

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

Applicants

**FACTUM OF THE RESPONDENT,
COMMUNICATIONS, ENERGY AND
PAPERWORKERS UNION OF CANADA**

May 17, 2012

CaleyWray

Labour/Employment Lawyers
1600 - 65 Queen Street West
Toronto ON M5H 2M5

Douglas Wray
(18023C)
wrayd@caleywrap.com
Tel: 416-775-4673

Jesse B. Kugler
(55269V)
kuglerj@caleywrap.com
Tel: 416-775-4677
Fax: 416-366-3763

Lawyers for the Respondent,
Communications, Energy and
Paperworkers Union of Canada

TO: **SERVICE LIST**

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

Applicants

**SERVICE LIST
(as at March 19, 2012)**

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

<p>FTI CONSULTING CANADA INC. TD Waterhouse Tower 79 Wellington Street, Suite 2010 Toronto, ON M5K 1G8</p> <p>Monitor</p>	<p>Nigel D. Meakin Tel: (416) 649-8065 Fax: (416) 649-8101 Email: nigel.meakin@fticonsulting.com</p> <p>Toni Vanderlaan Tel: (416) 649-8075 Email: toni.vanderlaan@fticonsulting.com</p>
<p>BLAKE, CASSELS & GRAYDON LLP 199 Bay Street Suite 4000, Commerce Court West Toronto ON M5L 1A9</p> <p>Lawyers for the Monitor</p>	<p>Steven J. Weisz Tel: (416) 863-2616 Email: steven.weisz@blakes.com</p> <p>Linc Rogers Tel: (416) 863-4168 Email: linc.rogers@blakes.com</p> <p>Jackie Moher Tel: (416) 863-3174 Fax: (416) 863-2653 Email: jackie.moher@blakes.com</p>
<p>BANK OF AMERICA, N.A. 20975 Swenson Drive, Suite 200 Waukesha, WI 53186</p> <p>Canada Branch 200 Front Street, Suite 2700 Toronto, ON M5V 3L2</p>	<p>Client Manager Fax: (262) 207-3347</p> <p>Medina Sales De Andrade Fax: (416) 349-4282</p>

<p>INVESTISSEMENT QUÉBEC 393 Rue Saint-Jaques, Suite 500 Montréal, QC H2Y 1N9</p>	<p>Danièle Leroux Tel: (514) 873-0439 Fax: (514) 873-9917 Email: daniele.leroux@invest-quebec.com</p> <p>Iya Toure Email: iya.toure@invest-quebec.com</p> <p>François Lamothe Email: francois.lamothe@invest-quebec.com</p> <p>Christine Fillion Email: christine.fillion@invest-quebec.com</p> <p>Liliane Monier Email: liliane.monier@invest-quebec.com</p>
<p>FASKEN MARTINEAU DUMOULIN LLP 140 Grande Allee Est, Suite 800 Quebec City, QC G1R 5M8</p> <p>333 Bay Street, Suite 2400 Toronto, ON M5H 2T6</p> <p>Lawyers for Investissement Quebec</p>	<p>Charles Mercier Tel: (418) 640-2046 Fax: (418) 647-2455 Email: cmercier@fasken.com</p> <p>Claude Girard Tel: (418) 640-2050 Fax: (418) 647-2455 Email: cgirard@fasken.com</p> <p>Aubrey Kauffman Tel: (416) 868-3538 Fax: (416) 364-7813 Email: akauffman@fasken.com</p>
<p>MCCARTHY TÉTRAULT LLP Toronto Dominion Bank Tower Suite 5300 Toronto, ON M5K 1E6</p> <p>Lawyers for AMG Advanced Metallurgical Group N.V.</p>	<p>James Gage Tel: (416) 601-7539 Fax: (416) 868-0673 Email: jgage@mccarthy.ca</p>

