

**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

MOTION RECORD
(Re Consulting Agreement between Timminco Limited and J. Thomas Timmins)
(Returnable June 4, 2012)

May 7, 2012

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INDEX

TAB	DOCUMENT
1.	Notice of Cross-Motion
2.	Affidavit of Peter A.M. Kalins sworn May 7, 2012

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NOTICE OF CROSS-MOTION

(Returnable June 4, 2012)

(Re Consulting Agreement between Timminco Limited and J. Thomas Timmins)

Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**") will make a motion to a judge presiding over the Commercial List on Monday, June 4, 2012 at 10:00 a.m. or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING:

The motion is to be heard orally.

THE MOTION IS FOR:

1. An Order declaring that Timminco's obligations under the Agreement (as defined below) constitute pre-filing obligations which are stayed by the Initial Order (as defined below) and granting such further and other relief as this Court deems just.

THE GROUNDS FOR THE MOTION ARE:

Background

1. The Applicants' primary business, the production and sale of silicon, is carried on principally through BSI, a Québec-based wholly-owned subsidiary of Timminco. BSI purchases silicon metal produced by Québec Silicon Limited Partnership ("QSLP") for resale to customers in the chemical (silicones), aluminum, and electronics/solar industries. QSLP is a production partnership between BSI and Dow Corning Corporation, of which BSI owns 51%. 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. Timminco also formerly operated a magnesium business through its unincorporated division, Timminco Metals. The Ontario-based manufacturing operations of Timminco Metals were discontinued in June 2008;
2. As a result of severe liquidity issues the Timminco Entities were unable to meet various financial covenants set out in their senior secured credit facility, do not have the liquidity needed to meet their ongoing payment obligations and are thus insolvent;
3. The Timminco Entities were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "CCAA") pursuant to an Order of this Court dated January 3, 2012 (the "Initial Order");
4. The Timminco Entities, in consultation with the Monitor, determined that it was in the best interests of the Timminco Entities and their stakeholders to commence a marketing process for the potential sale of all or substantially all of their assets. Pursuant to the Order of Justice Morawetz dated March 9, 2012, the Timminco Entities commenced and completed the marketing process with respect to all or substantially all of their assets;

5. The Timminco Entities received bids to purchase the assets of BSI only and an auction was conducted on April 24-25, 2012. The Timminco Entities expect to return to Court to seek approval of the successful bid shortly. There were no bids made to purchase any of the assets of Timminco. The assets of Timminco continue to be marketed separately;

The Agreement

6. On September 19, 1996, Timminco entered into an agreement with Mr. Timmins (the "**1996 Agreement**") pursuant to which Timminco agreed to pay Mr. Timmins a "*monthly amount by which \$29,166.66 exceeds the monthly amount to which [Mr. Timmins] is entitled on [Mr. Timmins'] retirement under any pension or retirement plans of [Timminco]*". The monthly payments were to commence on the first day of the month following Mr. Timmins' retirement and terminate only on Mr. Timmins' death (subject to earlier termination due to any breach of obligations by Mr. Timmins);

7. Mr. Timmins retired as Chief Executive Officer of Timminco effective May 28, 2001. Effective the same day, the 1996 Agreement was amended by letter agreement (the "**Letter Agreement**");

8. Pursuant to the Letter Agreement, Timminco agreed to pay Mr. Timmins a monthly amount of \$20,833.33 without further deduction except as may be required by law commencing on July 1, 2001;

9. Since the execution of the Letter Agreement, Timminco has neither sought nor received any consulting services from Mr. Timmins, notwithstanding that Timminco has paid Mr. Timmins approximately \$2,625,000 since then;

10. The benefits conferred on Mr. Timmins under the 1996 Agreement, as amended by the Letter Agreement (the "**Agreement**") are in substance unsecured termination and/or retirement benefits;

11. The provisions of the CCAA and the inherent and equitable jurisdiction of this Court;
12. Rules 1.04, 1.05, 2.03, and 37 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended; and
13. Such further grounds as counsel may advise and this Court may see fit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- 1) the Affidavit of Peter A.M. Kalins sworn May 7, 2012; and
- 2) such further and other materials as counsel may advise and this Court may permit.

May 7, 2012

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

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

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

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

Proceeding commenced at Toronto

**NOTICE OF CROSS-MOTION
(RETURNABLE JUNE 4, 2012)**

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(Applicants)

**AFFIDAVIT OF PETER A.M. KALINS
(Sworn May 7, 2012 re Consulting Agreement between Timminco
Limited and J. Thomas Timmins)**

I, PETER A.M. KALINS, of the City of Toronto, in the Province of Ontario,
MAKE OATH AND SAY:

1. I am the President, General Counsel and Corporate Secretary of the Applicant Timminco Limited ("**Timminco**") and the President, General Counsel and Corporate Secretary, as well as a director of the Applicant Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**") and as such have knowledge of the matters to which I hereinafter depose, except where otherwise stated.

