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 BECANCOUR SILICON INC.

Applicants

FACTUM OF PURCHASER IN SUPPORT OF APPROVAL OF QSI TRANSACTION AND ASSIGNMENT OF ASSIGNED AGREEMENTS

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I. OVERVIEW

1. After the Timminco Entities'[1] entry into the Stalking Horse Agreement, approval by this Court of the Bidding Procedures Order and the running of a robust marketing, bidding, and auction process pursuant thereto (including the continuous thirty-hour Auction), the Timminco Entities received an Overbid that was determined by the Timminco Entities and their advisers (in consultation with the Monitor), in their sound business judgment, pursuant to the Court-approved Bid Assessment Criteria, to be the highest and/or best Bid for their assets; namely, the Aggregated Bid of QSI Partners Ltd. ("**QSI**") and Grupo FerroAtlantica, S.A. ("**Ferro**").

DCC OBJECTIONS

2. Based on the Affidavit of Joe Rinaldi dated May 14, 2012 (the "**Rinaldi Affidavit**"), submitted in opposition to the Timminco Entities' request for approval of the QSI Transaction and assignment of the Assigned Agreements to which DCC is privy (the "**DCC Agreements**"), DCC appears to be objecting to this Court's approval of the QSI Transaction[2] on four principal grounds:

(i) ***The Auction was procedurally flawed and the outcome incorrect.*** DCC asserts that the Timminco Entities and the Monitor erred in the conduct of the Auction and:

(A) challenges that the process itself was procedurally flawed, including because Wacker Chemie A.G. ("**Wacker**") was not permitted to call DCC after it requested to do so on the second day of the continuous thirty hour Auction and DCC was not allowed to attend the Auction; and

(B) challenges the outcome of the Auction and the business judgment of the Timminco Entities, arguing that the Back-up Bid submitted

[1] Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to such terms in the affidavit of Peter Kalins sworn May 9, 2012 (the "**Kalins Affidavit**"), filed in support of the Timminco Entities' motion for this Court's approval of the Aggregated Bid of QSI and Ferro.

[2] This Court approved the FerroTransaction on May 18, 2012, but the approval order was not issued at such time to permit such parties to work out various amendments to the approval order requested by this Court.

by Wacker (together with the Ferro Bid) should have been declared the Successful Bid by the Timminco Entities;

(ii) ***QSI is not a Fit Party.*** DCC's asserts that QSI, by reason of having been recently-incorporated, is not a proper party to become party to the DCC Agreements. DCC alleges that QSI has not demonstrated that it would be able to meet the obligations under the DCC Agreements, and has asserted that QSI did not met the requirements to qualify as a bidder under the Bidding Procedures;

(iii) ***Absent a Guarantee by Globe of QSI's Obligations under the DCC Agreements, DCC Would Be Prejudiced.*** Related to (ii) above and (iv) below, DCC objects to QSI's obligations under the DCC Agreements not being guaranteed by Globe (as defined herein), and argues that the assignment of the DCC Agreements should be denied on this basis; and

(iv) ***The DCC Agreements and DCC Non-Assigned Agreements are "One Contract" and Can Only Be Assigned In Toto.*** DCC asserts that this Court should not grant the assignment of the DCC Agreements because QSI is purchasing or taking an assignment of some, but not all, agreements that DCC (or its affiliates) are party to, including the Framework Agreement (such agreements not being acquired by QSI being, the "**DCC Non-Assigned Agreements**").

Each of DCC's objections are without merit and should be overruled.

WACKER OBJECTIONS

3. There are some similarities in the objections raised by Wacker to those made by DCC (and to the extent such objections are considered herein with respect to DCC and the Rinaldi Affidavit, they are not repeated with respect to Wacker).

4. Based on the Affidavit of Ralf Widmer sworn May 15, 2012 (the "**Widmer Affidavit**"), submitted in opposition to the Timminco Entities' request for approval of the QSI Transaction

and assignment of the Wacker Agreement, Wacker appears to be objecting to this Court's approval of the QSI Transaction on two additional grounds:

(i) ***BSI's Alleged Failure to Supply to Wacker is a Breach of Contract that Gives Rise to a Monetary Default that Must be Cured.*** Wacker asserts that BSI's contractual obligation to supply silicon to Wacker was breached and that such breach gives rise to a monetary claim against BSI that must be cured QSI as part of any assignment of the Assigned Agreements; and

(ii) ***BSI's Communications with Wacker Amount to an Amendment of the Contract.*** Wacker has asserted that BSI has amended the relevant contract through its communications with Wacker in respect of the alleged failure to supply silicon, such that any assignment of the contract includes the assumption of the purported amended terms of the contract.

Each of Wacker's objections are without merit and should be overruled.

QSI POSITION

5. Pursuant to the QSI Agreement, the parties agreed to use reasonable commercial efforts to seek the Consents and Approvals for contracts to be assigned to QSI (or its designated assignee pursuant to Section 9.11 of the QSI Agreement) (the "**Purchaser**") pursuant to the QSI Agreement and which contracts require the consent of the counterparty to such assignment.

6. Pursuant to the QSI Agreement, the Timminco Entities, as it relates to contracts that DCC or its affiliates are party to, are to assign to the Purchaser the Limited Partnership Agreement, the Shareholders Agreement and the Supply Agreement, which contracts contain provisions requiring consent to assignment.

7. Pursuant to the QSI Agreement, the Timminco Entities, as it relates to the Wacker Agreement, are to assign to the Purchaser the Wacker Agreement, which contains provisions requiring consent to assignment.

8. At this time, neither DCC nor Wacker has consented to the assignment of the Assigned Agreements pursuant to the QSI Agreement and, as such, the Timminco Entities have requested this Court's approval of such assignment pursuant to Section 11.3 of the CCAA, in accordance with the Timminco Entities' obligations under the QSI Agreement.

9. Through its objections, DCC is seeking to hold up the Timminco Entities' consummation of the QSI Transaction with the hope that it can extract concessions from the Purchaser or further negotiate with the Back-up Bidder (*i.e.*, Wacker) for DCC's benefit. There is no basis in law or equity that would require the Purchaser to meet the demands made by DCC. DCC is seeking preferential treatment for its claims ahead of other unsecured creditors of the Timminco Entities, and it has improperly sought to create a continued contest between QSI and Wacker for DCC's sole benefit notwithstanding the conclusion of the Auction and that its actions risk the Timminco Entities' ability to close the QSI Transaction.

