

- (e) Quonta will agree to indemnify and hold Timminco harmless from any and all claims of any kind arising in respect of the Property which is the responsibility of Quonta under the Beauharnois Sale Agreement or the Certificate of Authorization.

5. The Settlement Agreement is conditional on the granting of an Order approving the Settlement Agreement and Vesting of the Beauharnois Property in Quonta.

6. The following factors led me to recommend approval of the Settlement Agreement:

- (a) Timminco has already received the purchase price provided for in the Beauharnois Sale Agreement and the only remaining condition to title to the Beauharnois Property passing to Quonta is the completion of the environmental remediation work as required in the Beauharnois Sale Agreement;
- (b) While the remediation work necessary to satisfy the suspensive condition and the existing Certificate of Authorization has not been completed to date, there remains sufficient time to do so;
- (c) There is at least a reasonable possibility that the regulatory authorities will authorize Quonta as owner to perform remediation under an amended Certificate of Authorization which will involve lower expense to Quonta if the Settlement Agreement is approved;
- (d) Litigating the disclaimer motion would require Timminco to incur substantial legal costs;
- (e) The outcome of the motion to disclaim is uncertain from the perspective of both parties and would very likely be subject to appeals and

correspondingly, a lengthy delay for a final determination of the disclaimer issue;

- (f) Even if successful in its motion to disclaim the Beauharnois Sale Agreement, Timminco would face proceedings to establish what equitable charge, if any, Quonta would have over sales proceeds in respect of the purchase price already paid and the expenses of remediation already incurred;
- (g) If successful, Timminco would bear the expense and risk of marketing and selling the Beauharnois property and arranging compliance with the Certificate of Authorization in a very short period of time; and
- (h) The Settlement Agreement preserves the ability of the Timminco Entities to maximize value under whichever regime (BIA or CCAA) appears most expeditious.


For all of these reasons, I am of the view that the Settlement Agreement is advantageous to Timminco and represents a reasonable compromise of the claims it may have in respect of the Beauharnois Sale Agreement, having regard to the risks.

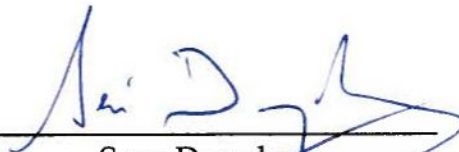
7. The Monitor has indicated that it supports the Settlement Agreement and the granting of the Vesting Order.

#### **PURPOSE OF AFFIDAVIT**

8. This Affidavit is sworn in support of the Timminco Entities' motion for the relief described in paragraph 2 above and for no improper purpose.

SWORN BEFORE ME at the City of  
Toronto, Province of Ontario on  
January 25, 2013.

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
*Kathryn Esau*

  
\_\_\_\_\_  
Sean Dunphy

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

Court File No. CV12-9539-00CL

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

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

Proceeding commenced at Toronto

**AFFIDAVIT OF SEAN DUNPHY  
(SWORN JANUARY 25, 2013)**

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Lawyers for the Applicants

# TAB A

This is Exhibit "A"  
to the affidavit of Sean Dunphy,  
sworn before me on the  
25th day of January, 2013



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Commissioner for Taking Affidavits

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

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

Applicants

**AFFIDAVIT OF SEAN DUNPHY  
(Sworn November 19, 2012 re Stay Extension and  
Beauharnois Sale Agreement Disclaimer)**

I, SEAN DUNPHY, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the President of Russell Hill Advisory Services Inc., the Court-appointed Chief Restructuring Officer of Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**"), and as such have knowledge of the matters to which I hereinafter depose, except where otherwise stated.
2. This affidavit is sworn in connection with the Timminco Entities' motion for:
  - (a) an Order, substantially in the form of the draft Order included in the Motion Record at Tab 3, extending the Stay Period (as defined below) until January 31, 2013 (the "**Stay Extension**") and approving the Fifteenth and Sixteenth Reports (as defined in the Order) of FTI Consulting Canada Inc. in its capacity as monitor of the Timminco Entities (the "**Monitor**"); and

- (b) an Order, substantially in the form of the draft Order included in the Motion Record at Tab 4, disclaiming the Beauharnois Sale Agreement (as defined below) in respect of the Beauharnois Property (as defined below) pursuant to s. 32 of the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, as amended (the "CCAA").

