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

FACTUM OF THE APPLICANTS

(Motion returnable May 29, 2012)
(Re Sale of Silicon Metal Assets and Assignment of Agreements)

Dated: May 23, 2012

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PART I - OVERVIEW[1]

1. On January 3, 2012, Timminco Ltd. ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**") applied for, and obtained, protection from their creditors pursuant to the *Companies' Creditors Arrangement* Act, R.S.C. 1985, c. C-36 (the "**CCAA**"). The restructuring of the Timminco Entities consists of a Sales Process (as defined below) conducted with the approval of the Court and under the supervision of FTI Consulting Canada Inc. in its capacity as the Court-appointed Monitor of the Timminco Entities (the "**Monitor**") for the purpose of maximizing the potential recovery for the creditors of the Timminco Entities.

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[1] Capitalized terms used but not defined herein have the meanings ascribed to them in the affidavit of Peter A.M. Kalins sworn May 9, 2012 (the "**May 9 Affidavit**").

2. The Timminco Entities' single most valuable asset is its 51% interest in the joint venture, formed by Québec Silicon General Partner Inc. ("**QSGP**") and Québec Silicon Limited Partnership ("**QSLP**"), and the Sales Process has revolved around that asset.

3. As a result of the Sales Process, an offer to acquire BSI's 51% interest in the joint venture for a cash purchase price of approximately $32 million, subject to adjustment, was obtained from QSI Partners Ltd. ("**QSI**"). In addition, a cash purchase price of approximately $2.6 million was obtained for the Solar Assets (as defined below).

4. BSI has secured debt of approximately $28.5 million owed to Investissement Québec ("**IQ**"), as well as obligations existing under the Court-approved DIP Facility of approximately $4.25 million. Based on the results of the Sales Process, it appears that there may be a small distribution to unsecured creditors.

5. Both the Timminco Entities and the Monitor, acting reasonably, have concluded that the proposed sale to QSI is in the best interests of all of the creditors of the Timminco Entities.

6. Dow Corning Corporation ("**DCC**") is the respondent on this motion and its affiliate is a partner with BSI in the Québec Silicon joint venture. In October 2010, in an effort to raise capital, the Timminco Entities transferred BSI's silicon metal business into QSLP and created a joint venture with certain affiliates of DCC by selling 49% of QSLP and QSGP to those DCC affiliates for approximately $40 million pursuant to a number of different agreements.

7. Two of the contracts between the joint venturers are inseparable from the joint venture itself and define the nature of the equity interests in the joint venture: Specifically, (a) the Limited Partnership Agreement governs the conduct of the partnership, including among other things, the allocation of profits and losses between Dow Corning Canada, Inc. ("**DCC Canada**"), an indirect subsidiary of DCC, and BSI and the requirements of the partners to make capital contributions to QSLP; and (b) the Shareholders Agreement provides for the conduct of the business and affairs of QSGP, which manages QSLP, and governs the relationship between the shareholders.

8. In addition, the Supply Agreement entered into among QSLP, BSI and DCC Canada sets forth the terms upon which QSLP will produce and supply silicon metal of certain grades to DCC Canada and BSI and is integral to the ongoing operations of the joint venture.

9. Other contracts entered into between the Timminco Entities and DCC, notably the Framework Agreement, facilitated the creation of the joint venture, but are not inseparable from the equity interests in the joint venture nor integral to the ongoing operations of the joint venture. The provisions of the Framework Agreement are largely spent; however, the agreement continues to contain legacy obligations that relate to the amount of consideration paid for DCC's indirect 49% interest in the joint venture.

10. Both the Successful Bid and the Back-Up Bid received during the Sales Process for the 51% interest in the joint venture call for the transfer and assignment of the

Limited Partnership Agreement, the Shareholders Agreement, and the Supply Agreement. Neither the Successful Bidder nor the Back-up Bidder (as those terms are defined in the Bidding Procedures) is willing to assume all of the legacy obligations under the Framework Agreement, most notably certain indemnity obligations that the Timminco Entities owed to DCC prior to the CCAA restructuring. DCC has refused to grant its consent to the assignment of the Limited Partnership Agreement, the Shareholders Agreement, and the Supply Agreement unless the purchaser also agrees to assume those legacy obligations. In refusing to grant its consent to the transfer and assignment, DCC is attempting to use its position as a 49% joint venture partner to improve its recovery on its claims against the Timminco Entities. Effectively, DCC is attempting to elevate itself to the status of a secured creditor even though its claims are, and are acknowledged to be, unsecured claims.

11. The Timminco Entities submit that the sale to QSI should be approved and the assignment of the Limited Partnership Agreement, the Shareholders Agreement and the Supply Agreement (collectively the "**QSLP Agreements**") should be ordered.

12. It is also submitted that this Honourable Court ought to assign the Wacker Agreement (as defined below) despite the objections of Wacker Chemie AG ("**Wacker**").

13. The Sale Process has been conducted in accordance with the Court approved bidding process and the submitted bids have been given due consideration by the Timminco Entities in accordance with the Bidding Procedures. The Monitor has

concluded that the Sale Process was fair, transparent and reasonable and supports the Timminco Entities' request for approval of the QSI Agreement (defined below). The CCAA and existing case law clearly establish that the Court can order the transfer and assignment of assets, including agreements, over the objections of the counter-parties.

14. The Timminco Entities therefore are seeking:

(a) An Order (the "**Silicon Sale Order**"):

(i) approving the Agreement of Purchase and Sale (the "**QSI Agreement**") made and entered into as of April 25, 2012, between the Timminco Entities, QSI and Globe Specialty Metals, Inc. ("**Globe**" or the "**Guarantor**") for the sale of the Purchased Assets (as defined below) and the transactions contemplated thereby (the "**QSI Transaction**");

(ii) vesting all of the Purchased Assets (as defined below) in QSI free and clear of any security, charge or other restriction other than Permitted Encumbrances (as defined in the QSI Agreement);

(iii) assigning the rights and obligations of the Timminco Entities under the QSLP Agreements and the Wacker Agreement;

(iv) approving the HP2 Severance Transaction; and

(v) vesting the Dust Collector in QSGP, as general partner of QSLP, free and clear of any security, charge or other restriction pursuant

to and in conjunction with closing of the HP2 Severance Transaction;

(b) An Order (the "**Subsequent DIP Amendment Order**") substantially in the form attached at Tab 6 of the Motion Record approving the Subsequent DIP Amendment (as defined below); and

(c) Such other relief as counsel may request and this Honourable Court may grant.

PART II - THE FACTS

15. The Applicants' primary business, the production and sale of silicon metal, is carried on principally through BSI, a Québec-based wholly-owned subsidiary of Timminco. BSI purchases silicon metal produced by QSLP for resale to customers in the chemical (silicones), aluminum, and electronics/solar industries. QSLP is a joint venture between BSI and an affiliate of DCC, described in greater detail at paragraphs 41 - 62 of the May 9 Affidavit. BSI owns approximately 51% of the limited partnership units of QSLP and 51% of the shares of QSGP, the general partner of QSLP. QSLP and QSGP may be referred to collectively herein as "**Québec Silicon**". DCC Canada, owns approximately 49% of the limited partnership units of QSLP and DC Global Holdings S.a.r.l., ("**DC Global**") a subsidiary of DCC, owns 49% of the shares of QSGP.

May 9 Affidavit, Motion Record of the Timminco Entities ("**Motion Record**"), Tab 2, at paras. 3, 41 - 62

16. BSI also produced 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.

May 9 Affidavit, Motion Record, Tab 2, at para. 4

The Sales Process

17. On March 9, 2012, this Court granted an Order authorizing the Timminco Entities to enter into an Agreement of Purchase and Sale (the "**Stalking Horse Agreement**") with QSI and Globe as Guarantor, and approving the bidding procedures as attached to the Bidding Procedures Order (the "**Bidding Procedures**").

May 9 Affidavit, Motion Record, Tab 2, at para. 10

18. The Stalking Horse Agreement was entered into and the Bidding Procedures were designed for the purpose of creating a "stalking horse" sales process (the "**Sales Process**") and auction with a view to maximizing the purchase price that could be obtained for the assets of the Timminco Entities.

May 9 Affidavit, Motion Record, Tab 2, at para. 11

19. The Bidding Procedures and the Timminco Entities' efforts in marketing their assets to potentially interested parties and selecting the Qualified Phase II Bidders are described in greater detail in, *inter alia*, paragraphs 14 - 18 of the May 9 Affidavit.

May 9 Affidavit, Motion Record, Tab 2, at paras. 14 - 18

20. As per the terms of the Bidding Procedures, following receipt of a Qualified Phase II Bid other than the Stalking Horse Bid by the Phase II Bid Deadline, an auction

was held on April 24 and 25, 2012 to determine the highest and/or best bid (the "**Auction**"). The conduct of the Auction is described in, *inter alia*, paragraphs 20 - 24 of the May 9 Affidavit.

May 9 Affidavit, Motion Record, Tab 2, at paras. 19 - 24

21. Throughout the Auction, including when determining the Successful Bid, the Timminco Entities had assistance from legal counsel and the Monitor.

