

**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

FACTUM OF THE APPLICANTS
(Comeback Motion returnable January 12, 2012)

Dated: January 9, 2012

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

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236

Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230

Kathryn Esaw LSUC#: 58264F
Tel: (416) 869-6820
Fax: (416) 947-0866

Lawyers for the Applicants

**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 BECANCOUR SILICON INC.

Applicants

**FACTUM OF THE APPLICANTS
(Comeback Motion Returnable January 12, 2012)**

PART I - INTRODUCTION

1. Timminco Limited ("**Timminco**") and Becancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**") were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to the initial order of the Ontario Superior Court of Justice dated January 3, 2012 (the "**Initial Order**"). FTI Consulting Canada Inc. was appointed as monitor of the Timminco Entities (the "**Monitor**") in these CCAA proceedings.

2. This motion is brought by the Timminco Entities seeking an order substantially in the form of the draft Order included with the Motion Record:

- (a) Granting increased priority to the Administration Charge and the D&O Charge (as these terms are defined below);

- (b) Suspending the Timminco Entities' obligations to make certain pension contributions with respect to their pension plans;
- (c) Approving certain key employee retention plans (the "KERPs") offered by the Timminco Entities to certain employees considered critical to a successful restructuring and a charge over the Property (as defined below) securing the Timminco Entities' obligations under the KERPs; and
- (d) Sealing the confidential supplement (the "Confidential Supplement") to the First Report of the Monitor.

PART II - THE FACTS¹

BACKGROUND

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

Comeback Motion Affidavit, para. 3, Motion Record, Tab 2

¹ Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Affidavit of Peter A.M. Kalins sworn January 4, 2012 (the "Comeback Motion Affidavit").

4. The Timminco Entities are facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume long-term supply contract at below market prices, a decrease in the demand and market price for solar grade silicon, failure to recoup their capital expenditures incurred in connection with development of their solar grade operations, and the inability to secure additional funding. The Timminco Entities are also facing significant pension, and environmental remediation, legacy costs and financial costs related to large outstanding debts. A significant portion of the legacy costs are as a result of discontinued operations relating to Timminco's former magnesium business.

Comeback Motion Affidavit, para. 4, Motion Record, Tab 2

5. As a result, the Timminco Entities were unable to meet various financial covenants set out in their senior secured credit facility and do not have the liquidity needed to meet their ongoing payment obligations. Without the protection of the CCAA, a shut-down of operations was inevitable, which would be extremely detrimental to the Timminco Entities' employees, pensioners, suppliers, and customers.

Comeback Motion Affidavit, para. 5, Motion Record, Tab 2

TIMMINCO ENTITIES' CASH POSITION AND CASH FLOWS

6. As at December 31, 2011, the Timminco Entities' consolidated cash balance was approximately \$2.4 million.

Comeback Motion Affidavit, para. 8, Motion Record, Tab 2

7. The 30-day consolidated Cashflow Forecast prepared and filed by the Timminco Entities in support of their CCAA application estimates that for the period January 3, 2012 to February 3, 2012, the Timminco Entities will have total receipts of approximately \$5.5 million, total operating disbursements of approximately \$7.7 million for net cash outflow of approximately \$2.2 million. The ending cash position as at February 3, 2012 is estimated to be \$157,000.

Comeback Motion Affidavit, paras. 9-10, Motion Record, Tab 2

8. As the Cashflow Forecast demonstrates, the Timminco Entities' cash position is extremely constrained and reaches very low levels during the forecast period.

Comeback Motion Affidavit, para. 11, Motion Record, Tab 2

9. The Timminco Entities approached their existing stakeholders and third party lenders in an effort to secure a suitable debtor-in-possession (DIP) facility. The Timminco Entities' existing stakeholders, Bank of America, N.A, Investissement Quebec ("IQ") and AMG Advanced Metallurgical Group N.V., declined to advance any funds to the Timminco Entities at this time. Two third party lenders also refused to enter into negotiations regarding the provision of a DIP facility.

Comeback Motion Affidavit, para. 12, Motion Record, Tab 2

10. The Timminco Entities did engage in negotiations with a third party lender with respect to providing DIP financing, but to date have not been able to finalize those negotiations. The Timminco Entities are continuing to attempt to negotiate an

appropriate DIP facility in order to maintain sufficient liquidity throughout their CCAA proceedings. Based on the latest cashflow forecast and subject to the underlying assumptions thereto, the Timminco Entities currently estimate that additional funding will be required by mid-February in order to avoid an interruption in operations.

