than Normal Cost Contributions (the “**Pension Contributions**”), they will not have sufficient funds to continue operating and will be forced to cease operating to the detriment of their stakeholders, including their employees and pensioners.

28. The Timminco Entities intend to make all normal cost contributions when due. However, management of the Timminco Entities does not anticipate an improvement in their cashflows that would permit the making of Pension Contributions with respect to the Pension Plans during these CCAA proceedings.

The Position of CEP and USW

[16] Counsel to CEP submits that the super priority charge sought by the Timminco Entities would have the effect of subordinating the rights of, *inter alia*, the pension plans, including the statutory trusts that are created pursuant to the QSPPA. In considering this matter, I have proceeded on the basis that this submission extends to the PBA as well.

[17] In order to grant a super priority charge, counsel to CEP, supported by USW, submits that the Timminco Entities must show that the application of provincial legislation “would frustrate the company’s ability to restructure and avoid bankruptcy”. (See *Indalex (Re)*, 2011 ONCA 265 at para. 181.)

[18] Counsel to CEP takes the position that the evidence provided by the Timminco Entities falls short of showing the necessity of the super priority charge. Presently, counsel contends that the Applicants have not provided any plan for the purpose of restructuring the Timminco Entities and, absent a restructuring proposal, the affected creditors, including the pension plans, have no reason to believe that their interests will be protected through the issuance of the orders being sought.

[19] Counsel to CEP takes the position that the Timminco Entities are requesting extraordinary relief without providing the necessary facts to justify same. Counsel further contends that the Timminco Entities must “wear two hats” and act both in their corporate interest and in the best interest of the pension plan and cannot simply ignore their obligations to the pension plans in favour of the corporation. (See *Indalex (Re)*, *supra*, at para. 129.)

[20] Counsel to CEP goes on to submit that, where the “two hats” gives rise to a conflict of interest, if a corporation favours its corporate interest rather than its obligations to its fiduciaries, there will be consequences. In *Indalex (Re)*, *supra*, the court found that the corporation seeking CCAA protection had acted in a manner that revealed a conflict with the duties it owed the beneficiaries of pension plans and ordered the corporation to pay the special payments it owed the plans (See *Indalex (Re)*, *supra*, at paras. 140 and 207.)

[21] In this case, counsel to CEP submits that, given the lack of evidentiary support for the super priority charge, the risk of conflicting interests and the importance of the Timminco Entities' fiduciary duties to the pension plans, the super priority charge ought not to be granted.

[22] Although counsel to CEP acknowledges that the court has the discretion in the context of the CCAA to make orders that override provincial legislation, such discretion must be exercised through a careful weighing of the facts before the court. Only where the applicant proves it is necessary in the context and consistent with the objects of the CCAA may a judge make an order overriding provincial legislation. (*See Indalex (Re)*, *supra*, at paras. 179 and 189.)

[23] In the circumstances of this case, counsel to CEP argues that the position of any super priority charge ordered by the court should rank after the pension plans.

[24] CEP also takes the position that the Timminco Entities' obligations to the pension plans should not be suspended. Counsel notes that the Timminco Entities have contractual obligations through the collective agreement and pension plan documents to make contributions to the pension plans and, as well, the Timminco Entities owe statutory duties to the beneficiaries of the pension funds pursuant to the QSPPA. Counsel further points out that s. 49 of the QSPPA provides that any contributions and accrued interest not paid into the pension fund are deemed to be held in trust for the employer.

[25] In addition, counsel takes the position that the Court of Appeal for Ontario in *Indalex (Re)*, *supra*, confirmed that, in the context of Ontario legislation, all of the contributions an employee owes a pension fund, including the special payments, are subject to the deemed trust provision of the PBA.

[26] In this case, counsel to CEP points out that the special payments the Timminco Entities seek to suspend in the amount of \$95,300 per month to the Bécancour Union Pension Plan, and of \$47,743 to the Silicium Union Pension Plan, are payments that are to be held in trust for the beneficiaries of the pension plans. Thus, they argue that the Timminco Entities have a fiduciary obligation to the beneficiaries of the pension plans to hold the funds in trust. Further, the Timminco Entities' request to suspend the special payments to the Bécancour Union Pension Plan and the Quebec Silicon Union Pension Plan reveals that its interests are in conflict.

[27] Counsel also submits that the Timminco Entities have not pointed to a particular reason, other than generalized liquidity problems, as to why they are unable to make special payments to their pension plans.

