

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

**Timminco Limited
Bécancour Silicon Inc.**

NINTH REPORT OF THE MONITOR

May 27, 2012

**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.

**NINTH REPORT TO THE COURT
SUBMITTED BY FTI CONSULTING CANADA INC.,
IN ITS CAPACITY AS MONITOR**

INTRODUCTION

1. On January 3, 2012, Timminco Limited (“**Timminco**”) and Bécancour Silicon Inc. (“**BSI**”, together with Timminco, the “**Timminco Entities**”) made an application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) and an initial order (the “**Initial Order**”) was made by the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”), granting, *inter alia*, a stay of proceedings against the Applicants until February 2, 2012, (the “**Stay Period**”) and appointing FTI Consulting Canada Inc. as monitor of the Timminco Entities (the “**Monitor**”). The proceedings commenced by the Timminco Entities under the CCAA will be referred to herein as the “**CCAA Proceedings**”.
2. The Stay Period has been extended a number of times. Pursuant to the Order of the Honourable Mr. Justice Morawetz dated April 27, 2012, the Stay Period currently expires on June 20, 2012.

3. Pursuant to the Order of the Honourable Mr. Justice Morawetz granted March 9, 2012 (the “**Bidding Procedures Order**”), the Timminco Entities were authorized to enter into the Stalking Horse Agreement and the Bidding Procedures were approved, each as defined in the Monitor’s Fourth Report.
4. As described in the Monitor’s Seventh Report, the marketing process was completed and the Auction was conducted by the Timminco Entities, in consultation with the Monitor, on April 24 and 25, 2012 pursuant to Bidding Procedures Order. At the conclusion of the Auction, the QSI APA and Ferro APA were together designated as the Successful Bid. The Monitor’s comments on the conduct of the Auction, the QSI APA and the Ferro APA are set out in the Seventh Report.
5. The Ferro APA was approved pursuant to an Order granted by the Court on May 22, 2012.
6. The Monitor has filed reports on various matters relating to the CCAA Proceedings. The purpose of this, the Monitor’s Ninth Report, is to inform the Court of the Monitor’s comments and recommendation in respect of the Assignment Order, as defined in the QSI APA.
7. In preparing this report, the Monitor has relied upon unaudited financial information of the Timminco Entities, the Timminco Entities’ books and records, certain financial information prepared by the Timminco Entities and discussions with the Timminco Entities’ management. The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the information. Accordingly, the Monitor expresses no opinion or other form of assurance on the information contained in this report or relied on in its preparation. Future oriented financial information reported or relied on in preparing this report is based on management’s assumptions regarding future events; actual results may vary from forecast and such variations may be material.

8. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars. Capitalized terms not otherwise defined herein have the meanings defined in the previous reports of the Monitor, the Bidding Procedures Order or in the Initial Order or the affidavit of Peter Kalins sworn on May 9, 2012 (the “**May 9 Kalins Affidavit**”).

THE ASSIGNMENT ORDER

INTRODUCTION

9. In order to complete the transactions contemplated under the QSI APA, and as part of the Approval and Vesting Order in the form attached to the Timminco Entities’ Motion Record dated May 9, 2012, the Timminco Entities filed a motion seeking the Assignment Order pursuant to section 11.3 of the CCAA in respect of the following Contracts (collectively, the “**Assigned Contracts**”), each as defined below and filed in support of the Timminco Entities motion for the approval of the QSI APA:
 - (a) The Limited Partnership Agreement;
 - (b) The Shareholders Agreement;
 - (c) The Supply Agreement (together with the Limited Partnership Agreement and the Shareholders Agreement, the “**Assumed DCC Agreements**”); and
 - (d) The Wacker Agreement.
10. Section 11.3 of the CCAA states:

“11.3 (1) Assignment of agreements - On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under

the agreement to any person who is specified by the court and agrees to the assignment.