## BACKGROUND

3. The Timminco Entities' primary business, the production and sale of silicon, was carried on principally through BSI, a Québec-based wholly-owned subsidiary of Timminco. BSI purchased silicon metal produced by Québec Silicon Limited Partnership ("QSLP") for resale to customers in the chemical (silicones), aluminum, and electronics/solar industries. QSLP was a production partnership between BSI (51%) and, indirectly, Dow Corning Corporation (49%).

4. Due to a number of factors, the Timminco Entities were facing severe liquidity issues and were unable to meet their ongoing payment obligations. As such, the Timminco Entities were granted protection from their creditors under the CCAA pursuant to the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012 (the "Initial Order"). FTI Consulting Canada Inc. was appointed as the Monitor pursuant to the Initial Order. A copy of the Initial Order is available, together with all other filings in the CCAA proceedings, on the Monitor's website at: <http://cfcanada.fticonsulting.com/timminco>.



## A. STAY EXTENSION

### STATUS OF CCAA PROCEEDINGS

#### *Claims Procedure and Priority Claims Process*

5. Pursuant to an Order granted by the Court on June 15, 2012 (the "Claims Procedure Order"), the Timminco Entities called for claims against the Timminco Entities and the Directors and Officers of the Timminco Entities. The Claims Bar Date (as defined in the Claims Procedure Order) was July 23, 2012. Claims totalling approximately \$280 million and approximately \$700,000 were filed against the Timminco Entities and the Directors and Officers of the Timminco Entities, respectively. The Monitor continues to review these claims and I understand that further details about the claims process to date will be contained in the Monitor's report to be filed in respect of this motion.

6. Investissement Québec ("IQ") is a secured creditor of BSI in the amount of approximately \$29 million as of August 17, 2012. In order to stop the continuing accrual of interest while preserving the ability of other creditors of BSI to assert a claim ranking in priority to IQ and to provide for reimbursement should any such claim be established (a "Priority Claim"), the Timminco Entities, IQ and the Monitor entered into an agreement (the "Reimbursement Agreement") which contemplated an interim distribution to IQ while providing that IQ would repay to BSI such portion of the distribution as may be necessary to satisfy a Priority Claim.

7. In accordance with the terms of the Reimbursement Agreement, two claims filed pursuant to the Claims Procedure Order were ultimately determined be potential Priority Claims. The Timminco Entities, the Monitor and IQ developed a procedure for the adjudication of these claims, which was approved by the Court by Order dated October 18, 2012 (the "Priority Claim Adjudication Protocol Order"). A copy of the Priority Claim Adjudication Protocol Order is attached hereto as Exhibit "A". On October 24, 2012, one claimant informed the Monitor that it would not be pursuing its claim and as such, there remains only one potential Priority Claim to be resolved.

*Working Capital Adjustment Dispute*

8. Pursuant to an agreement of purchase and sale between QSI Partners Ltd. ("QSI"), Timminco and BSI dated April 25, 2012, as amended by the amending agreement dated June 1, 2012, QSI purchased BSI's right, title and interest in and to, *inter alia*, assets comprising effectively all of BSI's silicon metal business for a purchase price of approximately \$32 million, subject to a working capital adjustment (the "Working Capital Adjustment").

9. On July 12, 2012, QSI delivered a working capital adjustment statement (the "Draft Statement of BSI Working Capital") to BSI, which BSI objected by letter dated July 19, 2012. The parties have not been able to resolve their differences regarding the Working Capital Adjustment and a motion to determine same is scheduled to be heard by the Court on December 4, 2012.

*Asset Sales and Other Initiatives*

10. The Timminco Entities continue to assess their options in respect of their remaining assets, including certain real property assets, in an effort to maximise the proceeds available to their creditors. Further details of the recent activities of the Timminco Entities are contained in my affidavit sworn October 26, 2012, a copy of which attached hereto as **Exhibit "B"**.

*Cash Flows*

11. I believe that there are sufficient funds available from the proceeds of the sale transactions for the majority of the Timminco Entities' assets to continue with the CCAA proceedings throughout the Stay Extension and that cash flows indicating sufficiency of funds will be included in the Monitor's report filed in respect of this motion.