[28] With respect to the KERPs, counsel to CEP acknowledges that the court has the power to approve a KERP, but the court must only do so when it is convinced that it is necessary to make such an order. In this case, counsel contends that the Timminco Entities have not presented any meaningful evidence on the propriety of the proposed KERPs. Counsel notes that the Timminco Entities have not named the KERPs recipients, provided any specific information regarding their involvement with the CCAA proceeding, addressed their replaceability, or set out their individual bonuses. In the circumstances, counsel submits that it would be unfair and inequitable for the court to approve the KERPs requested by the Timminco Entities.

[29] Counsel to CEP's final submission is that, in the event the KERPs are approved, they should not be sealed, but rather should be treated in the same manner as other CCAA documents through the Monitor. Alternatively, counsel to CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

The Position of the Timminco Entities

[30] At the time of the initial hearing, the Timminco Entities filed evidence establishing that they were facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume, long-term supply contract at below market prices, a decrease in the demand and market price for solar grade silicon, failure to recoup their capital expenditures incurred in connection with the development of their solar grade operations, and the inability to secure additional funding. The Timminco Entities also face significant pension and environmental remediation legacy costs, and financial costs related to large outstanding debts.

[31] I accepted submissions to the effect that without the protection of the CCAA, a shutdown of operations was inevitable, which the Timminco Entities submitted would be extremely detrimental to the Timminco Entities' employees, pensioners, suppliers and customers.

[32] As at December 31, 2011, the Timminco Entities' cash balance was approximately \$2.4 million. The 30-day consolidated cash flow forecast filed at the time of the CCAA application projected that the Timminco Entities would have total receipts of approximately \$5.5 million and total operating disbursements of approximately \$7.7 million for net cash outflow of approximately \$2.2 million, leaving an ending cash position as at February 3, 2012 of an estimated \$157,000.

[33] The Timminco Entities approached their existing stakeholders and third party lenders in an effort to secure a suitable debtor-in-possession ("DIP") facility. The Timminco Entities existing stakeholders, Bank of America NA, IQ, and AMG Advance Metallurgical Group NV, have declined to advance any funds to the Timminco Entities at this time. In addition, two third-party lenders have apparently refused to enter into negotiations regarding the provision of a DIP Facility.¹

[34] The Monitor, in its Second Report, dated January 11, 2012, extended the cash forecast through to February 17, 2012. The Second Report provides explanations for the key variances in actual receipts and disbursements as compared to the January 2, 2012 forecast.

¹ In a subsequent motion relating to approval of a DIP Facility, the Timminco Entities acknowledged they had reached an agreement with a third-party lender with respect to providing DIP financing, subject to court approval. Further argument on this motion will be heard on February 6, 2012.

- Page 9 -

[35] There are some timing differences but the Monitor concludes that there are no significant changes in the underlying assumptions in the January 10, 2012 forecast as compared to the January 2, 2012 forecast.

[36] The January 10 forecast projects that the ending cash position goes from positive to negative in mid-February.

[37] Counsel to the Applicants submits that, based on the latest cash flow forecast, the Timminco Entities currently estimate that additional funding will be required by mid-February in order to avoid an interruption in operations.

[38] The Timminco Entities submit that this is an appropriate case in which to grant super priority to the Administration Charge. Counsel submits that each of the proposed beneficiaries will play a critical role in the Timminco Entities' restructuring and it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

[39] Statutory Authority to grant such a charge derives from s. 11.52(1) of the CCAA. Subsection 11.52(2) contains the authority to grant super-priority to such a charge:

11.52(1) Court may order security or charge to cover certain costs — On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[40] Counsel also submits that the Timminco Entities require the continued involvement of their directors and officers in order to pursue a successful restructuring of their business and/or finances and, due to the significant personal exposure associated with the Timminco Entities' liabilities, it is unlikely that the directors and officers will continue their services with the Timminco Entities unless the D&O Charge is granted.

[41] Statutory authority for the granting of a D&O charge on a super priority basis derives from s. 11.51 of the CCAA:

11.51(1) Security or charge relating to director's indemnification — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

(2) Priority — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) Restriction — indemnification insurance — The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) Negligence, misconduct or fault — The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Analysis

(i) Administration Charge and D&O Charge

[42] It seems apparent that the position of the unions' is in direct conflict with the Applicants' positions.

[43] The position being put forth by counsel to the CEP and USW is clearly stated and is quite understandable. However, in my view, the position of the CEP and the USW has to be considered in the context of the practical circumstances facing the Timminco Entities. The Timminco Entities are clearly insolvent and do not have sufficient reserves to address the funding requirements of the pension plans.