(2) Exceptions - Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

(3) Factors to be considered - In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

(4) Restriction - The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement - other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation - will be remedied on or before the day fixed by the court." [emphasis added]

11. Section 11.3(3)(a) of the CCAA does not provide guidance as to what factors the Monitor should consider in determining whether to “approve” the assignment. The Monitor and its counsel are not aware of any authority on this point. In the Monitor’s respectful view, in considering whether to approve and recommend the requested assignment, the Monitor should consider and inform itself of the facts relevant to the tests set out in section 11.3(3) of the CCAA as well as the views of interested parties.
12. In preparing this report, the Monitor and/or its counsel have reviewed the motion material filed by the interested parties, including affidavits, facts, books of authorities and transcripts of cross examinations of various affiants. The Monitor and its counsel are not aware of additional facts or authorities which may assist the Court in adjudicating this matter.
13. In addition to reviewing the motion material filed by the interested parties, the Monitor invited each of those parties to discuss their respective positions on the proposed assignment. Discussions took place with counsel to DCC, Wacker, QSI and the Timminco Entities and the views expressed to the Monitor have been considered in preparing this report. In the Monitor’s view, the positions of the various parties are principled and the issue before the Court represents a legitimate commercial dispute between interested parties in need of the Court’s adjudication.

14. In that regard, the interested parties have filed evidence and legal briefs and will present oral argument to the Court. The Monitor acknowledges and emphasises that it is the Court, and not the Monitor, that is the only authority for the adjudication of the matters in dispute. The Monitor's views and recommendations set out in this report are based on the information available to the Monitor and its counsel and the advice provided by the Monitor's counsel. The facts and commentary set out herein are provided to illustrate to the Court and other interested parties the basis and rationale for the Monitor's recommendations. The views of the Monitor are in no way intended to be determinative of any legal issue before the Court.

THE WACKER AGREEMENT

15. Pursuant to an agreement dated May 25, 2011, between BSI, Wacker and QSI and subject to the conditions therein, Wacker has provided its consent to the assignment of the Wacker Agreement. Accordingly, the Monitor understands that the motion for an Assignment Order in respect of the Wacker Agreement will not be proceeding.

THE ASSUMED DCC AGREEMENTS

Background

16. Dow Corning Canada, Inc. ("**DC Canada**") and DC Global Holdings S.a.r.l. ("**DC Global**") are subsidiaries of Dow Corning Corporation ("**DCC**").
17. DCC, through its subsidiaries, Dow Corning Canada and DC Global, entered into a joint venture with BSI (the "**Joint Venture**") for the purposes of owning and operating a production facility located in Bécancour Quebec, and supplying silicon metal to the joint venture partners.
18. The business of the Joint Venture was conducted by a limited partnership, known as Quebec Silicon Limited Partnership ("**QSLP**").

19. QSLP was formed according to the laws of Quebec and is governed by the Limited Partnership Agreement, which was entered into by BSI, Dow Corning Canada, and Quebec Silicon General Partner Inc. (“**QSGP**”).
20. Section 10 of the Limited Partnership Agreement provides a complete prohibition, without prior written consent, on the transfer of a partner’s partnership units within a period of 5 years from the effective date of the Limited Partnership Agreement. Partners are also given complete and absolute discretion to withhold consent for any and no reason. An equivalent provision with respect to the transfer of the shares of QSGP is found in the Shareholders Agreement.
21. On August 10, 2010, DCC, Timminco and BSI entered into a framework agreement (the "**Framework Agreement**") for the purpose of setting forth certain key terms of the framework of a joint venture arrangement between DCC, through its subsidiaries, DC Canada and DC Global, and BSI for the purposes of owning and operating certain assets of the silicon metal production facility located at Becancour, Quebec that BSI contributed to the Joint Venture.
22. In addition to the Framework Agreement, a number of other agreements were executed in connection with the Joint Venture arrangements:
 - (a) The Limited Partnership Agreement;
 - (b) The Shareholders Agreement;
 - (c) The output and supply agreement (the “**Supply Agreement**”) dated October 1, 2010, between the QSLP, DCC, and BSI;
 - (d) A business transfer agreement (the “**Business Transfer Agreement**”) dated September 30, 2010, between BSI and QSLP;
 - (e) A pension transfer agreement (the “**Pension Agreement**”) dated September 30, 2010, between BSI, the QSLP and DCC;

- (f) An intellectual property assignment agreement (the “**IP Assignment**”) dated September 30, 2010, between BSI and QSLP;
- (g) Two intellectual property license agreements (the “**IP Licenses**”) dated October 1, 2010, between QSLP, BSI and DCC; and
- (h) various other support services or lease agreements.