Cross-Examination of Peter A.M. Kalins on May 17, 2012 (the "**Kalins Cross**"), Qs. 16 & 17, pp. 10 – 11. Supplemental Motion Record of the Timminco Entities ("**SMR**"), Tab 1

22. Among other things and as described in greater detail in the May 9 Affidavit, at approximately 9:30 a.m. on the second day of the Auction, Wacker requested an adjournment of the Auction in order to have further discussions with DCC. The Timminco Entities considered the adjournment request, including:

(a) The fact that one of the DCC decision makers was not available at the time;

(b) The fact that all Qualified Phase I Bidders had been granted the opportunity to negotiate with DCC prior to the Auction (and Wacker had engaged in such negotiations); and

(c) The fact that DCC had clearly and consistently informed all Qualified Phase II Bidders with whom it had met prior to the Auction that it would oppose any transaction that did not assume all of the Timminco Entities' indemnity obligations under the Framework Agreement.

May 9 Affidavit, Motion Record, Tab 2, at para. 21

Kalins Cross, Qs. 199 - 217, pp. 66 - 73, SMR, Tab 1

23. Based on the consideration of the above facts, the Timminco Entities concluded that it was highly unlikely that further discussions between Wacker and DCC at that time would result in a decision in a timely manner. The Timminco Entities, after consulting with the Monitor, denied the request for an adjournment.

May 9 Affidavit, Motion Record, Tab 2, at para. 21

24. The Timminco Entities determined that the Successful Bid was comprised of the Portion Bids (as defined in the Bidding Procedures) submitted by QSI and FerroAtlantica and the Back-Up Bid was comprised of the Portion Bids submitted by Wacker (the "**Wacker Bid**") and FerroAtlantica.

May 9 Affidavit, Motion Record, Tab 2, at paras. 22 - 24

25. In order to determine the Successful Bid and the Back-up Bid, the Timminco Entities, with the assistance of their advisors and in consultation with the Monitor, carefully reviewed and weighed each final Overbid and considered the Bid Assessment Criteria (as defined in the Bidding Procedures), including the amount of the purchase price and any purchase price adjustment, the liabilities to be assumed by the Bidder, the ability of the Bidder to close the transaction and related closing conditions, and the likelihood, extent and impact of any potential delays in closing.

May 9 Affidavit, Motion Record, Tab 2, at para. 23

26. In particular, in assessing the Overbids of QSI and Wacker, the Timminco Entities, with the assistance of their advisors and in consultation with the Monitor, considered the following issues, which the Timminco Entities had discussed with Wacker and QSI during the Auction:

(a) The risk that Wacker may refuse to close in the event that the provision exculpating Wacker from certain employee obligations of BSI, a provision which Communications, Energy & Paperworkers Union of Canada (the "**CEP**") previously informed the Timminco Entities and the Court that it intended to oppose, is found to be unenforceable pursuant to applicable law, and the absence of this risk in the QSI Agreement;

(b) The closing condition in the Wacker Bid that anti-trust approvals be obtained in numerous jurisdictions around the world;

(c) The inclusion in the Wacker Bid of a partial indemnity in favour of DCC for DCC for 75 per cent of certain pension and retirement benefit liabilities;

(d) The fact that the Wacker Bid contemplated an indemnity by DCC in favour of Wacker for 25 per cent of the BSI pension and retirement benefit liabilities, to the extent that those attached to Wacker or QSLP and that the cross indemnity as a result could be viewed negatively by DCC in that it could expose DCC to a liability that otherwise it would not have; and

May 9 Affidavit, Motion Record, Tab 2, at para. 23

Kalins Cross, Qs. 208 and 217, pp. 70 and 73, SMR, Tab 1

(e) The fact that DCC had informed all Qualified Phase II Bidders with whom it had met prior to the Auction that it would oppose any transaction that did not fully assume all of the indemnity provisions in the Framework Agreement.

May 9 Affidavit, Motion Record, Tab 2, at para. 24

Kalins Cross, Qs. 201, 209 and 229, pp. 67 - 68, 70 - 72 and 79 - 84, SMR, Tab 1

27. The Timminco Entities also considered their obligations to their stakeholders to obtain the most benefit for the estate of BSI, as well the implications to DCC of the sale of the Silicon Metal Assets. Based on the consideration of the foregoing, the Timminco Entities exercised their business judgement and determined that the Aggregated Bid made up of the Portion Bids submitted by QSI and FerroAtlantica was the Successful Bid and the Aggregated Bid made up of the Portion Bids submitted by Wacker and FerroAtlantica was the Back-up Bid.

May 9 Affidavit, Motion Record, Tab 2, at para. 24

Kalins Cross, Q. 286, p. 101, SMR, Tab 1

28. Neither Wacker nor any other Qualified Phase II Bidder contested the Timminco Entities' determination of the Successful Bid following the Auction.

May 9 Affidavit, Motion Record, Tab 2, at para. 24

The QSI Agreement and the F.A. Agreement

29. Following the close of the Auction, the Timminco Entities entered into agreements of purchase and sale with QSI and FerroAtlantica. The terms of the QSI Agreement are described in greater detail in the May 9 Affidavit at paragraphs 26 - 37 and the terms of the F.A. Agreement are described in greater detail in the May 9 Affidavit at paragraphs 71 - 83.

May 9 Affidavit, Motion Record, Tab 2, at paras. 2, 26 – 37 and 71 - 83

30. The assets to be purchased under the F.A. Agreement (the "**F.A. Purchased Assets**" or the "**Solar Assets**") consist of BSI's right, title and interest, in and to substantially all of BSI's currently inactive solar grade silicon production business, including certain real property, certain intellectual property, inventory and equipment. The assets to be purchased under the QSI Agreement (the "**Purchased Assets**" or "**Silicon Metal Assets**") consist of BSI's right, title and interest, in and to substantially all of BSI's silicon metal business, including the BSI's equity interest in QSLP and QSGP, certain customer contracts, inventory, certain intellectual property and certain real property. There is no overlap between the F.A. Purchased Assets and the Purchased Assets. Neither the QSI Agreement nor the F.A. Agreement contemplates the purchase of Timminco assets.

May 9 Affidavit, Motion Record, Tab 2, at paras. 13, 30 - 33 and 74 - 77

31. It is expected that the Court will grant an Order (the "**Solar Sale Order**") approving the F.A. Agreement and the F.A. Transaction and vesting all of the F.A.

Purchased Assets in FerroAtlantica. It is not a requirement of the Bidding Procedures Order or the QSI Agreement to have sale approval for the F.A. Agreement granted concurrently with sale approval of the QSI Agreement.

May 9 Affidavit, Motion Record, Tab 2, at paras. 10, 13, and 35 – 37

32. The QSI Agreement contains certain conditions to closing, described at paragraphs 35 - 37 of the May 9 Affidavit.

May 9 Affidavit, Motion Record, Tab 2 at paras. 35 - 37

Assignment of QSLP Agreements & the Wacker Agreement

33. As described in greater detail in the May 9 Affidavit, pursuant to the QSI Agreement, the Timminco Entities are obligated to obtain consents to the assignment of certain agreements to be assumed by QSI (which are described in greater detail at paragraphs 39 - 64 of the May 9 Affidavit) including the QSLP Agreements and the Wacker Agreement. To the extent such consents are not obtained, the Timminco Entities are required to apply to this Court for an order approving the assignment of those agreements.

May 9 Affidavit, Motion Record, Tab 2, at paras. 38 - 59

34. The Timminco Entities and QSI were unable to obtain DCC's consent (the "**DCC Consent**") to the assignment of the QSLP Agreements as of May 9, 2012. DCC has prepared a list of terms for the DCC Consent which has been provided to QSI and Wacker. Neither Wacker nor QSI has agreed to the terms of the DCC Consent. Since the completion of the Auction, QSI has engaged in discussions with DCC regarding the

terms of the DCC Consent but advised the Timminco Entities that it would be prudent to proceed with the within motion on the basis that the DCC Consent will not be forthcoming.

> Affidavit of Joe Rinaldi, sworn May 14, 2012 (the "**Rinaldi Affidavit**"), Responding Motion Record of Dow Corning Corporation, at paras. 53 – 54
>
> Affidavit of Ralf Widmer, sworn May 15, 2012 (the "**Widmer Affidavit**"), Motion Record of the Responding Party, Wacker Chemie AG Widmer Affidavit, paras. 20-23
>
> May 9 Affidavit, Motion Record, Tab 2, at paras. 39 - 40

35. DCC's refusal to grant the DCC Consent relates to the fact that the QSI Agreement does not provide for the assumption of certain contracts to which BSI and DCC are party. Specifically, DCC is insisting that QSI assume the indemnification and other legacy obligations of BSI under the Framework Agreement, which is not a Purchased Asset.

