

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

**Timminco Limited  
Bécancour Silicon Inc.**

**TENTH REPORT OF THE MONITOR**

**June 1, 2012**

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

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

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

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

**INTRODUCTION**

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

3. Pursuant to the Order of the Honourable Mr. Justice Morawetz granted March 9, 2012 (the “**Bidding Procedures Order**”), the Timminco Entities were authorized to enter into the Stalking Horse Agreement and the Bidding Procedures were approved, each as defined in the Monitor’s Fourth Report.
4. As described in the Monitor’s Seventh Report, the marketing process was completed and the Auction was conducted by the Timminco Entities, in consultation with the Monitor, on April 24 and 25, 2012 pursuant to Bidding Procedures Order. At the conclusion of the Auction, the QSI APA and Ferro APA were together designated as the Successful Bid.
5. The Ferro APA was approved pursuant to an Order granted by the Court on May 22, 2012. Approval of the QSI APA is the subject of a pending motion before the Court which commenced on May 29, 2012 and is to be continued on June 1, 2012.
6. The Monitor has filed reports on various matters relating to the CCAA Proceedings. The purpose of this, the Monitor’s Tenth Report, is to inform the Court of the Monitor’s comments and recommendation in respect of the motion of J. Thomas Timmins (“**Timmins**”) in respect of the disclaimer of a consulting agreement between Timminco Limited and Timmins made as of September 19, 1996, as amended (the “**Timmins Agreement**”) and the cross-motion of the Timminco Entities with respect thereto.

7. In preparing this report, the Monitor has relied upon unaudited financial information of the Timminco Entities, the Timminco Entities' books and records, certain financial information prepared by the Timminco Entities and discussions with the Timminco Entities' management. The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the information. Accordingly, the Monitor expresses no opinion or other form of assurance on the information contained in this report or relied on in its preparation. Future oriented financial information reported or relied on in preparing this report is based on management's assumptions regarding future events; actual results may vary from forecast and such variations may be material.
8. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars. Capitalized terms not otherwise defined herein have the meanings defined in the previous reports of the Monitor, the Bidding Procedures Order or in the Initial Order.

## **BACKGROUND**

9. Subsequent to the granting of the Initial Order in these proceedings on January 3, 2012, the Timminco Entities suspended making payments that were determined not to be required for the ongoing business of the Timminco Entities, or the maintenance and protection of their assets, during the Stay Period, including amounts under the Timmins Agreement.
10. On February 17, 2012, counsel to Timmins wrote to counsel to the Timminco Entities requesting the payment of the amount of \$20,833 per month (the "**Timmins Monthly Payment**") pursuant to the terms of the Timmins Agreement, the payment of which had been suspended by Timminco as described above. A copy of that letter is attached as Exhibit D to the affidavit of Timmins sworn April 12, 2012 filed in support of the Timmins Motion (the "**Timmins April 12 Affidavit**").

11. On March 9, 2012, counsel to the Timminco Entities wrote to counsel for Timmins, advising that it was the position of the Timminco Entities that Timminco's obligations under the Timmins Agreement were pre-filing obligations which could be stayed and suspended in the CCAA Proceedings. A copy of that letter is also included in Exhibit D to the Timmins April 12 Affidavit. Timmins disputed this position by letter of its counsel dated March 27, 2012.
  
12. On March 30, 2012, a notice of disclaimer of the Timmins Agreement was issued by Timminco pursuant to section 32 of the CCAA with the effective date of disclaimer set out therein being April 30, 2012 (the "**Disclaimer Notice**"). The Monitor approved the proposed disclaimer. The Disclaimer Notice was delivered by Timminco explicitly without prejudice to its position that the obligations under the Timminco Agreement were pre-filing obligations, and that as such, any remedies in respect of the non-payment of these obligations were stayed and suspended.
  
13. On April 13, 2012, within the statutory period provided for in section 32(2) of the CCAA, Timmins filed a motion (the "**Timmins Motion**") for:
  - (a) An Order that the Timmins Agreement not be disclaimed (the "**No Disclaimer Order**"); or
  - (b) In the alternative, an Order
    - (i) directing Timminco to pay Timmins the amount of \$83,333.32 being the amount owing under the Timmins Agreement from the commencement of the CCAA Proceedings to April 30, 2012, the effective date of the disclaimer; and
    - (ii) declaring that the value of the provable claim of Timmins as a result of the disclaimer is at least \$2.2 million.