**THE STAY EXTENSION REQUEST**

12. The Initial Order granted a stay of proceedings up to and including February 2, 2012, which has been extended from time to time, most recently to December 7, 2012 by Order dated September 27, 2012 (the "**Stay Period**").

13. The Timminco Entities have been working diligently to complete the winding down of their businesses within the CCAA proceedings. An extension of the Stay Period to January 31, 2013 is necessary to give the Timminco Entities sufficient time to,

among other things, pursue the resolution of issues regarding the remaining assets and negotiate with parties who may propose a transaction involving one or both of the Timminco Entities and which could generate additional proceeds for stakeholders and review the Claims. The Timminco Entities and the Monitor also continue to assess whether the classification and amount of claims filed pursuant to the Claims Procedure Order should be accepted, revised or rejected and to prepare for the determination of potential Priority Claims in accordance with the Priority Claim Adjudication Protocol Order.

14. It is my belief that the Timminco Entities have acted and continue to act in good faith and with due diligence. I do not believe that any creditor will suffer any material prejudice if the Stay Period is extended as requested.

15. The stability provided by the stay of proceedings is critical to the Timminco Entities in order to be able to continue assessing claims for the benefit of their creditors and continue to wind down its business in an orderly manner.

16. I am informed by the Monitor that it supports the Timminco Entities' request to extend the Stay Period.

## B. DISCLAIMER OF THE BEAUHARNOIS SALE AGREEMENT

### BEAUHARNOIS PROPERTY

17. Timminco is the registered owner of the real property located at 54 Hauts-Fourneaux in Beauharnois, Québec (the "Beauharnois Property"). I am advised by Greg Donaldson, former Vice-President and Corporate Controller of Timminco, that Timminco formerly carried on operations on the site but had ceased operations prior to 2003.

18. In 2003, the Beauharnois Property was deemed to require environmental remediation by the Ministère du Développement durable, de l'Environnement et des Parcs ("DDEP") and a Certificate of Authorization was issued by the DDEP which set out a remediation plan with a completion deadline of 2013.

19. Although no recent formal appraisal of the Beauharnois Property has been undertaken by Timminco, a tax assessment from the Commission scolaire de la Vallée-des-Tisserands dated July 1, 2012 (a copy of which is attached hereto as Exhibit "C") attributes the value of the Beauharnois Property as being approximately \$1.3 million and as such, I believe that the Beauharnois Property may have significant value were it sold at the present time. However, given the legal status described herein, Timminco has not sought to list the property for sale as of yet.

**BEAUHARNOIS SALE AGREEMENT<sup>1</sup>**

20. In December 2004, Timminco entered into an Agreement of Purchase and Sale (the "**Beauharnois Sale Agreement**") with Quonta Holdings Ltd. ("**Quonta**") which provides for conditional sale to Quonta of the Beauharnois Property, the facilities located thereon, and any Leases and Service Contracts Quonta wishes to assume, *inter alia*, in consideration of the payment of a Purchase Price of \$660,000 and the assumption by Quonta of the obligation to perform certain remediation work described therein. A copy of the Beauharnois Sale Agreement is attached hereto as **Exhibit "D"**.

21. As far as I can determine, there is no dispute regarding Quonta's having paid the two stipulated instalments of the Purchase Price described in the Beauharnois Sale Agreement. The sole open question that I am aware of is the status of Quonta's rights, if any, to the Beauharnois Property in light of the insolvency of Timminco and the fact that the work necessary to entitle Quonta to demand a transfer of title of the Beauharnois Property had not been completed at the time of the CCAA proceedings herein or, as far as I am aware, as of the present time.

22. Under the terms of the Beauharnois Sale Agreement, title to the Beauharnois Property will not pass to Quonta until it completes the remediation of the Beauharnois Property in accordance with the Certificate of Authorization (referenced therein) and

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<sup>1</sup> Capitalized terms used in this section of the affidavit but not otherwise defined shall have the definitions ascribed to them in the Beauharnois Sale Agreement.

obtains written confirmation from the DDEP that the remediation work has been satisfactorily completed. Specifically, Section 8.1 of the Beauharnois Sale Agreement provides that:

The Purchaser undertakes to carry-out, at its cost, diligently, and in a good and workman like manner and in accordance with environmental laws, all of the remediation work contemplated by the Certificate of Authorization and to complete such remediation to the satisfaction of the [DDEP] and obtain a written confirmation accordingly, no later than October 2013.