> May 9 Affidavit, Motion Record, Tab 2, at para. 40

36. The Framework Agreement is a separate agreement from the Limited Partnership Agreement, the Shareholders Agreement, and the Supply Agreement, and is not integrated into any of these agreements. Other than the transactions contemplated by the HP2 Transaction (described below), all of the parties' obligations under the Framework Agreement and the Business Transfer Agreement have been satisfied except for the indemnification obligations referred to in paragraph 46, the reimbursement obligations referred to in paragraph 47, and the Post-Closing Purchase Price Adjustment.

> May 9 Affidavit, Motion Record, Tab 2, at para. 49

37. The Limited Partnership Agreement and the Shareholders Agreement are inseparable from the joint venture itself and define the nature of the equity interests in the joint venture. The Supply Agreement sets forth the terms upon which QSLP will produce and supply silicon metal of certain grades to DCC Canada and BSI and is integral to the ongoing operations of the joint venture. Consequently, the assignment of all three of these contracts is a fundamental term of the QSI Agreement.

38. QSI, following the transfer of the Silicon Metal Assets (if approved), will have substantial presence in the jurisdiction, other relationships within the Globe group of companies and access to Globe's human capital and other resources to assist it in carrying out its core business of producing silicon metal and would allow it to operate and fill the obligations under the QSLP Agreements.

May 9 Affidavit, Motion Record, Tab 2, at para. 67

Kalins Cross, page 107, Question 306

Affidavit of Stephen Lebowitz, sworn May 18, 2012 (the "**Lebowitz Affidavit**"), Motion Record, Tab 3 at paras. 6 - 9

39. The Timminco Entities and QSI were also unable to obtain the consent (the "**Wacker Consent**") of Wacker to the assignment of a long-term silicon metal supply contract with Wacker dated May 2011 (as amended, the "**Wacker Agreement**") as of May 9, 2012. The Wacker Consent may not be obtained prior to this motion. The Wacker Agreement and the Wacker Consent are described in greater detail at paragraphs 35 and 63 - 64 of the May 9 Affidavit.

May 9 Affidavit, Motion Record, Tab 2, at paras. 35 and 63 - 64

Affidavit of Ralf Widmer, para. 24

HP2 Severance Transaction

40. The HP2 Severance Transaction is described in greater detail at paragraphs 84 - 90 of the May 9 Affidavit and is the final step required to complete the reorganization of BSI's business which began on September 30, 2010 with the transfer of its silicon metals production business to QSLP and the establishment of the solar grade silicon operations as a stand-alone business. The HP2 Severance Transaction is but one aspect of the larger transaction involving the formation of the Quebéc Silicon joint venture, which pre-dated the CCAA proceedings.

May 9 Affidavit, Motion Record, Tab 2, at paras. 84 - 90

Subsequent DIP Amendment

41. The QSI Agreement provides that if QSI is the Successful Bidder, an amendment (the "**Subsequent DIP Amendment**") will be entered into between QSI and the Timminco Entities providing for an increase in the DIP Facility by $2,500,000 and an extension of the DIP Facility to July 4, 2012. The Subsequent DIP Amendment will provide the Timminco Entities with additional flexibility to close the Q81 Transaction should closing be delayed past June 8, 2012. The details of the Subsequent DIP Amendment are described in greater detail at paragraphs 68 - 70 of the May 9 Affidavit.

May 9 Affidavit, Motion Record, Tab 2, at paras. 68 – 70

42. The Monitor and IQ support the approval of the QSI Agreement and the Subsequent DIP Amendment.

May 9 Affidavit, Motion Record, Tab 2, at para. 93

Seventh Report of the Monitor, dated May 15, 2012 ("**Monitor's Seventh Report**"), at para. 51

PART III - ISSUES

43. The issues on this motion are:

(a) Should the Court approve the QSI Agreement and the QSI Transaction, including the vesting of the Purchased Assets in QSI free and clear of all claims and restrictions and the assignment of the QSLP Agreements and the Wacker Agreement?

(b) Should the Court approve the HP2 Severance Transaction?

(c) Should the Court grant the Subsequent DIP Amendment Order?

PART IV - LAW AND ARGUMENT

A. THE QSI AGREEMENT AND QSI TRANSACTION SHOULD BE APPROVED

(1) *The Court has the Power to Approve a Sale of Assets in CCAA Proceedings Free and Clear of any Security, Charge or other Restriction*

44. The power to approve a sale of assets prior to the formulation of a plan is contained in section 36 of the CCAA which, prior to codification in September 2009, was a well-established common law principle.

Re Consumers Packaging Inc. (2001), 27 C.B.R. (4th) 197 (Ont. C.A.) [*Consumers Packaging*], Applicants' Book of Authorities, Tab 1 at para 9

Re Nortel Networks Corp. (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List]), Applicants' Book of Authorities, Tab 2 at paras. 30 - 32

45. Section 36 of the CCAA sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor's sale of assets outside the ordinary course of business:

(a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) Whether the monitor approved the process leading to the proposed sale or disposition;

(c) Whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) The extent to which the creditors were consulted;

(e) The effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

CCAA, s. 36(3)

Re Canwest Publishing Inc. (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List]) [*Canwest Publishing*], Applicants' Book of Authorities, Tab 3 at para. 13

46. In *Canwest Publishing*, Justice Pepall noted that the section 36 criteria largely overlaps with the criteria established in *Royal Bank v. Soundair Corp.* for approval of a sale of assets in an insolvency scenario:

(a) Whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

(b) The interests of all parties;

(c) The efficacy and integrity of the process by which offers have been obtained; and

(d) Whether there has been unfairness in the working out of the process.

CCAA, s. 36(3)

Canwest Publishing, Applicants' Book of Authorities, Tab 3 at para. 13.

Royal Bank v. Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.), Commercial List Authorities Book at para. 24.

47. In *Re White Birch Paper Holding Co.*, Justice Mongeon approved an asset sale pursuant to section 36 of the CCAA, holding that, while recovery for unsecured creditors would be low, it was not in the best interest of any of the stakeholders for him to refuse the order.

Re White Birch Paper Holding Co., 2010 QCCS 4915, Applicants' Book of Authorities, Tab 4 at paras. 48, 49, 51 - 52 & 57

(2) The Sale Process

48. If the sale process leading up to the proposed asset sale is determined to be fair and reasonable, "a court will not lightly interfere with the exercise of [the Debtors' and Monitor's] commercial and business judgement in the context of an asset sale."

> *Re AbitibiBowater Inc.*, 2010 QCCS 1742, Applicants' Book of Authorities, Tab 5 at para 71

49. In *Re Grant Forest Products Inc.*, creditors of the insolvent debtor objected to the granting of a sale approval order. Justice Campbell noted that no objections had been raised regarding the Court-approved sales process prior to the sale approval motion and commented that "once a process has been put in place by Court Order for the sale of assets of a failing business, that process should be honoured, excepting extraordinary circumstances."

> *Re Grant Forest Products Inc.* 2010 ONSC 1846 [Comm. List], Applicants' Book of Authorities, Tab 6 at para. 29

50. The Sales Process was designed in consultation with the Monitor in order to maximize the purchase price that could be obtained for the assets of the Timminco Entities for the benefit of all of the Timminco Entities' stakeholders. On March 9, 2012, the Court approved the Stalking Horse Agreement, including the bid protections provided for therein, and the Bidding Procedures proposed to govern the determination of the Successful Bid and the Back-Up Bid. The motion seeking approval of the Sales Process was supported by the Monitor.

> May 9 Affidavit, Motion Record, Tab 2, at paras. 10 - 11

51. No party has objected to the process that led to the Auction. The Sales Process also resulted in the negotiation of the F.A. Agreement to sell the Solar Assets to FerroAtlantica.

52. In the Monitor's Seventh Report, the Monitor states that it is satisfied that the Sales Process was fair, transparent and reasonable:

> 46. The Monitor was provided with full access to information during the marketing process, attended the Auction and the Timminco Entities provided full cooperation with the Monitor throughout. The Timminco Entities consulting with the Monitor in respect of all material decisions made at the Auction.
>
> 47. The Monitor has considered the conduct of the marketing process and the Auction in light of the principles of the decision in the leading case of *Royal Bank of Canada v. Soundair Corp.* and the requirements of the Bidding Procedures Order. The Monitor is satisfied that the marketing process was fair, transparent and reasonable in the circumstances and that the marketing process and the Auction were conducted in accordance with the provisions of the Bidding Procedures Order.
>
> Monitor's Seventh Report, at paras. 46 - 47

53. In addition, the Monitor considered the option of a piecemeal liquidation of the assets subject to the QSI Transaction and the Solar Assets and noted that:

> (a) There is, in the Monitor's view, no viable liquidation alternative beyond the marketing process for the sale of the QSLP Equity;
>
> (b) During the marketing process, the Monitor sought liquidation offers for the plant and equipment that is subject to the Successful Bid. Six liquidation firms reviewed the opportunity but all declined to provide a liquidation offer;

(c) During the marketing process, the Monitor sought proposals for the listing of the real estate subject to the Successful Bid, being the HP1 Property and the HP2 Property. Each of the real estate firms contacted declined to provide a listing proposal or indication of value.

