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

Timminco Limited
Bécancour Silicon Inc.

TWENTY-FOURTH REPORT OF THE MONITOR

March 3, 2014

FTI CONSULTING

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.

TWENTY-FOURTH 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 its wholly owned subsidiary, 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 Timminco Entities 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 Newbould granted December 16, 2014 (the "**December 16 Order**") the Stay Period currently expires on June 16, 2014.

3. Pursuant to the Order of the Honourable Mr. Justice Morawetz dated January 16, 2012, the Timminco Entities' obligations to make all contributions or payments (other than normal cost contributions, contributions to a defined contribution provision, and employee contributions deducted from pay) to its pension plans were suspended pending further order of the Court.

4. Pursuant to the Order of the Honourable Mr. Justice Morawetz dated 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.

5. 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 the Bidding Procedures Order. At the conclusion of the Auction, the asset purchase agreement entered into between the Timminco Entities and QSI Partners Ltd. (the "**QSI APA**") and the asset purchase agreement between the Timminco Entities and FerroAtlantica, S.A. (the "**Ferro APA**") were collectively designated as the Successful Bid.

6. The Ferro APA was approved pursuant to an Order granted by the Court on May 22, 2012. The QSI APA was approved pursuant to an Order granted by the Court on June 1, 2012. Closing under the Ferro APA occurred on June 14, 2012. Closing under the QSI APA occurred on June 13, 2012.

7. On June 15, 2012, the Honourable Mr. Justice Morawetz granted an order approving a procedure for the submission, review and adjudication of claims against the Timminco Entities and of claims against the directors and officers of the Timminco Entities (the "**Claims Procedure Order**"). The Claims Bar Date was set at 5:00 p.m. Toronto time on July 23, 2012. The Monitor has reviewed all claims and been in contact with various claimants in order to attempt to resolve a variety of outstanding issues.

8. By Order of the Honourable Mr. Justice Newbould dated August 17, 2012, Russell Hill Advisory Services Inc. ("**Russell Hill**") was appointed as Chief Restructuring Officer (the "**CRO**") of the Timminco Entities and the engagement letter dated July 24, 2012, between Russell Hill and the Timminco Entities (the "**CRO Agreement**") was approved.

9. The CRO Agreement was for an initial term of six months with any extension to be negotiated with the Monitor subject to approval of the Court. The CRO Agreement was extended a number of times pursuant to the terms of the CRO Extension Agreement dated April 25, 2013 approved by the Court on May 14, 2013.

10. The CRO was discharged on December 16, 2013 pursuant to the provisions of the December 16 Order. On the same date, Mr. Justice Newbould issued an Order (the "**Monitor Powers Order**") expanding the powers of the Monitor to enable the Monitor to complete the estate in the name of and on behalf of the Timminco Entities. A copy of the Monitor Powers Order is attached hereto as **Appendix A** for ease of reference.

11. To date, the Monitor has filed twenty-three reports on various matters relating to the CCAA Proceedings. The purpose of this, the Monitor's Twenty-Fourth Report, is to seek advice and directions from the Court in respect of a motion for leave to appeal and, if granted, an appeal by the Timminco Entities, acting by the Monitor, of the decision of the Honourable Mr. Justice Mongeon the Superior Court of Québec (Commercial Division) delivered January 24, 2014 in respect of the priority of the BSI Pension Reimbursement Claims described later in this report.

TERMS OF REFERENCE

12. 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 and others.

13. Except as described in this Report:

    (a) The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would comply with Generally Accepted Assurance Standards pursuant to the Canadian Institute of Chartered Accountants Handbook;

    (b) The Monitor has not examined or reviewed financial forecasts and projections referred to in this report in a manner that would comply with the procedures described in the Canadian Institute of Chartered Accountants Handbook;

14. 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.

15. The Monitor has prepared this Report in connection with the motion described in its Notice of Motion dated March 3, 2014, returnable at a date to be set by the Court at a scheduling conference on March 6, 2014. The Report should not be relied on for other purposes.

16. 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 Initial Order or other Order of the Court issued in the CCAA Proceedings.

BACKGROUND

17. On August 28, 2012, the Honourable Mr. Justice Newbould granted an Order authorizing and directing an interim distribution to be made by the Monitor to Investissement Quebec ("**IQ**"), a secured creditor of BSI (the "**Interim Distribution Order**"). The Interim Distribution Order authorized an initial distribution of $25,393,057.43. In accordance with the endorsement of the Honourable Justice Newbould dated August 31, 2012, the Monitor made a subsequent distribution to IQ of $1,213,000. A final distribution in the amount of $1,714,879.90 was made on January 31, 2013 following completion of the Working Capital Settlement Agreement as defined and described in the Monitor's Eighteenth Report.

18. The Interim Distribution Order also provided for a process for other parties that had filed a secured claim against BSI in accordance with the Claims Procedure Order to assert priority over IQ and approved a reimbursement agreement dated August 28, 2012 between BSI, the Monitor and IQ (the "**Reimbursement Agreement**") pursuant to which IQ is obliged to reimburse any portion of the Interim Distribution necessary to satisfy any Reimbursement Claim (as defined in the Reimbursement Agreement) that is proven to have priority over IQ's security. A copy of the Reimbursement Agreement is attached hereto as **Appendix B**.

19. Pursuant to an Order of the Honourable Mr. Justice Morawetz granted October 18, 2012, a copy of which is attached hereto as **Appendix C**, the Priority Claim Adjudication Protocol was approved and two claims were designated as Reimbursement Claims, being:

    (a) A claim on behalf of Mercer Canada ("**Mercer**"), as administrator of the Haley Pension Plan, and on behalf of the beneficiaries of that plan (the "**Mercer Reimbursement Claim**"), which claim was supported by The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("**USW**"); and

(b) A claim by Le Comité de retraite du Régime de rentes pour les employés nonsyndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively, the "**BSI Pension Committees**") (the "**BSI Pension Reimbursement Claims**").

20. On October 24, 2012, both Mercer and the USW informed the Monitor and IQ that they would not be pursuing the Mercer Reimbursement Claim.

21. Pursuant to the Priority Claim Adjudication Protocol, the adjudication of whether the BSI Pension Reimbursement Claims constitute Priority Claims (as defined in the Interim Distribution Order) was to be determined exclusively by the Superior Court of Québec (Commercial Division) (the "**Quebec Court**"). The motion for such determination is referred to herein as the "**Quebec Priority Motion**".

22. The BSI Pension Reimbursement Claims consisted of the following:

(a) The unpaid special payments due to the BSI Pension Plan for unionized employees (the "**BSI Union Plan**");

(b) The unpaid special payments due to the BSI Pension Plan for non-unionized employees (the "**BSI Non-union Plan**");

(c) The solvency deficit of the BSI Union Plan; and

(d) The solvency deficit of the BSI Non-union Plan.

23. Special payments for the BSI Union Plan (the "**BSI Union Plan Special Payments**") were in the amount of $93,810 per month, with $668,690 claimed as owing for the months December 2011 to June 2012. The solvency deficit for the BSI Union Plan (the **"BSI Union Plan Deficit"**) was estimated to be $9,889,600 at December 31, 2011. Special payments for the BSI Non-union Plan (the "**BSI Non-union Plan Special Payments**" and together with the BSI Union Plan Special Payments, the "**BSI Special Payments**") were in the amount of $41,710 per month, with $297,520 claimed as owing for the months December 2011 to June 2012. The solvency deficit for the BSI Non-union Plan (the **"BSI Non-union Plan Deficit"** and together with the BSI Union Plan Deficit, the "**BSI Plan Deficits**") was estimated to be $3,998,700 at December 31, 2011.

24. Pursuant to Section C of the Priority Adjudication Protocol, any appeal from an order of the Quebec Court on the Quebec Priority Motion shall be to the Court of Appeal of Quebec and in determining whether the BSI Reimbursement Claims constitute Priority Claims, the determination of the quantum of such Priority Claims was postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

25. The Quebec Priority Motion was heard by the Honourable Mr. Justice Mongeon of the Quebec Court on May 27 and 28, 2013, who reserved his decision.

26. On January 24, 2014, Mr. Justice Mongeon released his decision in respect of the Quebec Priority Motion (the "**Quebec Priority Decision**"). A copy of a translation of the Quebec Priority Decision prepared by a translator at the Monitor's Counsel, together with an affidavit of certification, is attached hereto as **Appendix D**. Mr. Justice Mongeon found that:

    (a) The unpaid BSI Special Payments and interest thereon are subject to a deemed trust that is enforceable against IQ;

(b) The unpaid BSI Special Payments and interest thereon are unassignable and unseizable, are excluded from the application of IQ's movable and immovable hypothec without delivery and have priority over IQ's secured claim; and

(c) The BSI Plan Deficits are not subject to a deemed trust and do not have priority over IQ's secured claim.

27. The quantum of the claims in respect of the BSI Special Payments and interest thereon (collectively, the "**Deemed Trust Claim**") ranking in priority to IQ and subject to reimbursement under the Reimbursement Agreement is yet to be determined.

MOTION FOR LEAVE TO APPEAL

28. On or around February 11, 2014, the Monitor learned that IQ would not be seeking leave to appeal the Quebec Priority Decision.

29. In order to protect the rights of Timminco, which has asserted the largest unsecured claim against BSI, the rights of unsecured creditors of BSI and the rights of the Timminco Pension Plan which have asserted deemed trust claims over amounts owing to Timminco and to ensure that rights of affected creditors are not adversely affected by the passage of time, Timminco and BSI, acting by the Monitor, filed a motion seeking leave to appeal the Quebec Priority Decision on February 14, 2014 (the "**Leave Motion**").

30. The Leave Motion, a copy of which is attached hereto as **Appendix E**, is expressly subject to the Monitor seeking advice and directions of the Ontario Superior Court of Justice. The grounds for the appeal are that the Quebec Priority Decision contains several errors of law and raises legal issues of public interest as it:

(a) Creates a statutory deemed trust in contradiction to the previous judicial decisions on this issue by the same First Instance Judge;

(b) Creates a priority for those deemed trusts in contradiction to Supreme Court of Canada case law;

(c) Contrary to prior case law in Quebec, provides that a purported priority created by provincial legislation remains operative in a proceeding under the federal CCAA;

(d) Affects the interests of pension plans and pensioners of the Timminco Pension Plan who have valid deemed trust claims in Ontario in accordance with applicable legislation and the decision of the Supreme Court of Canada in *re. lndalex*; and

(e) Prejudices the rights of other unsecured creditors of BSI.

MOTION FOR ADVICE AND DIRECTIONS

THE MONITOR'S POWERS

31. As noted earlier in this report, the CRO was discharged pursuant to the December 16 Order and the Monitor Powers Order was granted to provide for the ability to complete the CCAA Proceedings in the absence of any remaining management or employees of the Timminco Entities.

32. Paragraphs 4 and 5 of the Monitor Powers Order articulate a number of powers and duties that the Monitor is authorized, but not required, to take in the name of and on behalf of the Timminco Entities (the "**Monitor's Increased Powers**"), including, *inter alia*:

> "to perform such other functions as this Court may order from time to time"

33. Paragraph 8 of the Monitor Powers Order states:

> "THIS COURT ORDERS that, in addition to its prescribed rights in the CCAA, the Monitor's Existing Powers, the

> Monitor's Increased Powers and all other authority granted to the Monitor in all Orders granted in these CCAA Proceedings, the Monitor is empowered and authorized to take such additional actions and execute such documents, in the name of and on behalf of the Timminco Entities, as the Monitor considers necessary or desirable in order to respond to matters resulting from (a) the pending decision of Justice Mongeon in the Superior Court of Quebec (Commercial Division) pursuant to the Priority Claim Adjudication Protocol approved by the Order of the Honourable Mr. Justice Morawetz dated October 18, 2012 and any motions for leave to appeal or appeals relating thereto; and (b) the pending decision of Justice Morawetz in the Ontario Superior Court of Justice (Commercial Division) relating to a motion to lift the stay of proceedings brought by the plaintiff St. Clair Pennyfeather in the action with the Court File No. CV-09-378701-00CP; and (c) any motions for leave to appeal or appeals relating thereto." *emphasis added*

34. Accordingly, the Monitor is of the view that it is empowered and authorized to seek leave to appeal in response to the Quebec Priority Decision if the Monitor considers it necessary or desirable to do so.

THE NEED FOR ADVICE AND DIRECTIONS

35. As set out in the Monitor's Twenty-Third Report, there is approximately $1.4 million, less additional costs of the proceeding, in the estate of BSI that is available to creditors beyond the amount already paid to IQ (the "**Estate Funds**").

36. As a result of the Quebec Priority Decision, IQ would be required to reimburse the amount of the Deemed Trust Claim and would have an unpaid secured claim in an amount equal to the Deemed Trust Claim, payable from the Estate Funds. While the quantum of the Deemed Trust Claim is yet to be determined, the amount of $966,210 plus interest is asserted to be owing for the months December 2011 to June 2012. Accordingly, it would appear that a material portion, if not all, of the Estate Funds otherwise available to unsecured creditors of BSI would be paid to IQ as a result of the Quebec Priority Decision and there would be little or nothing available for unsecured creditors of BSI.

37. If the Quebec Priority Decision was overturned on appeal, the Estate Funds would be available for distribution to unsecured creditors of BSI.

38. The largest unsecured claim against BSI is the claim of Timminco in the amount of approximately $143 million as at the CCAA filing date (the "**Timminco Claim**"), representing approximately 87% of unsecured claims. The Monitor has not completed its adjudication of the Timminco Claim as its review has been deferred pending the final outcome of the Quebec Priority Motion in order to avoid incurring unnecessary costs. The Monitor notes, however, that the affidavit of Peter Kalins sworn January 2, 2012 and filed in support of the Timminco Entities application under the CCAA stated the following:

> "**Intercompany Indebtedness**

> 69. Timminco has been extending funds over the years to BSI, on an unsecured basis, to provide capital to BSI to support growth opportunities and fund operating cash flow deficits. These funding activities have resulted in intercompany indebtedness in the approximate amount of $136 million as at November 30, 2011."

39. The claims in respect of the BSI Plan Deficits are asserted at approximately $14 million in the aggregate, representing approximately 8.5% of unsecured claims against BSI. The amount of the BSI Pension Plan Deficits could be materially lower if the applicable discount rate has increased since the 2011 deficiency estimate.

40. Claims of other unsecured creditors of BSI total approximately $17.5 million in the aggregate.

41. Any distribution in the CCAA Proceedings on account of Timminco's claim against BSI would be subject to the deemed trust in respect of the solvency deficit of the Timminco pension plan, which was estimated to be approximately $5.1 million as at January 1, 2012.

42. Accordingly, the Quebec Priority Decision benefits the BSI Union Plan and the BSI Non-Union Plan, but adversely affects IQ (to the extent that the Deemed Trust Claims exceed the Estate Funds), the general body of unsecured creditors of BSI including Timminco, and the Timminco pension plan.

43. A successful appeal of the Quebec Priority Decision would benefit IQ (to the extent that the Deemed Trust Claims exceed the Estate Funds), the general body of unsecured creditors of BSI including Timminco, and the Timminco pension plan, but would adversely impact the BSI Union Plan and the BSI Non-Union.

44. IQ is represented by counsel but has chosen not to seek leave to appeal.

45. The Timminco Pension Plan is represented by counsel, but it is unclear whether it would have standing to appeal the Quebec Priority Decision.

46. The unsecured creditors of BSI are not generally represented.

47. The Monitor represents the interests of all creditors of both Timminco and BSI. In this situation, there is conflict between the interests of competing groups of creditors and one group or the other could be adversely affected by the decisions and actions of the Timminco Entities, acting by the Monitor, in respect of the Leave Motion and, if granted, an appeal of the Quebec Priority Decision, including any decision to not proceed with the Leave Motion.

48. Accordingly, while the Monitor is of the view that it is empowered and authorized, for and on behalf of the Timminco Entities, to file the Leave Motion and seek leave to appeal in response to the Quebec Priority Decision in accordance with the powers granted to it or as may be further ordered by the Court, the Monitor seeks the advice and directions of the Court in respect of whether the Leave Motion should proceed and, if the Leave Motion is granted, the prosecution of an appeal of the Quebec Priority Decision.

The Monitor respectfully submits to the Court this, its Twenty-Fourth Report.

Dated this 3rd day of March, 2014.

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

Nigel D. Meakin
Senior Managing Director

Toni Vanderlaan
Senior Managing Director

Appendix A

The Monitor Powers Order

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 16TH DAY
	)	
JUSTICE NEWBOULD	)	OF DECEMBER, 2013

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

ORDER
(Re Expansion of Monitor Powers)

THIS MOTION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together, the "**Timminco Entities**"), for an order authorizing and directing the Timminco Entities to pay the Funds (as defined below) to FTI Consulting Canada Inc. in its capacity as the court appointed monitor of the Timminco Entities (the "**Monitor**") and expanding the powers of the Monitor was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Sean Dunphy sworn December 5, 2013 (the "**Dunphy Affidavit**"), and the Twenty-Third Report of the Monitor dated December 6, 2013 (the "**Twenty-Third Report**"), and on hearing the submissions of counsel for the Timminco Entities and the Monitor, no one appearing for any other person on the

service list, although duly served as appears from the affidavit of service of Kathryn Esaw sworn December 6, 2013, filed:

PAYMENTS TO MONITOR

1. **THIS COURT ORDERS** that the Timminco Entities are authorized and directed to (a) transfer, direct and pay over to the Monitor forthwith and in any event by no later than 4:00 pm EST on December 16, 2013, all monies currently held in accounts in the name of and/or controlled by the Timminco Entities; and (b) transfer, direct and pay over to the Monitor forthwith all monies received by the Timminco Entities after the date hereof (all such monies, together with any monies received on behalf of the Timminco Entities, the "**Funds**"), which Funds shall continue to be Property (as defined at paragraph 4 of the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012, the "**Initial Order**") of the Timminco Entities.

2. **THIS COURT ORDERS** that all Persons (as defined at paragraph 19 the Initial Order) in possession or control of Property, including for greater certainty any monies, belonging to or owed to the Timminco Entities shall forthwith advise the Monitor of such and shall grant immediate and continued access to the Property to the Monitor, and shall forthwith deliver all such Property to the Monitor upon the Monitor's request, other than documents or information which cannot be disclosed or provided to the Monitor due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

3. **THIS COURT ORDERS** that the Administration Charge, the Directors' Charge and the DIP Lenders Charge (as defined in the Initial Order) shall continue to apply to the Property of the Timminco Entities, including the Funds in accordance with their priority as established by the Initial Order.

ADDITIONAL POWERS OF THE MONITOR

4. **THIS COURT ORDERS** the Monitor of the Timminco Entities shall continue to be authorized and directed, and is authorized, but not required, in the name of and on behalf of the Timminco Entities, if appropriate, to :

(a) complete the Claims Procedure established by the Claims Procedure Order of Mr. Justice Morawetz dated June 15, 2013 (the "**Claims Procedure Order**") and settle, resolve and/or adjudicate the remaining disputed Claims and any other outstanding items in the Claims Procedure in accordance with the Claims Procedure Order, without consulting with the Timminco Entities; and

(b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims or D&O claims (as both are defined in the Claims Procedure Order).

5. **THIS COURT ORDERS** that the Monitor is authorized, but not required, in the name of and on behalf of the Timminco Entities, to

(a) seek the directions of this Honourable Court in respect of the validity and quantum, if any, of the D&O Claims and whether such claims are secured by the D&O Charge (as defined at paragraph 27 of the Initial Order);

(b) take such steps as may be necessary or appropriate to seek and obtain recovery of the proceeds of sale of the Memphis Property (as described in the Dunphy Affidavit) and matters ancillary thereto;

(c) file any and all tax returns of the Timminco Entities with any governmental tax authority that the Monitor considers necessary or desirable;

(d) claim any and all rebates, refunds or other amounts of tax (including sales taxes, capital taxes and income taxes) paid by or payable to the Timminco Entities;

(e) engage, deal, communicate, negotiate, agree and settle with any and all governmental authorities on behalf of the Timminco Entities and all such government authorities shall treat the Monitor as the authorized representative of the Timminco Entities. Any rebates, refunds or other amounts received by the Monitor on account of taxes paid by or payable to the Timminco Entities shall form part of the Funds;

(f) to seek the directions of this Honourable Court in respect of the distribution of the Funds and/or any Property to creditors or to deal with and/or abandon any Property and any matters related thereto;

(g) to seek directions from this Honourable Court in respect of the filing of any plan of arrangement or compromise or the termination of these proceedings commenced by the Timminco Entities under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") pursuant to the Initial Order (the "**CCAA Proceedings**"), the discharge of the Monitor and all incidental and ancillary matters thereto; and

to perform such other functions as this Court may order from time to time (collectively, with paragraph 4 of this Order, the "**Monitor's Increased Powers**").

6. **THIS COURT ORDERS** that the Monitor's Increased Powers shall be in addition to the powers of the Monitor set out in any previous order of the Court (the "**Monitor's Existing Powers**")

7. **THIS COURT ORDERS** that the Monitor is prohibited from causing the Timminco Entities to make a voluntary assignment in bankruptcy without further Order of this Court.

8. THIS COURT ORDERS that, in addition to its prescribed rights in the CCAA, the Monitor's Existing Powers, the Monitor's Increased Powers and all other authority granted to the Monitor in all Orders granted in these CCAA Proceedings, the Monitor is empowered and authorized to take such additional actions and execute such documents, in the name of and on behalf of the Timminco Entities, as the Monitor considers necessary or desirable in order to respond to matters resulting from (a) the pending decision of Justice Mongeon in the Superior Court of Quebec (Commercial Division) pursuant to the Priority Claim Adjudication Protocol approved by the Order of the Honourable Mr. Justice Morawetz dated October 18, 2012 and any motions for leave to appeal or appeals relating thereto; and (b) the pending decision of Justice Morawetz in the Ontario Superior Court of Justice (Commercial Division) relating to a motion to lift the stay of proceedings brought by the plaintiff St. Clair Pennyfeather in the action with the Court File No. CV-09-378701-00CP; and (c) any motions for leave to appeal or appeals relating thereto.

9. **THIS COURT ORDERS** that in exercising the Monitor's Increased Powers, the Monitor shall not take possession of any real property belonging to the Timminco Entities.

10. **THIS COURT ORDERS** that, except as required by the CCAA or as provided for in any Orders issued by the Court in respect of the CCAA Proceedings, the Monitor shall not be authorized or directed to act in any other manner, and shall have no responsibility for any other duties or functions whatsoever other than by further Order of this Court.

11. **THIS COURT ORDERS** that the Monitor shall be at liberty to engage such persons as the Monitor deems necessary or advisable respecting the exercise of the Monitor's Existing Powers and the Monitor's Increased Powers.

12. **THIS COURT ORDERS** that, in addition to its prescribed rights under the CCAA, the powers granted by the Initial Order, this Order and all other orders granted in these proceedings, the Monitor is empowered and authorized to take such additional actions and execute such additional documents, in the name of and on behalf of the Timminco Entities, that may be incidental or ancillary to its prescribed rights and the powers granted to it, in order to facilitate the orderly completion of these proceedings and the winding up of the Timminco Entities' estates.

13. **THIS COURT ORDERS** that the Monitor shall continue to hold the Funds, and the Monitor is authorized and directed:

(a) to pay the reasonable fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Timminco Entities, in the name of and on behalf of the Timminco Entities;

(b) to pay all post-filing liabilities properly incurred by the Timminco Entities in the ordinary course of business which have not been previously paid, in the name of and on behalf of the Timminco Entities;

(c) to pay all costs associated with any actions taken by the Monitor pursuant to paragraph 11 of this Order; and

(d) to return to Court in order to seek such further authority or directions as the Monitor considers appropriate with respect to the use or distribution of the Funds.

14. **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 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, any other applicable legislation or any other Order granted in the CCAA Proceedings.

15. **THIS COURT ORDERS** that, except as specifically provided for herein, nothing in this Order shall vary or amend any order or endorsement previously granted in the CCAA Proceedings.

GENERAL

16. **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 Monitor, the CRO, 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 Monitor and to the CRO, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

DEC 16 2013

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER
(Re Expanded Monitor Powers)

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Lawyers for the Applicants

Appendix B

The Reimbursement Agreement

REIMBURSEMENT AGREEMENT

THIS AGREEMENT is made as of August 28th, 2012,

BETWEEN

BÉCANCOUR SILICON INC. ("**BSI**")

-and-

INVESTISSEMENT QUÉBEC (together with any successors thereof "**IQ**")

-and-

FTI CANADA CONSULTING INC., solely in its capacity as court-appointed monitor (the "**Monitor**") of Timminco Limited ("**Timminco**") and BSI and not in its personal capacity or corporate capacity

RECITALS

A. On January 3, 2012, Timminco and BSI (collectively, the "**Timminco Entities**") commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA Proceedings**"), and an initial order was made by the Ontario Superior Court of Justice (Commercial List) (the "**Court**") pursuant to which, among other things, FTI Consulting Canada Inc. was appointed as Monitor.

B. Pursuant to a term loan agreement, dated July 10, 2009, between BSI and IQ (the "**Loan Agreement**"), IQ advanced funds to BSI in the principal amount of $25,000,000. The amount outstanding under the Loan Agreement (including principal and interest accrued to date but excluding applicable costs and expenses) as at August 17, 2012 was $29,118,708.44. The amount owing by BSI to IQ from time to time under the Loan Agreement shall hereinafter be referred to as the "**Indebtedness**".

C. The Indebtedness is secured by, *inter alia*, a charge upon all of BSI's present and future assets, undertaking and properties (the "**Collateral**") pursuant to the terms of a Hypothec Universelle dated July 10, 2009 between BSI and IQ (the "**IQ Security**").

D. The Monitor is in possession of certain proceeds from the realization of Collateral (collectively, the "**Proceeds**").

E. IQ asserts a claim to the Proceeds, and the other Collateral pursuant to the IQ Security. Certain Claims (as defined below) have been asserted against BSI in the CCAA Proceedings pursuant to the Claims Procedure Order. The holders of these Claims may assert that the Claims are Priority Claims (as defined below).

F. As a condition precedent to BSI bringing a motion before the Court authorizing and directing the Monitor to make an initial interim distribution to IQ in the amount of $27,393,057.43 in partial repayment of the Indebtedness (the "**Initial Distribution**") together with such additional distributions to IQ up to the amount of the Indebtedness that the Monitor in its discretion considers to be reasonable and appropriate in light of all circumstances (the "**Subsequent Distributions**" and together with the Initial Distribution the "**Interim Distribution**") BSI requires that IQ enter into this Agreement.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

SECTION 1 - INTERPRETATION

1.1 Definitions

In this Agreement:

(1) "**Agreement**" means this agreement and all attached schedules, as the same may be supplemented, amended, restated, updated or replaced from time to time;

(2) "**Business Day**" means a day on which banks are open for business in the City of Toronto, but does not include a Saturday, Sunday or statutory holiday in the Province of Ontario;

(3) "**CCAA Proceedings**" has the meaning set out in the Recitals;

(4) "**Claim**" means a claim as defined in the Claims Procedure Order and submitted in compliance with the procedure set out in the Claims Procedure Order;

(5) "**Claims Procedure Order**" means the order of the Court dated June 15, 2012 dealing with, *inter alia*, the solicitation, classification and adjudication of Claims against the Timminco Entities;

(6) "**Collateral**" has the meaning set out in the Recitals;

(7) "**Court**" has the meaning set out in the Recitals or such other court of competent jurisdiction with respect to the applicable matter in dispute;

(8) "**Finally Determined**", means the validity, quantum and priority of a Reimbursement Claim have been finally determined in accordance with the Priority Claim Adjudication Process and the Claims Procedure Order;

(9) "**Indebtedness**" has the meaning set out in the Recitals;

(10) "**Initial Distribution**" has the meaning set out in the Recitals;

(11) "**Interim Distribution**" has the meaning set out in the Recitals;

(12) "**Interim Distribution Order**" means an order of the Court authorizing and directing the Monitor to make the Interim Distribution and providing for the Priority Claims Adjudication Process;

(13) "**IQ Security**" has the meaning set out in the Recitals;

(14) "**Proceeds**" has the meaning set out in the Recitals;

(15) "**Priority Claim**" means a Reimbursement Claim that has been Finally Determined to be secured against the Collateral by security ranking in priority to the IQ Security or a Reimbursement Claim that has otherwise been Finally Determined to be entitled to payment in priority to the Indebtedness;

(16) "**Priority Claimant**" means a creditor holding a Reimbursement Claim which creditor asserts that such Reimbursement Claim is a Priority Claim;

(17) "**Priority Claim Adjudication Process**" means the process to be established by the Interim Distribution Order whereby the Monitor, IQ or a Priority Claimant may submit a dispute regarding the priority of a Reimbursement Claim to be adjudicated in accordance with paragraphs 20-27 of the Claims Procedure Order; provided, however, such adjudication process will provide that the quantum and validity of a Reimbursement Claim determined to be a Priority Claim will not be voluntarily settled without the consent of IQ, acting reasonably;

(18) "**Reimbursement Claim**" means a Claim that is held by Priority Claimant and has been added to Schedule "**A**" in accordance with the protocol set out on Schedule "**A**";

(19) "**Reimbursement Payment**" has the meaning set out in Section 2.1; and

(20) "**Subsequent Distributions**" has the meaning set out in the Recitals.

(21) "**Timminco Entities**" has the meaning set out in the Recitals.

1.2 Interpretation Not Affected by Headings, etc.

The division of this Agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement. Unless otherwise indicated, all references to a "section" followed by a number and/or a letter refer to the specified section of this Agreement. The terms "this Agreement", "hereof", "herein" and "hereunder" and similar expressions refer to this Agreement and not to any particular section hereof.

1.3 Extended Meanings

Words importing the singular include the plural and vice versa, words importing gender include all genders and words importing persons include individuals, partnerships, associations, trusts, unincorporated organizations, corporations and governmental authorities. The term "including" means "including, without limitation," and such terms as "includes" have similar meanings.

SECTION 2 - REIMBURSEMENT

2.1 IQ Undertaking

Subject to the terms hereof, IQ hereby undertakes and agrees to reimburse to BSI by payment to the Monitor such portion of the Interim Distribution as may be necessary to satisfy any Reimbursement Claim, or portion thereof, that has been Finally Determined to be a Priority Claim (a "**Reimbursement Payment**"). Such Reimbursement Payment shall be made by IQ to the Monitor, by way of immediately payable funds within (7) seven business days following the time that a Reimbursement Claim has been Finally Determined to be a Priority Claim.

2.2 Limitation of Liability

Notwithstanding any other provision of this Agreement, the liability of IQ to reimburse the Interim Distribution pursuant to this Agreement shall be limited to the lesser of: (a) the aggregate amount of all Reimbursement Claims that are Finally Determined to be Priority Claims; and (ii) the aggregate amount of the Interim Distribution received by IQ.

2.3 Distributions

Provided that the Interim Distribution Order is issued, the Monitor shall distribute the Initial Distribution to IQ or its designee. The Monitor shall be entitled but under no obligation to distribute the Subsequent Distributions to IQ. The Monitor shall be entitled to disburse the balance of the Proceeds to parties other than IQ only in accordance with existing or future orders of the Court.

2.4 Term

This Agreement and the liability of IQ to BSI with respect to any Reimbursement Claim shall terminate on the earlier of: (a) (2) two months from the date of the issuance of the Interim Distribution Order; and (b) the date such Reimbursement Claim has been Finally Determined and all reimbursement obligations of IQ hereunder in respect thereof have been satisfied (the "**Term**"); provided, however, if the process to Finally Determine a Reimbursement Claim has been commenced during the Term, the Term will be extended until the date such Reimbursement Claim is actually Finally Determined and any reimbursement obligation of IQ in respect of such Reimbursement Claim is satisfied.

2.5 IQ Security and Interest

Upon receipt of the Interim Distribution, or any portion thereof, by IQ, or any designee of IQ, no further interest will continue to accrue on the amount of the repaid Indebtedness unless a Reimbursement Payment is made. If a Reimbursement Payment is made pursuant to this Agreement, the amount of the Reimbursement Payment shall be added back to the Indebtedness and such amount (plus all interest accrued thereon (i) from the date the Reimbursement Payment is made if the Priority Claim in respect of which the Reimbursement Payment is made has not borne interest since the date the Interim Distribution was made; and, (ii) from the date the Interim Distribution was made if the Priority Claim in respect of which the Reimbursement Payment is made has borne interest from the date of the Interim Distribution) shall be secured by

the IQ Security. BSI acknowledges and agrees that: (a) the payment of the Initial Distribution to IQ does not discharge all of the Indebtedness; (b) the Collateral and Proceeds remain subject to the IQ Security until such time as the Indebtedness is indefeasibly paid in full; and (c) all legal costs incurred by IQ in connection with the CCAA Proceedings prior to or after the entering into of this Agreement are to be included in the Indebtedness in accordance with the Loan Agreement.

2.6 Use of Interim Distribution

Subject to Section 2.1, BSI and the Monitor each acknowledge and agree that IQ shall have the full use of the Interim Distribution and IQ shall have no obligation to hold the amount of the Interim Distribution in trust or keep it separate and apart from its general assets.

SECTION 3 - GENERAL

3.1 Notice

All notices and other communications pursuant to this Agreement shall be in writing and delivered or transmitted by facsimile or other electronic transmission as follows:

(a) in the case of BSI:

Bécancour Silicon Inc.
c/o Russell Hill Advisory Services Inc.
150 King Street West
Suite 2401
Toronto, Ontario
M5H 1J9

Attention: Sean Dunphy
Fax No.: 416.364.3451
Email: sdunphy@timminco.com

with a copy to:

Stikeman Elliott LLP
199 Bay Street
5300 Commerce Court West
Toronto, Ontario
M5L 1B9

Attention: Ashley Taylor
Fax No.: 416.947.0866
Email: ataylor@stikeman.com

(b) in the case of IQ:

Direction des créances spéciales
413, rue Saint-Jacques, bureau 500
Montreal, PQ H2Y 1N9

Attention: François Lamothe
Fax No.: 514.873.1212
Email: Francois.Lamothe@invest-quebec.com

with a copy to:

Fasken Martineau DuMoulin LLP
333 Bay Street, Suite 2400
Toronto, ON M5H 2T6

Attention: Aubrey Kauffman
Fax No.: 416-364-7813
Email: akauffman@fasken.com

(c) in the case of the Monitor:

FTI Canada Consulting Inc.
TD Waterhouse Tower
79 Wellington St. W., Suite 2010
Toronto ON M5K 1G8

Attention: Nigel Meakin
Fax No.: 416-649-8101
Email: nigel.meakin@fticonsulting.com

with a copy to:

Blake, Cassels & Graydon LLP
199 Bay Street, Suite 4000
Toronto, ON M5L 1A9

Attention: Linc Rogers
Fax No.: 416-863-2653
Email: linc.rogers@blakes.com

Any such notice or other communication, if given by personal delivery, will be deemed to have been given on the day of actual delivery thereof and, if transmitted by fax or other electronic transmission before 5:00 p.m. (Toronto time) on a Business Day, will be deemed to have been given on the Business Day, and if transmitted by fax or other electronic transmission after 5:00 p.m. (Toronto time) on a Business Day, will be deemed to have been given on the Business Day after the date of transmission. The parties may update their respective contact information by providing notice to the other parties to the Agreement in accordance with this Section.

3.2 Entire Agreement

This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof.

3.3 Governing Law

This Agreement shall be governed by the laws of the Province of Ontario and the federal laws of Canada applicable therein.

3.4 Benefit of Agreement

This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

3.5 Further Assurances

At the reasonable request of another party to this Agreement, each of the parties hereto agrees to do, execute and deliver all such further acts, instruments or documents as may be necessary to give effect to this Agreement and the mutual obligations contained herein.

3.6 Counterparts

This Agreement may be signed in counterparts, by original, facsimile or other electronic transmission, and each such counterpart taken together shall constitute a binding agreement among all the parties hereto.

3.7 Court Approval

It is a condition precedent to the effectiveness of this Agreement that it be approved by the Court.

3.8 Capacity of the Monitor

IQ and BSI acknowledge and agree that FTI Consulting Canada Inc. is party to this Agreement solely in its capacity as court-appointed monitor and not in its personal or corporate capacity and shall have no liability under this Agreement of any kind in its personal or corporate capacity.

[Signatures following on next page]

This Agreement is made as of the date first above written.

BÉCANCOUR SILICON INC.

By: _____
Name: Sean Dyer for
Title: Russell Hill Advisory Services Inc
CRO.

INVESTISSEMENT QUÉBEC

By: _____
Name:
Title:

Acknowledged and consented to this _____ day of August, 2012

FTI CANADA CONSULTING INC., solely in its capacity as court-appointed monitor of Timminco Limited and Bécancour Silicon Inc. and not in its personal or corporate capacity

By: _____
Name:
Title:

This Agreement is made as of the date first above written.

BÉCANCOUR SILICON INC.

By: _____
Name:
Title:

INVESTISSEMENT QUÉBEC

By: _____
Name: ALESSANDRO MORALES
Title: Director Special loans

Acknowledged and consented to this _____ day of August, 2012

FTI CANADA CONSULTING INC., solely in its capacity as court-appointed monitor of Timminco Limited and Bécancour Silicon Inc. and not in its personal or corporate capacity

By: _____
Name:
Title:

This Agreement is made as of the date first above written.

BÉCANCOUR SILICON INC.

By: _____
Name:
Title:

INVESTISSEMENT QUÉBEC

By: _____
Name:
Title:

Acknowledged and consented to this 28th day of August, 2012

FTI CANADA CONSULTING INC., solely in its capacity as court-appointed monitor of Timminco Limited and Bécancour Silicon Inc. and not in its personal or corporate capacity

By: _____
Name: Ms. Toni Vanderlaan
Title: Managing Director

SCHEDULE "A"
REIMBURSEMENT CLAIMS*

The parties agree that this Schedule "A" will be updated in accordance with the following protocol:

1. Within (7) seven days of the date of the Interim Distribution Order is issued by the Court, a creditor that has filed a Claim as a secured Claim in accordance with the provisions of the Claims Procedure Order, must provide a written notice to the Monitor, IQ and BSI, in accordance with the notice provisions of this Agreement, which states (a) the name of the creditor; (b) the quantum of the claim that the creditor asserts constitutes a Priority Claim; and (c) in a summary manner only, the basis on which the Claim constitutes a Priority Claim. If a creditor fails to file a notice in accordance with this paragraph, its Claim shall not constitute a Reimbursement Claim for the purpose of this Agreement and its Claim shall not be added to this Schedule "**A**".

2. If the Monitor, IQ and BSI collectively agree that the basis on which the creditor (that satisfies the criteria set out in paragraph 1 above) asserts its Claim is a Priority Claim establishes a genuine issue for adjudication, the Claim shall constitute a Reimbursement Claim for the purpose of this Agreement and shall be added to this Schedule "**A**".

3. If the Monitor, IQ and BSI do not agree that the basis on which a creditor (that satisfies the criteria set out in paragraph 1 above) establishes a genuine issue for adjudication, then the Monitor shall seek advice and direction from the Court, on notice to the applicable creditor, IQ and BSI as to whether the Claim establishes a genuine issue for adjudication. If the Court concludes the Claim does establish a genuine issue for adjudication, the Claim shall constitute a Reimbursement Claim for the purpose of this Agreement and shall be added to this Schedule "**A**". If the Court concludes the Claim does not establish a genuine issue for adjudication then the Claim shall not constitute a Reimbursement Claim for the purpose of this Agreement and shall not be added to this Schedule "**A**".

Appendix C

The Priority Claim Adjudication Protocol

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

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

THE HONOURABLE	)	~~WEDNESDAY~~ THURSDAY, THE ~~10th~~ 18th DAY OF
	)	
JUSTICE MORAWETZ	)	OCTOBER 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

ORDER
(Approval of Priority Claim Adjudication Protocol)

This Motion, made by Investissement Québec for an order approving the Priority Claim Adjudication Protocol and referring the adjudication of the BSI Pension Reimbursement Claims to the Superior Court of Québec (Commercial Division) was heard this day at 330 University Avenue, Toronto, ON.

On the consent of counsel for Timminco Limited and Bécancour Silicon Inc., FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco entities, Investissement Québec, Mercer Canada, the administrator of the Haley Pension Plan, The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") and BSI Union and Non-Union employee Pension Committees:

1. **THIS COURT ORDERS** that the Priority Claim Adjudication Protocol, attached hereto as Schedule "A", be and the same is hereby authorized and approved.

2. **THIS COURT ORDERS** that the adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims, all as defined in the attached Priority Claim Adjudication Protocol, be and the same is hereby referred exclusively to the Superior Court of Québec (Commercial Division) to be determined in accordance with the Priority Claim Adjudication Protocol.

3. **THIS COURT HEREBY REQUESTS** the aid and recognition of the Superior Court of Québec (Commercial Division) to give effect to this order and to adjudicate whether the BSI Pension Reimbursement Claims constitute Priority Claims in accordance with the terms of the Priority Claims Adjudication Protocol.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

OCT 19 2012

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SCHEDULE "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

PRIORITY CLAIM ADJUDICATION PROTOCOL

A. OVERVIEW

1. In accordance with the Reimbursement Agreement (the "**Reimbursement Agreement**") among Investissement Québec ("**IQ**"), FTI Consulting Canada Inc., as court-appointed Monitor, and Bécancour Silicon Inc., dated August 28, 2012 and the August 28, 2012 Interim Distribution Order (the "**Interim Distribution Order**")[1], two (2) sets of claims have been designated as Reimbursement Claims, namely:

(i) a claim on behalf of Mercer Canada ("**Mercer**"), as administrator of the Haley Pension Plan, and on behalf of the beneficiaries of that plan (the "**Mercer Reimbursement Claim**"), which claim is supported by The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("**USW**"); and

(ii) a claim by Le Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively the "**BSI Pension Committees**") (the "**BSI Pension Reimbursement Claims**").

2. IQ disputes that the above Reimbursement Claims have priority over the IQ Security and the parties do not anticipate the dispute will be resolved through the consented resolution process

[1] Unless otherwise indicated, any capitalized terms used but not defined herein shall have the meaning ascribed to such term in the Reimbursement Agreement and the Interim Distribution Order.

provided for in the Interim Distribution Order. Accordingly, an adjudication is required to determine whether such Reimbursement Claims constitute Priority Claims.

The following is the protocol for the adjudication of whether the Reimbursement Claims constitute Priority Claims.

B. THE MERCER REIMBURSEMENT CLAIM

1. The Mercer Reimbursement Claim shall be adjudicated by way of a motion before this Court wherein Mercer and USW will be the moving parties and IQ will be the respondent. If at any time Mercer shall cease the prosecution of the Mercer Reimbursement Claim, the USW shall be entitled to prosecute the Mercer Reimbursement Claim in the place and stead of Mercer.

As issues to be adjudicated regarding the Mercer Reimbursement Claim (such as, by way of example, substantive consolidation) may impact on other stakeholders of BSI or Timminco, the motion material hereafter described shall be served on the service list herein. Any creditor of the Timminco Entities or the Monitor, or the Timminco Entities themselves ("**Interested Stakeholders**") shall have the right to file material and participate in the motion proceedings in accordance with the following timetable:

(i) Mercer and USW, if so advised, will deliver moving party motion material by October 29, 2012;

(ii) IQ and Interested Stakeholders, if any, shall deliver responding material by November 30, 2012;

(iii) Mercer and USW will deliver reply material, if so advised, by December 17, 2012;

(iv) cross-examinations on filed affidavits, if required, will be conducted during the week of January 13, 2012. During this period, the examination of Peter Kalins, (a former officer and director of Timminco and BSI) as a witness to the motion, shall be conducted if consented to by Peter Kalins or if an appropriate court order has been obtained;

(v) Mercer and USW, if so advised, will deliver moving party's facta by January 25, 2013;

(vi) IQ and any Interested Stakeholders will deliver responding facta by February 13, 2013;

(vii) Mercer and USW will deliver reply facta by February 20, 2013, if so advised; and

(viii) the hearing of the motion will take place during the week of February 25, 2013.

2. In determining whether the Mercer Reimbursement Claim constitutes a Priority Claim, the determination of the quantum of such Priority Claim shall be postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

C. THE BSI PENSION REIMBURSEMENT CLAIMS

1. The adjudication of whether the BSI Reimbursement Claims constitute Priority Claims shall be referred exclusively to the Superior Court of Québec (Commercial Division) wherein the BSI Pension Committees will be the moving parties and IQ will be the respondent in accordance with the following timetable:

(i) the BSI Pension Committees shall deliver their motion to institute proceedings within 60 days after the Order is made referring this matter to the Superior Court of Québec (Commercial Division);

(ii) IQ and any Interested Stakeholders shall deliver their Statement of Defence within 30 days after receipt of the motion to institute proceedings;

(iii) the BSI Pension Committees shall have up to 30 days after receipt of the IQ defence to deliver their response, if any;

(iv) examinations, if necessary, are to be conducted by January 11, 2013;

(v) written arguments and joint books of procedure and exhibits shall be delivered at least 2 weeks before the hearing of the motion; and

(vi) the hearing of the motion is to be scheduled between February 18, 2013 and March 15, 2013 based upon a 1-2 day hearing.

For greater certainty, any appeal from an order of the Superior Court of Québec (Commercial Division) herein shall be to the Court of Appeal of Québec.

2. In determining whether the BSI Reimbursement Claims constitute Priority Claims, the determination of the quantum of such Priority Claims shall be postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

D. MONITOR'S REPORT

1. The Monitor, if it deems it necessary and appropriate to do so, may file a report with the court in connection with adjudication of either Reimbursement Claim.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

Proceedings commenced at

TORONTO

ORDER
(Approval of Priority Claim Adjudication Protocol)

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents
333 Bay Street, Suite 2400
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Toronto, ON M5H 2T6

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Tel: 416 868 3538
Fax: 416 364 7813

Lawyers for Investissement Québec

CITATION: Timminco Limited (Re), 2012 ONSC 5959
COURT FILE NO.: CV-12-9539-00CL
DATE: 20121018

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: **S. J. Weisz, for FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco Entities**

HEARD: **OCTOBER 18, 2012**

ENDORSEMENT

[1] On consent of Timminco Limited and Bécancour Silicon Inc., FIT Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco Entities, Investissement Québec, Mercer Canada, the Administrator of the Haley Pension Plan, The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") and BSI Union and Non-Union Employee Pension Committees, the Priority Claim Adjudication Protocol is approved. The adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims is referred to the Superior Court of Québec (Commercial Division) to be determined in accordance with the terms of the Priority Claims Adjudication Protocol.

[2] This determination has been made pursuant to s. 17 of the CCAA, and I express my thanks, in advance, to the Superior Court of Québec.

[3] To the extent leave is required to proceed, such leave is granted.

MORAWETZ J.

Date: October 18, 2012

Appendix D

The Quebec Priority Decision
(English Translation)

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No: 500-11-043844-121

DATE: January 24, 2014

PRESIDING: THE HONOURABLE ROBERT MONGEON, J.S.C.

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 LIMITÉE

-and-

BÉCANCOUR SILICON INC.

Debtors

-and-

FTI CONSULTING INC.

Monitor

-and-

Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc.

-and-

Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc.

Petitioners

v.

INVESTISSEMENT QUÉBEC

Respondent

JUDGMENT ON DIRECTIONS AND DECLARATORY JUDGMENT RELATING TO PRIORITY CLAIMS
(Sections 11 and 17 CCAA)

INTRODUCTION AND BACKGROUND

[1] Bécancour Silicon Inc. ("BSI") is a subsidiary of Timminco Inc. ("TI").

[2] BSI and TI have been under the protection of the *Companies' Creditors Arrangement Act,* R.S.C., 1985, c. C-36 as amended (the "CCAA") since January 3, 2012, following the issuance of an initial order by Justice Geoffrey Morawetz of the Ontario Superior Court of Justice.

[3] By a subsequent order rendered on January 16, 2012 (the "Suspension Order")[1], all special payments to be made by BSI in favour of the two defined benefit pension plans for the benefit of its unionized[2] and non-unionized[3] employees were suspended.

[4] Those plans are governed by their constituting contracts (P-1 and P-2) and by the *Supplemental Pension Plans Act,* R.S.Q., c. R-15.1 as amended (the "SPPA"). It is admitted that BSI, the employer, has paid the current service contributions and special payments until January 31, 2012 and that the current service contributions are paid up to today.

[5] The two pension plans P-1 and P-2 have been (or are about to be) terminated, given that these two plans have, for all practical purposes, no participating employees left. Moreover, these pension plans are in a state of solvency deficit.

[6] On December 31, 2011, the unionized employees' pension plan's solvency deficit was $9,889,600.00 (exhibit P-3) while that of the non-unionized employees' was $3,998,700.00 (exhibit P-4).[4]

[7] In order to clear, at least partially, the above-mentioned solvency deficits, BSI had to pay special payments of $93,810.00 and of $41,710.00 per month into the above-mentioned pension plans' funds (exhibits P-3 and P-4). These special payments have been suspended since the above-mentioned Suspension Order.

[8] The Petitioner Pension Committees consider that their above-mentioned claims constitute priority claims that rank ahead of the claim of the Respondent Investissement Québec ("IQ"), who holds a universal hypothec without delivery on all of BSI's movable and immovable property pursuant to which it received about $29 million in reimbursement of its claim.

[9] This judgment deals with the status of these priority claims.

[10] The two Petitioners allege that their priority claims should be recognized as such by the Court, ranking ahead of IQ's claim and of the said payment of more than $29 million made by the Monitor to IQ within the context of the liquidation of BSI's assets made under the CCAA.

---

1 Written reasons filed on February 2, 2012.
2 Exhibit P-1.
3 Exhibit P-2.
4 As of July 20, 2012, the Pension Committees' priority claims totalled $10,558,290.00 and $4,296,220.00 respectively (exhibits P-3, P-4, P-13 and P-14).

[11] The parties have also agreed to stipulate that if the Petitioners' claims are recognized as priority claims in whole or in part, IQ shall reimburse the said claims which could add up to $14.8 million (subject to adjustment) to both Pension Committees in accordance with their respective interests. However, if the Court determines that the claims in question are not priority claims, IQ will have nothing to reimburse. Such a scenario would, since there is no (or very little) residual amount available to reimburse non-priority claims, result in the pension funds being deprived of considerable amounts, resulting in the reduction of the retirees' retirement benefits of up to near 40%. We can therefore easily understand the importance of the question to the retirees.

CHRONOLOGY OF RELEVANT FACTS

[12] Here is the chronology of the relevant facts and documents that are necessary for a good understanding of the questions to be resolved and for the resolution of the present dispute:

a) January 3, 2012: First order of Justice Morawetz staying all claims against TI and its subsidiary BSI, with an effective date of January 3, 2012, at 12:01 a.m.;

b) January 16, 2012: Suspension Order regarding TI's and BSI's special payments. Justice Morawetz was of the opinion that TI's and/or BSI's financial statements did not allow them to meet such obligations. Furthermore, Justice Morawetz wrote (in his reasons filed on February 2, 2012):

> **[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) reflex, (2009) 57 C.B.R. (5th) 285 (Q.S.C.); *Collins & Aikman Automotive Canada Inc.* 2007 CanLII 45908 (ON SC), (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc. (Re)* 2009 CanLII 39776 (ON SC), (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.**
>
> **…**
>
> **[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.