(collectively with the Framework Agreement, the “**QSLP Agreements**”)

- 23. The QSI APA contemplates the assignment of the Limited Partnership Agreement, the Shareholders Agreement, the Supply Agreement and the IP Licences, but not the other QSLP Agreements.
- 24. The Monitor understands from QSI that efforts have been made to obtain the consent of DCC to the assignment of the Assumed DCC Agreements, but that, to date, such consent has not been obtained. The IP Licenses do not contain a provision restricting assignment.
- 25. The Monitor understands that the Timminco Entities and QSI take the position that, among other things:
 - (a) The Auction process was fair and commercially reasonable;
 - (b) The QSLP Agreements do not form a single unified agreement and accordingly the Assumed DCC Agreements can be assigned without the other QSLP Agreements also being assigned; and
 - (c) QSI would be able to perform the obligations under the Assumed DCC Agreements.

26. In addition, the Monitor understands QSI is of the view that the value of the covenant of QSI would not be materially different from the value of the covenant of the Timminco Entities (the obligations of BSI under the Assumed DCC Agreements having been guaranteed by Timminco pursuant to the Framework Agreement) in respect of performance of the obligations under the Assumed DCC Agreements if the Assumed DCC Agreements are assigned.
27. The Monitor understands that DCC takes the position that, among other things:
- (a) The Auction process was flawed and did not result in the highest and best offer being accepted as the Successful Bid;
 - (b) It is not appropriate to assign the Assumed DCC Agreements, including because the QSLP Agreements are intrinsically linked, together comprise a single unified agreement governing the Joint Venture and no single QSLP Agreement can be appropriately extracted from the QSLP Agreements and assigned without all of the QSLP Agreements being assigned; and
 - (c) DCC has no assurance that QSI will be able to perform the obligations under the Assumed DCC Agreements and that it is potentially prejudicial to DCC and QSLP's stakeholders to approve the assignment without QSI's parent company providing a performance guarantee to DCC/QSLP akin to that provided to BSI in connection with the Stalking Horse Agreement.
28. The positions of the parties are more fully set out in their respective materials filed with the Court.

Section 11.3(2) – Exceptions to Assignment

29. In the Monitor's view, the Assumed DCC Agreements are not agreements to which the exceptions in section 11.3(2) of the CCAA apply.

Section 11.3(3)(b) – Performance of Obligations

30. In forming its views with respect to the issue of the assignment of the Assumed DCC Agreements, the Monitor considered whether QSI would be able to perform the obligations under the Assumed DCC Agreements. Counsel to the Monitor reviewed each of the Assumed DCC Agreements and has summarized the material obligations contained therein as set out below.
31. With respect to the Limited Partnership Agreement, in the event that the Assignment Order is granted, the material obligations to be performed by QSI have been summarized by the Monitor’s counsel as follows (capitalized terms not otherwise defined are as defined in the Limited Partnership Agreement):
- (a) Under section 10.10 of the Limited Partnership Agreement in the event that QSI proposes to transfer its partnership interest in accordance with the terms and conditions of the Limited Partnership Agreement, QSI shall be responsible for any expenses incurred by QSGP in connection with such transfer;
 - (b) Under section 12.10 of the Limited Partnership Agreement, if QSGP determines that there is Negative Distributable Cash at the end of any Fiscal Quarter of a particular Fiscal Year or at the end of a Fiscal Year, QSI shall be responsible to repay the Advances previously made in respect of such Fiscal Year in an amount not exceeding its Pro-Rata Share of such amount of Negative Distributable Cash, within ten days of such determination;
 - (c) Under Section 12.14 of the Limited Partnership Agreement, QSI will have indemnity obligations in respect of certain incremental tax liabilities to the extent that they arise as a result of a transaction between QSLP and QSI; and

- (d) Under section 15.1 of the Limited Partnership Agreement, QSGP may make cash calls from time to time on behalf of QSLP so as to ensure that there are sufficient funds available to enable QSLP to comply with all applicable laws, maintain the facility such that it may operate safely at the required capacity and to satisfy pension obligations.