(d) Based on its experience and the information available to the Monitor, the Monitor estimates that in the event of a forced liquidation the realizable value of the inventory and receivables subject to the QSI APA may be approximately $5.3 million.

(e) Based on its experience and the information available to the Monitor, the Monitor estimates that in the event of a forced liquidation the realizable value of the inventory and receivables subject to the Ferro APA may be approximately $0.9 million.

Monitor's Seventh Report, at para. 49

54. The Monitor concluded that in its view, "the results of a liquidation of assets would be uncertain and time-consuming and would not likely result in any materially higher recovery to stakeholders than the closing the transactions contemplated by the QSI APA and the Ferro APA."

Monitor's Seventh Report, at para. 50

55. The Timminco Entities' creditors and significant stakeholders were also appropriately consulted during the Sales Process. Both the Timminco Entities and the Monitor were available throughout the Sales Process to answer general or specific inquiries from stakeholders.

Monitor's Seventh Report, at paras 15 - 20

May 9 Affidavit, Motion Record, Tab 2, at para. 17

Affidavit of Peter A.M. Kalins, sworn April 23, 2012 (re: Stay Extension), at para. 8

Affidavit of Maria Konyukhova, sworn April 21, 2012 (re: Motion to Lift Stay), at para. 6

56. In addition, during the Sales Process a number of Qualified Phase I Bidders requested to meet with certain stakeholders of the Timminco Entities, including representatives of CEP, IQ, and DCC, prior to making their Phase II Bids. In fact, some Qualified Phase I Bidders indicated that they would not submit a Phase II Bid unless they had such an opportunity in advance of the Phase II Bid Deadline. In order to ensure a level playing field and thus a fair and transparent bidding process, on March 27, 2012, the Timminco Entities sent a notice to each Qualified Phase I Bidder, including the Stalking Horse Bidder, informing them that such requests had been made and requesting that such Bidders notify the Monitor if they wished to meet with representatives of any stakeholders. On April 2, 2012, the Timminco Entities sent a follow up notice to those Qualified Phase I Bidders who had not responded to the March 27 notice setting a deadline of noon on April 3, 2012, for requesting a meeting with stakeholders.

Affidavit of Peter A.M. Kalins sworn April 9, 2012 (Re Amendment of Bidding Procedures) (the "**April 9 Affidavit**"), at para 18

57. A number of additional Qualified Phase I Bidders, including the Stalking Horse Bidder, responded to the Monitor indicating that they wished to meet with certain stakeholders. The Monitor attempted to arrange meetings between all Qualified Phase I Bidders who requested meetings and those stakeholders they wished to meet with. A

number of meetings took place, however, DCC had only limited availability prior to the Phase II Bid Deadline and originally stated that it was only available on April 4, 2012. Some Qualified Phase I Bidders were able to meet with DCC on that day but others were not. Subsequently, DCC informed the Timminco Entities and the Monitor that it could make itself available for further meetings on either April 17 and 18 or April 18 and 19 (after the Phase II Bid Deadline).

April 9 Affidavit at para 19

Fifth Report of the Monitor, dated April 19, 2012 at paras. 10, 17 - 18

58. In order to allow all interested Phase I Qualified Bidders to complete their requested meetings with DCC and thereby provide a level playing field and fair bidding process, the Timminco Entities proposed an extension of the Phase II Bid Deadline to 5:00 p.m. on April 19, 2012, while leaving the date of the Auction and all subsequent dates unchanged. Following negotiation with the Stalking Horse Bidder, the Phase II Bid Deadline was extended.

May 9 Affidavit, Motion Record, Tab 2, at para 18

(3) Selection of the Successful Bid

59. The purchase price obtained for the Purchased Assets under the QSI Agreement was the highest price that could be obtained pursuant to a Court-approved sales process that provided for a competitive auction of the assets. The aggregate purchase price under the QSI Transaction and the sale of the Solar Assets represents a premium

of approximately $14.5 million (72%) over the purchase price provided under the Stalking Horse Agreement and should provide some recovery for unsecured creditors.

Monitor's Seventh Report at para 33

May 9 Affidavit, Motion Record, Tab 2, at para 92

60. DCC is opposing the approval of the QSI Transaction on the basis that the Timminco Entities failed to properly value the QSI Bid and the Wacker Bid. The evidence filed in respect of this motion demonstrates that the Timminco Entities, with the assistance of its advisors and in consultation with the Monitor, considered the appropriate factors and exercised their business judgment in selection of the successful Bid in good faith.

May 9 Affidavit, Motion Record, Tab 2, at paras. 18 - 22

Rinaldi Affidavit, Responding Motion Record of Dow Corning Corporation, at paras. 47 - 50

61. In order to determine the Successful Bid and the Back-up Bid, the Timminco Entities, with the assistance of their advisors and in consultation with the Monitor, carefully reviewed and weighed each final Overbid and considered the Bid Assessment Criteria as required by the Bidding Procedures, including the amount of the purchase price and any purchase price adjustment, the liabilities to be assumed by the Bidder, the ability of the Bidder to close the transaction and related closing conditions, and the likelihood, extent and impact of any potential delays in closing.

May 9 Affidavit, Motion Record, Tab 2, at para 23

Monitor's Seventh Report at para 34

62. In particular, in assessing the Overbids of QSI and Wacker, the Timminco Entities, with the assistance of their advisors and in consultation with the Monitor, considered among other things the following factors, which the Timminco Entities had discussed with Wacker and QSI during the Auction.

(a) **Cross-indemnities with DCC relating to certain pension and retirement benefit liabilities in the Wacker Bid**

63. During the Auction, the Timminco Entities, with the assistance of its advisors and the Monitor, using the best information available to the Timminco Entities, performed a calculation of the potential value to BSI's estate of Wacker's conditional offer to assume approximately $18 million worth of potential unsecured claims relating to certain pension and retirement benefit obligations of BSI (75% of approximately $25 million of potential claims). The calculation was performed in order to estimate the incremental cash purchase price that would be required in a competing bid that did not include the indemnity to result in the same distribution to unsecured creditors of BSI.

> Eighth Report of the Monitor dated May 20, 2012 (the "**Monitor's Eighth Report**"), Appendix A, Schedule A, pp. 1 - 2
>
> Kalins Cross, Qs. 222 - 226, pp. 75 – 78, SMR, Tab 1

64. The calculation, which was shared with Wacker and QSI during the Auction, yielded a cash value of approximately $240,000. Further detail of the calculation is set forth at pages 77 to 78 of the transcript of Mr. Kalins' cross-examination. A copy of the calculation shared with bidders at the Auction is reproduced in the Monitor's Eighth Report as Schedule A to Appendix A.

Kalins Cross, Qs. 222 - 226, pgs. 75 - 78, SMR, Tab 1

Monitor's Eighth Report, Appendix A, Schedule A

65. The Timminco Entities also considered the likelihood that the inclusion of the cross-indemnities would result in the provision of the DCC Consent notwithstanding that DCC had informed all bidders that it would oppose any bid that did not assume 100% of BSI's liabilities under the Framework Agreement. Further, the Timminco Entities considered the Wacker indemnity condition that DCC provide an indemnity in favour of Wacker for 25% of amounts that Wacker or QSLP could be held liable for in respect of certain pension and retirement benefit obligations of BSI which meant that in certain circumstances DCC would be worse off under the Wacker Bid proposal than under the QSI Bid.

Monitor's Eighth Report, Appendix A, pp. 1 - 2 and Schedule A

May 9 Affidavit, Motion Record, Tab 2, at para. 23

Kalins Cross, Qs. 222 - 229, pp. 71 - 72 and 75 - 80, SMR, Tab 1

66. Although the Timminco Entities believed that on balance the proposal by Wacker would be viewed more favourably by DCC than QSI's proposal, the value that was eventually attributed to Wacker's proposal was decreased to reflect the fact that DCC had informed all Bidders with whom it met prior to the Auction that it would oppose any transaction that did not assume all of the indemnity obligations under the Framework Agreement. In addition to this stated position, the Timminco Entities thought that DCC may not be convinced of the benefit of the proposal by Wacker

because of the inclusion of the 25% indemnity in favour of Wacker and the fact that in some circumstances (such as where Wacker may be determined to be a successor employer) the cross-indemnities would be less favourable to DCC than no indemnity.

Kalins Cross, Q. 229, p. 79, SMR, Tab 1

(b) **Lack of "severability" provision in the Wacker Bid with respect to employer obligations provisions**

67. Both the final bid submitted by Wacker and the QSI Agreement provide that the purchaser will not assume certain debts, liabilities, obligations or claims relating to a collective agreements or certain employee related benefit plans, pension plans, and post-retirement liabilities. Both the Wacker Bid and the QSI Agreement include a severability clause that provides that if a section of the agreement is unenforceable then that section will be severed from the agreement and the remainder of the agreement will remain enforceable. However, the severability clause in the Wacker Bid contains a carve-out for the provision excluding those employee related liabilities the effect of which is that if the provision is determined to be unenforceable then arguably the entire agreement could be determined to be unenforceable.