23. Section 8.2 of the Beauharnois Sale Agreement provides that:

...the sale of the Property will be subject to a suspensive condition and therefore title to the Property will not transfer from the Vendor to the Purchaser until the Purchaser has successfully completed the environmental remediation in accordance with section 8.1 and has received a written acknowledgement to that effect from the [DDEP]. If the aforesaid condition is not fulfilled by the Purchaser on or before October 31, 2013, the Agreement will be considered null and void, the sale of the Property will not be completed, title to the Property will not transfer to the Purchaser and the Purchase Price will be forfeited and kept by the Vendor without prejudice to any other recourse the Vendor may have.

24. Under the terms of the Beauharnois Sale Agreement, if Quonta fails to satisfactorily remediate the Beauharnois Property by October 31, 2013 in accordance with the Certificate of Authorization, the Beauharnois Sale Agreement will be null and void, the sale of the Beauharnois Property will not be completed and title will not pass to Quonta. In such event, Timminco will be entitled to retain the Purchase Price, but will be responsible for the remaining environmental remediation obligations with respect to the Beauharnois Property. The Beauharnois Sale Agreement is silent regarding treatment of the remediation costs incurred by Quonta in the instance that the Beauharnois Sale Agreement becomes null and void. I understand that the disclaimer of

the Beauharnois Sale Agreement, if approved by the Court, may give rise to a Restructuring Claim (as defined in the Claims Procedure Order) into the Timminco estate.

**CURRENT STATUS OF BEAUHARNOIS PROPERTY**

*Title to and Occupation of the Beauharnois Property*

25. As at the date of this affidavit, title to the Beauharnois Property has not passed to Quonta and remains with Timminco. Attached hereto as Exhibit "E" is the index to immovable with respect to the Beauharnois Property.

26. On the date the Beauharnois Sale Agreement was executed, Valleypac Industries Inc. ("Valleypac"), was the lessee of the Beauharnois Property pursuant to a lease (the "Lease") between Timminco and Valleypac. The term of the Lease was to January 31, 2006. Section 8.4 of the Beauharnois Sale Agreement provided that Timminco would assign to Quonta Timminco's rights under the lease and that Quonta would assume Timminco's responsibilities under same. I understand from Mr. Donaldson that, as of the date of the swearing of this affidavit, Valleypac is still a tenant of the Beauharnois Property.

*Status of the Environmental Remediation Efforts*

27. Following the date of the Beauharnois Sale Agreement, Quonta was permitted to take possession of and occupy the Beauharnois Property and has commenced



environmental remediation efforts. According to the reports received from Genivar Inc. ("Genivar"), the company engaged by Timminco to perform groundwater testing and reporting to the amDDEP, Quonta has yet to complete the necessary work and has not provided Timminco with the necessary certification of the Québec Ministry to that effect. A copy of Genivar's reports dated April 2011 and June 2012 are attached hereto as Exhibits "F" and "G", respectively, and each include an English translation of Genivar's summaries.

28. As no sale has yet been completed, Timminco has remained responsible for the environmental condition of the property as an owner. Since the Beauharnois Sale Agreement was entered into, Timminco has incurred costs of at least \$118,115 in payments to Genivar and its predecessor in monitoring and reporting upon the condition of the property (over \$8,000 of which has been incurred since the time of filing). Further costs continue to be incurred.

29. I am advised by a representative of Genivar that in 2009-2010, Quonta and Genivar prepared and obtained verbal approval from the DDEP of a revised Certificate of Authorization. The cost of the remaining remediation work to be performed at the Beauharnois Property as required by the revised Certificate of Authorization was estimated to be approximately \$100,000. The revised Certificate of Authorization has not, as far as I am aware, been finalized.

*Hypothec Registered by Quonta*

30. On February 27, 2012, Quonta registered a hypothec on the Beauharnois Property to secure a claim of \$1.25 million in principal (the "Hypothec") for work done on the Beauharnois Property that has allegedly increased the value of the Beauharnois Property by \$1.25 million. A copy of the Hypothec is attached hereto as Exhibit "H".