RAYMOND CHABOT GRANT THORNTON 140 Grande Allée Est, Suite 200 Québec City, QC G1R 5P7	Jean Chiasson Tel: (418) 647-3204 Fax: (418) 647-9279 Email: chiasson.jean@rcgt.com
QUÉBEC SILICON LIMITED PARTNERSHIP 6500 Rue Yvon Trudeau Bécancour, QC G9H 2V8	Rene Boisvert Fax: (819) 294-9001 Email: rene.boisvert@quebecsilicium.com
QUÉBEC SILICON GENERAL PARTNER INC. 6500 Rue Yvon Trudeau Bécancour, QC G9H 2V8	Rene Boisvert Fax: (819) 294-9001 Email: rene.boisvert@quebecsilicium.com
DOW CORNING CORPORATION 2200 West Salzburg Road Midland, MI 48686-0994	Sue K. McDonnell Fax: (989) 496-8307 Email: sue.mcdonnell@dowcorning.com John Tierney Email: john.tierney@dowcorning.com
MCCARTHY TÉTRAULT 1000 De La Gauchetière Street West, Suite 2500 Montréal QC H3B 0A2 Toronto Dominion Bank Tower Suite 5300 Toronto, ON M5K 1E6 Counsel to Dow Corning Corporation	Sylvain A. Vauclair Tel: (514) 397-4102 Fax: (514) 875-6246 Email: savaclair@mccarthy.ca Barbara Boake Tel: (416) 601-7557 Fax: (416) 875-6246 Email: bboake@mccarthy.ca Sharon Kour Tel: (416) 601-8305 Email: skour@mccarthy.ca
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP Four Times Square New York, NY 10036 Counsel to Dow Corning Corporation	David J. Friedman Fax: (212) 735-2000 Email: david.friedman@skadden.com

<p>CANADIAN IMPERIAL BANK OF COMMERCE Commerce Court 11th Floor Toronto, ON M5L 1A2</p>	
<p>LAURENTIAN BANK OF CANADA 1981 McGill College Avenue Montréal, QC H3A 3K3</p>	
<p>TORYS LLP TD Centre 79 Wellington Street West, Suite 3000 Toronto, ON M5K 1N2</p> <p>Counsel to QSI Partners Ltd.</p>	<p>David Bish Tel: (416) 865-7353 Fax: (416) 865-7380 Email: dbish@torys.com</p>
<p>KIM ORR BARRISTERS 200 Front Street West, Suite 2300 Toronto, ON M5V 3K2</p>	<p>James C. Orr Tel: (416) 349-6571 Fax: (416) 598-0601 Email: jo@kimorr.ca</p>
<p>BAKER & MCKENZIE LLP Brookfield Place 181 Bay Street, Suite 2100 Toronto, Ontario M5J 2T3</p> <p>Lawyers for Wacker Chemie AG</p>	<p>Chris Besant Tel: (416) 865-2318 Fax: (416) 863-6275 Email: chris.besant@bakermckenzie.com</p> <p>Frank Spizzirri Tel: (416) 865-6940 Email: frank.spizzirri@bakermckenzie.com</p>
<p>OSLER HOSKIN & HARCOURT LLP 1 First Canadian Place Toronto, Ontario M5X 1B8</p> <p>Lawyers for Wacker Chemie AG</p>	<p>Steven Golick Tel: (416) 862-6704 Fax: (416) 862-6666 Email: sgolick@osler.com</p> <p>Andrea Lockhart Tel: (416) 862-6829 Email: alockhart@osler.com</p>

<p>BENNETT JONES LLP One First Canadian Place Suite 3400 Toronto, Ontario M5X 1A4</p> <p>Lawyers for John Walsh</p>	<p>Derek J. Bell Tel: (416) 777-4638 Fax: (416) 863-1716 Email: belld@bennettjones.com</p>
<p>GOWLING LAFLEUR HENDERSON LLP 1 Place Ville Marie, Suite 3700 Montréal, Québec H3B 3P4</p> <p>Lawyers for Wajax Equipment</p>	<p>Geneviève Cloutier Tel: (514) 392-9448 Fax: (514) 876-9048 Email: genevieve.cloutier@gowlings.com</p>
<p>DAVIES WARD PHILLIPS & VINEBERG LLP First Canadian Place, Suite 44 Toronto, Ontario M5X 1B1</p>	<p>Jay Swartz Tel: (416) 863-5520 Fax: (416) 863-0871 Email: jswartz@dwpv.com</p>