[44] Counsel to the Applicants submits that without the relief requested, the Timminco Entities will be deprived of the services being provided by the beneficiaries of the charges, to the company's detriment. I accept the submissions of counsel to the Applicants that it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. I also accept the evidence of Mr. Kalins that the role of the advisors is critical to the efforts of the Timminco Entities to restructure. To expect that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic.

[45] Likewise, I accept the submissions of counsel to the Applicants to the effect that the directors and officers will not continue their service without the D&O Charge. Again, in circumstances such as those facing the Timminco Entities, it is neither reasonable nor realistic to expect directors and officers to continue without the requested form of protection.

[46] It logically follows, in my view, that without the assistance of the advisors, and in the anticipated void caused by the lack of a governance structure, the Timmico Entities will be directionless and unable to effectively proceed with any type or form of restructuring under the CCAA.

[47] The Applicants argue that the CCAA overrides any conflicting requirements of the QSPPA and the BPA.

[48] Counsel submits that the general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalf & Mansfield Alternative Investment II Corp.*, (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 104. In addition, in *Nortel Networks Corporation (Re)*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory position are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Nortel Networks Corporation (Re)*, (2009), 59 C.B.R. (5th) 23 (Ont. C.A.).

[49] It has long been stated that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, with the purpose of allowing the business to continue. As the Court of Appeal for Ontario stated in *Stelco Inc., (Re)* (2005), 75 O.R. (3d) 5, at para. 36:

In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

[50] Further, as I indicated in *Nortel Networks Corporation (Re)*, (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), this purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders. Based on this reasoning, the fact that Timminco has not provided any plan for restructuring at this time does not change the analysis.

[51] The Court of Appeal in *Indalex Ltd. (Re)* (2011), 75 C.B.R. (5th) 19 (Ont. C.A.) confirmed the CCAA court's ability to override conflicting provisions of provincial statutes where the application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. The Court stated, *inter alia*, as follows (beginning at paragraph 176):

The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. ...

...

What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

[52] The Timminco Entities seek approval to suspend Special Payments in order to maintain sufficient liquidity to continue operations for the benefit of all stakeholders, including employees and pensioners. It is clear that based on the January 2 forecast, as modified by the Second Report, the Timminco Entities have insufficient liquidity to make the Special Payments at this time.

[53] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA granting, in the present case, super priority over the Encumbrances for the Administration Charge and the D&O Charge, even if such an order conflicts with, or overrides, the QSPPA or the PBA.

[54] Further, the Timminco Entities submit that the doctrine of paramountcy is properly invoked in this case and that the court should order that the Administration Charge and the D&O Charge have super priority over the Encumbrances in order to ensure the continued participation of the beneficiaries of these charges in the Timminco Entities' CCAA proceedings.

[55] The Timminco Entities also submit that payment of the pension contributions should be suspended. These special (or amortization) payments are required to be made to liquidate a going concern or solvency deficiency in a pension plan as identified in the most recent funding valuation report for the plan that is filed with the applicable pension regulatory authority. The requirement for the employer to make such payments is provided for under applicable provincial pension minimum standards legislation.

[56] The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater Inc.*, (Re) (2009) 57 C.B.R. (5th) 285 (Q.S.C.); *Collins & Aikman Automotive Canada Inc.* (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.).

[57] I accept the submission of counsel to the Applicants to the effect that courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.

[58] The Timminco Entities also submit that there should be no director or officer liability incurred as a result of a court-ordered suspension of payment of pension contributions. Counsel references *Fraser Papers*, where Pepall J. stated:

Given that I am ordering that the special payments need not be made during the stay period pending further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the CCAA process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Director's Charge.

[59] Importantly, *Fraser Papers* also notes that there is no priority for special payments in bankruptcy. In my view, it follows that the employees and former employees are not prejudiced by the relief requested since the likely outcome should these proceedings fail is bankruptcy, which would not produce a better result for them. Thus, the "two hats" doctrine from *Indalex (Re)*, *supra*, discussed earlier in these reasons at [20], would not be infringed by the relief requested. Because it would avoid bankruptcy, to the benefit of both the Timminco Entities and beneficiaries of the pension plans, the relief requested would not favour the interests of the corporate entity over its obligations to its fiduciaries.

[60] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.

[61] The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[62] On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[63] In my view, this is exactly the kind of result the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order suspending the requirement to make special payments is appropriate (see *ATB Financial* and *Nortel Networks Corporation (Re)*).

[64] In my view, the circumstances are such that the position put forth by the Timminco Entities must prevail. I am satisfied that bankruptcy is not the answer and that, in order to ensure that the purpose and objective of the CCAA can be fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of QSPPA and the PBA.