Comeback Motion Affidavit, para. 13, Motion Record, Tab 2

TIMMINCO ENTITIES' PENSION PLANS

11. The Timminco Entities sponsor the following three pension plans which are described in greater detail in the Comeback Motion Affidavit (collectively, the "**Pension Plans**"):

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

Comeback Motion Affidavit, para. 14, Motion Record, Tab 2

12. The Timminco Entities do not have the funds necessary to make any contributions to the Pension Plans other than (a) contributions in respect of normal cost, (b) contributions to the defined contribution provision of the BSI Non-Union Pension Plan, and (c) employee contributions deducted from pay (together, the “**Normal Cost Contributions**”). Timminco currently owes approximately \$1.6 million in respect of special payments to the Haley Pension Plan. In addition, assuming the Bécancour Non-Union Pension Plan and the Bécancour Union Pension Plan are not terminated, as at January 31, 2012, the Timminco Entities will owe approximately \$140,000 in respect of amortization payments under those plans. If the Timminco Entities are required to make the pension contributions other than Normal Cost Contributions (the “**Pension Contributions**”), they will not have sufficient funds to continue operating and will be forced to cease operating to the detriment of their stakeholders, including their employees and pensioners.

Comeback Motion Affidavit, para. 27, Motion Record, Tab 2

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

Comeback Motion Affidavit, para. 28, Motion Record, Tab 2

ADMINISTRATION CHARGE AND D&O CHARGE

14. The Initial Order granted a charge on the assets, property and undertakings of the Timminco Entities (the “**Property**”) in the maximum amount of \$1 million to secure the fees and disbursements of counsel to the Timminco Entities, the Monitor and the Monitor’s counsel incurred with respect to the CCAA proceedings (the “**Administration Charge**”). The Initial Order also granted a charge on the Property in the maximum amount of \$400,000 as security for the indemnity granted in favour of the directors and officers of the Timminco Entities against obligations and liabilities that they may incur in such capacity after the commencement of the CCAA proceedings (the “**D&O Charge**”).

Comeback Motion Affidavit, para. 29, Motion Record, Tab 2

15. The Initial Order provides that the D&O Charge and the first \$500,000 of the Administration Charge rank in priority to the existing security interest 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**”). The Initial Order further provides that the Timminco Entities or the beneficiaries of the Administration Charge and the D&O Charge shall be at liberty to seek priority ahead of the Encumbrances on notice to parties likely to be affected by such priority.

Comeback Motion Affidavit, para. 30, Motion Record, Tab 2

16. It is proposed that the Administration Charge and the D&O Charge will rank ahead of all of the Encumbrances, including any deemed trusts created under provincial pension legislation.

Comeback Motion Affidavit, para. 30, Motion Record, Tab 2

KERPs

17. In order to ensure the continued participation of certain employees of the Timminco Entities, the Timminco Entities have offered a limited number of key employees a KERP.

Comeback Motion Affidavit, para. 33, Motion Record, Tab 2

18. The employees offered the KERPs (the "**KERP Participants**") will receive a bonus payment as an incentive to continue their employment with the Timminco Entities for the duration of the CCAA proceedings. Pursuant to the terms of the KERPs, the KERP Participants will not receive any payments under the KERPs until both of the Timminco Entities have either:

- implemented a plan of compromise or arrangement as contemplated by the CCAA;
- concluded an asset sale for all or substantially all of the assets of the entity; or

- terminated their CCAA proceedings, including by order of a Judge of the Ontario Superior Court of Justice.

Comeback Motion Affidavit, para. 34, Motion Record, Tab 2

19. In order to receive payments under the KERPs, the KERP Participants cannot have resigned, been terminated with cause or have failed to perform his or her duties and responsibilities diligently, faithfully and honestly.

