

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.) WEDNESDAY, THE 8th
JUSTICE MORAWETZ) DAY OF FEBRUARY, 2012

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



DIP ORDER

THIS MOTION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**"), for an order approving the DIP Agreement and granting the DIP Lender's Charge (as these terms are defined below), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Peter A.M. Kalins sworn January 20, 2012 and the Exhibits attached thereto (the "**January 20 Affidavit**"), the Third Report of FTI Consulting Canada Inc. in its capacity as the Court-appointed Monitor of the Timminco Entities (the "**Monitor**"), and on being advised that those parties disclosed on the Service List attached to the Notice of Motion as Schedule "A", including, Investissement Québec ("**IQ**") and Bank of America, N.A., and (b) the members of the pension plan committees for Bécancour Non-Union Pension Plan and the Bécancour Union Pension Plan (as these terms are defined in the **January 20 Affidavit**), La Section Locale 184 De

Syndicat Canadien des Communciations, de l'Énergie et du Papier ("**CEP**"), the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("**USW**"), the Financial Services Commission of Ontario ("**FSCO**"), and the Régie Des Rentes Du Québec, were served with the Notice of Motion and Motion Record, and on hearing the submissions of counsel for the Timminco Entities, the Monitor, IQ, the DIP Lender (as defined below), Dow Corning Canada, CEP, USW, AMG Advanced Metallurgical Group N.V., and FSCO, no one appearing for any other person on the service list, although duly served as appears from the affidavit of service of Maria Konyukhova sworn January 20, 2012, and the affidavit of Kathryn Esaw dated January 20, 2012, filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DIP AGREEMENT & DEFINITIVE DOCUMENTS

2. **THIS COURT ORDERS** that the Timminco Entities are hereby authorized and empowered to obtain and borrow under a credit facility (the "**DIP Facility**") from QSI Partners Ltd. (the "**DIP Lender**") for the purposes set out in the DIP Agreement (as defined below), provided that principal borrowings under such credit facility shall not exceed US\$4,250,000 (the "**Maximum Amount**") unless permitted by further Order of this Court.

3. **THIS COURT ORDERS** that such credit facility shall be on the terms and subject to the conditions set forth in the DIP Agreement between the Timminco Entities and the DIP Lender dated as of January 18, 2012 (the "**DIP Agreement**"), filed.

4. **THIS COURT ORDERS** that within one business day of the date of this Order, the DIP Lender shall send by wire transfer to the Monitor the Maximum Amount, to be

deposited by the Monitor into a segregated, interest-bearing account of the Monitor (the "**Monitor Account**"). Subject to any applicable bank fees or charges in connection with the opening, operating and/or maintenance of the Monitor Account (the "**Bank Fees**"), unless and until funds are advanced by the Monitor to the Timminco Entities in accordance with the DIP Agreement, all funds in the Monitor Account, including interest earned thereon, are the sole property of the DIP Lender, and no lien, encumbrance, court-ordered charge, security interest, or hypothec in or on, or other claims to or interests in, the assets, undertaking, property or business of the Timminco Entities shall encumber, attach to or be admitted as a claim against the funds in the Monitor Account.

5. **THIS COURT ORDERS** that the Monitor shall disburse DIP Advances (as defined in the DIP Agreement) under the DIP Facility from the Monitor Account subject to and in accordance with the terms of the DIP Agreement, including without limitation DIP Advances will be made from the Monitor Account on the second business day following delivery of the drawdown certificate in accordance with the DIP Agreement, unless within one business day of delivery of such drawdown certificate the DIP Lender delivers to the Timminco Entities and the Monitor a notice of non-consent to such DIP Advance as a result of one or more of the conditions precedent not being met or the occurrence of an Event of Default (as defined in the DIP Agreement) that is continuing which notice shall include reasonable details of any such condition precedent not being met or Event of Default. The DIP Lender may also consent to the making of a DIP Advance prior to the second business day following delivery of the drawdown certificate by providing its written consent to same, to the Monitor and the Timminco Entities

6. **THIS COURT ORDERS** that in the event of any dispute between the Timminco Entities and the DIP Lender as to (a) whether an Event of Default has occurred; or (b) the entitlement of the Monitor to advance funds to the Timminco Entities, each of the Timminco Entities, the DIP Lender, and the Monitor shall be entitled to seek advice and directions from the Court with respect to such dispute, on at least four (4) days' notice

to the other parties, and the Monitor shall retain any amounts in the Monitor Account at the time the dispute arose, pending further Order of the Court or agreement by the Timminco Entities, the DIP Lender, and the Monitor; provided that while such dispute is outstanding and unresolved, no further funds in the Monitor Account shall be advanced by the Monitor to the Timminco Entities without the consent of the DIP Lender.