10. Through its objections, Wacker is seeking to have the Purchaser compensate it (whether through payment or assumption of obligations) for BSI's alleged existing non-monetary defaults in having failed to supply silicon to Wacker in accordance with the Wacker Agreement.

11. This Court should, respectfully, deny DCC's and Wacker's respective objections and approve the QSI Transaction and grant the approval and vesting order in the form presented by the Timminco Entities, which includes the assignment of the Assigned Agreements (the "**Approval Order**"). The statutory test under CCAA Section 11.3 for the assignment of contracts is met and this Court should approve the assignment of the Assigned Agreements. QSI has demonstrated that it has the financial wherewithal and other applicable resources, including appropriate business knowledge and experience, such that it would be able to meet its obligations under the Assigned Agreements. Moreover, the proposed assignment of the Assigned Agreements is fundamental to the Timminco Entities' ability to close and complete its sales process and restructuring efforts, which is consistent with the purposes and spirit of the CCAA, and appropriate.

II. FACTS

12. A detailed description of the facts relevant to the Timminco Entities' request for the Approval Order is set forth in the Kalins Affidavit. Through the Affidavit of Stephen Lebowitz sworn May 8, 2012 (the "**Lebowitz Affidavit**"), the Purchaser provided further evidence of its ability to meet the obligations under the Assigned Agreements in accordance with Section 11.3 of the CCAA.

13. The Purchaser refers this Court to the Kalins Affidavit, the Timminco Entities' factum, the Monitor's Seventh Report to this Court dated May 15, 2012 (the "**Seventh Report**"), and the Monitor's Eighth Report dated May 20, 2012 (the "**Eighth Report**") for further factual and legal basis for why the Auction was properly run and why the QSI Overbid was properly determined to be the Successful Bid (together with the Ferro Bid), and why QSI Transaction should be approved by this Court. The Purchaser has submitted this factum to respond to the various assertions of DCC contained in the Rinaldi Affidavit and those of Wacker in the Widmer Affidavit.

14. As noted in the Kalins Affidavit, after extensive negotiations, the Timminco Entities, the Purchaser, and Globe Specialty Metals, Inc. ("**Globe**"), as guarantor, entered into the Stalking Horse Agreement on March 1, 2012. The purpose of the Stalking Horse Agreement was to serve as a minimum floor price for the Timminco Entities' assets subject to the sales process. In connection therewith, this Court granted the Bidding Procedures Order, which approved the bidding and auction procedures for the sales process.

Kalins Affidavit at paras. 10-12

15. The deadline for submission of "Qualified Phase II Bids" under the Bidding Procedures was extended by three days in order to allow potential bidders a further opportunity to speak with the Timminco Entities' key stakeholders, including DCC, prior to the Auction and to otherwise continue due diligence efforts. Such extension was requested by the Timminco Entities, supported by the Monitor and approved by the Court.

Kalins Affidavit at para. 18.

16. Pursuant to Section 4 and 9(a) of the Bidding Procedures, QSI was, and was deemed to be, a Qualified Phase I Bidder and Qualified Phase II Bidder for all purposes of the Bidding Procedures, including being eligible to participate at the Auction.

17. In accordance with the Bidding Procedures Order, the Timminco Entities received one or more "Qualified Phase II Bids" and, thus, held the Auction. Four bidders attended the Auction, including QSI. The Auction was fair, open, and competitive. After thirty continuous hours of negotiations and bidding (which is summarized in the Kalins Affidavit, the Seventh Report and the Eighth Report), QSI submitted the final Overbid, which the Timminco Entities declared to be the then highest and best bid. Wacker did not seek to continue bidding and elected not to make a further Overbid, and the Timminco Entities, with the assistance of their advisors and in consultation with the Monitor, declared the final QSI Overbid, together with the Ferro Bid, to be the Successful Bid.

Kalins Affidavit at paras. 18-24.

18. The salient terms of the QSI Agreement are set forth in the Kalins Affidavit (see paras. 26-37), a copy of which is attached thereto as Exhibit "C".

19. Pursuant to the QSI Agreement, the Timminco Entities are obligated to use commercially reasonable efforts to obtain the consents of all of the counterparties to the Assigned Agreements.

Kalins Affidavit at para. 38

20. The Timminco Entities and the Purchaser have attempted to obtain the Consents and Approvals in respect of the Assigned Agreements, but these have not been obtained at this time.

Kalins Affidavit at paras. 39-40, 64

21. While, as of the date hereof, the Monitor has not formed a recommendation with respect to the assignment of the Assigned Agreements as it is waiting to review the submissions of the parties, it has indicated that it will do so before the hearing on this matter.

Seventh Report of the Monitor at para. 58

22. The Purchaser has demonstrated that it would be able to perform its obligations under the Assigned Agreements and intends to do so.

Lebowitz Affidavit at paras. 6-10

23. The Framework Agreement is a separate agreement from the Limited Partnership Agreement, the Shareholders Agreement, and the Supply Agreement and not integrated into any of these agreements. All of the parties' obligations under the Framework Agreement and the Business Transfer Agreement have been satisfied except for the indemnification obligation thereunder and the Post-Closing Purchase Price Adjustment.

Kalins Affidavit at para. 49.

24. Approval by the Court of the QSI Transaction and, in the absence of all Consents and Approvals, approval of the assignment of the Assigned Agreements, is a condition to closing under the QSI Agreement.

Kalins Affidavit at para. 15.

III. LAW & ARGUMENT

The Issues

25. The following issues are before this Court and addressed below:

(i) Should the Court grant the Approval Order approving the QSI Agreement and vesting the Purchased Assets in the Purchaser?

(ii) Should the assignment of the Assigned Agreements be ordered pursuant to Section 11.3 of the CCAA?

(iii) Is there any merit in the four principal objections raised by DCC, as set out above?

(iv) Is there any merit in the two additional objections raised by Wacker, as set out above?