14. On May 7, 2012, the Timminco Entities filed a cross-motion (the “**Timminco Cross-Motion**”) for an Order declaring that Timminco’s obligations under the Timmins Agreement constitute pre-filing obligations which are stayed by the Initial Order.
15. Although there is no specific request for relief included in the Notice of Motion filed by Timmins in respect of the effective date of the disclaimer in the event that the disclaimer of the Timmins Agreement is allowed (the “**Disclaimer Date**”), the factum of Timmins dated May 28, 2012 (the “**Timmins Factum**”) contains argument that the Disclaimer Date should be no earlier than the Court’s determination of the motion. Based on discussions with Timmins’ counsel, the Monitor understands that Timmins will seek an Order to that effect at the hearing of the Timmins Motion.
16. Further, the Monitor understands from its discussions with counsel for Timmins that Timmins will not be proceeding with the component of its request in the alternative in respect of the valuation of the provable claim of Timmins arising from the disclaimer as that matter can be dealt with in a claims procedure or otherwise at a later date.

#### **THE TIMMINS AGREEMENT**

17. The Timmins Agreement is attached as Exhibit A and Exhibit B to the affidavit of Timmins sworn April 12, 2012 filed in support of the Timmins Motion. The details of the Timmins Agreement are described in the materials filed by the parties and are not repeated here.

#### **THE ISSUES**

18. The Monitor summarizes its understanding of the issues to be addressed in respect of the Timmins Motion and the Timminco Cross-Motion as follows:

- (a) Whether the payment obligation of \$20,833 per month (the “**Timmins Monthly Payment**”) by Timminco to Timmins scheduled to be paid subsequent to the commencement of the CCAA Proceedings (the “**Timmins Monthly Payment Obligation**”), constitutes:
  - (i) a pre-filing obligation, and as such, remedies related to the non-payment of this obligation are stayed by the terms of the Initial Order; or
  - (ii) a post-filing obligation, which the CCAA court may enforce as having been incurred for services provided post-filing;
- (b) If the Timmins Monthly Payment Obligation is determined to be a post-filing obligation, whether Timminco is required to make the Timmins Monthly Payments or whether Timminco was entitled to suspend the payment thereof;
- (c) If the Timmins Monthly Payment Obligation is a post-filing obligation that Timminco is required to continue paying after the commencement of the CCAA Proceedings, whether the No Disclaimer Order should be made or whether the disclaimer should be allowed; and
- (d) If the Court declines to make the No Disclaimer Order, whether the effective date of the disclaimer is April 30, 2012 or some later date.

#### **THE MONITOR’S APPROVAL OF THE DISCLAIMER**

19. The disclaimer of agreements is governed by Section 32 of the CCAA.

20. Section 32(1) of the CCAA states:

“**32. (1) Disclaimer of resiliation of agreements** – Subject to subsections (2) and (3), a debtor company may — on

notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.”

21. Section 32(2) of the CCAA states:

“(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.”

22. Section 32(4) of the CCAA states:

“(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation; [emphasis added]

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.”

23. Section 32(9) of the CCAA states:

“(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower;



or

(d) a lease of real property or of an immovable if the company is the lessor.”

24. The interested parties have filed evidence and legal briefs and will present oral argument to the Court on the factors to be considered by the Court in respect of the proposed disclaimer. The Monitor acknowledges and emphasises that it is the Court, and not the Monitor, that is the only authority for the adjudication of the matters in dispute.

25. However, whether the Monitor has approved the disclaimer is one of the factors to be considered by the Court and in this case it has done so. Accordingly, the Monitor believes it to be appropriate to describe to the Court the considerations that went into its decision to approve the issuance of the Disclaimer Notice.

26. Section 32(4)(a) does not provide guidance as to what factors the Monitor should consider in determining whether to approve the disclaimer, and the Monitor and its counsel are not aware of any authority that has considered this provision since its enactment.

27. However, the Canadian Association of Insolvency and Restructuring Professionals have issued Standards of Professional Practice which provide guidance to Monitor’s on a number of issues, including the disclaimer of agreements (the “**Standards**”). The Standards provide that:

“5.01 The Monitor should gain an understanding of the reason/purpose of the proposed disclaimer or resiliation, the benefits and costs to the Company resulting from such disclaimer or resiliation, and the impact of the disclaimer or resiliation, or the absence of such disclaimer or resiliation, as the case may be, on the Company and its proceedings under the Act.