31. I am advised by François Ouimet of Stikeman Elliott LLP, counsel to Timminco in these CCAA Proceedings, that hypothecs in the nature of the Hypothec registered by Quonta are registered to secure obligations owing under a contract where the owner of real property fails to pay for the work performed thereon. Other than a possible claim that may be filed in respect of the value of the remediation work performed by Quonta were this Court to authorize the repudiation of Timminco's remaining obligations under the Beauharnois Sale Agreement, I am aware of no basis under which Timminco could be held responsible to pay for the work performed on the site. The validity of the Hypothec has not been established in any proceedings thus far and would of course only be material to Timminco in the event repudiation were authorized or were Quonta to fail to complete its obligations by the deadline provided in the Beauharnois Sale Agreement.

#### **PROPOSED DISCLAIMER OF THE BEAUHARNOIS SALE AGREEMENT**

32. The Timminco Entities are seeking to disclaim the Beauharnois Sale Agreement.

33. A disclaimer of the Beauharnois Sale Agreement will permit Timminco to market and sell the Beauharnois Property and the purchase price that would be obtained for the

Beauharnois Property will be available for distribution to all of Timminco's unsecured creditors, including Quonta. As noted above, I believe that proceeds from the sale of the Beauharnois Property will be greater than the costs of such a sale and any ancillary costs (including a claim into Timminco's estate by Quonta) and will result in a positive net benefit for Timminco's stakeholders.

34. Timminco is not involved in a classical restructuring of its existing operations and capital structure. However, I have consulted with counsel to the Timminco Entities and verily believe that it is an appropriate utilization of the CCAA to attempt to maximize recovery to stakeholders through an orderly sales process as the Timminco Entities are in the process of doing. I further believe that the disclaimer of the Beauharnois Sale Agreement will provide a net increase in the Timminco estate, permitting Timminco to maximize recoveries to its stakeholders for their benefit.

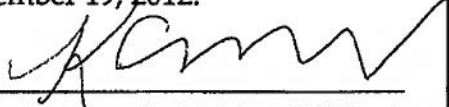
35. In consultation with counsel, it is my understanding that title to the Beauharnois Property would likely vest in a Trustee in Bankruptcy free and clear of obligations under the Beauharnois Sale Agreement to convey title to the Purchaser at a later date upon satisfaction (should such occur) of the suspensive condition. As such, Timminco should be permitted to seek to repudiate in these liquidating CCAA proceedings which are intended to achieve significantly the same outcome in order to avoid the unsecured creditors being prejudiced by the liquidation process being undertaken in the context of CCAA proceedings instead of BIA proceedings. However, the issue appears to be a novel one.

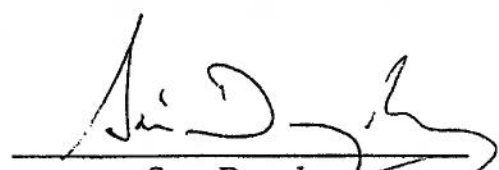
36. In light of the potentially novel issues raised by this application, the Monitor has indicated that it prefers the Court's views to be sought in respect of this disclaimer.

**PURPOSE OF AFFIDAVIT**

37. This Affidavit is sworn in support of the Timminco Entities' motion for the relief described in paragraph 2 above and for no improper purpose.

SWORN BEFORE ME at the City of Toronto, Province of Ontario on November 19, 2012.

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
**Kathryn Esaw**

  
\_\_\_\_\_  
Sean Dunphy

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.  
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**AFFIDAVIT OF SEAN DUNPHY  
(SWORN NOVEMBER 19, 2012)**

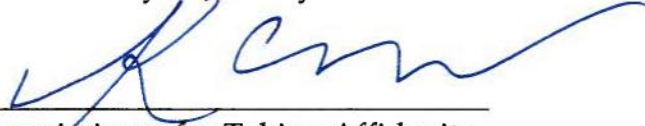
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Fax: (416) 947-0866

Lawyers for the Applicants

# TAB B

This is Exhibit "B"  
to the affidavit of Sean Dunphy,  
sworn before me on the  
25th day of January, 2013

A handwritten signature in blue ink, appearing to be 'K. Cron', written over a horizontal line.

Commissioner for Taking Affidavits