Issue I: The Approval and Vesting Order Should be Granted

26. It is well established that the Court has authority to approve a sale process and resulting transaction in the absence of a plan under the CCAA. In such circumstances, the Court has focused on the continuation of a business as a going concern, and the broad and liberal interpretation to be given to the CCAA to facilitate this underlying purpose.

27. Section 36 of the CCAA sets out various factors to be considered in determining whether to approve a debtor's sale of assets out of the ordinary course of business, and this Court has held that such criteria largely overlap with the criteria established in *Royal Bank v. Soundair Corp.*, which had been used by Courts to review the reasonableness of proposed sale transactions in CCAA proceedings prior to the enactment of Section 36.

28. The QSI Transaction meets the criteria for approval of disposition of assets in CCAA proceedings for, *inter alia*, the following reasons:

(i) the Bidding Procedures were approved by the Court and adhered to by the Timminco Entities and the Monitor;

(ii) the sale process was fulsome, competitive and resulted in total consideration for the Timminco Entities' assets that is considerably in excess of that provided for in the Stalking Horse Agreement;

(iii) the sale process was fair, transparent and reasonable in the circumstances (which has been attested to by the Monitor);

(iv) the QSI Transaction is supported by the Timminco Entities, the Monitor and key stakeholders of the Timminco Entities; and

(v) the QSI Transaction is anticipated by the Timminco Entities and the Monitor to result in the repayment in full all of the Timminco Entities' secured creditors and to provide a further recovery for unsecured creditors.

29. There are no objections to the approval of the QSI Transaction other than those raised by DCC (which are considered below). Although Wacker objects to the assignment of the Wacker Agreement, it has not otherwise objected to the approval of the QSI Transaction.

30. The Purchaser submits that the criteria set out in Section 36(3) of the CCAA are satisfied with respect to the QSI Agreement and that the QSI Agreement should be approved.

Issue II: This Court should Assign the Assigned Agreements pursuant to Section 11.3 of the CCAA

(i) *Statutory and Judicial Analysis*

31. Section 11.3(1) was incorporated into the CCAA as part of the September 2009 amendments and provides that this Court may authorize the assignment of all of an entity's rights and obligations under a contract.[3]

CCAA, s. 11.3, Schedule "A"

32. Section 11.3(3) of the CCAA provides that the factors a Court is to consider in determining whether to approve the assignment of rights and obligations under a contract are, among other things:

(i) whether the Monitor approved of the proposed assignment;

(ii) whether the proposed assignee would be able to perform the obligations under the contract; and

(iii) whether it would be appropriate to assign the rights and obligations under the contract to the proposed assignee.

CCAA, s. 11.3(3), Schedule "A"

33. The Purchaser submits that in determining whether the proposed assignee "would be able to" perform the obligations under the contract, the onus is not on the Timminco Entities nor the

[3] Section 11.3(2) of the CCAA provides that Section 11.3(1) of the CCAA does not apply to certain types of contracts. The Assigned Agreements do not fall under these exceptions.

proposed assignee to demonstrate with 100% certainty that the proposed assignee will meet every obligation under the assigned contract during its term. Rather, this Court is to assess whether the proposed assignee has access to available resources (financial or otherwise) such that it is can be held that the proposed assignee "would be able to" perform such obligations following assignment.

34. To be clear, whether a party will honour its obligations is subjective guess work not called for by the CCAA; the CCAA requires only an objective assessment as to whether a party would be able to honour its obligations.

35. Further, it is a legal maxim that the Court is to presume that a party will act in good faith and comply with its obligations in the absence of clear evidence to the contrary.

> *See, e.g., General Motors of Canada Ltd. v. Brunet*, [1977] 2 S.C.R. 537, at p. 548 ("persons are assumed to act in good faith unless proven otherwise"), Brief of Authorities at Tab 1.

36. DCC has made various unsubstantiated allegations in the Rinaldi Affidavit suggesting that QSI might not honour its obligations. The Courts have held that "[a]llegations in pleadings ... are not evidence, and cannot, unless and until they are established in a legal proceeding, displace the presumption of good faith which is well recognized at law."

> *Manitoba Securities Commission v. Crocus Investment Fund et al.* (2007), 31 C.B.R. (5th) 1 (Man. C.A.) at para. 40, Brief of Authorities at Tab 2.

37. There is no evidence that the Purchaser is not able to honour its obligations under the Assigned Agreements; on the contrary (and as considered below), there is compelling evidence before the Court that the Purchaser would be able to meet its obligations.

38. In addition, Section 11.3(4) of the CCAA provides that a Court may not order an assignment unless it is satisfied that all monetary defaults in relation to the agreement with the exception of those arising by reason of the company's insolvency, the commencement of the

CCAA proceedings or the company's failure to perform a non-monetary obligation will be remedied on or before a day fixed by the Court.

CCAA, s. 11.3(3), Schedule "A"

39. Section 11.3 of the CCAA does not require an applicant to seek consent to assignment prior to bringing an assignment motion, nor to accept whatever consent is proposed by a counterparty, although the Timminco Entities and QSI have attempted, and are continuing to attempt, to obtain the Consents and Approvals through commercially reasonably means, in accordance with the QSI Agreement.

CCAA, s. 11.3(3), Schedule "A"

40. Although there are no reported decisions discussing the application of Section 11.3 by this Court, it has previously granted an Order assigning contracts, leases and agreements pursuant to Section 11.3 of the CCAA:

> *See, e.g., Planet Organic Health Corp., Re,* Approval and Vesting Order of the Honourable Mr. Justice Morawetz dated June 4, 2010, Court File No. 10-8699-00CL, at para. 6, Brief of Authorities at Tab 3.

41. Similarly, in *Re White Birch Paper Holding Co.*, the Quebec Court approved the assignment of certain contracts and leases pursuant to Section 11.3 of the CCAA, but did not engage in a detailed analysis of the factors to be considered.