PENSION PLANS REPRESENTATIVES

BSI Non-Union Employee Pension Committee

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Maria Spensieri

[REDACTED]

Email: maria.spensieri@quebecsilicium.com

René Boisvert

[REDACTED]

Email: rene.boisvert@quebecsilicium.com

Carl Rivard

[REDACTED]

Email: carl.rivard@quebecsilicium.com

Clément Albert

[REDACTED]

Patrick Gauthier

[REDACTED]

Email: patrick.gauthier@quebecsilicium.com

Denis Bourassa

[REDACTED]

BSI Union Employee Pension Committee

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Maria Spensieri

[Redacted]

Email: maria.spensieri@quebecsilicium.com

René Boisvert

[Redacted]

Email: rene.boisvert@quebecsilicium.com

Carl Rivard

[Redacted]

Email: carl.rivard@quebecsilicium.com

Gérald Brodeur

[Redacted]

Luc Ducharme

[Redacted]

Laurent Milette

[Redacted]

Louis-Gilles Baron

[Redacted]

Clément Albert

[Redacted]

<p>SUPERINTENDENT OF FINANCIAL SERVICES 5160 Yonge Street PO Box 85 Toronto, ON M2N 6L9</p>	<p>Mark Bailey Tel: (416) 590-7555 Email: mark.bailey@fsco.gov.on.ca</p> <p>Deborah McPhail Tel: (416) 226-7764 Email: dmcphail@fsco.gov.on.ca</p> <p>Stephen Scharbach Tel: (416) 590-7244 Fax: (416) 590-7070 Email: stephen.scharbach@fsco.gov.on.ca</p>
<p>RÉGIE DES RENTES DU QUÉBEC Direction des régimes de retraite Régies de rentes du Québec Case postale 5200 Québec, QC G1K 7S9</p>	<p>Mario Marchand Tel: (418) 657-8715 ext. 3927 Fax: (418) 643-9590 Email: mario.marchand@rrq.gouv.qc.ca</p>
<p>KOSKIE MINKSY LLP 20 Queen Street West, Suite 900 Toronto, ON M5H 3R3</p> <p>Lawyers for Mercer (Canada) Limited, the administration of the Haley Pension Plan</p>	<p>Andrew Hatnay Tel: (416) 595-2083 Fax: (416) 204-2872 Email: ahatnay@kmlaw.ca</p> <p>Demetrios Yiokaris Tel: (416) 595-2130 Email: dyiokaris@kmlaw.ca</p>
<p>UNIONS</p>	
<p>LA SECTION LOCALE 184 DE SYNDICAT CANADIEN DES COMMUNICATIONS, DE L'ÉNERGIE ET DU PAPIER 6500, rue Yvon-Trudeau Bécancour, QC G9H 2V8</p> <p>7080, boul. Marion Trois-Rivières, QC G9A 6G4</p>	<p>Jean Simoneau Email: scep184@gmail.com</p> <p>René Gauthier Tel: (819) 378-4696 Email: rgauthier@scep.ca</p>

<p>CALEYWRAY 65 Queen Street West, Suite 1600 Toronto, ON M5H 2M5</p> <p>Lawyers for La Section Locale 184 de Syndicat Canadien des communications, de l'Énergie et du Papier</p>	<p>Denis W. Ellickson Tel: (416) 775-4678 Fax: (416) 366-4678 Email: ellicksond@caleywray.com</p> <p>Jesse B. Kugler Tel: (416) 775-4677 Fax: (416) 366-3673 Email: kuglerj@caleywray.com</p>
<p>THE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION 2285 Saint-Laurent Boulevard Suite D-11 Ottawa, ON K1G 4Z7</p>	<p>David Lipton Tel: (613) 260-7205 ext. 232 Email: dlipton@usw.ca</p>
<p>SACK GOLDBLATT MITCHELL LLP 20 Dundas Street West, Suite 1100 Toronto, ON M5G 2G8</p> <p>Lawyers for the United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union</p>	<p>Charles Sinclair Tel: (416) 979-4234 Fax: (416) 591-7333 Email: csinclair@sgmlaw.com</p>
<p>PPSA CREDITORS</p>	
<p>PRODAIR CANADA LTEE 7475 Boulevard Newman, Suite 311 La Salle, QC H8N 1X3</p>	
<p>SERVICES FINANCIERS CIT LTÉE 5035 South Service Road Burlington, ON L7R 4C8</p>	
<p>GE VFS CANADA LIMITED PARTNERSHIP 2300 Meadowvale Boulevard, Suite 200 Mississauga, ON L5N 5P9</p>	

