

**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 MATTERS OF A PLAN OF COMPROMISE OR ARRANGMENT
OF TIMMINICO LIMITED AND BECANCOUR SILICON INC.

Applicants

**RESPONDING MOTION RECORD OF
MERCER (CANADA) LIMITED
(Motion of the Monitor for advice and directions
returnable on April 28, 2014)**

March 21, 2014

KOSKIE MINSKY LLP
Barristers & Solicitors
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Andrew J. Hatnay (LSUC# 31885W)
Tel: (416) 595-2083
Fax: (416) 204-2872
ahatnay@kmlaw.ca

James Harnum (LSUC# 60459F)
Tel: (416) 542-6285
jharnum@kmlaw.ca

Lawyers for Mercer (Canada) Limited,
the administrator of the Haley Pension Plan

TO: SERVICE LIST

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TAB 1

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

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


Applicants

**AFFIDAVIT OF VERONICA DE LEOZ
(sworn on March 21, 2014)**

I, VERONICA DE LEOZ, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**


1. I am a legal assistant with the law firm Koskie Minsky LLP, counsel to Mercer (Canada) Limited ("Mercer"), 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) (the "Haley Plan").
2. Attached hereto as Exhibit "A" is a copy of correspondence sent by Andrew Hatnay of Koskie Minsky LLP to Steven Weisz of Blake, Cassels & Graydon LLP dated March 21, 2014.
3. This Affidavit is sworn in respect of the Monitor's motion for advice and directions returnable on April 28, 2014 and for no improper purpose.

SWORN BEFORE ME at the City of Toronto,
in the Province of Ontario, on March 21,
2014.



A Commissioner for taking affidavits, etc.

A. Hatnay,



VERONICA DE LEOZ

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

**AFFIDAVIT OF
VERONICA DE LEOZ
(SWORN ON MARCH 21, 2014)**

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900, Box 52
Toronto, Ontario
M5H 3R3

Andrew J. Hatnay (LSUC#: 31885W)
Tel: 416-595-2083
Fax: 416-204-2877
Email: ahatnay@kmlaw.ca

James Harnum (LSUC# 60459F)
Tel: (416) 542-6285
jharnum@kmlaw.ca

Counsel for Mercer (Canada) Limited, the
administrator of the Haley Plan

This is Exhibit "A"
referred to in the Affidavit of Veronica de Leoz
sworn before me this 21st day of March, 2014.

A handwritten signature in black ink, appearing to be "M. J. ...", written over a horizontal line.

A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

March 21, 2014

Sent via E-mail

Blake, Cassels & Graydon LLP
199 Bay Street
Suite 2800, Commerce Court West
Toronto, ON M5L 1A9

Andrew J. Hatnay
Direct Dial: 416-595-2083
Direct Fax: 416-204-2872
ahatnay@kmlaw.ca

Attention: Steven Weisz

Dear Mr. Weisz:

Re: Timminco Limited (CCAA)
Re: Retirement Pension Plan for the Haley Plant Hourly Employees of Timminco Metals, a Division of Timminco Limited, Registration Number 0589648 (the "Haley Plan")
Re: Motion by Monitor for advice and directions re: appeal of Quebec Superior Court decision dated January 24, 2014

We are writing in respect of the Monitor's motion for advice and directions returnable on April 28, 2014.

As you are aware, we act for Mercer (Canada) Limited ("Mercer"), the administrator appointed by the Ontario Superintendent of Financial Services over the Haley Plan. The Haley Plan was sponsored by Timminco and wound up as of August 1, 2008. The Haley Plan was underfunded by Timminco as of its wind up date. Mercer had originally calculated the wind up deficit as \$5.3 million and has since revised the wind up deficit to \$4,335,700. We will provide a report on the calculation of the wind up deficit under separate cover.

Based on the deemed trust provisions in the Ontario *Pension Benefits Act*, and pursuant to the Supreme Court of Canada's decision in *Indalex*, Mercer claims as a first priority creditor against Timminco for amounts owing to the Haley Plan and not paid by Timminco. We note in the Monitor's 23rd Report dated December 6, 2013, that the Monitor has acknowledged Mercer's first priority claim (para. 33, footnote 1).