Comeback Motion Affidavit, para. 35, Motion Record, Tab 2

20. The list of KERP Participants was formulated by the Chief Executive Officer (not himself a KERP Participant) in consultation with the Special Committee of the Board of Directors of Timminco and the Monitor and was approved by the Board of Directors of Timminco. In the opinion of the Chief Executive Officer and the Special Committee of the Board of Directors of Timminco, all of the KERP Participants are critical to the Timminco Entities' CCAA proceeding as they are experienced employees who have played central roles in the restructuring initiatives taken to date and will play critical roles in the steps taken in the future.

Comeback Motion Affidavit, para. 36, Motion Record, Tab 2

21. The aggregate amount payable under the KERPs is \$269,000. In order to secure the amounts payable under the KERPs, the Timminco Entities are seeking an Order approving the KERP Charge in the maximum amount of \$269,000. The KERP Charge is proposed to rank immediately subsequent to the Administration Charge and ahead of the D&O Charge.

Comeback Motion Affidavit, para. 37, Motion Record, Tab 2

CONFIDENTIAL SUPPLEMENT

22. The Confidential Supplement to the First Report contains individually identifiable personal and financial information of the KERP Participants. In order to protect the KERP Participants and to minimize disruption during the CCAA proceedings, the Timminco Entities seek an order sealing the Confidential Supplement pending further order of this Court.

Comeback Motion Affidavit, para. 38, Motion Record, Tab 2

Confidential Supplement to First Report of the Monitor

NOTICE OF THIS MOTION

23. Motion materials for this motion were served on, among others: (a) IQ, Bank of America, N.A., all personal property security registrants shown on searches of the personal property security registers in Ontario and in Quebec; (b) the members of the pension plan committees for the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan, FSCO; the Régie de rentes du Québec, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union and La Section Locale 184 De Syndicat Canadien Des Communications, De L'énergie Et Du Papier; and (c) various government entities, including Ontario and Quebec environmental agencies and federal and provincial taxing authorities.

PART III - ISSUES

24. The issues on this motion are as follows:
- (a) Should this Court grant increased priority to the Administration Charge and the D&O Charge?
 - (b) Should this Court grant an order suspending the Timminco Entities' obligations to make the Pension Contributions with respect to the Pension Plans?
 - (c) Should this Court approve the KERPs and grant the KERP Charge?
 - (a) Should this Court seal the Confidential Supplement?

PART IV - LAW AND ARGUMENT

A. PRIORITY SHOULD BE GRANTED TO THE ADMINISTRATION CHARGE AND THE D&O CHARGE

Court Has Jurisdiction To Order Super-Priority

25. On the initial CCAA application, the Court granted the Administration Charge and the D&O Charge and granted them limited priority over the security interests of Investissement Québec ("IQ"). As expressly permitted and provided for in the Initial Order, the Timminco Entities are seeking an order increasing the priority of the Administration Charge and the D&O Charge to rank ahead of all existing 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* (“PBA”) or the Quebec *Supplemental Pension Plans Act* (“QSPPA”), if any, in favour of any person.

26. Section 11.52 of the CCAA provides statutory jurisdiction to grant an administration charge and to grant super-priority to such a charge and states as follows:

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

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

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

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

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

[Emphasis added]

CCAA, s. 11.52

27. Similarly, section 11.51 of the CCAA provides statutory authority to grant a directors’ and officers’ charges on a super-priority basis and provides as follows:

11.51(1) Security or charge relating to director’s indemnification – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to

indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51(2) Priority – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.51(3) Restriction – indemnification insurance – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

11.51(4) Negligence, misconduct or fault – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

[Emphasis added]

CCAA, s. 11.51.

28. In granting priority to a charge over a debtor's property in a CCAA proceeding, the Courts must consider whether notice has been given to the secured creditors who are likely to be affected by the security or charge.

Canwest Global Communications Corp. (Re) (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) ["Canwest Global"] at paras. 32, 39 and 46, Applicants' Book of Authorities ["Applicants' BOA"], Tab 1.

29. The Timminco Entities have given notice of this motion to all creditors likely to be affected as identified from review of the Timminco Entities' books and records and as identified by searches of the Ontario and Québec Personal Property Security Registries and real property searches.