SERVICES FINANCIERS CATERPILLAR LTEE 5575 North Service Road Suite 600 Burlington, ON L7C 6M1	Kellie Wellenreiter Tel: (289) 313-1238 Email: kellie.wellenreiter@cat.com
SERVICES FINANCIERS DE LAGE LANDEN CANADA INC. 1235 North Service Road West, Suite 100 Oakville, ON L6M 2W2	
DCFS CANADA CORP 2680 Matheson Boulevard East Suite 500 Mississauga, ON L4W 0A5	
SERVICES FINANCIERS MERCEDES-BENZ 2680 Matheson Boulevard East Suite 500 Mississauga, ON L4W 0A5	
JOHN DEERE LIMITED 1001 Champlain Ave, Suite 401 Burlington, ON L7L 5Z4	
GE CAPITAL VEHICLE AND EQUIPMENT LEASING INC. 2300 Meadowvale Boulevard 2nd Floor Mississauga, ON L5N 5P9	
ENDRAS BMW 100 Achilles Rd. Ajax, On L1Z 0C5	
DOCUMENT DIRECTION 100-1235 North Service Road West Oakville, ON L6M 2W2	

BMW CANADA INC. 50 Ultimate Drive Richmond Hill, ON L4S 0C8	
TOYOTA CREDIT CANADA INC. 80 Micro Court, Suite 200 Markham, ON L3R 9Z5	
GOVERNMENT AGENCIES	
DEPARTMENT OF JUSTICE ONTARIO REGIONAL OFFICE The Exchange Tower 130 King Street West, Suite 3400 Toronto, ON M5X 1K6 Attorney General of Canada	Diane Winters Tel: (416) 973-3172 Fax: (416) 973-0809 Email: diane.winters@justice.gc.ca
CANADA REVENUE AGENCY 555 MacKenzie Avenue Ottawa, ON K1A 0L5	
CANADA REVENUE AGENCY GST Interim Processing Centre (GST/HST) 333 Laurier Avenue West Ottawa, ON K1A 1J8	
AGENCY OF REVENUE DU QUEBEC 1600 Boulevard René Levesque Ouest, 3 ^e étage Sector R23 CPF Montréal, QC H3H 2V2	
MINISTÈRE DE LA JUSTICE DU QUEBEC 1200, route de l'Église, 6 ^e étage Québec City, QC G1V 4M1	

<p>MINISTÈRE DU DÉVELOPPEMENT DURABLE, DE L'ENVIRONNEMENT ET DES PARCS Édifce Marie-Guyart, 5^e étage 675 boulevard René-Lévesque Est Québec, QC G1R 5V7</p>	<p>Tel: (418) 521-3816 Fax: (418) 646-0908</p>
<p>MINISTRY OF REVENUE (ONTARIO) 33 King Street West Oshawa, ON L1H 8H5</p>	
<p>MINISTRY OF THE ATTORNEY GENERAL (ONTARIO) McMurtry-Scott Building 720 Bay Street, 11th Floor Toronto, ON M7A 2S9</p>	
<p>MINISTRY OF THE ENVIRONMENT Legal Services Branch 135 St Clair Avenue West Toronto, ON M4V 1P5</p>	<p>Mario Faieta Tel: (416) 314-6482 Fax: (416) 314-6579 Email: mario.faieta@ontario.ca</p>
<p>ONTARIO MINISTRY OF NORTHERN DEVELOPMENT, MINES AND FORESTRY Rm. M2-24, Macdonald Block 900 Bay Street Toronto, ON M7A 1C3</p> <p>Ministry of Northern Development, Mines and Forestry 933 Ramsey Lake Road, B4, Sudbury, Ontario P3E 6B5</p>	<p>Ms. C. Blancher-Smith, Director of Mine Rehabilitation TeL: (705) 670-5784</p>