We also note from the 23rd Monitor's Report that Timminco currently has cash on hand in the approximate amount of \$1,015,200 (US). Becancour Silicon Inc. ("BSI") has cash on hand in the approximate amount of \$1,481,400 (US).

Based on the amount of the wind-up deficit and the amount in the estate of Timminco, there are insufficient assets in Timminco to satisfy Mercer's first priority wind up deficit claim against Timminco in full.

As noted in the Monitor's 24th Report (para. 38), Timminco has an unsecured claim in the amount of \$143 million against BSI based on intercompany loans extended by Timminco to BSI. We note in the Affidavit of Peter Kalins sworn on January 2, 2012 (para. 69), that Mr. Kalins acknowledges the intercompany indebtedness to Timminco from BSI.

The issue before the Quebec Superior Court was the priority contest over assets of BSI between certain Quebec unions in respect of underfunded pension plans sponsored by BSI (not Timminco) who advanced the deemed trust provisions of the Quebec *Supplemental Pension Plans Act* ("SPPA"), and the secured claim of IQ. We understand that approximately \$28,320,937 had been previously distributed to IQ from BSI in the CCAA proceedings based on IQ's secured claim against BSI, which was subject to the Adjudication Protocol that permitted a creditor to challenge the security of IQ and seek a repayment of the amount that had been paid to IQ from BSI. This is the protocol that the Quebec unions followed in challenging the secured claim of IQ.

In its decision, the Quebec Superior Court held that the Quebec unions had priority for the amounts owing to the BSI pension plans in the amount subject to the SPPA deemed trust, which amount remains to be calculated. As a result of the court's decision, IQ would therefore be required to reimburse the amount calculated to be subject to the SPPA deemed trust back to BSI. However, since IQ remains a secured creditor of BSI, the amounts that would be reimbursed to BSI would nevertheless be ultimately distributed to IQ based on IQ's secured claim and, if so, as the Monitor states "there would be little or nothing available for unsecured creditors of BSI".

Thus, the issue before the Quebec Superior Court involves a dispute between two creditors of BSI over the assets in the estate of BSI, not Timminco.

In order for Mercer to recover funds as a creditor of Timminco *in addition to* the amount currently in the Timminco estate, we believe the following events would have to occur:

- a) the Monitor would have to succeed in overturning the decision of the Quebec Superior Court;
- b) the unsecured claim of Timminco for \$143 million as a creditor of BSI is allowed; and
- c) BSI would pay a distribution to Timminco in respect of Timminco's unsecured claim which would be brought into the estate of Timminco and then in turn be distributed by Timminco to Mercer in respect of Mercer's first priority deemed trust claim against Timminco.

Accordingly, it is Mercer's position with respect to the Monitor's motion for advice and directions that it is not opposed to the Monitor proceeding with its appeal of the decision of the Quebec Superior Court provided that none of the costs of the Monitor in respect of those

proceedings are charged to the estate of Timminco. The dispute before the Quebec Superior Court directly relates to a dispute between two creditors of BSI (Quebec unions and IQ) over BSI assets. The Monitor's costs of proceeding with the appeal should be borne by the estate of BSI, not Timminco.

We note that the court-approved Cost Allocation Methodology in the Monitor's 23rd Report, paragraphs 23(a) and (d) includes the following provisions:

- a) Realizations specifically attributable to a company would be applied to that company, for example, sale of assets, cash on hand at the commencement of the CCAA Proceedings and collection of accounts receivable;

...

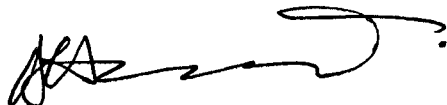
- d) Costs specifically attributable to a company would be applied to that company, for example, BSI's direct operating costs and costs associated with the Haley property.

The above sections indicate that the costs relating to the Monitor's appeal of the Quebec Superior Court decision should be borne by BSI, not Timminco.

Should you have any questions with respect to the above, please do not hesitate to contact the undersigned.

Yours truly,

KOSKIE MINSKY LLP



Andrew J. Hatnay
AJH:vdl

cc: David Kearney, Mercer (Canada) Limited
James Harnum, *Koskie Minsky LLP*

Applicants

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Email: ahatnay@kmlaw.ca

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Tel: (416) 542-6285

jharnum@kmlaw.ca

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