30. The Timminco Entities respectfully submit that this is an appropriate case in which to grant a super-priority to the Administration Charge. Each of the proposed

beneficiaries will play a critical role in the Timminco Entities' restructuring and it is unlikely that the above-noted advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

31. The Timminco Entities require the continued involvement of their directors and officers in order to pursue a successful restructuring of their business and/or finances and, due to the significant personal exposure associated with the Timminco Entities' liabilities, it is unlikely that the directors and officers will continue their service with the Timminco Entities unless the D&O Charge is granted. The Timminco Entities respectfully submit that this Court should grant priority to the D&O Charge ranking it immediately behind the Administration Charge and the KERP Charge (as defined below).

CCAA Overrides Any Conflicting Requirements of the QSPPA and the PBA

32. To the extent that the Timminco Entities' request for priority for the Administration Charge and the D&O Charge is a request for this Court to override the provisions of the QSPPA or the PBA, the Court has the jurisdiction to do so.

33. In *Collins & Aikman Automotive Canada Inc.*, representatives of the employees and retirees, among others, brought a motion objecting to certain paragraphs of the Initial Order including, *inter alia*, the paragraph which provided that Collins & Aikman Automotive Canada was not required to make special payments ordinarily required by Ontario pension legislation. The Court refused to grant that part of the moving parties'

motion, by reason that, *inter alia*, the Court had jurisdiction under the CCAA to approve an order which conflicted with and overrode provincial legislation.

Collins & Aikman (Re) (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) [*“Collins & Aikman”*] at para. 108, Applicants’ BOA, Tab 2.

34. The general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalf & Mansfield Alternative Investment II Corp.*, where the Ontario Court of Appeal stated, among other things:

The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount.

ATB Financial v. Metcalfe & Mansfield Alternative Investment II Corp. (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 104, Applicants BOA, Tab 3.

35. In *Nortel Networks Corp.*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory provision are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament.

Nortel Networks Corp. (Re) (2009), 59 C.B.R. (5th) 23 (Ont. C.A.) [*“Nortel 2009 (C.A.)”*] at para. 38, Applicants BOA, Tab 4.

36. Courts have held that the purpose of the CCAA regime cannot be thwarted by the operation of provincial legislation and, as a result, a CCAA court has the jurisdiction

and discretion to make an order that has the effect of overriding a provincial enactment, including the QSPPA and the PBA. In *Collins & Aikman*, Justice Spence stated:

...the Court has the jurisdiction under the CCAA to make an order under the CCAA which conflicts with, and overrides, provincial legislation. There is no apparent reason why this principle would not apply to an order made under the CCAA which conflicts with the PBA.

Collins & Aikman at paras. 42 and 87, Applicants BOA, Tab 2.

Nortel 2009 (C.A.) at paras. 44 and 47, Applicants BOA, Tab 4.

37. The purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, to the end that the business is able to continue. This purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders.

Nortel Networks Corp. (Re) (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List].) [*"Nortel 2009 (S.C.J.)"*] at paras. 33-40, Applicants BOA, Tab 5.

Lehndorff General Partner Ltd. (Re) (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at para. 6, Applicants BOA, Tab 6.

38. The recent decision of the Ontario Court of Appeal in *Indalex Ltd.* confirms CCAA court's ability to override conflicting provisions of provincial statutes where the application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. The Ontario Court of Appeal stated, *inter alia*, as follows:

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

...

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

[Emphasis added]

*Indalex Ltd. (Re) (2011), 75 C.B.R. (5th) 19 (Ont. C.A.) at paras. 176 and 181, Applicants BOA, Tab 7. Leave to appeal to the Supreme Court of Canada granted, *Sun Indalex Finance, LLC v. United Steelworkers*, [2011] S.C.C.A. No. 274.*

39. Where it is necessary to achieve the objective of the CCAA, this Court has the jurisdiction to make an order under the CCAA granting super-priority over the Encumbrances for the Administration Charge and the D&O Charge, even if such order conflicts with, or overrides, the QSPPA or the PBA.

40. The Timminco Entities require the services of the beneficiaries of the Court-ordered charges in order to pursue a successful restructuring of their business and/or finances. The Timminco Entities' management believes that absent charges in priority to the Encumbrances, the Timminco Entities will be deprived of the services being provided by the beneficiaries of these charges to the detriment of the Timminco Entities'

stakeholders and the Timminco Entities' ability to accomplish a successful restructuring will be frustrated.