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

Applicants

**FACTUM OF THE RESPONDENT,
COMMUNICATIONS, ENERGY AND
PAPERWORKERS UNION OF CANADA**

PART I – INTRODUCTION

1. The Communications, Energy and Paperworkers Union of Canada (the "CEP") does not oppose the approval of the F.A. Transaction. The CEP opposition lies exclusively with that portion of the Approval and Vesting Order that purports to expunge and discharge from the Purchase Assets certain statutory claims that the CEP may assert, including specifically a successor employer claim pursuant to the Quebec *Labour Code* and/or the Quebec *Supplemental Pension Plans Act* (the "CEP Claims").
2. For the reasons set out below, the CEP requests that this Honourable Court refuse to grant that part of the Approval and Vesting Order that purports to expunge and discharge the CEP Claims.

PART II - FACTS¹

The CEP as Collective Bargaining Agent

3. The CEP is the certified bargaining agent of the current and former unionized employees employed by Becancour Silicon Inc. ("BSI") in the Province of Quebec.
4. The CEP's right to represent the current and former unionized employees is a right conferred on the CEP by Order of the Commission des Relations du Travail (the "Commission"), the regulatory body established pursuant to the Quebec *Labour Code*, R.S.Q., chapter C-27 (the "*Code*") with jurisdiction to determine matters arising under the *Code*.
5. The CEP and BSI are parties to a collective bargaining agreement with a notional expiry date of April 30, 2013 (the "Collective Agreement"). As at November 30, 2011, the Collective Agreement governed the terms and conditions of employment for approximately three active unionized employees and a large number of retired employees. Currently, at least one unionized employee of BSI is employed in connection with the Silicon Solar operations and the HP1 property.
6. The Collective Agreement constitutes a "collective agreement" within the meaning of section 1(d) of the *Code*. The Collective Agreement recognizes the CEP as the exclusive statutory bargaining agent of the unionized employees employed and formerly employed by BSI, including employees employed in connection with Applicants' Silicon Solar operations.
7. Sections 45 and 45.2 of the *Code* provides a complete and comprehensive scheme that governs the effect of a sale of business on a certification granted by the Commission and resulting collective agreement. Where the Commission makes a finding that a sale of business has occurred within the meaning of the Code, it will typically

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

declare that the purchaser is a successor employer for the purposes of the certification and collective agreement.

8. Section 139 of the *Code* provides that the jurisdiction of the Commission is exclusive and is subject to review only on very narrow jurisdictional grounds. This includes the Commission's jurisdiction to make findings with respect to the application of section 45 and 45.2 of the *Code*.

Sale of the Solar Silicon Assets to FerroAtlantica

9. BSI 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.

10. The Collective Agreement and certification of the CEP covers, *inter alia*, BSI's solar grade silicon operations.

11. On March 9, 2012, this Court granted an Order authorizing the Applicants to enter into the Stalking Horse Bid and approving the Bidding Procedures. The CEP raised concerns with respect to the treatment of the CEP Claims at the motion to approve the Stalking Horse Bid and this Court's endorsement confirmed that the CEP's concerns could be raised at a future motion.

Endorsement of Morawetz J. dated March 9, 2012

12. Upon the conclusion of the Auction contemplated by the Bidding Procedures, the Applicants, with the assistance of the Monitor, entered into an agreement of purchase and sale with FerroAtlantica (the "F.A. Transaction").

May 9 Affidavit, Applicant's Motion Record, Tab 2, para. 24

13. The assets to be purchased under the F.A. Agreement consist of substantially all of BSI's right, title and interest, in and to BSI's solar grade silicon production business including certain real property, certain intellectual property, inventory and equipment.

May 9 Affidavit, Applicants' Motion Record, Tab 2, para. 74

14. Section 2.4 of the F.A. Transaction treats as Excluded Liabilities all debts, liabilities, obligations or Claims related to any Benefit Plans, Collective Agreement, Employees, Pension Plans, Post-Retirement Liabilities or under the Pension Transfer Agreement.

