

**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 August 28, 2012)
(Re Interim Distribution to IQ)

Dated: August 24, 2012

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PART I - INTRODUCTION

1. This motion is brought by Timminco Limited ("**Timminco**") and Becancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**") for an order authorizing and directing FTI Consulting Canada Inc. in its capacity as court-appointed Monitor (the "**Monitor**") to distribute cash (the "**Interim Distribution**") from the proceeds of the Sale Transactions (defined and described below) to Investissement Québec ("**IQ**"), a secured creditor of BSI, subject to certain reserves to be established by the Monitor and provisions of the Reimbursement Agreement (as such terms are defined below).

PART II - THE FACTS¹

2. The Applicants' primary business was the production and sale of silicon, which was carried on principally through BSI. BSI respectively purchased and produced silicon metal and solar grade silicon for sale to customers in the chemical (silicones), aluminum and electronics/solar industries, and the solar photovoltaic industries.

August 22 Affidavit, para. 3.

3. By January, 2012, the Timminco Entities were facing severe financial difficulties and became unable to meet their liabilities as they came due. As a result, the Timminco Entities sought and obtained granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") pursuant to the Initial Order of the Honourable Mr. Justice Morawetz dated January 3, 2012, as amended (the "**Initial Order**").

August 22 Affidavit, paras. 3-5.

Status of Proceedings

4. Substantially all of BSI's operating assets have been sold pursuant to two sales transactions which were approved by the Court on May 22, 2012 and June 1, 2012, respectively (the "**Sale Transactions**"). The net proceeds of the Sale Transactions total approximately \$30 million and are currently being held by the Monitor.

¹ Capitalized terms used herein but not defined have the meaning as defined in the Affidavit of Sean Dunphy dated August 22, 2012, Applicants' Motion Record, Tab 2 (the "**August 22 Affidavit**")

August 22 Affidavit, para. 6.

5. A claims procedure was approved by the Court on June 15, 2012 (the "**Claims Procedure Order**"). Claims totalling \$48.5 million and \$235 million were filed by the Claims Bar Date of July 23, 2012 against Timminco and BSI, respectively.

August 22 Affidavit, para. 7.

BSI'S Indebtedness to IQ

6. Pursuant to a term loan agreement dated July 10, 2009 (the "**Term Loan Agreement**"), BSI received a loan from IQ (the "**Secured Term Loan**"), which is secured by a charge upon all of BSI's assets (the "**Collateral**").

August 22 Affidavit, paras. 10-11.

7. The validity of the security granted to IQ was reviewed by counsel to the Monitor and found to be valid, legal and enforceable, subject to certain standard qualifications and assumptions.

August 22 Affidavit, para. 12

8. As at August 17, 2012, the amount outstanding under the Secured Term Loan totalled approximately \$29 million. The Secured Term Loan earns interest at a variable rate of Canada prime plus 9%, which is currently approximately 12% per annum. As such, BSI is incurring interest in the amount of approximately \$10,000 per day while the sale proceeds are earning very little in the current interest rate environment.

August 22 Affidavit, para. 13.

Reserve Fund

9. The payment of the Interim Distribution is subject to maintaining appropriate reserves for the Super-Priority Charges (being the Administration Charge, the KERP Charge, the D&O Charge and the DIP Charge, as defined and described in the August 22 Affidavit) and other potential post-filing payables.

August 22 Affidavit, paras. 14-18.

Claw Back Procedure

10. BSI, the Monitor and IQ have negotiated a mechanism (the “**Claw Back Procedure**”) to permit an interim distribution to IQ as soon as possible while preserving the ability for other creditors of BSI to assert a claim ranking in priority to IQ and, if such claim and priority is Finally Determined (any such claim being a “**Priority Claim**”), provide for the reimbursement of the necessary proceeds. Such mechanism will be governed by an agreement between BSI, the Monitor and IQ (the “**Reimbursement Agreement**”).

August 22 Affidavit, paras. 19-20.

11. The Claw Back Procedure contemplates a seven day period post-issuance of the Interim Distribution Order for parties to notify BSI, the Monitor and IQ of their intention to assert a claim ranking in priority to IQ, and, if BSI, the Monitor and IQ determine such claim to be a Reimbursement Claim (as defined in the Reimbursement

Agreement), such claimant will have two months from the date of the Interim Distribution Order to submit materials asserting its priority over the Collateral.

August 22 Affidavit, paras. 21-22.