(emphasis added)

c) June 13-14, 2012: Sale of substantially all of TI's and BSI's major assets. These sales had been approved beforehand by Justice Morawetz (exhibit P-10). The sales of assets generated $30.8 million in liquidity;[5]

d) August 17, 2012: Appointment of a CRO ("Chief Restructuring Officer");

e) August 28, 2012: Reimbursement of the loan (secured by a hypothec on the universality of BSI's assets) in the amount of $25 million plus some accrued interest (see exhibits P-11 and P-16). This payment was made subject to the Petitioner Pension Committees' rights;

f) September 7, 2012: Requests from the Petitioner Pension Committees for priority over a) both Pension Plans' solvency deficits ($9,889,600.00 and $3,998,700.00) subject to adjustment and b) the balance of unpaid special payments for the months of December 2011 to June 2012 ($668,690.00 and $297,520.00), the whole as appears from exhibit P-17.

g) October 18, 2012: Order from Justice Morawetz, following a request from the parties (exhibit P-19), to transfer the Pension Committees' motion to the Superior Court of Québec (exhibit P-20). The parties also agreed that the motion would be split, with the Quebec Court first ruling on the questions of law before deciding the quantum of the claims, if applicable.

[13] More specifically, exhibit P-20 reproduces Justice Morawetz's order approving a "Priority Claim Adjudication Protocol" ("the Protocol") under which the Superior Court of Ontario asks the

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[5] Monitor's Report no. 13, exhibit P-5, paragraph 7.

Superior Court of Québec to determine if the Petitioner Pension Committees' claims have priority over, notably, IQ's claim.[6]

[14] The Protocol states the following:

> **A. OVERVIEW**
>
> **1. In accordance with the Reimbursement Agreement (the « Reimbursement Agreement ») among Investissement Québec (« IQ »), FTI Consulting Canada Inc., as court-appointed Monitor, and Bécancour Silicon Inc., dated August 28, 2012 and the August 28, 2012 Interim Distribution Order (the « Interim Distribution Order »), two (2) sets of claims have been designated as Reimbursement Claims, namely :**
>
> **…**
>
> **(ii) a claim by Le Comté (sic) de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively the « BSI Pension Committees ») (the « BSI Pension Reimbursement Claims »).**
>
> **2. IQ disputes that the above Reimbursement Claims have priority over the IQ Security and the parties do not anticipate the dispute will be resolved through the consented resolution process provided for in the Interim Distribution Order. Accordingly, an adjudication is required to determine whether such Reimbursement Claims constitute Priority Claims.**
>
> **The following is the protocol for the adjudication of whether the Reimbursement Claims constitute Priority Claims.**
>
> **…**

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[6] See paragraphs 1 to 3 of the order :

1. **THIS COURT ORDERS that the Priority claim Adjudication Protocol, attached hereto as Schedule « A », be and the same is hereby authorized and approved.**
2. **THIS COURT ORDERS that the adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims, all as defined in the attached Priority Claim Adjudication Protocol, be and the same is hereby referred exclusively to the Superior Court of Québec (Commercial Division) to be determined in accordance with the Priority Claim Adjudication Protocol.**
3. **THIS COURT HEREBY REQUESTS the aid and recognition of the Superior Court of Québec (Commercial Division) to give effect to this order and to adjudicate whether the BSI Pension Reimbursement Claims constitute Priority Claims in accordance with the terms of the Priority Claims Adjudication Protocol.**

[15] The Pension Committees' motion for directions and declaratory judgment relating to the priority claims was filed on December 17, 2012. At the parties' request, the schedule was modified and the hearing on the questions of law was heard before the undersigned on May 27 and 28, 2013.

[16] The Pension Committees formulate the questions of law as follows [TRANSLATION]:

> **49. The question in issue is to determine whether the claims of the Pension Committees have priority over Investissement Québec's claim. The question of the status of the Pension Committees' claims as regards the DIP Charges is not a question in issue and has already been decided by Justice Morawetz (see the Order of February 8, 2012, Exhibit P-9).**
>
> **50. BSI stopped paying special payments pursuant to the Order of January 16, 2012 which suspended them. On July 23, 2012, the unpaid accrued special payments (with interest) totaled approximately $1 million for the two Pension Plans (see letters of July 20, 2012, Exhibit P-3 and Exhibit P-4).**
>
> **51. Solvency deficits (which would include unpaid special payments) for both Pension Plans on December 31, 2011 totaled approximately $14 million (see letters of July 20, 2012, Exhibit P-3 and Exhibit P-4) and will be crystallized if the Pension Plans' termination by the Régie des Rentes du Québec is completed.**
>
> **52. Under Quebec law applicable to the question in issue, the amounts claimed by the Pension Committees for the special payments and solvency deficits are deemed to be held in trust by the employer BSI in favour of the Pension Plans.**
>
> **53. It is clear that such deemed trusts have priority over Investissement Québec's secured claim.**
>
> **(emphasis added)**

[17] Once the Court has decided on the existence or not of a deemed trust affecting the Pension Committees' claims, the next step is to determine the effect of such a deemed trust on IQ's hypothecary claim.

[18] The Petitioner Committees therefore ask the Court to [TRANSLATION]:

> **DECLARE as being Priority Claims under the Repayment Agreement confirmed by the Order of the Superior Court of Justice (Commercial List) of Ontario on August 28, 2012, the following claims:**

1. **the unpaid special payments due to the Silicium Bécancour Inc.'s Pension Plan fund for unionized employees;**

2. **the unpaid special payments due to the Silicium Bécancour Inc.'s Pension Plan fund for non-unionized employees;**

3. **the solvency deficit of Silicium Bécancour Inc.'s Pension Plan for unionized employees; and**

4. **the solvency deficit of Silicium Bécancour Inc.'s Pension Plan for non-unionized employees.**

TAKE NOTICE of paragraph C.2. of the Adjudication Protocol so that the Priority Claims' quantums shall be determined once this Honourable Court has decided the nature of the claims, and shall be determined according to the Claims Procedure Order or by an order of this Court.

TAKE NOTICE of paragraph 9 of the Order of August 28, 2012 from the Superior Court of Justice (Commercial List) of Ontario and the Reimbursement Convention in Schedule "A" thereof, whereby Investissement Québec will reimburse the sums declared by this Court as having priority, if applicable, over Silicium Bécancour Inc. through the Monitor, FTI Consulting Inc., so that Silicium Bécancour Inc. transfers these sums to the Petitioners.

[19] In the alternative, and in the absence of recognition that the SPPA creates such a trust, the Pension Committees ask the Court to use its inherent powers and/or those established by Article 46 of the Québec *Code of Civil Procedure* to conclude that there is a priority claim in their favour.

[20] The question as to whether section 49 SPPA creates such a trust has already been addressed in the *White Birch*[7] case, where the undersigned answered the question in the negative. Moreover, this decision states that if it does exist, the deemed trust of section 49 SPPA is affected by the application of the doctrine of paramountcy of federal statutes over provincial statutes when there is a conflict between the two legislative regimes. In *White Birch*, the court had to determine whether the deemed trust of section 49 SPPA would have had priority over the super-priority claim of the "DIP" lender authorized under the CCAA.

[21] The Petitioner Pension Committees challenge this analysis. They allege that the conclusion that section 49 SPPA does not create a deemed trust is wrong in law. They thus raise the issue again, but with certain additional and reformulated arguments which deserve consideration.

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[7] *White Birch Paper Holding Co. (Arrangement relatif à)* 2012 QCCS 1679.

[22] As for the Respondent IQ's position, its arguments follow in every respect the above-mentioned *White Birch* case. On the strength of this decision, IQ alleges that the Pension Committees' Motion has no legal basis and must be dismissed.

[23] Let us first of all analyze in detail how the situation presented itself in the *White Birch* case: while one of the largest paper mills in Canada was under the protection of the CCAA and an initial order suspended the special payments payable by the employer to several defined benefit pension plans, a motion was filed to order the debtor to continue paying those special payments. It was shortly after the decision of the Court of Appeal of Ontario in the *Indalex*[8] case, which recognized that this kind of obligation must be honoured by employers despite CCAA protection, because these sums are deemed to be held in trust by employers for the benefit of the pension plans concerned and this trust is not affected by the CCAA restructuring process.

[24] In the *White Birch* case, the petitioning unions, pension committees and retirement groups argued in particular that section 49 SPPA created, under Quebec law, the same kind of trust as the one established under Section 57 of the Ontario *Pension Benefits Act*.[9] The essence of the *White Birch* decision is that section 49 SPPA does not create a deemed trust by operation of law under Quebec law. Starting from there, the special payments or the balances of the solvency deficits of the pension plans do not benefit from any priority over other debts of the employer and are only ordinary unsecured debts.

[25] The present action, based on an almost identical factual frame, should therefore, at first blush, have the same result: in the absence of a trust enforceable against IQ, the Pension Committees' motion should be dismissed. However, as we shall see later, the facts of this case are not exactly the same and certain legal arguments pleaded in the proceedings or raised by the Court were not been addressed in the *White Birch* case.

THE PARTIES' ARGUMENTS

[26] The Pension Committees argue that even if the *White Birch* decision raises and answers the question as to whether section 49 SPPA creates a trust in Quebec law in the negative, the whole question should be revisited.

[27] First, the Pension Committees seek the undersigned's intervention as a judge acting under the authority of the CCAA, so that his decision be made within the framework of the general objective of the Act and … "to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[10]

[28] However, a preliminary question arises as to whether the undersigned is acting as a judge supervising the CCAA process or as a decision-maker delegated by the supervisory judge to hear and settle a dispute between two creditors who both allege that they have priority over the other's claim, in light of the Quebec legislative context.

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8 The Court of Appeal for Ontario's decision is reported at 2011 ONCA 265.

9 R.S.O. 1990, c. P-8. Note, however, that in Ontario solvency deficits are affected by section 57(4) of said act, while in Québec, the contributions are affected by section 49 SPPA.

10 *Century Services Inc. v. Canada (Attorney General)* [2010] 3 S.C.R. 379, paragraph [15].

[29] The undersigned is of the opinion that he is not acting as a supervisory judge but as a delegated decision-maker (analogous to a "Claims Officer") designated as such under a claims determination protocol established under the CCAA.

[30] The Pension Committees argue, firstly, that the SPPA is a law of public interest. This is not disputed. The principles set out in this regard, notably by Justice Pierre Dalphond in the *Hydro-Québec* decision[11] rendered by the Court of Appeal in 2005, are entirely apposite. The same applies to those in the *Monsanto*[12] and *Buschau*[13] cases.

[31] The Pension Committees also point out the fact that, unlike in the *White Birch*[14] and *Indalex*[15] cases, the dispute is not between the debtor's creditor and a "DIP" lender enjoying a super-priority under the CCAA. They are right and the undersigned does not intend to provide IQ with any super-priority under the CCAA. Besides, IQ does not claim any. IQ only invokes its status as a secured creditor under its universal hypothec.

PETITIONERS' POSITION ON THE DEEMED TRUST OF SECTION 49 SPPA

[32] The existence of a deemed trust created by section 49 SPPA remains the Pension Committees' main argument.

[33] Their reasoning is as follows:

a) First, section 49 SPPA reads as follows:

> **"Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property."**
>
> **(emphasis added)**

b) This section must be read in conjunction with article 1262 C.C.Q. which provides that:

> **"A trust is established by contract, whether by onerous title or gratuitously, by will, or, in certain cases, by operation of law. Where authorized by law, it may also be established by judgment."**

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[11] *APRHQ v. Hydro-Québec*, 2005 QCCA 304, paragraph 32.
[12] *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* [2004] 3 S.C.R. 152, paragraph 38.
[13] *Buschau v. Rogers Communications Inc.* [2006] 1 S.C.R. 973, paragraph 19.
[14] 2012 QCCS 1679, paragraphs 216 and 217.
[15] 2013 SCC 6, paragraphs 58 and 59.

(emphasis added)

Therefore, in the Petitioners' opinion, the employer is the settlor of the trust under section 49 SPPA, the trust patrimony is constituted by the contributions to be paid, the pension fund in question is the trustee and the transfer of property (or separation of property) is deemed to exist under the terms of section 49.

c) Since the *Civil Code of Québec* provides, at article 1262, that a trust can be established, notably by operation of law, it follows, according to the Petitioner Committees, that the plain text of section 49 SPPA is sufficient to constitute a trust that is enforceable against BSI's creditors, whether they have priority or not.

d) The Pension Committees' theory excludes the application of article 1260 C.C.Q. to the trust established by operation of law. This is what they plead in their outline of arguments, at paragraphs 54, 55 and 56 [TRANSLATION]:

> **54. There are several types of trusts that are created in different ways, as set out in article 1262 CCQ.**
>
> > **1262. A trust is established by contract, whether by onerous title or gratuitously, by will, or, in certain cases, by operation of law. Where authorized by law, it may also be established by judgment.**
>
> **55. If a trust is established by contract, article 1260 CCQ provides that this trust must meet certain formal requirements.**
>
> > **1260. A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.**
>
> **56. Article 1262 CCQ thus recognizes trusts established by operation of law. To create such a trust, the legislator does so through legislation, <u>without the trust so created having to meet the formal requirements set out at article 1260 CCQ</u>. The legislator therefore has the power to create trusts by way of a statutory provision of deemed trusts. This is precisely the effect of the wording of section 49 SPPA: this section states that regardless of whether or not the amounts were held separately from the property of the employer, they are nevertheless deemed to be held in trust in a distinct patrimony by appropriation for the benefit of BSI's Pension Committees.**

(emphasis added)

e) Consequently, in the Petitioners' opinion, article 1262 C.C.Q. allows for the creation of a trust by sole operation of law and the statute may then provide for the existence of a valid trust even if the four conditions for the existence of a trust under the *Civil Code* set out at article 1260 C.C.Q. are not met. The statute may therefore specifically set aside one of

those conditions. According to them, this is exactly what section 49 SPPA does by eliminating the condition under article 1260 C.C.Q. requiring trust property to be separated from the settlor's patrimony.

f) Furthermore, the Petitioner Committees allege that their reasoning meets the requirements of article 1261 C.C.Q. At paragraph 57 of their outline of arguments, they plead [TRANSLATION]:

> **57. Article 1261 applies to all forms of trusts, including those established by operation of law.**
>
> > **1261. The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.**

g) Thus, the Petitioner Committees allege that the amounts of the special payments that are due but unpaid constitute a patrimony by appropriation, autonomous and distinct from that of the settlor, under the legal control of a trustee and deemed separate from the property of the settlor (the employer), even if this patrimony has not been separated from the other property of this settlor.[16]

h) Thus, the concept of a deemed trust is sufficient for BSI's assets to be charged with a priority trust charge that removes them from the employer's property and from the common pledge of its creditors.[17]

i) In conclusion, the Petitioner Committees suggest that if section 49 SPPA needed to comply with the essential conditions of article 1260 C.C.Q., section 49 SPPA would have no

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[16] See paragraph 58, Petitioners' Outline of Arguments.

[17] See: "*Loi sur les régimes complémentaires de retraite, Annotations et Commentaires*", Régie des Rentes du Québec, Bibliothèque Nationale du Québec, 1998, p. 49-3 [TRANSLATION]:
"By a legal fiction or legal presumption, the legislator considers that the contributions to be paid and the accrued interest are held in trust. As the trust is a patrimony by appropriation distinct from that of the employer, the assets deemed to be held in trust are thus subtracted from the employer's property, which is the common pledge of its creditors, in accordance with article 2645 of the *Civil Code of Québec*.
…
This article could thus be invoked against the employer's creditor who takes possession of the bank account or of the latter's claims under, for example, articles 2721 or 2773 of the *Civil Code of Québec*,
…
See also Lyne Duhaime: "*Les aspects juridiques des régimes de retraite*", Publications CCH Ltée, Brossard, 2011, p. 138 [TRANSLATION]:
Until they are paid to the pension fund, contributions and accrued interest shall be deemed held in trust by the employer, whether or not the latter kept them separate from its property. This means that in a state of insolvency or bankruptcy, contributions and accrued interest would not be part of the employer's patrimony and would therefore be protected from the creditors' claims."

(emphasis added)

effect, which would be contrary to the basic principle of statutory interpretation that the legislature does not speak in vain, and we must perforce give meaning to a clear legislative text. Furthermore, the SPPA, being a statute of specific application, must be interpreted as taking precedence over a statute of general application such as the *Civil Code of Québec*.

IQ'S POSITION ON THE DEEMED TRUST OF SECTION 49 SPPA

[34] IQ invokes in its favour the principles already set forth in the *AbitibiBowater*[18] and *White Birch*[19] cases.

[35] IQ insists, more specifically, that a trust established by operation of law, as provided for by article 1262 C.C.Q., must comply with all of the requirements of article 1260 C.C.Q. Citing, in particular, the author Jacques Beaulne[20], IQ points out that the four criteria of article 1260 CCQ must be met, namely:

a) the transfer of property from the settlor's patrimony;

b) to another patrimony;

c) which property is appropriated to a particular purpose;

d) which a trustee undertakes to hold and administer.

[36] Citing the *Bank of Nova Scotia v. Thibault*[21] and *White Birch*[22] cases, IQ reminds us that (as per Justice Deschamps in *Thibault*):

> [TRANSLATION] **… "The trust model cannot, however, be misused so as to encompass contracts under which the settlor retains all rights in the patrimony. I must therefore conclude that the Plan does not have the characteristics of a trust."**

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[18] *AbitibiBowater (Arrangement relatif à)* 2009, QCCS 2028, Justice Danièle Mayrand, J.S.C. writes [TRANSLATION]:

> [34] (…) Besides, the Court of Appeal of Ontario, in the *Ivaco* case, while deciding on the scope of Section 57(3) of the *Pension Benefits Act* (the terms of which are to the same effect as those of Section 49 SPPA), states the following regarding deemed trusts;
>
> ...
>
> "This Legislative designation by itself does not create a real trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account, it must legislate that separation. It has not done so."

[19] *White Birch Paper Holding Company (Arrangement relatif à)* 2012, QCCS 1679, pages 43 and 44.

[20] Beaulne, Jacques, *Droit des fiducies*, 2nd edition. Collection Bleue, Montréal, 2005, page 129. See also to the same effect : Commentaires du Ministre de la justice, tome 1, le Code civil du Québec, art. 1260, page 748; Duhaime Lyne, op. cit. page 15; Claxton, John B. *Langage du droit de la fiducie*, Revue du Barreau EYB2002, RDB64, pages 6 to 8.

[21] [2004] 1 S.C.R. 758, page 22, paragraph 41. It should be specified here that it was not a deemed trust or one created by operation of law, but a contractual registered retirement savings plan.

[22] 2012 QCCS 1679, page 56, paragraph 169.

and that (by the undersigned in *White Birch*) [TRANSLATION]:

> **"The comparison to the situation before us is obvious: here, White Birch did not dispose of anything. It keeps the entire control over the property intended to be part of a trust and creates no patrimony by appropriation."**

[37] IQ therefore argues that, since BSI never disposed of certain assets in order to constitute a distinct patrimony, there can be no real trust applicable in the present case.[23]

[38] Before proceeding further, it is necessary to establish the purpose of section 49 SPPA.

[39] Section 49 SPPA has been in effect since the statute was enacted in 1989.

[40] At the time, the new provisions of the *Civil Code of Québec* did not exist. The concept of a trust as it was found in the *Civil Code of Lower Canada* had nothing equivalent or comparable to the law as it currently stands.

[41] However, the kind of provision found in section 49 SPPA could already be found in several Quebec tax statutes. The notion of "presumed trust" or "deemed trust" was not unknown.

[42] But first, it is necessary to determine what such a deemed trust applies to, provided that it exists and is enforceable against IQ.

[43] Let us first examine the relevant provisions of the SPPA, cited by the parties in their respective submissions. When citing these provisions, some introductory comments will be necessary.

RELEVANT STATUTORY PROVISIONS OF THE SPPA

[44] The concept of a "pension plan" is set out in section 6 SPPA:

> **A pension plan is a contract under which retirement benefits are provided to the member, under given conditions and at a given age, the funding of which is ensured by contributions payable either by the employer only, or by both the employer and the member.**
>
> **Every pension plan, with the exception of insured plans, shall have a pension fund into which, in particular, contributions and the income derived therefrom**

[23] See, in particular, *White Birch Paper Holding Company (Arrangement relatif à)* 2012 QCCS 1679, at paragraphs 173, 174, 189 and 191 cited by IQ in its Outline of Arguments, pages 11 and 12, paragraphs 67 and 68.

are paid. The pension fund shall constitute a trust patrimony appropriated mainly to the payment of the refunds and pension benefits to which the members and beneficiaries are entitled.

[45] According to IQ, this is a perfect and complete trust, created by operation of law and fully respecting the provisions of article 1260 C.C.Q. This statutory trust is, moreover, cited as a model of its kind.

[46] This section creates a pension fund, which is a trust patrimony distinct from the assets of the employer (the settlor), a trust appropriation (the contributions), under the responsibility of the trustees (the fund officers).[24]

[47] Sections 7, 8 and 9 SPPA[25] distinguish between plans that are defined benefit, defined contribution, insured and uninsured.

[48] In the case before us, the plans are uninsured defined benefit plans.

[49] Sections 37 to 52 SPPA establish the nature of various contributions, the obligation to pay them to the pension fund, as well as the modalities of collection and remittance of such contributions to the pension plans in question. There is no need to reproduce these sections, since all parties agree in recognizing that:

a) A *member contribution* is the active member's contribution while an *employer contribution* is the employer's contribution (section 37 SPPA);

b) A *current service contribution* is the amount that the employer is required to pay to the plan and represents all the pension benefits provided for by pension plans in respect of completed service. It usually consists of all of the member and employer contributions covering a given period of time (section 38 SPPA)[26].

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[24] See also sections 14 to 18 SPPA which detail all the elements of a pension plan.

[25] 7. A defined contribution pension plan is a plan under which employer contributions and, where applicable, member contributions, or the method used for calculating them, are set in advance and the normal pension payable is based on the amounts credited to the member.

A defined benefit pension plan is a plan under which the normal pension payable is either a set amount, independent of the member's remuneration, or an amount corresponding to a percentage of the member's remuneration.

A defined benefit-defined contribution pension plan is a plan under which employer contributions and, where applicable, member contributions and the normal pension, or the method used for calculating them, are set in advance.

8. A contributory pension plan is a plan to which member contributions are paid by the members.

9. An insured pension plan is a plan under which refunds and pension benefits are at all times guaranteed by an insurer.

[26] See also sections 138 and 139 SPPA that determine the calculation of the current service contribution.

These three types of contributions are not in dispute in the present case. They have all been collected and remitted to the Petitioner pension funds.

c) Section 39 SPPA establishes another type of contribution: it is the *special payment*. This contribution aims at compensating, in accordance with certain terms determined by the plan's actuaries, the funding deficit and/or solvency deficit of the plan, made necessary by fluctuations of the pension fund's assets and all of the obligations of said fund towards its members and retirees.

[50] The employer BSI's special payments are at issue here.

[51] As indicated above, all agree that the "contributions" remitted or to be remitted by the employer include all member contributions that were collected from the participating employees and the employer contribution, these two components constituting the current service contribution, to which the special payment is added if necessary.

[52] Then comes section 49 SPPA which states that "contributions" are deemed to be held in trust by the employer whether or not the latter has kept them separate from its property.

[53] It is thus established that the special payments are affected by the application of section 49 SPPA. It cannot be concluded that only the contributions collected or deducted by the employer are covered by this section.

[54] If section 49 SPPA creates a trust enforceable against IQ, it must therefore be concluded that the special payments that are unpaid since the Suspension Order of Justice Morawetz will be covered by this trust.

ADDITIONAL ARGUMENTS OF THE PENSION FUNDS

[55] The Pension Committees add that the other applicable SPPA provisions are sections 228 and 264.

[56] The Pension Committees argue that not only are the special payments covered by the deemed trust of section 49 SPPA, but that the solvency deficits are also covered. However, this argument cannot withstand analysis for long. Section 228 SPPA rather states that:

> **228. The amount to be funded to ensure full payment of the benefits of the members or beneficiaries affected by the withdrawal of an employer from a multi-employer pension plan or the termination of a pension plan shall constitute a debt of the employer. The amount to be funded shall be established at the date of termination.**
>
> **If, at the date of termination, the employer has failed to pay contributions into the pension fund or to the insurer, as the case may be, the debt shall be the amount by which the amount to be funded exceeds such contributions.**

> **In the case of a multi-employer plan, this section applies to every employer who is a party to the plan and to whom a group of benefits under subdivision 3 consisting of the benefits of the members or beneficiaries affected by the withdrawal or termination pertains.**
>
> **(emphasis added)**

[57] This section is part of Chapter XIII of the SPPA, which deals with the rights of members and beneficiaries on winding-up.[27] This chapter also deals with the termination of a plan when there are no more active members.[28]

[58] A process of winding-up is then initiated[29] and when the assets of the plan are insufficient, section 228 applies: the employer is thus indebted to the plan. This debt does not constitute a contribution. Moreover, in none of the provisions of the SPPA that define a contribution is there any reference that could lead to the conclusion that the solvency deficits are covered by section 49 SPPA.

[59] It therefore seems clear that the deemed trust of section 49 SPPA can only apply to the "*contributions*" covered by this section and not to the solvency deficits. Moreover, the reimbursement of those deficits is governed by a set of specific rules.[30]

[60] Finally, the Petitioner Pension Committees invoke section 264 SPPA which reads as follows:

> **264. Unless otherwise provided by law, the following amounts or contributions are unassignable and unseizable:**
>
> **(1) all contributions paid or payable into the pension fund or to the insurer, with accrued interest;**
>
> **(2) all amounts refunded or pension benefits paid under a pension plan or this Act;**
>
> **(3) all amounts awarded to the spouse of a member following partition or any other transfer of benefits effected pursuant to Chapter VIII, with accrued interest, and the benefits deriving from such amounts.**
>
> **Except as far as they derive from additional voluntary contributions or represent a portion of the surplus assets allocated after termination of the plan, any of the above-mentioned amounts that have been transferred to a pension plan contemplated by section 98, with accrued interest, and any refunds of benefits resulting from such amounts, and any pension or payment**

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[27] Sections 198 and following SPPA.
[28] Section 205(3) SPPA.
[29] Sections 208 and following SPPA.
[30] Sections 229-230 and 230.0.01 to 230.0.012.

having replaced a pension pursuant to section 92 are also unassignable and unseizable.

(emphasis added)

[61] The Petitioner Committees plead that the notions of unassignability and unseizability of the "*contributions paid or payable into the pension fund*" reinforce their argument that these same contributions are subject to the deemed trust of section 49 SPPA. Conversely, if the due and unpaid contributions are covered by a deemed trust, section 264 SPPA must then apply to them and make them unassignable and unseizable. Thus, it would be impossible for the employer and its creditors to have any access to the amounts that represent or that may represent a contribution "*to be paid*" into the pension fund. By the combined effect of sections 49 and 264 SPPA, the unpaid special payments and the interest thereon would constitute priority claims over that of IQ.

[62] IQ's position is that this section may only be applied to the amounts that have clearly been identified as contributions and that have clearly been separated from the rest of the employer's patrimony. For example, if the employer opens a separate account in which it deposits the contributions to be paid into the pension fund, these amounts are then unassignable and unseizable. In IQ's opinion, section 264 SPPA may only apply if there is a separation of patrimonies.

[63] Otherwise, from a practical point of view, whenever an employer pays an amount of money to a creditor, the latter would then have to ensure (or the employer would have to demonstrate to this creditor) that all the contributions to be paid into the pension fund have been paid, and that the solvency deficit is adequately covered, or else see these amounts claimed by the concerned pension committee, as in the present case.

[64] This would, according to IQ, make no sense.

[65] It follows that an employer could never be certain that it has validly paid a debt to a third party, where the employer has, for example, been late in paying one of its contributions or failed to ensure its employees' pension plan(s) are adequately funded so as to avoid any risk of deficit.

[66] In IQ's opinion, the effect of this section is therefore to render unassignable and unseizable any contribution identified as such, which will be materially separated from the employer's patrimony in order to make a payment to a pension fund.

TRUST PROVISIONS OF THE *CIVIL CODE OF QUÉBEC*

[67] Since 1994, the Quebec law of trusts has undergone a complete transformation.

[68] All trusts under Quebec law have since then been subject to the rules laid down at articles 1260 and following C.C.Q.

[69] There is no longer any question in Quebec law of recognizing anything other than trusts under the Civil Code. Anglo-Saxon law trusts or those deriving from the Common Law in force in other Canadian provinces thus have no legal existence.

[70] The Civil Code is a law of general application because of its importance, because of the multitude of subjects it covers and because we find therein all of the provisions governing our civil law and our private law. However, the Petitioner Pension Plans submit that the SPPA is a law of specific application, the provisions of which must prevail over a law of general application.

[71] This proposition is somewhat more tenuous in light of the fact that an entire chapter on trusts has been inserted in the Civil Code. According to IQ, it cannot be concluded, from the mere fact that this chapter is inserted in the Civil Code, that its specific provisions in trust matters lose their status as a law of specific application, such that the SPPA's provisions take precedence over articles 1260 and following of the *Civil Code*.

[72] The relevant provisions of the *Civil Code* are as follows:

> **1260. A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.**
>
> **(emphasis added)**

[73] This article, as we have seen, establishes the essential components of a trust under Quebec law:

- the existence of a settlor;
- the need for a transfer from his patrimony to another patrimony;
- specific property;
- appropriated to a particular purpose.

[74] Article 1261 provides as follows:

> **1261. The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.**
>
> **(emphasis added)**

[75] There must therefore, according to this view, be a complete transfer of money or property to constitute an autonomous and distinct patrimony from that of the settlor, trustee and beneficiary and it must be such that none of them could assert any real right therein.

[76] Article 1262 C.C.Q. specifies the ways in which a trust is established:

> **1262. A trust is established by contract, whether by onerous title or gratuitously, by will, or, in certain cases, by operation of law. Where authorized by law, it may also be established by judgment.**
>
> **(emphasis added)**

[77] If the law allows the creation of a trust under article 1262 C.C.Q., can the law derogate from the criteria of article 1260 C.C.Q.?

[78] Article 1263 C.C.Q. reads as follows:

> **1263. The purpose of an onerous trust established by contract may be to secure the performance of an obligation. If that is the case, to have effect against third persons, the trust must be published in the register of personal and movable real rights or in the land register, according to the movable or immovable nature of the property transferred in trust.**
>
> **In case of default by the settlor, the trustee is governed by the rules regarding the exercise of hypothecary rights set out in the Book on Prior Claims and Hypothecs.**

[79] It is interesting to note that, in order to be enforceable against third parties (here, IQ is a third party), a contractual trust must be published in the RPMRR (Register of Personal and Movable Real Rights) or in the Land Register. A trust created by operation of law enforceable against third parties does not appear to have the same requirement even where the trust secures the payment of a contribution from the employer to a pension plan.

[80] From the foregoing, the Court concludes that, if section 49 SPPA creates a true deemed trust that is enforceable against IQ:

a) this deemed trust will apply to all contributions not paid to the Petitioner Pension Committees;

b) more specifically, it will apply to special payments covered by the Suspension Order issued by Justice Morawetz;

c) however, this deemed trust will only apply to contributions and not to the solvency deficits, which are debts of the employer as provided in section 228 SPPA;

d) Section 264 SPPA may also apply to the unpaid contributions to the Pension Committees and not to the solvency deficits.

[81] It remains to be determined

a) whether section 49 SPPA creates a deemed trust that is enforceable against IQ; and

b) in the affirmative, whether the property covered by such deemed trust is unassignable and unseizable, and thus excluded from the hypothecary security held by IQ.

ANALYSIS

a) The deemed trust of Section 49 SPPA

[82] For the reasons that follow and despite the undersigned's analysis in the *White Birch* case, it must be concluded that section 49 SPPA creates a deemed trust that may be set up against IQ. However, the present case deals with a different issue than the *White Birch* and *Indalex* cases. In both of those matters, the court had to decide whether the special payments or the pension plans' solvency deficits took precedence over the claim of the "DIP" lender, a claim which was protected by a super-priority under the CCAA, while provincial law provided for the existence of a deemed trust applicable to the contributions or actuarial deficits in question.

[83] The present proceedings relate to the priority of claims of two creditors who do not benefit from super priorities, while the Debtor BSI is in the process of reimbursing its creditors according to their respective priorities as established by Quebec law. It is therefore necessary to determine whether, under Quebec law, the order of priority attached to each of these claims allows the Pension Committees to claim priority over IQ.

[84] Thus, even though we must conclude that a trust can be created by operation of law under section 49 SPPA, such a conclusion, if it had been reached in *White Birch*, would not have had any impact on the outcome of that case because the issue was quite different.

[85] Indeed, the final conclusion arrived at in *White Birch* remains the same, since the doctrine of the paramountcy of federal law ensures that the section 49 SPPA trust, if it had been acknowledged, would not have been granted priority over the super-priority claim of the DIP lender.[31]

[86] The issue of deemed trusts in Quebec law has given rise to several decisions in the last 20 years, especially in tax matters and almost exclusively in the context of bankruptcy. However, even if the deemed trust of section 49 SPPA is found in a very different context, the way our courts have analyzed the deemed trust in tax matters allows us to understand how we must analyze the one purportedly created by section 49 SPPA.

[87] We must go back to the *Nolisair*[32] case where the Court of Appeal reversed a decision of Justice Roland Durand dated October 16, 1994.[33] In that case, the Ministry of Revenue claimed

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[31] See *Century Services*, above.

[32] *Re: Faillite de Nolisair International Inc. v. Le Sous-ministre du revenu du Québec* (1997) AZ 97011738 (C.A.).

the benefit of a deemed trust and filed a proof of priority claim covering all of the debtor's assets. The trustee rejected this claim, alleging the absence of such a trust because *Nolisair* had not kept the deductions at source collected from its employees in an account separate from its own patrimony. The Deputy Minister of Revenue argued in reply that section 20 of the *Act Respecting the Ministère du Revenu*[34] (the "ARMR") created such a deemed trust.

[88] Justice Durand decided at first instance that section 20 ARMR did not create a trust within the meaning of section 67(3) of the *Bankruptcy and Insolvency Act*.

[89] In parallel with the *Nolisair* case, Justice Roger Banford decided, in *Sécurité Saglac (1992) Inc. v. Sous-ministre du revenu du Québec*,[35] that the same section 20 ARMR did create a deemed trust.

[90] Both cases were heard at the same time by the Court of Appeal and were the subject of two separate decisions, one allowing the appeal from Justice Durand's decision[36] and the other dismissing the appeal from Justice Banford's.[37]

[91] The Court of Appeal, by a two-to-one majority, acknowledged the existence of a deemed trust created by section 20 ARMR, which then read as follows:

> **20. Every person who <u>deducts, withholds or collects</u> any amount under a fiscal law is deemed to hold it in trust for her Majesty in right of Québec.**
>
> **<u>Any such amount must be kept</u> by the person who deducted, withheld or collected it, <u>distinctly and separately from his own funds</u> and, in the case of a winding-up, assignment or bankruptcy, an amount equal to the amount thus deducted, withheld or collected <u>must be considered to form a separate fund not forming part of the property</u> subject to a winding-up, assignment or bankruptcy.**
>
> **However, the person may, when he files a return with the Minister under section 468 or 470 of the Act respecting the Québec sales tax and amending various fiscal legislation (*1991, chapter 67*), withdraw from the total funds held separately and distinctly from his own funds, the amounts that he is entitled to deduct and that he has actually deducted in the calculation of the amount to be remitted.**

[92] We note, and this is the point, that the text covers amounts "deducted, withheld or collected" by a person for tax purposes, and not amounts owed by that person. Thus, the

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[33] 700-11-000069-932 (S.C. St-Jérôme) AZ-94021150.
[34] R.S.Q. c. M-31.
[35] S.C. Chicoutimi, no. 150-11-000012-930.
[36] 1997 CanLII 10022 (QC. CA);
[37] 1997 CanLII 10026 (QC. CA).

amounts in question were amounts that did not belong and never did belong to the person in question.

[93] It will also be noted that section 20 ARMR, as it then was, did not contain the following words, which were added a few months later pursuant to an amendment[38]:

> **"… whether or not the amount has in fact been held separately from the patrimony of that person or from his own funds."**

[94] Incidentally, it is because of the absence of these words that Justice Durand refused to recognize the deemed trust of section 20 ARMR. We note, however, the presence of these same words in section 49 SPPA.

[95] Despite the benefit of this amendment, Justice Banford (in the *Sécurité Saglac* case) at first instance and Justice Chamberland in the Court of Appeal, based on an analysis of the words … "*an amount equal to the amount thus deducted, withheld or collected must be considered to form a separate fund*" … in the second paragraph of section 20 ARMR, decided that the text was sufficient for this section to create a deemed trust by operation of law. Justice Chamberland concluded in these terms [TRANSLATION]:[39]

> **The deemed trust**
>
> **For the purposes of this opinion, by "deemed trust" I mean the trust that exists only because the legislator, whether federal or provincial, says that it exists, whereas, in fact, it does not have all the features of a trust. The existence of a trust depends on the combined presence of three certainties: 1) certainty about the intention of the settlor to create a trust, 2) certainty about the identity of the beneficiary of the trust, and 3) certainty about the property that is subject to the trust, in the sense that the property must be held by the trustee in a way that is autonomous and distinct from his own patrimony (L.W. HOULDEN and C.H. MORAWETZ, Bankruptcy and Insolvency Law of Canada, 3rd Ed., updated 1996 (No 7), at pages 3-17 to 3-30, chapter entitled "Trust Property").**
>
> **…**
>
> **A deemed trust is one of the "devices which legislators often employ in order to recover moneys which ought to have lawfully been paid to them but have been unlawfully misappropriated by a debtor who subsequently encounters financial difficulty and is forced into winding up its business" (Royal Bank of Canada *v.* Sparrow Electric Corp. 1997 CanLII 377 (SCC), [1997] 1 S.C.R. 411, Justice Gonthier, at page 435).**

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[38] Section 39, An *Act to amend the Tobacco Tax Act, The Act respecting the Ministère du Revenu and other fiscal legislation*, S.Q. 1993 c. 79 assented to December 17, 1993 and applicable to any bankruptcy, winding-up or assignment occurring after April 23, 1993.

[39] Opinion of Justice Chamberland in *Sécurité Saglac*.

Returning to the first question raised by this dispute, it thus involves deciding whether section 20 of the *Act Respecting the Ministère du Revenu* creates a deemed trust.

The appellant pleads that it does not because some words, in its opinion essential to the creation of a deemed trust – and found, for example, in paragraph 5 of section 227 of the federal *Income Tax Act* – are not there. In short, without the words "whether or not the amount has in fact been held separately from the patrimony of that person or from his own funds", section 20 of the *Act respecting the Ministère du Revenu* would not create a deemed trust; it would only confirm the existence of a real trust, only enforceable against the mass of creditors if the deducted amounts were actually held separately by the debtor, which is not the case here.

I do not share this view.

…

In fact, the text of section 20 is different from the one studied by the Superior Court, in 1977, in the Joe's Steak House case, supra. The legislator added the words – "an amount equal to the amount thus deducted, withheld or collected" – that have, in my opinion, the same effect – the creation of a deemed trust – even though the words "whether or not the amount has in fact been held separately from the patrimony of that person or from his own funds", used in paragraph 227(5) of the federal ITA, are not there.

Let's compare the text of Section 20 at the time of the Joe's Steak House case, supra, (in 1979) and during the period in dispute (in 1992):

Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for her Majesty in right of Québec.	**Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for her Majesty in right of Québec.**
Any such amount must be kept by the person who deducted, withheld or collected it, distinctly and separately from his own funds and in the event of a winding-up, assignment or bankruptcy, must be considered to form a separate fund not forming part of the property subject to a winding-up, assignment or bankruptcy.	**Any such amount must be kept by the person who deducted, withheld or collected it, distinctly and separately from his own funds and, in the event of a winding-up, assignment or bankruptcy, an amount equal to the amount thus deducted, withheld or collected must be considered to form a separate fund not forming part of the property subject to the winding-up, assignment or bankruptcy.**

[…]

(emphasis added)

The first paragraph is identical: the legislator expressly provides, using the words "is deemed", that a person who deducted, withheld or collected any amount under a fiscal law holds this amount in trust and that her Majesty in right of Québec is the beneficiary of that trust. The beginning of the second paragraph is also identical; the legislator creates an obligation for the person to hold the amount so deducted, withheld or collected "distinctly and separately from his own funds". If this is the case, there is a real trust and, in the event of a bankruptcy, these amounts constitute the "property held by the bankrupt in trust for any other person", within the meaning of section 67(1)(a) of the BIA, and they are not part of the bankrupt's property.

The second part of the second paragraph was amended by adding the words "an amount equal to the amount thus deducted, withheld or collected …".[2] The addition of these words can only be explained, in my opinion, by the intention of the legislator to create a deemed trust and distinguish it from the real trust by expressly eliminating the need to respect the third essential condition for the existence of a trust, which is for a trustee to hold the property that is subject to the trust in a way that is autonomous and distinct from his own patrimony. Indeed, the words "an amount equal to the amount thus deducted, withheld or collected" are unnecessary in a context where the bankrupt keeps an account distinct and separate from its own funds for the amounts deducted, withheld or collected; the words only make sense if the bankrupt does not keep such a distinct and separate account. In this context, those words were sufficient to conclude as to the creation of a deemed trust; the first paragraph and the beginning of the second paragraph of section 20 addressed a real trust while the first paragraph and the end of the second addressed a deemed trust.

This is the basis for my conclusion that the legislator has created a deemed trust even if it did not use all of the words of the federal legislator from paragraph 5 of section 227. The use of the words "an amount equal to the amount thus deducted, withheld or collected" rendered, in my opinion, unnecessary the use of the words "whether or not the amount has in fact been held separately from the patrimony of that person or from his own funds".

(emphasis added)

[96] This long citation shows the way in which the Court of Appeal concluded as to the existence of a deemed trust based on the words chosen by the legislator. By applying this kind of analysis to section 49 SPPA, we must first question whether the text of this section is clear and complete enough to conclude as to the existence of a deemed trust. Such an exercise satisfies the Court that we must answer this question affirmatively, especially when noting that section 49 SPPA contains the words then presumed missing in section 20 ARMR and that later ensured that section 20 ARMR does indeed create a deemed trust.

[97] Thus, for Justice Chamberland, the words used by the legislator in the former section 20 ARMR were sufficiently clear to establish a deemed trust, causing deductions deducted, withheld or collected by the debtor to constitute a well-defined trust patrimony, "... considered to form a separate fund not forming part of the property ..." of said debtor in the context of an assignment or a bankruptcy.

[98] Despite the interest and the logic of the reasoning, the Supreme Court did not see things the same way.

[99] In both the *Nolisair* and *Sécurité Saglac* cases, Justice Fish, then on the Court of Appeal, dissented. In his view, in the absence of the words added to section 20 ARMR by the 1993 amendment, that section did not create a deemed trust.[40] He wrote:

> **"In fact and in effect, these deductions simply consisted in book keeping entries: no moneys were actually retained by the employer in an identifiable form, separate from the employer's own funds."**

[100] In Justice Fish's opinion, the 1993 amendment remedied the problem for the future but not for the two cases before the Court, since the facts arose on a date prior to the coming into force of the amendment. He agreed with the reasoning of Justice Durand in *Nolisair* and disagreed with the reasoning of Justice Banford in *Sécurité Saglac*.

[101] However, a careful reading of Justice Fish's opinion shows that the 1993 amendment only had the effect of rendering section 20 ARMR compatible with section 67 of the *Bankruptcy and Insolvency Act* and section 227 of the *Income Tax Act*.

[102] Justice Fish thus wrote, and this is where he disagrees with the reasoning of Justice Chamberland:

> **As I have already mentioned, the Minister of Revenue seeks to recover, from an estate in bankruptcy, income tax and pension contributions that were deducted at source by the debtor, but not separated from the rest of the debtor's patrimony, and never remitted to the government.**
>
> **To succeed on this claim, the Minister must establish that s. 20 MRA, prior to its amendment in 1993, created a deemed trust "substantially similar to subs. 227(4) of the Income Tax Act", within the meaning of s. 67(3)(a). The Minister must demonstrate as well that the Crown's beneficial interest under the trust attached to unremitted deductions at source whether or not the amounts deducted were held separately from the patrimony of the bankrupt debtor.**
>
> **Deductions at source under the ITA are in law the property of the employee. The employer, at the point of withholding, therefore holds the amounts**

[40] Opinion of Justice Fish in *Nolisair* in the Court of Appeal.

deducted as trustee of a fund belonging to the employees, not to the Crown. It is subs. 227(4) ITA that has the effect of making Her Majesty the beneficiary under that trust.

When the employer fails to retain the deductions in a separate fund, however, Her Majesty's beneficial interest becomes intermingled with the employer's general assets and "Her Majesty's claim ... then becomes that of a beneficiary under a non-existent trust".

Here, the employer failed to separate the source deductions from his own property. Accordingly, the deemed trust created by s. 20 MRA, if it were "substantially similar" to the deemed trust of subs. 227(4) ITA, would likewise make the Minister of Revenue "a beneficiary under a non-existent trust".

In considering whether a provincial deemed trust is substantially similar to the federal standard created by subs. 227(4), however, one cannot insulate the text of subs. 227(4) from its context. Subsection 227(5) is linked by reference to subs. 227(4) and, together, the two subsections may be said to create a coherent whole in the context of a bankruptcy.

For the purposes of disposing of the appeal, we should therefore, I believe, take into account the impact of subs. 227(5) ITA on the kind of deemed trust that will meet the requirements of subs. 67(3) BIA. In my view, we are also bound to read subs. 67(3) in a manner that respects the evident intent of Parliament to place deemed trusts, provincial and federal, on the same footing with respect to priority in the event of a bankruptcy.

To benefit from the full protection afforded by subs. 67(3), the deemed trust referred to in subs. 227(4) ITA must also conform to subs. 227(5). And to be eligible for that same protection, a provincial provision creating a deemed trust must be "substantially similar", having essentially the same reach and complying with the same basic requirements.

In particular, the provincial deemed trust must, to achieve the result of its federal counterpart under subs. 227(5), explicitly impress upon the amount of the unremitted deductions at source whether or not that amount has in fact been kept separate and apart from the debtor's own moneys or from the assets of the estate.

Prior to its amendment in 1993, s. 20 MRA did not, in my respectful view, meet this test.

Accordingly, even on the assumption that subs. 67(3) BIA authorized the creation by Quebec of a deemed trust substantially similar to the type contemplated either by subs. 227(4) ITA read alone, or by subss. 227(4) and (5) read together, I would feel bound to dismiss the appeal.

(emphasis added)

[103] Recalling thereafter the cases of *Re: Deslauriers Construction Productions Ltd* (1970) 3 O.R. 599 (C.A.), *Dauphin Plains Credit Union Ltd v. Xyloid Industries Ltd* [980] (sic) 1

SCR 1182, *British Columbia v. Henfrey Samson Bélair Ltd* [1989] 2 SCR 24 and *Royal Bank of Canada v. Sparrow Electric Corp.* [1997] 1 SCR 411, Justice Fish concluded that the text of section 20 ARMR, as it existed prior to the 1993 amendment, did not meet the requirements of sections 67 BIA and 227(5) of the federal *Income Tax Act*. The text of the 1993 amendment had the effect of solving the problem of the deemed trust of section 20 ARMR but we have to admit that the text of section 49 SPPA contains "sacramental" words confirming the existence of a deemed trust, whether or not the employer has kept the contributions it must remit to the Petitioner Pension Committees separate from its other property.

[104] The *Saglac* and *Nolisair* cases were appealed to the Supreme Court of Canada[41] and in a short and unanimous decision, the decisions of the Court of Appeal were reversed in favour of Justice Fish's dissent, without adding anything.

[105] The combined opinion of Justices Chamberland and Fish demonstrates in fact one thing only: for a deemed trust to exist, it is necessary that the language used to constitute it is unequivocal and that it demonstrates that the amounts or property deemed held in trust really are held as such, even without separating the said property or amounts from the remaining property of the debtor.

[106] This is what appears to exist in the present case, from the reading of section 49 SPPA.

[107] Nevertheless, several years later, in *Québec (Sous-ministre du Revenu) v. De Courval*, 2009 QCCA 409[42], the Court of Appeal had to determine the conditions for the existence of a trust within the meaning of section 20 of the *Act Respecting the Ministère du Revenu*. Justice Dutil wrote [TRANSLATION]:

> **[10] Based on a judgment of the Superior Court in the case of the bankruptcy of *Chibou-Vrac inc. (Syndic de)* and *Groupe Thibault Van Houtte & Associés Itée*, the trial judge concluded that QST may be held in a deemed trust within the meaning of Section 20 *ARMR*. However, for these amounts of money not to be considered the property of the bankrupt, for the purposes of paragraph 67(1)a) of the *Bankruptcy and Insolvency Act (BIA)*, it must be a real trust, which is not the case here.**
>
> **[11] The trial judge also believes that the *obiter dictum* of Justice Letarte, in the case of *Giguère (Syndic de) v. Lloyd Woodfine* [*Giguère*], regarding amounts held in trust, "cannot serve as a legal basis which would result in a profound change to the prior jurisprudence on the question of the application of sections 15.3.1 and 20 of the Act."**

[108] After quoting the relevant provisions of the *Act Respecting the Ministère du Revenu* and the *Bankruptcy and Insolvency Act*, Justice Dutil put the problem in these terms [TRANSLATION]:

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[41] 1999, 1 SCR 759.

[42] On appeal of a decision of the undersigned in Services Sécurité Québec.

[19] The trustee contends that section 20 *ARMR* confers no right of ownership upon the fiscal authorities with respect to amounts due as QST. Based on a recent decision of this Court in *9083-4185 Québec inc. (Syndic de*) *and Caisse populaire Desjardins de Montmagny* [*9083-4185 Québec inc.*], the trustee pleads that paragraph 67(2) *BIA* ensures that the property held in trust for Her Majesty, through a legislative provision, remains the bankrupt's property. Only that held by a bankrupt person for another person in a real trust is excluded from the bankruptcy. In addition, since the amounts held in trust are intermingled with other funds, they are no longer identifiable. Consequently, the Minister cannot be their owner.

…

[28] Section 20 ARMR provides that a person who collects an amount payable under a tax law is deemed to hold it for the State, separated from his patrimony and his own funds. It specifies that in case of non-payment to the State within the time and in the prescribed manner, this amount is deemed to constitute a separate fund not forming part of the property of that person.

[29] Pursuant to this section, there is thus a presumption that the amounts held by the Bank, as at July 10, 2006, were held in trust for the State. However, these amounts collected by the debtor had been deposited in an account where it also held other amounts from different sources. It was therefore only a trust created by the ARMR and not a real trust.

[30] In the case of *British Columbia v. Henfrey Samson Belair Ltd.* [*British Columbia*], the Supreme Court explained that when the tax money is mingled with other money, there is no more common law trust:

… At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. In an attempt to meet this problem, s. 18(1)(*b*) states that tax collected shall be deemed to be held separate from and form no part of the collector's money, assets or estate. But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. …

[31] I therefore conclude that the notice sent under section 15 *ARMR* has not transformed this deemed trust into a real trust, which could have in fact ensured that these assets are not included in the property of the bankrupt debtor pursuant to paragraph 67(1)a) *BIA*.