F.A. Agreement, Applicants' Motion Record, Tab 2(k), at pp. 461-462.

15. The Applicants' have brought the within motion to approve the F.A. Transaction and are seeking an Order from this Court declaring that the Purchased Assets shall vest free and clear of all Claims, including the CEP Claims, and that all such encumbrances or charges affecting or relating to the Purchased Assets other than Permitted Encumbrances are hereby expunged and discharged as against the Purchased Assets.

Approval and Vesting Order (Re Sale of Solar Assets), Applicants' Motion Record, Tab 5, p. 542, para. 4.

PART II – ISSUES AND THE LAW

16. The issue raised by the CEP is whether the Court should grant that part of the Approval and Vesting Order that purports to expunge and discharge the CEP Claims.

Jurisdiction to Expunge and Discharge the CEP Claims

17. The Approval and Vesting Order being sought effectively bars the CEP exercising its statutory rights under the Code, including making an application under section 45 of the *Code* (sale of business) and seeking relief from the Commission.

18. The jurisdiction to making findings with respect to the application of, *inter alia*, section 45 of the *Code* lies exclusively with the Commission.

19. The *CCAA* does not contain language conferring jurisdiction upon this Court to make findings with respect to the application of, *inter alia*, section 45 of the *Code* or to otherwise expunge or discharge a claim by CEP that, *inter alia*, section 45 of the *Code* is

triggered by the F.A. Transaction. Absent explicit language in the *CCAA* conferring jurisdiction upon this Court to make findings with respect to the application of the *Code* or to expunge and discharge otherwise valid claims under the *Code*, the jurisdiction over such issues lies exclusively with the Commission to be argued on the basis of a complete factual record.

***GMAC Commercial Credit Corp. – Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123, at paras. 43-52.**

20. Companies under *CCAA* protection are not immunized from complying with regulatory regimes, including the *Code*, unless the doctrine of paramountcy can be applied. There is no evidence on the record to support a finding that it is necessary to invoke the doctrine of paramountcy in these circumstances.

***Richtree Inc (Re)*, [2005] O.J. No. 251, at para. 8-10 and 17-18.**

21. Accordingly, this Court does not have jurisdiction to expunge and discharge the CEP Claims.

The Certification and Collective Agreement under the CCAA

22. While the *CCAA* allows a debtor to disclaim or resile from certain agreements, the *CCAA* expressly prohibits a debtor from disclaiming or resiling from a collective agreement. By expunging and discharging the CEP Claims, including successor employer claims, the Order being sought by the Applicants (and FerroAtlantica as a potential successor to BSI) effectively constitutes an attempt to disclaim or resile from the Collective Agreement contrary to the *CCAA*.

Section 32(9)(b) of the CCAA

23. Further, the *CCAA* expressly provides that any collective agreement that a debtor has entered into as employer remains in force and may not be altered except as permitted under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent. The request to expunge and discharge the CEP Claims, including a claim that FerroAtlantica is a successor employer pursuant to the

Code, would fundamentally alter the Collective Agreement and its force in a manner that is inconsistent with the *Code*.

Section 33(1) and (8) of the CCAA

24. Orders made under the *CCAA* cannot alter the validity of certifications issued by the Commission and the collective agreements entered into between BSI and the CEP. As the certification and Collective Agreement remain valid, their effects must be recognized, including the effect of a sale of business within the meaning of section 45 of the *Code*.

Syndicat national de l'aminante d'Asbestos inc. v. Jeffrey Mines Inc. [2003] Q.J. No. 264, at paras. 44-45.

Disposition of Assets by a Debtor in CCAA Proceedings

25. The power to approve a sale of assets is found in section 36 of the *CCAA* which directs the Court to consider a number of factors in determining whether to approve a debtor's sale of assets outside the ordinary course of business. One of the considerations that the Court is directed to consider is the effect of the proposed sale or disposition on the creditors and other interested parties.