7. **THIS COURT ORDERS** that subject to paragraph 6 the Monitor shall return to the DIP Lender the balance of the Maximum Amount held by the Monitor in the Monitor Account, together with any interest earned thereon and less any Bank Fees incurred, as of the date of transfer, by initiating a wire transfer to an account designated in writing by the DIP Lender and delivered to the Monitor in accordance with the notice provisions provided for in the DIP Agreement forthwith upon the Maturity Date (as defined in the DIP Agreement).

8. **THIS COURT ORDERS** that the Monitor shall not be liable to the Timminco Entities, the DIP Lender or any other person for any error in judgement or for any act or omission on its part in respect of the operation of the Monitor Account or the making of, or failure to make, the DIP Advances or any of them therefrom, unless such error in judgement, act or omission is made in bad faith or with gross negligence.

9. **THIS COURT ORDERS** that, with respect to mandatory repayments of the DIP Advances from Net Sale Proceeds (as defined in the DIP Agreement), the Monitor shall be entitled to hold in a segregated trust account the first \$1,269,000 of any Net Sale Proceeds (the "**Priority Charge Reserve**") and the Administration Charge and KERP Charge (as granted and defined in the Initial Order dated January 3, 2012 (the "**Initial Order**") and modified by the Order dated January 16, 2012 (the "**Comeback Order**") shall attach to the Priority Charge Reserve in the same rank and priority that such charges have as against the Property (as defined in the Initial Order) as set out in the Comeback Order. Subject to further Order of the Court, upon payment of all outstanding amounts secured by the Administration Charge and the KERP Charge

following the termination of the CCAA Proceedings, the remaining balance of the Priority Charge Reserve shall be paid forthwith (a) firstly, to the DIP Lender to the extent of any outstanding DIP Obligations, and (b) secondly, to the Timminco Entities or such other Persons entitled thereto in accordance with applicable law.

10. **THIS COURT ORDERS** that the Timminco Entities are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, security agreements, pledge agreements, guarantees and other security documents and definitive documents (collectively the "**Definitive Documents**"), as are contemplated by the DIP Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Timminco Entities are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Agreement and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order or any prior Order of this Honourable Court in these proceedings.

11. **THIS COURT ORDERS** that the Timminco Entities are hereby authorized and directed to not, directly or indirectly through any representative, solicit or entertain offers from, negotiate with or accept any proposal of any person other than the DIP Lender for the acquisition of substantially all of the assets of the Timminco Entities from the date hereof until the end of the Exclusivity Period (as defined in, and as may be extended in accordance with, the DIP Agreement) in order to provide the DIP Lender with the opportunity to prepare a "stalking horse bid" for consideration by the Timminco Entities who shall be under no obligation to accept any such bid, provided that if the DIP Obligations (as defined in the DIP Agreement) are declared to be immediately due and payable in accordance with the provisions of the DIP Agreement, the Exclusivity Period shall immediately terminate.

DIP LENDER'S CHARGE

12. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property, including, for greater certainty, the Collateral (as defined in the DIP Agreement), to secure the DIP Obligations, which DIP Lender's Charge shall not secure an obligation that exists before this Order is made.

13. **THIS COURT ORDERS** that the DIP Lender's Charge shall constitute a charge on the Property and, subject to section 11.8(8) of the CCAA, rank ahead in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise, including, for greater certainty, the Permitted Encumbrances (as defined in the DIP Agreement), other than any valid purchase money security interests (collectively, the "**Encumbrances**") in favour of any person, notwithstanding the order of perfection or attachment, including without limitation any deemed trust created under the Ontario Pension Benefits Act, or the Quebec Supplemental Pension Plans Act in favour of any person and shall rank subordinate only to the Administration Charge in the amount of \$1,000,000, the KERP Charge in the amount of \$269,000, and any valid purchase money security interest.