Comeback Motion Affidavit, para. 36, Motion Record, Tab 2

41. The Timminco Entities respectfully submit that the doctrine of paramountcy is properly invoked in this case and that this Court should exercise its discretion and order super-priority over the Encumbrances for the Administration Charge and the D&O Charge in order to ensure the continued participation of the beneficiaries of these charges in the Timminco Entities' CCAA proceedings.

B. PAYMENT OF THE PENSION CONTRIBUTIONS SHOULD BE SUSPENDED

Special (or Amortization) Payments Are Pre-Filing Obligations and Can Be Stayed

42. Special (or amortization) payments are payments required to be made to liquidate a going concern or solvency deficiency in a pension plan as identified in the most recent funding valuation report for the plan that is filed with the applicable pension regulatory authority. The requirement that an employer make such payments is provided for under the applicable provincial pension minimum standards legislation: for Quebec registered plans, the QSPPA, and for Ontario registered plans, the PBA.

43. The Courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. In *AbitibiBowater Inc.*, the Court held that special (or amortization) payments are pre-filing

obligations and quoted the decision of Justice Spence in *Collins & Aikman Automotive Canada* where it was held that:

It is not apparent that the continuation of the operation of the applicant in the post-filing period has given rise to an increase in the amount of the special payments from that amount that would have otherwise been applicable by reason of the pre-filing experience. Consequently, it seems tendentious to characterize the outstanding special payments as the cost of operating in the post-filing period.

[Emphasis added]

AbitibiBowater Inc. (Re) (2009) 57 C.B.R. (5th) 285 (Q.S.C.) [*"AbitibiBowater"*] at paras. 40-42, Applicants' BOA, Tab 8.

Collins & Aikman Automotive Canada Inc. at para. 103, Applicants' BOA, Tab 2.

Fraser Papers Inc. (Re) (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J. [Comm. List]) [*"Fraser Papers"*] at para. 20, Applicants' BOA, Tab 9.

44. In *Fraser Papers Inc.*, in granting an Order suspending special payments, Pepall J. concluded:

Applying these cases, I conclude that I do have the jurisdiction to make an order staying the requirement to make special payments. The evidence indicates that these payments relate to services provided in the period prior to the Initial Order and the collective agreements do not change this fact. In essence, the special payments are unsecured debts that relate to employment services provided prior to filing. Furthermore, I am not being asked to modify the terms of the pension plans or the collective agreements. The operative word is suspension, not extinction. In addition, the actuarial filings are current and the relief requested is not premature.

[Emphasis added]

Fraser Papers at para. 20, Applicants' BOA, Tab 9.

45. Courts in both Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA proceeding and have ordered the suspension of such payments where failure to stay the obligation to pay the special payments would jeopardize the business of the debtor company and the company's ability to restructure. Paragraph 21 of *Fraser Papers* referenced below also notes that there is no priority for special payments in bankruptcy. Thus, employees and former employees are not prejudiced by the relief requested as a bankruptcy, the alternate should these proceedings fail, would not produce a better result with respect to this obligation.

Fraser Papers at para. 21, Applicants' BOA, Tab 9.

Collins & Aikman at paras. 91 and 92, Applicants' BOA, Tab 2.

White Birch Paper Holding Co. (Re), 2010 CarswellQue 1780 (S.C.) at paras. 99 and 100, Applicants' BOA, Tab 10.

AbitibiBowater at paras. 61 and 62,, Applicants' BOA, Tab 8.

The Court Should Exercise Its Jurisdiction to Suspend the Pension Contributions

46. For the reasons outlined above, the Timminco Entities respectfully submit that where it is necessary to achieve the objective of the CCAA, this 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.

47. As described above, 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 and will be forced to cease operating to the detriment of their stakeholders, including their employees and pensioners.

Comeback Motion Affidavit, para. 27, Motion Record, Tab 2

48. The Timminco Entities respectfully submit that the doctrine of paramountcy is properly invoked in this instance and that this Court should exercise its discretion and suspend the Timminco Entities' obligations to make the Pension Contributions with respect to the Pension Plans in order to allow the Timminco Entities to restructure or sell the business as a going concern for the benefit of all of their stakeholders.