> *White Birch Paper Holding Co., Re* 72 C.B.R. (5th) 63 (Q.C.S.C.) at para. 16, Brief of Authorities at Tab 4;
>
> *White Birch Paper Holding Co., Re.,* Approval and Vesting Order of Honourable Mr. Justice Mongeon dated September 28, 2010, Court File No. 500-11-038474-108, at paras. 16-18, Brief of Authorities at Tab 5;
>
> *See also Re Sterling Shoes Inc. and Sterling Shoes GP Inc.* Order Approving Assignment of Contracts dated April 30, 2012 of the Honourable Mr. Justice

Pearlman, British Columbia Supreme Court, Court file No. S117071 (order approving assignment of real property leases pursuant to section 11.3 of the CCAA), Brief of Authorities at Tab 6.

42. In light of the lack of post-amendment jurisprudence on the application of Section 11.3, the Purchaser submits that the proper application of the 11.3(3) factors will involve a similar, but more streamlined, analysis to that undertaken by the Courts in the pre-amendment jurisprudence where Courts determined whether or not to exercise their inherent jurisdiction to grant an assignment. In particular, this pre-amendment jurisprudence is instructive with respect to addressing the "appropriate" factor in Section 11.3(3)(c) of the CCAA.

43. Prior to the enactment of the 2009 CCAA amendments, a Court could, in the exercise of its inherent discretion under Section 11 of the CCAA, authorize the assignment of a contract, including where the contract contained an anti-assignment clause and where consent of the counterparty to the contract was required but not obtained (even where such consent was reasonably withheld).

See, e.g., Playdium Entertainment Corp., Re (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Comm. List]). ["*Playdium*"], Brief of Authorities at Tab 7;

Hayes Forest Service Ltd., Re, 2009 BCSC 1169, Brief of Authorities at Tab 8;

44. In *Playdium,* Justice Spence of the Ontario Superior Court of Justice approved the assignment of a material agreement against the wishes of the counterparty to the agreement, holding:

> Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment

> of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.
>
> *Playdium, supra* at para. 42.

45. Moreover, Section 84.1 of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") provides for a similar provision to that of CCAA s. 11.3 (but for the absence of the Monitor's approval consideration), and provides as follows:

> 84.1 (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.
>
> ...
>
> Factors to be considered
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and
>
> (b) whether it is appropriate to assign the rights and obligations to that person.
>
> *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 84.1

46. The Alberta Court of Appeal in *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.* has recently considered s. 84.1 of the BIA and noted that this section was designed to preserve the value of the estate as a whole "even if the contractual rights of some creditors . . . are compromised".

> *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158 at para. 30 ["*Welcome Ford*"], Brief of Authorities at Tab 9.

47. The Alberta Court of Appeal held that Section 84.1 should be interpreted in light of Parliament's intention that it "be used to protect and enhance the assets of the estate of a bankrupt by permitting the sale/assignment of existing agreement to third parties for value".

Welcome Ford, *supra* at paras. 36 and 45.

48. The Alberta Court of Appeal in *Welcome Ford* noted that the estate of a bankrupt may include various forms of property. In certain instances, the most valuable property consists of the contractual rights of the bankrupt, which may be embodied in a franchise agreement or a lease. The "clear intent" of Parliament in enacting Section 84.1 was to address the vulnerability that a bankrupt's estate faced if it could not recoup some of the value of these contractual rights.

Welcome Ford, *supra* at paras. 38-39.

49. The Purchaser submits that the Alberta Court of Appeal's reasoning in *Welcome Ford* is applicable here, as the Assigned Agreements directly relate to the Timminco Entities' primary assets (*i.e.* the ownership interests in QSLP).

(ii) *The Remedial Nature of the CCAA*

50. The remedial nature of the CCAA confers broad power on this Court to facilitate the restructuring of insolvent companies and provides further support for the approval of the Approval Order. This jurisdiction stems from section 11 of the CCAA and the courts' inherent jurisdiction to fill the gaps of the CCAA to give effect to its objects.

CCAA, s. 11, Schedule "A";

See also Nortel Networks Corp., Re (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List]), Brief of Authorities at Tab 10.

51. The provisions of the CCAA are intended to be liberally and generously interpreted in order to give effects to its purposes. As outlined by Blair J. (as he then was) in *Re Armbro Enterprises Inc.*:

> The CCAA is broad, remedial legislation, designed to facilitate a re-organization of a debtor company's affairs in a way that is in the interests of the company, its creditors and the public. It is to be liberally construed.
>
> *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div.) at para. 12, Brief of Authorities at Tab 11.

52. In interpreting the CCAA, Courts are instructed to examine the nature of the orders sought and determine whether they fit within the overall purpose of the CCAA. As stated by the Supreme Court of Canada in *Re Ted Leroy Trucking [Century Services] Ltd.*:

> Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company.
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> *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 70, Brief of Authorities at Tab 12.

(iii) *The Proposed Assignment of the Assigned Agreements to QSI Satisfies the Factors in Section 11.3(3) of the CCAA and Accords with the Mandate of the CCAA*

53. The proposed assignment of the Assigned Agreements satisfies the considerations this Court is to look at in determining whether to order the assignment of a contract under Section 11.3 of the CCAA:

(i) the Purchaser believes the once the Monitor has reviewed the various positions of the parties that it will approve of the proposed assignment of the Assigned Agreements to the Purchaser;

(ii) the Purchaser has demonstrated that it possesses the financial wherewithal, and the relevant business experience and the intention to perform all obligations

under the Assigned Agreements and, thus, that it "would be" able to perform under the Assigned Agreements;

(iii) provision has been made for the obligations required to be paid under Section 11.3(4) of the CCAA;

(iv) none of the exceptions set out in Section 11.3(2) of the CCAA are applicable (*i.e.*, the Assigned Agreements are not contracts incapable of assignment by reason of their nature, agreements entered into post-filing, eligible financial contracts or collective agreements); and

(v) it is "appropriate" for the purpose of Section 11.3(3)(c) of the CCAA to assign the Assigned Agreements. The assignment of the Assigned Agreements is critical to the Timminco Entities consummation of the QSI Transaction and consistent with the purposes and spirit of the CCAA, and is proper given the benefits to the Timminco Entities and their creditors and the corresponding absence of any material harm or unfairness to the interests of DCC or Wacker.