14. **THIS COURT ORDERS AND DECLARES** that the DIP Lender, in its capacity as DIP Lender and with respect to any claims arising from the Definitive Documents shall be treated as unaffected in any plan of arrangement or compromise filed by the Timminco Entities under the *Companies' Creditors Arrangement Act* (Canada) (the "**CCAA**"), or any proposal filed by the Timminco Entities under the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), with respect to any amounts owing to the DIP Lender by the Timminco Entities pursuant to the DIP Agreement and the Definitive Documents.

15. **THIS COURT ORDERS** that the filing, registration or perfection of the DIP Lender's Charge shall not be required, and that the DIP Lender's Charge shall be valid

and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the DIP Lender's Charge coming into existence, notwithstanding any such failure to file, register, record or perfect.

16. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Timminco Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the DIP Lender's Charge, save and except for the Administration Charge in the amount of \$1,000,000 and the KERP Charge in the amount of \$269,000, unless the Timminco Entities also obtain the prior written consent of the DIP Lender.

17. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

- (a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents and the Timminco Entities shall take all reasonable steps to cooperate and assist in the same;
- (b) upon the occurrence of an event of default under the DIP Agreement, Definitive Documents or the DIP Lender's Charge, the DIP Lender shall be entitled to, and to instruct the Monitor to, cease making advances to the Timminco Entities and set off and/or consolidate any amounts owing by the DIP Lender to the Timminco Entities against the obligations of the Timminco Entities to the DIP Lender under the DIP Agreement, the Definitive Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices and upon seven (7) days' notice to the Timminco Entities and the Monitor and with leave of the Court, may exercise any and all other rights and remedies against the Timminco Entities or the Property under or pursuant to the DIP Agreement, Definitive Documents and the DIP Lender's Charge, including without limitation, apply to this Court for the

appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Timminco Entities and for the appointment of a trustee in bankruptcy of the Timminco Entities; and

- (c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Timminco Entities or the Property.

18. **THIS COURT ORDERS** that the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the DIP Lender shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Timminco Entities, and notwithstanding any provision to the contrary in any Agreement:

- (a) the creation of the DIP Lender's Charge shall not create or be deemed to constitute a breach by the Timminco Entities of any Agreement to which it is a party;
- (b) the DIP Lender shall have no liability to any person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the DIP Lender's Charge; and
- (c) the payments made by the Timminco Entities pursuant to this Order and the granting of the DIP Lender's Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive

conduct, or other challengeable or voidable transactions under any applicable law.

19. **THIS COURT ORDERS** that the DIP Lender's Charge over leases of real property in Canada shall only be a charge in the Timminco Entities' interest in such real property leases.

20. **THIS COURT DECLARES** that this Order and the DIP Lender's Charge are binding upon all creditors of the Timminco Entities, all entitlements of pension benefit beneficiaries and a trustee in bankruptcy of the Timminco Entities, receiver, receiver-manager or other officer of the Court.

GENERAL

21. **THIS COURT ORDERS** that the Timminco Entities or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder and/or the DIP Agreement.

22. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Timminco Entities, the Monitor, the DIP Lender and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Timminco Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Timminco Entities and the Monitor and their respective agents in carrying out the terms of this Order.

23. **THIS COURT ORDERS** that each of the Timminco Entities and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal,

regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

24. **THIS COURT ORDERS** that any motion to vary or amend the DIP Lender's Charge may only be brought by a party that has not been served with notice of the within motion and any such motion must be brought and be returnable no later than February 3, 2012 and on not less than four (4) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order. Notwithstanding the foregoing, any DIP Advances made from the Monitor Account, prior to the date of any motion to vary or amend the DIP Lender's Charge shall be unaffected by any such motion, including, without limitation, its rights to receive reimbursement for its legal fees incurred prior to the date thereof.

25. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

FEB 10 2012 



Giuseppe Di Pietro
Registrar

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.

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

Proceeding Commenced at Toronto

DIP ORDER

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