Monitor's Eighth Report, Appendix A, pp. 3 - 4

68. The Timminco Entities considered this difference to create additional closing risk with respect to the Wacker Bid as compared to the QSI Agreement. The Timminco Entities were concerned that Wacker might refuse to close if there was an outstanding challenge by the CEP to the enforceability of that exclusion of liabilities. This concern was particularly acute given that CEP had indicated to the Court, at the time that the

Stalking Horse Agreement was approved, that it intended to oppose the provision excluding the employee related liabilities.

May 9 Affidavit, para 23

Monitor's Eighth Report, Appendix A, pp. 3 - 4

Kalins Cross, Q. 229, pp. 81 - 82, SMR, Tab 1

(c) **The condition in the Wacker Bid requiring that Anti-Trust approvals be obtained**

69. The conditions precedent to closing in the Wacker Bid and the QSI Agreement differ in that the QSI Agreement does not contain a condition precedent requiring any anti-trust approvals prior to closing. The Timminco Entities understand that no such approvals are necessary. By comparison, the Wacker Bid contains a condition precedent requiring that anti-trust approvals have been obtained prior to closing. The Timminco Entities understand that approvals would be required from a number of jurisdictions around the world. The Timminco Entities requested that Wacker narrow the condition or insert a deadline for obtaining such approvals, but Wacker was unwilling to do so.

Kalins Cross, Q. 229, p. 83, SMR, Tab 1

(4) Additional Criteria for Approval under Section 36 of the CCAA

70. In addition to the factors set out in subsection 36(3) discussed above, subsection 36(7) of the CCAA sets out the following restrictions on disposition of assets within CCAA proceedings:

> 36 (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.
>
> *CCAA*, s. 36(7)
>
> Section 36(7) references paragraphs 6(4)(a) and (5)(a), which appears to be a drafting error. It is submitted that this section should read 6(5)(a) and (6)(a)

71. Justice Pepall considered section 36(7) of the CCAA in *Re Canwest Global Communications Corp.* where (although she held that section 36 was not applicable to the facts of that case) she was satisfied by confirmation by counsel for the debtors of compliance with section 36(7), and asked the Monitor to report to the Court on the status of those payments should a compromise or arrangement be made in future.

> *Re Canwest Global Communications Corp.* [2009] O.J. No. 4788 (S.C.J. [Comm. List]), Applicants' Book of Authorities, Tab 7 at para 42

72. The Timminco Entities intend to continue making the payments required under sections 6(5)(a) and 6(6)(a) of the CCAA in the ordinary course.

> *CCAA*, s. 6(5)(a)
>
> *Bankruptcy and Insolvency Act*, R.S.C. 1985, B-3, as amended [BIA] s. 81.3, s. 81.4 & s. 136(1)(d)
>
> May 9 Affidavit, Motion Record, Tab 2, at para. 96

73. The additional factors and restrictions under section 36(4) and (5) of the CCAA are not applicable in this case as QSI and the Timminco Entities are not related persons within the meaning of the CCAA.

> May 9 Affidavit, Motion Record, Tab 2, at para. 94

(4) Vesting the QSLP Equity in QSI Free and Clear of Transfer Restrictions

74. Section 10 of the Limited Partnership Agreement and section 6 of the Shareholders Agreement prohibit BSI from effecting any transfer, sale or assignment of QSLP units and QSGP shares, respectively, until October 1, 2015, without the prior written permission of DCC. DCC has indicated that it will not consent to the transfer of the QSLP Equity on terms acceptable to QSI. Accordingly, the Timminco Entities are requesting that the Silicon Sale Order vest the QSLP Equity in QSI free and clear of such restrictions.

> May 9 Affidavit, Motion Record, Tab 2, at paras. 39, 40, 53 and 58
>
> Rinaldi Affidavit, Responding Motion Record of Dow Corning Corporation, at paras. 53 - 54

75. The CCAA court has the authority to vest the assets of a debtor in a purchaser free and clear of any security, charge or other restriction.

> CCAA, s. 36(6)

76. Prior to the amendments to the CCAA and the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**") in 2009, the Court fashioned a remedy using its inherent jurisdiction to terminate a unanimous shareholder agreement where it was necessary to give effect to a reorganization. In *Fiber Connections*, one shareholder was opposing a change in the share structure of a company that was required to effect a restructuring. Justice Campbell was clearly motivated to avoid a situation where the recovery to the debtor's creditors would be prejudiced as a result of a shareholder, whose opposition may have

been motivated by a desire to obtain a tactical advantage, exercising its right to withhold its consent to an amendment to the U.S.A.

> *Fiber Connections Inc. v. SVCM Capital Ltd*, (2005), 10 C.B.R. (5th) 192 (Ont. S.C.J.), leave to appeal granted (2005), 10. C.B.R. (5th) 201 (ONCA) but later abandoned [*Fiber Connections*] Applicants' Book of Authorities, Tab 8 at paras. 18 - 39

77. In the case of the Timminco Entities, the QSLP Equity (and the associated entitlement to an allocation of the silicon metal production pursuant to the Supply Agreement) represents all or substantially all of the value of BSI's assets and the transfer of the QSLP Equity is an essential feature of the QSI Agreement without which there is no sale transaction. In order to maximize the recovery to the Timminco Entities' creditors it is necessary to convey the QSLP Equity notwithstanding the transfer restrictions included in the Limited Partnership Agreement and the Shareholders Agreement. Allowing DCC to thwart the QSI Transaction by insisting on the transfer restrictions would have the effect of increasing DCC's leverage with respect to the Bidders thereby allowing DCC to effectively elevate its unsecured claims to a secured status because it would allow DCC to insist that any purchaser acquire the Timminco Entities' legacy obligations under the Framework Agreement.

> Kalins Cross, Q. 90 - 102, p. 33 - 36, SMR, Tab 1
>
> *Fiber Connections*, Applicants' Book of Authorities, Tab 8 at paras 41, 42

B. ASSIGNMENT OF THE QSLP AGREEMENTS, AND THE WACKER AGREEMENT SHOULD BE APPROVED

(1) The Court has Jurisdiction to Order the Assignment of Agreements

78. As described above, pursuant to the QSI Agreement, the Timminco Entities are obligated to use commercially reasonable efforts to obtain certain consents and approvals. To the extent that those consents or approvals have not been obtained, the Timminco Entities are obligated to apply to Court for an order approving the assignment of such agreements. As the DCC Consent and the Wacker Consent have not been granted, the Timminco Entities are seeking an Order assigning the QSLP Agreements and the Wacker Agreement to QSI.

May 9 Affidavit, Motion Record, Tab 2, at para. 35

79. Section 11.3 of the CCAA authorizes the Court to make an order assigning the rights and obligations of a debtor company under an agreement to any person who is specified by the Court and who agrees to the assignment.

CCAA, s. 11.3

80. Prior to the enactment of section 11.3 in September 2009, courts had exercised their discretion pursuant to their authority under section 11 of the CCAA to order the assignment of agreements over the objection of a counterparty and to permanently stay the termination of the agreement by reason of the assignment or any insolvency defaults that arose in the context of the CCAA proceedings.

Re Playdium Entertainment Corp. (2001), 31 C.B.R. (4th) 302, Applicants' Book of Authorities, Tab 10 [*Playdium*], as supplemented at 31 C.B.R. (4th) 309 (Ont. Sup.

Ct. Jus.), Applicants' Book of Authorities, Tab 11 [*Playdium Supplemental Reasons*] at para. 32

Re Nexient Learning Inc., [2009] O.J. No. 5507 (S.C.J.), Applicant's Book of Authorities, Tab 12 at paras. 53, 54

Re Hayes Forest Services Ltd., [2009] B.C.J. No. 1725 (S.C.), Applicant's Book of Authorities, Tab 13 at paras. 32, 51

81. More recently, courts have exercised their authority pursuant to section 11.3 to order the assignment of a debtor company's rights and obligations under a contract notwithstanding a restriction or prohibition on assignment contained in the contracts. In addition, the courts have ordered that all contractual counter-parties are deemed to have waived all existing or previously committed non-monetary defaults under the contracts.

Re White Birch Paper Holding Company (2010), 72 C.B.R. (5th) 63 (Que. S.C.), Applicant's Book of Authorities, Tab 14 at para. 16

Re Sterling Shoes Inc. (30 April 2012), Vancouver No. S117081 (B.C.S.C.), Applicant's Book of Authorities, Tab 15 at para. 6

82. An analogous provision to section 11.3 of the CCAA was included in parallel amendments made to the *BIA* in 2009.

BIA, s. 84.1

83. In *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, the Alberta Court of Appeal upheld the decision of a chambers judge granting an order pursuant to section 84.1 of the BIA authorizing the assignment of an auto dealership agreement over the objections of the non-debtor counterparty to the agreement:

> In summary, the chambers judge concluded the dealership agreement was assignable by reason of its nature based on an assessment of evidence showing the proposed assignee would be able to discharge the dealer's obligations thereunder and upon concluding that it was appropriate to assign the agreement based on evidence that Ford unreasonably withheld its consent, that the effect of earlier breaches of the agreement would be remedied through its assignment, and that Ford's rights and remedies under the agreement would carry on unchanged.
>
> *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, Applicants' Book of Authorities, Tab 16 at para. 71

(2) *The Criteria for Assignment of the QSLP Agreements and the Wacker Agreement are Satisfied*

84. In considering whether to order the assignment of the debtor company's rights and obligations under an agreement, the CCAA sets out a non-exhaustive list of factors a court shall consider:

> (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.
>
> CCAA, s. 11.3(3)

Monitor Approval

85. The QSI Agreement provides for the assignment of the QSLP Agreements and the Wacker Agreement either pursuant to any required consent or, where such consent is not forthcoming, pursuant to the Assignment Order. In the Seventh Report, the

Monitor supports the Timminco Entities' request for approval of the QSI Agreement and states that it will be issuing a separate report dealing specifically with the issue of the Assignment Order.