> **[32] Indeed, paragraph 67(2) *BIA* provides that, subject to certain exceptions (including, among others, deductions at source), property shall not be regarded as held in trust for the purposes of the *BIA* unless it would be so regarded in the absence of statutory provision. But this is precisely so in the present case: the amounts were deemed to be held in trust under section 20 *ARMR*, but there was no real trust.**

[109] This decision thus followed the logic of the Supreme Court case of *Sparrow Electric*[43], where it was established that the bank security granted to the Royal Bank of Canada pursuant to section 427 of the *Bank Act* (BA)[44] took priority over the deemed trust found in section 227(5) of the *Income Tax Act* (ITA)[45].

[110] In *Sparrow*, the Supreme Court held that the security of section 427 of the *Bank Act* had been put in place before the debtor failed to remit to the State the tax withholding provided for by section 227(5) ITA. Therefore, in the absence of any other provision giving priority ranking to the deemed trust, the terms of the bank security were not affected by the subsequent default of the debtor towards the Federal Crown.

[111] Here is how Justice Gonthier (dissenting on the merits) puts the problem:

> **23 It has been unfortunate that the development of the case law, to this point, has not inspired the degree of certainty which is so manifestly desirable in this area of commercial law. Indeed, the jurisprudence has been referred to as a "troubled area of the law" (*Manitoba (Minister of Labour) v. Omega Autobody Ltd. (Receiver of)* 1989 CanLII 178 (MB CA) (1989), 59 D.L.R. (4th) 34 (Man. C.A.), at p. 36), and has been the subject of, at times, scathing academic criticism (Roderick J. Wood, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*" (1995), 10 *B.F.L.R.* 429, and Roderick J. Wood and Michael I. Wylie, "Non-Consensual Security Interests in Personal Property" (1992), 30 *Alta. L. Rev.* 1055). The general view, I believe, has been summarized by Professor Wood in his most helpful case commentary, "Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*", *supra*, at p. 430: "[i]t is somewhat of an embarrassment that after more than two decades we still cannot confidently predict the outcome of a priority dispute between a deemed trust and a security interest". The above judicial and academic commentary, I believe, invites this Court to proceed steadfastly towards the pronouncement of clear principles to be applied in determining the priority between statutory trusts and consensual security interests.**

[112] Contrary to the majority holding, Justice Gonthier found principles in the *Sparrow Electric* case that allowed him to conclude as to the existence of a priority ranking of the Crown's deemed trust over the bank's conventional security. Despite the length of the text that follows, it is necessary to reproduce it:

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[43] *Royal Bank of Canada v. Sparrow Electric Corp*. [1997] 1 SCR 411.
[44] SC 1991, c. 46.
[45] RSC 1985, c. 1.

30 This Court recently had occasion to review the principles of law to be applied to the interpretation of tax legislation. In *Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R.*, 1996 CanLII 244 (SCC), [1996] 1 S.C.R. 963, at pp. 975-76, Cory J. quoted this Court's decision in *Friesen v. Canada*, 1995 CanLII 62 (SCC), [1995] 3 S.C.R. 103, at pp. 112-14, where the relevant principles were summarized as follows:

> **In interpreting sections of the *Income Tax Act*, the correct approach, as set out by Estey J. in Stubart Investments Ltd. v. The Queen, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, is to apply the plain meaning rule. Estey J. at p. 578 relied on the following passage from E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87:**
>
> > **Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.**
>
> **The principle that the plain meaning of the relevant sections of the Income Tax Act is to prevail unless the transaction is a sham has recently been affirmed by this Court in Canada v. Antosko, 1994 CanLII 88 (SCC), [1994] 2 S.C.R. 312. Iacobucci J., writing for the Court, held at pp. 326-27 that:**
>
> > **While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed: *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, 1988 CanLII 58 (SCC), [1988] 2 S.C.R. 175, at p. 194; see also *Symes v. Canada*, 1993 CanLII 55 (SCC), [1993] 4 S.C.R. 695.**
>
> **I accept the following comments on the *Antosko* case in P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (1995), Section 22.3c) "Strict and purposive interpretation", at pp. 453-54:**
>
> > **It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.... (The *Antosko* case) is simply a recognition that "object and purpose" can play only a limited role in the interpretation of a statute that is as precise and detailed as the Income Tax Act. When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.**

At pp. 976-77 of *Alberta (Treasury Branches)*, *supra*, Cory J. concluded:

> **Thus, when there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts then the statutory provision must be**

> **applied regardless of its object or purpose. I recognize that agile legal minds could probably find an ambiguity in as simple a request as "close the door please" and most certainly in even the shortest and clearest of the ten commandments. However, the very history of this case with the clear differences of opinion expressed as between the trial judges and the Court of Appeal of Alberta indicates that for able and experienced legal minds, neither the meaning of the legislation nor its application to the facts is clear. It would therefore seem to be appropriate to consider the object and purpose of the legislation. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the "scheme of the Act, the object of the Act, and the intention of Parliament".**

31 In the present case, I find the language in s. 227(5) to be clear and unambiguous, especially when viewed as a provision directly following s. 227(4), which renders amounts unremitted as held in trust for Her Majesty. In my view, this section is designed to, upon liquidation, assignment, receivership or bankruptcy, seek out and attach Her Majesty's beneficial interest to property of the debtor which at that time is in existence. The trust is not in truth a real one, as the subject matter of the trust cannot be identified from the date of creation of the trust: D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 117. However, s. 227(5) has the effect of revitalizing the trust whose subject matter has lost all identity. This identification of the subject matter of the trust therefore occurs *ex post facto*. In this respect, I agree with the conclusion of Twaddle J.A. in *Roynat*, *supra*, where he states the effect of s. 227(5) as follows, at p. 647: "Her Majesty has a statutory right of access to whatever assets the employer then has, out of which to realize the original trust debt due to Her".

32 I add that this approach was taken to a provision substantially similar to s. 227(5) by Gale C.J. in *Re Deslauriers Construction Products Ltd.*, *supra*, at p. 601, whose reasoning was affirmed by this Court in *Dauphin Plains*, *supra*. The *Deslauriers* case, *supra*, involved a priority competition between a trustee-in-bankruptcy and a statutory deemed trust provision created under the *Canada Pension Plan*, S.C. 1964-65, c. 51. Section 24(3) and (4) of that Act stated:

> **24....**
>
> **(3) Where an employer has deducted an amount from the remuneration of an employee as or on account of any contribution required to be made by the employee but has not remitted such amount to the Receiver General of Canada, the employer shall keep such amount separate and apart from his own moneys and shall be deemed to hold the amount so deducted in trust for Her Majesty.**
>
> **(4) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (3) is deemed to be held in trust for Her Majesty shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.**

This Court in *Dauphin Plains*, *supra*, at p. 1198, approved of Gale C.J.'s conclusion as to the interpretation of s. 24(4) (at p. 601 of *Deslauriers*, *supra*):

> **It seems to us that s-s. (4), and particularly the concluding six words thereof, were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the creation of a trust and making those moneys the property of the Minister.**

33 This interpretation of s. 227(5) also has the virtue of being consistent with the scheme of distribution under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3. Section 67 of that Act expressly removes claims for unremitted payroll deductions, which are held in trust (*inter alia*) pursuant to s. 227 *ITA*, from the bankrupt's estate:

> **67. (1) The property of a bankrupt divisible among his creditors shall not comprise**
>
> > **(*a*) property held by the bankrupt in trust for any other person,**
> >
> > **...**
>
> **(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.**
>
> **(3) Subsection (2) does not apply in respect of subsections 227(4) and (5) of the *Income Tax Act*, subsections 23(3) and (4) of the *Canada Pension Plan* or subsections 57(2) and (3) of the *Unemployment Insurance Act*....**

It is to be observed that in addition to attaching Her Majesty's interest to the debtor's property upon the triggering of any of the events mentioned in s. 227(5), the deemed trust operates to the benefit of Her Majesty in a secondary manner. Namely, s. 227(5) permits Her Majesty's interest to attach to collateral which is subject to a fixed charge if the deductions giving rise to Her Majesty's claim arose before that charge attached to that collateral. This proposition flows from the decision of this Court in *Dauphin Plains*, *supra*. *Dauphin Plains* involved a determination as to priority in respect of the proceeds of a liquidation sale of a receiver-manager. In that case, the claims of Her Majesty (*inter alia*) arose by virtue of the non-remittance of payroll deductions in regard to payments under the *Canada Pension Plan*, R.S.C. 1970, c. C-5, and the *Unemployment Insurance Act*, *1971*, S.C. 1970-71-72, c. 48. Those Acts provided Her Majesty with claims pursuant to deemed trusts whose language is substantially similar to the version of s. 227(4) and (5) at issue in this appeal. In finding that these claims took precedence over a

floating charge which had crystallized after the deductions at issue were actually made, Pigeon J. stated at p. 1199:

> **It should first be observed that, for reasons similar to those on which the decision in the *Avco* case, *supra*, was based, the claim for Pension Plan and Unemployment Insurance deductions cannot affect the proceeds of realization of property subject to a fixed and specific charge. From the moment such charge was created, the assets subject thereto, were no longer the property of the debtor except subject to that charge. The claim for the deductions arose subsequently and thus cannot affect this charge in the absence of a statute specifically so providing. However, the floating charge did not crystallize prior to the issue of the writ and the appointment of the receiver. In the present case it makes no difference which of the two dates is selected, both are subsequent to the deductions. [Emphasis added.]**

Thus, s. 227(5) alternatively permits Her Majesty's interest to attach retroactively to the disputed collateral if the competing security interest has attached after the deductions giving rise to Her Majesty's claim in fact occurred. Conceptually, the s. 227(5) deemed trust allows Her Majesty's claim to go back in time and attach its outstanding s. 227(4) interest to the collateral before that collateral became subject to a fixed charge. The same result occurs when a statutory lien attaches prior to the mortgaging of disputed collateral. In *Avco*, *supra*, this Court *per* Martland J. commented upon just such a scenario, at p. 706:

> **From that date, the lien attaches to the employer's property and, as provided in subs. (1), it will take priority over any other claim, including an assignment or mortgage. In other words, after the lien attaches, its priority is unaffected by a disposition of his property made by the employer. Where a mortgage has been made prior to the lien attaching, it is not affected. The lien will only attach to the employer's equity in that property. [Emphasis added.]**

[113] Justice Gonthier thus recognizes in these statements that the provisions of the ITA created a deemed trust, but that these provisions may not be sufficient to give priority ranking to the Crown's claim. To do this, it was necessary for section 227(5) ITA (as it then existed) to grant such priority.

[114] Justice Gonthier adds:

> **76 In the case at bar, the GSA contained an express licence permitting Sparrow to sell inventory in the course of its business and use the proceeds available; the BAS contained an implied licence to this effect. While it is true that the GSA contained a trust proceeds clause, I find that this cannot have the effect of limiting the scope of the licence where the real arrangement between the parties was, as expressly stated, that Sparrow could use the proceeds of inventory in the course of its business. The bank in this case was not a small inventory financier who required Sparrow to immediately remit proceeds of inventory to it. To the contrary, the bank was a large scale lender who permitted Sparrow to use inventory sales to maintain the viability of its**

enterprise. For these reasons, applying Professor Wood's test, I find that under the licence to "sell ... inventory" "in the ordinary course of ... business" and "use [the] [m]oneys available" the bank permitted Sparrow to sell inventory to pay wages and, necessarily, payroll deduction obligations.

77 For all these reasons, through the application of the licence theory, it is my conclusion that the appellant's s. 227(5) deemed trust must take priority over the bank's security interests in the disputed collateral. The trust fund representing the deducted amounts, while without identified subject matter from the date of its inception, is capable of identifying property subject to that trust *ex post facto*. To reiterate, the bank consented to the reduction in its security in inventory in order to pay wage deductions at the time those deductions were made, and s. 227(5) *ITA* has the effect of carrying forward that consent to the time of receivership. By consenting to the payment of wages out of the proceeds of inventory during the course of Sparrow's business, the bank *ipso facto* consented to the statutory scheme under the *ITA* designed to cover unpaid wage deductions. In short, in the present case the licence to deal with inventory proceeds coupled with the statutory scheme in s. 227(4) and (5) *ITA* gives priority to Her Majesty's claims for statutory wage deductions. This result is obtained both in regard to the bank's GSA, and its BAS.

[115] Justice Gonthier eventually concluded as follows:

87 It is possible to summarize my conclusions in this case into the following five propositions:

1. Priorities between statutory trusts and consensual security interests are resolved by determining which interest has an attached interest in the disputed collateral at the time the statutory trust becomes operative.

2. The s. 227(5) *ITA* deemed trust attaches to any property of the debtor which exists upon liquidation, assignment, bankruptcy or receivership.

3. For example, if deductions are made prior to the attachment of a fixed charge over collateral, the s. 227(5) deemed trust will engage to retroactively attach Her Majesty's beneficial interest to that collateral. The fixed charge over that collateral will thereafter be subject to Her Majesty's pre-existing claims for unremitted payroll deductions.

4. Otherwise, if a security interest is in the nature of a fixed and specific charge, that interest gives the holder legal title to the collateral, such that a subsequent competing statutory trust will not be able to attach its interest. In such a case, all the statutory trust can attach to is the equity of redemption in the collateral.

5. However, as an exception to propositions 2 and 4, where the holder of a fixed security interest permits the debtor to sell the collateral, this may provide an opportunity for the statutory trust to attach. Whether this actually occurs depends entirely on the facts of each case. The test is whether, at the time the deductions occurred, the debtor had the right to sell the collateral and use the proceeds to pay the obligation to which the statutory trust is related.

[116] The majority, however, agreed with Justice Iacobucci's opinion, which refused to see in the provisions of the ITA the sacramental words that would allow for the priority of the deemed trust in favour of the Crown over the previous securities of the Royal Bank.

[117] Rather, Justice Iacobucci states as follows:

11 The deeming is thus not a mechanism for undoing an existing security interest, but rather a device for going back in time and seeking out an asset that was not, at the moment the income taxes came due, subject to any competing security interest. In short, the deemed trust provision cannot be effective unless it is first determined that there is some unencumbered asset out of which the trust may be deemed. The deeming follows the answering of the chattel security question; it does not determine the answer.

12 Indeed, Gonthier J. does seize on the peculiar nature of the deemed trust as a possible ground for distinguishing the Crown's interest from rival interests. However, his argument differs from the one I have outlined to the extent that it emphasizes the deemed performance of the obligation to the Crown. It appears to be my colleague's position that the licence to sell represents a reduction in the value of the security interest only with respect to performed obligations but not with respect to unperformed ones. In his view, this represents a sufficient check on the licence theory. I agree that, if the distinction between performed and unperformed obligations were maintainable, then the likelihood of the licence consuming the security interest would be greatly reduced. However, in my view, the distinction cannot be maintained. As Gonthier J. says more than once in his reasons, the licence theory rests on the consent of the parties. But the parties to this case consented to the sale of inventory "in the ordinary course of Debtor's business". The language is unqualified. No distinction is drawn between performed and unperformed obligations. The only performance that is contemplated in the licence is the actual sale of the inventory and the application of the proceeds to a debt. And, as I have already argued, the deeming mechanism does not furnish the needed actual sale. Accordingly, I conclude that if the words of the licence are to be given their due as an *indicium* of the parties' intent, then there can be no distinction between performed and unperformed obligations.

13 My colleague places great emphasis on the fact that the debtor covenanted, in the general security agreement, "to pay all taxes, rates, levies, assessments and other charges of every nature which may be lawfully levied,

> **assessed or imposed against or in respect of Debtor or Collateral as and when the same become due and payable". But this covenant is not part of the licence. And in any event, it is merely a covenant to obey the law. It adds nothing to s. 153(1) *ITA*. Furthermore, it does not prescribe the outcome of a priority contest. What is more, the covenant to pay taxes is only one of several in the agreement. Another covenant provides that the debtor shall "carry on and conduct the business of Debtor in a proper and efficient manner". Presumably the debtor might incur subsequent debts in the course of carrying on and conducting its business. Gonthier J. advances no principle that might permit the settlement of priority disputes as between the Crown and subsequent lenders. In the event of a dispute, both would have the benefit of the licence to sell inventory and of express covenants, so that some other criterion would have to be found to determine which takes priority. Here, as before, the prospect of a reversal of the ordinary priority rules is immediate and troubling.**

[118] And further, he adds:

> **23 Moreover, and for reasons I have already given, there is every likelihood that a broad interpretation of the licence theory would do violence to the *PPSA*. The Act clearly contemplates that inventory financing will be an important commercial device. But allowing the mere potential operation of a licence to sell to defeat a security interest in inventory would deprive the interest of all efficacy. It would not be any sort of security against subsequent obligations.**
>
> **24 <u>Finally, I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown "notwithstanding any security interest in those moneys" and provides that they "shall be paid to the Receiver General in priority to any such security interest". All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation</u>.**
>
> **(emphasis added)**

[119] We therefore know how to avoid the impact of the *Sparrow Electric* case. All that is necessary to ensure the primacy of the deemed trust over movable hypothecs without delivery is for the SPPA to contain wording having the same legal effect as the amendment to the ITA. We must examine whether section 264 SPPA meets this requirement.

[120] Thus, in 2009, after the case of *SMRQ v. De Courval*, we have to admit that the Court of Appeal was not inclined to read the existence of a deemed trust into section 20 ARMR, whereas the decisions in the *Nolisair* and *Sécurité Saglac* cases offer a very different reading of the statute (with or without the words that were added to it by the 1993 amendment).

[121] Moreover, the opinion of the undersigned in *White Birch* was, among other things, based on the Court of Appeal's interpretation in *De Courval*.

[122] Furthermore, the decision of the Court of Appeal in *SMRQ v. De Courval* has been criticized and was not followed by the Federal Court of Appeal in *Toronto-Dominion Bank v. Canada*, reported at 2010 FCA 174.

[123] Then came the case of *Banque nationale du Canada v. Agence du revenu du Québec* 2011, QCCA 1943 on appeal from a Court of Québec decision, 2009, QCCQ 8079[46]. This case is another illustration of the difficulty of interpreting the concept of deemed trust (in section 20 ARMR). There, Justice Gilson Lachance of the Court of Québec concluded that section 20 ARMR created a deemed trust, but did so without considering the decision of the Court of Appeal in the above-mentioned case of *Québec (SMRQ) v. De Courval*[47] and without analyzing the trust provisions of the *Civil Code of Québec*.

[124] Justice Lachance, however, analyzes the scope of section 20 ARMR on the claims of secured creditors, in light of *R. v. First Vancouver Finance* and *Great West Transport Ltd.*, 2002 SCC 49, [2002] 2 SCR 720, which likened the deemed trust of section 227(4.1) BIA to a "floating charge[48] in favour of Her Majesty over all the tax debtor's assets."[49]

[125] Justice Lachance's decision was appealed[50] and Justice Dalphond accepted the reasoning of the trial judge, except for a correction of numbers.

[126] Here is how justice Dalphond addressed the issue [TRANSLATION]:

> **[16] The trial judge concludes that Revenu Québec benefits from a deemed trust under section 20 of the *Act respecting the Ministère du Revenu*, R.S.Q., c. M-31 (ARMR), on the amounts deducted at source by Canouxa. This trust attaches, according to him, to all the tax debtor's assets, except for assets sold in the ordinary course of business, in which case the trust attaches to the proceeds of this sale or to the replacement property. The BNC, creditor of Canouxa, is not a third-party purchaser and is subject to the trust, as the Supreme Court established in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49 (CanLII), [2002] 2 S.C.R. 720, 2002 SCC 49. Moreover, this situation is not modified by the bankruptcy of Canouxa under section 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C., (1985), c. B-3 (BIA). The legislative intent is to subject the secured creditors to the deemed trust in the event of a bankruptcy, which carries an obligation to deliver to the tax authority the proceeds from the sale of property subject to this trust.**

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[46] The decision of the Court of Québec is dated July 16, 2009.
[47] The decision of the Court of Appeal is dated March 3, 2009.
[48] This notion of "floating charge" was ruled out in *White Birch*[48] at paragraphs [203] to [207].
[49] Paragraph 18 [2009] QCCQ 8099. See also paragraph [25] of the same decision.
[50] *Banque Nationale du Canada v. Agence du revenu du Québec*, 2011 QCCA 1943.

[127] However, he adds that:

> **[29] I have no hesitation in concluding that the amounts claimed from the tax debtor under section 1015 of the *Taxation Act*, C.Q.L.R. c. I-3 (withholdings on salary) are of the same nature as those referred to in paragraphs 227(4) or (4.1) of the *Income Tax Act* and that the provincial act provides for a tax similar to that of federal act. The same goes for QPP contributions in relation to those for CPP.**
>
> **[30] As to the nature and extent of the invoked trust, they are outlined in section 20 ARMR:**
>
> > **20. Every person who deducts, withholds or collects any amount under a fiscal law is deemed to hold it in trust for the State, separately from the person's patrimony and the person's own funds, for payment to the State in the manner and at the time provided under a fiscal law.**
> >
> > **Where at any time an amount deemed by the first paragraph to be held by a person in trust for the State is not paid to the State in the manner and at the time provided under a fiscal law, an amount equal to the amount thus deducted, withheld or collected is deemed, from the time the amount is deducted, withheld or collected, to be held in trust for the State, separately from the person's patrimony and the person's own funds, and to form a separate fund not forming part of the property of that person, whether or not the amount has in fact been held separately from that person's patrimony or that person's own funds.**
> >
> > **However, the person may, when filing a return with the Minister under section 468 or 470 of the Act respecting the Québec sales tax (chapter T-0.1), withdraw from the total amount that the person is deemed by the first paragraph to hold in trust for the State, the amounts that the person is entitled to deduct and that the person has actually deducted in the calculation of the amount to be remitted.**
> >
> > **(emphasis added)**
>
> **[31] The deemed trust is therefore on the collected amounts and, in case of non-remittance, on equivalent amounts belonging to the tax debtor. The situation is equivalent to that provided by section 227 (4) of the *Income Tax Act*, R.S.C. (1985), c. 1 (5th Supp.), but does not extend to other property of the debtor, as provided by Section 227 (4.1) of the federal Act:**
>
> > **227(4) Trust for moneys deducted**
> >
> > **Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3))**

of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.

(4.1) Extension of trust

Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

(emphasis added)

[32] Commenting on section 227 of the federal act, Justice Iacobucci wrote in *First Vancouver Finance*:

27 In response to *Sparrow Electric*, the deemed trust provisions were amended in 1998 (retroactively to 1994) to their current form. Most notably, the words "notwithstanding any security interest … in the amount so deducted or withheld" were added to s. 227(4). As well, s. 227(4.1) (formerly s. 227(5)) expanded the scope of the deemed trust to include "property held by any secured creditor … that but for a security interest … would be property of the person". Section 227(4.1) was also amended to remove reference to the triggering events of liquidation, bankruptcy, etc., instead deeming property of the tax debtor and of secured creditors to be held in trust "at any time an amount deemed by

> **subsection (4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act". Finally, s. 227(4.1) now explicitly deems the trust to operate "from the time the amount was deducted or withheld".**
>
> **28 It is apparent from these changes that the intent of Parliament when drafting ss. 227(4) and 227(4.1) was to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect. This is clear from the use of the words "notwithstanding any security interest" in both ss. 227(4) and 227(4.1). In other words, Parliament has reacted to the interpretation of the deemed trust provisions in *Sparrow Electric*, and has amended the provisions to grant priority to the deemed trust in situations where the Minister and secured creditors of a tax debtor both claim an interest in the tax debtor's property.**
>
> **29 As noted above, Parliament has also amended the deemed trust provisions in regard to the timing of the trust. Reference to events triggering operation of the deemed trust such as liquidation or bankruptcy have been removed. Section 227(4.1) now states that the deemed trust begins to operate "at any time [source deductions are] … not paid to Her Majesty in the manner and at the time provided under this Act" (emphasis added). Thus, the deemed trust is now triggered at the moment a default in remitting source deductions occurs. Further, pursuant to s. 227(4.1)(*a*), the trust is deemed to be in effect "from the time the amount was deducted or withheld". Thus, while a default in remitting source deductions triggers the operation of the trust, the trust is deemed to have been in existence retroactively to the time the source deductions were made. It is evident from these changes that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister.**
>
> **(emphasis added)**

[128] Thus, the deemed trust of section 20 ARMR is unambiguously recognized. Furthermore, the interpretation given by Justice Dalphond removes doubts and, once this interpretation is applied to section 49 SPPA, the undersigned must conclude that this provision creates a deemed trust attaching to the contributions that are suspended and unpaid to the Petitioner Pension Committees.

[129] Several authors support such a conclusion.

[130] Louis Payette, in his text "*Les sûretés réelles dans le Code civil du Québec*", 2010, EYB2010SUR3, indicates in paragraph 63, pages 19 and 20, that the legislator may provide that a deemed trust by operation of law may exist to the extent that the property covered by the trust is only deemed to be held in trust (i.e. without physical separation from the debtor's patrimony). At paragraph 1821 of the same text, page 104, M^{e} Payette adds [TRANSLATION]:

> **Some laws create a fiction whereby the property of a taxpayer is "deemed" to be held in trust for the benefit of the public authorities of which he is the debtor. The existence of a hypothec on a property does not prevent the creation of such trusts on this property and taking in payment does not result in their extinction; the person who takes in payment must therefore account for the amounts due to the beneficiary of the deemed trust, in the amount of the property's value or resale price.**

[131] See also John Claxton "*Studies on the Quebec Law of Trust*", Thomson Carswell 2005, pages 84 and following, no. 4.2 and following, viz: "*Trust Constituted by Operation of Law*"; Roger P. Simard in *Juris Classeur Québec – sûretés* viz: "*Fiducies réputées*".

[132] This review of the relevant case law on deemed trusts therefore allows for the following conclusions:

a) For a deemed trust to exist in Quebec law, the legislator must intervene clearly in this regard. Such is the case here;

b) The deemed trust of section 49 SPPA states that it produces its effects whether or not there is physical separation of the property covered by the trust from the employer's patrimony. These words, once they were added to the provisions of section 20 of the ITA, allowed the deemed trust to produce the effects intended by the legislator. Upon reflection, it is clear that the same words used in section 49 SPPA must produce the same effects;

c) Contrary to what the undersigned concluded in *White Birch*, *supra*, section 49 SPPA creates a trust by operation of law within the meaning of article 1262 C.C.Q. and ensures that the special payments due and unpaid because of Justice Morawetz's Suspension Order are covered by that deemed trust, which therefore must produce its effects;

d) However, this is not sufficient to conclude that this trust has priority ranking over IQ's movable hypothec on all of BSI's property;

e) Indeed, in contrast to the "Personal Property Security Acts" in some other provinces, Quebec has no legislative provision that would cause a deemed trust to take precedence over legal or conventional securities found in the *Civil Code of Québec*;

f) Therefore, unless the SPPA contains other provisions ensuring that the property covered by the deemed trust of section 49 SPPA escapes IQ's universal hypothec, the latter should therefore be given full effect in respect of all of BSI's property, defeating any possibility for the Petitioner Pension Committees to recover anything;

g) We must therefore decide whether section 264 SPPA remedies the issue and ensures that the property covered by the deemed trust of section 49 SPPA is not affected by IQ's universal hypothec. That is the question we must now discuss.

b) **The effect of section 264 SPPA on IQ's claim**

[133] The Pension Committees argue that section 264 SPPA reinforces their argument that the special payments are covered by a deemed trust and are not part of the common pledge of BSI's creditors.

[134] The relevant portion of section 264 SPPA reads as follows:

> **264. Unless otherwise provided by law, the following amounts or contributions are unassignable and unseizable:**
>
> **(1) all contributions paid or payable into the pension fund or to the insurer, with accrued interest;**

[135] Any contribution paid or payable to the pension fund of BSI's unionized and non-unionized employees would therefore be unassignable or unseizable. To give meaning to this provision, one must conclude that the contributions ... "payable" ... literally are out of the reach of BSI's other creditors, whether or not such creditors are secured, and whether they benefit from a security which is earlier than the due date of the paid or unpaid contributions.

[136] The word "contribution" used in section 264 SPPA must have the same meaning as in section 49 SPPA. It therefore includes the special payment "payable" but that has been suspended since the issuance of the initial order.

[137] The Pension Committees also argue that section 264 SPPA is not the only provision which would make the contributions unpaid to the pension fund unseizable. Article 553(7) of the *Code of Civil Procedure* indeed states that they are unseizable:

> **(7) Benefits payable under a supplemental pension plan to which an employer contributes on behalf of his employees, other amounts declared unseizable by an Act governing such plans and contributions paid or to be paid into such plans.**
>
> **(emphasis added)**

[138] Consequently, these amounts do not form part of the common pledge of BSI's creditors and could not be subject to a hypothec or other form of appropriation in favour of a third party.

[139] Articles 2644 and 2645 C.C.Q. reinforce this approach:

> **Art. 2644. The property of a debtor is charged with the performance of his obligations and is the common pledge of his creditors.**

> **Art. 2645. Any person under a personal obligation charges, for its performance, all his property, movable and immovable, present and future, except property which is exempt from seizure or property which is the object of a division of patrimony permitted by law.**
>
> **However, the debtor may agree with his creditor to be bound to fulfil his obligation only from the property they designate.**
>
> **(emphasis added)**

[140] It thus follows, according to the Petitioner Committees, that the special payments suspended by the initial order are unassignable and unseizable pursuant to section 264 SPPA, in addition to being covered by a deemed trust pursuant to section 49 SPPA. The combined effect of these two provisions therefore ensures that the amounts unpaid to the pension plans are excluded from BSI's patrimony and cannot be used to reimburse IQ's hypothecary claim.

[141] In *Marché Bernard Lemay v. Beljaars*, 2003 CanLII 30892, the Superior Court decided as follows [TRANSLATION]:

> **[40] The provisions of this special act [the SPPA] should prevail over the general provisions of the Civil Code or of the Act respecting trust companies … and are very clear.**
>
> **[41] It seems obvious that section 264 SPPA, combined with article 553(7) C.C.P. which also deals with unseizability, giving this status to the rights granted under a pension plan, must take precedence over all other less relevant or less specific provisions because they are more general, such as the Civil Code articles on the subject that we have dealt with.**

[142] See also: *Loi sur les régimes complémentaires de retraite – Annotations et Commentaires* by the Régie des rentes du Québec, Bibliothèque nationale du Québec 1998, paragraph 264.3.[51]

[143] Furthermore, in the context of bankruptcy, these amounts would also not be included in the "property of the bankrupt" and would not be part of the seisin of a trustee, considering the wording of section 67(1)(b) BIA which provides as follows:

> **67. (1) The property of a bankrupt divisible among his creditors shall not comprise**
>
> **(*a*) property held by the bankrupt in trust for any other person;**
>
> **(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;**
>
> **(emphasis added)**

[144] We must admit that these arguments are, at first blush, convincing.

[145] IQ argues, contrary to the foregoing, that for section 264 SPPA to apply, there must have been a physical separation of the contributions to be paid in order for their unassignable and unseizable status to receive full application. IQ adds that these contributions have been subject to a suspension order since the initial order issued by Justice Morawetz. These contributions are therefore not "due and payable."

[146] The undersigned does not agree with this argument.

[147] The undersigned is of the opinion that sections 49 and 264 SPPA should indeed be read and interpreted in the same context.

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[51] [TRANSLATION] Unseizable property is property that cannot be the object of an *inter vivos* transfer, whether for consideration or free of charge. An assignment of rights could be realized by the sale of the assigned property, by its donation, by its use as a security or simply through the waiver of a right in the property. Unseizable property, on the other hand, cannot be subject to seizure, which is a procedure whereby a creditor puts property belonging to its debtor under judicial control in order to preserve its rights*. Note that there are two types of seizures: seizure by garnishment, which is to order the holder of property not to dispose of it, and seizure in execution, which is to order the holder of property to return it in order to pay a debt to its owner.

…

Article 2465 of the *Civil Code of Québec* provides that a person who is personally obligated is required to fulfill his obligation on all his movable and immovable property, present and future, unless it is unseizable. Thus, in general, a person's property is seizable; it is only exceptionally that it is unseizable. Section 264 therefore constitutes an exception to the general rule. ...

(emphasis added)

[148] If section 49 SPPA creates a deemed trust enforceable against IQ, this means that the property covered by the deemed trust is not only easily identifiable and that the amounts it represents are available, but that in fact they are clearly "identified" by the very effect of section 49 SPPA. Similarly, section 264 SPPA may apply to amounts to which section 49 SPPA applies.

[149] It will therefore no longer be necessary in this particular context to physically separate the special payments to be paid from BSI's remaining assets for the proceeds of those contributions to be unassignable and unseizable pursuant to section 264 SPPA, as it is not necessary to do so in order for the deemed trust of section 49 SPPA to produce its effects.

[150] To this effect, section 264 SPPA completes the logic of section 49 SPPA; otherwise, these two provisions would be entirely stripped of their meaning, scope and effect.

[151] When the Petitioner Pension Committees' motion was drafted, BSI's only assets consisted of a cash amount of some $30 million. The parties agreed that this amount should be paid to IQ to mitigate the impact of the accrued interest on its debt.

[152] The section 49 SPPA deemed trust could therefore attach to this portion of BSI's cash assets representing the total special payments due and not yet paid to the Petitioner Pension Committees because of the Suspension Order, without it being necessary to separate these amounts from the rest of BSI's liquid assets and, consequently, the unassignability and unseizability of such amounts, pursuant to section 264 SPPA, could affect them.

[153] Finally, the fact that the amounts have been distributed to IQ, subject to the Petitioner Pension Committees' rights, does not have the effect of making these assets lose their status of unassignable and unseizable trust property.

[154] As to IQ's argument to the effect that during the suspension of special payments by the issuing of the initial order rendered by Justice Morawetz, no special payment was due and not yet paid (and hence, no amount could be subject to section 49 SPPA or section 264 SPPA), this argument must also be rejected. Indeed, we must distinguish between the effect of staying the obligation to pay such amounts and their being subject to sections 49 and 264 SPPA. These sections cover any not yet paid amount. We must distinguish between the exigibility of a debt and a (temporary) suspension of the obligation to make payment. Therefore, contributions remain due and payable but only the actual payment of such amounts is suspended.

[155] The notion of the unassignability and unseizability of due and not yet paid contributions prevents the employer and its creditors from using these funds for purposes other than those specified in the SPPA. These amounts thus cannot be subject to a universal hypothec on movable property, with or without delivery.

[156] The result of the foregoing is that the reasoning of the *Sparrow Electric* decision cannot apply in this case.

[157] IQ also pleads the application of the case of *Poulin v. Morency*[52], in which the issue was to determine whether the sums contributed by an employee to an unseizable pension plan had lost their unseizability following the transfer of the plan's assets to an RRSP. The Court of Appeal of Québec decided that the entire RRSP of the appellant Poulin was seizable, which was upheld by the Supreme Court, and that the unseizability provision did not protect the sums transferred into an RRSP at the request of the appellant for investment purposes.

[158] In the present case, the employer's contributions that are due and not yet paid to the Petitioner Pension Committees are unassignable and unseizable. The sale of BSI's assets and their transformation into cash assets therefore does not remove the unassignable and unseizable status of said contributions.

[159] In *Poulin* v. *Morency* (*supra*), it was the transfer of the funds in question into an RRSP that caused the amounts in dispute to lose their unassignability and unseizability, because the amounts in question necessarily had to have come under the control of the appellant before they ended up in an RRSP. Moreover, as discussed by Justice Gonthier[53], when the Quebec legislature intended to extend the unseizability of certain sums referred to in section 264 SPPA, it did so expressly[54].

[160] Finally, we must admit that section 264 SPPA has, by analogy, more or less the same effect as section 30(7) of the *Ontario Personal Property Security Act* (RSO 1990, c. D-10 (sic)), commonly called the "PPSA", which subordinates the security interest to the interest of a beneficiary of a deemed trust created by a statute relating to pension plans. As confirmed by the Supreme Court in *Indalex*, were it not for the application of the doctrine of federal legislative paramountcy, such a deemed trust would have had priority over a secured claim pursuant to a security interest granted by a debtor.

[161] The granting of a security interest in favour of IQ in the nature of a movable and immovable hypothec without delivery, even though duly registered with the RDPRM, does not nullify the effect of this status. If that were the case, section 264 SPPA would have no practical effect. In fact, the due and unpaid contributions not belonging to BSI, notably because of the effect of the section 49 SPPA deemed trust on those assets, are neither part of BSI's assets nor the common pledge of its creditors.

[162] In conclusion, the Court is of the opinion that:

1) the special payments at issue in this case are subject to a deemed trust created by operation of law;

2) said contributions are unassignable and unseizable;

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[52] 1999 3 SRC 351; 1999 CanLii 662

[53] See paragraphs 37 and following of his opinion.

[54] See article 264(3), paragraph 2. See also section 28(3) of the *Regulation respecting supplementary pension plans* (1990) 122 C.O. II-3246.

3) they are not affected by IQ's universal hypothec, even if such special payments became payable to the Petitioner Pension Committees after the creation of said universal hypothec.

General conclusion

[163] We are at the end of a reorganization process under the CCAA which took the form of a sale of BSI's assets to a new entity (which will continue the activities of BSI). The task is now to distribute the proceeds of the asset sale to BSI's creditors. Those creditors do not hold any super-priority that could have been given to them under the CCAA. The priority to be given to the Pension Committees' claims, on the one hand, and to IQ's claims, on the other hand, must be analyzed in light of Quebec law only. There is no question of the application of the doctrine of federal legislative paramountcy over provincial legislation.

[164] Here, two obstacles prevent the exercise of IQ's rights over all of BSI's assets: some of those assets are unassignable and unseizable in addition to being subject to a deemed trust.

[165] The special payments that remain unpaid since the Suspension Order of January 16, 2012 are therefore outside IQ's reach. The pension plans' solvency deficits existing on the date of their termination are not covered by section 49 or section 264 SPPA.

[166] Sections 49 and 264 SPPA must be read and applied restrictively given that they create an exceptional regime. A deemed trust must not be interpreted in a broad and liberal way, even if the SPPA, as a whole, must be interpreted broadly. We cannot extend the application of section 49 or section 264 SPPA to solvency deficits.

[167] Section 49 SPPA applies only to contributions and to accrued interest on those contributions.

[168] It is the combined effect of sections 49 and 264 SPPA that subtract BSI's assets in the amount of the special payments unpaid to the Pension Committees (plus interest thereon) from IQ's hypothecary claim. Those two provisions have the effect of literally removing assets from the common pledge of BSI's creditors.

[169] In the Supreme Court case of *Indalex*, Justice Deschamps wrote:

> **[51] … Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to CCAA proceedings or to proposals under the BIA. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the CCAA, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation**

> **under the BIA. Indalex achieved the goal it was pursuing. It chose to sell its assets under the CCAA, not the BIA.**
>
> **[52] <u>The provincial deemed trust under the PBA continues to apply in CCAA proceedings, subject to the doctrine of federal paramountcy</u> (Crystalline Investments Ltd. v. Domgroup Ltd., 2004 SCC 3 (CanLII), 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a CCAA liquidation proceeding, priorities may be determined by the PPSA's scheme rather than the federal scheme set out in the BIA.**
>
> **(emphasis added)**

[170] The same applies to the deemed trust of section 49 SPPA and to the protection that section 264 SPPA gives to these assets.

[171] In the absence of the application of the doctrine of federal paramountcy, it must be concluded that these provisions should be given full effect.

[172] Let us imagine the following scenario: rather than ending up in a context of reorganization under the CCAA, BSI could have simply decided to sell its assets to a new company before paying its creditors with the proceeds of the sale, without discharging its obligation to pay the Petitioner Pension Committees the special payments due to them. The above reasoning would have applied without further questioning. The Court is of the view that, in the context of the present debate, that reasoning should be applied.

[173] With respect to those who think differently, the undersigned is of the opinion that the issues cannot be resolved by reference to the *Sparrow Electric* case nor by reference to section 37 CCAA. In *Sparrow*, there was no question of unassignability or unseizability of the amounts owing to the federal Crown but only of the non-priority application of the amounts covered by the deemed trust contained in the ITA, a problem which was corrected by a subsequent amendment to the *Income Tax Act*. Here, the property covered by the deemed trust is literally excluded from the scope of IQ's security. For IQ, this property is unseizable because it cannot form part of any assignment or transfer by BSI.

[174] It is neither useful nor possible to resort to the inherent powers of the Superior Court under article 46 C.C.P. to ensure that the special payments are paid to the Pension Committees, because they are to be paid in any case. It is not appropriate to apply this concept to allow the Petitioners to recover the solvency deficits, since those deficits are clearly identified as debts of the employer (section 228 SPPA) and clearly excluded from the scope of section 49 SPPA. In the presence of statutory provisions as clear as this, there is no justification for using the inherent powers of the Court, as the legislator has already taken a position on the issue.

[175] This debate was very well prepared and argued by the attorneys involved. Even after the hearing on May 27 and 28, 2013, the attorneys were able to submit several additional texts to the undersigned, clarifying some of their positions or answering questions of the undersigned. The Court is grateful to them and thanks them. Exchanges between attorneys ranged from June to October 2013, which partly explains the length of the deliberation.

FOR ALL THESE REASONS, the Court

[176] **GRANTS** the Petitioner Pension Committees' motion in part;

[177] **DECLARES** that the special payments and interest thereon not paid to the Petitioner Pension Committees are subject to a deemed trust that is enforceable against the Respondent Investissement Québec Inc. pursuant to section 49 SPPA;

[178] **DECLARES** that these contributions and the interest thereon are unassignable and unseizable, are excluded from the scope of Investissement Québec Inc.'s movable and immovable hypothec without delivery and have priority over the latter's claim, by the combined effect of sections 49 and 264 SPPA;

[179] **DISMISSES** the Petitioner Pension Committees' motion with respect to their argument that the pension plans' solvency deficits have the same status as the special payments and the interest thereon;

[180] **ADJOURNS** the motion for directions to a date to be determined for purposes of determining the quantum of the amounts to be reimbursed to the Petitioner Pension Committees by Investissement Québec Inc.;

[181] **THE WHOLE**, without costs.

_____
ROBERT MONGEON, J.S.C.

Me Tina Hobday
Me Alexander Herman
Langlois Kronström Desjardins
Attorneys for the plaintiff

Me Charles Mercier
Me Émilie Truchon
Fasken Martineau
Attorneys for the defendant

Me Adam Spiro
Me Steven Weisz
Blake, Cassels & Graydon
Attorneys for the respondent

Hearing dates: May 27 and 28, 2013.

AFFIDAVIT

I, the undersigned, **ADAM T. SPIRO**, attorney with the law firm Blake, Cassels & Graydon LLP, located at 600, De Maisonneuve Blvd. West, Suite 2200, Montréal, Québec, H3A 3J2, Canada, do hereby solemnly declare and say:

1. I am a duly registered member of the Bar of the Province of Québec;

2. I understand both French and English;

3. I have compared the English translation of the following:

   judgment of the Superior Court (Commercial Division) relating to Priority Claims (Sections 11 and 17 CCAA) – Canada – Province of Québec – District of Montréal – N°: 500-11-043844-121 dated January 24, 2014

   (hereinafter referred to as the "Document");

4. I certify that the English version of the Document is in all material respects a true and correct translation;

5. All facts herein are true.

AND I HAVE SIGNED

ADAM T. SPIRO

SWORN TO before me in Montréal,
Province of Québec, on February 27, 2014.

Commissioner of Oaths for all Judicial Districts
of the Province of Québec

COMMISSAIRE À L'ASSERMENTATION
COMMISSIONER FOR OATHS
PINA CICCARELLI
#96 566
POUR LE QUÉBEC I FOR QUEBEC

Appendix E

The Leave Motion

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-09-
S.C. : 500-11-043844-121

COURT OF APPEAL

TIMMINCO LIMITÉE a corporation duly incorporate pursuant to the laws of the province of Ontario, having its head office at 150 King Street West, Toronto, Ontario, M5H 1J9

-and-

BÉCANCOUR SILICON INC. a corporation duly incorporate pursuant to the laws of the province of Quebec, having its head office at 6500 rue Yvon-Trudeau, Bécancour, Québec, G9H 2V8

Debtors/APPELLANTS

v.

COMITÉ DE RETRAITE DU RÉGIME DE RENTES POUR LES EMPLOYÉS SYNDIQUÉS DE SILICIUM BÉCANCOUR INC.

-and-

COMITÉ DE RETRAITE DU RÉGIME DE RENTES POUR LES EMPLOYÉS NON-SYNDIQUÉS DE SILICIUM BÉCANCOUR INC.

Petitioners/RESPONDENTS

-and-

INVESTISSEMENT QUÉBEC a joint stock company duly constituted by special act under the laws of the province of Queebc, having its head office at 1200, route de l'Église, Suite 500, Québec, Québec, G1V 5A3

Respondent/MISE EN CAUSE

-and-

FTI CONSULTING CANADA INC. a corporation duly incorporate pursuant to the laws of Canada, having its registered office at 1200 Waterfront Centre, 200 Burrard Street, Vancouver, British Columbia, V6C 3L6

Monitor/MONITOR

APPELLANT'S MOTION FOR LEAVE TO APPEAL
(Sections 13 and 14 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 and Article 26 (or subsidiarily, Articles 29 and 511) of the *Code of Civil Procedure*)

TO ONE OF THE HONOURABLE JUDGES OF THE COURT OF APPEAL, SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE PETITIONERS STATE AS FOLLOWS:

1. The Appellant Debtors hereby seeks leave to appeal the judgment rendered on January 24, 2014 by the Honourable Robert Mongeon, J.S.C. (the "**First Instance Judge**") in the case bearing docket number 500-11-043844-121 (the "**Judgment**"). A copy of the First Instance Judgment is attached hereto as **Schedule 1**.

2. FTI Consulting Canada Inc. (the "**Monitor**") was appointed Monitor of the Debtors pursuant to the Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the "**Ontario Court**") dated January 3, 2012 which granted the Debtors protection from their creditors pursuant to the provisions of the *Creditors, Companies Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") (the "**Initial Order**"), a copy of which is attached as **Schedule 2**.

3. The Appellants are bringing this Motion pursuant to the special powers granted to the Monitor to take certain actions in the name of and on behalf of the Appellants by an Order of Justice Newbould of the Ontario Court dated December 16, 2013, a copy of which is attached hereto as **Schedule 3**.

4. This Motion is being filed by the Appellants to ensure that the rights of affected creditors are not prejudiced by the passage of time and the expiry of the delay to seek leave to appeal, and the Appellants will seek directions from the Ontario Court before proceeding with this Motion.

5. By the Judgment, the First Instance Judge granted in part the Respondents' *Requête pour directives et jugement déclaratoire* (the "**Motion for Directions**"), a copy of which is attached hereto as **Schedule 4**.

6. The Motion for Directions sought a declaration that special payments due but not paid by the Appellant, Bécancour Silicon Inc. ("**BSI**"), to the pension plans represented by the Respondents as well as the solvency deficits of those pension plans constituted priority claims against the Appellants in the context of the proceedings in respect of the Appellants under the CCAA.

7. The Judgment ruled, *inter alia*, that:

   a) special payments due but not paid to the Respondents by BSI are subject to a deemed trust created by the operation of law pursuant to s. 49 of the *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1 as amended (the "**SPPA**");

   b) these deemed trusts were priority claims that ranked ahead of the Mise en Cause's claim as first-ranking secured creditor pursuant to ss. 49 and 264 of the SPPA; and

   c) solvency deficits were not the subject of a deemed trust pursuant to the SPPA, and the Respondents therefore do not have any priority claim in this regard.

8. The Judgment contains several errors of law and raises legal issues of public order as it:

   a) creates a statutory deemed trust in contradiction to the previous judicial decisions on this issue by the same First Instance Judge;

   b) creates a priority for those deemed trusts in contradiction to Supreme Court of Canada case law;

   c) contrary to prior case law in Quebec, provides that a purported priority created by provincial legislation remains operative in a proceeding under the federal CCAA;

   d) affects the interests of pension plans and pensioners of Timminco ("**Timminco Pension Plans**") who have valid deemed trust claims in Ontario in accordance with applicable legislation and the Supreme Court of Canada decision in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6; and

   e) prejudices the rights of other ordinary unsecured creditors of BSI.

9. The Appellant Timminco Limitée ("**Timminco**") is the largest unsecured creditor of BSI, and this Motion is brought to protect the rights of unsecured creditors of BSI and the Timminco Pension Plans having valid deemed trust claims.

I. THE PARTIES

10. The Appellants are Debtors that are subject to the above-captioned CCAA restructuring proceedings, as mentioned above.

11. The Monitor is the Monitor in the aforementioned CCAA proceedings, as mentioned above.

12. The Respondents represent the interests of the beneficiaries of two defined benefit pension plans for the benefit of the unionized and non-unionized employees of BSI.

13. The Mise en Cause was granted a first-ranking hypothec over the universality of BSI's movable and immovable property.

II. PROCEDURAL CONTEXT AND BACKGROUND

14. On December 31, 2011, the unionized employees' pension plan's solvency deficit was $9,889,600.00 while that of the non-unionized employees was $3,998,700.00.

15. In order to satisfy, at least partially, the above-mentioned solvency deficits, BSI would have had to pay special payments of $93,910.00 and of $41,710.00 per month in the above-mentioned pension plans' funds. These special payments had been stayed by the Stay Order (defined below).

16. The Appellants have been under the protection of the CCCA since January 3, 2012, following the issuance of the Initial Order (Schedule 3).

17. By a subsequent order rendered on January 16, 2012 (the "**Stay Order**"), all special payments to be made by BSI in favor of the Respondents were stayed, as appears from a copy of the Stay Order attached hereto as **Schedule 5**.

18. On June 13-14, 2012, substantially all of the Appellants' assets were sold, generating $30.8 million of proceeds, following orders by Justice Morawetz approving the sales in question, copies of which are attached hereto, *en liasse*, as **Schedule 6**.

19. On August 28, 2012, the Mise en Cause's loan (secured by a hypothec on the universality of BSI's movable and immovable property) was reimbursed in the initial amount of $25 million plus some accrued interest (subject to the Respondents' reservation of rights), and, as a result of subsequent distributions, a total aggregate amount of approximately $29 million;

20. Respondents' position was that their above-mentioned claims constitute priority claims that rank ahead of the claim of the Mise en Cause, who holds a hypothec without delivery on all of BSI's movable and immovable property.

21. The parties also agreed to stipulate that if the Respondents' claims are recognized as priority claims in whole or in part, the Mise en Cause would reimburse the said claims to both Respondents in accordance with their respective interests. However, if the Court was to determine that the claims in question are not priority claims, the Mise en Cause would have nothing to reimburse.

22. On October 18, 2012, following a request from the Mise en Cause Justice Morawetz issued an Order referring the adjudication of the priority dispute over the special payments balance and the solvency deficits to the Superior Court of Québec and requested the aid and assistance of the Superior Court of Québec in accordance with the Court-approved Priority Claims Adjudication Protocol, as appears from the copy of this Order attached hereto as **Schedule 7**.