Issue III: DCC's Objections are Without Merit

(A) The Sales and Auction Process was Fair and Appropriate and the QSI Agreement is the Best and/or Highest Bid for the Assets Subject Thereto

54. The Bidding Procedures Order did not in any way delegate the Timminco Entities' reasonable business judgment to DCC to determine what the highest and/or best Bid is. This Court should not replace the Timminco Entities' business judgment – which is supported by the Monitor and other stakeholders – with that of DCC.

55. This Court has acknowledged that it is to grant deference to the business judgment of debtors and this Court's officers, absent clear evidence of improvident behavior (which does not exist here). This Court's Monitor in its Seventh Report stated that the QSI Agreement represents, in its view, the highest and/or best Overbid made at the Auction for the assets subject to the QSI Agreement and, thus, with the Ferro Bid, properly constituted the Successful Bid. The Eighth Report provides the Monitor's responses from questions posed by DCC to the

Monitor as to the valuation of Bids at the Auction and provides further support on the appropriateness of the result of the Auction.

56. The Purchaser submits that the Timminco Entities and Monitor have appropriately responded to DCC's allegations that the process and the outcome of the Auction were flawed. The Purchaser is also of the view that the process of the Auction was fair and open and that the Aggregated Bid of QSI and Ferro was properly declared the Successful Bid.

The Reasonable Business Judgment of the Timminco Entities is to be Granted Deference

57. As noted above, the Purchaser agrees with the submissions of the Timminco Entities and the Monitor that the Auction was procedurally fair and that the outcome of the QSI Agreement being declared a superior bid to that of the Wacker Agreement was the correct decision and that the transaction should be approved pursuant to Section 36 of the CCAA.

58. It is well-established in CCAA jurisprudence that the Court is to grant deference to the business judgment of debtors, and not supplant such judgment with the judgment of the Court, absent clear evidence of improvident conduct (which is often referred to as the "business judgment rule"). As noted by the Ontario Court of Appeal in *Re Stelco*, "the court is not entitled to usurp the role of the directors and management in conducting what are in substance *the company's* restructuring efforts" and that "it is well-established that judges supervising restructuring proceedings — and courts in general — will be very hesitant to second-guess the business decisions of directors and management".

Stelco Inc., Re (2005), 75 O.R. (3d) 5 (C.A.) at paras. 44 and 65, Brief of Authorities at Tab 13;

See also Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 12 O.R. (3d) (500) (Gen. Div.): "As other courts have done, I observe that it is not my function to second guess the business people with respect to the 'business' aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the

business judgment of the participants. The parties themselves know best what is in their interests in those areas", Brief of Authorities at Tab 14.

59. As held in the recent decision of *Crystallex International Corp., Re*, 2012 ONSC 538 at para. 12 (Brief of Authorities at Tab 15):

> The board of directors of Crystallex considered the offers of Tenor and the Noteholders and concluded that it was in the best interests of Crystallex to accept the Tenor proposal. They took into account the advice received from Mr. Skatoff as well as other considerations. This was a business judgment protected by the business judgment rule so long as it was a considered and informed judgment made honestly and in good faith with a view to the best interests of Crystallex. See *Stelco Inc., Re* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) regarding the rule and its application to CCAA proceedings. I see no grounds for concluding that the decision of Crystallex to prefer the Tenor bridge financing proposal is not protected by the business judgment rule or that I should not give it appropriate deference.

60. The evidentiary record is clear that in determining the Successful Bid at the Auction, the Timminco Entities acted with in accordance with their reasonable business judgment and the Bid Assessment Criteria approved by the Court in its Bidding Procedures Order. The reasonable business judgment of the Timminco Entities should be granted deference by this Court.

Kalins Affidavit at paras. 23 and 24.

Seventh Report at para. 48.

61. As noted, this Court, through its Bidding Procedures Order had already determined that the Timminco Entities with the assistance of their advisers and in consultation with the Monitor were to determine the highest and/or best Bid for their assets pursuant to the Bid Assessment Criteria. DCC's objection is, therefore, in essence simply a collateral attack on this final order as

it is seeking to substitute the company and Monitor's determinations with those of DCC, which is simply not what the Bidding Procedures Order provides.

(B) The Purchaser Would Be Able To Meet the Obligations under the Assigned Agreements

62. There are very few financial obligations under the Assigned Agreements, as QSI essentially would be the holder of the equity interest in QSLP (with few obligations arising therefrom). The only obligation cited by DCC to date is the prospective obligation to meet any capital calls, should that eventuality arise under the Limited Partnership Agreement.

63. The Lebowitz Affidavit demonstrates that QSI would be able to perform the obligations under the Assigned Agreements, as contemplated by CCAA Section 11.3. Mr. Lebowitz highlights that as a member of the Globe family of companies (a world leader in the production of silicon metal and silicon-based alloys), QSI will have available to it all of the human capital and financial resources to meet the obligations under the Assigned Agreements. As at March 31, 2012, Globe and its subsidiaries have more than $140 million of cash. Globe will loan the needed funds to QSI in order to pay the purchase price, fund working capital, and to insure that future ongoing liabilities are met. QSI is adequately capitalized and will have access to considerable liquidity from its parent and affiliate companies to insure that all future ongoing liabilities under the Assigned Agreements are met.

Lebowitz Affidavit at paras 4 - 9.

64. DCC alleges that there are problems with QSI that make the assignment of the Assigned Agreements inappropriate, including that QSI didn't qualify properly as a bidder, that QSI is unable to meet its obligations under the Assigned Agreements and that it is purely a "shell" company, and that the assignment should not be approved because of this. The Purchaser submits that the factual response to this is contained in, *inter alia*, the Bidding Procedures and the Lebowitz Affidavit, but also that QSI's good faith should be presumed in the absence of any evidence suggesting that QSI cannot meet its obligations.

65. Given the nature of the Limited Partnership Agreement, Shareholders Agreement and Supply Agreement relating predominantly to the Debtors' ownership interest in an operating joint venture, there are not significant operational amounts anticipated to be incurred in respect of such contracts following closing. QSI has proven its ability to meet obligations through provision of DIP funds, payment of the deposit under the Stalking Horse Agreement (and further increase in the deposit following acceptance of the QSI Agreement as the Successful Bid following the Auction), and will continue to prove such ability after payment of the purchase price, after which it will hold in Canada valuable assets post-closing (which assets are substantially the same as those assets held by BSI pre-closing and to which QSLP and DCC had recourse).