Monitor's Seventh Report, para. 51 and 58

Assignee's Ability to Perform

86. QSI will be able to perform its obligations under the QSLP Agreements.

87. DCC is opposing the assignment of the QSLP Agreements on the basis that QSI is an inappropriate assignee because it is an off-shore entity incorporated for the purpose of acquiring the Purchased Assets. DCC also objects to the absence of a guarantee from QSI's parent company, the Guarantor. DCC's objections ignore the practical and legal realities of the QSI Transaction.

88. In essence, pursuant to the QSI Transaction, QSI will become a limited partner of QSLP and a shareholder of QSGP. As such, there are limited financial obligations that QSI will be required to satisfy pursuant to the QSLP Agreements.

89. QSI is a wholly-owned subsidiary of Globe. Globe and its subsidiaries are among the world's largest producers of silicon metal and silicon-based alloys. As a member of the Globe family of companies, QSI will have access to Globe's human capital and other resources, including experts in silicon metal production. In addition, QSI will have access to liquidity sufficient to fund its business. Globe's principal sources of liquidity are its cash and cash equivalents balance (approximately $152 million as at September 2011), cash flows from operations (approximately $12 million

from consolidated cash flows during the three months ended September 30, 2011), and unused commitments under its existing credit facilities ($48 million). In the ordinary course of business, Globe's subsidiaries borrow funds from Globe affiliates in order to finance working capital requirements and capital expansion programs. According to Mr. Lebowitz, the General Counsel of Globe, Globe will loan QSI the funds it needs to pay the purchase price, fund working capital, and to ensure that future ongoing liabilities are met.

Lebowitz Affidavit, Motion Record, Tab 3, paras. 5 - 8

90. DCC has suggested that the fact that the Timminco Entities obtained a guarantee from Globe of the payment obligations under the Stalking Horse Agreement is evidence that QSI is incapable of performing its obligations under the QSLP Agreements. This suggestion ignores the fact that at the time that the Timminco Entities entered into the Stalking Horse Agreement, QSI had no evidence of assets or its ability to obtain funding from Globe. By comparison, at the time of the assignment of the QSLP Agreements, should they be ordered, QSI will have demonstrated its ability to: (a) obtain funds from Globe in order to provide the DIP Facility to the Timminco Entities; (b) pay the increase to the Deposit to the Monitor; (c) pay a substantial purchase price; and (d) it will own the Purchased Assets.

91. DCC has suggested that the fact that Wacker is not a newly incorporated corporation is evidence that it is a more appropriate assignee. This suggestion ignores the legal effect of the terms of the Wacker Bid. The Wacker Bid, as well as the QSI

Agreement, contains provisions that permit the purchaser to assign the benefit of all or a portion of the agreement to an affiliate. Further, the Wacker Bid and the QSI Agreement provides that third-parties are not entitled to rely upon the agreements.

> **8.6 Benefit of Agreement**
>
> This Agreement shall enure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns. Each Party intends that this Agreement shall not benefit or create any right or cause of action in or on behalf of any Person other than the Parties and their successors and permitted assigns, and no Person, other than the Parties and their successors and their permitted assigns, shall be entitled to rely on the provisions hereof in any action, suit, proceeding, hearing or other forum.

Sections 8.6 and 8.11 of the Wacker Bid, Motion Record, Tab 2B

May 9 Affidavit, Motion Record, Tab 2, at para. 2

Lebowitz Affidavit, Tab 3 at paras. 5 - 6

<u>It is Appropriate to Assign the Rights and Obligations of the Timminco Entities to QSI under the QSLP Agreements and the Wacker Agreement</u>

92. DCC is opposing the assignment of the QSLP Agreements on the basis that QSI is not taking assignment of the Framework Agreement and the indemnity obligations set forth therein. The Timminco Entities submit that it is appropriate to assign the rights and obligations under the QSLP Agreements to QSI without QSI taking assignment of the Framework Agreement.

93. *In re AbitibiBowater Inc.*, the United States Bankruptcy Court for the District of Delaware considered the factors to be taken into account when determining whether

related agreements constitute a single integrated agreement in the context of a rejection motion. That Court authorized the rejection (or repudiation) of an option agreement over the objections of the counter-party who had argued that it was an integrated agreement with a partnership agreement related to the same undertaking (a newsprint facility). Based on the evidence and the applicable law, the Court agreed with the debtors that "the two agreements, while related, were intended to be separate agreements".

> *In re AbitibiBowater Inc.* (2009), 418 B.R. 815 (Bankr. D. Del.) [*AbitibiBowater Delaware*], Applicants' Book of Authorities, Tab 17 at 824

94. The Delaware Court considered a number of factors, including that the agreements were executed at different times, related to different subject matters, were not between the same parties, contained integration clauses (i.e., entire agreement clauses), one agreement would continue, even if the other is terminated, the agreements were not consideration for one another, different choice of law and dispute resolution provisions were contained in each agreement, and subsequent amendments to each agreement were designed to keep the economics of the two agreements separate. Judge Carey observed that:

> Many transactions involve the simultaneous negotiation and execution of multiple agreements embodied in multiple documents, which are *almost always related*, but relatedness alone does not warrant the undoing of a structure purposefully chosen by the parties.

> While no single item here may be determinative of the issue, the above considerations, taken together, lead me to conclude that the parties intended to, and did, make separate agreements.
>
> [Emphasis in original]

AbitibiBowater Delaware, Applicants' Book of Authorities, Tab 17 at 828

95. The Limited Partnership Agreement, the Shareholders Agreement, and the Supply Agreement are each integral to the ongoing business of Québec Silicon; whereas the Framework Agreement and the other agreements (together, the "**Alleged Joint Venture Agreements**") entered into between the Timminco Entities and DCC are not. DCC has suggested that the QSLP Agreements, and other agreements that relate to the Québec Silicon joint venture (collectively, the "**Other Agreements**") the Alleged Joint Venture Agreements constitute one overall joint venture agreement.

96. The Limited Partnership Agreement and the Shareholder Agreement are inseparable from Quebéc Silicon itself and define the nature of the equity interests in the joint venture. The Limited Partnership Agreement regulates the business, affairs, governance and management of Québec Silicon and governs the relationship between DCC Canada and BSI with respect thereto. The Limited Partnership Agreement provides how profits and losses are to be allocated between DCC Canada and BSI based on their respective equity interests in QSLP, sets forth the obligations of BSI and DCC Canada to make capital contributions to QSLP in certain circumstances, and provides guidelines and procedures for the conduct of meetings and voting by partners. The Shareholder Agreement provides for the conduct of the business and

affairs of QSGP and governs the relationship between the shareholders, including the composition and decision-making of the board of directors of QSGP.

97. The Supply Agreement sets out the pricing, payment, shipment, storage and delivery terms with respect to the silicon metal produced by QSLP. Under the Supply Agreement, QSLP must produce silicon metal according to the specifications of DCC Canada and BSI, and DCC Canada and BSI are entitled to a supply allocation of QSLP's silicon metal production that is proportionate to its equity interest in QSLP, subject to certain adjustments.

98. The provisions of the Framework Agreement are largely spent other than certain legacy obligations, such as the indemnities, which relate to the amount of consideration paid for the 49% interest in Québec Silicon and the obligations to complete the HP2 Severance Transaction.

