Court of Appeal File No. M41085
Court of Appeal File No. M41062
Superior Court File No. CV-12-9539-00CL

COURT OF APPEAL FOR ONTARIO

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

RESPONDING FACTUM OF THE APPLICANTS
(Responding to Motions for Leave to Appeal the DIP Order)

April 17, 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

Erica Tait LSUC#: 55996O
Tel: (416) 869-6805
Fax: (416) 947-0866

Lawyers for the Applicants

TO: The Attached Service List

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

SERVICE LIST
(as at April 9, 2012)

GENERAL	
TIMMINCO LIMITED AND BÉCANCOUR SILICON INC. Sun Life Financial Tower 150 King Street West, Suite 2401 Toronto ON M5H 1J9 **Applicants**	**Peter A.M. Kalins** Tel: (416) 364-5171 x340 Fax: (416) 364-3451 Email: pkalins@timminco.com **Doug Fastuca** Tel: (416) 364-5171 Email: dfastuca@timminco.com
STIKEMAN ELLIOTT LLP 5300 Commerce Court West 199 Bay Street Toronto, ON M5L 1B9 **Lawyers for the Applicants**	**Ashley J. Taylor** Tel: (416) 869-5236 Fax: (416) 947-0866 Email: ataylor@stikeman.com **Daphne MacKenzie** Tel: (416) 869-5695 Email: dmackenzie@stikeman.com **Pat O'Kelly** Tel: (416) 869-5633 Email: pokelly@stikeman.com **Dan Murdoch** Tel: (416) 869-5529 Email: dmurdoch@stikeman.com **Maria Konyukhova** Tel: (416) 869-5230 Email: mkonyukhova@stikeman.com **Kathryn Esaw** Tel: (416) 869-6820 Email: kesaw@stikeman.com

FTI CONSULTING CANADA INC. TD Waterhouse Tower 79 Wellington Street, Suite 2010 Toronto, ON M5K 1G8 **Monitor**	**Nigel D. Meakin** Tel: (416) 649-8065 Fax: (416) 649-8101 Email: nigel.meakin@fticonsulting.com **Toni Vanderlaan** Tel: (416) 649-8075 Email: toni.vanderlaan@fticonsulting.com
BLAKE, CASSELS & GRAYDON LLP 199 Bay Street Suite 4000, Commerce Court West Toronto ON M5L 1A9 **Lawyers for the Monitor**	**Steven J. Weisz** Tel: (416) 863-2616 Email: steven.weisz@blakes.com **Linc Rogers** Tel: (416) 863-4168 Email: linc.rogers@blakes.com
BANK OF AMERICA, N.A. 20975 Swenson Drive, Suite 200 Waukesha, WI 53186 Canada Branch 200 Front Street, Suite 2700 Toronto, ON M5V 3L2	**Client Manager** Fax: (262) 207-3347 **Medina Sales De Andrade** Fax: (416) 349-4282
INVESTISSEMENT QUÉBEC 393 Rue Saint-Jaques, Suite 500 Montréal, QC H2Y 1N9	**Danièle Leroux** Tel: (514) 873-0439 Fax: (514) 873-9917 Email: daniele.leroux@invest-quebec.com **Iya Toure** Email: iya.toure@invest-quebec.com **François Lamothe** Email: francois.lamothe@invest-quebec.com **Christine Fillion** Email: christine.fillion@invest-quebec.com **Liliane Monier** Email: liliane.monier@invest-quebec.com

FASKEN MARTINEAU DUMOULIN LLP 140 Grande Allee Est, Suite 800 Quebec City, QC G1R 5M8 333 Bay Street, Suite 2400 Toronto, ON M5H 2T6 **Lawyers for Investissement Quebec**	**Charles Mercier** Tel: (418) 640-2046 Fax: (418) 647-2455 Email: cmercier@fasken.com **Claude Girard** Tel: (418) 640-2050 Fax: (418) 647-2455 Email: cgirard@fasken.com **Aubrey Kauffman** Tel: (416) 868-3538 Fax: (416) 364-7813 Email: akauffman@fasken.com
MCCARTHY TÉTRAULT LLP Toronto Dominion Bank Tower Suite 5300 Toronto, ON M5K 1E6 **Lawyers for AMG Advanced Metallurgical Group N.V.**	**James Gage** Tel: (416) 601-7539 Fax: (416) 868-0673 Email: jgage@mccarthy.ca
RAYMOND CHABOT GRANT THORNTON 140 Grande Allée Est, Suite 200 Québec City, QC G1R 5P7	**Jean Chiasson** Tel: (418) 647-3204 Fax: (418) 647-9279 Email: chiasson.jean@rcgt.com
QUÉBEC SILICON LIMITED PARTNERSHIP 6500 Rue Yvon Trudeau Bécancour, QC G9H 2V8	**Rene Boisvert** Fax: (819) 294-9001 Email: rene.boisvert@quebecsilicium.com
QUÉBEC SILICON GENERAL PARTNER INC. 6500 Rue Yvon Trudeau Bécancour, QC G9H 2V8	**Rene Boisvert** Fax: (819) 294-9001 Email: rene.boisvert@quebecsilicium.com
DOW CORNING CORPORATION 2200 West Salzburg Road Midland, MI 48686-0994	**Sue K. McDonnell** Fax: (989) 496-8307 Email: sue.mcdonnell@dowcorning.com **John Tierney** Email: john.tierney@dowcorning.com

McCarthy Tétrault 1000 De La Gauchetière Street West, Suite 2500 Montréal QC H3B 0A2 Toronto Dominion Bank Tower Suite 5300 Toronto, ON M5K 1E6 **Counsel to Dow Corning Corporation**	**Sylvain A. Vauclair** Tel: (514) 397-4102 Fax: (514) 875-6246 Email: savauclair@mccarthy.ca **Barbara Boake** Tel: (416) 601-7557 Fax: (416) 875-6246 Email: bboake@mccarthy.ca **Sharon Kour** Tel: (416) 601-8305 Email: skour@mccarthy.ca
Skadden, Arps, Slate, Meagher & Flom LLP Four Times Square New York, NY 10036 **Counsel to Dow Corning Corporation**	**David J. Friedman** Fax: (212) 735-2000 Email: david.friedman@skadden.com
Canadian Imperial Bank of Commerce Commerce Court 11th Floor Toronto, ON M5L 1A2	
Laurentian Bank of Canada 1981 McGill College Avenue Montréal, QC H3A 3K3	
Torys LLP TD Centre 79 Wellington Street West, Suite 3000 Toronto, ON M5K 1N2 **Counsel to QSI Partners Ltd.**	**David Bish** Tel: (416) 865-7353 Fax: (416) 865-7380 Email: dbish@torys.com
Kim Orr Barristers 200 Front Street West, Suite 2300 Toronto, ON M5V 3K2	**James C. Orr** Tel: (416) 349-6571 Fax: (416) 598-0601 Email: jo@kimorr.ca

BAKER & MCKENZIE LLP Brookfield Place 181 Bay Street, Suite 2100 Toronto, Ontario M5J 2T3 **Lawyers for Wacker Chemie AG**	**Chris Besant** Tel: (416) 865-2318 Fax: (416) 863-6275 Email: chris.besant@bakermckenzie.com **Frank Spizzirri** Tel: (416) 865-6940 Email: frank.spizzirri@bakermckenzie.com
OSLER HOSKIN & HARCOURT LLP 1 First Canadian Place Toronto, Ontario M5X 1B8 **Lawyers for Wacker Chemie AG**	**Steven Golick** Tel: (416) 862-6704 Fax: (416) 862-6666 Email: sgolick@osler.com **Andrea Lockhart** Tel: (416) 862-6829 Email: alockhart@osler.com
BENNETT JONES LLP One First Canadian Place Suite 3400 Toronto, Ontario M5X 1A4 **Lawyers for John Walsh**	**Derek J. Bell** Tel: (416) 777-4638 Fax: (416) 863-1716 Email: belld@bennettjones.com
GOWLING LAFLEUR HENDERSON LLP 1 Place Ville Marie, Suite 3700 Montréal, Québec H3B 3P4 **Lawyers for Wajax Equipment**	**Geneviève Cloutier** Tel: (514) 392-9448 Fax: (514) 876-9048 Email: genevieve.cloutier@gowlings.com
DAVIES WARD PHILLIPS & VINEBERG LLP First Canadian Place, Suite 44 Toronto, Ontario M5X 1B1	**Jay Swartz** Tel: (416) 863-5520 Fax: (416) 863-0871 Email: jswartz@dwpv.com