- 32. With respect to the Shareholders Agreement the material obligations to be performed by QSI thereunder in the event that the Assignment Order is granted have been summarized by the Monitor's counsel as follows (capitalized terms not otherwise defined are as defined in the Shareholders Agreement):
 - (a) Under section 6.6 of the Shareholders Agreement, in the event that QSI proposes to transfer any Shares in accordance with the terms and conditions of the Shareholders Agreement, QSI shall be responsible for any expenses incurred by the Company in connection with such Transfer.

- 33. With respect to the Supply Agreement the material obligations of QSI thereunder in the event that the Assignment Order is granted have been summarized by the Monitor's counsel as follows (capitalized terms not otherwise defined are as defined in the Supply Agreement):
 - (a) Under section 2.1 of the Supply Agreement, during each calendar year QSI shall purchase its allocated share of the volume of Product produced by QSLP in that year pursuant to the Production Plan as agreed to at the annual production planning meeting held between the parties to the Supply Agreement;
 - (b) Under section 2.2(b) of the Supply Agreement, QSI will be obligated to make certain payments to DCC in the event that a shortfall of deliveries to DCC has not been rectified by the end of 2012;

- (c) Under section 2.2(c) of the Supply Agreement, QSI will have certain obligations in respect of capital expenditures in the event of certain capital projects being undertaken;
 - (d) Under section 2.3 of the Supply Agreement, if QSI elects not to purchase any portion of its allocation of Product that has not yet been produced (and is not in process) and the other Customer does not purchase all of the Non-Purchased Product, QSI will have certain obligations set out in the Supply Agreement which were substantially redacted in the motion materials served on the Service List, and as a result are not reproduced in this Report.
 - (e) Under section 4.4 of the Supply Agreement, QSI will have certain obligations with respect to a Price Tune-up, which obligations set out in the Supply Agreement were substantially redacted in the motion materials served on the Service List, and as a result are not reproduced in this Report.
34. Generally, it appears that the major obligations under the Assumed DCC Agreements are the purchasing of product from QSLP and, to the extent required, the funding of QSLP.
35. On Closing of the QSI APA, QSI's assets will include the assets subject to the QSI APA for which it will have paid the cash purchase price of \$31.875 million and approximately \$10 million in Cure Costs. Based on the aggregate cash purchase price of the Successful Bid, these assets represent more than 90% of BSI's assets.
36. While QSI has no operating history, after Closing its business would be the same as the primary operations of the Timminco Entities: the purchase and sale of silicon metal. QSI would not be carrying the legacy costs of the Timminco Entities or the solar silicon business.

37. Pursuant to the terms of the QSI APA, Globe Specialty Metals Inc. (“**Globe**”), QSI’s ultimate parent company, has guaranteed the obligations of QSI in respect of payment of the cash portions of the Purchase Price. Globe has not provided a guarantee in respect of the Assumed Obligations to be discharged following Closing, which include the obligations under the Contracts to be assigned. At the time of entering into the QSI APA, QSI owned no material assets. However, on Closing, Globe will have invested more than \$40 million in QSI’s acquisition of the assets subject to the QSI APA. In addition, the affidavit of Mr. Stephen Lebowitz, General Counsel of Globe, sworn May 8, 2012 states in paragraph 8 that “Globe will loan the needed funds to QSI in order to pay the purchase price, fund working capital, and to insure [sic] that future ongoing liabilities are met.”
38. Based on the foregoing, the Monitor is of the view that it is reasonable to conclude that QSI would be able to perform its obligations under the Assumed DCC Agreements if they are assigned.