5.02 The Monitor should consider whether the disclaimer or resiliation of an Agreement would enhance the prospects of a viable compromise or arrangement being made in respect of the Company or otherwise benefit the Company’s stakeholders as a whole.”

28. In the Monitor's respectful view, in considering whether to approve and recommend the requested assignment, the Monitor should consider and inform itself of the facts relevant to the tests set out in the balance of section 32(4) of the CCAA, the factors identified in the Standards, other factors that may be relevant to the issue in the particular circumstances, the views of interested parties and whether any of the exceptions set out in section 32(9) of the CCAA applies.
29. The facts and commentary set out herein are provided to describe to the Court and other interested parties the basis and rationale for the Monitor's recommendations, which are based on the information available to the Monitor and its counsel and the advice provided by the Monitor's counsel. However, the views of the Monitor are in no way intended to be determinative of any legal issue before the Court.
30. The Monitor notes that in considering whether to approve the Disclaimer Notice, the Monitor did not consider the issue as to whether the Timmins Monthly Payment Obligations were pre-filing or post-filing obligations, as these issues were not relevant to the consideration of the appropriateness of the Disclaimer Notice. The arguments of both parties in favour of their respective positions on the issue of pre-filing or post-filing obligations and what may flow from that determination have been set out in the materials that have been filed with the Court. The Monitor does not have any additional facts or views that it believes would be of assistance to the Court on these issues.
31. As such, the balance of the Monitor's report focuses on the issue of the Disclaimer Notice.

**SECTION 32(4)(B) – ENHANCEMENT OF VIABLE PLAN OF COMPROMISE OR ARRANGEMENT**

32. From the start, the CCAA Proceedings have been structured as an orderly sales process. It is unlikely that there will be any ongoing entity that will maintain or assume the obligations of the Timmins Agreement, or that Timminco will require the ongoing consulting services of Timmins. The Timminco Entities are not currently contemplating the presentation of a plan of compromise or arrangement to their creditors.
33. However, in considering reasonable commercial outcomes of the CCAA Proceedings, the Monitor has considered circumstances in which a plan might become a viable option, for example, in connection with a restructuring plan that could monetize the significant existing tax loss attributes of the Timminco Entities, a scenario about which the Monitor has recently commenced discussions with a potential interested party.
34. Based on the Monitor's experience, it is reasonable to expect that in such circumstances, any sponsor of a plan of arrangement would likely require an obligation such as the Timmins Agreement to be disclaimed or otherwise terminated.
35. In any event, the CCAA contemplates that a debtor company may never propose a plan of compromise and arrangement, and only proceed by way of the sale of its business and assets. In such circumstances, the more relevant issue for consideration is the impact on the debtor and its stakeholders of the agreement and/or its disclaimer. This impact is considered in the discussion of other factors below.

**SECTION 32(4)(C) – SIGNIFICANT FINANCIAL HARDSHIP**

36. In considering whether any significant financial hardship would be caused by the disclaimer if the disclaimer was allowed, the Monitor considered whether significant financial hardship, if any, suffered by Timmins, would in fact be as a result of the disclaimer, or more generally as a result of the insolvency of Timminco.
37. To date, there have been no realizations from assets of Timminco. The only assets for which offers were received in the marketing process are assets of BSI and realizations from those assets will be insufficient to pay the creditors of BSI in full.
38. Once the asset realization process has been completed, Timminco will be a shell company without any resources to maintain any ongoing obligations. Even if there are some funds available in Timminco, it is not realistic to assume that Timminco's other creditors would support the continued payment of the Timmins Monthly Payment of \$20,833 per month when the Timmins Monthly Payment Obligation could only be an unsecured claim in the event of a bankruptcy of Timminco.
39. As such, it appears to the Monitor that cessation of the Timmins Monthly Payment is inevitable. As a result, any significant financial hardship for Timmins that would be caused from the cessation of the payments is also inevitable and would not only be caused by the disclaimer but also due to the failure of Timminco as a viable entity.
40. In considering whether to approve the disclaimer, the Monitor was also cognizant of the statutory right to challenge the Disclaimer Notice, at which time it would be open to Timmins to adduce evidence in respect of any significant financial hardship.