PENSION PLANS REPRESENTATIVES	
BSI Non-Union Employee Pension Committee	
[redacted]	**Maria Spensieri** [redacted] Email: maria.spensieri@quebecsilicium.com
[redacted]	**René Boisvert** [redacted] Email: rene.boisvert@quebecsilicium.com
[redacted]	**Carl Rivard** [redacted] Email: carl.rivard@quebecsilicium.com
[redacted]	**Clément Albert** [redacted]
[redacted]	**Patrick Gauthier** [redacted] Email: patrick.gauthier@quebecsilicium.com
[redacted]	**Denis Bourassa** [redacted]

BSI Union Employee Pension Committee [redacted]	**Maria Spensieri** [redacted] Email: maria.spensieri@quebecsilicium.com **René Boisvert** [redacted] Email: rene.boisvert@quebecsilicium.com **Carl Rivard** [redacted] Email: carl.rivard@quebecsilicium.com **Gérald Brodeur** [redacted] **Luc Ducharme** [redacted] **Laurent Milette** [redacted] **Louis-Gilles Baron** [redacted] **Clément Albert** [redacted]
SUPERINTENDENT OF FINANCIAL SERVICES 5160 Yonge Street PO Box 85 Toronto, ON M2N 6L9	**Mark Bailey** Tel: (416) 590-7555 Email: mark.bailey@fsco.gov.on.ca **Deborah McPhail** Tel: (416) 226-7764 Email: dmcphail@fsco.gov.on.ca **Stephen Scharbach** Tel: (416) 590-7244 Fax: (416) 590-7070 Email: stephen.scharbach@fsco.gov.on.ca

RÉGIE DES RENTES DU QUÉBEC Direction des régimes de retraite Régies de rentes du Québec Case postale 5200 Québec, QC G1K 7S9	**Mario Marchand** Tel: (418) 657-8715 ext. 3927 Fax: (418) 643-9590 Email: mario.marchand@rrq.gouv.qc.ca
KOSKIE MINKSY LLP 20 Queen Street West, Suite 900 Toronto, ON M5H 3R3 **Lawyers for Mercer (Canada) Limited, the administration of the Haley Pension Plan**	**Andrew Hatnay** Tel: (416) 595-2083 Fax: (416) 204-2872 Email: ahatnay@kmlaw.ca **Demetrios Yiokaris** Tel: (416) 595-2130 Email: dyiokaris@kmlaw.ca
UNIONS	
LA SECTION LOCALE 184 DE SYNDICAT CANADIEN DES COMMUNICATIONS, DE L'ÉNERGIE ET DU PAPIER 6500, rue Yvon-Trudeau Bécancour, QC G9H 2V8 7080, boul. Marion Trois-Rivières, QC G9A 6G4	**Jean Simoneau** Email: scep184@gmail.com **René Gauthier** Tel: (819) 378-4696 Email: rgauthier@scep.ca
CALEYWRAY 65 Queen Street West, Suite 1600 Toronto, ON M5H 2M5 **Lawyers for La Section Locale 184 de Syndicat Canadien des communications, de l'Énergie et du Papier**	**Denis W. Ellickson** Tel: (416) 775-4678 Fax: (416) 366-4678 Email: ellicksond@caleywray.com **Jesse B. Kugler** Tel: (416) 775-4677 Fax: (416) 366-3673 Email: kuglerj@caleywray.com
THE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION 2285 Saint-Laurent Boulevard Suite D-11 Ottawa, ON K1G 4Z7	**David Lipton** Tel: (613) 260-7205 ext. 232 Email: dlipton@usw.ca

SACK GOLDBLATT MITCHELL LLP 20 Dundas Street West, Suite 1100 Toronto, ON M5G 2G8 **Lawyers for the United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union**	**Charles Sinclair** Tel: (416) 979-4234 Fax: (416) 591-7333 Email: csinclair@sgmlaw.com
PPSA CREDITORS	
PRODAIR CANADA LTEE 7475 Boulevard Newman, Suite 311 La Salle, QC H8N 1X3	
SERVICES FINANCIERS CIT LTÈE 5035 South Service Road Burlington, ON L7R 4C8	
GE VFS CANADA LIMITED PARTNERSHIP 2300 Meadowvale Boulevard, Suite 200 Mississauga, ON L5N 5P9	
SERVICES FINANCIERS CATERPILLAR LTEE 5575 North Service Road Suite 600 Burlington, ON L7C 6M1	**Kellie Wellenreiter** Tel: (289) 313-1238 Email: kellie.wellenreiter@cat.com
SERVICES FINANCIERS DE LAGE LANDEN CANADA INC. 1235 North Service Road West, Suite 100 Oakville, ON L6M 2W2	
DCFS CANADA CORP 2680 Matheson Boulevard East Suite 500 Mississauga, ON L4W 0A5	
SERVICES FINANCIERS MERCEDES-BENZ 2680 Matheson Boulevard East Suite 500 Mississauga, ON L4W 0A5	
JOHN DEERE LIMITED 1001 Champlain Ave, Suite 401 Burlington, ON L7L 5Z4	

GE CAPITAL VEHICLE AND EQUIPMENT LEASING INC. 2300 Meadowvale Boulevard 2nd Floor Mississauga, ON L5N 5P9	
ENDRAS BMW 100 Achilles Rd. Ajax, On L1Z 0C5	
DOCUMENT DIRECTION 100-1235 North Service Road West Oakville, ON L6M 2W2	
BMW CANADA INC. 50 Ultimate Drive Richmond Hill, ON L4S 0C8	
TOYOTA CREDIT CANADA INC. 80 Micro Court, Suite 200 Markham, ON L3R 9Z5	
GOVERNMENT AGENCIES	
DEPARTMENT OF JUSTICE **ONTARIO REGIONAL OFFICE** 130 King Street West, Suite 3400 Toronto, ON M5X 1K6 **Attorney General of Canada**	**Diane Winters** Tel: (416) 973-3172 Fax: (416) 973-0810 Email: diane.winters@justice.gc.ca
CANADA REVENUE AGENCY 130 King Street West, Suite 3400 Toronto, ON M5X 1K6 **Solicitor for Canada Revenue Agency**	**Diane Winters** Tel: (416) 973-3172 Fax: (416) 973-0810 Email: diane.winters@justice.gc.ca
CANADA REVENUE AGENCY GST Interim Processing Centre (GST/HST) 333 Laurier Avenue West Ottawa, ON K1A 1J8	

AGENCY OF REVENUE DU QUEBEC 1600 Boulevard Réné Levésque Ouest, 3e étage Sector R23 CPF Montréal, QC H3H 2V2	
MINISTÈRE DE LA JUSTICE DU QUEBEC 1200, route de l'Église, 6e étage Québec City, QC G1V 4M1	
MINISTÈRE DU DÉVELOPPEMENT DURABLE, DE L'ENVIRONNEMENT ET DES PARCS Édifice Marie-Guyart, 5e étage 675 boulevard René-Lévesque Est Québec, QC G1R 5V7	Tel: (418) 521-3816 Fax: (418) 646-0908
MINISTRY OF REVENUE (ONTARIO) 33 King Street West Oshawa, ON L1H 8H5	
MINISTRY OF THE ATTORNEY GENERAL (ONTARIO) McMurtry-Scott Building 720 Bay Street, 11th Floor Toronto, ON M7A 2S9	
MINISTRY OF THE ENVIRONMENT Legal Services Branch 135 St Clair Avenue West Toronto, ON M4V 1P5	**Mario Faieta** Tel: (416) 314-6482 Fax: (416) 314-6579 Email: mario.faieta@ontario.ca
ONTARIO MINISTRY OF NORTHERN DEVELOPMENT, MINES AND FORESTRY Rm. M2-24, Macdonald Block 900 Bay Street Toronto, ON M7A 1C3 Ministry of Northern Development, Mines and Forestry 933 Ramsey Lake Road, B4, Sudbury, Ontario P3E 6B5	**Ms. C. Blancher-Smith,** Director of Mine Rehabilitation TeL: (705) 670-5784

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PART I - OVERVIEW

1. This factum is filed by Timminco Limited ("**Timminco**") and its wholly-owned subsidiary Bécancour Silicon Inc. ("**BSI**" and together with Timminco, the "**Applicants**") in response to two motions brought by:

(a) The Communications, Energy and Paperworkers' Union of Canada ("**CEP**") (Court of Appeal File No. M41062); and

(b) The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "**USW**") (Court of Appeal File No. M41085);

seeking leave to appeal the order of the Honourable Mr. Justice Morawetz (the "**CCAA Judge**") dated February 9, 2012 approving a debtor-in-possession (DIP) credit facility (the "**DIP Facility**") and granting a charge in favour of the DIP lender over substantially all of the

property of the Applicants (the "**Property**") in priority to all other security interests, including any deemed trusts created under the Ontario *Pension Benefits Act* (the "**PBA**") and/or the Quebec *Supplemental Pensions Plans Act* (the "**SPPA**"), other than the Administration Charge and the KERP Charge (each as defined below) and any valid purchase money security interests (the "**DIP Order**").