III. THE JUDGMENT

23. In the Judgment, the First Instance Judge ruled that special payments were subject to a deemed trust created by operation of law, that they were unassignable and unseizable and that they were not affected by the Mise en Cause's universal hypothec, even if they became payable after the granting of said universal hypothec.

24. First Instance Judge ruled that the amounts of solvency deficit, on the other hand, were not subject to such a trust.

IV. RIGHT TO APPEAL

25. The Appellants respectfully submit that leave to appeal the Judgment should be granted pursuant to Sections 13 and 14 of the CCAA (and Article 26 of the *Code of Civil Proceedure* (the "**CCP**"), or subsidiarily Articles 29 and 511 of the CCP).

26. The Judgment is a final judgment pursuant to Article 26(1) of the CCP, or, subsidiarily it in part decides the issues pursuant to Article 29(1) of the CCP.

27. The pursuit of justice requires the intervention of this Honourable Court to reform the Judgment, as:

    a) the rights of the mass of BSI creditors are detrimentally affected as a result thereof;

    b) the rights of pensioners under the Timminco Pension Plans with valid deemed trust claims are affected; and

c) the creation of a deemed trust by operation of law that has priority over a first-ranking universal hypothec is a novelty that will completely alter the commercial interests and expectations of economic actors throughout the province.

28. Furthermore, in light of the above, it is in the interest of justice to stay the proceedings before the Superior Court of Quebec in the present file in order to avoid the cost of the progression of proceedings to determine quantum until this Court has rendered a final decision in relation to the Judgment.

V. GROUNDS OF APPEAL

29. The Judgment rules on a purely legal issue, i.e. whether the Respondents claims constitute a deemed trust pursuant to the SPPA with priority over the Mise en Cause's universal hypothec.

30. The Motion Judge erred in law by issuing the ruling found in the judgment, and summarized above at paragraphs 7, 23 and 24.

31. In particular, the intervention of this Honourable Court is required to reform the errors of law found in the Judgment.

32. More specifically, the Judgment contradicts previous case law on the issue, including case law from the Supreme Court of Canada, and is inconsistent with the general law of trusts in Québec.

33. The Appellants reserve the right to raise such other grounds as may be directed by the Ontario Court.

VI. CONCLUSION

34. For the reasons more fully expounded above, the Appellants submit that the intervention of this Honourable Court is required to reform the Judgment.

35. The Appellants reserves the right to amend the present Motion.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present Motion for leave to appeal;

AUTORIZE the Appellants to appeal the judgment rendered on January 24, 2014 by the Honourable Robert Mongeon, J.S.C. of the Superior Court of Québec, District of Montreal, Commercial Division in file number 500-11-043844-121;

STAY the proceedings in Court file number 500-11-043844-121 pending the appeal;

THE WHOLE without costs, save in the discretion of the Court;

AND IN THE FINAL JUDGMENT, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present appeal;

REFORM the judgment rendered on January 24, 2014 by the Honourable Robert Mongeon, J.S.C.

DECLARE that the special payments owing and unpaid by BSI to the Respondents do not constitute a deemed trust;

SUBSIDIARILY, DECLARE that, if the special payments owing and unpaid by BSI to the Respondents do constitute a deemed trust, they do not have priority over the claims of the Mise en Cause or over other unsecured creditors;

RENDER any other order or declaration that the Court deems necessary, which may be sought by the Appellants at the direction of the Ontario Court:

THE WHOLE, without costs, save in the discretion of the Court.

Montreal, this 14th day of February, 2014

Blake, Cassels & Graydon

BLAKE, CASSELS & GRAYDON LLP
Counsel for (the Monitor in the name of and on behalf of) the Appellants

AFFIDAVIT

I, **Adam T. Spiro**, an attorney practicing at 600 de Maisonneuve Boulevard West, Suite 2200, Montreal, Quebec, H3A 3J2 affirm as follows:

1. I am one of the attorneys in the present file;

2. I have read the Appellant's Motion for Leave to Appeal and all the facts alleged therein not otherwise supported by the Schedules hereto are true.

AND I HAVE SIGNED:

ADAM T. SPIRO

SWORN TO BEFORE ME in Montreal
this 14th day of February 2014

Commissioner of Oaths

COMMISSAIRE À L'ASSERMENTATION
COMMISSIONER FOR OATHS
EDITH MESSIER
#80 049
POUR LE QUÉBEC / FOR QUEBEC

NOTICE OF PRESENTATION

TO: M[tre] Tina Hobday
Langlois Kronström Desjardins, LLP
1002 Sherbrooke Street West, 28th Floor
Montréal, Quebec H3A 3L6

Attorneys for the Respondents

M[tre] Charles Mercier
Fasken Martineau DuMoulin LLP
140 Grande Allée Est, Suite 800
Quebec City, Quebec G1R 5M8

Attorneys for the Mise en Cause

TAKE NOTICE that the present Motion for leave to appeal an interlocutory judgment will be presented for decision before the Court of Appeal on **April 11, 2014**, at 9:30 a.m., at 100 Notre-Dame Street East, Montreal, Quebec, H2Y 4B6, in room **RC-18**.

PLEASE GOVERN YOURSELF ACCORDINGLY.

Montreal, February 14, 2014

BLAKE, CASSELS & GRAYDON LLP
Counsel for the (the Monitor in the name of and on behalf of) the Appellants

8403452.3

COUR SUPÉRIEURE
(Chambre Commerciale)

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-11-043844-121

DATE : Le 24 janvier 2014

SOUS LA PRÉSIDENCE DE : L'HONORABLE ROBERT MONGEON, J.C.S.

DANS L'AFFAIRE DE LA LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES, L.R.C. (1985), c. C-36, EN SA VERSION MODIFIÉE ET DANS L'AFFAIRE D'UN PLAN DE TRANSACTION OU D'ARRANGEMENT DE :

TIMMINCO LIMITÉE
-et-
BÉCANCOUR SILICON INC.
Débitrices
-et-
FTI CONSULTING INC.
Contrôleur
-et-
Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium, Bécancour Inc.
-et-
Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc.
Requérants
c.
INVESTISSEMENT QUÉBEC
Intimée

JUGEMENT SUR DIRECTIVES ET JUGEMENT DÉCLARATOIRE TOUCHANT CERTAINES RÉCLAMATIONS PRIORITAIRES
(Articles 11 et 17 LACC)

JM1838

INTRODUCTION ET MISE EN SITUATION

[1] Bécancour Silicon Inc. ou, dans sa dénomination française, Silicium Bécancour Inc. (SBI) est une société filiale de Timminco Inc. (TI).

[2] SBI et TI sont sous la protection de la *Loi sur les arrangements avec les créanciers des compagnies L.R.C. (1985) c. c-36* telle qu'amendée (la LACC) depuis le 3 janvier 2012, suite à l'émission d'une ordonnance initiale prononcée par le juge Geoffrey Morawetz de la Cour supérieure de justice de l'Ontario.

[3] Par ordonnance subséquente rendue le 16 janvier 2012 (l'« Ordonnance de Suspension »)[1], tous les paiements d'équilibre devant être effectués par SBI en faveur de deux régimes de retraite à prestations déterminées au bénéfice de ses employés syndiqués[2] et non-syndiqués[3] ont été suspendus.

[4] Ces régimes sont régis d'une part par les contrats les constituant (P-1 et P-2) et par la *Loi sur les régimes complémentaires de retraite, LRQ c. R-15.1* telle qu'amendée (la LRCR). Il est admis que les cotisations d'exercice et d'équilibre ont été versées par l'employeur SBI jusqu'au 31 janvier 2012 et que les cotisations d'exercice ont été versées jusqu'à date.

[5] Les deux régimes de retraite P-1 et P-2 sont (ou sont sur le point de le devenir) en situation de terminaison de régime vu que ces deux régimes n'ont, à toutes fins pratiques, plus d'employés participants. De plus, ces régimes de retraite sont en situation de déficit actuariel de solvabilité.

[6] Au 31 décembre 2011, le déficit actuariel de solvabilité du régime des employés syndiqués était de 9 889 600,00$ (pièce P-3) tandis que celui des employés non-syndiqués était de 3 998 700,00$ (pièce P-4)[4].

[7] Pour effacer, du moins en partie, les déficits actuariels précités, SBI devait verser des cotisations d'équilibre de 93 810,00$ et de 41 710,00$ par mois dans les caisses des deux régimes précités (pièces P-3 et P-4). Ces cotisations d'équilibre sont suspendues depuis l'Ordonnance de Suspension précitée.

---

[1] Motifs écrits déposés le 2 février 2012.
[2] Pièce P-1.
[3] Pièce P-2.
[4] En date du 20 juillet 2012, les réclamations prioritaires des Comités de retraite totalisent 10 558 290,00$ et 4 296 220,00$ respectivement (pièces P-3, P-4, P-13 et P-14).

[8] Les Comités de retraite requérants sont d'avis que leurs réclamations précitées constituent des créances prioritaires prenant rang avant celle de l'Intimée Investissement Québec (IQ), qui détient une hypothèque universelle sans dépossession sur la totalité des biens meubles et immeubles de SBI et en vertu de laquelle elle a reçu un paiement de quelques 29 millions de dollars en remboursement de sa créance.

[9] L'objet du présent jugement porte sur le statut de ces réclamations prioritaires.

[10] Les deux Comités de retraite requérants prétendent que leurs réclamations prioritaires se doivent d'être reconnues comme telles par le Tribunal, prenant rang devant celle de IQ et dudit paiement de plus de 29 millions$ effectué par le Contrôleur en faveur de IQ dans le cadre d'un processus de liquidation des actifs de SBI effectué sous l'empire de la LACC.

[11] Les parties sont aussi d'accord pour stipuler que si les réclamations des requérants sont reconnues comme prioritaires en tout ou en partie, IQ devra rembourser lesdites réclamations pouvant aller jusqu'à 14.8 millions$ (sauf à parfaire) aux deux Comités de retraite selon leurs intérêts respectifs. Par contre, si le Tribunal vient à la conclusion que les réclamations en question ne sont pas prioritaires, IQ n'aura rien à rembourser. Un tel scénario ferait en sorte que, puisqu'il n'existe pas (ou très peu) de reliquat disponible pour rembourser les réclamations non-prioritaires, les caisses de retraite seraient privées de sommes importantes qui auront comme conséquence l'amputation des prestations de retraite des retraités pouvant aller jusqu'à hauteur de près de 40%. On réalise donc facilement l'importance de la question pour les retraités.

LA CHRONOLOGIE DES FAITS PERTINENTS

[12] Voici la chronologie des faits et des documents pertinents et nécessaires à une bonne compréhension des questions à résoudre et de la solution du présent litige:

a) 3 janvier 2012 : Première ordonnance du juge Morawetz visant la suspension de toutes les procédures de réclamation contre TI et sa filiale SBI, avec date effective à 0h01 le 3 janvier 2012;

b) 16 janvier 2012 : Ordonnance de Suspension des cotisations d'équilibre par TI et SBI. Le juge Morawetz était d'avis d'une part que les états financiers de TI et/ou de SBI ne leur permettaient pas d'assumer de telles obligations. De plus, le juge Morawetz a écrit (dans ses motifs déposés le 2 février 2012) :

> **[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) reflex, (2009) 57 C.B.R. (5th) 285 (Q.S.C.); *Collins & Aikman Automotive Canada Inc.* 2007 CanLII 45908**

(ON SC), (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc. (Re)* 2009 CanLII 39776 (ON SC), (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.

…

[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.

(soulignements ajoutés)

c) 13-14 juin 2012 : Vente de la quasi-totalité des actifs importants appartenant à SBI et à TI. Ces ventes avaient été préalablement approuvées par le juge Morawetz (pièce P-10). Les ventes d'actifs ont généré des liquidités de 30.8 millions$[5];

d) 17 août 2012 : Nomination d'un CRO (« Chief Restructuring Officer »);

e) 28 août 2012 : Remboursement du prêt (garanti par hypothèque sur l'universalité des biens de SBI) au montant de 25 millions$ plus certains intérêts accumulés (voir pièces P-11 et P-

[5] Rapport no. 13 du Contrôleur, pièce P-5, paragraphe 7.

16). Ce paiement a été fait sous réserve des droits des Comités de retraite requérants;

f) 7 septembre 2012 : Demandes de priorité des Comités de retraite requérants couvrant a) les deux déficits actuariels de solvabilité des deux régimes (9 889 600,00$ et 3 998 700,00$) sauf à parfaire et b) le solde des cotisations d'équilibre non versées pour les mois de décembre 2011 à juin 2012 (668 690,00$ et 297 520,00$), le tout selon la pièce P-17.

g) 18 octobre 2012 : Ordonnance du juge Morawetz, suite à une demande des parties (pièce P-19) visant à référer la requête des Comités de retraite à la Cour supérieure du Québec (pièce P-20). Les parties ont aussi convenu que la requête serait scindée, le tribunal québécois devant d'abord se prononcer sur les questions de droit avant de se prononcer dans un deuxième temps sur le quantum des réclamations, le cas échéant.

[13] Plus spécifiquement, la pièce P-20 reproduit l'ordonnance du juge Morawetz approuvant un « Priority Claim Adjudication Protocol » (« le Protocole ») aux termes duquel la Cour supérieure de l'Ontario demande à la Cour supérieure du Québec de déterminer si les réclamations des Comités de retraite requérants jouissent d'une priorité notamment sur la réclamation de IQ[6].

[14] Le Protocole stipule ce qui suit :

A. OVERVIEW

1. In accordance with the Reimbursement Agreement (the « Reimbursement Agreement ») among Investissement Québec (« IQ »), FTI

[6] Voir paragraphes 1 à 3 de l'ordonnance:

1. THIS COURT ORDERS that the Priority claim Adjudication Protocol, attached hereto as Schedule « A », be and the same is hereby authorized and approved.

2. THIS COURT ORDERS that the adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims, all as defined in the attached Priority Claim Adjudication Protocol, be and the same is hereby referred exclusively to the Superior Court of Québec (Commercial Division) to be determined in accordance with the Priority Claim Adjudication Protocol.

3. THIS COURT HEREBY REQUESTS the aid and recognition of the Superior Court of Québec (Commercial Division) to give effect to this order and to adjudicate whether the BSI Pension Reimbursement Claims constitute Priority Claims in accordance with the terms of the Priority Claims Adjudication Protocol.

Consulting Canada Inc., as court-appointed Monitor, and Bécancour Silicon Inc., dated August 28, 2012 and the August 28, 2012 Interim Distribution Order (the « Interim Distribution Order »), two (2) sets of claims have been designated as Reimbursement Claims, namely :

…

(ii) a claim by Le Comté de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively the « BSI Pension Committees ») (the « BSI Pension Reimbursement Claims »).

2. IQ disputes that the above Reimbursement Claims have priority over the IQ Security and the parties do not anticipate the dispute will be resolved through the consented resolution process provided for in the Interim Distribution Order. Accordingly, an adjudication is required to determine whether such Reimbursement Claims constitute Priority Claims.

The following is the protocol for the adjudication of whether the Reimbursement Claims constitute Priority Claims.

…

[15] La Requête des Comités de retraite pour directives et jugement déclaratoire touchant les réclamations prioritaires a donc été déposée le 17 décembre 2012. A la demande des parties, l'échéancier a été modifié et l'audition des questions de droit a été débattue les 27 et 28 mai 2013 devant le soussigné.

[16] Voici comment les Comités de retraite formulent les questions de droit :

49. La question en litige est de déterminer si les <u>réclamations des Comités de retraite ont priorité sur la créance d'Investissement Québec</u>. La question du statut des réclamations des Comités de retraite vis-à-vis les DIP Charges n'est pas une question en litige et a déjà été tranchée par le juge Morawetz (voir l'Ordonnance du 8 février 2012, Pièce P-9).

50. SBI a cessé de verser les cotisations d'équilibre suite à l'Ordonnance du 16 janvier 2012 qui les a suspendues. Au 23 juillet 2012, les cotisations d'équilibre (avec intérêts) accumulés mais non-versées pour les deux Régimes de retraite totalisaient environ 1 million de dollars (voir lettres du 20 juillet 2012, Pièce P-3 et Pièce P-4).

51. Les déficits de solvabilité (qui incluraient les cotisations d'équilibre non-versées) pour les deux Régimes de retraite au 31 décembre 2011 totalisaient environ 14 millions de dollars (voir lettres du 20 juillet 2012, Pièce P-3 et Pièce P-4) et seront cristallisés si la terminaison

des Régimes de retraite par la Régie des rentes du Québec est complétée.

52. <u>En vertu du droit québécois applicable à la question en litige, les montants réclamés par les Comités de retraite pour les cotisations d'équilibre et pour les déficits actuariels, sont réputés détenus en fiducie par l'employeur SBI en faveur des Régimes de retraite.</u>

53. <u>Il est évident que de telles fiducies réputées ont un rang prioritaire sur la réclamation garantie d'Investissement Québec.</u>

(soulignements ajoutés)

[17] Une fois que le Tribunal aura statué sur l'existence ou non d'une fiducie réputée affectant les créances des Comités de retraite, une seconde étape devra déterminer l'effet d'une telle fiducie réputée sur la créance hypothécaire de IQ.

[18] Les Comités requérants demandent donc au Tribunal de :

DÉCLARER comme étant des Réclamations prioritaires [Priority Claims] en vertu de la Convention de remboursement entérinée par l'Ordonnance du 28 août 2012 de la Cour supérieure de justice (Rôle commercial) de l'Ontario, les réclamations suivantes :

1. les cotisations d'équilibre non versées à la Caisse de retraite du Régime de rentes des employés syndiqués de Silicium Bécancour Inc.;

2. les cotisations d'équilibre non versées à la Caisse de retraite du Régime de rentes des employés non syndiqués de Silicium Bécancour Inc.;

3. le déficit actuariel de solvabilité du Régime de rentes des employés syndiqués de Silicium Bécancour Inc.; et

4. le déficit actuariel de solvabilité du Régime de rentes des employés non-syndiqués de Silicium Bécancour Inc.

PRENDRE ACTE du paragraphe C.2. du Protocole d'adjudication afin que les quantums des Réclamations prioritaires [Priority Claims] soient déterminés une fois que cette honorable Cour aura décidé sur la nature des réclamations, et soient déterminés selon l'Ordonnance du Processus de réclamation [Claims Procedure Order] ou selon une ordonnance de cette Cour.

PRENDRE ACTE du paragraphe 9 de l'Ordonnance du 28 août 2012 de la Cour supérieure de justice (Rôle commercial) de l'Ontario et de la Convention de remboursement à l'annexe « A » de celle-ci, en vertu de laquelle Investissement Québec remboursera les sommes déclarées par

cette Cour comme étant prioritaires, le cas échéant, à Silicium Bécancour Inc. par l'entremise du Contrôleur, FTI Consulting Inc., afin que Silicium Bécancour Inc. transmette ces sommes aux Requérants.

[19] Subsidiairement et à défaut de reconnaître que la LRCR crée une telle fiducie, les Comités de retraite demandent au Tribunal d'utiliser ses pouvoirs inhérents et/ou découlant de l'article 46 du Code de Procédure Civile du Québec pour conclure à l'existence d'une créance prioritaire en leur faveur.

[20] La question de savoir si l'article 49 LRCR crée une telle fiducie a déjà été abordée dans l'affaire *White Birch*[7] alors que le soussigné a répondu négativement à la question. Au surplus, ce jugement énonce que si elle existe, la fiducie réputée de l'article 49 LRC est affectée par l'application de la doctrine de la préséance des lois fédérales sur les lois provinciales lorsqu'il y a conflit entre ces deux régimes législatifs. Dans *White Birch*, il s'agissait de déterminer si la fiducie réputée de l'article 49 LRCR aurait eu priorité sur la créance super-prioritaire du prêteur « DIP » autorisée sous l'empire de la LACC.

[21] Les Comités de retraite requérants contestent cette analyse. Ils prétendent que la conclusion voulant que l'article 49 LRCR ne crée pas de fiducie réputée est mal fondée en droit. Ils reviennent donc à la charge mais avec certains arguments additionnels et reformulés qui méritent d'être examinés.

[22] Quant à la position de l'Intimée IQ, ses arguments suivent en tous points l'affaire White Birch précitée. Forte de cette décision, IQ prétend que la Requête des Comités de retraite n'a donc aucun fondement légal et doit être rejetée.

[23] Voyons, dans un premier temps et plus en détail la situation telle qu'elle se présentait dans l'affaire *White Birch* : alors que l'une des plus importantes papetières au Canada, est sous la protection de la LACC et qu'une ordonnance initiale suspend les cotisations d'équilibre payables par l'employeur à l'endroit de plusieurs régimes de retraite à prestations déterminées, une requête est déposée visant à ordonner à la débitrice de continuer à verser lesdites cotisations d'équilibre. Nous sommes au lendemain de la décision de la Cour d'appel de l'Ontario dans l'affaire *Indalex*[8], qui vient de reconnaître que ce genre d'obligation doit être honoré par les employeurs malgré la protection de la LACC, et ce, notamment, parce que ces sommes sont réputées être détenues en fiducie par les employeurs au bénéfice des Régimes de retraite concernés et que cette fiducie n'est pas affectée par le processus de restructuration de la LACC.

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[7] White Birch Paper Holding Co. (Arrangement relatif à) 2012 QCCS 1679.
[8] La décision de la Cour d'appel de l'Ontario est rapportée à 2011 ONCA 265.

[24] Dans l'affaire *White Birch*, les syndicats, comtés de retraite et regroupements de retraités requérants ont notamment plaidé que l'article 49 LRCR créait, en droit québécois, le même genre de fiducie que celle qui était créée aux termes de l'article 57 du *Pensions Benefit Act*[9] de l'Ontario. L'essentiel du jugement *White Birch* décide que l'article 49 LRCR ne crée pas de fiducie légale réputée selon le droit québécois. Partant de là, les cotisations d'équilibre ou encore les soldes des déficits actuariels des régimes de retraite ne jouissent d'aucune priorité par rapport aux autres dettes de l'employeur et ne constituent que des dettes chirographaires.

[25] Le présent recours, basé sur une trame factuelle quasi-identique, devrait donc à première vue suivre le même sort : en l'absence d'une fiducie opposable à IQ, la requête des Comités de retraite devrait donc être rejetée. Par contre, comme nous le verrons plus loin, les faits du présent dossier ne sont pas exactement les mêmes et certains arguments juridiques plaidés en l'instance ou soulevés par le Tribunal n'ont pas été abordés dans l'affaire *White Birch*.

LES ARGUMENTS DES PARTIES

[26] Les Comités de retraite soutiennent que même si la décision dans *White Birch* énonce et répond négativement à la question de savoir si l'article 49 LRCR crée une fiducie en droit québécois, il y a lieu de revoir l'ensemble de la question.

[27] Dans un premier temps, les Comités de retraite recherchent l'intervention du soussigné comme juge agissant sous l'autorité de la LACC afin que sa décision soit prise dans l'objectif général de cette loi et … « de permettre au débiteur de continuer d'exercer ses activités et, dans le cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. »[10]

[28] Toutefois, une question préliminaire se pose visant à déterminer si le soussigné agit à titre de juge superviseur du processus en vertu de la LACC ou s'il agit à titre de décideur délégué par le juge superviseur pour entendre et régler un différend entre deux créanciers qui prétendent avoir un droit prioritaire sur la créance de l'autre, à la lumière du contexte législatif du Québec.

[29] Le soussigné est d'avis qu'il n'agit pas à titre de juge superviseur mais à titre de décideur délégué, (analogue à un « Claims Officer ») désigné comme tel en vertu d'un Protocole de détermination de réclamations établi sous l'empire de la LACC.

[30] Les Comités de retraite plaident, dans un premier temps, que la LRCR est une loi d'intérêt public. Cela n'est pas contredit. Les principes énoncés en ce sens,

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[9] RSO 1990 c. P-8. A noter, cependant, qu'en Ontario, ce sont les déficits actuariels qui sont touchés par l'article 57(4) de ladite loi, tandis qu'au Québec, ce sont les cotisations qui sont visées par l'article 49 LRCR.

[10] *Century Services Inc. c. Canada* (Procureur Général) [2010] 3 R.C.S. 379, paragraphe [15].

notamment par le juge Pierre Dalphond dans l'arrêt *Hydro-Québec* [11] rendu par la Cour d'appel en 2005, sont tout à fait justes. Il en va de même pour ceux que l'on retrouve dans les affaires *Monsanto*[12] et *Buschau*.[13]

[31] Les Comités de retraite font aussi état du fait que, contrairement aux affaires *White Birch*[14] et *Indalex*,[15] le litige ne se situe pas entre un créancier de la débitrice et un prêteur « DIP » jouissant d'une super-priorité en vertu de la LACC. Ils ont raison et le soussigné n'entend pas faire bénéficier IQ d'une quelconque super-priorité découlant de la LACC. D'ailleurs, IQ n'en réclame aucune. IQ n'invoque que son statut de créancière garantie aux termes de son hypothèque universelle.

POSITION DES REQUÉRANTS SUR LA FIDUCIE RÉPUTÉE DE L'ARTICLE 49 LRCR

[32] L'existence d'une fiducie réputée créée par l'article 49 LRCR demeure le principal argument des Comités de retraite.

[33] Leur raisonnement est le suivant :

a) Tout d'abord, l'article 49 LRCR se lit comme suit :

> **« Jusqu'à leur versement à la caisse de retraite ou à l'assureur, les cotisations et les intérêts accumulés sont réputés détenus en fiducie par l'employeur, que ce dernier les ait ou non gardés séparément de ses biens. »**
>
> **(soulignements ajoutés)**

b) Cet article doit se lire avec l'article 1262 C.c.Q. qui se lit ainsi :

> **« La fiducie est établie par contrat, à titre onéreux ou gratuit, par testament ou, dans certains cas, par la loi. Elle peut aussi, lorsque la loi l'autorise, être établie par jugement. »**
>
> **(soulignements ajoutés)**

Donc, pour les requérants, le constituant de la fiducie de l'article 49 LRCR est l'employeur, le patrimoine fiduciaire est constitué des cotisations à être versées, le fiduciaire est la caisse de retraite concernée et le transfert des biens (ou les séparation des biens) est réputé exister selon les termes de l'article 49.

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[11] *APRHQ c. Hydro-Québec*, 2005 QCCA 304, paragraphe 32.
[12] *Monsanto c. Surintendant des services financiers* [2004] 3 RCS 152, paragraphe 38.
[13] *Buschau c. Rogers Communications Inc*. [2006] 1 RCS 973, paragraphe 19.
[14] 2012 QCCS 1679, paragraphes 216 et 217.
[15] 2013 CSC 6, paragraphes 58 et 59.

c) Étant donné que le Code civil du Québec prévoit à son article 1262 qu'une fiducie peut être établie, notamment par la loi, il s'ensuit toujours, selon les Comités requérants, que le simple texte de l'article 49 LRCR est suffisant pour constituer une véritable fiducie opposable aux créanciers de BSI, prioritaires ou non.

d) La thèse des Comités de retraite exclut l'application de l'article 1260 C.c.Q. à la fiducie créée par la loi. Voici ce qu'ils plaident dans leur plan d'argumentation aux paragraphes 54, 55 et 56 :

> **54. Il y a plusieurs formes de fiducies qui sont créées par différents moyens, tel qu'énoncé à l'article 1262 CCQ.**
>
> > **1262. La fiducie est établie par contrat, à titre onéreux ou gratuit, par testament ou, dans certains cas, par la loi. Elle peut aussi, lorsque la loi l'autorise, être établie par jugement.**
>
> **55. Si une fiducie est établie par contrat, l'article 1260 CCQ stipule que cette fiducie doit rencontrer certaines conditions formelles.**
>
> > **1260. La fiducie résulte d'un acte par lequel une personne, le constituant, transfère de son patrimoine à un autre patrimoine qu'il constitue, des biens qu'il affecte à une fin particulière et qu'un fiduciaire s'oblige, par le fait de son acceptation, à détenir et à administrer.**
>
> **56. L'article 1262 CCQ reconnaît aussi la fiducie établie par la loi. Afin que le législateur crée une telle fiducie, il le fait par législation sans que cette création n'ait à rencontrer les conditions formelles prévues à l'article 1260 CCQ. Le législateur a donc le pouvoir de créer des fiducies par voie d'une disposition statutaire de fiducies réputées. C'est exactement l'effet du texte de l'article 49 Loi RCR : cet article énonce que peu importe si les montants ont été gardés séparément ou non des biens de l'employeur, ils sont néanmoins réputés être détenus en fiducie dans un patrimoine d'affectation distinct pour le bénéfice des Comités de retraite de SBI.**
>
> **(soulignements ajoutés)**

e) Ainsi, pour les Requérants, l'article 1262 C.c.Q. permet la création d'une fiducie par le seul effet de la loi et la loi peut alors prévoir l'existence d'une fiducie valide même si les quatre conditions d'existence de la fiducie du *Code civil* prévues à l'article 1260 C.c.Q. ne sont pas remplies. Il suffit alors que la loi écarte spécifiquement l'une de ces conditions. Selon eux, c'est exactement ce que fait l'article 49 LRCR en éliminant la condition de l'article 1260 C.c.Q.

exigeant que les biens mis en fiducie soient séparés du patrimoine du constituant.

f) Plus encore, les Comités requérants prétendent que leur raisonnement correspond aux exigences de l'article 1261 C.c.Q. Ils plaident au paragraphe 57 de leur plan d'argumentation :

> **57. L'article 1261 s'applique à toutes formes de fiducies, incluant celles établies par la loi.**
>
> > **1261. Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d'affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire sur lequel aucun d'entre eux n'a de droit réel.**

g) Ainsi, les Comités requérants prétendent que les montants des cotisations d'équilibre, dues mais non versées, constituent un patrimoine d'affectation autonome et distinct de celui du constituant, sous le contrôle juridique d'un fiduciaire et réputé séparé des biens du constituant (l'employeur), même si ce patrimoine n'a pas été séparé des autres biens de ce même constituant.[16]

h) Ainsi, le concept de fiducie réputée suffit pour que les actifs de SBI soient grevés d'une charge fiduciaire prioritaire qui les soustrait des biens de l'employeur et du gage commun des créanciers de ce dernier.[17]

i) Pour conclure, les Comités requérants suggèrent que s'il fallait que l'article 49 LRCR se conforme aux conditions essentielles de l'article 1260 C.c.Q., l'article 49 LRCR n'aurait aucun effet, ce qui serait contraire au principe de base

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[16] Voir paragraphe 58, Plan d'Argumentation des Requérants.

[17] Voir : ; « *Loi sur les régimes complémentaires de retraite, Annotations et Commentaires* », Régie des rentes du Québec, Bibliothèque Nationale du Québec, 1998, p. 49-3 :

> « Par une fiction juridique ou présomption légale, le législateur considère que les cotisations à verser et les intérêts accumulés sont détenus en fiducie. Comme la fiducie constitue un patrimoine d'affectation distinct de celui de l'employeur, les biens réputés détenus en fiducie se trouvent donc soustraits des biens de l'employeur, lesquels constituent le gage commun de ses créanciers, conformément à l'article 2645 du *Code civil du Québec*.
> […]
> Ainsi le présent article pourrait être invoqué à l'encontre du créancier de l'employeur qui prend possession du compte bancaire ou des créances de ce dernier en vertu par exemple des articles 2721 ou 2773 du Code civil du Québec,
> […]

Voir aussi Lyne Duhaime : « *Les aspects juridiques des régimes de retraite* », Publications CCH Ltée, Brossard, 2011, p. 138 :

> « Jusqu'à leur versement à la caisse de retraite, les cotisations et les intérêts accumulés sont réputés détenus en fiducie par l'employeur, que ce dernier les ait ou non gardés séparément de ses biens. Ceci signifie que dans une situation d'insolvabilité ou de faillite, les cotisations et intérêts ainsi accumulés ne feraient pas partie du patrimoine de l'employeur et seraient donc à l'abri des réclamations des créanciers. »
>
> (soulignements ajoutés)

d'interprétation des lois voulant que le législateur ne parle pas pour ne rien dire et qu'il faut nécessairement donner un sens à un texte législatif clair. De plus, la LRCR étant une loi d'application spécifique, elle doit être interprétée comme ayant préséance sur une loi d'application générale telle que le Code civil du Québec.

POSITION DE IQ SUR LA FIDUCIE RÉPUTÉE DE L'ARTICLE 49 LRCR

[34] IQ reprend à son crédit les principes déjà énoncés dans les dossiers *AbitibiBowater*[18] et *White Birch*[19].

[35] IQ insiste plus particulièrement sur le fait que toute fiducie établie par la loi, tel que le prévoit l'article 1262 C.c.Q., doit se conformer à toutes les exigences de l'article 1260 C.c.Q. Citant notamment l'auteur Jacques Beaulne[20], IQ souligne que les quatre éléments de l'article 1260 C.c.Q. doivent être rencontrés, soit :

a) le transfert d'un bien du patrimoine du constituant

b) à un autre patrimoine;

c) dont les biens sont affectés à une fin particulière;

d) qu'un fiduciaire s'oblige à détenir et à administrer.

[36] Citant les affaires *Banque de Nouvelle-Écosse c. Thibault*[21] et *White Birch*[22], IQ rappelle que (par la juge Deschamps dans *Thibault*) :

> **… « le modèle de la fiducie ne peut être travesti pour incorporer des contrats où le constituant conserve tous les droits sur le patrimoine. Je conclus donc que le Régime n'a pas les caractéristiques d'une fiducie. »**

et que (par le soussigné dans White Birch) :

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[18] *AbitibiBowater (Arrangement relatif à*) 2009, QCCS 2028, juge Danièle Mayrand, j.c.s. qui écrit :

> [34] (…) D'ailleurs, la Cour d'appel de l'Ontario, dans l'affaire *Ivaco*, alors qu'elle décide de la portée de l'article 57(3) du *Pension Benefit Act* (dont les termes sont au même effet que ceux de l'article 49 LRCR), mentionne ce qui suit à l'égard des fiducies présumées (Deemed Trust);
>
> (…)
>
> « This Legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account, it must legislate that separation. It has not done so. » »

[19] *White Birch Paper Holding Company (Arrangement relatif à)* 2012 QCCS 1679, pages 43 et 44.

[20] Beaulne, Jacques*, Droit des fiducies*, 2e édition. Collection Bleue, Montréal, 2005, page 129.
Voir aussi au même effet : Commentaires du Ministre de la justice, tome 1, le Code civil du Québec, art. 1260, page 748; Duhaime Lyne, op.cit. page 15; Claxton, John B. *Langage du droit de la fiducie*, Revue du Barreau EYB2002, RDB64, pages 6 à 8.

[21] [2004] 1 RCS 758, page 22, paragraphe 41. Il faut spécifier ici qu'il ne s'agissait pas d'une fiducie présumée ou créée par une loi mais d'un régime contractuel d'épargne enregistré de retraite.

[22] 2012 QCCS 1679, page 56, paragraphe 169.

> **« La comparaison dans la situation qui nous occupe est flagrante : ici, White Birch ne se départit de rien. Elle garde l'entier contrôle sur les biens censés faire partie d'une fiducie et ne crée aucun patrimoine d'affectation. »**

[37] IQ soutient donc que, SBI ne s'étant jamais départie de certains actifs en vue de constituer un patrimoine distinct, il ne peut y avoir de fiducie réelle applicable en l'espèce[23].

[38] Avant de poursuivre plus loin, il est nécessaire d'établir ce sur quoi porte l'article 49 LRCR.

[39] L'article 49 LRCR date de la promulgation de la loi, soit depuis 1989.

[40] A l'époque, les nouvelles dispositions du *Code civil du Québec* n'existaient pas. La notion de fiducie telle qu'elle se retrouvait au *Code civil du Bas-Canada* n'avait rien d'équivalent ni de comparable au droit actuel.

[41] Par contre, le genre de disposition que l'on retrouve à l'article 49 LRCR se retrouvait déjà dans plusieurs lois fiscales québécoises. La notion de « fiducie présumée » « ou de fiducie réputée » n'était pas inconnue.

[42] Mais d'abord, il faut déterminer ce sur quoi porterait cette fiducie réputée, pour autant qu'elle existe et qu'elle soit opposable à IQ.

[43] Voyons, dans un premier temps, les dispositions pertinentes de la LRCR, reprises par les parties dans leurs positions respectives. Au fur et à mesure de leur citation, certains commentaires liminaires s'avéreront nécessaires.

LES DISPOSITIONS LÉGISLATIVES PERTINENTES DE LA LRCR

[44] La notion de régime de retraite est énoncée à l'article 6 LRCR :

> **Un régime de retraite est un contrat en vertu duquel le participant bénéficie d'une prestation de retraite dans des conditions et à compter d'un âge donnés, dont le financement est assuré par des cotisations à la charge soit de l'employeur seul, soit de l'employeur et du participant.**
>
> **À moins qu'il ne soit garanti, tout régime de retraite doit avoir une caisse de retraite où sont notamment versés les cotisations ainsi que les revenus qui en résultent. Cette caisse constitue un patrimoine fiduciaire affecté principalement au versement des remboursements et prestations auxquels ont droit les participants et bénéficiaires.**

[23] Voir notamment *White Birch Paper Holding Company (Arrangement relatif à*) 2012 QCCS 1679, aux paragraphes 173, 174, 189 et 191 cités par QI dans son Plan d'Argumentation, pages 11 et 12, paragraphes 67 et 68.

[45] Voici, selon IQ, une fiducie parfaite et complète, créée par la loi et qui respecte en tous points les dispositions de l'article 1260 C.c.Q. Cette fiducie légale est d'ailleurs citée en exemple comme un modèle du genre.

[46] Cet article crée une caisse de retraite, donc un patrimoine fiduciaire séparé des actifs de l'employeur (le constituant), un apport fiduciaire (les cotisations), sous la responsabilité de fiduciaires (les dirigeants de la caisse)[24].

[47] Les articles 7, 8 et 9 LRCR[25] distinguent entre les régimes à prestation déterminée, à cotisations déterminées, garantis ou non-garantis.

[48] Dans le cas qui nous occupe, les régimes sont non-garantis et à prestations déterminées.

[49] Les articles 37 à 52 LRCR établissent la nature des diverses cotisations, l'obligation de les verser à la caisse de retraite ainsi que les modalités de perception et de versement de ces mêmes cotisations aux régimes de retraite concernés. Il n'y a pas lieu de reproduire ces articles, toutes les parties s'entendent pour reconnaître que :

a) la *cotisation salariale* est la quote-part du participant alors que la *cotisation patronale* est constituée de la quote-part de l'employeur (article 37 LRCR) ;

b) la *cotisation d'exercice* est la somme que l'employeur doit verser au régime et qui représente la totalité des prestations prévues aux régimes de retraite au titre des services effectués. Il s'agit normalement de la

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[24] Voir aussi les articles 14 à 18 LRCR qui détaillent toutes les composantes d'un régime de retraite.

[25] 7. Le régime de retraite est à cotisation déterminée s'il détermine à l'avance les cotisations patronales et, le cas échéant, les cotisations salariales, ou la méthode pour les calculer, et si la rente normale est fonction des sommes portées au compte du participant.

Il est à prestations déterminées si la rente normale est soit un montant déterminé, indépendant de la rémunération du participant, soit un montant qui correspond à un pourcentage de cette rémunération.

Il est à cotisation et prestations déterminées s'il détermine à l'avance les cotisations patronales et, le cas échéant, les cotisations salariales, ainsi que la rente normale, ou la méthode pour les calculer.

8. Le régime de retraite est contributif si le participant y verse des cotisations salariales.

9. Est garanti le régime de retraite dont les remboursements et prestations sont à tout moment garantis par un assureur.

totalité des cotisations salariales et patronales couvrant une période donnée (article 38 LRCR)[26].

Précisons tout de suite que ces trois types de cotisatons ne sont pas ici en litige. Elles ont toutes été perçues et versées aux caisses de retraite requérants.

c) L'article 39 LRCR établit un autre type de cotisation : c'est la *cotisation d'équilibre*. Cette cotisation vise à compenser, selon certaines modalités déterminées par les actuaires du régime, les déficits actuariels de capitalisation et/ou de solvabilité du régime, rendues nécessaires par la fluctuation de l'actif de la caisse de retraite et l'ensemble des obligations de cette même caisse face à ses participants et retraités.

[50] Ce sont les cotisations d'équilibre de l'employeur SBI qui sont ici en jeu.

[51] Tel qu'indiqué ci-haut, tous s'entendent pour soutenir que les « cotisations » versées ou à être versées par l'employeur regroupent l'ensemble des cotisations salariales qu'il a perçues de ses employés participants, de sa cotisation patronale, ces deux éléments constituant la cotisation d'exercice, à laquelle la cotisation d'équilibre vient s'ajouter lorsque celle-ci est nécessaire.

[52] Vient alors l'article 49 LRCR qui stipule que les « cotisations » sont réputées détenues en fiducie par l'employeur que ce dernier les ait gardées ou non séparément de ses biens.

[53] Il est donc acquis que les cotisations d'équilibre sont touchées par l'application de l'article 49 LRCR. On ne saurait conclure que seules les cotisations perçues ou déduites par l'employeur sont visées par cet article.

[54] Si l'article 49 LRCR crée une véritable fiducie opposable à IQ, il faut donc conclure que les cotisations d'équilibre non versées depuis l'ordonnance du juge Morawetz les suspendant seront visées par cette fiducie.

LES ARGUMENTS ADDITIONNELS DES CAISSES DE RETRAITE

[55] Les Comités de retraite ajoutent que les autres dispositions de la LRCR pouvant trouver application sont les articles 228 et 264 LRCR.

[56] Les Comités de retraite plaident en effet que non seulement les cotisations d'équilibre sont couvertes par la fiducie réputée de l'article 49 LRCR mais aussi que les soldes des déficits actuariels sont aussi couverts. Or, cet argument additionnel ne peut résister longuement à l'analyse. L'article 228 LRCR affirme plutôt que :

[26] Voir aussi les articles 138 et 139 LRCR qui déterminent le calcul de la cotisation d'exercice.

> **228. Constitue une dette de l'employeur le manque d'actif nécessaire à l'acquittement des droits des participants ou bénéficiaires visés par le retrait d'un employeur partie à un régime interentreprises ou par la terminaison d'un régime de retraite. Ce manque d'actif doit être établi à la date de la terminaison.**
>
> **Si l'employeur a, à la date de la terminaison, omis de verser des cotisations à la caisse de retraite ou, selon le cas, à l'assureur, cette dette est l'excédent du manque d'actif sur ces cotisations.**
>
> **Dans le cas d'un régime interentreprises, le présent article s'applique à chaque employeur partie au régime et auquel se rapporte un groupe de droits formé en application de la sous-section 3 et composé des droits de participants ou bénéficiaires visé par le retrait ou la terminaison.**
>
> **(soulignements ajoutés)**

[57] Cet article fait partie du chapitre XIII de la LRCR qui traite de la liquidation des droits des participants et des bénéficiaires[27]. Ce chapitre traite aussi de la terminaison d'un régime lorsqu'il n'y a plus de participant actif[28].

[58] Un processus de liquidation est alors mis en branle[29] et lorsque l'actif du régime s'avère insuffisant, l'article 228 s'applique : l'employeur est donc endetté envers le régime. Cette dette ne constitue pas une cotisation. D'ailleurs, nulle part dans les dispositions de la LRCR définissant ce qu'est une cotisation ne peut-on trouver une quelconque référence permettant de conclure que les soldes des déficits actuariels sont visés par l'article 49 LRCR.

[59] Il semble donc clair que la fiducie réputée de l'article 49 LRCR ne peut s'appliquer qu'aux « *cotisations* » visées par cet article et non aux soldes des déficits actuariels. D'ailleurs, le remboursement de ces soldes est régi par une série de règles particulières.[30]

[60] Finalement, les Comités de retraite requérants invoquent l'article 264 LRCR qui se lit ainsi :

> **264. Sauf dispositions contraires de la loi, est incessible et insaisissable:**
>
> **1° toute cotisation versée ou qui doit être versée à la caisse de retraite ou à l'assureur, ainsi que les intérêts accumulés;**
>
> **2° toute somme remboursée ou toute prestation versée en vertu d'un régime de retraite ou de la présente loi;**

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[27] Articles 198 ss. LRCR.
[28] Article 205(3e) LRCR.
[29] Articles 208 ss. LRCR.
[30] Articles 229-230 et 230.0.01 à 230.0.012.

> **3° toute somme attribuée au conjoint du participant à la suite d'un partage ou d'une autre cession de droits visés au chapitre VIII, avec les intérêts accumulés, ainsi que les prestations constituées avec ces sommes.**
>
> **Sauf dans la mesure où elles proviennent de cotisations volontaires ou représentent une part d'excédent d'actif attribuée après la terminaison d'un régime de retraite, l'incessibilité et l'insaisissabilité valent également à l'égard des sommes susmentionnées qui ont fait l'objet d'un transfert dans un régime de retraite visé à l'article 98, avec les intérêts accumulés, de tout remboursement de ces sommes et de toute prestation en résultant, ainsi qu'à l'égard de la rente ou du paiement ayant remplacé une rente en application de l'article 92.**
>
> **(soulignements ajoutés)**

[61] Les Comités requérants plaident que la notion d'incessibilité et d'insaisissabilité des « *cotisations versées ou à être versées à la caisse de retraite* » vient renforcer leur argument que ces mêmes *cotisations* sont assujetties à la fiducie réputée de l'article 49 LRCR. Inversement, si les cotisations dues mais non versées font l'objet d'une fiducie réputée, l'article 264 LRCR doit alors s'appliquer à celles-ci et les rendre incessibles et insaisissables. Ainsi, il serait impossible pour l'employeur et ses créanciers d'avoir un quelconque accès aux sommes représentant ou pouvant représenter une cotisation « *à être versée* » à la caisse de retraite. Par l'effet combiné des articles 49 et 264 LRCR, les cotisations d'équilibre non versées et les intérêts y afférant constitueraient des créances prioritaires à celle de IQ.

[62] La position de IQ est de soutenir que cet article ne peut s'adresser qu'aux sommes qui ont été clairement identifiées comme des cotisations et qui ont été clairement séparées du reste du patrimoine de l'employeur. Par exemple, si l'employeur ouvre un compte séparé dans lequel il dépose les cotisations qui seront versées à la caisse de retraite, ces sommes sont alors insaisissables et incessibles. Pour IQ, l'article 264 LRCR ne peut s'appliquer que s'il y a séparation de patrimoines.

[63] Sinon, sur le plan pratique, à chaque fois qu'un employeur paie une somme d'argent à un créancier, ce dernier devrait alors s'assurer (ou l'employeur devrait être en mesure de lui démontrer) que toutes les cotisations à être versées à la caisse de retraite sont payées, et que le déficit actuariel est adéquatement couvert sous peine de voir ces montants réclamés par le Comité de retraite concerné, comme c'est le cas en l'espèce.

[64] Cela ne ferait, selon IQ, aucun sens.

[65] Il s'ensuivrait que tout employeur ne pourrait jamais être certain qu'il a payé valablement une dette à un tiers, lorsqu'il serait, par exemple, en retard de paiement

sur l'une ou l'autre de ses cotisations ou encore que le ou les régimes de retraite de ses employés soient adéquatement pourvus de manière à éviter tout risque de déficit.

[66] Pour IQ, la portée de cet article serait donc de rendre incessible ou insaisissable toute cotisation identifiée comme telle qui aura fait l'objet d'une séparation physique du patrimoine de l'employeur en vue d'effectuer un paiement à une caisse de retraite.

LES DISPOSITIONS DU *CODE CIVIL DU QUEBEC* EN MATIERE DE FIDUCIES

[67] Depuis 1994, le droit des fiducies au Québec a subi une transformation complète.

[68] Toutes les fiducies de droit québécois sont dorénavant assujetties aux règles édictées par les articles 1260 et suivants C.c.Q.

[69] Il n'est définitivement plus question au Québec de reconnaître autre chose que la fiducie du Code civil. Les fiducies de droit anglo-saxon ou dérivant de la Common Law en vigueur dans les autres provinces canadiennes n'ont donc pas d'existence légale.

[70] Le Code civil est une loi d'application générale de par son importance, de la multitude des sujets qu'elle couvre et du fait que l'on y retrouve l'ensemble des dispositions gouvernant notre droit civil et notre droit privé. Par contre, les Régimes de retraite requérants soutiennent que la LRCR est une loi spécifique dont les dispositions doivent l'emporter sur une loi d'application générale.

[71] La question se pose différemment lorsqu'un chapitre entier consacré à un concept comme la fiducie est inséré au Code civil. On ne peut, selon IQ, du simple fait que ce chapitre est inséré au *Code civil*, conclure que les dispositions particulières en matière de fiducie perdent leur statut de loi particulière au point de prétendre que les dispositions de la LRCR, elles, auraient préséance sur les articles 1260 et suivants du *Code civil*.

[72] Les articles pertinents du *Code civil* sont les suivants :

> **1260. La fiducie résulte d'un acte par lequel une personne, le constituant, transfère de son patrimoine à un autre patrimoine qu'il constitue, des biens qu'il affecte à une fin particulière et qu'un fiduciaire s'oblige, par le fait de son acceptation, à détenir et à administrer.**
>
> **(soulignements ajoutés)**

[73] Cet article, comme nous l'avons vu, détermine les composantes essentielles d'une fiducie de droit québécois :

- l'existence d'un constituant;
- la nécessité d'un transfert de son patrimoine à un autre patrimoine;
- des biens spécifiques;
- affectés à une fin particulière.

[74] L'article 1261 édicte ce qui suit :

> **1261. Le patrimoine fiduciaire, formé des biens transférés en fiducie, constitue un patrimoine d'affectation autonome et distinct de celui du constituant, du fiduciaire ou du bénéficiaire, sur lequel aucun d'entre eux n'a de droit réel.**
>
> **(soulignements ajoutés)**

[75] Il faut donc, selon cette façon de voir, qu'il y ait transfert complet des sommes ou des biens pour constituer un patrimoine autonome et distinct de celui du constituant, du fiduciaire et du bénéficiaire et que ni l'un ni l'autre d'entre eux ne puisse y faire valoir un quelconque droit réel.

[76] L'article 1262 C.c.Q. énonce les modes d'établissement d'une fiducie :

> **1262. La fiducie est établie par contrat, à titre onéreux ou gratuit, par testament ou, dans certains cas, par la loi. Elle peut aussi, lorsque la loi l'autorise, être établie par jugement.**
>
> **(soulignements ajoutés)**

[77] Si la loi permet la création d'une fiducie selon l'article 1262 C.c.Q., la loi peut-elle déroger aux critères de l'article 1260 C.c.Q.?

[78] L'article 1263 C.c.Q. se lit ainsi :

> **1263. La fiducie établie par contrat à titre onéreux peut avoir pour objet de garantir l'exécution d'une obligation. En ce cas, la fiducie doit, pour être opposable aux tiers, être publiée au registre des droits personnels et réels mobiliers ou au registre foncier, selon la nature mobilière ou immobilière des biens transférés en fiducie.**
>
> **Le fiduciaire est, en cas de défaut du constituant, assujetti aux règles relatives à l'exercice des droits hypothécaires énoncées au livre Des priorités et des hypothèques**.