41. In the materials filed in connection with the motion, Timmins acknowledges that he will not suffer significant financial hardship, though argues that the Court should look to the absolute size of the loss suffered rather than the relative degree of hardship caused by the disclaimer of the Timmins Agreement. The Monitor has considered the evidence presented by Timmins and the arguments contained in his factum. Neither the facts nor the arguments presented in the Timmins materials lead the Monitor to change its conclusion in respect of its approval of the disclaimer.

#### **OTHER FACTORS**

42. The Monitor also considered the cash flow implications and value of the Timmins Agreement to the insolvent Timminco Entities. In this case, there has been no active service provided to the Timminco Entities by Timmins since the issuance of the Initial Order or, the Monitor understands, for some period of time prior to the Initial Order.
43. There is also no suggestion in the record that that Timmins has forgone other opportunities as a result of being “on standby” to provide consulting services, or that his non-competition covenant has prevented him from taking advantage of any such opportunities since the date of the Initial Order and the Monitor is not aware of any such assertion being advanced by Timmins at any time during the CCAA Proceedings. In the event of a disclaimer, Timmins will be relieved of these obligations.

44. However, if the Timmins Agreement is not disclaimed and Timminco is required to continue making the Timmins Monthly Payment for “services<sup>1</sup>” that are no longer required (as a result of a finding of the Court that it is a post-filing obligation that must be paid), there would be a substantial burden on the Timminco Entities, and by extension other stakeholders, for no substantive benefit. This would appear to the Monitor to be inconsistent with what is, in its view, the generally accepted principle that cash flow in a CCAA proceeding should be focussed on operational and protective necessities.

#### **SECTION 32(9) – EXCEPTIONS TO DISCLAIMER**

45. In the Monitor’s view, the Timmins Agreement is not an agreement to which the exceptions in section 32(9) of the CCAA apply.

#### **THE EFFECTIVE DATE OF THE DISCLAIMER**

46. The Monitor understands that Timmins takes the position that in the event that the Court allows the disclaimer of the Timmins Agreement, the Disclaimer Date should be no earlier than the Court’s determination of the motion, rather than the effective date set out in the Disclaimer Notice.
47. The Monitor understands that if the Court allows the disclaimer of the Timmins Agreement but finds that the Timminco Monthly Payment Obligation is a post-filing obligation that the Timminco Entities are obliged to pay, the Timminco Entities take the position that the effective date of the disclaimer should be April 30, 2012 as stated in the Disclaimer Notice.
48. In the specific circumstances of this case, where:
- (a) The “services” provided by Timmins do not require Timmins to undertake any active steps;

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<sup>1</sup> Non-compete obligations, availability of consulting services and consulting services, if required

- (b) Timmins does not appear to have foregone other opportunities or otherwise suffered cost or loss as a result of the continuation of the Timmins Agreement past the effective date of the Disclaimer Notice due to the scheduling of the Timmins Motion and the Timminco Cross-Motion; and
- (c) The cost of the Timmins Agreement is \$20,833 per month;

the Monitor supports the Timminco Entities' position that the effective date of the of the disclaimer, if allowed by the Court, should be April 30, 2012 as set out in the Disclaimer Notice.

#### **THE MONITOR'S RECOMMENDATION**

- 49. In response to the Timminco Entities request that the Monitor approve the Disclaimer Notice, the Monitor considered the factors described above, the burden of the Timmins Agreement on the Timminco Entities' estate, the remote likelihood that payments would continue for any substantial period even if the No Disclaimer Order was granted, the potential impact of the disclaimer on Timmins and the interests of all stakeholders. The Monitor determined that, on balance, it was appropriate to approve the disclaimer of the Timmins Agreement.
- 50. Having reviewed the materials filed in connection with the Timmins Motion and the Timminco Cross-Motion, the Monitor remains of the view that approval of the disclaimer is appropriate in the circumstances.
- 51. The Monitor expresses no view on whether the Timmins Monthly Payment Obligation is a pre-filing or a post-filing obligation.

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

Dated this 1st day of June, 2012.

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



Nigel D. Meakin  
Senior Managing Director



for Toni Vanderlaan  
Managing Director