2. The Applicants respectfully submit that the motions brought by CEP and the USW (collectively, the "**Unions**") are without merit and should be dismissed as they do not satisfy the well-established test for granting leave to appeal an order issued in a CCAA proceeding for, *inter alia*, the following reasons:

(a) in granting the DIP Order, the CCAA Judge properly exercised his discretion based on the evidentiary record before him and the proposed appeals are not prima facie meritorious;

(b) the proposed appeals are of no significance to the practice as the CCAA Judge's decision: (i) follows well-established jurisprudence and the recent guidance of this Court provided in *Indalex*, *infra*, (ii) constitutes an exercise of discretion based on findings of fact supported by the evidence before him, and (iii) bears little precedential value outside of the specific facts of this proceeding; and

(c) granting leave to appeal will not only unduly hinder this proceeding, but will put the DIP Facility at risk of termination and the Applicants at risk of bankruptcy which would be detrimental to all of the Applicants' stakeholders, including the employees and pensioners represented by the Unions.

3. Accordingly, the Applicants respectfully submit that the Unions' requests for leave to appeal ought to be denied.

PART II - THE FACTS[1]

A. The Applicants

4. The Applicants' primary business, the production and sale of silicon, is carried on principally through the Applicant, BSI, a Québec-based wholly-owned subsidiary of Timminco. BSI purchases silicon metal produced by Québec Silicon Limited Partnership ("**Québec Silicon**") for resale to customers in the chemical (silicones), aluminum, and electronics/solar industries. Québec Silicon is a production partnership between BSI and Dow Corning Corporation ("**Dow Corning**"), of which BSI owns 51%. BSI also produces solar grade silicon for customers in the solar photovoltaic industry through its unincorporated division, Timminco Solar. Timminco Solar ceased active production of its solar grade silicon in January 2010. Timminco also formerly operated a magnesium and other speciality metals business. The Ontario-based manufacturing operations of Timminco were discontinued in June, 2008.

> Affidavit of Peter A.M. Kalins sworn January 20, 2012 ("Kalins' **January 20 Affidavit**") at para. 5, Motion Record of the Moving Party, the USW ("**USW's Motion Record**"), Tab 4, p. 46
>
> Affidavit of Peter A.M. Kalins sworn January 2, 2012 ("**Kalins' January 2 Affidavit**") at paras. 8, 13, 15(b), 23(c), 36 & 55, Responding Motion Record of the Applicants ("**Applicants' Motion Record**"), Tab 1, pp. 3, 4, 6-8, 13 & 17

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[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 20, 2012.

B. The CCAA Proceedings

5. On January 3, 2012, the Applicants commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C.36, as amended (the "**CCAA**") and obtained an Initial Order from the CCAA Judge (the "**Initial Order**").

Kalins' January 20 Affidavit at para. 8, USW's Motion Record, Tab 4, p. 47

Initial Order dated January 3, 2012 ("**Initial Order**"), Exhibit A to Kalins' January 20 Affidavit, USW's Motion Record, Tab 4A

6. Pursuant to the Initial Order, the CCAA Judge, among other things, granted two charges on the Property of the Applicants: (i) an administration charge to secure the fees and disbursements of counsel to the Applicants, the Monitor and the Monitor's counsel incurred in connection with the CCAA proceedings (the "**Administration Charge**"); and (ii) a second ranking charge to secure an indemnity granted in favour of the directors and officers of the Applicants against obligations and liabilities that they may incur in such capacities following the commencement of these proceedings (the "**D&O Charge**").

Initial Order, Exhibit A to Kalins' January 20 Affidavit at paras. 27, 37-38 & 40, USW's Motion Record, Tab 4A, pp. 74 & 78-79

C. The USW and the Haley Pension Plan

7. The USW represents the formerly hourly employees and pensioners that are subject to the Retirement Pension Plan for The Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco (Ontario Registration Number 0589648) (the "**Haley Pension Plan**").

Affidavit of Peter A.M. Kalins sworn January 5, 2012 ("**Kalins' January 5 Affidavit**") at para. 14, Applicants' Motion Record, Tab 2, p. 51

8. The Haley Pension Plan, which is subject to the PBA, was terminated effective August 1, 2008, and despite Timminco having made contributions of over $4.5 million during the period from August 1, 2008 to July 31, 2011, the deficit remaining in the Haley Pension Plan, as of August 1, 2011 is estimated at approximately $3.1 million. Contributions for the period from August 1, 2011 to July 31, 2012, which are estimated to be approximately $1.6 million, have not been remitted to the plan.

> Kalins' January 5 Affidavit at paras. 14-18, Applicants' Motion Record, Tab 2, p. 51-52

D. CEP and the Bécancour Union Pension Plan

9. CEP represents the employees and pensioners that are subject to the Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (Québec Registration Number 32063) (the "**Bécancour Union Pension Plan**"). The Bécancour Union Pension Plan is an on-going defined benefit pension plan with two active members and 98 retired and deferred vested members including surviving spouses. The Bécancour Union Pension Plan and the Haley Pension Plan are referred to collectively herein as the "**Pension Plans**".

> Kalins' January 5 Affidavit at parsa. 14 & 22, Applicants' Motion Record, Tab 2, pp. 51 & 53

10. In 2011, normal cost contributions to the Bécancour Union Pension Plan totaled approximately $7,083 per month and special payments owing to the plan totaled approximately $95,300 per month. Until the January 16 Order (as defined and described in greater detail below), all contributions owing to the Bécancour Union Pension Plan in accordance with the SPPA and the regulations thereunder were paid when due. Since the

January 16 Order (defined below), BSI has continued to make all normal cost contributions to the Bécancour Union Pension Plan.

Kalins' January 5 Affidavit at para. 24, Applicants' Motion Record, Tab 2, p. 54

11. CEP states repeatedly in its factum that the Applicants are the administrator of the Bécancour Union Pension Plan, and are on the pension committee. In fact, BSI is the employer and sponsor of the Bécancour Union Pension Plan. Neither BSI nor Timminco is the administrator of the Bécancour Union Pension Plan. The pension committee, made up of current and former employee representatives (including members of CEP) and employer representatives, is the administrator of the Bécancour Union Pension Plan. Notwithstanding CEP's statements to the contrary, neither BSI nor Timminco is a member of that committee. The fiduciary duties referred to by CEP are accordingly owed by the pension committee as administrator of the Bécancour Union Pension Plan, not by the Applicants.

Kalins' January 20 Affidavit at para. 15, USW's Motion Record, Tab 4, pp. 49-51

Kalins' January 5 Affidavit at para, 22, Applicants' Motion Record, Tab 2, p.53

12. Further, none of the employer representatives on the pension committee have had any part in any decision making process regarding any significant steps in the CCAA proceedings.

13. The pension committee of the Bécancour Union Pension Plan (as well as all of the Applicants' key creditors and stakeholders) were notified of the Applicant's motion seeking approval of the DIP Facility. The pension committee did not oppose the granting of the DIP Order, and is not seeking leave to appeal same.

Kalins' January 20 Affidavit at paras. 40 & 52, USW's Motion Record, Tab 4, pp. 58 & 59

See also Kalins' January 20 Affidavit at paras.10-19, including in particular paras. 15 & 19, wherein Mr. Kalins' describes the communication process with the Applicants' stakeholders, including the Unions, USW's Motion Record, Tab 4, pp. 47-51

E. The January 16 Order

14. On January 12, 2012, the Applicants brought a motion for orders:

(a) granting priority ranking for the Administration Charge and the D&O Charge ahead of all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the PBA or the SPPA (collectively, the "**Encumbrances**"), other than valid purchase money security interests;

(b) approving certain key employee retention plans ("**KERPs**");

(c) granting a super priority charge over the Property to secure the Applicants' obligations under the KERPs (the "**KERP Charge**") ranking ahead of all Encumbrances; and

(d) suspending the Applicants' obligations to make special (or amortization) payments with respect to, *inter alia*, the Pension Plans.[2]

The Third Report to the Court submitted by FTI Consulting Canada, Inc. in its capacity as Monitor dated January 23, 2012 ("**Monitor's Third Report**") at para. 2, CEP's Motion Record, Vol. II, Tab 6, p. 267

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[2] The Applicants also sought to suspend certain amortization payments owing under the Bécancour Non-Union Pension Plan (as defined in the Affidavit of Peter A.M. Kalins, sworn January 2, 2012). The Bécancour Non-Union Pension Plan is an on-going defined benefit plan subject to the SPPA. The Applicants are sponsors of the plan and were making both normal costs contributions to the plan, as well as special amortization payments with respect to the solvency deficit in the plan. The beneficiaries under the Bécancour Non-Union Pension Plan are not seeking leave to appeal the DIP Order.