66. To the extent capital call or other obligations arise in respect of the Assigned Agreements, Globe will loan the needed funds to QSI will either pay such amounts from cash available on hand or through intercompany loans provided by Globe.

Lebowitz Affidavit at para. 8.

67. Importantly, Section 11.3(3)(b) indicates that the criteria to be considered is whether the prospective assignee "would be able to" perform it obligations. This test is forward looking, not present tense (*i.e.* the test is not whether it "will with absolute certainty" but rather "would be able"). Corporations regularly complete acquisitions through the use of newly-incorporated entities, done for a variety of legitimate purposes, including tax-planning. Globe has no present operations in Canada, and it has elected to hold its newly-acquired business interests through a newly-created subsidiary. This is entirely legitimate and commonplace and the CCAA recognizes that the emphasis of the analysis is on whether the Purchaser would in the future (*i.e.* post-assignment, and post-closing of related transactions) be able to meet its obligations.

68. It must be noted that DCC and Globe (and its affiliates) are already partners in a different joint venture in Alloy, West Virginia, and have a good working relationship as to same. To be clear, DCC has previously and voluntarily chosen a Globe subsidiary as a joint venture partner, and there is no serious question that the Purchaser is a proper assignee of the Assigned Agreements and would be able to meets its obligations under same in a complex and highly competitive industry. DCC's objection to QSI should be seen for what it is: an attempt to extract

concessions, consideration, or the assumption of liabilities from the Purchaser to which it has no lawful entitlement.

(C) A Guarantee from a Third Party is Neither Relevant Nor Required

69. DCC alleges that the QSI Transaction should not be approved and/or the assignment approved because Globe has not guaranteed QSI's obligations. There is no obligation for a third party to provide a guarantee under Section 11.3 of the CCAA. The statutory test is whether the proposed assignee would be able to meet the obligations assumed, and there is no evidence to suggest otherwise (and, in fact, evidence that it can - again, good faith being presumed).

70. DCC is asking that the Court hypothetically consider a scenario in which QSI elects not to meet its obligations and to then consider what remedies DCC would have in that scenario. DCC has argued that in the absence of a third-party guarantee from Globe, DCC would not be satisfied with the remedies available to it arising from a breach by QSI. This is entirely irrelevant to the CCAA – Section 11.3 does not contemplate any consideration of remedies in the event of breach. On the contrary, if the Court is of the view that QSI would not be able to meet its obligations (for which there is no evidence), then it is to deny the assignment, not require a guarantee from a third party.

71. Even if remedies are considered, DCC will have recourse to the assets being purchased by QSI. As noted, save for the relatively immaterial assets sold to Ferro (*i.e.*, the "solar assets"), the Purchaser is acquiring substantially all of BSI's assets. Accordingly, DCC is in no worse position post-assignment than it is presently (and, in fact, is in a better position given the insolvency of BSI). To grant to DCC a new guarantee from a third party would give DCC greater remedies than it presently has and result in a windfall to DCC. Further, DCC's existing "guarantee" is an indemnity given under the Framework Agreement, which is not an Assigned Agreement. The "asset base" of the Purchaser will be substantially similar to that of BSI (in which, according to the Rinaldi Affidavit at para. 31, served as a "credit-worthy parent guarantee" under the Framework Agreement).

72. DCC makes a great deal of the fact that Globe is a guarantor of QSI's obligations under the Stalking Horse Agreement and QSI Agreement. That is irrelevant to the foregoing analysis;

but in any event, the Stalking Horse Agreement was entered into when QSI had minimal assets (including none in Canada), and with no history of demonstrating its ability to meet obligations. Having paid only a deposit, it had a minimal investment should it have chosen to "walk away" from its obligations under the Stalking Horse Agreement. Now, it has funded the DIP, funded the deposit under the Stalking Horse Agreement and the increased deposit under the QSI Agreement and, once closing has occurred, it will have funded the substantial purchase price and will have considerable assets (including assets in Canada). It will have made a very sizable investment from which it is unlikely to "walk away". The QSI that DCC would get as a joint venture partner is a materially different company from the one that entered the Stalking Horse Agreement with a Globe guarantee.

73. Respectfully, this Court does not have the authority to attach conditions to an assignment under Section 11.3 of the CCAA; it cannot compel the provision of a guarantee by a third party. If this Court is not satisfied that the Purchaser would be able to meet its obligations, it should refuse the assignment; if it is satisfied that the Purchaser would be able to meet its obligations, there is no need for third party guarantees or other additional remedies. DCC's attempts to better its position should be denied.

(D) The DCC Agreements and the DCC Non-Assigned Agreements Do Not Constitute a Single Unified Contract

74. One of DCC's positions appears to be that it is not appropriate for this Court to assign the DCC Agreements because the DCC Agreements and DCC Non-Assigned Agreements constituted a single unified contract and that assigning only some of these agreements but not the others would prejudice DCC because it would be tantamount to assigning some provisions of a contract but not others. However, the DCC Agreements and the DCC Non-Assigned Agreements are not "one contract," and, thus, DCC's argument that the Timminco Entities and the Purchaser are "cherrypicking" particular contractual provisions (*i.e.,* taking the "good" but not the "bad" of one single contract) has no basis in fact or law. It is telling that the Rinaldi Affidavit fails to mention what are the key provisions of the relevant agreements on the point of whether such agreements are one unified contract or a series of separate contracts (i.e., the *very issue of this portion of its objection*): the "Entire Agreement" provision. This is a common

provision in commercial agreements where parties indicate their intention to (in the absence of an express integration) have more than one agreements considered as one agreement.

75. It is trite law that the express terms of a contract are the best indication of the parties' intentions, including with respect to an "Entire Agreement" provision. As held by the British Columbia Supreme Court in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*:

> Applying these principles, the question is whether the intention of the parties in the case at bar was that the written contract together with the specified appendices would constitute the whole of the contract. That intention, as in all matters relating to contractual construction, must be determined objectively. Here the parties expressly agreed that the contract documents constituted the whole of their agreement. While in most cases such an agreement is only a presumption based on the parol evidence rule, in this case it has been made an express term of the contract. A presumption can be rebutted; an express term of the contract, barring mistake or fraud, cannot. I have no alternative but to conclude that the parties intended the contract documents to be the whole of their agreement and the plaintiffs cannot rely on collateral contract against Westar.
>
> *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, [1989] B.C.J. No. 114 (S.C. (Chambers)) (Q.L.) (emphasis added), Brief of Authorities at Tab 16.