C. THERE SHOULD BE NO DIRECTOR OR OFFICER LIABILITY INCURRED AS A RESULT OF THE COURT-ORDERED SUSPENSION OF PAYMENT OF PENSION CONTRIBUTIONS

49. In the event that this Court grants the requested Order suspending the payment of the Pension Contributions, the Timminco Entities submit that the Timminco Entities and their officers, directors, officials and agents should not have any liability for the companies' failure to pay same. In *Fraser Papers Inc.*, Justice Pepall stated:

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

Fraser Papers at para. 22, Applicants' BOA, Tab 9.

50. Accordingly, it is respectfully submitted that in order to encourage the officers and directors of the Timminco Entities to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities' failure to make the Pension Contributions during the CCAA proceedings.

D. THE KERPS SHOULD BE APPROVED AND THE KERP CHARGE SHOULD BE GRANTED

51. The Timminco Entities seek an Order approving the KERPs offered by the Timminco Entities to certain employees considered critical to a successful proceeding under the CCAA and the KERP Charge over the Property to secure the Timminco Entities' obligations under the KERPs.

52. There is no express statutory jurisdiction in the CCAA for the Court to approve a KERP. However, courts have recognized that approval of a KERP and a charge to secure same is within their statutory discretion under the CCAA. A KERP is designed to retain employees that are important to the management and operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress.

Grant Forest Products Inc. (Re) (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Comm. List]) [*"Grant Forest Products"*], at para. 8, Applicants' BOA, Tab 11.

Canwest Global at para. 49, Applicants' BOA, Tab 1.

53. KERPs have been approved in numerous CCAA proceedings where the retention of key employees is critical to a successful restructuring. Recently, in approving

certain payment plans designed to retain key employees during the Nortel restructuring, Justice Morawetz held that the commitment and retention of key employees was “*essential to the execution of a restructuring of Nortel and the completion of a plan of arrangement*”.

Nortel Networks Corp. (Re), [2009] O.J. No. 1044 (S.C.J. [Comm. List]) at para. 4, Applicants’ BOA, Tab 12.

54. In *Grant Forest Products Inc.*, the Court considered the following factors in approving a KERP charge:

- (a) Whether the monitor supports the KERP agreement and the KERP charge;
- (b) Whether the beneficiaries of the KERP are likely to consider other employment opportunities if the KERP charge is not approved;
- (c) Whether the beneficiaries of the KERP are crucial to the successful restructuring of the debtor company;
- (d) Whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and
- (e) The business judgement of the board of directors of the debtor company.

Grant Forest Products at paras. 8-10,, Applicants’ BOA, Tab 11.

55. More recently, in *Canwest Global Communications Corp.*, Pepall J. approved the KERP charge requested by the applicants on the basis that the factors enumerated in *Re Grant Forest*, were satisfied and that the monitor had carefully reviewed the charge and was supportive of the request.

Canwest Global at paras. 49-50, Applicants' BOA, Tab 1.

56. In *Grant Forest Products Inc.*, Justice Newbould noted that the business judgement of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge:

The business acumen of the board of directors of [the debtor company], including the independent directors, is one that the court should not ignore unless there is good reason of the record to ignore it. This is particularly so in light of the support of the Monitor and [the Chief Restructuring Advisor] for the KERP provisions. Their business judgement cannot be ignored.

Grant Forest Products at para. 18, Applicants' BOA, Tab 11.

57. In this case, the KERPs have been approved in form and substance by the board of directors of Timminco. In the opinion of the Chief Executive Officer and the Special Committee of the Board of Directors of Timminco, all of the KERP Participants are critical to the Timminco Entities' CCAA proceeding as they are experienced employees who have played central roles in the restructuring initiatives taken to date and will play critical roles in the steps taken in the future.

58. As a result of the Timminco Entities' financial situation and commencement of the CCAA proceedings, the KERP Participants may be incentivized to seek alternative

employment. The KERPs provide appropriate incentives for the participants to remain in their current positions and also ensures that they are properly compensated for their assistance in the CCAA process.

59. The Monitor also supports the approval of the KERPs and, following review of several court-approved retention plans in CCAA proceedings, is satisfied that the KERPs are consistent with the current practice for retention plans in the context of a CCAA proceeding and that the quantum of the proposed payments under the KERPs are reasonable in the circumstances. The Timminco Entities submit that this militates strongly in favour of approving the proposed KERPs and granting the KERP Charge.