15. The motion was opposed by CEP and the USW.

16. The CCAA Judge granted the relief sought by the Applicants by Order dated January 16, 2012 (the "**January 16 Order**"). The Union initially sought leave to appeal the January 16 Order, but have subsequently informed the Applicants that they are not pursuing such motions.

Monitor's Third Report at para. 2, CEP's Motion Record, Vol. II, Tab 6, p. 267

Order dated January 16, 2012 ("**January 16 Order**"), Applicants' Motion Record, Tab 3, p. 63

F. The DIP Facility and the DIP Order

17. Prior to securing the DIP Facility, the Applicants were facing serious cash constraints. The cash flow projections filed in support of the motion seeking the DIP Order forecast that without additional financing the Applicants would be unable to continue operating past the third week of February 2012 and would not be able to complete a restructuring of their business, either through a sale or a plan, for the benefit of their stakeholders.

Kalins' January 20 Affidavit at paras. 3 & 7, USW's Motion Record, Tab 4, pp. 45-47

18. The Applicants attempted to secure DIP financing prior to commencing the CCAA proceeding, but were unable to do so. The Applicants had approached their existing stakeholders and third party financing lenders in order to identify a suitable DIP facility. Investissement Québec ("**IQ**"), Bank of America, N.A., AMG Advanced Metallurgical Group N.V., and two third party lenders declined to advance any funds to the Applicants. Negotiations with another third party lender failed to result in a DIP facility with mutually agreeable terms.

Kalins' January 20 Affidavit at para. 25, USW's Motion Record, Tab 4, p. 53

19. Following the issuance of the Initial Order and the grant of the stay of proceedings, the Applicants, with the assistance of the Monitor, expanded their efforts to secure DIP financing by contacting parties who could not be contacted in advance of the filing. In addition, a number of other parties contacted the Monitor and the Applicants to inquire as to the possibility of providing DIP financing.

Kalins' January 20 Affidavit at para. 27, USW's Motion Record, Tab 4, p. 53

Monitor's Third Report at paras. 17-18, CEP's Motion Record, Vol. II, Tab 6, p. 273

20. The Applicants pursued the arrangement of a DIP facility with each of the foregoing parties. Five parties submitted indicative terms for a DIP facility. Following further discussions and negotiations with those parties, the Applicants successfully negotiated the DIP Facility with QSI Partners Ltd. ("**QSI**" or the "**DIP Lender**").

Kalins' January 20 Affidavit at para. 28, USW's Motion Record, Tab 4, p. 53

21. On or about January 18, 2012, the Applicants and QSI entered into an agreement, pursuant to which QSI agreed to provide the Applicants with the DIP Facility to a maximum amount of $4.25 million USD, subject to the terms and conditions set out therein.

Kalins' January 20 Affidavit at para. 27, USW's Motion Record, Tab 4, p. 53

DIP Agreement dated as of January 18, 2012 ("**DIP Facility**"), Exhibit B to Kalins' Affidavit, USW's Motion Record, Tab 4B

22. The terms of the DIP Facility are described in greater detail in paragraphs 30 to 39 of the January 20 Affidavit and include a number of affirmative covenants, negative covenants, events of default, and conditions customary for this type of financing.

Kalins' January 20 Affidavit at paras. 30-39, USW's Motion Record, Tab 4, pp. 54-58

Monitor's Third Report at paras. 19-28, CEP's Motion Record, Vol. II, Tab 6, pp. 273-276

23. One of the terms of the DIP Facility provides that the advancement of funds to the Applicants is conditional upon leave to appeal the DIP Order not being granted. In addition, the failure to comply with a condition precedent, or the issuance of an order staying, reversing, vacating or otherwise modifying the DIP Charge (as the Unions seek to do on appeal) constitutes an Event of Default under the DIP Facility, which, if not remedied, give the DIP Lender the right to terminate any DIP advances, realize on the Collateral (as defined in the DIP Facility) and apply to the court to appoint a receiver.

See DIP Facility at paras. 7(e), (f), (h) & 16(c) & (d), Exhibit B to Kalins' January 20 Affidavit, USW's Motion Record, Tab 4B, pp. 88-89 & 100-101

24. The DIP Facility was conditional, among other things, upon the issuance of a Court order approving the DIP Facility and granting the DIP Lender a priority charge in its favour (the "**DIP Charge**") over all of the Property, including the Collateral (as defined in the DIP Facility), ranking ahead in priority to all Encumbrances in favour of any person, notwithstanding the order of perfection or attachment, including without limitation any deemed trust created under the PBA and the SPPA, other than the Administration Charge and the KERP Charge, and any valid purchase money security interests.

Kalins' January 20 Affidavit at para. 36, USW's Motion Record, Tab 4, pp. 56-57

25. The financial terms of the DIP Facility were better than or not materially worse than those proposed in the competing term sheets provided by other potential lenders during the DIP negotiations described below. The other four term sheets provided to the Applicants

failed to provide sufficient liquidity, contained more onerous financial terms than those contained in the DIP Facility, or contained terms and conditions that made it unlikely that a binding agreement could be negotiated within the necessary time frame, or some combination of these factors. Considering each of the term sheets as a whole, management of the Applicants and the Monitor determined that the DIP Facility was the best available option.

Kalins' January 20 Affidavit at para. 29, USW's Motion Record, Tab 4, pp. 53-54

Monitor's Third Report at paras. 17-18 & 29(g), CEP's Motion Record, Vol. II, Tab 6, pp. 273 & 280

26. Based on its research of the terms of recent DIP financings based on publicly available information, the Monitor reported to the Court that it believed that the terms of the DIP Facility are in line with or better than market.

Monitor's Third Report at para. 29(g), CEP's Motion Record, Vol. II, Tab 6, p. 280

27. The DIP Facility was stated to and will provide Timminco with the requisite liquidity to continue operating and preserve the opportunity to obtain a going concern solution. The cash flow projection attached as Schedule "A" to the DIP Facility projects that the Applicants will have sufficient funding to continue operating until the first week of June 2012.

Kalins' January 20 Affidavit at para. 43, USW's Motion Record, Tab 4, p. 58

Weekly CCAA Cash Flow, Schedule "A" to the DIP Facility, Exhibit B to Kalins' January 20 Affidavit, USW's Motion Record, Tab 4B, pp. 10-112

Monitor's Third Report at para. 29(f), CEP's Motion Record, Vol. II, Tab 6, p. 279

28. Accordingly, the Monitor and the Special Committee of the Timminco Board of Directors approved execution of the DIP Facility and the seeking of Court approval, including the grant of the DIP Charge, with priority over, *inter alia*, the D&O Charge.

Kalins' January 20 Affidavit at para. 29, USW's Motion Record, Tab 4, pp. 53-54

Monitor's Third Report at paras. 29(g) & 30, CEP's Motion Record, Vol. II, Tab 6, pp. 280-281

29. On January 27, 2012, on notice to all of the Applicants' key stakeholders and other interested parties[3], including the pension committee of the Bécancour Union Pension Plan, the Applicants moved for, among other relief, an order approving the DIP Facility and granting the DIP Charge (the "**DIP Approval Motion**").

30. In support of the DIP Approval Motion, the Applicants filed an affidavit from Mr. Peter Kalins, the President, General Counsel and Corporate Secretary of the Applicants and a director of BSI. In his affidavit, Mr. Kalins stated, among other things, that the DIP Lender was specifically asked whether it would advance under the DIP Facility if the DIP Charge was not granted priority over the Encumbrances (other than any valid purchase money security interests), and that the DIP Lender advised that it would not.

Kalins' January 20 Affidavit at para. 36, USW's Motion Record, Tab 4, pp. 56-57

Monitor's Third Report at para. 27, CEP's Motion Record, Vol. II, Tab 6, p. 276

31. Neither CEP nor the USW requested to cross-examine Mr. Kalins on this (or any other) part of his affidavit in connection with the DIP Approval Motion.

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[3] Among others, the following entities were served with notice of the DIP Approval Motion: the members of the pension plan committees for the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan, Financial Services Commission of Ontario; the Régie de rentes du Québec, the USW and CEP.

32. On February 9, 2012, the CCAA Judge granted the DIP Approval Motion, releasing his Endorsement (the "**DIP Reasons**") and issuing the DIP Order that same day.