2. This affidavit is sworn:

- (a) In support of a motion by the Timminco Entities for an order declaring that Timminco's obligations under the Agreement (as defined below) constitute pre-filing obligations which are stayed by the Initial Order (as defined below); and
- (b) In response to a motion brought by J. Thomas Timmins pursuant to s. 32(2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as

amended (the "CCAA"), seeking an order that the Agreement not be disclaimed or resiliated.

Background

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

4. As described in greater detail in the affidavit sworn by me on January 2, 2012, in support of the Timminco Entities' application under the CCAA, the Timminco Entities were facing severe liquidity issues. The Timminco Entities are also facing significant pension and environmental legacy costs and financial costs related to large outstanding debts.

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

6. The Timminco Entities were granted protection from their creditors under the CCAA pursuant to the Initial Order of the Ontario Superior Court of Justice dated

January 3, 2012 (the "Initial Order"). FTI Consulting Canada Inc. was appointed as monitor of the Timminco Entities (the "Monitor") in the CCAA proceedings. A copy of the Initial Order is available, together with all other filings in the CCAA proceedings, on the Monitor's website at: <http://cfcanada.fticonsulting.com/timminco>.

7. The Timminco Entities, in consultation with the Monitor, determined that it was in the best interests of the Timminco Entities and their stakeholders to commence a marketing process for the potential sale of all or substantially all of their assets. Pursuant to the Order of Justice Morawetz dated March 9, 2012, the Timminco Entities commenced and completed the marketing process with respect to all or substantially all of their assets.

8. The Timminco Entities received bids to purchase the assets of BSI only and an auction was conducted on April 24-25, 2012. The Timminco Entities expect to return to Court to seek approval of the successful bid shortly. There were no bids made to purchase any of the assets of Timminco. The assets of Timminco continue to be marketed separately.

9. Further details regarding the background to this CCAA proceeding are set out in my affidavit sworn January 2, 2012 and subsequent affidavits sworn by me in these proceedings and, unless relevant to the present motion, are not repeated herein.

Timminco's Obligations under the Agreement Are Pre-Filing Obligations

10. Mr. Timmins was the Chief Executive Officer of Timminco for at least two decades until his retirement in 2001. Mr. Timmins was also Chairman of Timminco's board of directors and a member of several committees thereof. He was also a significant shareholder of Timminco, through his affiliate Timmins Investments Limited, holding approximately 46% of Timminco's outstanding shares at the time of his retirement.

11. On September 19, 1996, Timminco entered into an agreement with Mr. Timmins (the "1996 Agreement") pursuant to which Timminco agreed to pay Mr. Timmins a "monthly amount by which \$29,166.66 exceeds the monthly amount to which [Mr. Timmins] is entitled on [Mr. Timmins'] retirement under any pension or retirement plans of [Timminco]". The monthly payments were to commence on the first day of the month following Mr. Timmins' retirement and terminate only on Mr. Timmins' death (subject to earlier termination due to any breach of obligations by Mr. Timmins).

12. Under the 1996 Agreement, Mr. Timmins was to consult with Timminco "within the limits from time to time of his physical and other abilities...; provided, however, that consultation and advice shall never occupy [Mr. Timmins'] time to such an extent as shall prevent him from devoting the greater portion of his time to other activities".

13. Mr. Timmins retired as Chief Executive Officer of Timminco effective May 28, 2001. Effective the same day, the 1996 Agreement was amended by letter agreement (the "Letter Agreement").

14. Pursuant to the Letter Agreement, Timminco agreed to pay Mr. Timmins a monthly amount of \$20,833.33 without further deduction except as may be required by law commencing on July 1, 2001.

15. The payments under the Letter Agreement constitute the entirety of Mr. Timmins' entitlements from Timminco following his retirement as Chief Executive Officer. Mr. Timmins is not entitled to and is not receiving any other pension, retirement or severance payments from Timminco following his retirement.

16. Under the Letter Agreement, payment of \$20,833.33 is to be made on a monthly basis irrespective of whether the services of Mr. Timmins' had been engaged or are foreseen to be engaged in the future.

17. The Letter Agreement also provided that Timminco would terminate various employment benefits of Mr. Timmins (such as car lease and parking) and would cease

to provide Mr. Timmins with office space and secretarial assistance after September 30, 2001. For all intents and purposes, the Letter Agreement concluded whatever employment relationship remained between Mr. Timmins and Timminco.