[79] Il est intéressant de noter ici que pour être opposable aux tiers (ici, IQ est un tiers), la fiducie contractuelle doit être publiée au RDPRM ou au registre foncier. Une

fiducie créée par la loi opposable au tiers ne semble pas requérir un tel élément même si la fiducie a pour objet de garantir le paiement d'une cotisation par l'employeur à un régime de retraite.

[80] De ce qui précède, le Tribunal conclut que si l'article 49 LRCR crée une véritable fiducie réputée opposable à IQ :

a) cette fiducie réputée s'appliquera à toutes les cotisations non versées aux Comités de retraite requérants;

b) plus spécifiquement, elle s'appliquera aux cotisations d'équilibre ayant fait l'objet de l'Ordonnance de Suspension émise par le juge Morawetz;

c) par contre, cette fiducie réputée ne s'appliquera qu'aux cotisations et non aux soldes déficits actuariels qui, eux, sont des dettes de l'employeur conformément aux dispositions de l'article 228 LRCR.

d) l'article 264 LRCR pourra s'appliquer aussi aux cotisations non versées aux Comités de retraite et non aux soldes des déficits actuariels.

[81] Il reste à déterminer

a) si l'article 49 LRCR crée une fiducie réputée opposable à IQ; et

b) si oui, les biens visés par une telle fiducie réputée sont incessibles et insaisissables et, partant de là, s'ils sont exclus de la garantie hypothécaire dont bénéficie IQ.

ANALYSE

a) La fiducie réputée de l'article 49 LRCR

[82] Pour les motifs qui suivent et malgré l'analyse du soussigné dans l'affaire *White Birch*, force est de conclure que l'article 49 LRCR crée une fiducie réputée opposable à la créance de IQ. Toutefois, le présent dossier touche une question différente des affaires *White Birch* et *Indalex*. Dans ces deux dossiers, il s'agissait de décider si les contributions d'équilibre ou les soldes des déficits actuariels des régimes de retraite avaient préséance sur la créance du prêteur « DIP », elle-même protégée par une super-priorité en vertu de la LACC, et ce, alors que la loi provinciale entrevoyait l'existence d'une fiducie réputée applicable aux cotisations ou soldes actuariels en question, selon le cas.

[83] La présente instance porte sur la priorité des créances de deux créanciers qui ne bénéficient pas de super-priorités alors que la débitrice SBI est au stade de rembourser ses créanciers selon leur priorités respectives établies par le droit québécois. Il s'agit donc de décider si, aux termes du droit québécois, l'ordre de

priorité attaché à chacune de ces créances fait en sorte que les Comités de retraite peuvent se réclamer d'un rang prioritaire à celui de lQ.

[84] Ainsi, même si l'on doit conclure à l'existence d'une fiducie créée par la loi en vertu de l'article 49 LRCR, une telle conclusion, si elle avait été retenue dans *White Birch* n'aurait pas eu d'impact sur la finalité de ce débat car la question était toute autre.

[85] En effet, la conclusion finale retenue dans *White Birch* demeure la même car la doctrine de la préséance du droit fédéral fait en sorte que la fiducie de l'article 49 LRCR, si elle avait été retenue, ne lui aurait pas donné priorité de rang sur la créance super-prioritaire du prêteur DIP.[31]

[86] La question des fiducies réputées en droit québécois a donné lieu à plusieurs décisions au cours des quelques 20 dernières années, surtout en matière fiscale et presqu'exclusivement dans un contexte de faillite. Cependant, même si la fiducie réputée de l'article 49 LRCR s'inscrit dans un contexte fort différent, la façon dont nos tribunaux ont analysé la fiducie réputée en matière fiscale nous permet de comprendre comment l'on doit s'y prendre pour analyser celle que nous suggère l'article 49 LRCR.

[87] Il faut remonter à l'affaire *Nolisair*[32] alors que la Cour d'appel renversait un jugement du juge Roland Durand du 16 octobre 1994[33]. Le fond du litige portait sur la fiducie présumée dont se réclamait alors le Ministère du revenu et qui avait déposé une preuve de réclamation prioritaire couvrant l'ensemble des actifs de la débitrice. Le syndic a rejeté cette réclamation, alléguant l'absence d'une telle fiducie au motif que *Nolisair* n'avait pas gardé les retenues à la source perçues de ses employés dans un compte séparé de son patrimoine. Le SMRQ objectait que l'article 20 de la *Loi sur le Ministère du revenu*[34] (la LMRQ) créait une telle fiducie présumée.

[88] Le juge Durand a décidé en première instance que l'article 20 LMRQ ne créait pas de fiducie au sens de l'article 67(3) de la *Loi sur la faillite et l'insolvabilité.*

[89] Parallèlement à l'affaire *Nolisair,* le juge Roger Banford décidait dans l'affaire *Sécurité Saglac (1992) Inc. c. Sous-ministre du revenu du Québec*[35] que ce même article 20 créait une fiducie présumée.

[90] Les deux dossiers ont été entendus en même temps par la Cour d'appel et ont fait l'objet de deux jugements séparés, l'un accueillant l'appel formé à l'endroit du

[31] Voir *Century Services* précité.
[32] Re : Faillite de *Nolisair International Inc. c. Le Sous-ministre du revenu du Québec* (1997) AZ 97011738 (C.A.).
[33] 700-11-000069-932 (C.S. St-Jérôme) AZ-94021150.
[34] *LRQ c. M-31*.
[35] C.S. Chicoutimi, no. 150-11-000012-930.

jugement du juge Durand[36] et l'autre rejetant l'appel formé à l'endroit de celui du juge Banford[37].

[91] La Cour d'appel, à deux juges contre un, a alors reconnu l'existence d'une fiducie réputée créée par l'article 20 LMRQ qui se lisait alors ainsi :

> **20. Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour Sa Majesté aux droits du Québec.**
>
> **Un tel montant doit être tenu, par la personne qui l'a déduit, retenu ou perçu, distinctement et séparément de ses propres fonds et dans les cas d'une liquidation, cession ou faillite, un montant égal au montant ainsi déduit, retenu ou perçu doit être considéré comme formant un fonds séparé ne faisant pas partie des biens sujets à la liquidation, cession ou faillite.**
>
> **Toutefois, cette personne peut, lors de la production au ministre d'une déclaration en vertu des articles 468 ou 470 de la *Loi sur la taxe de vente au Québec* et modifiant certaines dispositions législatives d'ordre fiscal (*1991 c. 67*) retirer du total des fonds tenus séparément et distinctement de ses propres fonds, les montants qu'elle a droit de déduire et qu'elle a effectivement déduits dans le calcul de son montant à remettre.**

[92] On aura remarqué , et c'est là l'intérêt de la chose, que ce texte vise des montants « déduits, retenus ou perçus » par une personne à des fins fiscales et non des montants dus par cette même personne. Somme toute, les sommes ici visées sont des sommes qui n'appartiennent pas et qui n'ont jamais appartenu à la personne en question.

[93] On aura aussi remarqué que l'article 20 LMRQ, tel qu'il existait alors, ne contenait pas les mots qui y seront ajoutés quelques mois plus tard et qui se liront, après l'amendement en question[38] :

> **« … que ce montant ait été ou non, dans les faits tenu séparé des éléments du patrimoine de cette personne ou de ses propres fonds. »**

[94] C'est d'ailleurs à cause de l'absence de ces mots que le juge Durand refusera de reconnaître la fiducie réputée de l'article 20 LMRQ. On remarquera, cependant, la présence de ces mêmes mots dans l'article 49 LRCR.

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[36] 1997 CanLii 10022 (QC.CA); 1

[37] 1997 Canlii 10026 (QC.CA).

[38] Article 39, *Loi* modifiant la *Loi concernant l'Impôt sur le tabac*, la *Loi sur le Ministère du Revenu* et d'autres dispositions législatives d'ordre fiscal L.Q. *1993 c. 79* sanctionnée le 17 décembre 1993 et applicable à toute faillite, liquidation ou cession survenue après le 23 avril 1993.

[95] Malgré le bénéfice de cet amendement, les juges Bamford (dans l'affaire *Sécurité Saglac*) en première instance et Chamberland en Cour d'appel, se basant sur une analyse des mots … « *un montant égal au montant ainsi déduit, retenu ou perçu doit être considéré comme formant un fonds séparé* »… du deuxième alinéa de l'article 20 LMRQ ont décidé que le texte était suffisant pour que cet article puisse créer une fiducie réputée créée par la loi. Le juge Chamberlalnd conclut en ces termes[39] :

> **La fiducie réputée**
>
> **Aux fins de cette opinion, j'entends par «fiducie réputée» la fiducie qui n'existe que parce que le législateur, provincial ou fédéral, dit qu'elle existe, alors que, dans les faits, elle ne revêt pas tous les attributs d'une fiducie. L'existence de la fiducie dépend de la présence conjuguée de trois certitudes: 1) certitude quant à l'intention du constituant de créer une fiducie, 2) certitude quant à l'identité du bénéficiaire de la fiducie, et enfin, 3) certitude quant aux biens assujettis à la fiducie, en ce sens que ces biens doivent être conservés par le fiduciaire de façon autonome et distincte de son patrimoine (L.W. HOULDEN et C.H. MORAWETZ, Bankruptcy and Insolvency Law of Canada, 3rd Ed., mis à jour 1996 (No 7), aux pages 3-17 à 3-30, chapitre intitulé «Trust Property»).**
>
> **…**
>
> **La fiducie réputée est l'un «des moyens auxquels les législateurs ont souvent recours pour recouvrer des sommes qui auraient dû leur être versées, mais qui ont été illégalement détournées par un débiteur qui a, par la suite, éprouvé des difficultés financières et s'est vu forcé de liquider son entreprise» (Banque Royale c. Sparrow Electric Corp., 1997 CanLII 377 (CSC), [1997] 1 R.C.S. 411, le juge Gonthier, à la page 435).**
>
> **Revenant à la première question soulevée par ce litige, il s'agit donc de décider si l'article 20 de la LMRevenu Québec crée une fiducie réputée.**
>
> **L'appelant plaide que non parce que certains mots, à son avis essentiels à la création d'une fiducie réputée - et que l'on retrouve, par exemple, au paragraphe 5 de l'article 227 de la LIR fédérale - ne s'y trouvent pas. En somme, en l'absence des mots «que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne ou des éléments du patrimoine», l'article 20 de la LMRevenu Québec ne créerait pas de fiducie réputée; il ne ferait que confirmer l'existence d'une fiducie réelle, opposable à la masse des créanciers que dans la mesure où les**

[39] Opinion du juge Chamberland dans *Sécurité Saglac*.

sommes déduites ont été réellement détenues à part par le débiteur, ce qui n'est pas le cas en l'espèce.

Je ne partage pas ce point de vue.

…

De fait, le texte de l'article 20 est bien différent de celui que la Cour supérieure étudiait, en 1977, dans l'affaire Joe's Steak House, précitée. Le législateur y a ajouté des mots -«un montant égal au montant ainsi déduit, retenu ou perçu» - qui ont, à mon avis, le même effet - la création d'une fiducie réputée - même si les mots «que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne ou des éléments du patrimoine», utilisés au paragraphe 227(5) de la LIR fédérale ne s'y trouvent pas.

Comparons les textes de l'article 20 à l'époque de l'affaire Joe's Steak House, précitée, (en 1979) et durant la période en litige (en 1992):

Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour Sa Majesté aux droits du Québec.	**Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour Sa Majesté aux droits du Québec.**
Un tel montant doit être tenu par la personne qui l'a déduit, retenu ou perçu distinctement et séparément de ses propres fonds et dans les cas d'une liquidation, cession ou faillite, doit être considéré comme formant un fonds séparé ne faisant pas partie des biens sujets à la liquidation, cession ou faillite.	**Un tel montant doit être tenu, par la personne qui l'a déduit, retenu ou perçu, distinctement et séparément de ses propres fonds et dans les cas d'une liquidation, cession ou faillite, un montant égal au montant ainsi déduit, retenu ou perçu doit être considéré comme formant un fonds séparé ne faisant pas partie des biens sujets à la liquidation, cession ou faillite.**
	[...]
	(soulignements ajoutés)

> **Le premier paragraphe est identique; le législateur y prévoit expressément, en utilisant les mots «est réputée», qu'une personne qui a déduit, retenu ou perçu un montant en vertu d'une loi fiscale détient ce montant en fiducie et que Sa Majesté aux droits du Québec est la bénéficiaire de cette fiducie. Le début du deuxième paragraphe est également identique; le législateur y crée l'obligation pour la personne visée de tenir le montant ainsi déduit, retenu ou perçu «distinctement et séparément de ses propres fonds». Si tel est le cas, il y a fiducie réelle et, advenant faillite, ces montants constituent des «biens détenus par le failli en fiducie pour toute autre personne», au sens de l'alinéa 67(1)(a) de la Loi FI, et ils ne sont pas compris dans les biens du failli.**
>
> **La seconde partie du deuxième paragraphe a été modifiée par l'ajout des mots «un montant égal au montant ainsi déduit, retenu ou perçu [...]».[2] L'ajout de ces mots ne s'explique, à mon avis, que par la volonté du législateur de créer une fiducie réputée et de la distinguer de la fiducie réelle en éliminant expressément la nécessité de respecter la troisième des conditions essentielles à l'existence d'une fiducie, soit le fait pour le fiduciaire de conserver les biens affectés à la fiducie séparément et distinctement de son patrimoine. En effet, les mots «un montant égal au montant ainsi déduit, retenu ou perçu» sont inutiles dans le contexte où le failli tient un compte distinct et séparé de ses propres fonds pour les montants déduits, retenus ou perçus; les mots n'ont de sens que si le failli ne tient pas un tel compte distinct et séparé. Dans le contexte, ces mots suffisaient pour conclure à la création d'une fiducie réputée; le premier paragraphe de l'article 20 et le début du second visaient la fiducie réelle alors que le premier paragraphe et la fin du second visaient la fiducie réputée.**
>
> **D'où, à mon avis, la conclusion que le législateur a ainsi créé une fiducie réputée même s'il n'a pas repris tous les mots du législateur fédéral au paragraphe 5 de l'article 227. L'utilisation des mots «un montant égal au montant ainsi déduit, retenu ou perçu» rendait, à mon avis, inutile l'utilisation des mots «que ce montant ait été ou non, en fait, tenu séparé des propres fonds de la personne».**
>
> **(soulignements ajoutés)**

[96] Cette longue citation indique la manière retenue alors par la Cour d'appel pour conclure à l'existence d'une fiducie réputée en se basant sur les mots retenus par le législateur. En appliquant ce genre d'analyse à l'article 49 LRCR, on doit d'abord se poser la question à savoir si le texte de cet article est suffisamment clair et complet pour conclure à l'existence d'une fiducie réputée. Un tel exercice convainc le Tribunal que l'on doit répondre affirmativement à cette question surtout lorsque l'on constate que l'article 49 LRCR reprend les mots alors présumés manquants à l'article 20 LMRQ et qui, plus tard, feront en sorte que l'article 20 LMRQ crée effectivement une fiducie réputée.

[97] Ainsi, pour le juge Chamberland, les mots utilisés par le Législateur dans l'ancien article 20 LMR étaient suffisamment clairs pour établir une fiducie réputée, faisant des déductions déduites, retenues ou perçues par la partie débitrice un patrimoine fiduciaire suffisamment bien défini, « …comme formant un fonds séparé ne faisant pas partie des biens… » de ladite débitrice dans le contexte d'une cession ou d'une faillite.

[98] Malgré l'intérêt et la logique du raisonnement, la Cour suprême ne verra pas les choses de la même façon.

[99] Tant dans *Nolisair* que dans *Sécurité Saglac*, le juge Fish, siégeant alors à la Cour d'appel, était dissident. Pour lui, en l'absence des mots ajoutés à l'article 20 LMRQ par l'amendement de 1993, ledit article ne créait pas de fiducie réputée[40]. Il écrira :

> **« In fact and in effect, these deductions simply consisted in book keeping entries: no moneys were actually retained by the employer in an identifiable form, separate from the employer's own funds."**

[100] Pour le juge Fish, l'amendement de 1993 vient corriger le problème pour le futur mais non pour les deux cas dont la Cour est saisie, dont les faits remontent à une date antérieure à la prise d'effet dudit amendement. Il se dit d'accord avec le raisonnement du juge Durand dans *Nolisair* et en désaccord avec celui du juge Banford dans *Sécurité Saglac.*

[101] Par contre, une lecture attentive de l'opinion du juge Fish fait ressortir que l'amendement de 1993 n'a pour effet que de rendre l'article 20 LMRQ compatible avec l'article 67 de la *Loi sur la faillite et l'insolvabilité* et l'article 227 de la *Loi sur les impôts fédérale.*

[102] Le juge Fish écrira donc, et c'est là où il est en désaccord avec le raisonnement du juge Chamberland :

> **As I have already mentioned, the Minister of Revenue seeks to recover, from an estate in bankruptcy, income tax and pension contributions that were deducted at source by the debtor, but not separated from the rest of the debtor's patrimony, and never remitted to the government.**
>
> **To succeed on this claim, the Minister must establish that s. 20 MRA, prior to its amendment in 1993, created a deemed trust "substantially similar to subs. 227(4) of the Income Tax Act", within the meaning of s. 67(3)(a). The Minister must demonstrate as well that the Crown's beneficial interest under the trust attached to unremitted deductions at source whether or not the amounts deducted were held separately from the patrimony of the bankrupt debtor.**

[40] Opinion du juge Fish dans *Nolisair* en Cour d'appel.

Deductions at source under the ITA are in law the property of the employee. The employer, at the point of withholding, therefore holds the amounts deducted as trustee of a fund belonging to the employees, not to the Crown. It is subs. 227(4) ITA that has the effect of making Her Majesty the beneficiary under that trust.

When the employer fails to retain the deductions in a separate fund, however, Her Majesty's beneficial interest becomes intermingled with the employer's general assets and "Her Majesty's claim ... then becomes that of a beneficiary under a non-existent trust".

Here, the employer failed to separate the source deductions from his own property. Accordingly, the deemed trust created by s. 20 MRA, if it were "substantially similar" to the deemed trust of subs. 227(4) ITA, would likewise make the Minister of Revenue "a beneficiary under a non-existent trust".

In considering whether a provincial deemed trust is substantially similar to the federal standard created by subs. 227(4), however, one cannot insulate the text of subs. 227(4) from its context. Subsection 227(5) is linked by reference to subs. 227(4) and, together, the two subsections may be said to create a coherent whole in the context of a bankruptcy.

For the purposes of disposing of the appeal, we should therefore, I believe, take into account the impact of subs. 227(5) ITA on the kind of deemed trust that will meet the requirements of subs. 67(3) BIA. In my view, we are also bound to read subs. 67(3) in a manner that respects the evident intent of Parliament to place deemed trusts, provincial and federal, on the same footing with respect to priority in the event of a bankruptcy.

To benefit from the full protection afforded by subs. 67(3), the deemed trust referred to in subs. 227(4) ITA must also conform to subs. 227(5). And to be eligible for that same protection, a provincial provision creating a deemed trust must be "substantially similar", having essentially the same reach and complying with the same basic requirements.

In particular, the provincial deemed trust must, to achieve the result of its federal counterpart under subs. 227(5), explicitly impress upon the amount of the unremitted deductions at source whether or not that amount has in fact been kept separate and apart from the debtor's own moneys or from the assets of the estate.

Prior to its amendment in 1993, s. 20 MRA did not, in my respectful view, meet this test.

Accordingly, even on the assumption that subs. 67(3) BIA authorized the creation by Quebec of a deemed trust substantially similar to the type

> **contemplated either by subs. 227(4) ITA read alone, or by subss. 227(4) and (5) read together, I would feel bound to dismiss the appeal.**
>
> **(soulignements ajoutés)**

[103] Rappelant par la suite les affaires Re: *Deslauriers Construction Productions Ltd* (1970)3 O.R. 599 (C.A.), *Dauphin Plains Credit Union Ltd c. Xyloid Industries Ltd* [980] 1 S.C.R. 1182, *British Columbia c. Henfrey Samson Bélair Ltd* [l989] 2 SCR 24 et *Royal Bank of Canada c. Sparrow Electric Corp.* [1997] 1 S.C.R. 411, le juge Fish conclut que le texte de l'article 20 LMRQ, tel qu'il existait antérieurement à l'amendement de 1993, ne rencontrait pas les exigences des articles 67 LFI et 227(5) de la *Loi fédérale sur les impôts*. Le texte de l'amendement de 1993 a eu pour effet de régler le problème de la fiducie présumée de l'article 20 LMRQ mais force est de constater que le texte de l'article 49 LRCR contient les mots « sacramentels » confirmant l'existence d'une fiducie réputée, même si l'employeur n'a pas gardé les cotisations qu'il doit verser aux Comités de retraite requérants séparées ou non de ses autres biens.

[104] Les affaires *Saglac* et *Nolisair* ont été portées en appel devant la Cour suprême du Canada[41] et dans un jugement aussi court qu'unanime, les jugements de la Cour d'appel ont été renversés au profit de la dissidence du juge Fish, sans rien y ajouter.

[105] L'opinion combinée des juges Chamberland et Fish démontre en fait une seule chose : pour qu'une fiducie réputée existe, il faut que le langage qui la constitue soit sans équivoque et qu'il démontre que les sommes ou biens réputés être détenus en fiducie le sont, même sans séparation desdits biens ou sommes du reste des actifs de la partie débitrice.

[106] C'est ce qui semble exister en l'espèce, à la lecture de l'article 49 LRCR.

[107] Pourtant, plusieurs années plus tard, dans *Québec (Sous-ministre du Revenu) c. De Courval,* 2009 QCCA 409[42], la Cour d'appel avait à décider des conditions d'existence ou non d'une fiducie au sens de l'article 20 de la *Loi sur le Ministère du Revenu*. La juge Dutil a écrit ceci :

> **[10] S'appuyant sur un jugement de la Cour supérieure, dans l'affaire de la faillite de *Chibou-Vrac inc. (Syndic de)* et *Groupe Thibault Van Houtte & Associés ltée*, le juge de première instance conclut que la TVQ peut être détenue dans une fiducie présumée au sens de l'article 20 *LMR*. Toutefois, pour que ces sommes d'argent ne soient pas considérées comme des biens du failli, par l'application de l'alinéa 67(1)a) de la *Loi sur la faillite et l'insolvabilité (LFI)*, il doit s'agir d'une fiducie réelle, ce qui n'est pas le cas en l'espèce.**

[41] 1999, 1 RCS 759.
[42] En appel du jugement du soussigné dans Services Sécurité Québec.

> **[11] Le juge de première instance estime également que l'*obiter dictum* du juge Letarte, dans l'arrêt *Giguère (Syndic de*) *c. Lloyd Woodfine* [*Giguère*], concernant des sommes détenues en fiducie, « ne peut servir de base juridique qui aurait pour effet de modifier profondément tout le courant jurisprudentiel antérieur sur la question de l'application des articles 15.3.1 et 20 de la Loi. »**

[108] Après avoir cité les dispositions pertinentes de la *Loi sur le Ministère du Revenu* et de la *Loi sur la faillite et l'insolvabilité*, la juge Dutil pose le problème en ces termes :

> **[19] Le syndic soutient que l'article 20 *LMR* ne confère aucun droit de propriété aux autorités fiscales en ce qui a trait aux montants dus à titre de TVQ. Prenant appui sur un arrêt récent de notre Cour, dans *9083-4185 Québec inc. (Syndic de*) *et Caisse populaire Desjardins de Montmagny* [*9083-4185 Québec inc.*], le syndic plaide que le paragraphe 67(2) *LFI* fait en sorte que des biens détenus dans une fiducie pour Sa Majesté, par le biais d'une disposition législative, demeurent des biens du failli. Seuls ceux détenus par un failli dans une fiducie réelle, pour une autre personne, sont exclus de la faillite. En outre, puisque les sommes détenues en fiducie sont entremêlées avec d'autres fonds, elles ne sont plus identifiables. En conséquence, le ministre ne peut en être propriétaire.**
>
> **…**
>
> **[28] L'article 20 *LMR* édicte qu'une personne qui perçoit un montant dû en vertu d'une loi fiscale est réputée le détenir pour l'État, séparé de son patrimoine et de ses propres fonds. Il précise qu'en cas de non-versement à l'État dans le délai et selon les modalités prescrites, ce montant est réputé former un fonds séparé ne faisant pas partie des biens de cette personne.**
>
> **[29] En vertu de cet article, il y avait donc une présomption que les montants détenus par la Banque en date du 10 juillet 2006 l'étaient en fiducie pour l'État. Toutefois, ces montants perçus par la débitrice avaient été déposés dans un compte où elle en détenait également d'autres provenant de différentes sources. Il ne s'agissait donc que d'une fiducie créée par l'effet de la *LMR* et non d'une fiducie réelle.**
>
> **[30] Dans l'arrêt *Colombie-Britannique c. Henfrey*, *Samson, Belair Ltd.* [*Colombie-Britannique*], la Cour suprême explique que dès que le montant de la taxe est confondu avec d'autres sommes, il n'existe plus de fiducie de common law :**
>
> **[…] Au moment de la perception de la taxe, il y a fiducie légale réputée. À ce moment-là, le bien en fiducie est identifiable et la fiducie répond aux exigences d'une fiducie établie en vertu des principes généraux du droit. La difficulté que présente l'espèce, qui est la même que dans la plupart**

> **des cas, vient de ce que le bien en fiducie cesse bientôt d'être identifiable. Le montant de la taxe est confondu avec d'autres sommes que détient le marchand et immédiatement affecté à l'acquisition d'autres biens de sorte qu'il est impossible de le retracer. Dès lors, il n'existe plus de fiducie de *common law*. Pour obvier à ce problème, l'al. 18(1)b) prévoit que la taxe perçue sera réputée être détenue de manière séparée et distincte des deniers, de l'actif ou du patrimoine de celui qui l'a perçue. Mais, comme l'existence de la disposition déterminative le reconnaît tacitement, en réalité, après l'affectation de la somme, la fiducie légale ressemble peu à une fiducie véritable. […]**
>
> **[31] Je conclus donc que l'avis expédié en vertu de l'article 15 *LMR* n'a pas transformé cette fiducie présumée en fiducie réelle, ce qui aurait pu, effectivement, faire en sorte que ces biens ne soient pas compris dans le patrimoine de la débitrice faillie en vertu de l'alinéa 67(1)a) *LFI*.**
>
> **[32] En effet, le paragraphe 67(2) *LFI* édicte que, sous réserve de certaines exceptions (dont entre autres les retenues à la source), un bien n'est pas considéré être détenu en fiducie aux fins de la *LFI* si, en l'absence d'une disposition législative, il ne le serait pas. Or, c'est exactement le cas dans la présente affaire : les montants étaient réputés être détenus en fiducie en vertu de l'article 20 *LMR*, mais il n'existait aucune fiducie réelle.**

[109] Cette décision suivait alors la logique de l'arrêt Sparrow Electric[43] en Cour suprême, où il fut établi que la garantie bancaire consentie à la Banque Royale du Canada en vertu de l'article 427 de la *Loi sur les banques* (LB)[44] avait priorité sur la fiducie réputée que l'on retrouve à l'article 227(5) de la *Loi sur l'impôt sur le revenu* (LIR)[45].

[110] Pour conclure ainsi dans *Sparrow*, la Cour suprême a dû constater que la garantie de l'article 427 de la *Loi sur les banques* avait été mise en place avant que la débitrice soit en défaut de remettre à l'État les retenues fiscales prévues à l'article 227(5) LIR. Donc, en l'absence d'une autre disposition donnant priorité de rang à la fiducie réputée, les termes de la garantie bancaire n'étaient pas affectés par le défaut subséquent de la débitrice à l'égard de la Couronne fédérale.

[111] Voici comment le juge Gonthier (dissident sur le fond) pose le problème :

> **23 Il est malheureux que, jusqu'à maintenant, la jurisprudence n'ait pas su susciter la certitude qui est si manifestement souhaitable dans ce domaine du droit commercial. En fait, la jurisprudence a été qualifiée de [TRADUCTION] «secteur trouble du droit» (*Manitoba (Minister of Labour) c. Omega Autobody Ltd. (Receiver of)* 1989 CanLII 178 (MB CA), (1989), 59**

[43] Royal Bank of Canada c. Sparrow Electric Corp. [1997] 1 RCS 411.
[44] LC (1991) ch. 46.
[45] LRC (1985) ch. 1.

> **D.L.R. (4th) 34 (C.A. Man.), à la p. 36), et elle a fait l'objet, à certains moments, de critiques acerbes de la part d'auteurs de doctrine (Roderick J. Wood, «Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*» (1995), 10 *B.F.L.R.* 429, ainsi que Roderick J. Wood et Michael I. Wylie, «Non-Consensual Security Interests in Personal Property» (1992), 30 *Alta. L. Rev*. 1055). L'opinion générale a, je crois, été résumée par le professeur Wood dans son commentaire de décision fort utile, «Revenue Canada's Deemed Trust Extends Its Tentacles: *Royal Bank of Canada v. Sparrow Electric Corp.*», *loc. cit.*, à la p. 430: [TRADUCTION] «[i]l est quelque peu embarrassant de constater qu'après plus de deux décennies, nous ne pouvons toujours pas prédire en toute confiance le résultat d'un litige quant à la priorité de rang entre une fiducie réputée et une garantie». Les commentaires ci-dessus tirés de la jurisprudence et de la doctrine invitent, je crois, notre Cour à s'orienter résolument vers une énonciation de principes clairs qui permettront de déterminer la priorité de rang entre les fiducies légales et les garanties consensuelles.**

[112] Contrairement à ce que soutiendra la majorité, le juge Gonthier retrouvera dans les éléments de l'affaire *Sparrow Electric* les principes lui permettant de conclure à l'existence d'une priorité de rang de la fiducie réputée de la Couronne sur la garantie conventionnelle de la banque. Malgré la longueur du texte qui suit, il y a lieu de le reproduire :

> **30 Notre Cour a récemment eu l'occasion d'examiner les principes de droit qui doivent être appliqués à l'interprétation des lois fiscales. Dans *Alberta (Treasury Branches) c. M.R.N.; Banque Toronto-Dominion c. M.R.N.*, 1996 CanLII 244 (CSC), [1996] 1 R.C.S. 963, aux pp. 975 et 976, le juge Cory cite l'arrêt de notre Cour *Friesen c. Canada*, 1995 CanLII 62 (CSC), [1995] 3 R.C.S. 103, où les principes pertinents sont résumés ainsi, aux pp. 112 à 114:**
>
> > **Pour interpréter les dispositions de la Loi de l'impôt sur le revenu, il convient, comme l'affirme le juge Estey dans l'arrêt Stubart Investments Ltd. c. La Reine, 1984 CanLII 20 (CSC), [1984] 1 R.C.S. 536, d'appliquer la règle du sens ordinaire. À la page 578, le juge Estey se fonde sur le passage suivant de l'ouvrage de E. A. Driedger, intitulé Construction of Statutes (2e éd. 1983), à la p. 87:**
> >
> > > **[TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.**
> >
> > **Le principe voulant que le sens ordinaire des dispositions pertinentes de la Loi de l'impôt sur le revenu prévale, à moins d'être en présence d'une opération simulée, a récemment été approuvé par notre Cour dans l'arrêt Canada c. Antosko, 1994 CanLII 88 (CSC), [1994] 2 R.C.S. 312. Le juge Iacobucci affirme, au nom de la Cour, aux pp. 326 et 327:**

> **Même si les tribunaux doivent examiner un article de la *Loi de l'impôt sur le revenu* à la lumière des autres dispositions de la Loi et de son objet, et qu'ils doivent analyser une opération donnée en fonction de la réalité économique et commerciale, ces techniques ne sauraient altérer le résultat lorsque les termes de la Loi sont clairs et nets et que l'effet juridique et pratique de l'opération est incontesté: *Mattabi Mines Ltd. c. Ontario (Ministre du Revenu)*, 1988 CanLII 58 (CSC), [1988] 2 R.C.S. 175, à la p. 194; voir également *Symes c. Canada*, 1993 CanLII 55 (CSC), [1993] 4 R.C.S. 695.**

J'accepte les commentaires suivants qui ont été faits à l'égard de l'arrêt *Antosko* dans l'ouvrage de P. W. Hogg et J. E. Magee, intitulé *Principles of Canadian Income Tax Law* (1995), dans la section 22.3c) [TRADUCTION] «Interprétation stricte et fondée sur l'objet visé», aux pp. 453 et 454:

> **[TRADUCTION] La Loi de l'impôt sur le revenu serait empreinte d'une incertitude intolérable si le libellé clair d'une disposition détaillée de la Loi était nuancé par des exceptions tacites tirées de la conception qu'un tribunal a de l'objet de la disposition. (. . .) (L'arrêt *Antosko*) ne fait que reconnaître que «l'objet» ne peut jouer qu'un rôle limité dans l'interprétation d'une loi aussi précise et détaillée que la Loi de l'impôt sur le revenu. Lorsqu'une disposition est rédigée dans des termes précis qui n'engendrent aucun doute ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée nonobstant son objet. Ce n'est que lorsque le libellé de la loi engendre un certain doute ou une certaine ambiguïté, quant à son application aux faits, qu'il est utile de recourir à l'objet de la disposition.**

Aux pages 976 et 977 de l'arrêt *Alberta (Treasury Branches)*, précité, le juge Cory conclut:

> **En conséquence, lorsqu'il n'y a aucun doute quant au sens d'une mesure législative ni aucune ambiguïté quant à son application aux faits, elle doit être appliquée indépendamment de son objet. Je reconnais que des juristes habiles pourraient probablement déceler une ambiguïté dans une demande aussi simple que «fermez la porte, s'il vous plaît», et très certainement même dans le plus court et le plus clair des dix commandements. Cependant, l'historique même de la présente affaire, conjugué aux divergences évidentes d'opinions entre les juges de première instance et la Cour d'appel de l'Alberta, révèle que, pour des juristes doués et expérimentés, ni le sens de la mesure législative ni son application aux faits ne sont clairs. Il semblerait donc convenir d'examiner l'objet de la mesure législative. Même si l'ambiguïté n'était pas apparente, il importe de signaler qu'il convient toujours d'examiner «l'esprit de la loi, l'objet de la loi et l'intention du législateur» pour déterminer le sens manifeste et ordinaire de la loi en cause.**

31 En l'espèce, j'estime que le texte du par. 227(5) est clair et sans ambiguïté, compte tenu, particulièrement, du fait que cette disposition suit immédiatement le par. 227(4), qui prévoit que les sommes non versées sont conservées en fiducie pour Sa Majesté. À mon avis, ce

paragraphe vise, en cas de liquidation, cession, mise sous séquestre ou faillite, à rattacher le droit que Sa Majesté détient à titre bénéficiaire aux biens que le débiteur possède alors. À vrai dire, la fiducie n'est pas réelle, étant donné que son objet ne peut être identifié à compter de la date de création de la fiducie: D. W. M. Waters, *Law of Trusts in Canada* (2e éd. 1984), à la p. 117. Cependant, le par. 227(5) a pour effet de revitaliser la fiducie dont l'objet a perdu toute identité. L'identification de l'objet de la fiducie est donc faite après coup. À cet égard, je suis d'accord avec la conclusion que le juge Twaddle tire dans l'arrêt *Roynat*, précité, lorsqu'il affirme, à la p. 647, au sujet de l'effet du par. 227(5), que [TRADUCTION] «la Loi confère à Sa Majesté un droit d'accès à tous les éléments d'actif, quels qu'ils soient, que l'employeur possède alors, au moyen desquels elle peut réaliser la fiducie initiale dont elle est bénéficiaire».

32 J'ajoute que, dans l'arrêt *Re Deslauriers Construction Products Ltd.*, précité, à la p. 601, le juge en chef Gale a adopté ce point de vue relativement à une disposition semblable au par. 227(5), et que notre Cour a confirmé la validité de son raisonnement dans l'arrêt *Dauphin Plains*, précité. Dans l'affaire *Deslauriers*, précitée, un syndic de faillite et le bénéficiaire d'une fiducie légale réputée créée par le *Régime de pensions du Canada*, S.C. 1964-65, ch. 51, se faisaient la lutte pour obtenir la priorité de rang. Les paragraphes 24(3) et (4) de cette loi prévoyaient ceci:

> **24. . . .**
>
> **(3) L'employeur qui a déduit de la rémunération d'un employé un montant au titre de la cotisation que ce dernier est tenu de verser, ou à valoir sur celle-ci, mais ne l'a pas remis au receveur général du Canada, doit garder ce montant à part, en un compte distinct du sien et il est réputé détenir le montant ainsi déduit en fiducie pour Sa Majesté.**
>
> **(4) En cas de liquidation, de cession ou de faillite d'un employeur, un montant égal à celui qui, selon le paragraphe (3), est réputé détenu en fiducie pour Sa Majesté doit être considéré comme étant séparé et ne formant pas partie des biens en liquidation, cession ou faillite, que ce montant ait été ou non, en fait, conservé distinct et séparé des propres fonds de l'employeur ou de la masse des biens.**

À la page 1198 de l'arrêt *Dauphin Plains*, précité, notre Cour approuve la conclusion du juge en chef Gale (à la p. 601 de l'arrêt *Deslauriers*, précité) quant à l'interprétation du par. 24(4):

> **[TRADUCTION] Il nous semble que le par. (4), en particulier les six derniers mots, a été inséré dans la Loi dans le but spécifique de soustraire de la masse des biens du failli, par la création d'une fiducie, un montant équivalent aux déductions et d'en faire la propriété du ministre.**

33 Cette interprétation du par. 227(5) a aussi l'avantage d'être compatible avec le régime de répartition établi par la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3. L'article 67 de cette loi retire expressément de la masse des biens du failli les créances relatives à des retenues sur la paye non versées et conservées en fiducie (notamment) en vertu de l'art. 227 *LIR*:

> **67. (1) Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants:**
>
> ***a*) les biens détenus par le failli en fiducie pour toute autre personne;**
>
> **. . .**
>
> **(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.**
>
> **(3) Le paragraphe (2) ne s'applique pas à l'égard des paragraphes 227(4) et (5) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) et (4) du *Régime de pensions du Canada* ou des paragraphes 57(2) et (3) de la *Loi sur l'assurance-chômage* . . .**

Il faut remarquer qu'en plus de rattacher le droit de Sa Majesté aux biens du débiteur lorsque survient l'un des événements précisés au par. 227(5), la fiducie réputée profite encore à Sa Majesté d'une manière accessoire, en ce sens que le par. 227(5) permet de rattacher le droit de Sa Majesté à un bien donné en garantie qui est grevé d'un privilège fixe, si les déductions à l'origine de la demande de Sa Majesté ont été faites avant que le privilège ne soit rattaché au bien donné en garantie. Cette proposition découle de l'arrêt de notre Cour *Dauphin Plains*, précité, où il était question de déterminer l'ordre de priorité quant au produit d'une vente de liquidation d'un administrateur-séquestre. Dans cette affaire, les créances de Sa Majesté (notamment) résultaient du non-versement de retenues sur la paye liées à l'application du *Régime de pensions du Canada*, S.R.C. 1970, ch. C-5, et de la *Loi de 1971 sur l'assurance-chômage*, S.C. 1970-71-72, ch. 48. Ces lois rendaient Sa Majesté bénéficiaire de créances conformément à des fiducies réputées créées en vertu de dispositions dont le texte était fort semblable à celui des par. 227(4) et (5) dont il est question en l'espèce. En concluant que ces créances avaient priorité sur un privilège flottant qui s'était cristallisé après que les retenues en cause eurent été faites, le juge Pigeon a affirmé à la p. 1199:

> **Il faut d'abord faire remarquer que, pour des raisons analogues à celles qui motivent l'arrêt *Avco* précité, la réclamation des déductions**

> **au titre du Régime de pensions et de l'assurance-chômage ne peut affecter le produit de la réalisation de biens grevés d'un privilège fixe et spécifique. À partir de la création de cette charge, l'actif qui en est grevé n'est plus la propriété du débiteur qu'à charge de ce privilège. La réclamation des déductions est née plus tard et ne peut donc primer ce privilège en l'absence d'une loi le prescrivant spécifiquement. Cependant, le privilège général ne s'est pas cristallisé avant la délivrance du bref d'assignation et la nomination du séquestre. En l'espèce, que l'on choisisse l'une ou l'autre date n'a pas d'importance, les deux étant postérieures aux déductions. [Je souligne.]**

Ainsi, le par. 227(5) permet subsidiairement de rattacher rétroactivement le droit de Sa Majesté au bien en litige donné en garantie, si la garantie concurrente s'est concrétisée après que les déductions à l'origine de la créance de Sa Majesté eurent été faites. Sur le plan conceptuel, la fiducie réputée, visée au par. 227(5), permet à la créance de Sa Majesté de s'appliquer rétroactivement et de rattacher le droit qu'elle possède en vertu du par. 227(4) au bien donné en garantie avant qu'il devienne grevé d'un privilège fixe. La même chose se produit lorsqu'un privilège légal s'applique avant la constitution d'une hypothèque sur un bien en litige donné en garantie. Dans l'arrêt *Avco*, précité, le juge Martland, s'exprimant au nom de notre Cour, fait le commentaire suivant au sujet d'un tel scénario (à la p. 706):

> **À compter de ce jour, le privilège s'applique aux biens de l'employeur et, comme le prévoit le par. (1), il prévaut sur toute autre créance, y compris une cession ou une hypothèque. En d'autres termes, lorsque le privilège s'applique, l'ordre de préférence n'est pas modifié par une disposition du bien par l'employeur. L'hypothèque consentie avant la création du privilège n'est pas touchée. Le privilège s'applique uniquement au droit de l'employeur dans ce bien. [Je souligne.]**

[113] Le juge Gonthier reconnaît donc dans ces énoncés que les dispositions de la LIR créent une fiducie réputée mais que ces dispositions ne sont pas nécessairement suffisantes pour donner priorité de rang à la créance de la Couronne. Pour ce faire, il faut que l'article 227(5) LIR (tel qu'il existait alors) accorde cette priorité.

[114] Le juge Gonthier ajoute :

> **76 En l'espèce, la CGG accordait expressément à Sparrow la permission de vendre les biens de l'inventaire dans le cours de ses affaires et d'utiliser le produit dont elle disposerait; la GLB comportait implicitement la même permission. Bien qu'il soit vrai que la CGG comportait une clause de produit en fiducie, je considère que cela ne peut pas avoir pour effet de limiter la portée de la permission alors que l'arrangement réel intervenu entre les parties voulait, comme cela a été précisé, que Sparrow puisse utiliser le produit de la vente des biens de l'inventaire dans le cours de ses affaires. Dans cette affaire, la banque n'était pas un petit financier de biens d'inventaire, qui exigeait que**

Sparrow lui verse immédiatement le produit de la vente des biens de l'inventaire. Au contraire, la banque était un gros bailleur de fonds qui permettait à Sparrow d'utiliser le produit de la vente des biens de l'inventaire pour maintenir la viabilité de son entreprise. Pour ces motifs, appliquant le critère du professeur Wood, je conclus que, en vertu de la permission de «vendre [. . .] les biens figurant dans l'inventaire» «dans le cours normal de[s] affaires» et d'«utiliser les sommes d'argent dont [elle] dispose[rait]», la banque permettait à Sparrow de vendre les biens de l'inventaire pour payer des salaires et, nécessairement, pour verser des retenues sur la paye.

77 Pour tous ces motifs, en application de la thèse de la permission, je conclus que la fiducie réputée dont bénéficie l'appelante en vertu du par. 227(5) doit avoir priorité de rang sur les garanties que la banque détient sur les biens en litige donnés en garantie. Le fonds en fiducie constitué des retenues effectuées, bien que sans objet identifié au moment de sa constitution, est capable de viser après coup les biens faisant l'objet de cette fiducie. Encore une fois, la banque a consenti à la diminution de sa garantie sur les biens de l'inventaire pour payer les retenues sur la paye au moment où elles ont été effectuées, et le par. 227(5) *LIR* a pour effet de reporter ce consentement jusqu'au moment de la mise sous séquestre. En consentant à ce que Sparrow paie les salaires au moyen du produit de la vente des biens de l'inventaire dans le cours de ses affaires, la banque consentait par le fait même au régime légal de recouvrement des retenues sur la paye non versées, établi par la *LIR*. Bref, en l'espèce, la permission d'aliéner le produit de la vente des biens figurant dans l'inventaire, conjuguée au régime légal des par. 227(4) et (5) *LIR*, accorde priorité de rang aux demandes de Sa Majesté relatives aux retenues légales sur la paye. Cela vaut tant à l'égard de la CGG de la banque que de sa GLB.

[115] Le juge Gonthier finira par conclure ainsi :

87 Il est possible de résumer mes conclusions en l'espèce au moyen des cinq propositions suivantes:

1. On résout la question de la priorité de rang entre des fiducies légales et des garanties consensuelles en déterminant quel droit grève les biens en litige donnés en garantie, au moment où la fiducie légale devient opérante.

2. La fiducie réputée du par. 227(5) *LIR* grève tous les biens du débiteur qui existent au moment de la liquidation, cession, faillite ou mise sous séquestre.

3. Par exemple, si des retenues sont effectuées avant qu'un privilège fixe grève les biens donnés en garantie, la fiducie réputée du par. 227(5) fera en sorte que le droit que Sa Majesté possède à titre bénéficiaire grèvera rétroactivement ces biens. Le privilège fixe

> **applicable à ces biens sera, par la suite, assujetti aux créances préexistantes de Sa Majesté relatives aux retenues sur la paye non versées.**
>
> **4. Sous cette réserve, si une garantie tient d'un privilège fixe et spécifique, elle confère à son détenteur le droit de propriété sur les biens donnés en garantie, de sorte qu'une fiducie légale concurrente subséquente ne pourra pas s'y appliquer. Dans ce cas, tout ce que la fiducie légale peut grever est le droit de rachat que l'*equity* reconnaît relativement aux biens donnés en garantie.**
>
> **5. Cependant, à titre d'exception aux deuxième et quatrième propositions, si le détenteur d'une garantie fixe permet au débiteur de vendre les biens donnés en garantie, cela peut donner ouverture à l'application de la fiducie légale. Cette éventualité dépend entièrement des faits de chaque affaire. Le critère applicable consiste à déterminer si, au moment où les retenues ont été effectuées, le débiteur avait le droit de vendre les biens donnés en garantie et d'utiliser le produit de cette vente pour exécuter l'obligation liée à la fiducie légale.**

[116] Les juges majoritaires se rallieront cependant à l'opinion du juge Iacobucci qui refuse de voir dans les dispositions de la LIR, les mots sacramentels permettant de confirmer la priorité de la fiducie réputée de la Couronne sur les garanties antérieures de la Banque Royale.

[117] Le juge Iacobucci énonce plutôt ce qui suit :

> **11 La présomption n'est donc pas un moyen de supprimer une garantie existante. Elle permet plutôt de retourner en arrière pour chercher un élément d'actif qui, au moment où l'impôt est devenu exigible, n'était pas assujetti à une garantie opposée. Bref, la disposition en matière de fiducie réputée ne peut s'appliquer que s'il est préalablement déterminé qu'il existe des éléments d'actifs libres de toute charge qui peuvent faire l'objet d'une fiducie réputée. La présomption suit la réponse à la question de la garantie mobilière; elle ne détermine pas cette réponse.**
>
> **12 En fait, le juge Gonthier considère que la nature particulière de la fiducie réputée peut justifier l'établissement d'une distinction entre le droit de Sa Majesté et les droits opposés. Toutefois, son argument diffère de celui que j'ai exposé dans la mesure où il met l'accent sur l'exécution réputée de l'obligation qui existe envers Sa Majesté. Mon collègue semble considérer que la permission de vendre ne contribue à réduire la valeur de la garantie qu'à l'égard des obligations exécutées et non à l'égard des obligations inexécutées. À son avis, cela représente un obstacle suffisant à la thèse de la permission. Je conviens que, si la distinction entre les obligations exécutées et les obligations inexécutées**

pouvait être maintenue, la probabilité que la permission anéantisse la garantie serait alors considérablement réduite. J'estime cependant que cette distinction ne saurait être maintenue. Comme le juge Gonthier l'affirme à plus d'une reprise dans ses motifs, la thèse de la permission repose sur le consentement des parties. Toutefois, les parties en l'espèce ont consenti à ce que les biens figurant dans l'inventaire soient vendus [TRADUCTION] «dans le cours normal de[s] affaires [du débiteur]». Les termes utilisés sont formels. Aucune distinction n'est établie entre les obligations exécutées et les obligations inexécutées. La seule exécution prévue par la permission est la vente réelle des biens figurant dans l'inventaire et l'utilisation du produit de cette vente pour rembourser une dette. Comme je l'ai déjà affirmé, le mécanisme de la présomption ne satisfait pas à l'exigence de vente réelle. Je conclus donc que si l'on veut rendre justice au libellé de la permission en tant qu'indice de l'intention des parties, il ne saurait y avoir de distinction entre les obligations exécutées et les obligations inexécutées.

13 Mon collègue attache beaucoup d'importance au fait que le débiteur s'est engagé, dans la convention de garantie générale, à [TRADUCTION] «payer tous les impôts, tarifs, redevances, cotisations et autres sommes de toute nature qui peuvent être légalement perçues, cotisées ou imposées à l'égard du débiteur ou d'un bien donné en garantie, lorsque ces sommes sont dues et exigibles». Toutefois, cet engagement qui, du reste, n'est qu'un engagement à respecter la loi, ne fait pas partie de la permission donnée. Il n'ajoute rien au par. 153(1) *LIR*. Il ne prescrit pas non plus l'issue d'une lutte pour obtenir la priorité de rang. Qui plus est, l'engagement à payer des impôts n'est qu'un seul parmi plusieurs engagements contenus dans la convention. Un autre engagement veut que le débiteur [TRADUCTION] «exploite [son] entreprise [. . .] d'une manière appropriée et efficiente». Le débiteur pourrait vraisemblablement contracter des dettes subséquentes en exploitant son entreprise. Le juge Gonthier n'énonce aucun principe qui pourrait permettre de régler les luttes que Sa Majesté et des prêteurs subséquents se feraient pour obtenir la priorité de rang. En cas de conflit, chacun d'eux bénéficierait de la permission de vendre les biens figurant dans l'inventaire ainsi que d'engagements explicites, de sorte qu'il faudrait trouver un autre critère pour déterminer qui a priorité. Ici, comme auparavant, la perspective d'un renversement des règles ordinaires en matière de priorité est immédiate et inquiétante.

[118] Et plus loin, il ajoute :

23 De plus, pour les raisons que j'ai déjà exposées, il est fort probable qu'une interprétation large de la thèse de la permission contreviendrait à la *PPSA*. La Loi prévoit clairement que le financement des biens figurant dans un inventaire est un outil commercial important. Toutefois, permettre que la simple mise à exécution potentielle d'une permission de vendre fasse obstacle à une garantie sur les biens figurant dans un

> **inventaire dépouillerait cette garantie de toute efficacité. Ce ne serait plus une garantie contre des obligations subséquentes.**
>
> **24 Finalement, je tiens à souligner qu'il est loisible au législateur d'intervenir et d'accorder la priorité absolue à la fiducie réputée. Le paragraphe 224(1.2) *LIR* illustre clairement comment cela pourrait se faire. Cette disposition attribue à Sa Majesté certaines sommes «malgré toute autre garantie au titre de ce[s] somme[s]», et prévoit qu'elles «doi[vent] être payée[s] au receveur général par priorité sur toute autre garantie au titre de ce[s] somme[s]». Pour obtenir le résultat souhaité, il suffit d'utiliser des termes aussi clairs. En l'absence de pareils termes, l'innovation judiciaire n'est pas souhaitable parce qu'il s'agit d'une question qui regorge de considérations de principe et parce qu'une prescription du législateur est plus susceptible d'être claire qu'une règle dont les limites précises ne seront établies que par suite d'une longue et coûteuse série de poursuites.**
>
> **(soulignements ajoutés)**

[119] On sait donc comment éviter l'impact de l'arrêt *Sparrow Electric*. Il suffit que la LRCR comporte un texte produisant le même effet juridique que l'amendement apporté à la LIR pour assurer la préséance de la fiducie réputée de la LIR sur les hypothèques mobilières sans dépossession. Il faudra voir si l'article 264 LRCR rencontre cet objectif.