Kalins' January 20 Affidavit at para. 52, USW's Motion Record, Tab 4, pp. 59-60

Endorsement of the Court released by Morawetz J. dated February 9, 2012 ("**DIP Reasons**"), USW's Motion Record, Tab 2, p. 8

PART III - QUESTIONS PROPOSED TO THE COURT

33. The sole question for determination by this Court on these motions is whether the Unions have met the test for granting leave to appeal the DIP Order.

34. In the event that leave to appeal is granted, the issue on appeal will be whether the CCAA Judge erred in approving the DIP Facility and granting the DIP Charge in priority to any deemed trusts created under the PBA or the SPPA.

PART IV - LAW AND ARGUMENT

A. The Test for Leave to Appeal

35. In the context of CCAA proceedings leave to appeal is to be granted "sparingly" and only where there are "serious and arguable grounds that are of real and significant interest to the parties". Appellate courts should accordingly be cautious about intervening in the CCAA process, and decisions of supervising CCAA judges should be interfered with in only the clearest of cases.

Stelco Inc. (Re), [2005] O.J .No. 4883 (C.A.) at paras. 15 & 18, Book of Authorities of the Applicants ("Applicants' Book of Authorities"), Tab 1

36. In determining whether leave to appeal ought to be granted, this Court is required to consider the following four-part inquiry:

(a) Whether the appeal is prima facie meritorious and not frivolous;

(b) Whether the appeal is of significance to the practice;

(c) Whether the point on appeal is of significance to the action; and

(d) Whether the appeal will unduly hinder the progress of the action.

Stelco Inc. (Re), [2005] O.J .No. 4883 (C.A.) at para. 15, Applicants' Book of Authorities, Tab 1

37. The Applicants submit that the Unions are unable to meet at least three of the prongs of the test as the proposed appeal is: not prima facie meritorious, not of significance to the practice, and will unduly hinder the progress of the action and jeopardize the entire CCAA proceeding.

B. The Proposed Appeal is Not Prima Facie Meritorious

i. The Applicable Standard of Review

38. Due to the nature of the CCAA proceedings, CCAA judges are afforded considerable deference by appellate courts.' Their decisions will only be interfered with in the event of unreasonable acts, errors in principle, or manifest errors.

Resurgence Asset Management LLC v. Canadian Airlines Corp., 2000 ABCA 149, [2000] A.J. No. 610 at paras. 28-29 [In Chambers], Applicants' Book of Authorities, Tab 2

Liberty Oil & Gas Ltd., (Re), 2003 ABCA 158, [2003] A.J. No. 615 at paras. 19-20, Applicants' Book of Authorities, Tab 3

39. It is well established that the applicable standard of review with respect to a decision of a CCAA judge is one of palpable and overriding error with respect to the exercise of

discretion or in findings of fact. A correctness standard is only applicable with respect to errors of law. Further, an appeal should not be hearing of the case *de novo*.

> *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, 2000 ABCA 149, [2000] A.J. No. 610 at paras. 28-29 [In Chambers], Applicants' Book of Authorities, Tab 2

40. The CCAA Judge's decision to grant the DIP Charge priority over any potential deemed trusts under the PBA or SPPA was, by the express wording of the CCAA, an exercise of the Court's discretion and is, therefore, afforded significant deference and ought not to be interfered with, absent palpable or overriding error. There was no palpable or overriding error in the exercise of the Court's discretion in granting the DIP Order.

ii. <u>The Proposed Appeal Is Not Prima Facie Meritorious</u>

41. The CCAA Judge did not err in granting the DIP Order, including approving the DIP Facility and granting the DIP Charge priority over all of the Encumbrances, other than the Administration Charge, the KERP Charge and any valid purchase money security interests.

a. The CCAA Judge Properly Exercised His Discretion in Approving the DIP Facility and Granting the DIP Charge

42. Section 11.2 of the CCAA, and existing jurisprudence, grants the CCAA Judge clear jurisdiction to exercise his discretion under the CCAA to approve the DIP Facility and grant the DIP Charge ranking ahead of any potential PBA or SPPA deemed trusts. The Unions do not dispute this point, and in fact, CEP expressly concedes that the CCAA provides the CCAA Judge with the general power to approve the DIP Facility, and the express jurisdiction to grant the DIP Charge.

> *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C.36 ("CCAA"), s. 11.2

Canwest Global Communications Corp. (Re), [2009] O.J. No. 4286, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Comm.List]) at paras. 31-34, Applicants' Book of Authorities, Tab 4

Factum of The Communications, Energy and Paperworkers Union of Canada dated March 26, 2012 at para. 56, pp. 19-20

43. In exercising his discretion under the CCAA, the CCAA Judge specifically addressed the factors enumerated in sections 11.2(1) and (4) of the CCAA, as well as the relevant case law. Moreover, the CCAA Judge's decision is founded upon a careful consideration and unqualified acceptance of the following evidence, which he held to be "clear" and "uncontradicted":

> *(a) In the third week of February the Timminco Entities will become cash flow negative;*
>
> *(b) Without additional funding the Timminco Entities will be forced to cease operating;*
>
> *(c) The Timminco Entities with the assistance of the Monitor, have attempted to secure DIP financing, both prior to and after commencement of the CCAA proceedings;*
>
> *(d) There was insufficient liquidity or unfavourable terms associated with the rejected DIP proposals;*
>
> *(e) The DIP Lender will not permit DIP advances to be used to pay special payments or for claims in respect of pension plans ranked in priority to the DIP Lender's Charge; and*
>
> *(f) The DIP Facility is expected to provide sufficient liquidity to conduct an orderly marketing process of the Timminco Entities' business.*

DIP Reasons at paras. 31-34 & 44-45, USW's Motion Record, Tab 2, pp. 12-13 & 15-16

Kalins' January 20 Affidavit at paras. 3, 7, 25, 27-29, 36 & 43 USW's Motion Record, Tab 4, pp. 45-47, 53-54 & 56-58

Monitor's Third Report at paras. 17-18, 27, 29(f) & (g) CEP's Motion Record, Vol. II, Tab 6, p. 273, 276, 279-280

44. The CCAA Judge also noted the positions taken by the Applicants' other key stakeholders and the Monitor on the DIP Approval Motion. Neither the directors nor officers of the Applicants, nor IQ or any other secured creditor, all of whom have security interests that (as a result of the DIP Order) now rank behind the DIP Charge, opposed the DIP Approval Motion. The pension committee of the Bécancour Union Pension Plan similarly did not oppose the DIP Approval Motion. The Court-appointed Monitor supported approval of the DIP Facility and recommended that the requested relief be granted.

DIP Reasons at paras. 23 & 35, USW's Motion Record, Tab 2, pp. 11 &14

Monitor's Third Report at para. 30, CEP's Motion Record, Vol. II, Tab 6, p. 281

b. The CCAA Judge Properly Exercised His Discretion to Apply the Doctrine of Paramountcy To Override the Provisions of the PBA and SPPA

45. It is not contested by the Unions that the CCAA Court had jurisdiction to invoke the doctrine of paramountcy 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. This Court has recently confirmed this jurisdiction in its decision in *Indalex Limited. (Re)* ("*Indalex*").

Indalex Ltd. (Re), 2011 ONCA 265, [2011] O.J. No. 1621 at paras. 176 & 181 (C.A.), Book of Authorities of the Moving Party, CEP, Tab 3; Leave to appeal to the Supreme Court of Canada granted, *Sun Indalex Finance, LLC v. United Steelworkers,* [2011] S.C.C.A. No. 274

46. This Court's decision in *Indalex* is consistent with the accepted jurisprudence establishing that the purpose of the CCAA cannot be thwarted by the operation of provincial legislation.

ATB Financial v. Metcalfe & Mansfield Alternative Investment II Corp., 2008 ONCA 587, [2008] O.J. No. 3164 at para. 104, Applicants' Book of Authorities, Tab 5

Nortel Networks Corp. (Re), 2009 ONCA 833, [2009] O.J. No. 4967 at paras. 38, 44 & 47, Applicants' Book of Authorities, Tab 6

Collins & Aikman Automotive Canada Inc. (Re), [2007] O.J. No. 4186, 37 C.B.R. (5th) 282 (Ont. S.C.J.) at paras. 42, 87 & 108, Applicants' Book of Authorities, Tab 7

47. The Unions allege that the CCAA Judge failed to consider whether a conflict of purposes between provincial and federal legislation really existed and that absent such consideration it is impossible to determine that compliance with provincial law will have the effect of frustrating the purpose of federal law and therefore the intent of Parliament.