99. Upon examining the QSLP Agreements, the Framework Agreement and the Alleged Joint Venture Agreements, it is clear that these documents do not comprise one entire agreement for, *inter alia*, the following reasons:

(a) **The agreements were executed at different times:** the Framework Agreement was entered into on August 10, 2010; the Business Transfer Agreement and other Alleged Joint Venture Agreements were entered into on September 30, 2010; and finally the QSLP Agreements were entered into on October 1, 2010;

(b) **The agreements have different purposes:** the purpose of the Framework Agreement was to provide a "roadmap" for the creation of the joint venture and the consideration to be paid by DCC to acquire its indirect 49% interest therein. The purpose of the Business Transfer Agreement, the Pension Transfer Agreement and the Intellectual Property Assignment Agreement was to effect the transfer of assets and obligations to QSLP, prior to the DCC affiliate's acquisition of its 49% interest therein. By contrast, the Limited Partnership Agreement and the Shareholders Agreement define the nature of the QSLP Equity and govern the ongoing relationship between the partners of QSLP and shareholders of QSGP, as applicable; and the purpose of the Supply Agreement is to set forth the terms upon which the joint venture produces and supplies silicon metal and allocates its output between BSI and DCC Canada;

(c) **The agreements are not between the same parties:** DCC, Timminco and BSI are the parties to the Framework Agreement; BSI, DCC Canada and QSGP are the parties to the Limited Partnership Agreement; BSI, DC Global and QSGP are parties to the Shareholders Agreement; and QSLP, DCC (subsequently assigned to DCC Canada) and BSI are the parties to the Supply Agreement;

(d) **Entire agreement clauses**: the Shareholders Agreement and the Limited Partnership Agreement each contain entire agreement clauses that, apart

from a cross reference to each other, expressly indicate they "constitute the complete and exclusive statement of the agreements between them with respect to their relationship as" shareholders and partners; the Supply Agreement contains an entire agreement clause that, apart from a cross reference to the Limited Partnership Agreement, "constitutes the entire agreement between the parties with respect to the subject matter" thereof;

(e) **One Agreement continues, even if the other is terminated:** QSLP Agreements are not cross defaulted upon a failure to perform an obligation under, or a termination of, the Alleged Joint Venture Agreements;

(f) **Consideration:** the Framework Agreement, the Business Transfer Agreement and the other Alleged Joint Venture Agreements did not form part of the consideration for the QSLP Agreements;

(g) **The Agreements have different choice of law and dispute resolution provisions:** the Framework Agreement is governed by Québec law and disputes are to be resolved by courts located in Montreal; the Limited Partnership Agreement and the Shareholders Agreement are governed by Québec law and provide for binding arbitration to resolve disputes; and the Supply Agreement is governed by New York law and disputes are to

be resolved by federal or state courts located in New York, New York; and

(h) **No operational relationship:** there is no operational interdependence between the obligations contemplated by the Framework Agreement and the QSLP Agreements. The business of the partnership can operate independently of the Framework Agreement.

May 9 Affidavit, Motion Record, Tab 2 at paras. 30, 41 - 62

Amended and Restated Limited Partnership Agreement, Motion Record, Tab 2G, articles 19, 21.5

Shareholders Agreement, Motion Record, Tab 2H, Articles 12, 13.5

Framework Agreement, Motion Record, Tab 2D, articles 11.5, 11.6, 11.8

Supply Agreement, Motion Record, Tab 2I, Articles 10, 12.5, 12.8

100. For the foregoing reasons, it is respectfully submitted that the Court should find that the QSLP Agreements and the Alleged Joint Venture Agreements are separate agreements and that it is appropriate for this Court to make an order assigning the rights and obligations of the Timminco Entities under the QSLP Agreements to QSI.

101. Wacker is opposing the assignment of the Wacker Agreement on the basis that the proposed assignment does not contemplate the "entire supply relationship between Wacker and BSI." The May 9 Affidavit defines the Wacker Agreement "as amended." The draft form of order defines the Wacker Agreement in accordance with the May 9 Affidavit. The Timminco Entities are not seeking to assign a portion of the Wacker Agreement.

May 9 Affidavit, Motion Record, Tab 2 at para. 63

Widmer Affidavit, Motion Record, para 24

102. Wacker suggests that Wacker must be compensated for the "2012 Backlog Quantity" as a condition precedent to any assignment or in the alternative QSI must agree to deliver such product. Section 11.3(4) of the CCAA requires that monetary defaults must be satisfied. It cannot be that an alleged existing non-monetary breach of contract automatically gives rise to a monetary default. Otherwise section 11.3 would be unworkable and the purpose of the CCAA would be frustrated. Further, if Wacker is correct and the Wacker Agreement has been amended to provide for delivery of certain additional quantities in 2013 and 2014, it would be improper to require that those obligations be satisfied by way of payment.

Widmer Affidavit, Motion Record, para 25

CCAA, s. 11.3(4)

103. For the foregoing reasons, it is respectfully submitted that it is appropriate for this Court to make an order assigning the rights and obligations of the Timminco Entities under the Wacker Agreement to QSI.

(5) Assignment of QSLP Agreements and Wacker Agreement in QSI Free of Pre-Closing Defaults

104. Section 11.3(4) of the CCAA provides that the Court may not make an order assigning the rights and obligations of the debtor company under an agreement 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 the CCAA or the debtor company's failure to perform a non-monetary obligation – will be remedied on or before the day fixed by the court.

CCAA, s. 11.3(4)

105. Industry Canada states the purpose of subsection 11.3(4) the CCAA as follows:

> Subsection (4) is amended to ensure that the agreement may only be assigned if the court is satisfied that, if a monetary default has occurred, it will be remedied within a time frame set by the court. It also clarifies that monetary defaults do not include those that arise merely by virtue of the fact that the debtor company is insolvent or failed to perform a non-monetary obligation. This amendment is required to ensure that agreements may not be drafted so as to be rendered unassignable, or assignable only at excessive cost, thereby defeating the purpose of the provision and providing the other party to the agreement a means of obtaining greater recovery than can be expected by other creditors of the same class. [Emphasis added]

Office of the Superintendent of Bankruptcy Canada, Bill C-12: Clause by clause Analysis:
<http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01985.html#a70>
Applicants' Book of Authorities, Tab 18

106. Prior to the enactment of section 11.3 of the CCAA, the Courts relied on their discretion pursuant to section 11 of the CCAA to, among other things, prevent counterparties to agreements with debtor companies from relying on a breach of a contract with the debtor company to terminate the contract and to grant permanent stays surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring.

Playdium, Applicants' Book of Authorities, Tab 10

107. In *Playdium*, Justice Spence ordered the assignment of a contract between the debtor company and a third party and ordered that the contract counterparty was entitled to retain its rights against the debtor company in respect of claims relating to the pre-assignment period and entitled to continue to assert, in respect of the period from and after assignment, the same rights against the assignee as it had against the debtor company, including rights to terminate for default, except the insolvency default which occasioned and was the subject of the CCAA stay. At para. 32 of the supplementary reasons in *Playdium Supplemental Reasons* Justice Spence stated:

> In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by the Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the Court should not take such a restrictive view of the s. 11(4) jurisdiction. [Emphasis added]
>
> *Playdium Supplemental Reasons*, Applicants' Book of Authorities, Tab 11 at para. 32

108. This reasoning was endorsed by Justice Tysoe of the British Columbia Supreme Court who stated as follows in *Re. Doman Industries Ltd.*:

> The law is clear that the court has the jurisdiction under the CCAA to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of a contract with the debtor company to terminate the contract. It is also my view that the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring.
>
> *Re Doman Industries Ltd.*, [2003] B.C.J. No. 562, Applicants' Book of Authorities, Tab 19 at para 15

109. It is appropriate and necessary to vest the Purchased Assets, including the QSLP Agreements, in QSI free of pre-closing non-monetary defaults. The alternative could have a tremendous detrimental impact on the value of BSI's assets and the recovery realized by its creditors.

C. THE HP2 SEVERANCE TRANSACTION AND THE VESTING OF THE DUST COLLECTOR IN QSGP SHOULD BE APPROVED

110. As described in greater detail in the May 9 Affidavit, the Timminco Entities are seeking approval of the HP2 Severance Transaction.

> May 9 Affidavit, Motion Record, Tab 2 at paras. 84 - 90

111. The Timminco Entities submit that the HP2 Severance Transaction represents a completion of an internal corporate reorganization that commenced in 2010 and that is not subject to the requirements of section 36 of the CCAA which applies only to asset sales being completed "outside the ordinary course of business".

> CCAA, s. 36(1)

112. Justice Pepall held in *Re Canwest Global Communications Corp.* that Section 36 of the CCAA does not apply and does not prohibit internal reorganizations done in the ordinary course. The analysis as to whether section 36 applies to an internal reorganization is a contextual one.

> *Re Canwest Global Communications Corp.*, [2009] O.J. No. 4286 (S.C.J. [Comm. List]) [*Canwest Global Communications*], Applicants' Book of Authorities, Tab 20 at para. 24

113. In *Re Canwest Global Communications Corp.* Justice Pepall identified the following several factors that formed the basis for the conclusion that section 36 did not apply to the internal reorganization sought to be approved:

(a) the transaction realigned services and assets within a company or group of related companies;

(b) the transaction involved steps within a larger corporate reorganization; and

(c) the transaction provided a framework for the debtor companies to properly restructure inter-entity arrangements for the benefit of their respective stakeholders.

> *Canwest Global Communications*, Applicants' Book of Authorities, Tab 20 at paras. 24 and 36

114. All of the foregoing factors apply to the HP2 Severance Transaction and support the conclusion that section 36 is not triggered. The HP2 Severance Transaction is the last remaining step of a larger transfer of BSI's silicon metals production business to

QSLP that happened on September 30, 2010. Its purpose is to ensure that (a) BSI continues to have access to its facilities and establish access rights and other servitudes against and in favour of the HP2 Property, and (b) to ensure that QSLP has the necessary access and leasehold or ownership interest in the Dust Collector located on the HP2 Property.