76. The Rinaldi Affidavit makes bald assertions on the issue of the DCC Agreements and DCC Non-Assigned Agreements forming one unified contract, including, but not limited to the following:

- "The Joint Venture was created to permit each of DCC and BSI to benefit from a reliable supply of silicon metal at an attractive price for use in its own business or, in the case of BSI, for re-sale. To accomplish this, a series of related agreements were entered into which, taken together, comprise the overall joint venture

agreement." (para. 14) (emphasis added). A "related agreement" is not the same as the same agreement.

- "Given the size and complexity of the transactions required to create and manage the Joint Venture, the rights and obligations of the partners were contained in these separate but intrinsically linked documents, all of which together comprise the Joint Venture Agreement. Consequently, no single agreement or set of terms in an agreement can be appropriately abstracted from the Joint Venture Agreement as a whole." (para. 15). Again, this is simply a reference to the contracts being "intrinsically linked" without reference to their terms.

- "The Joint Venture Agreement was designed to ensure that DCC would not be forced into a commercial relationship with a party that it did not wish to have as a partner. It would not have accepted a minority interest in the Joint Venture without such protections. This fact is reflected in numerous terms of the Joint Venture Agreement which provides restrictions on the transfer of a partner's interest in the Joint Venture and which also demonstrates the extent to which the various ancillary agreements are linked together to form one Joint Venture Agreement." (para. 29). Again, references to the contracts being "linked" without reference to the particular terms of the contracts themselves.

- "These restrictions on transfer, coupled with the ongoing obligations of the partners (and their affiliates) make clear that the Joint Venture Agreement was intended and designed to reflect a long-term commitment by the parties to a particular partner who was in a position to provide (and to have a credit-worthy parent guarantee) the assurances set out in the Framework Agreement and related agreements." (para. 31). Contrary to this statement, the Limited Partnership Agreement (as will be discussed below) expressly contemplates a transfer of BSI's partnership interest, subject only to the general partnership shares and Supply Agreement obligations being transferred as well (*i.e., not the Framework Agreement or any liabilities under the Framework Agreement).* Further, a Court is able to transfer assets of a debtor despite restrictions on transfer and consents to

assignment not being provided by counterparties to contracts pursuant to CCAA sections 36 and 11.3.

- "The QSI Bid includes the assignment and assumption of various agreements related to the Joint Venture, but not all of the documents comprising the Joint Venture Agreement, and in particular, not the Framework Agreement, the Business Transfer Agreement or any of their terms." (para. 36). Again, DCC makes bald assertions of the contracts being "related" and "comprising" a single unified contract without reference to the terms of such agreements.

- "The effect of the bid is to remove from the Joint Venture Agreement ongoing obligations in the Framework Agreement that gave stability to the Joint Venture and are fundamental to the Joint Venture Agreement." (para. 43). Here, DCC's intention becomes clear. It wants the Purchaser to assume the tail obligations of the Timminco Entities under the Framework Agreement. If the Timminco Entities did not have any obligations under this agreement, DCC would very likely be taking a different position. This demonstrates DCC's intention to recover on a pre-filing claim as opposed to asserting such claim against the Timminco Entities in their CCAA proceeding. There is no evidence that a third-party purchaser could not operate under the Limited Partnership Agreement, Shareholders Agreement and Supply Agreement without, at the same time, assuming the obligations under the Framework Agreement.

- "In contrast to the QSI Bid, the Wacker Bid recognizes that the documents that make up the Joint Venture Agreement cannot be isolated from one another and Wacker assumes them (with some limitations in the case of the Framework Agreement) with a view to becoming a full partner in the Joint Venture." (para. 49). This statement is simply not accurate of the Wacker Bid. The Wacker Bid never incorporated the indemnification provisions of the Framework Agreement. As such, even were the DCC Agreements and DCC Non-Assigned Agreements "one contract" (which they are not), then the Wacker Bid presents serious issues in respect of CCAA Section 11.3 as it would then be the case that this Court could

be asked to approve the assignment of some but not all of the provisions in a single contract (by leaving only the indemnification provisions out of the assignment of the Framework Agreement).

77. ***The express terms of the DCC Agreements do not support such bald assertions in the Rinaldi Affidavit.*** In particular:

(i) No DCC Agreement contains an "Entire Agreement" clause that incorporates the Framework Agreement (or other Non-Assigned Agreement).

(ii) No DCC Agreement contains an express clause integrating the Framework Agreement (or other Non-Assigned Agreement) into such DCC Agreement or any similar provision providing that it was the intention of the parties that the Limited Partnership Agreement, Shareholders Agreement, Supply Agreement and the DCC Non-Assigned Agreements are all to be treated as one unified contract for all purposes.

(iii) The Limited Partnership Agreement contains an "Entire Agreement" provision (s. 21.5) which includes the Limited Partnership Agreement and the Shareholders Agreement. *It does not, however, include the Framework Agreement or any other Non-Assigned Agreement.* The reference to the Framework Agreement in section 21.5 is simply in respect of the Limited Partnership Agreement not superseding the Framework Agreement. Correspondingly, the Shareholders Agreement at section 13.5 only incorporates the Shareholders Agreement and the Limited Partnership Agreement. As such, it is clear that the parties intended not to incorporate the Framework Agreement (or any other Non-Assigned Agreement) into such contracts on the basis that by explicitly referencing one thing means that one intended to not include what was not referenced.