48. The Applicants submit that it is abundantly clear from the review of the DIP Reasons that the CCAA Judge fully recognized the conflict between the federal CCAA and the provincial PBA and SPPA, including, among other things, when he stated as follows:

> *In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated....*
>
> *... I am satisfied that bankruptcy is not the answer and, in order to ensure that the objectives of the CCAA are fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of the QSPPA and the OPBA.*
>
> DIP Reasons at paras. 49-50, USW's Motion Record, Tab 2, p. 16

49. In addition, the CCAA Judge expressly incorporated by reference his reasons for decision issued in connection with the January 16 Order (the "**January 16 Reasons**") into the DIP Reasons. The CCAA Judge's appreciation and understanding of the doctrine of paramountcy, including the need to consider whether the provisions in issue are truly in

conflict, is clearly demonstrated in the January 16 Reasons, wherein he cites *Indalex*, sets out the Applicants submissions and finally concludes:

> *On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy...*
>
> *In my view, this is exactly the kind of result that the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order suspending the requirement to make special payments is appropriate.*
>
> *In my view, the circumstances are such that the position put forth by the Timminco Entities must prevail. I am satisfied that bankruptcy is not the answer and that, in order to ensure that the purpose and objective of the CCAA can be fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of the QSPPA and the PBA.*
>
> DIP Reasons at para. 50, USW's Motion Record, Tab 2, p. 16
>
> *Timminco Limited (Re)*, 2012 ONSC 506 ("**January 16 Reasons**") at paras. 62-64
> USW's Motion Record, Tab 2, pp. 30-31

50. The Unions also argue that the evidentiary record before the CCAA Judge failed to properly establish that the purposes of the CCAA would be frustrated by compliance with the provincial legislation. The Unions have attempted to characterize the record before the CCAA Judge as demonstrating that the extent of the negotiations regarding the priority of the DIP Charge involved the Applicants merely "asking" the DIP Lender whether it would advance under the DIP Facility if the DIP Charge was not granted priority over the Encumbrances (other than any valid purchase money security interests). Further, the Unions suggest that there was no evidence regarding the terms of the other interested DIP Lenders

and whether any of those interested parties may have presented proposals that would have permitted compliance with the SPPA and the PBA.

51. Contrary to the Unions' submissions, the extensive factual record before the CCAA Judge contained, among other things, evidence that:

(a) the Applicants were unable to secure DIP financing prior to filing for CCAA protection;

(b) the DIP proposals rejected by the Applicants either:

(i) proposed an amount of funding that was insufficient to meet the Applicants' liquidity demands;

(ii) contained onerous financial or other prejudicial terms that were disadvantageous to the Applicants, or

(iii) contained terms and conditions that, in the opinion of the Applicants and the Monitor, effectively precluded the parties from negotiating a binding agreement within the time constraints facing the Applicants;

(c) the DIP Lender refused to permit DIP advances to be used to pay special payments or for claims in respect of pension plans ranked in priority to the DIP Charge;

(d) the DIP Lender further refused to provide the DIP Facility unless the DIP Charge ranked in priority to any potential deemed trusts under the PBA and the SPPA, and a court order to that effect was obtained;

(e) without the DIP Facility, the Applicants would have become cash flow negative within weeks of the hearing of the DIP Approval Motion, and been forced to cease operations; and

(f) bankruptcy was the only other viable solution.

Kalins' January 20 Affidavit at paras. 3, 7, 25, 27-29, 36 & 43 USW's Motion Record, Tab 4, pp. 45-47, 53-54 & 56-58

Monitor's Third Report at paras. 17-18, 27, 29(f) & (g) CEP's Motion Record, Vol. II, Tab 6, p. 273, 276, 279-280

52. The CCAA Judge summarized the foregoing evidence as follows: "the stark reality of the situation facing the Timminco Entities' is that without the approval of the DIP Facility and the granting of the DIP Charge, there simply will be no money available."

DIP Reasons at para. 43, USW's Motion Record, Tab 2, p. 15

53. The Applicants' evidence was not challenged by either CEP or the USW. Neither of the Unions sought to cross-examine Mr. Kalins on his January 20 Affidavit. The CCAA Judge was correct to accept what he characterized as "clear" and "uncontradicted" evidence in arriving at his decision to exercise his discretion to apply the doctrine of paramountcy.

54. In addition, a review of the DIP Reasons reveals that in exercising his discretion to approve the DIP Facility and grant the DIP Charge, the CCAA Judge specifically considered the perilous business realities facing the Applicants. Based on the reality of the Applicants' situation, which is consistent with the undisputed evidentiary record before the Court, the CCAA Judge rejected the alternatives to approval of the DIP Facility suggested by CEP as unrealistic in the circumstances, and concluded that the DIP Facility was the only viable option open to the Applicants:

> ***It is unrealistic to expect that any commercially motivated DIP Lender will advance funds without receiving the priority that is being requested on [the DIP Approval Motion].*** *It is also unrealistic to expect that any commercially motivated party would make advances to the Timminco Entities for the purpose of making special payments or other payments under the pension plans.*
>
> ***The alternative proposed by CEP – of a DIP Charge without super priority – is not, in my view, realistic, nor is directing the Monitor to investigate alternative financing without providing super priority.*** *If there is going to be any opportunity for the Timminco Entities to put forth a restructuring plan, it seems it is essential and necessary for the DIP Financing to be approved and the DIP Charge granted. The alternative is a failed CCAA process.*
>
> *This underscores the lack of other viable options that was fully considered in the first Timminco endorsement (Timminco Limited (Re) 2012 ONSC 506). The situation has not changed.* ***The reality, in my view, is that there is no real alternative. The position being put forth by CEP does not, in my view, satisfactorily present any viable alternative. In this respect, it seems to me that the challenge of the unions to the position being taken by the Timminco Entities is suspect, as the only alternative is a shutdown. It is impossible for me to reach any conclusion other than the fact that there simply is no other viable alternative.***
>
> *In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated.* ***It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings.*** *Such an outcome would be prejudicial to all stakeholders, including CEP and USW.* [Emphasis Added]
>
> DIP Reasons at paras. 46-49, USW's Motion Record, Tab 2, p. 15

55. The Unions also argue that the CCAA Judge erred in granting the DIP Order by failing to consider whether the Applicants satisfied their fiduciary duties to the Pension Plans

in negotiating the DIP Facility. In this regard, the Unions suggest that in addition to the factors outlined in the CCAA to be considered by the Court in deciding whether to grant a DIP financing charge, the Court should also consider whether the Applicants satisfied their fiduciary duties to the Pension Plans during the negotiation of the DIP Facility.

56. The Unions cite no authority for the requirement to consider this additional criteria in considering approval of DIP financing under the CCAA and the Applicants submit that the statutory test for approval of DIP financing as interpreted by the Canadian Courts does not include any such requirement.

57. In addition, as previously outlined herein, BSI does not wear "two hats" as, contrary to CEP's submissions, BSI is not the administrator of the Bécancour Union Pension Plan, the pension committee is. Plan administrators play distinctly different roles played and have different legal obligations as compared to plan sponsors of a Québec registered pension plan.

Supplemental Pension Plans Act R.S.Q. c.R-15.1, s. 147

58. Lastly, the USW submits that the Applicants bear the onus of demonstrating that there were no other reasonable alternatives available to them other than entering into the DIP Facility. There are two problems with this submission: (a) there is no authority for this proposition, nor does the USW attempt to suggest any, and (b) this submission ignores completely the clear findings of fact made by the CCAA Judge on the basis of the evidence before him, namely, that the DIP Facility provided by QSI was the only "viable alternative" available to the Applicants.

59. Indeed, the CCAA Judge determined that the only alternative to the DIP Facility was a bankruptcy, which would be prejudicial to all stakeholders, including the Unions. The granting of the DIP Charge therefore did not prejudice the interests of the Applicants' former employees and pensioners relative to the DIP Facility.