12. The determination of whether a Reimbursement Claim is a Priority Claim will be conducted in accordance with the terms of the Reimbursement Agreement, which contemplates generally following the process laid out at paragraphs 20-27 of the Claims Procedure Order. IQ, acting reasonably, will participate in any process taking place under the Claims Procedure Order which could affect IQ's priority status in respect of the Collateral.

August 22 Affidavit, para. 23.

13. Should a Priority Claim be found to exist, IQ will reimburse to BSI through the Monitor such portion of the Interim Distribution as may be necessary to satisfy the Priority Claim within seven business days of the determination that such claim is a Priority Claim.

August 22 Affidavit, para. 24.

PART III - ISSUES

14. The issue on this motion is whether the Court ought to authorize and direct the Monitor to make the Interim Distribution to IQ.

PART IV - LAW AND ARGUMENT

This Court Should Order Payment of the Interim Distribution

(1) *The Court has the Jurisdiction to Make the Interim Distribution Order*

15. Section 11 of the CCAA provides that a court may, “*subject to the restrictions set out in [the CCAA]... make any order it considers appropriate in the circumstances.*” The court has inherent jurisdiction to fill in the gaps of the CCAA to give effect to its objects.

Re Nortel Networks Corp., (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List]), Applicants' Book of Authorities, Tab 1 at para 30.

CCAA, s. 11

16. Orders granting interim distributions are routinely granted by Canadian courts. In *Re AbitibiBowater Inc.*, the Honourable Mr. Justice Gascon approved an interim distribution, noting that nothing in the CCAA prevents such relief and that “it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization.”

Re AbitibiBowater Inc., 2009 QCCS 6461 (“*Abitibi*”), Applicants' Book of Authorities, Tab 2 at paras 70-75.

Re Windsor Machine & Stamping Ltd. (2009), 55 C.B.R. (5th) 241 (Ont. S.C. [Comm. List.]), Applicants' Book of Authorities, Tab 3.

Re PCAS Patient Care Automation Services Inc., 2012 ONSC 3367, Applicants' Book of Authorities, Tab 4.

Re Northstar Aerospace, Inc., 2012 ONSC 4423, Applicants' Book of Authorities, Tab 5.

(2) *The Interim Distribution Order Should be Granted*

17. In coming to his decision in *Abitibi*, Justice Gascon considered a number of factors, including:

(a) The payee’s security was valid and enforceable;

- (b) The amounts owed to the payee exceeded the distribution; and
- (c) The distribution would result in significant interest savings.

Abitibi, Applicants' Book of Authorities, Tab 2 at para. 75.

All of these factors are met in the case at bar.

18. BSI is accruing interest at a rate of approximately \$10,000 per day in respect of the Secured Term Loan. The Interim Distribution will cause such accrual to cease, preventing further erosion of BSI's estate.

August 22 Affidavit, para. 13.

19. Independent review has confirmed the validity and enforceability of IQ's security, which exists over substantially all of BSI's assets.

August 22 Affidavit, para. 12.

20. The Timminco Entities and the Monitor have taken care to ensure that the ability to assert a claim ranking in priority to IQ has been preserved and that the process for determining Priority Claims is fair and reasonable. The process for determining Priority Claims generally follows the process set out by the Claims Procedure Order as granted by the Court and provides for the Monitor's oversight.

August 22 Affidavit, para. 21-23.

21. The opportunity to assert a higher-ranking claim has been communicated to all stakeholders: in addition to all of the parties on the service list, all creditors who asserted secured claims in the Claims Process have been served with the motion materials for this motion.

Affidavit of Service of Kathryn Esaw sworn August 24, 2012.

22. The motion for the Interim Distribution is supported by the Monitor.


August 22 Affidavit, para. 25.

23. For the foregoing reasons, it is respectfully submitted that it is appropriate for this Court to grant the Interim Distribution Order.

PART V - ORDER REQUESTED

24. The Timminco Entities therefore request an Order authorizing and directing the Monitor to make the Interim Distribution to IQ.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of August,
2012.



Stikeman Elliott LLP

Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

TAB	DOCUMENT
1.	<i>Re Nortel Networks Corp.</i> , (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List])
2.	<i>Re AbitibiBowater Inc.</i> , 2009 QCCS 6461
3.	<i>Re Windsor Machine & Stamping Ltd.</i> (2009), 55 C.B.R. (5th) 241 (Ont. S.C. [Comm. List.])
4.	<i>Re PCAS Patient Care Automation Services Inc.</i> , 2012 ONSC 3367
5.	<i>Re Northstar Aerospace, Inc.</i> , 2012 ONSC 4423

SCHEDULE "B"
RELEVANT STATUTES

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

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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(RETURNABLE August 28, 2012)**

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