18. In connection with the Letter Agreement and his retirement from Timminco, Mr. Timmins executed a Release and Indemnity which provides, in part, as follows:

WHEREAS I have agreed to retire voluntarily as Chief Executive Officer and an employee of Timminco Limited and as a director and/or officer of any subsidiaries of Timminco Limited (hereinafter referred to collectively as "Timminco") effective immediately;

AND WHEREAS I have agreed to accept the consideration described in the attached letter to me from Timminco dated May 28, 2001 and in the agreement between Timminco and me dated as of September 19, 1996 (collectively, the "Retirement Agreement"), in full settlement of any and all claims I may have relating to my employment with Timminco or the termination thereof;

...

I UNDERSTAND AND AGREE that the consideration described above satisfies all obligations of Timminco, arising from or out of my employment with Timminco or the termination of my employment with Timminco, including without limitation obligations pursuant to the Employment Standards Act (Ontario) and the Human Rights Code (Ontario). For the said consideration, I covenant that I will not file any claims or complaints under the Employment Standards Act (Ontario) or the Human Rights Code (Ontario);

[Emphasis in bold added]

19. I am advised by Nancy Ramalho of Stikeman Elliott LLP, counsel to the Timminco Entities in these CCAA proceedings, that in exchange for payments over and above those required by statute, releases and indemnities in respect of claims relating to the employee's employment and termination are standard provisions for settlement agreements in respect of an individual's termination of employment.

20. Following his retirement in May 2001, Mr. Timmins remained a member of Timminco's board of directors until October 2007 and served as a member of several board committees until that time, including the Strategic Committee of the board from June 2003 until October 2007. Mr. Timmins received director fees and was reimbursed for his expenses in connection with his services as a member of the board of directors of Timminco and its various committees.

21. I joined Timminco as General Counsel and Corporate Secretary in September 2007. I am not aware of any instances of Timminco seeking or receiving any consulting services from Mr. Timmins since that date.

22. I made enquiries with several current and former Timminco executives and members of the board of directors with respect to Mr. Timmins' claim that he continued to provide consulting services to Timminco following his retirement in May 2001.

23. Among others, I made enquiries of Mr. Tim Pretzer who, after joining Timminco in July 1998, served as President and Chief Operating Officer from April 2003 until August 2005 and as President - Magnesium Division from September 2005 to August 2007. Mr. Pretzer informed me that he is not aware of any consulting services being rendered by or requested of Mr. Timmins and that he did not at any time seek Mr. Timmins' consulting services after Mr. Timmins' retirement and during Mr. Pretzer's employment with Timminco.

24. I also made enquiries of Mr. Keith D'Souza, who has held various officer positions with Timminco, including Corporate Secretary & Director - Human Resources from May 2001 and Vice-President and Secretary from June 2004 until May 2007. Mr. D'Souza informed me that he is not aware of any consulting services being rendered by or requested of Mr. Timmins and that he did not at any time seek Mr. Timmins' consulting services after Mr. Timmins' retirement and during Mr. D'Souza's employment with Timminco. Mr. D'Souza further informed me that his only dealings with Mr. Timmins following Mr. Timmins' retirement were in the context of meetings

of or communications with Timminco's board of directors or Mr. Timmins' relationship as a shareholder of Timminco, through his affiliate Timmins Investments Limited.

25. I also made enquiries of Dr. Heinz C. Schimmelbusch, who has been Chairman of Timminco's board of directors since April 2003, and served as Chief Executive Officer from April 2003 until September 2005 and again from August 2007 until August 2011. Dr. Schimmelbusch informed me that he has no recollection of Timminco or the board of directors of Timminco seeking or receiving any consulting advice from Mr. Timmins following his retirement in May 2001.

26. I also made enquiries of Mr. Arthur R. Spector, who has been a member of Timminco's board of directors since April 2003, served as Vice-chairman of the board from March 2004 until December 2008, Interim Chief Financial Officer from October 2004 until April 2005, and a member of the Strategic Committee of the board from June 2003 until October 2007. Mr. Spector informed me that he has no recollection of Timminco or the board of directors of Timminco seeking or receiving any consulting advice from Mr. Timmins following his retirement in May 2001. Mr. Spector further informed me that his only dealings with Mr. Timmins following Mr. Timmins' retirement were in the context of meetings or communications of Timminco's board of directors or the Strategic Committee of the board of directors.

27. I also made enquiries of Mr. Mickey M. Yaksich, who has been a member of Timminco's board of directors since 1998. Mr. Yaksich informed me that he has no recollection of Timminco or the board of directors of Timminco seeking or receiving any consulting advice from Mr. Timmins following his retirement in May 2001. Mr. Yaksich further informed me that his only dealings with Mr. Timmins following Mr. Timmins' retirement were in the context of meetings or communications of Timminco's board of directors or the Strategic Committee of the board of directors.

28. I have also searched Timminco's records for any correspondence or reports containing consulting advice from Mr. Timmins following his retirement in May 2001 and did not locate any such documents.