60. In reaching his decision to approve the DIP Facility and grant the DIP Charge, the CCAA Judge properly found that approval of the DIP Facility and the granting of the DIP Order was in the best interests of all stakeholders, including the employees and pensioners represented by the USW and CEP, and stated, *inter alia*, as follows (which, although excerpted above, stands to be repeated):

> *... If there is going to be any opportunity for the Timminco Entities to put forth a restructuring plan, it seems to me that it is essential and necessary for the DIP Financing to be approved and the DIP Charge granted.* ***The alternative is a failed CCAA process.***
>
> *The reality, in my view, is that there is no real alternative. The position being put forth by CEP does not, in my view, satisfactorily present any viable alternative.* ***In this respect, it seems to me that the challenge of the unions to the position being taken by the Timminco Entities is suspect, as the only alternative is a shutdown.*** *It is impossible for me to reach any conclusion other than the fact that there simply is no other viable alternative.*
>
> ...
>
> ***The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders, including CEP and USW.*** [Emphasis Added]
>
> DIP Reasons at paras. 47-49, USW's Motion Record, Tab 2, p. 16

> See also January 16 Reasons at paras. 61 & 62, wherein the CCAA Judge states, *inter alia*, that forcing the Timminco Entities to cease operations would be to the detriment of their stakeholders, including their employees and pensioners, USW's Motion Record, Tab 2, p. 30

61. Based on the foregoing, the Applicants submit that, to the extent that they owed any fiduciary duties to the beneficiaries of the Pension Plans as administrator which affected the negotiation of the DIP financing (which is not admitted but denied), the Applicants fulfilled those obligations by negotiating and entering into the DIP Facility, thereby avoiding bankruptcy, and protecting the interests of all of their stakeholders. As effectively stated by the CCAA Judge in considering whether to grant the January 16 Order suspending special payments to the Pension Plans and granting the Administration Charge and D&O Charge priority over any deemed trusts under the applicable provincial pension plan legislation, where the relief requested avoids bankruptcy to the benefit of the Applicants and the beneficiaries of the Pension Plans, any obligations that the Applicants are alleged to owe under the "two hats" doctrine are satisfied by the avoidance of a bankruptcy:

> *Importantly, Fraser Papers also notes that there is no priority for special payments in bankruptcy.* ***In my view, it follows that the employees and former employees are not prejudiced by the relief requested since the likely outcome should be these proceedings fail is bankruptcy, which would not produce a better result for them. Thus, the "two hats" doctrine from Indalex (Re), supra, discussed earlier in these reasons at [20], would not be infringed by the relief requested. Because it would avoid bankruptcy, to the benefit of both the Timminco Entities and beneficiaries of the pension plans, the relief requested would not favour the interests of the corporate entity over its obligations to its fiduciaries.***
>
> ...
>
> ***If bankruptcy results, the outcome for the employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners.*** *The lack of a desirable alternative to the relief requested only serves to*

> *strengthen my view that the objectives of the CCAA would be frustrated if the relief requested was not granted.*
>
> *For these reasons, I have determined that it is both necessary and appropriate to grant super priority to the Administrative Charge and the D&O Charge.*
>
> January 16 Reasons at paras. 62-64 USW's Motion Record, Tab 2, pp. 30-31

62. The foregoing analysis from the January 16 Reasons is equally applicable to the negotiation of the DIP Facility and the motion for a court order granting the DIP Charge. In fact, the January 16 Reasons were expressly adopted and incorporated by reference in the DIP Reasons by the CCAA Judge. As is evident from the DIP Reasons and the January 16 Reasons, the Unions' submissions as to the Applicants' failure to satisfy their alleged fiduciary duties are not grounded in the facts of this case, and are without merit.

63. In summary, the factual record before the CCA Judge was uncontradicted and clearly supported the CCAA Judges' factual findings that the Applicants required the DIP Facility to provide them with the requisite liquidity to continue operating and preserve the opportunity to obtain a going concern solution, and that approval of the DIP Facility was the only viable alternative available in the circumstances.

64. The Unions have therefore failed to establish that the CCAA Judge made a palpable and overriding error in exercising his discretion to grant the DIP Order. Indeed, the Applicants' submit that the CCAA Judge did not err in granting the DIP Order, and any appeal therefrom is not *prima facie* meritorious.

C. The Proposed Appeal Is Not of Significance to the Practice

65. Although the CCAA Judge's endorsement may represent the first application of the principles enunciated by this Court in *Indalex* in a subsequent CCAA proceeding, this fact does not alone render the proposed appeal of significance to the practice. To the contrary, having regard to the nature of the underlying decision, and the comprehensive evidentiary record on which that decision is based, the Applicants submit that this case offers little, if any, ground for additional guidance or clarification from this Court, beyond that provided in *Indalex.*

66. The decision rendered by the CCAA Judge is founded on well-established legal doctrines, and follows the guidance of this Court provided in *Indalex.* The decision constitutes an exercise of discretion by the supervising CCAA Judge based on findings of fact supported by the evidence before him. Indeed, the proposed appeals are themselves premised on allegations of errors of fact, or mixed fact and law. The precedential value of any appeal is therefore limited to the specific facts of this case, and is of no real significance to the practice.

D. The Proposed Appeals Will Unduly Hinder the Progress of the CCAA Proceedings

67. Granting the Unions leave to appeal with the proposed appeals will not only hinder the progress of the CCAA proceedings, but may well result in their termination and force the Applicants into bankruptcy to the detriment of all of their stakeholders.

68. Pursuant to the terms of the DIP Facility, the advancement of funds to the Applicants is conditional upon leave to appeal the DIP Order not being granted. In addition, the failure

to comply with a condition precedent or the issuance of an order staying, reversing, vacating or otherwise modifying the DIP Charge (as the Unions seek to do on appeal) each constitute an Event of Default under the DIP Facility, which, if not remedied, give the DIP Lender the right to terminate any DIP advances, realize on the Collateral (as defined in the DIP Facility) and apply to the court to appoint a receiver.

DIP Facility at paras. 7(e), (f), (h) & 16(c) & (d), Exhibit B to Kalins' January 20 Affidavit, USW's Motion Record, Tab 4B, pp. 88-89 & 100-101

69. Granting leave to appeal may result in the DIP Lender refusing to advance additional funds to the Applicants. The Applicants do not have sufficient funds to continue operating or to attempt to restructure or sell the company, without access to the DIP Facility. Moreover, it is highly unlikely that the Applicants would be able to obtain alternative DIP financing in a timely manner, or at all.

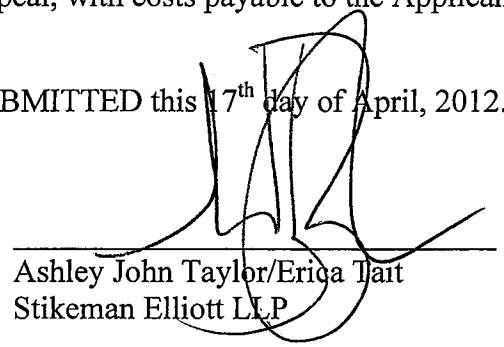
70. As previously discussed herein, the Applicants, with the assistance of the Monitor, sought to secure suitable DIP financing both prior to and after the commencement of the CCAA proceedings. At the end of those negotiations, the current DIP Facility was determined by each of management of the Applicants, the Special Committee of the Board of Timminco, and the Court-appointed Monitor, to be the best option for the Applicants. As determined by the CCAA Judge, it is the only viable alternative option to bankruptcy.

71. In the circumstances, the proposed appeals will undoubtedly hinder, if not result in the termination of, the CCAA proceedings. This factor therefore weighs in favour of denying the Unions leave to appeal the DIP Order.

PART V - ORDER REQUESTED

72. For all of the reasons set out herein, the Applicants respectfully request that this Court dismiss the Unions' motions for leave to appeal, with costs payable to the Applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of April, 2012.



Ashley John Taylor/Erica Tait
Stikeman Elliott LLP

Lawyers for the Applicants

TAB A

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Stelco Inc. (Re),* [2005] O.J .No. 4883 (C.A.)

2. *Resurgence Asset Management LLC v. Canadian Airlines Corp.,* 2000 ABCA 149, [2000] A.J. No. 610 [In Chambers]

3. *Liberty Oil & Gas Ltd., (Re),* 2003 ABCA 158, [2003] A.J. No. 615

4. *Canwest Global Communications Corp. (Re),* [2009] O.J. No. 4286, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Comm.List])

5. *Indalex Ltd. (Re),* 2011 ONCA 265, [2011] O.J. No. 1621

6. *ATB Financial v. Metcalfe & Mansfield Alternative Investment II Corp.,* 2008 ONCA 587, [2008] O.J. No. 3164

7. *Nortel Networks Corp. (Re),* 2009 ONCA 833, [2009] O.J. No. 4967

8. *Collins & Aikman Automotive Canada Inc. (Re),* [2007] O.J. No. 4186, 37 C.B.R. (5th) 282 (Ont. S.C.J.)

TAB B

SCHEDULE "B"
RELEVANT STATUTES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C.36, s. 11.2, 12, & 14

General power of court -- s. 11

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances. R.S., c. C-25, s. 11; 1992, c. 27, s. 90(1)(f); 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Interim financing -- s. 11.2

11.2 (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, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors -- s. 11.2(2)

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

Priority — other orders -- s. 11.2(3)

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered -- s. 11.2(4)

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

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and (g) the monitor's report referred to in paragraph 23(1)(b), if any.