May 9 Affidavit, Motion Record, Tab 2 at paras. 84 - 90

115. The HP2 Severance Transaction is the final step in a corporate reorganization and formation of the joint venture, QSLP, and is, therefore, in the ordinary course of business of BSI and is not subject to the requirements of section 36 of the CCAA.

May 9 Affidavit, Motion Record, Tab 2 at para. 97

D. THE SUBSEQUENT DIP AMENDMENT SHOULD BE APPROVED

116. As described in greater detail above, the Timminco Entities are seeking the Subsequent DIP Amendment Order approving an increase in the DIP Facility by an amount of $2,500,000 and amending the Order of Justice Morawetz dated February 2, 2012 (the "**DIP Order**") accordingly.

May 9 Affidavit, Motion Record, Tab 2 at para. 68

117. Where a DIP facility has previously been approved and an increase in the amount available under the DIP facility is sought, courts will consider whether the criteria in s. 11.2(4) of the CCAA have been met.

Re PCAS Patient Care Automation Services Inc., 2012 ONSC 2423 [Comm. List], [*PCAS*], Applicants' Book of Authorities, Tab 21 at para. 4

118. Section 11.2(4) of the CCAA sets out the following factors to be considered when granting DIP financing.

> (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.
>
> *CCAA, 11.2(4)*

119. This Court considered these factors when it approved the DIP Facility and granted the DIP Order. The Timminco Entities submit that these criteria continue to be satisfied by the Timminco Entities.

120. Granting the Subsequent DIP Amendment will provide the Timminco Entities with the flexibility and stability to continue working towards the closing of the QSI Transaction and additional breathing room should the QSI Transaction not close by June 8, 2012, which will enhance the prospects of a successful asset sale for the benefit of the Timminco Entities' stakeholders.

CCAA, 11.2(4)

PCAS, Applicants' Book of Authorities, Tab 24 at para. 4

May 9 Affidavit, Motion Record, Tab 2 at paras. 68 – 70

121. The Timminco Entities do not believe that any creditor will be materially prejudiced by the granting of the Subsequent DIP Amendment Order and the Monitor supports the granting of this order.

CCAA, 11.2(4)

Monitor's Seventh Report, at para. 56

122. As required by s. 11.2 of the CCAA, all creditors likely to be affected by the requested increase in the DIP Facility have been notified of this motion and the Timminco Entities are unaware of any opposition to the granting of the Subsequent DIP Amendment Order.

CCAA, 11.2

123. For the foregoing reasons, it is respectfully submitted that it is appropriate for this Court to grant the Subsequent DIP Amendment Order.

PART V - ORDER REQUESTED

124. The Timminco Entities therefore request:

(a) An Order:

(i) approving the QSI Agreement and the QSI Transaction contemplated therein;

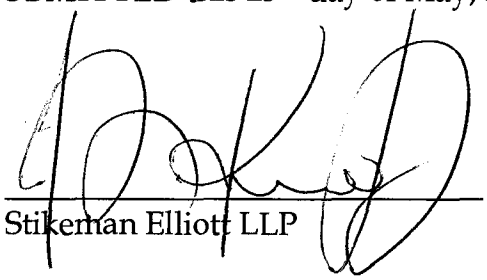
(ii) vesting all of the Purchased Assets in QSI free and clear of all restrictions;

(iii) assigning the QSLP Agreements and the Wacker Agreement to QSI;

(iv) approving the HP2 Severance Transaction; and

(b) An Order approving the Subsequent DIP Amendment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of May, 2012.



Stikeman Elliott LLP

Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

TAB	DOCUMENT
1.	*Consumers Packaging Inc. (Re)* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.)
2.	*Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List])
3.	*Canwest Publishing Inc. (Re)* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List])
4.	*White Birch Paper Holding Co. (Re),* 2010 QCCS 4915
5.	*AbitibiBowater Inc. (Re),* 2010 QCCS 1742
6.	*Grant Forest Products Inc. (Re),* 2010 ONSC 1846 [Comm. List]
7.	*Canwest Global Communications Corp. (Re)* [2009] O.J. No. 4788 (S.C.J. [Comm. List])
8.	*Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 192 (Ont. S.C.J.), leave to appeal granted (2005), 10 C.B.R. (5th) 201 (Ont. C.A.) at para. 20 but later abandoned
9.	*Playdium Entertainment Corp. (Re)* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Comm. List])
10.	*Playdium Entertainment Corp. (Re)* (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Comm. List])
11.	*Nexient Learning Inc. (Re),* [2009] O.J. No. 5507 (S.C.J.)
12.	*Hayes Forest Services Ltd. (Re),* [2009] B.C.J. No. 1725 (S.C.)
13.	*White Birch Paper Holding Company (Re)* (2010), 72 C.B.R. (5th) 63 (Que. S.C.)
14.	*Sterling Shoes Inc. (Re)* (30 April 2012), Vancouver No. S117081 (B.C.S.C.)
15.	*Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.,* 2011 ABCA 158

16. *In re AbitibiBowater Inc.* (2009), 418 B.R. 815 (Bankr. D. Del.)

17. Office of the Superintendent of Bankruptcy Canada, Bill C-12: Clause by clause Analysis: <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01985.html#a70>

18. *Doman Industries Ltd. (Re),* [2003] B.C.J. No. 562 (S.C.)

19. *Canwest Global Communications Corp. (Re),* [2009] O.J. No. 4286 (S.C.J. [Comm. List])

20. *PCAS Patient Care Automation Services Inc., (Re)* 2012 ONSC 2423 [Comm. List]

SCHEDULE "B"
RELEVANT STATUTES

Bankruptcy and Insolvency Act
R.S.C. 1985, c. B-3

Security for unpaid wages, etc. — bankruptcy

81.3 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of $2,000 — less any amount paid for those services by the trustee or by a receiver — by security on the bankrupt's current assets on the date of the bankruptcy.

Commissions

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the period referred to in that subsection, are deemed to have been earned in that period.

Security for disbursements

(3) The claim of a travelling salesperson who is owed money by a bankrupt for disbursements properly incurred in and about the bankrupt's business during the period referred to in subsection (1) is secured, as of the date of the bankruptcy, to the extent of $1,000 — less any amount paid for those disbursements by the trustee or by a receiver — by security on the bankrupt's current assets on that date.

Rank of security

(4) A security under this section ranks above every other claim, right, charge or security against the bankrupt's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2 and amounts referred to in subsection 67(3) that have been deemed to be held in trust.

Liability of trustee

(5) If the trustee disposes of current assets covered by the security, the trustee is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current

assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the trustee.

Claims of officers and directors

(6) No officer or director of the bankrupt is entitled to have a claim secured under this section.

Non-arm's length

(7) A person who, in respect of a transaction, was not dealing at arm's length with the bankrupt is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the trustee, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

Proof by delivery

(8) A claim referred to in this section is proved by delivering to the trustee a proof of claim in the prescribed form.

Definitions

(9) The following definitions apply in this section.

"compensation"

"compensation" includes vacation pay but does not include termination or severance pay.

"receiver"

"receiver" means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

Security for unpaid wages, etc. — receivership

81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of $2,000 — less any amount paid for those services by a

receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

Commissions

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the six-month period referred to in that subsection, are deemed to have been earned in those six months.

Security for disbursements

(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person's business during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of $1,000 — less any amount paid for those disbursements by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

Rank of security

(4) A security under this section ranks above every other claim, right, charge or security against the person's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2.

Liability of receiver

(5) If the receiver takes possession or in any way disposes of current assets covered by the security, the receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the receiver.

Claims of officers and directors

(6) No officer or director of the person who is subject to a receivership is entitled to have a claim secured under this section.

Non-arm's length

(7) A person who, in respect of a transaction, was not dealing at arm's length with a person who is subject to a receivership is not entitled to have a claim

arising from that transaction secured by this section unless, in the opinion of the receiver, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

Proof by delivery

(8) A claim referred to in this section is proved by delivering to the receiver a proof of claim in the prescribed form.

Definitions

(9) The following definitions apply in this section.

"compensation"

"compensation" includes vacation pay but does not include termination or severance pay.

"person who is subject to a receivership"

"person who is subject to a receivership" means a person any of whose property is in the possession or under the control of a receiver.

"receiver"

"receiver" means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

...

Assignment of agreements

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.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only rights and obligations in relation to the business may be assigned.

Exceptions

(3) 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 date of the bankruptcy;

(b) an eligible financial contract; or

(c) a collective agreement.

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.

Restriction

(5) 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 person's bankruptcy, insolvency or failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

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

...

Priority of claims

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

...

(*d*) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid

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

Restriction — employees, etc.

6.(5) The court may sanction a compromise or an arrangement only if

(*a*) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(*d*) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period

...

6.(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(*a*) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards*

Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament;

...

Interim financing

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

(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

(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

(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.

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.

...

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

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