29. Since the execution of the Letter Agreement, Timminco paid Mr. Timmins approximately \$2,625,000.

30. The benefits conferred on Mr. Timmins under the 1996 Agreement, as amended by the Letter Agreement (the "Agreement") are in substance unsecured termination and/or retirement benefits. The proper characterization of the Agreement is apparent from, among other things, the following attributes or characteristics:

- (a) the amount of Mr. Timmins' monthly fee under the 1996 Agreement was essentially a "top up" to any other retirement and pension benefits that Mr. Timmins would receive from Timminco;
- (b) the "consulting" term of the 1996 Agreement was to commence the first day of the month following Mr. Timmins' retirement;
- (c) under the Agreement, Mr. Timmins is not entitled to and is not receiving any retirement or pension benefits from Timminco following his retirement other than the payments;
- (d) neither the 1996 Agreement nor the Letter Agreement provide for any minimum amount of consulting to be provided by Mr. Timmins in order to be entitled to receive the monthly payments under the Agreement;
- (e) all other employment benefits and provision of services to enable Mr. Timmins to provide employment services to Timminco were terminated by the Letter Agreement; and
- (f) Mr. Timmins has not provided any consulting services to Timminco following his retirement as Chief Executive Officer.

31. For all of the foregoing reasons, the Agreement represents an unsecured pre-filing obligation which is stayed and suspended by the Initial Order.

Mr. Timmins' Application that the Agreement Is Not To Be Disclaimed Should Be Dismissed

32. On March 30, 2012, Timminco delivered a notice of disclaimer of the Agreement to Mr. Timmins. A copy of the notice is attached as Exhibit "E" to the Timmins Affidavit. The notice of disclaimer was delivered expressly without prejudice to Timminco's position that its obligations under the Agreement are unsecured pre-filing obligations.

33. The Monitor had approved the disclaimer of the Agreement.

34. As described in greater detail above, Mr. Timmins has not provided any consulting services to Timminco since his retirement in May 2001. Since that time, Timminco has paid Mr. Timmins \$2,625,000. Neither the Timminco Entities nor any of their stakeholders have received any benefit as a result of paying this amount to Mr. Timmins, including payments made during times of severe liquidity constraints.

35. If the Agreement is disclaimed, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's other unsecured creditors, including Mr. Timmins.

36. In addition, as has been described in great detail in various affidavits sworn by me in these proceedings, the Timminco Entities were (and are) facing severe liquidity issues which necessitated them to cease making payments with respect to many of their pre-filing obligations in order to preserve their ability to continue operating and implement a successful sale of their assets for the benefit of their stakeholders.

37. The Timminco Entities' severe cash constraints also forced them to seek and obtain debtor-in-possession financing. Under the DIP Agreement with QSI Partners

Ltd. (the "DIP Lender") (approved by the Court on February 8, 2012), the Timminco Entities are restricted to use the proceeds of the DIP facility for the purpose of funding operating costs, expenses and liabilities in accordance with the cash flow projections which must be in form and substance satisfactory to the DIP Lender. The cash flow projections do not provide for payment of the monthly payments under the Agreement. Accordingly, making such payments would result in an event of default under the DIP Agreement.

38. Timminco is not involved in a classical restructuring of its existing operations and capital structure. However, I am advised by Kathryn Esaw of Stikeman Elliott LLP and verily believe that it is an appropriate utilization of the CCAA to attempt to maximize recovery to stakeholders through an orderly sales process as the Timminco Entities are in the process of doing.


39. The remaining assets of Timminco continue to be marketed separately. As stated above, there were no bids submitted and no interest expressed in acquiring the assets of Timminco at any time throughout the course of these CCAA proceedings and the marketing process run by the Timminco Entities. Based on my extensive participation in the marketing process, I do not believe that any prospective purchaser would be interested in obtaining an assignment of Timminco's obligations under the Agreement.

40. For all of the foregoing reasons, the disclaimer of the Agreement will enhance the prospects of a viable compromise or arrangement being made in respect of Timminco and is expected to benefit the stakeholders of Timminco as a whole in that it will permit Timminco to maximize recoveries to its stakeholders.

41. Mr. Timmins admits in his affidavit that he will not experience "*significant financial hardship overall*" as a result of the disclaimer or resiliation of the Agreement.

42. This affidavit is sworn in respect of the motions described in paragraph 2 hereof and for no improper purpose.

SWORN BEFORE ME at the City of Toronto, Province of Ontario, on May 7, 2012.



Commissioner for Taking Affidavits



Peter A.M. Kalins

Yusuf Yannick Katiral, a
Commissioner etc., Province of Ontario,
while a student-at-law.
Expires April 12, 2013.

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

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

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