[120] Donc, en 2009, après l'affaire *SMRQ c. De Courval*, force est de constater que la Cour d'appel n'est pas enclin à lire dans l'article 20 LMRQ l'existence d'une fiducie réputée, alors que les jugements dans les affaires *Nolisair* et *Sécurité Saglac* proposent une lecture fort différente du texte de loi (avec ou sans les mots qui y furent ajoutés par l'amendement de 1993).

[121] D'ailleurs, l'opinion du soussigné dans *White Birch* a été, entre autres choses, basée sur l'interprétation de la Cour d'appel dans *De Courval*.

[122] Par ailleurs, la décision de la Cour d'appel dans *SMRQ c. De Courval* a été critiquée et non suivie par la Cour d'appel fédérale dans une affaire de la *Banque Toronto Dominion c. S.M. la Reine* rapportée à 2010 CAF 174.

[123] Vient alors l'affaire *Banque nationale du Canada c. Agence du revenu du Québec*, 2011, QCCA 1943 en appel d'un jugement de la Cour du Québec, 2009, QCCQ 8079[46]. Cette affaire est une autre illustration de la difficulté d'interprétation de la notion de fiducie réputée (dans l'article 20 LMRQ). Dans cette instance, le juge Gilson Lachance de la Cour du Québec a conclu que l'article 20 LMRQ créait une fiducie réputée mais sans considérer ni l'arrêt de la Cour d'appel dans *Québec*

[46] La décision de la Cour du Québec date du 16 juillet 2009.

(SMRQ) c. De Courval précitée[47] et sans non plus analyser les dispositions du *Code civil du Québec* en matière de fiducies.

[124] Le juge Lachance analyse cependant la portée de l'article 20 LMRQ sur les créances de créanciers garants, à la lumière de *R. c. First Vancouver Finance* et *Great West Transport Ltd* [2002] CSC 49; [2002] 2 RCS 720, qui a apparenté la fiducie réputée de l'article 227 (4.1) LFI à une « charge flottante[48] grevant la totalité des biens du débiteur fiscal au profit de Sa Majesté »[49].

[125] La décision du juge Lachance a fait l'objet d'un appel[50] et le juge Dalphond accepte le raisonnement du juge de première instance sauf en ce qui a trait à une correction de chiffres.

[126] Voici comment le juge Dalphond aborde la question :

> **[16] Le premier juge conclut que Revenu Québec bénéficie d'une fiducie présumée en vertu de l'article 20 de la *Loi sur le ministère du Revenu*, L.R.Q., c. M-31 (LMR), sur les sommes retenues à la source par Canouxa. Cette fiducie s'applique, selon lui, sur l'ensemble des biens de la débitrice fiscale, sauf sur les biens vendus dans le cours normal des activités de l'entreprise, où la fiducie se transporte sur le produit de cette vente ou sur le bien de remplacement. La BNC, créancière de Canouxa, n'est pas un tiers acquéreur et est assujettie à la fiducie, comme la Cour suprême l'a établi dans l'arrêt *First Vancouver Finance c. M.R.N.*, 2002 CSC 49 (CanLII), [2002] 2 R.C.S. 720, 2002 CSC 49. De plus, cette situation n'est pas modifiée par la faillite de Canouxa selon l'article 67(1)a) de la *Loi sur la faillite et l'insolvabilité*, L.R.C. (1985), ch. B-3 (LFI). L'intention du législateur est d'assujettir les créanciers garantis au respect de la fiducie présumée en cas de faillite, ce qui emporte une obligation de remettre à l'autorité fiscale le produit de la vente des biens assujettis à cette fiducie.**

[127] Il ajoute cependant ce qui suit :

> **[29] Je n'ai pas d'hésitation à conclure que les sommes réclamées de la débitrice fiscale en vertu de l'art. 1015 de la *Loi sur les impôts*, L.R.Q., c. I-3 (retenues à la source sur salaire) sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu* et que la loi provinciale prévoit un impôt semblable à celle de la loi fédérale. Il en va de même pour les contributions au RRQ par rapport à celles au RPC.**

[47] L'arrêt de la Cour d'appel est du 3 mars 2009.

[48] Cette notion de « charge flottante » a été écartée dans *White Birch[48] aux paragraphes [203] à [207].*

[49] Paragraphe 18 [2009] QCCQ 8099. Voir aussi paragraphe [25] de la même décision.

[50] Banque Natinale du Canada c. Agence du Revenu du Québec, 2011, QCCA 1943.

[30] Quant à la nature et l'étendue de l'assiette de la fiducie invoquée, elles sont précisées à l'article 20 LMR :

> **20. Toute personne qui déduit, retient ou perçoit un montant quelconque en vertu d'une loi fiscale est réputée le détenir en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et en vue de le verser à l'État selon les modalités et dans le délai prévus par une loi fiscale.**
>
> **En cas de non-versement à l'État, selon les modalités et dans le délai prévus par une loi fiscale, d'un montant qu'une personne est réputée par le premier alinéa détenir en fiducie pour l'État, un montant égal au montant ainsi déduit, retenu ou perçu est réputé, à compter du moment où le montant est déduit, retenu ou perçu, être détenu en fiducie pour l'État, séparé de son patrimoine et de ses propres fonds, et former un fonds séparé ne faisant pas partie des biens de cette personne, que ce montant ait été ou non, dans les faits, tenu séparé du patrimoine de cette personne ou de ses propres fonds.**
>
> **Toutefois, cette personne peut, lors de la production au ministre d'une déclaration en vertu des articles 468 ou 470 de la Loi sur la taxe de vente du Québec (chapitre T-0.1), retirer du montant total qu'elle est réputée par le premier alinéa détenir en fiducie pour l'État, les montants qu'elle a droit de déduire et qu'elle a effectivement déduits dans le calcul de son montant à remettre. [je souligne]**

[31] La fiducie présumée porte donc sur les montants perçus et, en cas de non-remise, sur des montants équivalents appartenant au débiteur fiscal. La situation est donc équivalente à ce que prévoit l'art. 227 (4) de la *Loi de l'impôt sur le revenu*, L.R.C. (1985), c. 1 (5e suppl.), mais ne s'étend pas aux biens autres du débiteur, comme le prévoit l'art. 227 (4.1) de la loi fédérale :

> **227(4) Montant détenu en fiducie**
>
> **Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi.**
>
> **(4.1) Non-versement**
>
> **Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus**

> **par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés:**
>
> **a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;**
>
> **b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie.**
>
> **Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie. [je souligne]**

[32] Commentant l'art. 227 de la loi fédérale, M. le juge Iacobucci écrit dans *First Vancouver Finance* :

> **27 Le législateur a donné suite à l'arrêt *Sparrow Electric* en modifiant les dispositions relatives à la fiducie réputée en 1998 (avec effet rétroactif en 1994) pour adopter leur libellé actuel. Plus particulièrement, les mots « malgré toute autre garantie [...] le concernant » ont été ajoutés au par. 227(4). De même, le par. 227(4.1) (l'ancien par. 227(5)) a accru la portée de la fiducie réputée de façon qu'elle englobe les « biens détenus par son créancier garanti [...] qui, en l'absence d'une garantie [...] seraient ceux de la personne ». Le paragraphe 227(4.1) a également été modifié par la suppression du renvoi aux événements déclencheurs (liquidation, faillite, etc.), le législateur établissant plutôt une présomption selon laquelle les biens du débiteur fiscal et de ses créanciers garantis sont détenus en fiducie « en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté ». Enfin, le par. 227(4.1) précise désormais que les biens sont réputés être détenus en fiducie « à compter du moment où le montant est déduit ou retenu ».**
>
> **28 Ces modifications démontrent que le législateur a voulu que les par. 227(4) et (4.1) accordent la priorité de rang à la fiducie réputée lorsque les biens sont par ailleurs grevés d'une garantie, que celle-ci ait pris effet avant ou après les retenues à la source ou l'application de la fiducie réputée. C'est ce qui ressort clairement de l'expression « malgré toute autre garantie » employée aux par. 227(4) et (4.1). En d'autres termes, vu la manière dont les dispositions relatives à la fiducie réputée avaient été interprétées dans l'affaire *Sparrow Electric*, le législateur les a modifiées de façon à accorder la priorité de rang à la fiducie réputée lorsque le**

> **ministre et des créanciers garantis font valoir concurremment un droit sur les biens du débiteur fiscal.**
>
> **29 Comme je l'indique précédemment, le législateur a également modifié le moment auquel la fiducie se matérialise. Tout renvoi à un événement déclencheur emportant l'application de la fiducie, comme la liquidation ou la faillite, a été supprimé. Le paragraphe 227(4.1) dispose désormais qu'une fiducie réputée s'applique « en cas de non-versement [de retenues à la source] à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi » (je souligne). Ainsi, l'application de la fiducie réputée est désormais enclenchée dès qu'il y a manquement à l'obligation de verser les retenues à la source. En outre, suivant l'al. 227(4.1)a), les biens sont réputés être détenus en fiducie « à compter du moment où le montant est déduit ou retenu » Par conséquent, bien que l'omission de verser les retenues à la source enclenche l'application de la fiducie, cette dernière est réputée prendre effet rétroactivement au moment où les retenues à la source ont été faites. Ces modifications révèlent que le législateur a manifestement voulu consolider la fiducie réputée et en accroître la portée afin de faciliter les opérations de recouvrement du ministre. *[je souligne]***

[128] Ainsi, la fiducie réputée de l'article 20 LMRQ est donc reconnue sans équivoque. Plus encore, l'interprétation que nous donne le juge Dalphond dissipe les doutes et, une fois cette interprétation appliquée au texte de l'article 49 LRCR, le soussigné doit conclure que cette disposition établit une fiducie réputée touchant les cotisations suspendues et non versées aux Comités de retraite requérants.

[129] Plusieurs auteurs supportent une telle conclusion.

[130] Louis Payette dans son texte « *Les sûretés réelles dans le Code civil du Québec* », 2010, EYB2010SUR3, indique au paragraphe 63, pages 19 et 20, que le législateur peut prévoir qu'une fiducie légale réputée peut exister dans la mesure où les biens visés par la fiducie sont simplement réputés détenus en fiducie (i.e. sans séparation physique du patrimoine du débiteur). Au paragraphe 1821 du même texte, page 104, Me Payette ajoute :

> **Certaines lois créent une fiction aux termes de laquelle les biens d'un contribuable sont « réputés » être détenus en fiducie au profit des pouvoirs publics dont il est le débiteur. L'existence d'une hypothèque sur un bien n'empêche pas la naissance de telles fiducies sur ce bien et une prise en paiement n'entraîne pas leur extinction; le preneur en paiement doit par conséquent rendre compte des sommes dues au bénéficiaire de la fiducie présumée, à hauteur de la valeur du bien ou du prix de sa revente.**

[131] Voir aussi John Claxton « *Studies on the Quebec Law of Trust* », Thomson Carswell 2005, pages 84 et suivantes, nos. 4.2 et suivants, viz : « *Trust Constituted*

by Operation of Law»; Roger P. Simard dans *Juris Classeur Québec – sûreté* viz : « *Fiducies réputées* ».

[132] Cette revue de la jurisprudence pertinente en matière de fiducies réputées permet donc de conclure ainsi :

a) Pour qu'une fiducie réputée existe en droit québécois, il faut que le législateur intervienne clairement en ce sens. C'est le cas en l'espèce.

b) La fiducie réputée de l'article 49 LRCR stipule que celle-ci produit ses effets, qu'il y ait ou qu'il n'y ait pas séparation physique des biens visés par la fiducie du patrimoine de l'employeur. Ces mots, une fois qu'ils furent ajoutés aux dispositions de l'article 20 de la LIR, ont permis à cette dernière fiducie réputée de produire les effets visés par le législateur. Après réflexion, il apparaît évident que les mêmes mots utilisés dans l'article 49 LRCR doivent produire les mêmes effets;

c) Contrairement à ce que le soussigné a conclu dans *Whilte Birch* précitée, l'article 49 LRCR crée une véritable fiducie légale au sens de l'article 1262 C.c.Q. et fait en sorte que les cotisations d'équilibre dues et non payées à cause de l'effet suspensif de l'ordonnance du juge Morawetz sont visées par ladite fiducie réputée, laquelle doit donc produire ses effets;

d) Cependant, cela n'est pas suffisant pour conclure que cette fiducie prend rang avant l'hypothèque mobilière sur l'universalité des biens de SBI en faveur de IQ;

e) En effet, contrairement aux « Personal Property Security Acts » de certaines autres provinces, le Québec ne possède aucune disposition législative faisant en sorte qu'une fiducie réputée puisse avoir préséance sur les sûretés légales ou conventionnelles que l'on retrouve au Code civil du Québec;

f) Donc, à moins que la LRCR ne contienne d'autres dispositions faisant en sorte que les biens visés par la fiducie réputée de l'article 49 LRCR échappent à l'hypothèque universelle de IQ, cette dernière devra donc recevoir son plein effet à l'égard de la totalité des biens de SBI, défaisant en cela toute possibilité de récupération par les Comités de retraite requérants;

g) Il faut donc décider si l'article 264 LRCR permet de remédier à la question et faire en sorte que les biens faisant l'objet de la fiducie réputée de l'article 49 LRCR ne soient pas touchés par l'hypothèque universelle de IQ. Voilà la question que l'on doit maintenant débattre.

b) **L'effet de l'article 264 LRCR sur la créance de IQ**

[133] Les Comités de retraite plaident que l'article 264 LRCR vient renforcer leur thèse selon laquelle les cotisations d'équilibre sont affectées d'une fiducie réputée et ne font pas partie du gage commun des créanciers de SBI.

[134] Rappelons ici la disposition pertinente de l'article 264 LRCR :

> **264. Sauf dispositions contraires de la loi, est incessible et insaisissable:**
>
> **1° toute cotisation versée ou qui doit être versée à la caisse de retraite ou à l'assureur, ainsi que les intérêts accumulés;**

[135] Serait donc insaisissable ou incessible toute cotisation versée ou qui doit être versée à la caisse de retraite des employés syndiqués on non-syndiqués de SBI. S'il faut donner un sens à cet article, il faut conclure que les cotisations … « à être versées »… sont littéralement hors de la portée des autres créanciers de SBI, que ces derniers soient garantis ou non, qu'ils bénéficient d'une garantie antérieure à la date d'exigibilité des cotisations payées ou non.

[136] Le mot « cotisation » utilisé à l'article 264 LRCR se doit d'avoir le même sens que celui qu'on lui donne à l'article 49 LRCR. Il inclut donc la cotisation d'équilibre « qui doit être versée » mais qui fait l'objet d'une suspension depuis l'émission de l'ordonnance initiale.

[137] Les Comités de retraite plaident aussi que l'article 264 LRCR n'est pas la seule disposition qui rendrait insaisissables les cotisations non versées à la caisse de retraite. L'article 553(7) du *Code de procédure civile* stipule en effet que sont insaisissables :

> **7. Les prestations accordées au titre d'un régime complémentaire de retraite auquel cotise un employeur pour le compte des employés, les autres sommes déclarées insaisissables par une loi régissant ces régimes ainsi que les cotisations qui sont ou qui doivent être versées à ces régimes.**
>
> **(soulignement ajouté)**

[138] En conséquence, ces montants ne tomberaient pas dans le gage commun des créanciers de SBI et ne pourraient faire l'objet ni d'une hypothèque ou d'une autre forme d'affectation en faveur d'un tiers.

[139] Les articles 2644 et 2645 C.c.Q. viennent renforcer cette approche :

> **Art. 2644. Les biens du débiteur sont affectés à l'exécution de ses obligations et constituent le gage commun de ses créanciers.**

> **Art. 2645. Quiconque est obligé personnellement est tenu de remplir son engagement sur tous ses biens meubles et immeubles, présents et à venir, à l'exception de ceux qui sont insaisissables et de ceux qui font l'objet d'une division de patrimoine permise par la loi.**
>
> **Toutefois, le débiteur peut convenir avec son créancier qu'il ne sera tenu de remplir son engagement que sur les bines qu'ils désignent**
>
> **(soulignement ajouté)**

[140] Il s'ensuit donc, selon les Comités requérants que les cotisations d'équilibre suspendues par l'ordonnance initiale sont incessibles et insaisissables en vertu de l'article 264 LRCR en plus de faire l'objet d'une fiducie réputée selon l'article 49 LRCR. L'effet combiné de ces deux dispositions fait donc en sorte que les sommes non versées aux régimes de retraite sont exclues du patrimoine de SBI et ne peuvent être utilisées pour rembourser la créance hypothécaire de IQ.

[141] Dans *Marché Bernard Lemay c. Beljaars*, 2003 CanLii 30892, la Cour supérieure a décidé ce qui suit :

> **[40] Les dispositions de cette loi particulière [la LRCR] devraient primer sur les articles généraux du Code civil ou de la Loi sur les sociétés de fiducie… et sont très claires.**
>
> **[41] Il semble évident que l'article 264 de la LRCR, jumelé à l'article 553,7 C.p.c. qui traite aussi de l'insaisissabilité, conférant ce caractère aux droits accordés au titre d'un régime de retraite, doivent primer sur toutes autres dispositions moins pertinentes ou moins spécifiques parce que plus générales, comme les articles du Code civil sur le sujet et dont nous avons traité.**

[142] Voir aussi : *Loi sur les régimes complémentaires de retraite – Annotations et Commentaires* par la Régie des rentes du Québec, Bibliothèque nationale du Québec 1998, paragraphe 264.3.[51]

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[51] Un bien incessible est un bien qui ne peut faire l'objet d'une transmission entre vifs, que ce soit à titre onéreux ou à titre gratuit. La cession de droit pourrait se concrétiser par la vente du bien cédé, par sa donation, par sa mise en garantie ou tout simplement au moyen d'une renonciation à un droit dans le bien. Le bien insaisissable, quant à lui, ne peut faire l'objet d'une saisie, qui est une procédure en vertu de laquelle un créancier met sous le contrôle de la justice des biens qui appartiennent à son débiteur dans le but d'assurer la conservation de ses droits*. Soulignons qu'il existe deux types de saisies : la saisie-arrêt, qui consiste à ordonner au détenteur d'un bien de ne pas s'en départir, et la saisie-exécution, qui consiste à ordonner au détenteur d'un bien de le remettre afin de payer la créance de son propriétaire.

…

[143] Qui plus est, dans un contexte de faillite, ces sommes n'entreraient pas, non plus, dans les « biens du failli » et ne feraient pas partie de la saisine d'un syndic, vu le libellé de l'article 67(1)(b) LFI qui édicte que :

> **67(1) Les biens d'un failli constituant le patrimoine attribué à ses créanciers ne comprennent pas les biens suivants :**
>
> **a) les biens détenus par le failli en fiducie pour toute autre personne;**
>
> **b) les biens qui, selon le droit applicable dans la province dans laquelle ils sont situé et où réside le failli, ne peuvent faire l'objet d'une mesure d'exécution ou de saisie contre celui-ci;**
>
> **(soulignements ajoutés)**

[144] Force est de reconnaître que ces arguments sont, à première vue, convaincants.

[145] IQ prétend, à l'encontre de ce qui précède, que pour que l'article 264 LRCR puisse recevoir application, il faut qu'il y ait eu séparation physique des cotisations qui doivent être versées pour que leur qualité d'incessibilité et d'insaisissabilité puisse recevoir pleine application. IQ ajoute que ces cotisations font l'objet d'une ordonnance de suspension de paiement suite à l'ordonnance initiale prononcée par le juge Morawetz. Ces cotisations ne seraient donc pas « dues et exigibles ».

[146] Le soussigné n'est pas d'accord avec une telle proposition.

[147] Le soussigné est d'avis qu'effectivement, les articles 49 et 264 LRCR doivent être lus et interprétés dans le même contexte.

[148] Si l'article 49 LRCR crée une fiducie réputée opposable à IQ, cela veut dire que les biens visés par la fiducie réputée sont non seulement facilement identifiables et que les montants qu'ils représentent sont disponibles mais qu'effectivement, ils se trouvent clairement « identifiés » par l'effet même de l'article 49. De même, l'article 264 LRCR peut s'appliquer aux montants auxquels l'article 49 LRCR s'applique.

[149] Il ne sera donc pas plus nécessaire dans ce contexte particulier de procéder à une séparation physique des cotisations d'équilibre à être versées du reste des actifs de SBI pour que le produit desdites cotisations jouissent du caractère d'incessibilité et

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> L'article 2465 du *Code civil du Québec* prévoit qu'une personne qui est obligée personnellement est tenue de remplir son engagement sur tous ses biens meubles et immeubles, présents et à venir, à moins qu'ils ne soient insaisissables. Ainsi, en règle générale, les biens d'une personne sont saisissables; ce n'est qu'exceptionnellement qu'ils sont insaisissables. L'article 264 constitue donc une exception à la règle générale. …
>
> (soulignements ajoutés)

d'insaisissabilité que leur procure l'article 264 LRCR, qu'il n'est nécessaire de le faire pour que la fiducie réputée de l'article 49 LRCR ne produise ses effets.

[150] En ce sens, l'article 264 LRCR vient compléter la logique de l'article 49 LRCR et, autrement, ces deux mêmes articles deviennent complètement dénudés de leur sens de leur portée et de leur effet.

[151] Lorsque la requête des Comités de retraite requérants est formulée, les seuls actifs de SBI sont constitués d'une somme liquide de quelques 30 millions$. Les parties ont convenu que ce montant devait être versé à IQ pour atténuer l'impact des intérêts courant sur la créance de cette dernière.

[152] La fiducie réputée de l'article 49 LRCR pouvait donc affecter cette portion des liquidités de SBI représentant le total des cotisations d'équilibre dues et non encore versées aux Comités de retraite requérants, à cause de l'ordonnance du suspension, sans qu'il soit nécessaire de les séparer du reste des actifs liquides de SBI et, du même fait, les caractères d'incessibilité et d'insaisissabilité de ces mêmes montants aux termes de l'article 264 LRCR pouvaient les affecter.

[153] Finalement, le fait que les sommes aient été distribuées à IQ sous réserve des droits des Comités de retraite requérants n'ont pas eu pour effet de faire perdre à ces actifs leur caractère de biens fiduciaires, incessibles et insaisissables.

[154] Quant à l'argument de IQ à l'effet que lors de la suspension des paiements des cotisations d'équilibre par l'émission de l'ordonnance initiale rendue par le juge Morawetz, aucune cotisation d'équilibre n'était due et non encore versée (et, partant, aucune somme ne pouvait être assujettie ni à l'article 49 LRCR, ni à l'article 264 LRCR), cet argument doit aussi être rejeté. En effet, il faut distinguer entre l'effet suspensif de l'obligation de payer ces sommes et leur assujettissement aux l'articles 49 et 264 LRCR. Ces articles couvrent toute somme non encore versée. Il faut distinguer entre l'exigibilité d'une dette et une suspension (temporaire) de l'obligation d'en effectuer le paiement. Les cotisations demeurent donc dues et exigibles mais seule l'exécution du paiement de ces sommes est suspendue.

[155] La notion d'incessibilité et d'insaisissabilité des cotisations dues et non versées empêche l'employeur et ses créanciers d'utiliser ces sommes à des fins autres que celles prévues à la LRCR. Ces sommes ne peuvent donc faire l'objet d'une hypothèque mobilière universelle avec ou sans dépossession.

[156] La conséquence de ce qui précède est que le raisonnement de l'arrêt Sparrow Electric ne peut s'appliquer en l'espèce.

[157] IQ plaide aussi l'application de l'affaire *Poulin c. Morency*[52], où il s'agissait de déterminer si les sommes cotisées par un employé dans un régime de retraite

[52] 1999 3 RCS 351; 1999 CanLii 662

insaisissable avait perdu son caractère d'insaisissabilité suite au transfert des biens du régime à un REER. La Cour d'appel du Québec avait décidé que la totalité du REER de l'appelant Poulin était saisissable, ce qui fut confirmé par la Cour suprême, et que la disposition d'insaisissabilité ne protégeait pas les sommes transférées à la demande de l'appelant aux fins d'investissement dans un REER.

[158] En l'instance, sont incessibles et insaisissables les cotisations dues par l'employeur et qui ne sont pas encore versées aux Comités de retraite requérants. La vente des actifs de SBI et leur transformation en actifs liquides n'enlève donc rien au caractère d'incessibilité et d'insaisissabilité desdites cotisations.

[159] Dans *Poulin c. Morency* (précitée) ce qui a fait perdre le caractère d'insaisissabilité et d'incessibilité aux sommes en litige, c'est leur transfert dans un REER car alors les sommes en question devaient nécessairement passer sous le contrôle de l'appelant avant qu'elles aboutissent dans un REER. D'ailleurs, comme l'expose le juge Gonthier[53] lorsque le législateur québécois veut étendre l'insaisissabilité de certaines sommes visées par l'article 264 LRCR, il le fait expressément[54].

[160] Finalement, force est de constater que l'article 264 LRCR a, par analogie, sensiblement le même effet que l'article 30(7) de la *Loi ontarienne sur les sûretés mobilières* (LRO 1990, ch. D-10) que l'on appelle communément le « PPSA » et qui subordonne les sûretés mobilières à l'intérêt du bénéficiaire d'une fiducie réputée créée par une loi portant sur les régimes de retraite. Comme le confirme la Cour suprême dans *Indalex,* n'eût été de l'application de la doctrine de la prépondérance du droit fédéral, une telle fiducie réputée aurait eu priorité sur une créance garantie en vertu d'une sûreté consentie par une débitrice.

[161] L'exécution d'une garantie en faveur de IQ de la nature d'une hypothèque immobilière et mobilière sans dépossession, même dûment enregistrée au RDPRM, n'a pas pour effet d'anéantir ce caractère. Si c'était le cas, l'article 264 LRCR n'aurait aucun effet pratique. De fait, les cotisations à être versées et qui ne l'ont pas été n'appartenant pas à SBI à cause notamment de l'effet de la fiducie réputée de l'article 49 LRCR portant sur les mêmes actifs, ne font ni partie des biens de SBI ni du gage commun des créanciers de cette dernière.

[162] En conclusion, le Tribunal est d'avis que :

1) les cotisations d'équilibre objet du présent litige, font l'objet d'une fiducie réputée créée par la loi;

2) lesdites cotisations sont incessibles et insaisissables;

[53] Voir les paragraphes 37 et suivants de son opinion.

[54] Voir article 264(3), second alinéa. Voir aussi l'article 28(3) du Règlement sur les régimes complémentaires de retraite (1990) 122 C.O. II-3246.

3) elles ne sont pas affectées par l'hypothèque universelle dont bénéficie IQ, et ce, même si lesdites cotisations d'équilibre sont devenues payables aux Comités de retraite requérants après la mise ne place de ladite hypothèque universelle.

Conclusion générale

[163] Nous sommes à la fin d'un processus de réorganisation sous l'empire de la LACC qui a pris la forme d'une vente des actifs de SBI à une nouvelle entité (qui continuera les activités de cette dernière). Il s'agit maintenant de distribuer le produit de cette vente d'actifs aux créanciers de SBI. Ces créanciers ne détiennent aucune super-priorité qui aurait pu leur être accordée sous l'empire de la LACC. La priorité accordée aux créances des Comités de retraite, d'une part, et de IQ, d'autre part, doit donc être analysée à la seule lumière du droit québécois. Il n'est nullement question de l'application de la doctrine de la préséance du droit fédéral sur le droit provincial.

[164] S'opposent ici deux obstacles à l'exercice du droit de IQ sur la totalité des actifs de SBI : certains de ces actifs sont incessibles et insaisissables en plus de faire l'objet d'une fiducie réputée.

[165] Sont donc hors de la portée de IQ, les cotisations d'équilibre non versées depuis l'ordonnance de suspension du 16 janvier 2012. Les déficits actuariels des régimes de retraite existant à la date de terminaison de ces derniers ne sont visés ni par l'article 49 ni par l'article 264 LRCR.

[166] Les articles 49 et 264 LRCR doivent être lus et appliqués restrictivement compte tenu du fait qu'ils créent un régime exceptionnel. Une fiducie réputée ne peut faire l'objet d'une interprétation large et libérale, et ce, même si la LRCR, dans son ensemble, doit être interprétée de façon généreuse. On ne peut donc étendre l'application de l'article 49 ou de l'article 264 LRCR aux déficits actuariels.

[167] L'article 49 LRCR ne s'applique qu'aux cotisations et aux intérêts accumulés sur ces cotisations.

[168] C'est l'effet combiné des articles 49 et 264 LRCR qui viennent soustraire les actifs de SBI représentant le montant des cotisations d'équilibre non versées aux Comités de retraite (plus les intérêts y afférant) à la créance hypothécaire de IQ. Ces deux dispositions ont pour effet de sortir littéralement ces actifs du gage commun des créanciers de SBI.

[169] Dans *Indalex* en Cour suprême, la juge Deschamps écrit :

> **[51] … Les priorités dont bénéficient les créanciers sont définies par la législation provinciale, à moins que ces droits soient écartés par une loi fédérale. Le législateur fédéral n'a pas expressément édicté que toutes les priorités établies en matière de faillite s'appliquent aux instances**

> **relevant de la LACC ou aux propositions régies par la LFI. Bien que les créanciers d'une société tentant de se réorganiser puissent, dans leurs négociations, tenir compte des droits qu'ils pourraient exercer en cas de faillite, ces droits ne constituent rien de plus qu'une considération tant que la faillite n'est pas survenue. Au début des procédures en matière d'insolvabilité, Indalex a choisi un processus régi par la LACC, ne laissant aucun doute sur le fait que, bien qu'elle cherchât à protéger les emplois, elle ne demeurerait pas leur employeur. Nous ne sommes pas en présence d'un cas où l'échec d'un arrangement a entraîné la liquidation d'une société sous le régime de la LFI. Indalex a atteint l'objectif qu'elle poursuivait. Elle a choisi de vendre son actif sous le régime de la LACC, et non sous celui de la LFI.**
>
> **[52] La fiducie réputée créée par la LRR continue de s'appliquer dans les instances relevant de la LACC, sous réserve de la doctrine de la prépondérance fédérale (Crystalline Investments Ltd. c. Domgroup Ltd., 2004 CSC 3 (CanLII), 2004 CSC 3, [2004] 1 R.C.S. 60, par. 43). La Cour d'appel a donc jugé à bon droit que, à l'issue d'un processus de liquidation relevant de la LACC, les priorités peuvent être établies selon le régime prévu dans la LSM, plutôt que selon le régime fédéral établi dans la LFI.**
>
> **(soulignements ajoutés)**

[170] Il en va de même pour la fiducie réputée de l'article 49 LRCR et de la protection que l'article 264 LRCR accorde à ces actifs.

[171] En l'absence de l'application de la doctrine de la prépondérance fédérale, force est de conclure que ces dispositions doivent recevoir leur plein effet.

[172] Supposons le scénario suivant : au lieu de se retrouver dans un contexte de réorganisation sous l'empire de la LACC, SBI aurait tout simplement décidé de vendre ses actifs à une nouvelle société avant de payer ses créanciers à même le produit de cette vente, sans pour autant faire honneur à son obligation de verser aux Comités de retraite requérants les cotisations d'équilibre qui leur sont dues. Le raisonnement qui précède aurait été applicable sans que l'on s'interroge plus loin. Le Tribunal est d'avis que dans le contexte du présent débat, ce raisonnement doit être appliqué.

[173] Avec égards pour l'opinion contraire, le soussigné est d'avis que les questions en litige ne se résolvent ni par une référence à l'affaire *Sparrow Electric* ni par une référence à l'article 37 LACC. Dans *Sparrow,* il n'était pas question d'insaisissabilité ou d'incessibilité des sommes devant revenir à la Couronne fédérale mais uniquement de la non-application prioritaire des sommes visées par la fiducie réputée contenue à la LIR, problème qui a été corrigé par un amendement subséquent à la *Loi de l'impôt*. Ici, les biens constituant l'assiette de la fiducie réputée sont littéralement exclus de l'application de la garantie dont bénéficie IQ. Pour IQ, ces biens sont inaccessibles car ils ne peuvent faire partie d'une quelconque cession ou transfert par SBI.

[174] Il n'est, non plus, ni utile, ni possible d'en référer aux pouvoirs inhérents de la Cour supérieure sous l'empire de l'article 46 C.p.c. pour faire en sorte que les cotisations d'équilibre soient versées aux Comités de retraite, car elles le sont de toutes façons. Il n'est pas approprié d'appliquer ce concept afin de permettre à ces mêmes requérants de récupérer les soldes des déficits actuariels réclamés, ces déficits étant clairement identifiés comme des dettes de l'employeur (article 228 LR R) et clairement exclus de la portée de l'article 49 LRCR. En présence de dispositions législatives aussi claires, il n'y a aucune justification de recourir aux pouvoirs inhérents de la Cour, le législateur ayant déjà pris position sur la question.

[175] Ce débat a été fort bien préparé et plaidé par les procureurs impliqués. Même après l'audition des 27 et 28 mai 2013, les procureurs ont pu soumettre plusieurs textes additionnels au soussigné, clarifiant certaines de leurs positions ou répondant aux questions du soussigné. Le Tribunal leur en sait gré et les remercie. Les échanges entre les procureurs se sont échelonnés de juin à octobre 2013, ce qui explique en partie la longueur du délibéré.

POUR L'ENSEMBLE DE CES MOTIFS, le Tribunal

[176] **ACCUEILLE** en partie la requête des Comités de retraite requérants;

[177] **DÉCLARE** que les cotisations d'équilibre ainsi que les intérêts y afférant et non versés aux Comités de retraite requérants font l'objet d'une fiducie réputée opposable à l'Intimée Investissement Québec Inc. aux termes de l'article 49 LRCR.

[178] **DÉCLARE** que ces cotisations et intérêts y afférant sont incessibles et insaisissables, sont exclus de l'application de l'hypothèque mobilière et immobilière sans dépossession dont bénéficie Investissement Québec Inc. et ont priorité sur la créance de cette dernière, par l'effet combiné des articles 49 et 264 LRCR.

[179] **REJETTE** la requête des Comités de retraite requérants quant à leur prétention que les déficits actuariels desdits régimes de retraite jouissent du même avantage que les cotisations d'équilibre et des intérêts y afférant.

[180] **CONTINUE** la requête pour directives à une date à être déterminée pour fins de fixation du quantum des sommes devant être remboursées aux Comités de retraite requérants par Investissement Québec Inc.

[181] **LE TOUT**, sans frais

_____

ROBERT MONGEON, J.C.S.

Me Tina Hobday
Me Alexander Herman
Langlois Kronström Desjardins
Procureurs de la partie demanderesse

Me Charles Mercier
Me Émilie Truchon
Fasken Martineau
Procureurs de la partie défenderesse

Me Adam Spiro
Me Steven Weisz
Blake, Cassels & Graydon
Procureurs de la partie intimée

Date d'audience : Les 27 et 28 mai 2013

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

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 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 their court materials with respect to the comeback motion expected to be heard ~~the week of~~ 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.

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

JAN 3 2012

PER / PAR:

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)

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

ONTARIO
SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

Proceeding commenced at Toronto

INITIAL ORDER

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Lawyers for the Monitor

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 16TH DAY
	)	
JUSTICE NEWBOULD	)	OF DECEMBER, 2013

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

ORDER
(Re Expansion of Monitor Powers)

THIS MOTION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together, the "**Timminco Entities**"), for an order authorizing and directing the Timminco Entities to pay the Funds (as defined below) to FTI Consulting Canada Inc. in its capacity as the court appointed monitor of the Timminco Entities (the "**Monitor**") and expanding the powers of the Monitor was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Sean Dunphy sworn December 5, 2013 (the "**Dunphy Affidavit**"), and the Twenty-Third Report of the Monitor dated December 6, 2013 (the "**Twenty-Third Report**"), and on hearing the submissions of counsel for the Timminco Entities and the Monitor, no one appearing for any other person on the

service list, although duly served as appears from the affidavit of service of Kathryn Esaw sworn December 6, 2013, filed:

PAYMENTS TO MONITOR

1. **THIS COURT ORDERS** that the Timminco Entities are authorized and directed to (a) transfer, direct and pay over to the Monitor forthwith and in any event by no later than 4:00 pm EST on December 16, 2013, all monies currently held in accounts in the name of and/or controlled by the Timminco Entities; and (b) transfer, direct and pay over to the Monitor forthwith all monies received by the Timminco Entities after the date hereof (all such monies, together with any monies received on behalf of the Timminco Entities, the "**Funds**"), which Funds shall continue to be Property (as defined at paragraph 4 of the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012, the "**Initial Order**") of the Timminco Entities.

2. **THIS COURT ORDERS** that all Persons (as defined at paragraph 19 the Initial Order) in possession or control of Property, including for greater certainty any monies, belonging to or owed to the Timminco Entities shall forthwith advise the Monitor of such and shall grant immediate and continued access to the Property to the Monitor, and shall forthwith deliver all such Property to the Monitor upon the Monitor's request, other than documents or information which cannot be disclosed or provided to the Monitor due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

3. **THIS COURT ORDERS** that the Administration Charge, the Directors' Charge and the DIP Lenders Charge (as defined in the Initial Order) shall continue to apply to the Property of the Timminco Entities, including the Funds in accordance with their priority as established by the Initial Order.

ADDITIONAL POWERS OF THE MONITOR

4. **THIS COURT ORDERS** the Monitor of the Timminco Entities shall continue to be authorized and directed, and is authorized, but not required, in the name of and on behalf of the Timminco Entities, if appropriate, to :

(a) complete the Claims Procedure established by the Claims Procedure Order of Mr. Justice Morawetz dated June 15, 2013 (the "**Claims Procedure Order**") and settle, resolve and/or adjudicate the remaining disputed Claims and any other outstanding items in the Claims Procedure in accordance with the Claims Procedure Order, without consulting with the Timminco Entities; and

(b) take such further steps and seek such amendments to the Claims Procedure Order or additional orders as the Monitor considers necessary or appropriate in order to fully determine, resolve or deal with any Claims or D&O claims (as both are defined in the Claims Procedure Order).

5. **THIS COURT ORDERS** that the Monitor is authorized, but not required, in the name of and on behalf of the Timminco Entities, to

(a) seek the directions of this Honourable Court in respect of the validity and quantum, if any, of the D&O Claims and whether such claims are secured by the D&O Charge (as defined at paragraph 27 of the Initial Order);

(b) take such steps as may be necessary or appropriate to seek and obtain recovery of the proceeds of sale of the Memphis Property (as described in the Dunphy Affidavit) and matters ancillary thereto;

(c) file any and all tax returns of the Timminco Entities with any governmental tax authority that the Monitor considers necessary or desirable;

(d) claim any and all rebates, refunds or other amounts of tax (including sales taxes, capital taxes and income taxes) paid by or payable to the Timminco Entities;

(e) engage, deal, communicate, negotiate, agree and settle with any and all governmental authorities on behalf of the Timminco Entities and all such government authorities shall treat the Monitor as the authorized representative of the Timminco Entities. Any rebates, refunds or other amounts received by the Monitor on account of taxes paid by or payable to the Timminco Entities shall form part of the Funds;

(f) to seek the directions of this Honourable Court in respect of the distribution of the Funds and/or any Property to creditors or to deal with and/or abandon any Property and any matters related thereto;

(g) to seek directions from this Honourable Court in respect of the filing of any plan of arrangement or compromise or the termination of these proceedings commenced by the Timminco Entities under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**") pursuant to the Initial Order (the "**CCAA Proceedings**"), the discharge of the Monitor and all incidental and ancillary matters thereto; and

to perform such other functions as this Court may order from time to time (collectively, with paragraph 4 of this Order, the "**Monitor's Increased Powers**").

6. **THIS COURT ORDERS** that the Monitor's Increased Powers shall be in addition to the powers of the Monitor set out in any previous order of the Court (the "**Monitor's Existing Powers**")

7. **THIS COURT ORDERS** that the Monitor is prohibited from causing the Timminco Entities to make a voluntary assignment in bankruptcy without further Order of this Court.

8. THIS COURT ORDERS that, in addition to its prescribed rights in the CCAA, the Monitor's Existing Powers, the Monitor's Increased Powers and all other authority granted to the Monitor in all Orders granted in these CCAA Proceedings, the Monitor is empowered and authorized to take such additional actions and execute such documents, in the name of and on behalf of the Timminco Entities, as the Monitor considers necessary or desirable in order to respond to matters resulting from (a) the pending decision of Justice Mongeon in the Superior Court of Quebec (Commercial Division) pursuant to the Priority Claim Adjudication Protocol approved by the Order of the Honourable Mr. Justice Morawetz dated October 18, 2012 and any motions for leave to appeal or appeals relating thereto; and (b) the pending decision of Justice Morawetz in the Ontario Superior Court of Justice (Commercial Division) relating to a motion to lift the stay of proceedings brought by the plaintiff St. Clair Pennyfeather in the action with the Court File No. CV-09-378701-00CP; and (c) any motions for leave to appeal or appeals relating thereto.

9. **THIS COURT ORDERS** that in exercising the Monitor's Increased Powers, the Monitor shall not take possession of any real property belonging to the Timminco Entities.

10. **THIS COURT ORDERS** that, except as required by the CCAA or as provided for in any Orders issued by the Court in respect of the CCAA Proceedings, the Monitor shall not be authorized or directed to act in any other manner, and shall have no responsibility for any other duties or functions whatsoever other than by further Order of this Court.

11. **THIS COURT ORDERS** that the Monitor shall be at liberty to engage such persons as the Monitor deems necessary or advisable respecting the exercise of the Monitor's Existing Powers and the Monitor's Increased Powers.

12. **THIS COURT ORDERS** that, in addition to its prescribed rights under the CCAA, the powers granted by the Initial Order, this Order and all other orders granted in these proceedings, the Monitor is empowered and authorized to take such additional actions and execute such additional documents, in the name of and on behalf of the Timminco Entities, that may be incidental or ancillary to its prescribed rights and the powers granted to it, in order to facilitate the orderly completion of these proceedings and the winding up of the Timminco Entities' estates.

13. **THIS COURT ORDERS** that the Monitor shall continue to hold the Funds, and the Monitor is authorized and directed:

(a) to pay the reasonable fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Timminco Entities, in the name of and on behalf of the Timminco Entities;

(b) to pay all post-filing liabilities properly incurred by the Timminco Entities in the ordinary course of business which have not been previously paid, in the name of and on behalf of the Timminco Entities;

(c) to pay all costs associated with any actions taken by the Monitor pursuant to paragraph 11 of this Order; and

(d) to return to Court in order to seek such further authority or directions as the Monitor considers appropriate with respect to the use or distribution of the Funds.

14. **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 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, any other applicable legislation or any other Order granted in the CCAA Proceedings.

15. **THIS COURT ORDERS** that, except as specifically provided for herein, nothing in this Order shall vary or amend any order or endorsement previously granted in the CCAA Proceedings.

GENERAL

16. **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 Monitor, the CRO, 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 Monitor and to the CRO, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

DEC 16 2013

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER
(Re Expanded Monitor Powers)

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Lawyers for the Applicants

C A N A D A

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° :

[N° (Cour Supérieure de justice - Ontario) : CV-12-9539-00CL]

C O U R S U P É R I E U R E
(Chambre commerciale)

DANS L'AFFAIRE DE LA *LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES*, L.R.C. (1985), c. C-36, EN SA VERSION MODIFIÉE
ET DANS L'AFFAIRE D'UN PLAN DE TRANSACTION OU D'ARRANGEMENT DE :

TIMMINCO LIMITÉE -et-
BÉCANCOUR SILICON INC.

Débitrices

- et -

FTI CONSULTING INC.

Contrôleur

- et -

Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc., ayant une place d'affaires au 6500, rue Yvon-Trudeau, en la ville de Bécancour, district de Trois-Rivières, Province de Québec, G9H 2V8;

- et -

Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc., ayant une place d'affaires au 6500, rue Yvon-Trudeau, en la ville de Bécancour, district de Trois-Rivières, Province de Québec, G9H 2V8;

Requérants

c.

INVESTISSEMENT QUÉBEC, ayant une place d'affaires au 600, rue de la Gauchetière Ouest, bureau 1500, en les cité et district de Montréal, Province de Québec, H3B 4L8;

Intimée

REQUÊTE POUR DIRECTIVES ET JUGEMENT DÉCLARATOIRE TOUCHANT LES RÉCLAMATIONS PRIORITAIRES (ARTICLES 11 ET 17 LACC)

(Référé au tribunal siégeant dans le district judiciaire de Montréal par Ordonnance de la Cour supérieure de justice de l'Ontario datée du 18 octobre 2012)

À L'HONORABLE MARK SCHRAGER, J.C.S., SIÉGEANT EN CHAMBRE COMMERCIALE POUR LE DISTRICT DE MONTRÉAL, LES REQUÉRANTS EXPOSENT CE QUI SUIT :

I. INTRODUCTION

1. La présente requête consiste en une demande référée à la Cour supérieure du Québec par la Cour supérieure de justice (Rôle commercial) de l'Ontario, dans le contexte d'une procédure de restructuration sous la *Loi sur les arrangements avec les créanciers des compagnies* qui procède en Ontario.

2. La question à trancher entre les Requérants et l'Intimée concerne l'interprétation et l'application du droit québécois à l'égard de réclamations de régimes de retraite québécois, des droits d'un créancier acquis au Québec ainsi que de la priorité de ces réclamations, s'il y a lieu, sur le produit de ventes d'actifs situés au Québec, tel qu'il sera élaboré ci-dessous.

II. LES PARTIES

3. Le premier Co-Requérant, le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (le « Comité de retraite des syndiqués »), administre le Régime de rentes pour les participants et bénéficiaires syndiqués de la compagnie Silicium Bécancour Inc. (« SBI ») établi sous la *Loi sur les régimes complémentaires de retraite* (le « Régime de retraite des syndiqués »), tel qu'il appert du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. en vigueur le 1er janvier 2006 et daté du 11 décembre 2006, produit au soutien de la présente comme **Pièce P-1**.

4. Le deuxième Co-Requérant, le Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. (le « Comité de retraite des non-syndiqués » et, ensemble avec le Comité de retraite des syndiqués, les « Comités de retraite »), administre un Régime de rentes pour les participants et bénéficiaires non-syndiqués de SBI établi sous la *Loi sur les régimes complémentaires de retraite* (le « Régime de retraite des non-syndiqués ») et, ensemble avec le Régime de retraite des syndiqués, les « Régimes de retraite »), tel qu'il appert de la copie du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc., au 1er janvier 2007 et daté du 18 mai 2007, produite au soutien de la présente comme **Pièce P-2**.

5. L'Intimée, Investissement Québec, est un organisme gouvernemental constitué par le gouvernement du Québec en vertu de la *Loi sur Investissement Québec*, chapitre I-16.0.1.

III. LES FAITS

A. Le déficit de solvabilité et les cotisations d'équilibre

6. En vertu des dispositions des Régimes de retraite, Pièce P-1 et Pièce P-2, et de la *Loi sur les régimes complémentaires de retraite* (« Loi RCR »), SBI avait l'obligation de verser une cotisation patronale pour chaque exercice financier, ce qui inclut les cotisations d'exercice et les cotisations d'équilibre, aux Comités de retraite pour être déposées à la caisse de retraite du Régime de retraite des syndiqués (la « Caisse des syndiqués ») et à la caisse de retraite du Régime de retraite des non-syndiqués (la « Caisse des non-syndiqués » et, ensemble avec la Caisse des syndiqués, les « Caisses de retraite »).

7. En vertu de la Loi RCR, toute somme due par SBI pour l'acquittement des droits des participants ou bénéficiaires visés doit, dès sa détermination, être versée par SBI aux Caisses de retraite.

8. En date du 31 décembre 2011, il existait un déficit actuariel de solvabilité estimé dans la Caisse des syndiqués de 9 889 600 $, tel qu'il appert du rapport préparé par Mercer (Canada) Limited (« Mercer ») pour le Régime de retraite des syndiqués en date du 20 juillet 2012 (le « Rapport Mercer (Syndiqués) »), produit au soutien de la présente comme **Pièce P-3**.

9. Toujours en date du 31 décembre 2011, il existait un déficit actuariel de solvabilité estimé dans la Caisse des non-syndiqués de 3 998 700 $, tel qu'il appert du rapport préparé par Mercer pour le Régime de retraite des non-syndiqués en date du 20 juillet 2012 (le « Rapport Mercer (Non-Syndiqués) »), produit au soutien de la présente comme **Pièce P-4**.

10. En vertu de la Loi RCR, l'existence de tels déficits créait des obligations de versement de cotisations d'équilibre de la part de SBI aux Caisses de retraite afin de combler les déficits actuariels sur une période de temps.

11. En raison de l'existence du déficit actuariel de solvabilité du Régime de retraite des syndiqués en date du 31 décembre 2011, SBI avait l'obligation de verser à la Caisse des syndiqués des cotisations d'équilibre mensuelles au montant de 93 810 $, tel qu'il appert de l'annexe II du Rapport Mercer (Syndiqués), Pièce P-3.

12. De plus, en raison de l'existence du déficit actuariel de solvabilité du Régime de retraite des non-syndiqués en date du 31 décembre 2011, SBI avait l'obligation de verser à la Caisse des non-syndiqués des cotisations d'équilibre mensuelles au montant de 41 710 $, tel qu'il appert de l'annexe II du Rapport Mercer (Non-Syndiqués), Pièce P-4.

13. Depuis le 16 janvier 2012, SBI a cessé de verser les cotisations d'équilibre aux Caisses de retraite, suite à une décision de la Cour supérieure de justice (Rôle commercial) de l'Ontario (la « Cour ontarienne ») qui a ordonné la suspension des cotisations d'équilibre de SBI envers les Caisses de retraite pour la durée de la suspension des procédures dans le contexte de la restructuration entreprise sous la *Loi sur les arrangements avec les créanciers des compagnies* (« la LACC »), tel qu'il sera élaboré ci-dessous.

B. Le début des procédures en Ontario sous la LACC

14. SBI est une filiale entièrement détenue par Timminco Limited, cette dernière ayant une place d'affaires à Toronto dans la Province de l'Ontario (« Timminco » et, ensemble avec SBI, les « Entités Timminco »), tel qu'il appert du 13^{e} Rapport du Contrôleur daté du 27 août 2012, au paragraphe 1, produit au soutien de la présente comme **Pièce P-5**.