[65] There is a clear inter-relationship between the granting of the Administration Charge, the granting of the D&O Charge and extension of protection for the directors and officers for the company's failure to pay the pension contributions.

[66] In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

[67] If bankruptcy results, the outcome for employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners. The lack of a desirable alternative to the relief requested only serves to strengthen my view that the objectives of the CCAA would be frustrated if the relief requested was not granted.

[68] For these reasons, I have determined that it is both necessary and appropriate to grant super priority to both the Administrative Charge and D&O Charge.

[69] I have also concluded that it is both necessary and appropriate to suspend the Timminco Entities' obligations to make pension contributions with respect to the Pension Plans. In my view, this determination is necessary to allow the Timminco Entities to restructure or sell the business as a going concern for the benefit of all stakeholders.

[70] I am also satisfied that, in order to encourage the officers and directors to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities' failure to make pension contributions during the CCAA proceedings. At this point in the restructuring, the participation of its officers and directors is of vital importance to the Timminco Entities.

(ii) The KERPs

[71] Turning now to the issue of the employee retention plans (KERPs), the Timminco Entities seek an order approving the KERPs offered to certain employees who are considered critical to successful proceedings under the CCAA.

[72] In this case, the KERPs have been approved by the board of directors of Timminco. The record indicates that in the opinion of the Chief Executive Officer and the Special Committee of the Board, all of the KERPs participants are critical to the Timminco Entities' CCAA proceedings as they are experienced employees who have played central roles in the restructuring initiatives taken to date and will play critical roles in the steps taken in the future. The total amount of the KERPs in question is \$269,000. KERPs have been approved in numerous CCAA proceedings where the retention of certain employees has been deemed critical to a successful restructuring. See *Nortel Networks Corporation (Re)*, (2009) O.J. No. 1044 (S.C.J.), *Grant Forest Products Inc. (Re)*, (2009) 57 C.B.R. (5th) 128 (Ont. S.C.J.) [Commercial List], and *Canwest Global Communications Corp. (Re)*, (2009) 59 C.B.R. (5th) 72 (Ont. S.C.J.).

[73] In *Grant Forest Products*, Newbould J. noted that the business judgment of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge.

[74] The Monitor also supports the approval of the KERPs and, following review of several court-approved retention plans in CCAA proceedings, is satisfied that the KERPs are consistent with the current practice for retention plans in the context of a CCAA proceeding and that the quantum of the proposed payments under the KERPs are reasonable in the circumstances.

[75] I accept the submissions of counsel to the Timminco Entities. I am satisfied that it is necessary, in these circumstances, that the KERPs participants be incentivized to remain in their current positions during the CCAA process. In my view, the continued participation of these experienced and necessary employees will assist the company in its objectives during its restructuring process. If these employees were not to remain with the company, it would be necessary to replace them. It is reasonable to conclude that the replacement of such employees would not provide any substantial economic benefits to the company. The KERPs are approved.

[76] The Timminco Entities have also requested that the court seal the Confidential Supplement which contains copies of the unredacted KERPs, taking the position that the KERPs contain sensitive personal compensation information and that the disclosure of such information would compromise the commercial interests of the Timminco Entities and harm the KERPs participants. Further, the KERPs participants have a reasonable expectation that their names and salary information will be kept confidential. Counsel relies on *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522 at para. 53 where Iacobucci J. adopted the following test to determine when a sealing order should be made:

A confidentiality order under Rule 151 should only be granted when:

- (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[77] CEP argues that the CCAA process should be open and transparent to the greatest extent possible and that the KERPs should not be sealed but rather should be treated in the same manner as other CCAA documents through the Monitor. In the alternative, counsel to the CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

[78] In my view, at this point in time in the restructuring process, the disclosure of this personal information could compromise the commercial interests of the Timminco Entities and cause harm to the KERP participants. It is both necessary and important for the parties to focus on the restructuring efforts at hand rather than to get, in my view, potentially side-tracked on this

issue. In my view, the Confidential Supplement should be and is ordered sealed with the proviso that this issue can be revisited in 45 days.

Disposition

[79] In the result, the motion is granted. An order shall issue:

- (a) suspending the Timminco Entities' obligation to make special payments with respect to the pension plans (as defined in the Notice of Motion);
- (b) granting super priority to the Administrative Charge and the D&O Charge;
- (c) approving the KERPs and the grant of the KERP Charge;
- (d) authorizing the sealing of the Confidential Supplement to the First Report of the Monitor.


MORAWETZ J.

Date: February 2, 2012