Section 11.3(3)(c) – Whether Appropriate to Assign

39. As stated in the Monitor’s Seventh Report, the Timminco Entities, in consultation with their advisors and the Monitor, determined that the QSI APA (in conjunction with the Ferro APA) represents the highest and/or best Overbid made at the Auction. The Monitor also stated that it is of the view that the Timminco Entities applied their business judgement reasonably in the circumstances and that the Monitor supported the Timminco Entities request for approval of the QSI APA and the Ferro APA. Absent obtaining the consent of DCC to the assignment of the Assumed DCC Agreements, obtaining the Assignment Order is necessary to complete the transactions contemplated under the QSI APA.

40. The Monitor recognizes and agrees with the fundamental proposition that in seeking to assign a contract under the provisions of the CCAA, the contract must be assigned as a whole; a contract cannot be assigned in part in order to “cherry pick” favourable provisions while abandoning onerous ones. In this case, the issue is not the exclusion of provisions of a single document. There are multiple documents which DCC asserts comprise a single agreement but that the Timminco Entities and QSI assert are separate agreements. As noted earlier in this report, the arguments of all parties are principled and a legal determination is required. In the Monitor’s view, it would not be appropriate for the Assumed DCC Agreements be assigned, if the Court determines that the QSLP Agreements are a single contract.

Section 11.3(4) – Cure Costs

41. As noted earlier in this report, section 11.3(4) of the CCAA requires that the Court be satisfied that monetary defaults in relation to the agreements to be assigned will be remedied on or before the day fixed by the Court.

42. Section 2.4 of the QSI APA states:

“The Purchaser shall assume and perform, discharge and pay when due the debts, liabilities and obligations under the Contracts (to the extent assigned or transferred to the Purchaser on Closing) for the period from and after the Closing Time and all Cure Costs (other than Post-Filing Costs) of the Vendors (the "Assumed Obligations") after the Closing. Notwithstanding anything to the contrary contained herein, in no event shall the Purchaser's obligations to pay Cure Costs hereunder exceed a maximum aggregate amount of C\$10,000,000.”

43. Section 1.1(hh) of the QSI APA defines “Cure Costs” as follows:

“**Cure Costs**” means collectively, (i) the amounts, if any, that are required to be paid under section 11.3 of the CCAA to cure any monetary defaults in connection with the assignment of the Contracts to the Purchaser under section 11.3 of the CCAA; and (ii) such other reasonable costs required to obtain any Consent and Approval (such reasonable costs required to obtain any Consent and Approval, the “Consent Cost”);”

44. The Timminco Entities estimate that the Cure Costs relating to the Assumed DCC Agreements are approximately \$9.7 million, all of which relates to amounts owing under the Supply Agreement.
45. The QSI APA is silent on the timing of the payment of Cure Costs. In order that the Court can be satisfied that the Cure Costs associated with the Assumed DCC Agreements will be paid on or before the date fixed by the Court in the event that the Court is inclined to grant the Assignment Order in respect of the Assumed DCC Agreements, the Monitor recommends that the Cure Costs be paid on Closing. In the event that there is a dispute between affected parties in respect of the amount of Cure Costs that has not been resolved by Closing, the Monitor recommends that the disputed amounts be funded by QSI (subject to its maximum obligation of \$10 million) and held by the Monitor pending resolution of the dispute. To the extent the aggregate Cure Costs in connection with all Contracts to be assigned exceed the maximum amount of \$10,000,000 to be paid by QSI, the Timminco Entities would, subject to Court approval, be able to pay such amounts from the proceeds of sale on Closing which are to be held by the Monitor pending further Order of the Court.

The Monitor's Recommendation in Respect of the Assumed DCC Agreements

46. Based on the foregoing and assuming that the Court concludes that the Assumed DCC Agreements are not part of a single integrated contract which includes the other QSLP Agreements (which is of course a matter for the Court's sole determination), the Monitor approves the assignment and is of the view that the granting of the Assignment Order in relation to the Assumed DCC Agreements is appropriate in the circumstances..

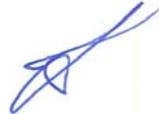
The Monitor respectfully submits to the Court this, its Ninth Report.

Dated this 27th day of May, 2012.

FTI Consulting Canada Inc.
In its capacity as Monitor of
Timminco Limited and Bécancour Silicon Inc.



Nigel D. Meakin
Senior Managing Director



Toni Vanderlaan
Managing Director