2005, c. 47, s. 128; 2007, c. 36, s. 65.

Leave to appeal -- s. 13

13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs. R.S., c. C-25, s. 13; 2002, c. 7, s. 134.

Court or appeal -- s. 14

14. (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

Practice -- s. 14(2)

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

R.S., c. C-25, s. 14; 2002, c. 7, s. 135.

2. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rr. 57 & 61.03.1

MOTION FOR LEAVE TO APPEAL TO COURT OF APPEAL

Motion in Writing

61.03.1 (1) Where an appeal to the Court of Appeal requires the leave of that court, the motion for leave shall be heard in writing, without the attendance of parties or lawyers. O. Reg. 333/96, s. 2 (1); O. Reg. 575/07, s. 4.

Notice of Motion

(2) The notice of motion for leave to appeal shall state that the court will hear the motion in writing, 36 days after service of the moving party's motion record, factum and transcripts, if any, or on the filing of the moving party's reply factum, if any, whichever is earlier. O. Reg. 333/96, s. 2 (1).

(3) The notice of motion,

(a) shall be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and

(b) shall be filed with proof of service in the office of the Registrar within five days after service. O. Reg. 61/96, s. 6; O. Reg. 14/04, s. 30 (1).

Moving Party's Motion Record, Factum and Transcripts

(4) The moving party shall serve a motion record and transcripts of evidence, if any, as provided in subrule 61.03 (2), and a factum consisting of the following elements:

1. Part I, containing a statement identifying the moving party and the court from which it is proposed to appeal, and stating the result in that court.

2. Part II, containing a concise summary of the facts relevant to the issues on the proposed appeal, with such reference to the evidence by page and line as is necessary.

3. Part III, containing the specific questions that it is proposed the court should answer if leave to appeal is granted.

4. Part IV, containing a statement of each issue raised, immediately followed by a concise statement of the law and authorities relating to that issue.

5. Schedule A, containing a list of the authorities referred to.

6. Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws. O. Reg. 61/96, s. 6; O. Reg. 333/96, s. 2 (2).

(5) Parts I to IV shall be arranged in paragraphs numbered consecutively throughout the factum. O. Reg. 61/96, s. 6.

(6) The moving party shall file three copies of the motion record, factum and transcripts, if any, and may file three copies of a book of authorities, if any, with proof of service, within 30 days after the filing of the notice of motion for leave to appeal. O. Reg. 61/96, s. 6.

Responding Party's Motion Record and Factum

(7) The responding party may, if of the opinion that the moving party's motion record is incomplete, serve a motion record as provided in subrule 61.03 (3). O. Reg. 61/96, s. 6; O. Reg. 333/96, s. 2 (3).

(8) The responding party shall serve a factum consisting of the following elements:

1. Part I, containing a statement of the facts in the moving party's summary of relevant facts that the responding party accepts as correct and those facts with which the responding party disagrees and a concise summary of any additional facts relied on, with such reference to the evidence by page and line as is necessary.

2. Part II, containing the responding party's position with respect to each issue raised by the moving party, immediately followed by a concise statement of the law and authorities relating to it.

3. Part III, containing a statement of any additional issues raised by the responding party, the statement of each issue to be followed by a concise statement of the law and authorities relating to it.

4. Schedule A, containing a list of the authorities referred to.

5. Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws. O. Reg. 61/96, s. 6.

(9) Parts I to III shall be arranged in paragraphs numbered consecutively throughout the factum. O. Reg. 61/96, s. 6.

(10) The responding party shall file three copies of the factum, and of the motion record, if any, and may file three copies of a book of authorities, if any, with proof of service, within 25 days after service of the moving party's motion record and other documents. O. Reg. 61/96, s. 6.

Moving Party's Reply Factum

(11) If the responding party's factum raises an issue on which the moving party has not taken a position in the moving party's factum, that party may serve a reply factum. O. Reg. 61/96, s. 6.

(12) The reply factum shall contain consecutively numbered paragraphs setting out the moving party's position on the issue, followed by a concise statement of the law and authorities relating to it. O. Reg. 61/96, s. 6.

(13) The moving party shall file three copies of the reply factum with proof of service within 10 days after service of the responding party's factum. O. Reg. 61/96, s. 6.

Determination of Motion

(14) Thirty-six days after service of the moving party's motion record and factum, and transcripts, if any, or on the filing of the moving party's reply factum, if any, whichever is earlier, the motion shall be submitted to the court for consideration, and,

(a) if it appears from the written material that no oral hearing is warranted, the court shall determine the motion;

(b) otherwise, the court shall order an oral hearing to determine the motion. O. Reg. 61/96, s. 6.

Date for Oral Hearing

(15) If the court orders an oral hearing, the Registrar shall fix a date for it. O. Reg. 61/96, s. 6.

Time for Delivering Notice of Appeal

(16) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave. O. Reg. 61/96, s. 6.

Costs Appeal Joined with Appeal as of Right

(17) Where a party seeks to join an appeal under clause 133 (b) of the *Courts of Justice Act* with an appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or in a supplementary notice of appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal as of right;

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 175/96, s. 2; O. Reg. 14/04, s. 30 (2).

Costs Cross-Appeal Joined with Appeal or Cross-Appeal as of Right

(18) Where a party seeks to join a cross-appeal under a statute that requires leave for an appeal with an appeal or cross-appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or cross-appeal or in a supplementary notice of appeal or cross-appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal or cross-appeal as of right;

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 175/96, s. 2; O. Reg. 206/02, s. 14; O. Reg. 14/04, s. 30 (3); O. Reg. 394/09, s. 25.

Application of Rules

(19) Subrules (1) to (16) do not apply where subrules (17) and (18) apply. O. Reg. 175/96, s. 2.

RULE 57 COSTS OF PROCEEDINGS

GENERAL PRINCIPLES

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

Costs Against Successful Party

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. R.R.O. 1990, Reg. 194, r. 57.01 (2).

Fixing Costs: Tariffs

(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. O. Reg. 284/01, s. 15 (1).

Assessment in Exceptional Cases

(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58. O. Reg. 284/01, s. 15 (1).

Authority of Court

(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,

(a) to award or refuse costs in respect of a particular issue or part of a proceeding;

(b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;

(c) to award all or part of the costs on a substantial indemnity basis;

(d) to award costs in an amount that represents full indemnity; or

(e) to award costs to a party acting in person. R.R.O. 1990, Reg. 194, r. 57.01 (4); O. Reg. 284/01, s. 15 (2); O. Reg. 42/05, s. 4 (2); O. Reg. 8/07, s. 3.

Bill of Costs

(5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service. O. Reg. 284/01, s. 15 (3).

Costs Outline

(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length. O. Reg. 42/05, s. 4 (3).

Process for Fixing Costs

(7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties. O. Reg. 42/05, s. 4 (3).

3. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131

Costs

131.(1)Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. R.S.O. 1990, c. C.43, s. 131 (1).

Crown costs

(2)In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund. R.S.O. 1990, c. C.43, s. 131 (2); 1994, c. 12, s. 45.

4. *Supplemental Pension Plans Act*, R.S.Q. c. R-15.1, s. 147

CHAPTER XI
ADMINISTRATION OF A PENSION PLAN

DIVISION I
ADMINISTRATION

147. Every pension plan shall, from its registration, be administered by a pension committee composed of at least one member, designated as and when provided in the pension plan, who is neither a party to the plan nor a third person to whom, under section 176, a loan may not be granted, and the following members:

(1) one member designated by the active members at the meeting held pursuant to section 166 or, in the absence of such a designation, one plan member designated as and when provided in the plan; and

(2) one member designated by the non-active members and beneficiaries at that meeting or, in the absence of such a designation, one plan member or beneficiary designated as and when provided in the plan.

1989, c. 38, s. 147; 2000, c. 41, s. 85.

Additional members.

147.1. At the meeting held pursuant to section 166, the active members as a group and the non-active members and beneficiaries as a group may each designate a pension committee member in addition to those designated under section 147.

An additional member designated under the first paragraph has the same rights as other committee members except the right to vote. Section 156 does not apply in respect of an additional member.

2000, c. 41, s. 86.

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

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

Court of Appeal File No. M41085
Court of Appeal File No. M41062
Superior Court File No. CV-12-9539-00CL

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

RESPONDING FACTUM OF THE APPLICANTS (MOTION FOR LEAVE TO APPEAL)

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

Erica Tait LSUC#: 55996O
Tel: (416) 869-6805
Fax: (416) 947-0866

Lawyers for the Applicants