First Report of the Monitor, paras. 17-18

60. Accordingly, the Timminco Entities respectfully request that the Court grant an Order approving the KERPs offered by the Timminco Entities and granting the KERP Charge.

E. THE CONFIDENTIAL SUPPLEMENT SHOULD BE SEALED

61. The Timminco Entities request that this Court seal the Confidential Supplement, which contains copies of the unredacted KERPs.

62. This Court has the discretion, pursuant to s. 137(2) of the *Courts of Justice Act*, to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 137(2).

63. In *Sierra Club of Canada v. Canada (Minister of Finance)*, a decision of the Supreme Court of Canada interpreting the sealing provisions of the Federal Court Rules, Iacobucci J. adopted the following test to determine when a sealing order should be made:

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

(a) *such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and*

(b) *the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*

Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522 at para. 53, Commercial List Authorities Book, Tab 13.

64. Orders sealing confidential supplements relating to KERPs containing sensitive personal and compensation information have been granted by this Court on a number of occasions.

Canwest Global at para. 52, Applicants' BOA, Tab 1.

Canwest Publishing Inc. (Re) (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J.[Comm. List]) [*"Canwest Publishing"*] at para. 65, Commercial List Authorities Book, Tab 14.

65. The Confidential Supplement contains unredacted copies of the KERPs. Protecting the disclosure of sensitive personal and compensation information of this

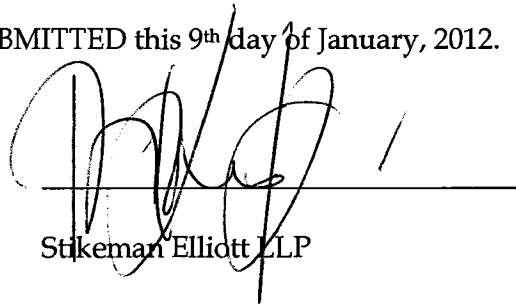
nature, the disclosure of which will cause harm to both the Timminco Entities and the KERP participants, is an important commercial interest that should be protected. Moreover, the KERP participants have a reasonable expectation that their names and salary information will be kept confidential.

66. Accordingly, it is respectfully submitted that this Court should order that the Confidential Supplement be permanently sealed from and not form part of the public record.

PART V - ORDER REQUESTED

67. The Timminco Entities therefore request an Order substantially in the form of the draft Order attached at Tab 3 of the Timminco Entities' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of January, 2012.



Stikeman Elliott LLP

Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J. [Comm. List]).
2. *Collins & Aikman Automotive Canada Inc. (Re)* (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.).
3. *ATB Financial v. Metcalf & Mansfield Alternative Investment II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.).
4. *Nortel Networks Corp. (Re)*, (2009), 59 C.B.R. (5th) 23 (Ont. C.A.).
5. *Nortel Networks Corp. (Re)*, (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List]).
6. *Lehndorff General Partner Ltd. (Re)*, (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.).
7. *Indalex Ltd.(Re)*, (2011), 75 C.B.R. (5th) 19 (Ont. C.A.).
8. *AbitibiBowater Inc. (Re)*, (2009), 57 C.B.R. (5th) 285 (Q.S.C.).
9. *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J. [Comm. List]).
10. *White Birch Paper Holding Co. (Re)*, 2010 CarswellQue 1780 (S.C.).
11. *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J. [Comm. List]).
12. *Nortel Networks Corp. (Re)*, [2009] O.J. No. 1044 (S.C.J. [Comm. List]).
13. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.
14. *Canwest Publishing Inc. (Re)* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Comm. List]).

SCHEDULE "B"
RELEVANT STATUTES

1. *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36*

...

11.51 Security or charge relating to director's indemnification

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

Priority

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

Restriction – indemnification insurance

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

Negligence, misconduct or fault

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

11.52 Court may order security or charge to cover certain costs

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

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

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

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

Priority

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

2. *Courts of Justice Act, R.S.O., c. C.43*

Documents public

137.(1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see

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

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

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

**ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL
LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS
(RETURNABLE JANUARY 12, 2012)**

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

Ashley J. Taylor LSUC#: 39932E
Tel: (416) 869- 5246
Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Kathryn Esaw LSUC# 58264F
Tel: (416) 869-6820
Fax: (416) 947-0866

Lawyers for Applicants