

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.

**FACTUM
OF THE RESPONDING PARTY, ST. CLAIR PENNYFEATHER,
REPRESENTATIVE PLAINTIFF IN THE CLASS ACTION**

(Returnable April 27, 2012)

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(Motion Returnable April 27, 2012)

Part I – INTRODUCTION

1. Timminco Limited (“**Timminco**”) and Becancour Silicon Inc. are seeking an order extending the stay of proceedings until June 20, 2012.
2. Mr. Pennyfeather does not oppose extending the stay of proceedings generally. However, Mr. Pennyfeather submits that the Court should refuse to extend the stay of proceedings as it applies to the Class Action.

Part II – ISSUES AND LAW

3. To further extend the stay of proceedings under the *CCAA*, Timminco bears the onus of proving that: (a) circumstances exist that make the order appropriate; (b) the applicant has acted and continues to act in good faith; and (c) the applicant has acted and continues to act with due diligence.¹

¹ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 11.02(3) [*CCAA*].

4. With respect of the Class Action, Timminco has failed to establish that it is acting in good faith and that an extension of the stay as it relates to the Class Action is appropriate.

5. Timminco's principal objection on the lift stay motion was that the Class Action would detract from the Mr. Kalin's focus on the CCAA proceedings.

6. On the lift stay motion, Timminco provided no direct evidence from anyone at Timminco. Mr. Kalin has now sworn an affidavit in support of this motion to extend the stay. His affidavit specifically refers to the Class Action and Mr. Pennyfeather's lift stay motion.² Mr. Kalin's affidavit makes no mention of any potential negative impact of the Class Action on the Timminco CCAA proceedings. This means that even if there was some legitimate basis for the speculation about Mr. Kalin's availability to instruct counsel in the Class Action at the time of the lift stay motion, it apparently no longer exists.

7. As a result, there is no evidentiary basis to establish Timminco's good faith in seeking the extension of the stay as it relates to the Class Action. There is no material indicating that an extended stay of the Class Action is necessary to further any legitimate purpose under the CCAA.

8. The Court should also be cognizant that at the lift stay motion, Mr. Walsh, Timminco's former Chief Executive Officer, President, and Director, submitted that the stay should not be lifted because the Class Action claims may be eliminated through a release of directors and officers (and their insurers), on a sanction motion. Mr. Walsh's

² Affidavit of Peter A.M Kalin sworn April 3, 2012 at para. 14, Applicants Motion Record (re Stay Extension)

submissions were supported by Timminco and the Photon Defendants.

9. It is improbable that the Class Action claims would be released as these parties hope given the following provisions of the *CCAA*:

5.1 (2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

10. The defendants' position indicates a desire to use the *CCAA* process for the collateral and improper purpose of eliminating all shareholders' claims in the Class Action without any examination of the defendants' conduct on the merits. In determining whether a matter is brought in good faith the Court needs to protect the institutional integrity of the *CCAA* courts, preserve their public esteem and do equity.³

11. Defendants in class action cases are attempting to turn the *CCAA* process into a laundromat for questionable corporate conduct. This tactical approach is not in the interest of the Court, the investing public, or those entities that require access to the stay provisions under the *CCAA* for legitimate commercial reasons.

Part III – ORDER SOUGHT

12. St. Clair Pennyfeather, the Plaintiff in the Class Action, requests an order refusing to extend the stay of proceedings as it applies to the Class Action.

³ *Re San Francisco Gifts Ltd.*, (2005), 2005 ABQB 91, 2005 Carswell Alta 174 at paras. 14-17, 23 (Alta. Q.B.)

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 26, 2012



James C. Orr

Lawyers for the Responding Party,
St. Clair Pennyfeather, the Plaintiff
in the Class Action
Kim Orr Barristers P.C.

SCHEDULE "A" – AUTHORITIES

1. *San Francisco Gifts Ltd. (Re)* (2005), 2005 ABQB 91, 2005 CarswellAlta 174 (Alta. Q.B.).

SCHEDULE "B" – STATUTES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 11 and 11.02

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

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.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

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