15. En date du 3 janvier 2012, les Entités Timminco ont amorcé un processus de restructuration en vertu de la LACC sous la supervision de la Cour ontarienne, numéro de cour CV-12-9539-00CL, présidée par l'honorable juge Morawetz, lequel a ordonné la suspension de toute procédure contre les Entités Timminco, tel qu'il appert du *Initial Application Record* du 2 janvier 2012 (sans les pièces, mais incluant l'affidavit de Peter Kalins du 2 janvier 2012 ainsi que la Pièce « A » au soutien de l'affidavit), l'Ordonnance initiale du 3 janvier 2012 (l'« Ordonnance initiale ») et le *Endorsement* du 4 janvier 2012, produits au soutien de la présente *en liasse* comme **Pièce P-6**.

16. L'Ordonnance initiale incluait aussi une demande par la Cour ontarienne requérant l'aide et la reconnaissance de tout tribunal ayant juridiction au Canada afin de prendre acte de l'Ordonnance initiale, de rendre eux-mêmes les jugements nécessaires et souhaitables ainsi que d'assister les Entités Timminco, le Contrôleur et leurs agents dans l'exécution de l'Ordonnance initiale, tel qu'il appert du paragraphe 50 de l'Ordonnance initiale déjà produite comme Pièce P-6.

17. En date du 16 janvier 2012, l'honorable juge Morawetz a ordonné la suspension du versement des cotisations d'équilibre par les Entités Timminco, dont SBI, aux Caisses de retraite, tel qu'il appert du *Motion Record* du 5 janvier 2012 (sans les pièces mais incluant l'affidavit de Peter Kalins du 5 janvier 2012) et l'Ordonnance du 16 janvier 2012, produits au soutien de la présente *en liasse* comme **Pièce P-7**.

18. Dans ses motifs soutenant l'ordonnance de suspendre les cotisations d'équilibre, l'honorable juge Morawetz s'est basé sur les états financiers des Entités Timminco pour en venir à la conclusion qu'à cette date, si les Entités Timminco étaient obligées de payer les cotisations d'équilibre aux Caisses de retraite, elles n'auraient pas les fonds nécessaires pour continuer d'exploiter leurs entreprises. L'application de la Loi RCR mènerait alors les Entités Timminco vers la faillite et irait à l'encontre des objectifs de la LACC, causant inévitablement préjudice à tous les intervenants, incluant les employés et les retraités, tel qu'il appert des motifs de l'honorable juge Morawetz dans son *Endorsement*, aux paragraphes 27, 28, 62, 63 et 69, en date du 2 février 2012, produit au soutien de la présente comme **Pièce P-8**.

19. SBI cessa ainsi de verser les cotisations d'équilibre dues aux Caisses de retraite en date du 16 janvier 2012.

20. En date du 8 février 2012, la Cour ontarienne a approuvé le financement intérimaire [*DIP financing*] par QSI Partners Ltd. (« QSI ») et a ordonné une super-priorité en faveur de ce dernier, tel qu'il appert de l'Ordonnance du 8 février 2012 et du *Endorsement* du 9 février 2012 (dont la permission d'appeler a été rejeté par la Cour d'appel de l'Ontario le 20 juillet 2012), produits au soutien de la présente *en liasse* comme **Pièce P-9**.

21. Les conclusions de l'Ordonnance initiale furent reconduites à plusieurs reprises par l'honorable juge Morawetz et prendront fin le 31 janvier 2013, à moins que les Entités Timminco ne requièrent une autre prorogation de l'Ordonnance initiale.

C. La vente des actifs de SBI

22. Des actifs importants de SBI ont étés vendus sous la supervision de la Cour ontarienne, notamment les actifs de silicium métallurgique qui ont été vendus à QSI en date du 13 juin 2012 et les actifs solaires qui ont été vendus à Ferroatlantica, S.A. (« Ferro ») en date du 14 juin 2012, tel qu'il appert des Ordonnances de la Cour ontarienne datées du 22 mai 2012 et du 1er juin 2012 approuvant les ventes d'actifs et les *Endorsements* du 18 mai 2012 et du 1er juin 2012, produits au soutien de la présente *en liasse* comme **Pièce P-10** et du 13e Rapport du Contrôleur daté du 27 août 2012, au paragraphe 6, Pièce P-5.

23. Les actifs vendus représentent substantiellement tous les actifs d'exploitation de SBI [*operating assets*], tel qu'il appert de l'affidavit du chef de la restructuration des Entités Timminco [*Chief Restructuring Officer* ou *CRO*], M. Sean Dunphy (« CRO »), du 23 août 2012, au paragraphe 6, sous l'onglet « 2 » de la requête des Entités Timminco du 23 août 2012, produite au soutien de la présente comme **Pièce P-11**.

24. Suite aux ventes de leurs actifs, les Entités Timminco ont récupéré une somme d'approximativement 30,8 millions $, tel qu'il appert du 13e Rapport du Contrôleur, au paragraphe 7, Pièce P-5.

25. Par conséquent, suite à la vente des actifs, les Entités Timminco se sont mis dans une situation beaucoup plus favorable quant à leur capacité de présenter à leurs créanciers un plan d'arrangement acceptable à ces derniers.

D. Le processus de réclamation

26. Suite à la vente d'actifs, un processus de réclamation a débuté suite à l'approbation de la Cour ontarienne par une ordonnance datée du 15 juin 2012 indiquant que des réclamations pouvaient être soumises à l'encontre des Entités Timminco [*Claims Procedure*] (le « Processus de réclamation »), tel qu'il appert de l'Ordonnance du 15 juin 2012, produite en versions anglaise et française au soutien de la présente, *en liasse*, comme **Pièce P-12**.

27. Selon les termes du Processus de réclamation, le Comité de retraite des syndiqués a soumis deux réclamations garanties :

    1) Une réclamation pour le déficit actuariel de solvabilité du Régime de retraite des syndiqués au montant de 9 889 600 $, comme il a été établi au 31 décembre 2011 dans le Rapport Mercer (Syndiqués); et

    2) Une réclamation pour les cotisations d'équilibre non versées pour décembre 2011 à juin 2012, représentant un montant de 668 690 $, tel qu'il a été établi dans le Rapport Mercer (Syndiqués);

tel qu'il appert de la preuve de réclamation soumise par le Comité de retraite des syndiqués au Contrôleur le 20 juillet 2012, produite au soutien de la présente comme **Pièce P-13**.

28. Selon les termes du Processus de réclamation, le Comité de retraite des non-syndiqués a soumis deux réclamations garanties :

1) Une réclamation pour le déficit actuariel de solvabilité du Régime de retraite des non-syndiqués au montant de 3 998 700 $, comme il a été établi au 31 décembre 2011 dans le Rapport Mercer (Non-Syndiqués); et

2) Une réclamation pour les cotisations d'équilibre non versées de décembre 2011 à juin 2012, étant un montant de 297 520 $, tel qu'il a été établi dans le Rapport Mercer (Non-Syndiqués);

tel qu'il appert de la preuve de réclamation soumise par le Comité de retraite des non-syndiqués au Contrôleur le 20 juillet 2012, produite au soutien de la présente comme **Pièce P-14**.

E. La nomination du CRO

29. Les Entités Timminco ont ensuite nommé un chef de la restructuration ou CRO, M. Sean Dunphy, décision qui a été approuvée par la Cour ontarienne en date du 17 août 2012.

F. Le processus de remboursement à Investissement Québec

30. Le 10 juillet 2009, Investissement Québec consentait un prêt au montant de 25 000 000 $ à SBI, garanti par une hypothèque sur l'universalité des biens de SBI (le « Prêt »), tel qu'il appert de l'offre de prêt signée par les parties le 10 juillet 2009 et l'hypothèque universelle du 10 juillet 2009, reproduites, *en liasse*, sous les onglets « 2.B » et « 2.C » de la requête des Entités Timminco du 23 août 2012, Pièce P-11.

31. Le Prêt n'est donc pas de même nature qu'un financement DIP, étant un prêt conventionnel. Le prêt n'a donc pas été mis en place afin de soutenir la restructuration des Entités Timminco et n'a donc pas été accordé avec l'objectif de supporter les Entités Timminco dans le cadre et avec les objectifs de la LACC.

32. Afin de limiter les intérêts sur le Prêt qui s'accumulaient par tranche d'environ 10 000 $ par jour, Investissement Québec, le Contrôleur et les Entités Timminco ont conclu une entente afin que soit remboursé le Prêt ainsi que la majorité des intérêts, tel qu'il appert de l'affidavit du CRO, reproduit, *en liasse*, sous l'onglet « 2 » de la requête des Entités Timminco du 23 août 2012, Pièce P-11.

33. Le 28 août 2012, la Cour ontarienne a entériné un processus par lequel le Prêt serait remboursé au montant de 25 393 057,43 $ (le « Processus de remboursement »), tel qu'il appert de l'Ordonnance de la Cour ontarienne du 28 août 2012, incluant notamment à l'annexe « A » une convention de remboursement [*Reimbursement Agreement*] (la « Convention de remboursement »), produite au soutien de la présente comme **Pièce P-15**, et le 16e Rapport du Contrôleur daté du 28 novembre 2012, au paragraphe 8, produit au soutien de la présente comme **Pièce P-16**.

34. Il était également stipulé à l'Ordonnance du 28 août 2012 que la Cour ontarienne requérait l'aide et la reconnaissance de tout tribunal ayant juridiction au Canada afin de prendre acte de l'Ordonnance, de rendre eux-mêmes les jugements nécessaires et souhaitables ainsi que d'assister les Entités Timminco, le Contrôleur et leurs agents dans l'exécution de l'Ordonnance, tel qu'il appert de l'Ordonnance du 28 août 2012, Pièce P-15, au paragraphe 50.

35. Suite à l'Ordonnance du 28 août 2012, le Contrôleur, qui détenait le produit de vente des actifs du 13 juin 2012 et du 14 juin 2012, a payé à Investissement Québec la somme de 25 393 058 $, tel qu'il appert du 16e Rapport du Contrôleur daté du 28 novembre 2012, au paragraphe 8, Pièce P-16.

36. Faisant suite à une Ordonnance additionnelle rendue le 31 août 2012, le Contrôleur a aussi payé un montant additionnel de 1 213 000 $ en faveur d'Investissement Québec, tel qu'il appert du 16e Rapport du Contrôleur daté du 28 novembre 2012, au paragraphe 8, Pièce P-16.

37. Le remboursement du Prêt a donc été effectué sous réserve des droits des créanciers pouvant détenir des créances prioritaires à Investissement Québec, dont notamment les Comités de retraite.

38. Conformément au Processus de remboursement, les créanciers ayant déposé des réclamations garanties en vertu du Processus de réclamation du 15 juin 2012 devaient soumettre au tribunal une demande de priorité [*Priority Assertion*] quant aux sommes versées à Investissement Québec en remboursement du Prêt.

G. Les réclamations de remboursement des Comités de retraite

39. En vertu du Processus de remboursement du Prêt, entériné par la Cour ontarienne le 28 août 2012, et notamment de la Convention de remboursement à l'annexe « A » de l'Ordonnance du 28 août 2012, les Comités de retraite ont encore une fois soumis les montants qu'ils réclamaient, cette fois-ci sous forme de demandes de priorité [*Priority Assertions*] (les « Demandes de priorité des Comités de retraite ») :

1) Le Comité de retraite des syndiqués a soumis deux demandes : une pour le déficit actuariel de solvabilité du Régime de retraite des syndiqués au montant de 9 889 600 $, tel qu'établi le 31 décembre 2011 dans le Rapport Mercer (Syndiqués); et l'autre pour les cotisations d'équilibre non versées de décembre 2011 à juin 2012, soit un montant de 668 690 $, tel qui a été établi dans le Rapport Mercer (Syndiqués); et

2) Le Comité de retraite des non-syndiqués a soumis deux demandes : une pour le déficit actuariel de solvabilité du Régime de retraite des syndiqués au montant de 3 998 700 $, tel qu'établi au 31 décembre 2011 dans le Rapport Mercer (Non-Syndiqués); et l'autre pour les cotisations d'équilibre non versées pour les mois de décembre 2011 à juin 2012, soit un montant de 297 520 $, tel qu'établi dans le Rapport Mercer (Non-Syndiqués);

tel qu'il appert de l'avis des Demandes de priorité des Comités de retraite du 7 septembre 2012 et signifié aux Contrôleur, SBI et Investissement Québec, produit au soutien de la présente comme **Pièce P-17**.

40. Le 12 septembre 2012, le Contrôleur, Investissement Québec et SBI ont consenti à ce que les Demandes de priorité des Comités de retraite soient catégorisées en tant que réclamations de remboursement sous le Processus de remboursement [*Reimbursement Claims*] (les « Réclamations de remboursement des Comités de retraite ») et que les réclamations des Comités de retraite soient ajoutées à l'annexe « A » du Processus de remboursement, tel qu'il appert du courriel transmis par le procureur du Contrôleur aux procureurs des Comités de retraite et daté le 12 septembre 2012, produit au soutien de la présente comme **Pièce P-18**.

H. Le transfert de la demande au Québec

41. Considérant que les questions soumises par les Comités de retraite étaient des questions de droit applicable dans la province de Québec, les parties ont convenu d'un protocole par lequel les Réclamations de remboursement des Comités de retraite seraient entendues par la Cour supérieure du Québec (Chambre commerciale) (le « Protocole d'adjudication »), ce protocole ayant été présenté à l'honorable juge Morawetz de la Cour ontarienne le 10 octobre 2012.

42. À la demande du juge Morawetz, les procureurs du Contrôleur ont rédigé une lettre pour confirmer la position selon laquelle la question devant être tranchée entre les Comités de retraite et Investissement Québec, concernant l'interprétation et l'application du droit québécois à l'égard de réclamations des Comités de retraite, des droits d'Investissement Québec et de la priorité relative de ces réclamations sur les produits de ventes sur des actifs au Québec, serait

tranchée de façon plus efficace et moins coûteuse par la Cour supérieure du Québec (Chambre commerciale) (la « Cour supérieure du Québec »), tel qu'il appert de la lettre des procureurs du Contrôleur datée le 10 octobre 2012, produite au soutien de la présente comme **Pièce P-19**.

43. La lettre du 10 octobre 2012 a aussi confirmé la demande à l'effet que l'honorable juge Morawetz réfère le dossier des Réclamations de remboursement des Comités de retraite à la Cour supérieure du Québec, en demandant l'aide et l'assistance de celle-ci, tel qu'il appert de la lettre des procureurs du Contrôleur datée le 10 octobre 2012, Pièce P-19.

44. Par l'Ordonnance du 18 octobre 2012, l'honorable juge Morawetz a accordé la demande des Comités de retraite, d'Investissement Québec, des Entités Timminco et du Contrôleur pour que la détermination des Réclamations de remboursement des Comités de retraite soit entendue devant la Cour supérieure du Québec en conformité avec le Protocole d'adjudication, tel qu'il appert de l'Ordonnance du 18 octobre 2012 approuvant le Protocole d'adjudication, produite au soutien de la présente comme **Pièce P-20**.

45. Également et conformément à l'Ordonnance du 18 octobre 2012, l'honorable juge Morawetz a demandé l'aide et la reconnaissance de la Cour supérieure du Québec afin de donner acte de l'Ordonnance du 18 octobre 2012, de déterminer si les Réclamations de remboursement des Comités de retraite avaient priorité sur le Prêt en vertu du Protocole d'adjudication, ainsi que pour entériner le Protocole d'adjudication, tel qu'il appert de l'Ordonnance du 18 octobre 2012 approuvant le Protocole d'adjudication, Pièce P-20.

46. Les Comités de retraite et Investissement Québec ont donc convenu d'un échéancier à suivre dans le dossier devant la Cour supérieure du Québec afin de s'assurer du bon déroulement et de l'efficacité du processus, tel qu'il appert du Protocole d'adjudication à la section C.1, en annexe à l'Ordonnance du 18 octobre 2012, Pièce P-20.

47. De plus, les Comités de retraite, Investissement Québec, les Entités Timminco et le Contrôleur ont convenu que les questions de droit seraient débattues devant la Cour supérieure du Québec dans un premier temps et que les questions ayant trait à la fixation des montants exacts des réclamations prioritaires à être versées aux Comités de retraite seraient débattues ultérieurement, le cas échéant, tel qu'il appert du Protocole d'adjudication à la section C.2, à annexe « A » de l'Ordonnance du 18 octobre 2012, Pièce P-20.

IV. LES QUESTIONS DE DROIT

48. Les questions de droit dans ce dossier, comme dans tous les dossiers en vertu de la LACC, doivent être analysées dans leur contexte factuel, dont les faits particulièrement importants sont :

- la quasi-totalité des actifs de SBI ont étés vendus à QSI et Ferro en juin 2012;
- le Contrôleur est à analyser toutes les réclamations afin de distribuer le produit des ventes aux créanciers;
- Investissement Québec avait une créance garantie et a été remboursé environ 27 millions de dollars sujet aux Réclamations Prioritaires [*Priority Claims*]; et
- certaines sommes (soit environ 4.5 millions de dollars) ont déjà été retenues du produit des ventes pour les *DIP Charges* (incluant le remboursement du *DIP Lender* QSI).

49. La question en litige est de déterminer si les réclamations des Comités de retraite ont priorité sur la créance d'Investissement Québec. La question du statut des réclamations des Comités de retraite vis-à-vis les *DIP Charges* n'est pas une question en litige et a déjà été tranchée par le juge Morawetz (voir l'Ordonnance du 8 février 2012, Pièce P-9).

50. SBI a cessé de verser les cotisations d'équilibre suite à l'Ordonnance du 16 janvier 2012 qui les a suspendues. Au 23 juillet 2012, les cotisations d'équilibre (avec intérêts) accumulés mais non-versées pour les deux Régimes de retraite totalisaient environ 1 million de dollars (voir lettres du 20 juillet 2012, Pièce P-3 et Pièce P-4).

51. Les déficits de solvabilité (qui incluraient les cotisations d'équilibre non-versées) pour les deux Régimes de retraite au 31 décembre 2011 totalisaient environ 14 millions de dollars (voir lettres du 20 juillet 2012, Pièce P-3 et Pièce P-4) et seront cristallisés si la terminaison des Régimes de retraite par la Régie des rentes du Québec est complétée.

52. En vertu du droit québécois applicable à la question en litige, les montants réclamés par les Comités de retraite pour les cotisations d'équilibre et pour les déficits actuariels, sont réputés détenus en fiducie par l'employeur SBI en faveur des Régimes de retraite.

53. Il est évident que de telles fiducies réputées ont un rang prioritaire sur la réclamation garantie d'Investissement Québec.

54. Il est donc respectueusement soumis que les Réclamations de remboursement des Comités de retraite constituent des réclamations prioritaires en vertu de la Convention de remboursement à l'annexe « A » de l'Ordonnance du 28 août 2012, Pièce P-15.

55. Conformément au paragraphe C.2. du Protocole d'adjudication (Pièce P-20), les Comités de retraite réservent leurs droits de parfaire les montants réclamés, suite à la détermination de la nature de leurs réclamations par cette Cour.

56. Conformément au paragraphe 9 de l'Ordonnance du 28 août 2012 de la Cour ontarienne et de la Convention de remboursement à l'annexe « A » de celle-ci (Pièce P-15), Investissement Québec remboursera les sommes déclarées par cette Cour comme étant prioritaires, le cas échéant, à Silicium Bécancour Inc. par l'entremise du Contrôleur, FTI Consulting Inc., afin que Silicium Bécancour Inc. transmette ces sommes aux Requérants.

57. Cette Requête est bien fondée en faits et en droit.

PAR CES MOTIFS, PLAISE AU TRIBUNAL :

D'ACCUEILLIR la présente requête.

PRENDRE ACTE de l'Ordonnance de la Cour supérieure de justice (Rôle commercial) de l'Ontario du 18 octobre 2012, ainsi que du Protocole d'adjudication à l'annexe « A » de celle-ci, à l'effet que la Cour supérieure du Québec (Chambre commerciale) détermine si les Réclamations de remboursement du Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. et du Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. sont des Réclamations prioritaires [*Priority Claims*], et ce, selon les dispositions du Protocol d'adjudication.

DÉCLARER comme étant des Réclamations prioritaires [*Priority Claims*] en vertu de la Convention de remboursement entérinée par l'Ordonnance du 28 août 2012 de la Cour supérieure de justice (Rôle commercial) de l'Ontario, les réclamations suivantes :

1. les cotisations d'équilibre non versées à la Caisse de retraite du Régime de rentes des employés syndiqués de Silicium Bécancour Inc.;
2. les cotisations d'équilibre non versées à la Caisse de retraite du Régime de rentes des employés non syndiqués de Silicium Bécancour Inc.;
3. le déficit actuariel de solvabilité du Régime de rentes des employés syndiqués de Silicium Bécancour Inc.; et
4. le déficit actuariel de solvabilité du Régime de rentes des employés non-syndiqués de Silicium Bécancour Inc.

PRENDRE ACTE du paragraphe C.2. du Protocole d'adjudication afin que les quantums des Réclamations prioritaires [*Priority Claims*] soient déterminés une fois que cette honorable Cour aura décidé sur la nature des réclamations, et soient déterminés selon l'Ordonnance du Processus de réclamation [*Claims Procedure Order*] ou selon une ordonnance cette Cour.

PRENDRE ACTE du paragraphe 9 de l'Ordonnance du 28 août 2012 de la Cour supérieure de justice (Rôle commercial) de l'Ontario et de la Convention de remboursement à l'annexe « A » de celle-ci, en vertu de laquelle Investissement Québec remboursera les sommes déclarées par cette Cour comme étant prioritaires, le cas échéant, à Silicium Bécancour Inc. par l'entremise du Contrôleur, FTI Consulting Inc., afin que Silicium Bécancour Inc. transmette ces sommes aux Requérants.

LE TOUT SANS FRAIS.

MONTRÉAL, le 17 décembre 2012

(S) LANGLOIS KRONSTRÖM DESJARDINS, S.E.N.C.R.L.

LANGLOIS KRONSTRÖM DESJARDINS, S.E.N.C.R.L.
Procureurs des Requérants

AFFIDAVIT

Je, soussigné, RENÉ BOISVERT, exerçant ma profession au 6500, rue Yvon-Trudeau, en la ville de Bécancour, district de Trois-Rivières, affirme solennellement ce qui suit:

1. Je suis président du Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. et président du Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc.;

2. Tous les faits allégués dans la présente requête relativement au Régime de rentes pour employés syndiqués de Silicium Bécancour Inc. et au Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. sont vrais.

ET J'AI SIGNE :

René Boisvert

RENÉ BOISVERT

Affirmé solennellement devant moi à
Bécancour, ce 17 décembre 2012

Marie-Claude Jutras #135931

Commissaire à l'assermentation
pour le Québec

AVIS DE PRÉSENTATION

À : INVESTISSEMENT QUÉBEC
À l'attention de : Me Charles Mercier
FASKEN MARTINEAU
140, Grande Allée Est
Bureau 800
Québec (Québec) G1R 5M8

Procureurs de l'intimée INVESTISSEMENT QUÉBEC

PRENEZ AVIS que la présente *Requête pour directives et jugement déclaratoire touchant les réclamations prioritaires* sera présentée pour adjudication devant l'honorable juge Mark Schrager, j.c.s., siégeant dans et pour le district de Montréal, au Palais de justice de Montréal, au 1 rue Notre-Dame Est, à une date et une salle à être déterminées.

VEUILLEZ AGIR EN CONSÉQUENCE.

MONTRÉAL, le 17 décembre 2012

(S) LANGLOIS KRONSTRÖM DESJARDINS, S.E.N.C.R.L.

LANGLOIS KRONSTRÖM DESJARDINS, S.E.N.C.R.L.
Procureurs des Requérants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	MONDAY, THE 16TH
	)	
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

ORDER
(Re Special Payments, KERPs and Super-Priority of Administration Charge and D&O Charge)

THIS MOTION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**") for an order, *inter alia*, (a) suspending the Timminco Entities' special payment obligations with respect to their Pension Plans (as defined below), (b) approving the KERPs and KERP Charge (both as defined below), and (c) granting super-priority to the Administration Charge and the D&O Charge (both as defined in the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012 (the "**Initial Order**"), was heard Thursday, January 12, 2012 at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Peter A.M. Kalins sworn January 5, 2012 and the Exhibits attached thereto (the "**Comeback Affidavit**"), the First Report (the "**First Report**") of FTI Consulting Canada Inc. in its capacity as the Court-appointed Monitor of the Timminco Entities (the "**Monitor**"), the Confidential Supplement to

the First Report, and the Second Report of the Monitor, and on being advised that those parties disclosed on the Service List attached to the Notice of Motion as Schedule "A", including, Investissement Québec ("**IQ**") and Bank of America, N.A., and (b) the members of the pension plan committees for Bécancour Non-Union Pension Plan and the Bécancour Union Pension Plan (as these terms are defined in the Comeback Affidavit), La Section Locale 184 De Syndicat Canadien des Communciations, de l'Energie et du Papier ("**CEP**"), the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("**USW**"), the Superintendent of Financial Services, and the Régie Des Rentes Du Québec, were served with the Notice of Motion and Motion Record, and on hearing the submissions of counsel for the Timminco Entities, the Monitor, IQ, CEP, USW, the Superintendent of Financial Services and AMG Advanced Metallurgical Group N.V., no one appearing for any other person on the service list, although duly served as appears from the affidavits of service of Kathryn Esaw sworn January 6, 2012 and January 10, 2012, filed,

SERVICE

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

SUSPENSION OF SPECIAL PAYMENTS UNDER PENSION PLANS

2. **THIS COURT ORDERS** that the Timminco Entities' obligations to make all contributions or payments (other than normal cost contributions, contributions to a defined contribution provision, and employee contributions deducted from pay) ("**Pension Contributions**") to the following pension plans (together, the "**Pension Plans**") are hereby suspended pending further order of this Court:

(a) the Régime de rentes pour les employés non syndiqués de Silicium Bécancour Inc. (Québec Registration Number 26042);

(b) the Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (Québec Registration Number 32063); and

(c) the Retirement Pension Plan for The Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco Limited (Ontario Registration Number 0589648).

3. **THIS COURT ORDERS** that the directors, officers, officials and agents of the Timminco Entities shall not incur any liability as a result of the failure of the Timminco Entities to make the Pension Contributions during the Stay Period (as defined in the Initial Order).

KEY EMPLOYEE RETENTION PLANS

4. **THIS COURT ORDERS** that the Timminco Entities' key employee retention plans (the "**KERPs**") in the forms attached to the confidential supplement to the First Report of the Monitor (the "**Confidential Supplement**") are hereby approved and the Timminco Entities are authorized and directed to make the payments contemplated thereunder in accordance with the terms and conditions of the KERPs.

5. **THIS COURT ORDERS** that the employees of the Timminco Entities subject to the KERPs shall be entitled to the benefit of and are hereby granted a charge (the "**KERP Charge**") on the Property (as defined in the Initial Order), which charge shall not exceed an aggregate amount of $269,000, to secure amounts owing to such employees under the KERPs. The KERP Charge shall have the priority set out in paragraphs 9 and 10 hereof.

6. **THIS COURT ORDERS** that the filing, registration or perfection of the KERP Charge shall not be required, and that the KERP Charge shall be valid and

enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the KERP Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

7. **THIS COURT ORDERS** that the KERP Charge shall not be rendered invalid or unenforceable and the rights and remedies of the beneficiaries of the KERP Charges 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 the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (the "**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 (as defined below), 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 KERP Charge shall not create or be deemed to constitute a breach by the Timminco Entities of any Agreement to which either of them is a party;

(b) the KERP Charge beneficiaries shall not 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 KERP Charge; and

(c) the payments made by the Timminco Entities pursuant to this Order and the granting of the KERP Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

8. **THIS COURT ORDERS** that the KERP 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.

PRIORITY OF CHARGES

9. **THIS COURT ORDERS** that the priorities of the Administration Charge and the D&O Charge, as first established in paragraph 38 of the Initial Order, and the KERP Charge (collectively, the "**Charges**"), as among them, shall from this date forth be as follows:

First – the Administration Charge (to a maximum amount of $1 million);

Second – the KERP Charge (to a maximum amount of $269,000); and

Third – the D&O Charge (to a maximum amount of $400,000).

10. **THIS COURT ORDERS** that, notwithstanding paragraph 40 of the Initial Order, the Charges shall constitute charges on the Property and, subject to section 11.8(8) of the CCAA, such Charges shall rank ahead in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "**Encumbrances**") in favour of any person, notwithstanding the order of perfection or attachment, including without limitation any deemed trust created under the Ontario *Pension Benefits Act,* or the Quebec *Supplemental Pension Plans Act* in favour of any person.

11. **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 Charges or further Order of this Court.

SEALING THE CONFIDENTIAL SUPPLEMENT

12. **THIS COURT ORDERS** that, subject to further order of this Court, the Confidential Supplement shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of this Court.

GENERAL

13. **THIS COURT ORDERS** that any interested party (including the Timminco Entities and the Monitor) may bring a motion to this Court to vary or amend this Order (provided that the beneficiary of any Charge shall be entitled to rely on the Charges up to and including the day on which such Charge or the priority granted to such Charge may be varied or amended), which motion must be returnable by no later than February 2, 2012 or such later date as the parties affected may agree, 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.

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

FEB - 7 2012

NB

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

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.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER
(Re Special Payments, KERPs and Super-Priority of Administration Charge and D&O Charge)

STIKEMAN ELLIOTT LLP
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Lawyers for the Applicants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 22ND
	)	
JUSTICE MORAWETZ	)	DAY OF MAY, 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

APPROVAL AND VESTING ORDER
(Re Sale of Solar Assets)

THIS MOTION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**"), for an order approving the sale transaction (the "**F.A. Transaction**") contemplated by the Agreement of Purchase and Sale (the "**F.A. Agreement**") between the Timminco Entities and Grupo FerroAtlantica, S.A. made and entered into as of April 25, 2012, to the Affidavit of Peter A.M. Kalins sworn May 9, 2012 (the "**May 9 Affidavit**") as Exhibit "K", vesting the Timminco Entities' right, title and interest in and to the Purchased Assets (as defined in the F.A. Agreement) in and to Grupo FerroAtlantica, S.A., including any assignee thereof permitted under the F.A. Agreement (the "**Purchaser**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the May 9 Affidavit and the Seventh Report of FTI Consulting Inc., in its capacity as Court-appointed Monitor of the Timminco Entities (the "**Monitor**") dated May 15, 2012, and on being advised that those parties disclosed on the Service List attached to the Motion Record were served with the Notice of Motion and Motion Record, and on hearing the submissions of counsel for the Timminco Entities, the Monitor, the Purchaser, Investissement Québec, QSI Partners Ltd., Dow Corning Corporation, La Section Locale 184 De Syndicat Canadien des Communciations, de l'Energie et du Papier, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AMG Advanced Metallurgical Group N.V., the Financial Services Commission of Ontario, and Mercer (Canada) Limited, in its capacity as the administrator of the Retirement Pension Plan for the Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco Limited (Ontario Registration Number 0589648), no one appearing for any other person on the service list, although duly served as appears from the affidavit of service of Kathryn Esaw sworn May 10, 2012, filed,

1. **THIS COURT ORDERS** that that any defined term used but not defined herein shall have the meaning ascribed to such term in the F.A. Agreement.

2. **THIS COURT ORDERS AND DECLARES** that the F.A. Transaction and the F.A. Agreement are hereby approved. The Timminco Entities and the Monitor are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the F.A. Transaction and for the conveyance of the Purchased Assets to the Purchaser.

3. **THIS COURT ORDERS AND DECLARES** that this Order shall constitute the only authorization required by the Timminco Entities to proceed

with the F.A. Transaction and that no shareholder approval shall be required in connection therewith.

4. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the "**Monitor's Certificate**"), all of the Timminco Entities' right, title and interest in and to the Purchased Assets shall vest, without further instrument of transfer or assignment, absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (a) any encumbrances or charges created by the Court, including by the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012, the Order (Re Special Payments, KERPs and Super-Priority of Administration Charge and D&O Charge) of the Honourable Mr. Justice Morawetz dated January 16, 2012, and the DIP Order of the Honourable Mr. Justice Morawetz dated February 8, 2012, as amended; (b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario), the *Civil Code of Québec*, or any other personal property registry system; (c) all Claims in respect of or relating to any debts, liabilities or other obligations of any of the Timminco Entities that do not constitute Assumed Obligations; and (d) those Claims listed on Schedule B hereto; and, for greater certainty, this Court orders that all Encumbrances or charges affecting or relating to the Purchased Assets other than the Permitted Encumbrances are hereby expunged and discharged as against the Purchased Assets and the Purchaser.

5. **THIS COURT ORDERS** the Land Registrar of the Land Registry Office for the Registration Division of Nicolet (Nicolet 2), upon presentation of the Monitor's Certificate and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, but without the necessity to file a certificate of non-appeal, to publish this Order and (a) to proceed with an entry on the index of immovables showing the Purchaser as the absolute owner in regards to the immovable property known and designated as:

> An immovable situated in the City of Bécancour, Province of Québec, known and designated as being composed of lot number THREE MILLION TWO HUNDRED AND NINETY-FOUR THOUSAND AND FIFTY-FOUR (3 294 054) of the Cadastre of Québec, Registration Division of Nicolet (Nicolet 2); and
>
> lot number FOUR MILLION ONE HUNDRED AND TEN THOUSAND FIVE HUNDRED AND NINETY-EIGHT (4 110 598) of the Cadastre of Québec, Registration Division of Nicolet (Nicolet 2) with the buildings thereon erected bearing civic address 5500 Yvon-Trudeau Street, city of Bécancour, province of Québec, G9H 0G1 (together, the "**HP1 Property**")

and (b) to proceed with the radiation and cancellation of any and all hypothecs, legal hypothecs and Encumbrances (the "**HP1 Encumbrances**") on the Purchased Assets, including the HP1 Property, but not the Encumbrances listed at Schedule "B" to the F.A. Agreement (the "**Permitted Encumbrances**"), including, without limitation, the radiation and cancellation of the rights resulting from the following deeds published at the said Land Registry:

- Hypothecs pursuant to a Deed of universal hypothec granted by Bécancour Silicon Inc. in favour of Investissement Québec registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on July 14, 2009, under number 16 368 865; and

- Legal hypothec against Bécancour Silicon Inc. in favour of Entreprises Arseneault Inc. registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on January 20, 2012, under number 18 783 570.

6. **THIS COURT ORDERS** the Registrar of the Québec Register of Personal and Movable Real Rights, upon presentation of the required form with a true copy of this Order and the Monitor's Certificate, but without the necessity to file a certificate of non-appeal, to reduce the scope of all hypothecs in connection with the Purchased Assets including: 1) registered under number 09-0420851-0001 in connection with the HP1 Property and to cancel, release and discharge, or partially cancel, release or discharge, all of the HP1 Encumbrances to the extent that such HP1 Encumbrances relate to the Purchased Assets, as described in Schedule C hereto, including without limitation the full or partial cancellation, release or discharge of the HP1 Encumbrances as may be registered under the following:

- Conventional hypothec without delivery signed between Bécancour Silicon Inc., Québec Silicon General Partner Inc. and Investissement Québec on October 29, 2010 and registered at the Register of Personal and Movable Real Rights ("**RPMRR**") on November 1, 2010 at 9:00 a.m. under number 10-0763732-0001;

- Conventional hypothec without delivery signed between Bécancour Silicon Inc. and Investissement Québec on July 10, 2009 and registered at the RPMRR on July 13, 2009 at 9:36 a.m. under number 09-0420851-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Services Financiers CIT Ltée on March 23, 2007 and registered at the RPMRR on April 3, 2007 at 2:00 p.m. under number 07-0171528-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Services Financiers CIT Ltée on March 15, 2006 and registered at the RPMRR on March 28, 2006 at 9:00 a.m. under number 06-0156193-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on November 10, 2011 and registered at the RPMRR on November 10, 2011 at 12:47 p.m. under number 11-0869515-0001;

- Rights resulting from a lease and assignment of the rights signed between Bécancour Silicon Inc. and 3566072 Canada Inc. (Toyota Credit Canada Inc., as assignee) on November 26, 2010 and registered at the RPMRR on December 9, 2010 at 2:42 p.m. under number 10-0867561-0001;

- Rights resulting from a lease signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on March 2, 2010 and registered at the RPMRR on March 3, 2010 at 9:00 a.m. under number 10-0118577-0002;

- Rights resulting from a lease signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on January 8, 2009 and registered at the RPMRR on January 9, 2009 at 9:00 a.m. under number 09-0010080-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Les Services Financiers Caterpillar Limitée on November 20, 2007 and registered at the RPMRR on November 30, 2007 at 2:26 p.m. under number 07-0688294-0001;

- Rights resulting from a lease signed between Bécancour Silicon Inc., Québec Silicon Limited Partnership and GE VFS Canada Limited

Partnership on September 28, 2007 and registered at the RPMRR on October 2, 2007 at 9:00 a.m. under number 07-0563868-0001; and

- Rights resulting from a lease signed between Bécancour Silicon Inc. and Prodair Canada Ltée on July 21, 2003 and registered at the RPMRR on August 22, 2003 at 2:46 p.m. under number 03-0441026-0001;

with such full or partial cancellations, releases or discharges relating only to the Purchased Assets, as described in Schedule C hereto, in order to allow the transfer to the Purchaser of the Purchased Assets, including the HP1 Property free and clear of any and all Encumbrances created by those hypothecs; and 2) in connection with the Solar Equipment located at the HP2 Property (lot 4 702 497, of the Cadastre of Québec, registration division of Nicolet (Nicolet 2) (the "**HP2 Property**"), servicing the HP2 Property and however installed to in or affixed to or forming part of the HP2 Property registered under number 10-0763732-0001 and to cancel, release and discharge, or partially cancel, release or discharge, any and all hypothecs, legal hypothecs and Encumbrances (the "**HP2 Encumbrances**") to the extent that such HP2 Encumbrances relate to the Purchased Assets, as described in Schedule C hereto, including without limitation the full or partial cancellation, release or discharge of the HP2 Encumbrances as may be registered under the following:

- Conventional hypothec without delivery signed between Bécancour Silicon Inc., Québec Silicon General Partner Inc. and Investissement Québec on October 29, 2010 and registered at the Register of Personal and Movable Real Rights ("**RPMRR**") on November 1, 2010 at 9:00 a.m. under number 10-0763732-0001;

- Conventional hypothec without delivery signed between Bécancour Silicon Inc. and Investissement Québec on July 10, 2009 and registered at the RPMRR on July 13, 2009 at 9:36 a.m. under number 09-0420851-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Services Financiers CIT Ltée on March 23, 2007 and registered at the RPMRR on April 3, 2007 at 2:00 p.m. under number 07-0171528-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Services Financiers CIT Ltée on March 15, 2006 and registered at the RPMRR on March 28, 2006 at 9:00 a.m. under number 06-0156193-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on November 10, 2011 and registered at the RPMRR on November 10, 2011 at 12:47 p.m. under number 11-0869515-0001;

- Rights resulting from a lease and assignment of the rights signed between Bécancour Silicon Inc. and 3566072 Canada Inc. (Toyota Credit Canada Inc., as assignee) on November 26, 2010 and registered at the RPMRR on December 9, 2010 at 2:42 p.m. under number 10-0867561-0001;

- Rights resulting from a lease signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on March 2, 2010 and registered at the RPMRR on March 3, 2010 at 9:00 a.m. under number 10-0118577-0002;

- Rights resulting from a lease signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on January 8, 2009 and registered at the RPMRR on January 9, 2009 at 9:00 a.m. under number 09-0010080-0001;

- Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Les Services Financiers Caterpillar Limitée on November 20, 2007 and

registered at the RPMRR on November 30, 2007 at 2:26 p.m. under number 07-0688294-0001;

- Rights resulting from a lease signed between Bécancour Silicon Inc., Québec Silicon Limited Partnership and GE VFS Canada Limited Partnership on September 28, 2007 and registered at the RPMRR on October 2, 2007 at 9:00 a.m. under number 07-0563868-0001; and

- Rights resulting from a lease signed between Bécancour Silicon Inc. and Prodair Canada Ltée on July 21, 2003 and registered at the RPMRR on August 22, 2003 at 2:46 p.m. under number 03-0441026-0001;

with such full or partial cancellations, releases or discharges relating only to the Purchased Assets, as described in Schedule C hereto, in order to allow the transfer to the Purchaser of the Solar Equipment free and clear of any and all Encumbrances created by those hypothecs.

7. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets held by the Monitor shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Monitor's Certificate, all Claims shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

8. **THIS COURT ORDERS** that the Monitor may rely on written notice from the Timminco Entities and the Purchaser regarding fulfillment or, if applicable, waiver of conditions to closing under the F.A. Agreement and shall have no liability with respect to delivery of the Monitor's Certificate.

9. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

10. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Timminco Entities and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Timminco Entities;

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Timminco Entities and shall not be void or voidable by creditors of the Timminco Entities, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

11. **THIS COURT ORDERS AND DECLARES** that the F.A. Transaction is exempt from any requirement under any applicable federal or provincial law to obtain shareholder approval and is exempt from the application of the *Bulk Sales Act* (Ontario).

ASSISTANCE OF OTHER COURTS

12. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories of Canada as against all persons and parties against who it may otherwise be enforced.

13. **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 Monitor and its 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 Monitor, as an officer of this Court, and to the Purchaser as may be necessary or desirable to give full effect to this Order or to assist the Monitor and the Purchaser and their respective agents in carrying out the terms of this Order.

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

MAY 25 2012

Schedule "A"
Form of Monitor's Certificate

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

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (the "**Court**") dated January 3, 2012, FTI Consulting Canada Inc. was appointed as the monitor (the "**Monitor**") of Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**");

B. Pursuant to an Order of the Court dated May ●, 2012, the Court approved the Agreement of Purchase and Sale (the "**QSI Agreement**") made and entered into as of April 25, 2012, between the Timminco Entities, QSI Partners Ltd. and Globe Speciality Metals, Inc. and provided for the vesting in QSI Partners Ltd., including any assignee thereof permitted under the QSI Agreement ("**QSI**") of the Timminco Entities' right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to QSI of a certificate certifying (a) that the Monitor has received written confirmation in the form and substance satisfactory to the Monitor from the Parties

that the conditions to Closing have been satisfied or waived by the applicable Parties, and (b) that the Monitor has received the Closing Cash Purchase Price; and

C. Unless otherwise indicated herein, defined terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the QSI Agreement.

THE MONITOR CERTIFIES the following:

1. The Monitor has received written confirmation from QSI and the Timminco Entities, in the form and substance satisfactory to the Monitor, that:

   (a) the conditions to Closing as set out in section 5 of the QSI Agreement; and

   (b) the deliveries as set out in section 6.2 and section 6.3 (other than this Certificate) of the QSI Agreement;

   have been satisfied or waived by QSI and the Timminco Entities, as applicable;

2. The Monitor has received the Closing Cash Purchase Price; and

3. This Certificate was delivered by the Monitor to the Timminco Entities at _____ [TIME] on _____ [DATE].

FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of the Timminco Entities and not in its personal capacity

Per: _____

Name:

Title:

SCHEDULE "B"
CLAIMS

1. Hypothecs pursuant to a Deed of universal hypothec granted by Bécancour Silicon Inc. in favour of Investissement Québec registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on July 14, 2009, under number 16 368 865; and

2. Legal hypothec against Bécancour Silicon Inc. in favour of Entreprises Arseneault Inc. registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on January 20, 2012, under number 18 783 570.

3. Conventional hypothec without delivery signed between Bécancour Silicon Inc., Québec Silicon General Partner Inc. and Investissement Québec on October 29, 2010 and registered at the Register of Personal and Movable Real Rights ("**RPMRR**") on November 1, 2010 at 9:00 a.m. under number 10-0763732-0001;

4. Conventional hypothec without delivery signed between Bécancour Silicon Inc. and Investissement Québec on July 10, 2009 and registered at the RPMRR on July 13, 2009 at 9:36 a.m. under number 09-0420851-0001;

5. Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Services Financiers CIT Ltée on March 23, 2007 and registered at the RPMRR on April 3, 2007 at 2:00 p.m. under number 07-0171528-0001;

6. Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Services Financiers CIT Ltée on March 15, 2006 and registered at the RPMRR on March 28, 2006 at 9:00 a.m. under number 06-0156193-0001;

7. Rights of ownership of the lessor signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on November 10, 2011 and registered at the RPMRR on November 10, 2011 at 12:47 p.m. under number 11-0869515-0001;

8. Rights resulting from a lease and assignment of the rights signed between Bécancour Silicon Inc. and 3566072 Canada Inc. (Toyota Credit Canada Inc., as assignee) on November 26, 2010 and registered at the RPMRR on December 9, 2010 at 2:42 p.m. under number 10-0867561-0001;

9. Rights resulting from a lease signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on March 2, 2010 and registered at the RPMRR on March 3, 2010 at 9:00 a.m. under number 10-0118577-0002;

10. Rights resulting from a lease signed between Bécancour Silicon Inc. and De Lage Landen Financial Services Canada Inc. on January 8, 2009 and registered at the RPMRR on January 9, 2009 at 9:00 a.m. under number 09-0010080-0001;

11. Rights of ownership of the lessor signed between Bécancour Silicon Inc. and Les Services Financiers Caterpillar Limitée on November 20, 2007 and registered at the RPMRR on November 30, 2007 at 2:26 p.m. under number 07-0688294-0001;

12. Rights resulting from a lease signed between Bécancour Silicon Inc., Québec Silicon Limited Partnership and GE VFS Canada Limited Partnership on September 28, 2007 and registered at the RPMRR on October 2, 2007 at 9:00 a.m. under number 07-0563868-0001;

13. Rights resulting from a lease signed between Bécancour Silicon Inc. and Prodair Canada Ltée on July 21, 2003 and registered at the RPMRR on August 22, 2003 at 2:46 p.m. under number 03-0441026-0001; and

14. Rights resulting from a lease signed between Silicium Bécancour and Prodair Canada Ltée on October 18, 2006 and registered at the RPMRR on January 4, 2007 at 10:30 a.m. under number 07-0004266-0001.

SCHEDULE "C"
PURCHASED ASSETS DESCRIPTION FOR VOLUNTARY REDUCTIONS UNDER THE RPMRR

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
1	1	Vibratory Screener	Vibrotech	With 40-HP Drive
2	1	Melting Furnace (#11)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System, Spare Door
3	1	Melting Furnace (#12)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System, Spare Door
4	1	Melting Furnace (#13)	Major	1,600°C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System, Spare Door
5	1	Bridge Crane (#1)	COH	with 32-Ton Main Cable Hoist, 10-Ton Auxiliary Cable Hoist, Integral Digital Hook Scale, Radio Controls

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
6	1	Bridge Crane (#2)	COH	with 32-Ton Main Cable Hoist, 10-Ton Auxiliary Cable Hoist, Integral Digital Hook Scale, Radio Controls
7	1	10MT crane	Kone Cranes	
8	Lot	Casting Area Support Equipment		(3) Ladle Hooks, (4) Slag Scraper Attachments, (4) 5' x 7' x 3'D Scrap Bins, 2-Point Cable Type Grapple, Cable Type Clam Shell Crane Bucket, *Approx. (100) 7' x 11' x 32"D Steel Pans, (10) Cast Iron Casting Pots, (30) 7' x 10' x 6'D Steel Slag Hopper, with Cast iron abrasive plate lining, **(7) cooling Frames 10' x 8' x 6', etc.
9	1	Arc Welding Power Source	Miller	
10	1	Ramp	Ramp Master	with Hydraulic Ramp Height Adjustment
11	1	Dust Collection System (#11)	Wheelabrator	248°F Operating temperature with 125-HP blower motor, inline spark arrester, 44"Dia x approx. 100' of ductwork, Fire protection sprinklers
12	1	Dust Collection System (#12)	Wheelabrator	248°F Operating temperature with 125-HP blower motor, inline spark arrester, 44"Dia x approx. 100' of ductwork, Fire protection sprinklers
13	1	Dust Collection System (#13)	Wheelabrator	248°F Operating temperature with 125-HP blower motor, inline spark arrester, 44"Dia x approx. 100' of ductwork, Fire protection sprinklers
14	1	Dust collector (29)	Wheelabrator	Not installed, outside
15	1	Saw	King Canada	10" abrasive sample cutting
16	1	Drill	Holti	DD130 - core cutting sample
17	6	Electromagnet ic Stirring purification	ABB	each with 8' x 10' x 10' Container, with Electromagnetic Power Supply, Est. 20 Gal Glycol Chilling System, Pumps, Controls, Deionized Water System, ABB PLC Controls, Self Contained Air Conditioner System, with Cart Mounted Electromagnet, Cable Wench, Etc.
18	2	Casting Pots	Unknown	with (3) insulated covers
19	lot	Crushing system Silicon Jack Hammer	screening station	steel rock screen, kent hydraulic articulating boom, kent pneumatic jack hammer, 50-HP hydraulic system, with fire resistant oil
20	1	Platform scale	Metler Toledo	Est. 20,000-Lb. Capacity

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
		Air compressor room		
21	1	Air Dryer (DTX-600-DDS-E)	Domnick Hunter	600-CFM
22	1	Air Dryer (DTA600-DS)	Domnick Hunter	600-CFM
23	1	Rotary screw type air compressor	Atlas Copco	GA90, API606885
24	1	Rotary screw type air compressor	Atlas Copco	GA90, API604948
25	1	Refractory Paste repair gunning mach	Unknown	with 32"Dia. Pressure pot. Guns, hoses
		Maintenance area		
26	1	Electric Furnace	Wilt	12-kw rated capacity, 42"x60"x16"
27	1	Disassembled paint room, 12'x12'x8'	with (1) entry door	
28	1	H-Frame hydraulic shop press	OTC	
29	1	Geared Head Engine Lathe	Harrison	Spindle speeds: 34-750-RPM, with Tailstock and thread chasing
30	1	Pipe Threader	Ridgid	with spare thread dies
31	1	Drill press	General	75-500M1, 77075006
32	1	Radial Arm Dirll	Tehcno	R2-40, 2080
33	1	Grinder	Scantool	6"tilting belt
34	1	Metal cutting band saw	General	10"x12" horizontal
35	1	Arc Welding Power Source	Miller	Goldstar 452 CC/DC, LH400634C
36	1	Arc Welding Power Source	Miller	Dimension 452, LJ310022C, with wire feeder
37	1	Arc Welding Power Source	Miller	Syncrowave 350LX
38	1	Plasma cutting system	Hypertherm	Powermax 800, 800-014893
39	1	Double end grinder	General	10"pedestal type
40	1	Metal cutting band saw	General	14" vertical
41	1	Fume collector (portable)	Diversitech	
42	1	Hydraulic Hammer attachment	Tramac	SC-50
43	lot	Miscellaneous support equipment throughout HP1		Assorted sections of shelving, storage cabinets, hand and power tools, welding supplies, work benches, inspections equipment
44	1	Bridge crane	Kone Cranes	with 10-ton cable hoist, radial controls
45	3	Bridge crane	Kone Cranes	*5,000 lbs capacity single girder. Note: (1) crane not installed)

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
46	1	Welder	Miller	Big 40, LH021915
47	1	Scale	Unknown	80,000 lbs capacity, In-Ground
		Shipping department		
		Screen and hand picking system :		
48	1	Feed hopper	MGR	12'x 8'
49	1	Belt conveyor		30"X x 12'L Power
50	1	Vibratory Screener		20"Wx32"L, with plastic screen
51	1	Belt conveyor		30"Wx7'L hand pick
52	1	Mezzanine		
		Vehicles		
53	1	Floor Sweeper	Tennant	S30-1119
53	1	Floor Sweeper	Tennant	S30-1562
54	1	Wheel Loader	Caterpillar	HJA6D01358
55	1	Wheel Loader (05)	Caterpillar	CAT0966HEA6D01529
56	1	Wheel Loader (07)	Caterpillar	CAT0966HAA6D02255
57	1	Forklift (02)	Hyster	L177V02164F
58	1	Forklift (01)	Hyster	G005D14975W
59	1	forklift (5)	Hyster	G019E01612E
60	1	Forklift (JCB 930) - (04)	JCB	SlP93002YF0822387
61	1	Forklift (03)	Raymond	EZ-A-00-16588
62	1	Forklift (06)	Hyster	G005D13590V
63	1	Forklift (07)	Hyster	P005V02182G
64	1	Forklift (08)	Hyster	P005V02179G
65	1	Forklift (25)	Hyster	POO5V01855F
66	1	Forklift (26)	Hyster	POO5V01848F
67	1	Forklift (28)	Hyster	POO5V02175G
69	1	Excavator	Gradall	5200000749
70	1	Excavator	Caterpillar	CCK01973
71	1	Tractor	Freightliner	1FVHC5CV19HAB7583
73	3	Hydraulic breaker	Tramac	700
74	1	Hydraulic breaker	Tramac	SC-50

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
75	1	Pickup truck	Dodge RAM 1500	1B7HC13Y8VJ612188
76	1	Pickup truck	Chevrolet SLE1500	2GTEK19R4W1532579
77	1	Pickup truck	Ford F-150	2FTRX07L42CA39978
78	1	Pickup truck	Ford F-150	2FTRX18WX2CA96782
80	1	Lifting platform		HD7845
		Process electrical equipment		
81	1	Transformer	Unknown	1,750/2,333 kVa, Onan/Onaf, Pri.: kV, Y Sec.: 600V D
82	1	Transformer	Ferranti Packard	2,500 kVa, Onan, Pri.: 25 kV, Y Sec.: 600V D
83	1	Transformer	Moloney	2,000 kVa, Onan/Onaf, Pri.: 25kV, Y Sec.: 600V D (crystallization)
84	1	Breaker	Unknown	25 kV, 600A
85	1	Equipment for control and protection of breaker		box, switch, announciator, indicator, relays, etc.
86	1	Switchgear	Westinghouse	Complete with (4) Vertical Sections, (2) Main Disconnects, DS-420, 600V, 2,000 A, with ampector relays LSI, (1) Bustie DS-420, 600 V, 2,000 A Disconnect, with ampector relay LSI, (6) Secondary disconnects, DS-416, 600V, 1,600 A, with ampector relay LSI, (2) Measuring customer electronic relays, (2) DSPMKII modules, with T9A sensors

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
87	1	Switchgear (crystallization)	Westinghouse	Complete with (2) Vertical sections, (1) main disconnect, DS-420, 600V, 2,000 A, with amnectro
88	2	480 kVA capacitor banks	Automatic	
89	lot	Motor control centers		(3) 600V, 1,200 A bus bracing, with (6) sections and lot of starter and switch, (1) 600 V, 1,200 A bus bracing, with (8) sections and lot of starter and switch, (2) 600 V, 1,200 A bus bracing, with (8) sections and lot of starter and switch (crystallization)
90	lot	miscellaneous process electrical equipment		Cabinet with battery charger, complete with 46 Ni-Cd battery, (2) logix Model 5000 PLC control system with rack, cards, processor, etc. Transformer, 600C@120-208V, panelboard 600 V & 120-208V, disconnect switch
91	40	Steel boxes		
92	1	Mold breaking station		
93	1	Mold Piercing Station		
94	1	Boxing Station		
95	1	Packaging station		
96		Computer equipment		
97		Spare parts		All spare parts in the HP1 storage room, except those belonging to AMGC

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
1	1	Melting Furnace (#21)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System
2	1	Melting Furnace (#22)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System
3	1	Melting Furnace (#23)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
4	1	Melting Furnace (#24)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System
5	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist, Class C Rated, with Radio Controls
6	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist, Class C Rated, with Radio Controls
7	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist,Radio Controls
8	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist,Radio Controls
9	1	Bridge Crane	Kone Crane	5 MT uninstalled
10	4	Melting Furnaces (#25 to #28)	Major	1,600 °C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System (Note : These furnace systems are partially installed. All components are on site.)