(iv) The Limited Partnership Agreement contains a provision which states that "Permitted" transfers are subject to a transfer of the GP Shares (as defined in the Limited Partnership Agreement) and rights and obligations under the Supply Agreement (s. 10.1). Only the Supply Agreement, the GP Shares and the Limited Partnership Agreement are connected in this provision. The Framework Agreement is simply not referenced. While the five year mark has not yet passed in respect of a transfer, this

provision essentially relates solely to the consent right of DCC which, given the CCAA Section 11.3 does not grant DCC a veto over the sale as this Court can approve the assignment even where DCC does not provide its consent. Thus, the parties always intended that there could be a transfer of the Limited Partnership Agreement, expressly turned their mind to this in section 10 thereof, and only conditioned such transfer on a corresponding transfer of the GP Shares and the rights and obligations under the Supply Agreement (not the Framework Agreement or any other Non-Assigned Agreement). To grant DCC this protection now would be to grant it something it itself didn't bargain for and obtain in the DCC Agreements and this Court should not re-write the DCC Agreements to grant DCC such a preference.

(v) The Supply Agreement contains an "Entire Agreement" provision (s. 12.8) which states that the Supply Agreement (including the exhibits thereto) constitutes the entire agreement between the parties with respect to the subject matter of such agreement and supersedes and cancels all prior agreements, negotiations, correspondence, undertakings, understandings and communications of the parties with respect to the subject matter thereof. The Entire Agreement provision does not include the Framework Agreement or any other Non-Assigned Agreement. In addition, the "Entire Agreement" section is "subject to Section 10 of the Limited Partnership Agreement". The fact that the "Framework Agreement" is not included in this explicit carve-out to the "Entire Agreement" provision provides a clear indication that the parties intended only that the Supply Agreement and the Limited Partnership Agreement be connected.

(vi) The Framework Agreement contains an "Entire Agreement" provision (s. 11.8) which states that the Framework Agreement, the Disclosure Letter and the Exhibits to the Framework Agreement (which includes the form of a output and supply agreement only) and a confidentiality agreement constitutes the entire agreement between the parties. The Entire Agreement provision does not include the Ancillary Agreements (under which the executed Supply Agreement would be included).

(vii) Neither agreement contains provisions providing for cross-defaults with respect to the other agreements.

78. Based on the foregoing, it is clear that when the DCC Agreements are themselves examined, that the DCC Agreements are simply not one unified contract with the DCC Non-Assigned Agreements, but separate and complex documents governing the subject matters thereof and having detailed "Entire Agreement" provisions that nowhere incorporate the DCC Non-Assigned Agreements.

Issue IV: Wacker's Objections are Without Merit

79. The objections raised by Wacker require a determination as to whether: (a) there has been a monetary default by BSI under the Wacker Agreement; and (b) whether the Wacker Agreement has been amended so as to require that any default in the supply of silicon thereunder is to be honoured in future years (i.e. 2013 and 2014).

80. Section 11.3(4) of the CCAA draws a distinction between monetary and non-monetary defaults of a debtor company. In connection with an assignment of a contract under this section, only monetary defaults are required to be cured.

81. All or substantially all non-monetary defaults under a contract will, presumably, form the basis of a claim sounding in damages. The Purchaser contends that the fact that a non-monetary default gives rise to a claim in damages does not result in such claim being a monetary default that must be cured pursuant to Section 11.3(4) of the CCAA. Otherwise, virtually all non-monetary claims would be considered, in fact, monetary claims, and the distinction made in Section 11.3(4) of the CCAA rendered moot.

82. The alleged failure of BSI to supply silicon to Wacker as required under the Wacker Agreement is, at best, a non-monetary default. The Purchaser, in taking an assignment of the Wacker Agreement, is not lawfully required to cure such default by payment of the damages claim resulting to Wacker therefrom.

83. The Purchaser contends that the Wacker Agreement has not been amended so as to require that in future years (i.e. 2013 and 2014) the past defaults of BSI would be cured. There is no contractual amendment and, to the extent that a purported contractual amendment was made by the Timminco Entities subsequent to the commencement of the within CCAA proceedings,

the Timminco Entities lacked authority to agree to such amendment (and no such amendment was approved by the Court or otherwise authorized, whether in the Initial Order or otherwise).

84. The Purchaser should not be compelled in taking an assignment of the Wacker Contract to cure BSI's non-monetary default. Wacker's argument that the Wacker Agreement has been amended should be seen for what it is – an attempt to have Wacker cure BSI's non-monetary default (which is contrary to what is envisioned in Section 11.3 of the CCAA).

IV. CONCLUSION

85. In conclusion, it is appropriate for this Court to approve the QSI Transaction and the QSI Agreement, and to order the Assignment of the Assigned Agreements to the Purchaser. The Auction was fair and competitive and resulted in the highest value being received for the Assigned Agreements.

86. This Court's approval of the assignment of the Assigned Agreements in the absence of a Consent and Approval is a condition to closing. The reasoning of the Alberta Court of Appeal in *Welcome Ford* together with the overall purpose and spirit of the CCAA to maximize value to avoid social and economic law also militates in favour of approving the assignment of the Assigned Agreements.

87. The QSI Transaction is essentially one for BSI's contractual rights under the Limited Partnership Agreement, Shareholders Agreement and Supply Agreement, and for the QSLP Equity. Thus, in essence, the primary asset that the Timminco Entities are seeking to maximize recovery for is their contractual rights. This Court should permit the Timminco Entities to maximize the recovery on such contractual rights by authorizing the assignment of the Assigned Agreements pursuant to CCAA Section 11.3 to protect and enhance the value of these assets, which been determined through a robust bidding and auction process. As the Approval Order is a closing condition under the QSI Agreement, should this Court not approve the assignment of the Assigned Agreements, the Timminco Entities would not be able to close on the QSI Transaction, which would result in the severe risk that significant value for the Timminco Entities' stakeholders being lost.

V. ORDER REQUESTED

88. The Purchaser respectfully requests that this Court (i) overrule DCC's and Wacker's respective objections; and (ii) grant the Approval Order in the form requested by the Timminco Entities.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

David Bish

Lee Cassey

Lawyers for QSI Partners Ltd.

Schedule "A"

Statutory Provisions Relied Upon

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

General power of court

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., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of Order

(5) The applicant is to send a copy of the order to every party to the agreement.

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

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

FACTUM OF PURCHASER IN SUPPORT OF APPROVAL OF QSI TRANSACTION AND APPROVAL OF ASSIGNED AGREEMENTS

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