Section 36 of the CCAA

26. The effect of the F.A. Transaction, and specifically the expungement and discharge of the CEP Claims, is extremely prejudicial to the interests of the CEP and its membership. As currently constituted, the Approval and Vesting Order would have the effect of eliminating or otherwise barring the CEP from exercising its rights pursuant to valid and enforceable provincial legislation.

27. The effects of the proposed Order are so prejudicial to the CEP that the Order sought should not be approved without expressly clarifying that the Order does not, and cannot, impact on the CEP Claims pursuant to the *Code*.

PART IV – DISPOSITION

28. The CEP therefore requests that the Order sought by the Applicants be dismissed insofar as it purports to expunge or discharge the CEP Claims.

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



Jesse Kugler

Douglas Wray
(18023C)
wrayd@caleywrap.com
Tel: 416-775-4673

Jesse B. Kugler
(55269V)
kuglerj@caleywrap.com
Tel: 416-775-4677
Fax: 416-366-3763

Lawyers for the Respondent,
Communications, Energy and
Paperworkers Union of Canada

SCHEDULE "A" – LIST OF AUTHORITIES

1. *GMAC Commercial Credit Corp. – Canada v. T.C.T. Logistics Inc.*, [2006] S.C.R. 123
2. *Richtree (Re)*, [2005] O.J. No. 25
3. *Syndicat national de l'amiante d'Asbestos Inc. v. Jeffrey Mines Inc.*, [2003] Q.J. No. 264

SCHEDULE "B" – RELEVANT STATUTES

Labour Code, R.S.Q. chapter C-27

1. In this Code, unless the context requires otherwise, the following expressions mean:

- (d) "collective agreement": an agreement in writing respecting conditions of employment made between one or more certified associations and one or more employers or employers' associations;
- (i) "Commission": the Commission des relations du travail established by this Code;

45. The alienation or operation by another in whole or in part of an undertaking shall not invalidate any certification granted under this Code, any collective agreement or any proceeding for the securing of certification or for the making or carrying out of a collective agreement.

The new employer, notwithstanding the division, amalgamation or changed legal structure of the undertaking, shall be bound by the certification or collective agreement as if he were named therein and shall become *ipso facto* a party to any proceeding relating thereto, in the place and stead of the former employer.

The second paragraph does not apply in the case of the transfer of part of the operation of an undertaking where such transfer does not entail the transfer to the transferee, in addition to functions or the right to operate, of most of the elements that characterize the part of the undertaking involved.

45.2. Where the operation of part of an undertaking is transferred, the following rules apply:

- (1) for the purposes of labour relations between the new employer and the association of employees involved, a collective agreement referred to in the second paragraph of section 45 that has not expired on the effective date of the transfer is deemed to expire on the day the transfer becomes effective;
- (2) the new employer is not bound by the certification or the collective agreement where a special agreement on the transfer includes a clause to the effect that the parties waive the application of the second paragraph of section 45. Such a clause binds the Commission but does not affect the effect, within the transferring employer's enterprise, of the certification of the association of employees having signed the agreement.

Subparagraph 1 of the first paragraph does not apply in the case of the transfer of the operation of part of an undertaking between employers of the public and parapublic sectors within the meaning of paragraph 1 of section 111.2.

139. Except on a question of jurisdiction, none of the extraordinary recourses provided for in articles 834 to 846 of the Code of Civil Procedure (chapter C-25) may be exercised and no injunction may be granted against an arbitrator, the Commission, any of its commissioners or a labour relations officer of the Commission acting in their official capacity.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-25

Disclaimer or resiliation of agreements

32. (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

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

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

Collective agreements

33. (1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

Unrevised collective agreements remain in force

(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

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.

“dispute”

**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

**FACTUM OF THE COMMUNICATIONS, ENERGY
AND PAPERWORKERS UNION OF CANADA**

CaleyWray

Labour/Employment Lawyers
1600 - 65 Queen Street West
Toronto ON M5H 2M5

Douglas Wray
(18023C)
wrayd@caleywright.com
Tel: 416-775-4673

Jesse B. Kugler
(55269V)
kuglerj@caleywright.com
Tel: 416-775-4677
Fax: 416-366-3763

Lawyers for the Respondent, Communications, Energy
and Paperworkers Union of Canada