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
11	1	Melting Furnace (#29)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System (Note : This furnace system is not installed. All components are on site.)
12	4	Electromagnet Stirrer	ABB	with 8' x 10' x 10' Container**, with Electromagnetic Power Supply, Est. 20 Gal Glycol Chilling System, Pumps, Controls, Deionized Water System, Allen-Bradley PLC Controls, Self Contained Air Conditioner System, with Cart Mounted Electromagnet, Cable Wench, Etc.
13	3	Electromagnet Stirrer	ABB	with 8' x 10' x 10' Container**, with Electromagnetic Power Supply, Est. 20 Gal Glycol Chilling System, Pumps, Controls, Deionized Water System, Allen-Bradley PLC Controls, Self Contained Air Conditioner System, with Cart Mounted Electromagnet, Cable Wench, Etc. (Note : Not Installed)
14	1	Platform Scale	Undefined Make	Est. 20,000-lb Capacity
16	1	Dust Collection System (#22)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower
17	1	Dust Collection System (#23)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower
18	1	Dust Collection System (#24)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
19	1	Dust Collection System (#25)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
20	1	Dust Collection System (#26)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
21	1	Dust Collection System (#27)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
22	1	Dust Collection System (#28)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
23	1	Gunning Machine	Unknown	with 42" Dia. Holding Tnak, Hoses, Guns
25	1	Forklift Truck (#24) - H360HD	Hyster	
26	1	Scale	Unknown	
27	6	Casting Mold		
28	1	2 ton Mold		
29	1	Mold Piercing Station		
30	69	Steel Boxes		
31		Computer equipment		Pursuant to agreement between FA and BSI

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
		Electrical Sub Station :		
32	1	Item removed		
33	4	Transformer	Maloney	2,000/2,667 kVa, Onan-Onaf, Pri.: 25kV D, Sec. : 600 V Y
34	1	Transformer	Maloney	4,000/5,320 kVa, Onan-Onaf, Pri.: 25kV D, Sec. : 4,16 kV
35	1	Item removed		
36	3	Breaker	Unknown	25 kV, 800 A
37	lot	Ancillary Breaker Equip.		Box, Switch, Announciator, Indicator, Relays For Control and Protective Relay of Breaker
38	2	Switchgear	Westinghouse	Complete with (4) Vertical Sections, (2) Main Disconnects, DS-420, 600V, 2,000 A, with Amptector Relay LSI, (1) Bustie DS-420, 600 V, 2,000 A. with Amptector Relay LSI, (6) Secondary Disconnects, DS-416, 600 V, 1,600 A, LSI, (2) Measuring Customer Electronic Relays, (2) DSPMKII Modules with T9A Sensors
39	4	Automatic		480 kVa, 600 V Capacitor Banks
40	Lot	Motor control Centers, Complete		(4) 600V, 1,200 A, 42 kVa Bus Bracing, with (5) Sections, Starter, Switch, (4) 600V, 1,200 A, 42 kVa Bus Bracing, with (4) Sections, Starter, Switch (1) 600 V, 1,200 A, 42 kVa Bus Bracing, with (8) Sections Starter, Switch
41	Lot	Miscellaneous Process Electrical Equipment		Pursuant to agreement between FA and BSI
42	1	Excavator	Gradall	52000000743
43	2	Hydraulic rotary grinding	Tramac	TCH60
79	1	Pickup truck	Chevrolet S-10	1GCCS19X638237398

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

APPROVAL AND VESTING ORDER

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Lawyers for the Timminco Entities

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	FRIDAY, THE 1ST
	)	
JUSTICE MORAWETZ	)	DAY OF JUNE, 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

APPROVAL AND VESTING ORDER
(Re Sale of Silicon Metal Assets)

THIS MOTION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**"), for an order (a) approving the sale and other related transactions (the "**QSI Transaction**") contemplated by the Agreement of Purchase and Sale made and entered into as of April 25, 2012, as amended by the Amending Agreement dated as of June 1, 2012, between the Timminco Entities, QSI Partners Ltd. ("**QSI**") and Globe Specialty Medals, Inc. (the "**QSI Agreement**"), a copy of which is attached to the Affidavit of Peter A.M. Kalins sworn May 9, 2012 (the "**May 9 Affidavit**") as Exhibit "C", vesting the Timminco Entities' right, title and interest in and to the Purchased Assets (as defined in the QSI Agreement) in and to one or more of QSI and its permitted assignee(s); and (b) approving the HP2

Transaction (as defined herein) was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Motion Record of the Timminco Entities, the Supplemental Motion Record of the Timminco Entities, the Affidavit of Rahib Assal sworn May 28, 2012, the Second Supplemental Motion Record of the Timminco Entities, the Responding Motion Record of Dow Corning Corporation ("**DCC**"), the Supplemental Responding Motion Record of DCC, the Responding Motion Record of Wacker Chemie AG ("**Wacker**"), the Affidavit of Dr. Tobias Brandis sworn May 25, 2012, the Responding Motion Record of QSI, and the Seventh Report, Eighth Report and Ninth Report of FTI Consulting Inc., in its capacity as Court-appointed Monitor of the Timminco Entities (the "**Monitor**") dated May 15, May 20 and May 27, 2012, respectively, and on being advised that those parties disclosed on the Service List attached to the Motion Record were served with the Notice of Motion and Motion Record, and on hearing the submissions of counsel for the Timminco Entities, the Monitor, QSI Partners Ltd., DCC, Wacker, Mercer Canada, the Administrator of the Haley Pension Plan, BSI Non-Union Employee Pension Committee, La Section Locale 184 De Syndicat Canadien des Communciations, de l'Energie et du Papier and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, no one appearing for any other person on the service list, although duly served as appears from the affidavit of service of Kathryn Esaw sworn May 10, 2012, filed,

1. **THIS COURT ORDERS** that any defined term used but not defined herein shall have the meaning ascribed to such term in the QSI Agreement.

QSI TRANSACTION

2. **THIS COURT ORDERS AND DECLARES** that the QSI Transaction and the QSI Agreement are hereby approved. The Timminco Entities and the

Monitor are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the QSI Transaction and for the conveyance of the rights, title and interest of BSI in and to the Purchased Assets pursuant to the QSI Agreement.

3. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Monitor's certificate to QSI substantially in the form attached as Schedule "A" hereto (the "**Monitor's Certificate**"), all of the Timminco Entities' right, title and interest in and to the Purchased Assets shall vest, without further instrument of transfer or assignment, absolutely in QSI and/or one or more permitted assignees pursuant to section 9.11 of the QSI Agreement, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (a) any encumbrances or charges created by the Court, including by the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012, the Order (Re Special Payments, KERPs and Super-Priority of Administration Charge and D&O Charge) of the Honourable Mr. Justice Morawetz dated January 16, 2012, and the DIP Order of the Honourable Mr. Justice Morawetz dated February 8, 2012; (b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario), the *Civil Code of Québec*, or any other personal property registry system; and (c) those Claims listed on Schedule C hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the Permitted Encumbrances, as defined in paragraph 14 of this Order); and (d) any rights or remedies of any person arising under the Limited Partnership Agreement or the Shareholders Agreement in connection with (i) the

transfer of the QSLP Equity, the Limited Partnership Agreement or the Shareholders Agreement, (ii) the Timminco Entities' insolvency or these CCAA Proceedings, or (iii) any pre-Closing breach of contract; and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

4. **THIS COURT ORDERS** the Registrar of the Québec Register of Personal and Movable Real Rights, upon presentation of the required form with a true copy of this Order and the Monitor's Certificate, but without the necessity to file a certificate of non-appeal, to reduce the scope of the hypothecs registered under numbers 10-0763732-0001 and 09-0420851-0001 in connection with the HP2 Property (as defined below) and to cancel, release and discharge, or partially cancel, release or discharge, any and all encumbrances (the "**HP2 Encumbrances**") on the HP2 Property to the extent that such HP2 Encumbrances relate to the Purchased Assets, as described in Schedule D hereto, including without limitation as may be registered under the following:

- Conventional hypothec without delivery signed between Bécancour Silicon Inc., Québec Silicon General Partner Inc. and Investissement Québec on October 29, 2010 and registered at the Register of Personal and Movable Real Rights ("**RPMRR**") on November 1, 2010 at 9:00 a.m. under number 10-0763732-0001;

- Conventional hypothec without delivery signed between Bécancour Silicon Inc. and Investissement Québec on July 10, 2009 and registered at the RPMRR on July 13, 2009 at 9:36 a.m. under number 09-0420851-0001;

with such full or partial cancellations, releases or discharges relating only to the Purchased Assets, as described in Schedule D hereto, in order to allow the

transfer to QSLP, as purchaser, or its permitted assignee(s) of the HP2 Property free and clear of any and all encumbrances created by those hypothecs.

5. **THIS COURT ORDERS** that forthwith following Closing QSI and/or one or more permitted assignees pursuant to section 9.11 of the QSI Agreement shall pay all existing monetary defaults in relation to the Assigned Agreements, other than those arising by reason of the Timminco Entities' insolvency, the commencement of these CCAA Proceedings, or the Timminco Entities' failure to perform a non-monetary obligation; provided that in accordance with section 2.4 of the QSI Agreement, the foregoing obligation to pay shall only apply up to the maximum aggregate amount of Cdn$10 million, and that the Timminco Entities shall pay forthwith after Closing any amounts in respect of such existing monetary defaults in excess of such Cdn$10 million threshold, other than those arising by reason of the Timminco Entities' insolvency, the commencement of these CCAA Proceedings, or the Timminco Entities' failure to perform a non-monetary obligation; provided further that the Timminco Entities, in accordance with section 2.5(c) of the QSI Agreement, shall forthwith after Closing pay or provide for all Post-Filing Costs in respect of the Assigned Agreements and QSI and/or one or more permitted assignees pursuant to section 9.11 of the QSI Agreement shall have no liability for such Post-Filing Costs.

6. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets held by the Monitor shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Monitor's Certificate, all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

7. **THIS COURT ORDERS** that the Monitor may rely on written notice from the Timminco Entities and QSI regarding fulfillment of conditions to closing under the QSI Agreement and shall have no liability with respect to delivery of the Monitor's Certificate.

8. **THIS COURT ORDERS AND DIRECTS** the Monitor to file a copy of the Monitor's Certificate with the Court, forthwith after delivery thereof.

9. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these CCAA proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Timminco Entities and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Timminco Entities;

the vesting of the Purchased Assets in and to QSI and/or one or more permitted assignees pursuant to section 9.11 of the QSI Agreement and the vesting of the HP2 property in and to QSGP, as general partner of QSLP, as purchaser, pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Timminco Entities and shall not be void or voidable by creditors of the Timminco Entities, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

10. **THIS COURT ORDERS AND DECLARES** that the QSI Transaction is exempt from any requirement under any applicable federal or provincial law to obtain shareholder approval and is exempt from the application of the *Bulk Sales Act* (Ontario).

11. **THIS COURT ORDERS** that the Timminco Entities are authorized and directed to disclose and transfer to QSI and its permitted assignee(s) all information (including information relating to the employment relationship) in BSI's records pertaining to BSI's past and current employees in Québec. QSI and its permitted assignee(s), as applicable, shall comply with all applicable laws relating to privacy and the protection of personal information in connection with such employee information and shall be entitled to use such employee information in a manner which is in all material respects identical to the use of such information by the Timminco Entities.

HP2 TRANSACTION

12. **THIS COURT ORDERS AND DECLARES** that the transactions contemplated by the HP2 Transaction Documents (the "**HP2 Transaction**") are hereby approved, subject to QSGP entering into the QSLP Access Agreement with Grupo FerroAtlantica, S.A., or its permitted assignee(s). The Timminco Entities and the Monitor are hereby authorized to take such additional steps and execute the HP2 Transaction Documents and such additional documents as may be necessary or desirable for the completion of the HP2 Transaction.

13. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Monitor's certificate to QSGP substantially in the form attached as Schedule "B" hereto (the "**HP2 Transaction Monitor's Certificate**"), all of BSI's right, title and interest in and to the HP2 Property and the dust collector no. 21 located on the HP2 Property and the related ducts connecting Furnaces no. 2 located at the QSLP Facility (collectively, the "**Dust Collector**") shall vest, without further

instrument of transfer or assignment, absolutely in QSGP, acting as general partner of QSLP, as purchaser, free and clear of and from any and all Claims; and, for greater certainty, this Court orders that all of the Claims or charges affecting or relating to the HP2 Property and the Dust Collector are hereby expunged and discharged as against the HP2 Property and the Dust Collector.

14. **THIS COURT ORDERS** the Land Registrar of the Land Registry Office for the Registration Division of Nicolet (Nicolet 2), upon presentation of the HP2 Transaction Monitor's Certificate and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, but without the necessity to file a certificate of non-appeal, to publish this Order and (a) to proceed with an entry on the index of immovables to register this Order transferring all of the rights, title and interest of BSI, in and to:

> an immovable situated in the City of Bécancour, Province of Québec, known and designated as being lot number FOUR MILLION SEVEN HUNDRED AND TWO THOUSAND FOUR HUNDRED NINETY-SEVEN (4 702 497) of the Cadastre of Québec, Registration Division of Nicolet (Nicolet 2) with all buildings thereon erected bearing civic address 6400 Yvon-Trudeau Street, city of Bécancour, province of Québec, G9H 2V8 (the "**HP2 Property**")

to QSGP, as general partner of QSLP, as purchaser, and (b) to proceed with the radiation and cancellation of any and all HP2 Encumbrances, but not the encumbrances listed at Schedule "E" to the QSI Agreement (the "**Permitted Encumbrances**"), including without limitation, the radiation and cancellation of the rights resulting from the following deeds published at the said Land Registry:

- Hypothec pursuant to a Deed of universal hypothec granted by Silicium Québec Commandité Inc. and by Bécancour Silicon Inc. in favour of Investissement Québec registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on November 1, 2010, under number 17 670 388; and

- Consent to Cadastral Amendment granted by Investissement Québec by Deed registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on February 23rd, 2011, under number 17 924 788.

ASSISTANCE OF OTHER COURTS

15. **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 and their 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 Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

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

JUN 05 2012

Schedule "A"
Form of Monitor's Certificate

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

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (the "**Court**") dated January 3, 2012, FTI Consulting Canada Inc. was appointed as the monitor (the "**Monitor**") of Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**");

B. Pursuant to an Order of the Court dated May ●, 2012, the Court approved the Agreement of Purchase and Sale (the "**QSI Agreement**") made and entered into as of April 25, 2012, between the Timminco Entities, QSI Partners Ltd. and Globe Speciality Metals, Inc. and provided for the vesting in QSI Partners Ltd., including any assignee thereof permitted under the QSI Agreement ("**QSI**") of the Timminco Entities' right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to QSI of a certificate certifying (a) that the Monitor has received written confirmation in the form and substance satisfactory to the Monitor from the Parties

that the conditions to Closing have been satisfied or waived by the applicable Parties, and (b) that the Monitor has received the Closing Cash Purchase Price; and

C. Unless otherwise indicated herein, defined terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the QSI Agreement.

THE MONITOR CERTIFIES the following:

1. The Monitor has received written confirmation from QSI and the Timminco Entities, in the form and substance satisfactory to the Monitor, that:

   (a) the conditions to Closing as set out in section 5 of the QSI Agreement; and

   (b) the deliveries as set out in section 6.2 and section 6.3 (other than this Certificate) of the QSI Agreement;

   have been satisfied or waived by QSI and the Timminco Entities, as applicable;

2. The Monitor has received the Closing Cash Purchase Price; and

3. This Certificate was delivered by the Monitor to the Timminco Entities at _____ [TIME] on _____ [DATE].

FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of the Timminco Entities and not in its personal capacity

Per: _____

Name:

Title:

Schedule "B"
Form of HP2 Transaction Monitor's Certificate

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

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (the "**Court**") dated January 3, 2012, FTI Consulting Canada Inc. was appointed as the monitor (the "**Monitor**") of Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**");

B. Pursuant to an Order of the Court dated June 1, 2012 (the "**Order**"), the Court approved the Agreement of Purchase and Sale (the "**QSI Agreement**") made and entered into as of April 25, 2012, as amended by an Amending Agreement dated June 1, 2012, between the Timminco Entities, QSI Partners Ltd. and Globe Speciality Metals, Inc. and provided for the vesting in QSI Partners Ltd., including any assignee thereof permitted under the QSI Agreement ("**QSI**") of the Timminco Entities' right, title and interest in and to the Purchased Assets;

C. Pursuant to the Order the Timminco Entities and the Monitor are authorized to take such additional steps and execute such additional documents as may be

necessary or desirable for the completion of the HP2 Transaction (as defined in the Order) and for the vesting of all of BSI's right, title and interest in and to the HP2 Property (as defined in the Order) and the Dust Collector (as defined in the Order) to Québec Silicon General Partner Inc. ("**QSGP**"), acting as general partner of Québec Silicon Limited Partnership ("**QSLP**"), with such vesting to be effective upon the delivery by the Monitor to QSGP of a certificate certifying that the Monitor has received written confirmation, in form and substance satisfactory to the Monitor from the Timminco Entities and QSGP, that the HP2 Transaction Documents have been executed and delivered by the parties thereto immediately prior to the completion of the QSI Transaction (as defined in the Order); and

D. Unless otherwise indicated herein, defined terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the QSI Agreement.

THE MONITOR CERTIFIES the following:

1. The Monitor has received written confirmation from the Timminco Entities and QSGP, in form and substance satisfactory to the Monitor, that the parties intend on completing the HP2 Transaction and the HP2 Transaction Documents have been executed and delivered by the parties thereto;

2. The Monitor has received written confirmation from QSI and the Timminco Entities, in form and substance satisfactory to the Monitor, that:

   (a) the conditions to Closing as set out in section 5 of the QSI Agreement; and

   (b) the deliveries as set out in section 6.2 and section 6.3 (other than the Monitor's Certificate and the Closing Cash Purchase Price) of the QSI Agreement;

have been satisfied or waived by QSI and the Timminco Entities, as applicable; and

3. This Certificate was delivered by the Monitor to QSGP at _____ [TIME] on _____ [DATE].

FTI Consulting Canada Inc., in its capacity as the Court-appointed Monitor of the Timminco Entities and not in its personal capacity

Per: _____

Name:

Title:

SCHEDULE "C"
CLAIMS

1. Hypothec pursuant to a Deed of universal hypothec granted by Silicium Québec Commandité Inc. and by Bécancour Silicon Inc. in favour of Investissement Québec registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on November 1, 2010, under number 17 670 388;

2. Consent to Cadastral Amendment granted by Investissement Québec by Deed registered in the Registry Office for the registration division of Nicolet (Nicolet 2), on February 23rd, 2011, under number 17 924 788;

3. Conventional hypothec without delivery signed between Bécancour Silicon Inc., Québec Silicon General Partner Inc. and Investissement Québec on October 29, 2010 and registered at the Register of Personal and Movable Real Rights ("**RPMRR**") on November 1, 2010 at 9:00 a.m. under number 10-0763732-0001;

4. Conventional hypothec without delivery signed between Bécancour Silicon Inc. and Investissement Québec on July 10, 2009 and registered at the RPMRR on July 13, 2009 at 9:36 a.m. under number 09-0420851-0001;

SCHEDULE "D"
PURCHASED ASSET DESCRIPTION FOR VOLUNTARY REDUCTIONS UNDER THE RPMRR

All movable property of Bécancour Silicon Inc. ("**BSI**") transferred to QSI Partners Ltd. ("**QSI**") pursuant to the agreement of purchase and sale (the "**APA**") dated April 25, 2012 between, *inter alia*, BSI and QSI including the QSLP Equity, the QSLP Contracts, the Silicon Metal Contracts, the Silicon Metal Accounts Receivable (in each case as defined below), the intellectual property relating to BSI's silicon metal business, the pre-paid expenses relating to BSI's silicon metal business and the silicon metals inventory and the packing supply inventory relating to BSI's silicon metal business and for greater certainty excluding the movable property set forth in Annex 2 to Schedule D.

The following defined terms have the meanings set out below:

"**BSI Owned Property**" means the real property described in Annex 1 to Schedule D;

"**Closing**" means the successful completion of the Transaction (as defined below);

"**Contracts**" means all of the contracts and other written agreements to which the Vendors (as defined below) or either one of them are parties constituting part of the Purchased Assets (as defined below);

"**Litigation Claims**" means, collectively, (i) any and all rights of actions or claims whatsoever of either Vendor against third parties arising by reason of any facts or circumstances that occurred or existed before the Closing but excluding any such rights of actions or claims of either Vendor against counterparties to any Contract, and (ii) all amounts owing or received in respect of any such rights of actions or claims;

"**Purchased Assets**" means, collectively, the Purchased Silicon Metal Assets (as defined below), and the BSI Owned Property;

"**Purchased Silicon Metal Assets**" means all of BSI's right, title and interest, in and to the QSLP Equity, the QSLP Contracts, the Silicon Metal Contracts and the Silicon Metal Accounts Receivable (each as defined below), the intellectual property relating to BSI's silicon metal business, the pre-paid expenses relating to BSI's silicon metal business and the silicon metals inventory and the packing supply inventory relating to BSI's silicon metal business;

"**QSGP**" means Québec Silicon General Partner Inc., a corporation formed under the laws of Québec, and its successors and assigns;

"**QSLP**" means Québec Silicon Limited Partnership, a limited partnership formed under the laws of Québec, and its successors and assigns;

"**QSLP Contracts**" means (a) the Amended and Restated Limited Partnership Agreement dated October 1, 2010 by and between Bécancour Silicon Inc., Dow Corning Canada Inc. and QSGP, as amended by the First Amendment thereto dated October 14, 2010 and (b) the Shareholders Agreement dated October 1, 2010 by and between Bécancour Silicon Inc., Dow Corning Netherlands, B.V. (now known as DC Global Holdings S.a.r.l.) and Québec Silicon General Partner Inc.

"**QSLP Equity**" means, collectively, 51,000 units in the capital of QSLP and 51 Class A Shares in the capital of QSGP, in each case, registered in the name of BSI;

"**Silicon Metal Accounts Receivable**" means all accounts receivable (net of doubtful accounts) owing to BSI in respect of the silicon metals business of BSI except for (i) any tax refunds or credits or (ii) any Litigation Claims;

"**Silicon Metal Contracts**" means (a) the Long-Term Supply Agreement dated June 1, 2011, and effective January 1, 2011, between Bécancour Silicon Inc. and Wacker Chemie AG, as amended by Amendment No. 1 thereto dated September 6, 2011, (b) the Output and Supply Agreement among Québec Silicon Limited Partnership, Bécancour Silicon Inc. and Dow Corning Corporation dated October 1, 2010, as amended by: (i) Amendment No. 1 dated November 16, 2010, effective as of October 1, 2010; (ii) Amendment No. 2 dated November 1, 2011, effective as of October 1, 2010; and (iii) Amendment No. 3 dated November 1, 2011, effective as of October 20, 2011, (c) the Purchase Order dated November 17, 2011 between Alliages Zabo Inc. and Silicium Bécancour Inc. for the sale and delivery of silicon metal, (d) the Purchase Order dated December 13, 2011 between Cable Alcan and Bécancour Silicon Inc. for the sale and delivery silicon metal and (e) the Purchase Order dated January 9, 2012 between GNP Ceramics, LLC and Bécancour Silicon Inc. for the sale and delivery of silicon metal.

"**Transaction**" means the transaction of purchase and sale contemplated by the APA;

"**Vendors**" means collectively, Timminco Limited and BSI.

ANNEX 1 to SCHEDULE D

HP2 PROPERTY:

DESCRIPTION OF IMMOVABLE

All of BSI's right, title and interest in and to:

An immovable situated in the City of Bécancour, Province of Québec, known and designated as being lot number FOUR MILLION SEVEN HUNDRED AND TWO THOUSAND FOUR HUNDRED NINETY-SEVEN (4 702 497) of the Cadastre of Québec, Registration Division of Nicolet (Nicolet 2).

With the buildings and all other structures, fixtures, equipment and ancillary improvements located thereon (other than Excluded Assets), including the building bearing the civic address 6400 Yvon-Trudeau Street, City of Bécancour, Province of Québec, G9H 2V8.

The whole as it is currently found with all that is or will be incorporated, attached, joined or united by accession to this immovable and that is considered an immovable under the law.

ANNEX 2 to SCHEDULE D

See attached.

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
1	1	Vibratory Screener	Vibrotech	With 40-HP Drive
2	1	Melting Furnace (#11)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System, Spare Door
3	1	Melting Furnace (#12)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System, Spare Door
4	1	Melting Furnace (#13)	Major	1,600°C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System, Spare Door
5	1	Bridge Crane (#1)	COH	with 32-Ton Main Cable Hoist, 10-Ton Auxiliary Cable Hoist, Integral Digital Hook Scale, Radio Controls

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
6	1	Bridge Crane (#2)	COH	with 32-Ton Main Cable Hoist, 10-Ton Auxiliary Cable Hoist, Integral Digital Hook Scale, Radio Controls
7	1	10MT crane	Kone Cranes	
8	Lot	Casting Area Support Equipment		(3) Ladle Hooks, (4) Slag Scraper Attachments, (4) 5' x 7' x 3'D Scrap Bins, 2-Point Cable Type Grapple, Cable Type Clam Shell Crane Bucket, *Approx. (100) 7' x 11' x 32"D Steel Pans, (10) Cast Iron Casting Pots, (30) 7' x 10' x 6'D Steel Slag Hopper, with Cast iron abrasive plate lining, **(7) cooling Frames 10' x 8' x 6', etc.
9	1	Arc Welding Power Source	Miller	
10	1	Ramp	Ramp Master	with Hydraulic Ramp Height Adjustment
11	1	Dust Collection System (#11)	Wheelabrator	248°F Operating temperature with 125-HP blower motor, inline spark arrester, 44"Dia x approx. 100' of ductwork, Fire protection sprinklers
12	1	Dust Collection System (#12)	Wheelabrator	248°F Operating temperature with 12S-HP blower motor, inline spark arrester, 44"Dia x approx. 100' of ductwork, Fire protection sprinklers
13	1	Dust Collection System (#13)	Wheelabrator	248°F Operating temperature with 12S-HP blower motor, inline spark arrester, 44"Dia x approx. 100' of ductwork, Fire protection sprinklers
14	1	Dust collector (29)	Wheelabrator	Not installed, outside
15	1	Saw	King Canada	10" abrasive sample cutting
16	1	Drill	Holti	DD130 - core cutting sample
17	6	Electromagnet ic Stirring purification	ABB	each with 8' x 10' x 10' Container, with Electromagnetic Power Supply, Est. 20 Gal Glycol Chilling System, Pumps, Controls, Deionized Water System, ABB PLC Controls, Self Contained Air Conditioner System, with Cart Mounted Electromagnet, Cable Wench, Etc.
18	2	Casting Pots	Unknown	with (3) insulated covers
19	lot	Crushing system Silicon Jack Hammer screening station		steel rock screen, kent hydraulic articulating boom, kent pneumatic jack hammer, 50-HP hydraulic system, with fire resistant oil
20	1	Platform scale	Metler Toledo	Est. 20,000-Lb. Capacity

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
		Air compressor room		
21	1	Air Dryer (DTX-600-DDS-E)	Domnick Hunter	600-CFM
22	1	Air Dryer (DTA600-DS)	Domnick Hunter	600-CFM
23	1	Rotary screw type air compressor	Atlas Copco	GA90, API606885
24	1	Rotary screw type air compressor	Atlas Copco	GA90, API604948
25	1	Refractory Paste repair gunning mach	Unknown	with 32"Dia. Pressure pot. Guns, hoses
		Maintenance area		
26	1	Electric Furnace	Wilt	12-kw rated capacity, 42"x60"x16"
27	1	Disassembled paint room, 12'x12'x8'	with (1) entry door	
28	1	H-Frame hydraulic shop press	OTC	
29	1	Geared Head Engine Lathe	Harrison	Spindle speeds: 34-750-RPM, with Tailstock and thread chasing
30	1	Pipe Threader	Ridgid	with spare thread dies
31	1	Drill press	General	75-500M1, 77075006
32	1	Radial Arm Dirll	Tehcno	R2-40, 2080
33	1	Grinder	Scantool	6"tilting belt
34	1	Metal cutting band saw	General	10"x12" horizontal
35	1	Arc Welding Power Source	Miller	Goldstar 452 CC/DC, LH400634C
36	1	Arc Welding Power Source	Miller	Dimension 452, LJ310022C, with wire feeder
37	1	Arc Welding Power Source	Miller	Syncrowave 350LX
38	1	Plasma cutting system	Hypertherm	Powermax 800, 800-014893
39	1	Double end grinder	General	10"pedestal type
40	1	Metal cutting band saw	General	14" vertical
41	1	Fume collector (portable)	Diversitech	
42	1	Hydraulic Hammer attachment	Tramac	SC-50
43	lot	Miscellaneous support equipment throughout HP1		Assorted sections of shelving, storage cabinets, hand and power tools, welding supplies, work benches, inspections equipment
44	1	Bridge crane	Kone Cranes	with 10-ton cable hoist, radial controls
45	3	Bridge crane	Kone Cranes	*5,000 lbs capacity single girder. Note: (1) crane not installed)

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
46	1	Welder	Miller	Big 40, LH021915
47	1	Scale	Unknown	80,000 lbs capacity, In-Ground
		Shipping department		
		Screen and hand picking system :		
48	1	Feed hopper	MGR	12'x 8'
49	1	Belt conveyor		30"X x 12'L Power
50	1	Vibratory Screener		20"Wx32"L, with plastic screen
51	1	Belt conveyor		30"Wx7'L hand pick
52	1	Mezzanine		
		Vehicles		
53	1	Floor Sweeper	Tennant	S30-1119
53	1	Floor Sweeper	Tennant	S30-1562
54	1	Wheel Loader	Caterpillar	HJA6D01358
55	1	Wheel Loader (05)	Caterpillar	CAT0966HEA6D01529
56	1	Wheel Loader (07)	Caterpillar	CAT0966HAA6D02255
57	1	Forklift (02)	Hyster	L177V02164F
58	1	Forklift (01)	Hyster	G005D14975W
59	1	forklift (5)	Hyster	G019E01612E
60	1	Forklift (JCB 930) - (04)	JCB	SIP93002YF0822387
61	1	Forklift (03)	Raymond	EZ-A-00-16588
62	1	Forklift (06)	Hyster	G005D13590V
63	1	Forklift (07)	Hyster	P005V02182G
64	1	Forklift (08)	Hyster	P005V02179G
65	1	Forklift (25)	Hyster	POO5V01855F
66	1	Forklift (26)	Hyster	POO5V01848F
67	1	Forklift (28)	Hyster	POO5V02175G
69	1	Excavator	Gradall	5200000749
70	1	Excavator	Caterpillar	CCK01973
71	1	Tractor	Freightliner	1FVHC5CV19HAB7583
73	3	Hydraulic breaker	Tramac	700
74	1	Hydraulic breaker	Tramac	SC-50

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
75	1	Pickup truck	Dodge RAM 1500	1B7HC13Y8VJ612188
76	1	Pickup truck	Chevrolet SLE1500	2GTEK19R4W1532579
77	1	Pickup truck	Ford F-150	2FTRX07L42CA39978
78	1	Pickup truck	Ford F-150	2FTRX18WX2CA96782
80	1	Lifting platform		HD7845
		Process electrical equipment		
81	1	Transformer	Unknown	1,750/2,333 kVa, Onan/Onaf, Pri.: kV, Y Sec.: 600V D
82	1	Transformer	Ferranti Packard	2,500 kVa, Onan, Pri.: 25 kV, Y Sec.: 600V D
83	1	Transformer	Moloney	2,000 kVa, Onan/Onaf, Pri.: 25kV, Y Sec.: 600V D (crystallization)
84	1	Breaker	Unknown	25 kV, 600A
85	1	Equipment for control and protection of breaker		box, switch, announciator, indicator, relays, etc.
86	1	Switchgear	Westinghouse	Complete with (4) Vertical Sections, (2) Main Disconnects, DS-420, 600V, 2,000 A, with ampector relays LSI, (1) Bustie DS-420, 600 V, 2,000 A Disconnect, with ampector relay LSI, (6) Secondary disconnects, DS-416, 600V, 1,600 A, with ampector relay LSI, (2) Measuring customer electronic relays, (2) DSPMKII modules, with T9A sensors

Fixed assets

Becancour Silicon Inc.,High Purity No.1 (HP1), 5500 Yvon-Trudeau, Bécancour, Québec

Ref. #	Qty	Item	Manufacturer	Description
87	1	Switchgear (crystallization)	Westinghouse	Complete with (2) Vertical sections, (1) main disconnect, DS-420, 600V, 2,000 A, with ampectro
88	2	480 kVA capacitor banks	Automatic	
89	lot	Motor control centers		(3) 600V, 1,200 A bus bracing, with (6) sections and lot of starter and switch, (1) 600 V, 1,200 A bus bracing, with (8) sections and lot of starter and switch, (2) 600 V, 1,200 A bus bracing, with (8) sections and lot of starter and switch (crystallization)
90	lot	miscellaneous process electrical equipment		Cabinet with battery charger, complete with 46 Ni-Cd battery, (2) logix Model 5000 PLC control system with rack, cards, processor, etc. Transformer, 600C@120-208V, panelboard 600 V & 120-208V, disconnect switch
91	40	Steel boxes		
92	1	Mold breaking station		
93	1	Mold Piercing Station		
94	1	Boxing Station		
95	1	Packaging station		
96		Computer equipment		
97		Spare parts		All spare parts in the HP1 storage room, except those belonging to AMGC

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
1	1	Melting Furnace (#21)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System
2	1	Melting Furnace (#22)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System
3	1	Melting Furnace (#23)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
4	1	Melting Furnace (#24)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System
5	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist, Class C Rated, with Radio Controls
6	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist, Class C Rated, with Radio Controls
7	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist,Radio Controls
8	1	Bridge Crane	COH	with 50-Ton Main Cable Hoist, 20-Ton Auxilliary Cable Hoist,Radio Controls
9	1	Bridge Crane	Kone Crane	5 MT uninstalled
10	4	Melting Furnaces (#25 to #28)	Major	1,600 °C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System (Note : These furnace systems are partially installed. All components are on site.)

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
11	1	Melting Furnace (#29)	Major	1,600° C Operating Temperature with (1) Air products 20,000,000-BTU Per Hour Burner, Hydraulic Tilt and Rotation, Hydraulic Door, Burner Mounted on Door, with Oxygen injection System, 12-Ton Silicon Capacity Refractory Lined 14' Dia. X 20'L Furnace Body, Exhaust Hood and Duct Work, Package Hydraulic System, with (2) 75-HP Pumps, (1) 100-HP Pump, Reservoir, with Allen-Bradley Panelview Plus 700 PLC Controls, Video Monitoring System, Purge fan, Control Valves, Electrical Switches and Gears, Automatic Pneumatic, Grease System (Note : This furnace system is not installed. All components are on site.)
12	4	Electromagnet Stirrer	ABB	with 8' x 10' x 10' Container**, with Electromagnetic Power Supply, Est. 20 Gal Glycol Chilling System, Pumps, Controls, Deionized Water System, Allen-Bradley PLC Controls, Self Contained Air Conditioner System, with Cart Mounted Electromagnet, Cable Wench, Etc.
13	3	Electromagnet Stirrer	ABB	with 8' x 10' x 10' Container**, with Electromagnetic Power Supply, Est. 20 Gal Glycol Chilling System, Pumps, Controls, Deionized Water System, Allen-Bradley PLC Controls, Self Contained Air Conditioner System, with Cart Mounted Electromagnet, Cable Wench, Etc. (Note : Not Installed)
14	1	Platform Scale	Undefined Make	Est. 20,000-lb Capacity
16	1	Dust Collection System (#22)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower
17	1	Dust Collection System (#23)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower
18	1	Dust Collection System (#24)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower

Fixed assets

Becancour Silicon Inc.,High Purity No.2 (HP2), 6500 Yvon-Trudeau, Bécancour, Québec				
Ref. #	Qty	Item	Manufacturer	Description
19	1	Dust Collection System (#25)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
20	1	Dust Collection System (#26)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
21	1	Dust Collection System (#27)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
22	1	Dust Collection System (#28)	Wheelabrator	450°F Operating Temperature, with 125-HP Blower (Note : Ductwork Not Installed, Part of Furnace Projects in Process)
23	1	Gunning Machine	Unknown	with 42" Dia. Holding Tnak, Hoses, Guns
25	1	Forklift Truck (#24) - H360HD	Hyster	
26	1	Scale	Unknown	
27	6	Casting Mold		
28	1	2 ton Mold		
29	1	Mold Piercing Station		
30	69	Steel Boxes		
31		Computer equipment		Pursuant to agreement between FA and BSI

Fixed assets

Ref. #	Qty	Item	Manufacturer	Description
		Electrical Sub Station :		
32	1	Item removed		
33	4	Transformer	Maloney	2,000/2,667 kVa, Onan-Onaf, Pri.: 25kV D, Sec. : 600 V Y
34	1	Transformer	Maloney	4,000/5,320 kVa, Onan-Onaf, Pri.: 25kV D, Sec. : 4,16 kV
35	1	Item removed		
36	3	Breaker	Unknown	25 kV, 800 A
37	lot	Ancillary Breaker Equip.		Box, Switch, Announciator, Indicator, Relays For Control and Protective Relay of Breaker
38	2	Switchgear	Westinghouse	Complete with (4) Vertical Sections, (2) Main Disconnects, DS-420, 600V, 2,000 A, with Amptector Relay LSI, (1) Bustie DS-420, 600 V, 2,000 A. with Amptector Relay LSI, (6) Secondary Disconnects, DS-416, 600 V, 1,600 A, LSI, (2) Measuring Customer Electronic Relays, (2) DSPMKII Modules with T9A Sensors
39	4	Automatic		480 kVa, 600 V Capacitor Banks
40	Lot	Motor control Centers, Complete		(4) 600V, 1,200 A, 42 kVa Bus Bracing, with (5) Sections, Starter, Switch, (4) 600V, 1,200 A, 42 kVa Bus Bracing, with (4) Sections, Starter, Switch (1) 600 V, 1,200 A, 42 kVa Bus Bracing, with (8) Sections Starter, Switch
41	Lot	Miscellaneous Process Electrical Equipment		Pursuant to agreement between FA and BSI
42	1	Excavator	Gradall	52000000743
43	2	Hydraulic rotary grinding	Tramac	TCH60
79	1	Pickup truck	Chevrolet S-10	1GCCS19X638237398

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

APPROVAL AND VESTING ORDER

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

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

THE HONOURABLE	)	~~WEDNESDAY~~ THURSDAY, THE ~~10th~~ 18th DAY OF
	)	
JUSTICE MORAWETZ	)	OCTOBER 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

ORDER
(Approval of Priority Claim Adjudication Protocol)

This Motion, made by Investissement Québec for an order approving the Priority Claim Adjudication Protocol and referring the adjudication of the BSI Pension Reimbursement Claims to the Superior Court of Québec (Commercial Division) was heard this day at 330 University Avenue, Toronto, ON.

On the consent of counsel for Timminco Limited and Bécancour Silicon Inc., FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco entities, Investissement Québec, Mercer Canada, the administrator of the Haley Pension Plan, The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") and BSI Union and Non-Union employee Pension Committees:

1. **THIS COURT ORDERS** that the Priority Claim Adjudication Protocol, attached hereto as Schedule "A", be and the same is hereby authorized and approved.

2. **THIS COURT ORDERS** that the adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims, all as defined in the attached Priority Claim Adjudication Protocol, be and the same is hereby referred exclusively to the Superior Court of Québec (Commercial Division) to be determined in accordance with the Priority Claim Adjudication Protocol.

3. **THIS COURT HEREBY REQUESTS** the aid and recognition of the Superior Court of Québec (Commercial Division) to give effect to this order and to adjudicate whether the BSI Pension Reimbursement Claims constitute Priority Claims in accordance with the terms of the Priority Claims Adjudication Protocol.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

OCT 19 2012

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SCHEDULE "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

PRIORITY CLAIM ADJUDICATION PROTOCOL

A. OVERVIEW

1. In accordance with the Reimbursement Agreement (the "**Reimbursement Agreement**") among Investissement Québec ("**IQ**"), FTI Consulting Canada Inc., as court-appointed Monitor, and Bécancour Silicon Inc., dated August 28, 2012 and the August 28, 2012 Interim Distribution Order (the "**Interim Distribution Order**")[1], two (2) sets of claims have been designated as Reimbursement Claims, namely:

(i) a claim on behalf of Mercer Canada ("**Mercer**"), as administrator of the Haley Pension Plan, and on behalf of the beneficiaries of that plan (the "**Mercer Reimbursement Claim**"), which claim is supported by The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("**USW**"); and

(ii) a claim by Le Comité de retraite du Régime de rentes pour les employés non-syndiqués de Silicium Bécancour Inc. and a claim by Le Comité de retraite du Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (collectively the "**BSI Pension Committees**") (the "**BSI Pension Reimbursement Claims**").

2. IQ disputes that the above Reimbursement Claims have priority over the IQ Security and the parties do not anticipate the dispute will be resolved through the consented resolution process

[1] Unless otherwise indicated, any capitalized terms used but not defined herein shall have the meaning ascribed to such term in the Reimbursement Agreement and the Interim Distribution Order.

provided for in the Interim Distribution Order. Accordingly, an adjudication is required to determine whether such Reimbursement Claims constitute Priority Claims.

The following is the protocol for the adjudication of whether the Reimbursement Claims constitute Priority Claims.

B. THE MERCER REIMBURSEMENT CLAIM

1. The Mercer Reimbursement Claim shall be adjudicated by way of a motion before this Court wherein Mercer and USW will be the moving parties and IQ will be the respondent. If at any time Mercer shall cease the prosecution of the Mercer Reimbursement Claim, the USW shall be entitled to prosecute the Mercer Reimbursement Claim in the place and stead of Mercer.

As issues to be adjudicated regarding the Mercer Reimbursement Claim (such as, by way of example, substantive consolidation) may impact on other stakeholders of BSI or Timminco, the motion material hereafter described shall be served on the service list herein. Any creditor of the Timminco Entities or the Monitor, or the Timminco Entities themselves ("**Interested Stakeholders**") shall have the right to file material and participate in the motion proceedings in accordance with the following timetable:

(i) Mercer and USW, if so advised, will deliver moving party motion material by October 29, 2012;

(ii) IQ and Interested Stakeholders, if any, shall deliver responding material by November 30, 2012;

(iii) Mercer and USW will deliver reply material, if so advised, by December 17, 2012;

(iv) cross-examinations on filed affidavits, if required, will be conducted during the week of January 13, 2012. During this period, the examination of Peter Kalins, (a former officer and director of Timminco and BSI) as a witness to the motion, shall be conducted if consented to by Peter Kalins or if an appropriate court order has been obtained;

(v) Mercer and USW, if so advised, will deliver moving party's facta by January 25, 2013;

(vi) IQ and any Interested Stakeholders will deliver responding facta by February 13, 2013;

(vii) Mercer and USW will deliver reply facta by February 20, 2013, if so advised; and

(viii) the hearing of the motion will take place during the week of February 25, 2013.

2. In determining whether the Mercer Reimbursement Claim constitutes a Priority Claim, the determination of the quantum of such Priority Claim shall be postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

C. THE BSI PENSION REIMBURSEMENT CLAIMS

1. The adjudication of whether the BSI Reimbursement Claims constitute Priority Claims shall be referred exclusively to the Superior Court of Québec (Commercial Division) wherein the BSI Pension Committees will be the moving parties and IQ will be the respondent in accordance with the following timetable:

(i) the BSI Pension Committees shall deliver their motion to institute proceedings within 60 days after the Order is made referring this matter to the Superior Court of Québec (Commercial Division);

(ii) IQ and any Interested Stakeholders shall deliver their Statement of Defence within 30 days after receipt of the motion to institute proceedings;

(iii) the BSI Pension Committees shall have up to 30 days after receipt of the IQ defence to deliver their response, if any;

(iv) examinations, if necessary, are to be conducted by January 11, 2013;

(v) written arguments and joint books of procedure and exhibits shall be delivered at least 2 weeks before the hearing of the motion; and

(vi) the hearing of the motion is to be scheduled between February 18, 2013 and March 15, 2013 based upon a 1-2 day hearing.

For greater certainty, any appeal from an order of the Superior Court of Québec (Commercial Division) herein shall be to the Court of Appeal of Québec.

2. In determining whether the BSI Reimbursement Claims constitute Priority Claims, the determination of the quantum of such Priority Claims shall be postponed until after the determination of the nature of the claim and will be determined in accordance with the Claims Procedure Order or further order of the Court.

D. MONITOR'S REPORT

1. The Monitor, if it deems it necessary and appropriate to do so, may file a report with the court in connection with adjudication of either Reimbursement Claim.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

Proceedings commenced at

TORONTO

ORDER
(Approval of Priority Claim Adjudication Protocol)

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CITATION: Timminco Limited (Re), 2012 ONSC 5959
COURT FILE NO.: CV-12-9539-00CL
DATE: 20121018

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: **S. J. Weisz, for FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco Entities**

HEARD: **OCTOBER 18, 2012**

ENDORSEMENT

[1] On consent of Timminco Limited and Bécancour Silicon Inc., FIT Consulting Canada Inc., in its capacity as court-appointed Monitor of the Timminco Entities, Investissement Québec, Mercer Canada, the Administrator of the Haley Pension Plan, The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW") and BSI Union and Non-Union Employee Pension Committees, the Priority Claim Adjudication Protocol is approved. The adjudication of whether the BSI Pension Reimbursement Claims are Priority Claims is referred to the Superior Court of Québec (Commercial Division) to be determined in accordance with the terms of the Priority Claims Adjudication Protocol.

[2] This determination has been made pursuant to s. 17 of the CCAA, and I express my thanks, in advance, to the Superior Court of Québec.

[3] To the extent leave is required to proceed, such leave is granted.

MORAWETZ J.

Date: October 18, 2012

N°: 500-09

COURT OF APPEAL
DISTRICT OF MONTRÉAL

TIMMINCO LIMITÉE AND
BÉCANCOUR SILICON INC.
Debtors/APPELANTS

v.

COMITÉ DE RETRAITE DU RÉGIME DE RENTES POUR LES EMPLOYÉS SYNDIQUÉS DE SILICIUM BÉCANCOUR INC. & AL.
Petitioners/RESPONDENTS

AND

INVESTISSEMENT QUÉBEC
Respondent/MISE EN CAUSE

AND

FTI CONSULTING CANADA INC.
Monitor/MONITOR

APPELANT'S MOTION FOR LEAVE TO APPEAL AND SCHEDULES 1 TO 7
(Ss. 13 and 14 CCAA & Art. 26, 29, 511 CCP)

ORIGINAL

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