

**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 April 27, 2012)**  
**(Re Stay Extension)**

Date: April 25, 2012

**STIKEMAN ELLIOTT LLP**  
Barristers & Solicitors  
5300 Commerce Court West  
199 Bay Street  
Toronto, Canada M5L 1B9

**Ashley John Taylor** LSUC#: 39932E  
Tel: (416) 869-5236

**Maria Konyukhova** LSUC#: 52880V  
Tel: (416) 869-5230

**Kathryn Esaw** LSUC#: 58264F  
Tel: (416) 869-6820  
Fax: (416) 947-0866

Lawyers for the Applicants

**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 APPLICANTS  
(Motion Returnable April 27, 2012 re Stay Extension)**

**PART I - INTRODUCTION**

1. Timminco Limited ("**Timminco**") and Becancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**") were 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 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 these CCAA proceedings.

2. This motion is brought by the Timminco Entities seeking an order substantially in the form of the draft Order included with the Motion Record:

- a. extending the Stay Period (as defined below) until June 20, 2012; and
- b. approving the Fourth Report (as defined below) and the Monitor's fifth report to the Court, dated April 9, 2012.

## PART II - THE FACTS<sup>1</sup>

### 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 ("**Québec Silicon**") for resale to customers in the in the chemical (silicones), aluminum, and electronics/solar industries. Québec Silicon is a production partnership between BSI and Dow Corning Corporation, for resale to BSI's customers, of which BSI owns 51%. BSI also produces 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

---

<sup>1</sup> Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Affidavit of Peter A.M. Kalins sworn April 23, 2012 (the "**April 23 Affidavit**").

a magnesium business. The Ontario-based manufacturing operations of Timminco Metals were discontinued in June 2008.

April 23 Affidavit at para. 3, Motion Record, Tab 2

## STATUS OF THE CCAA PROCEEDINGS

### *Sales Process*

4. The status of the CCAA proceedings is described in detail in paragraphs 8-25 of the April 23 Affidavit.

5. On March 9, 2012, this Court granted an order (the "**Bidding Procedures Order**"), inter alia, authorizing and directing the Timminco Entities to enter into an Agreement of Purchase and Sale with QSI Partners Ltd. (in such role, the "**Stalking Horse Bidder**") and approving the bidding procedures as attached to the Bidding Procedures Order (the "**Bidding Procedures**").

April 23 Affidavit at para. 16, Motion Record, Tab 2

6. Pursuant to the Bidding Procedures approved in the Bidding Procedures Order, the Timminco Entities sought and obtained a number of Qualified Phase I Bids and Qualified Phase II Bids and scheduled an auction to be held on April 24, 2012. The Timminco Entities expect to seek Court approval of the Successful Bid (and, at the Timminco Entities' discretion, the Back-Up Bid) and attempt to close the Successful Bid by June 20, 2012.

April 23 Affidavit at paras. 17-21, Motion Record, Tab 2

*The Timminco Entities' Cash Flows*

7. In its fourth report to the Court dated March 7, 2012 (the "**Fourth Report**"), the Monitor provided a cash flow forecast which indicated that the Timminco Entities had sufficient funds to operate through June 29, 2012.

April 23 Affidavit at para. 23, Motion Record, Tab 2

8. All amounts owed by the Timminco Entities in connection with the DIP Facility must be repaid in full by June 20, 2012, provided that no prior Event of Default (as defined in the DIP Agreement) has occurred.

April 23 Affidavit at para. 24, Motion Record, Tab 2

9. An updated cash flow forecast for the period from April 21, 2012 to June 29, 2012 contained in the Monitor's sixth report to the Court, dated April 25, 2012 (the "**Sixth Report**"), demonstrates that the Timminco Entities have sufficient liquidity to fund operations through to June 20, 2012.

April 23 Affidavit at paras. 23-25, Motion Record, Tab 2

Sixth Report at para. 17.

## REQUEST FOR EXTENSION OF THE STAY PERIOD

10. The Initial Order granted a stay of proceedings up to and including February 2, 2012, which was extended to April 30, 2012 (the “**Stay Period**”) by order of this Court on January 27, 2012.

April 23 Affidavit at para. 27, Motion Record, Tab 2

11. Since the commencement of the CCAA proceedings, the Timminco Entities have continued operating their business with the goal of selling their business for the benefit of their stakeholders. An extension of the Stay Period to June 20, 2012 is necessary to give the Timminco Entities sufficient time to achieve this goal by finalizing the transactions associated with the Successful Bid, returning to this Court for approval of same and closing the transaction(s). Further, extension of the Stay Period allows the Timminco Entities to continue benefiting from a stay of proceedings through to the expiry of the DIP Facility on June 20, 2012. The Timminco Entities have acted and continue to act in good faith and with due diligence. Such an extension would not materially prejudice any creditor, is critical to enabling the Timminco Entities to continue their daily operations and restructuring efforts, and is supported by the Monitor.

April 23 Affidavit at paras. 27-31, Motion Record, Tab 2

Sixth Report at paras. 16-20.

### PART III - ISSUES

12. The issue on this motion is whether this Court should extend the Stay Period up to and including June 20, 2012.

### PART IV - LAW AND ARGUMENT

13. Pursuant to s. 11.02 of the CCAA, the Court may extend the stay of proceedings with respect to a debtor company where: (a) circumstances exist that make the order appropriate; and (b) the applicant has acted and is acting in good faith and with due diligence.

CCAA, s. 11.02(2), 11.02(3)

14. In *Century Services Inc. v. Canada (Attorney General)*, the Supreme Court of Canada held that the appropriateness requirement in s. 11 of the CCAA must be assessed in light of the policy objectives underlying the CCAA:

*. . . Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA – avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. . . .*

*It is well-established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure". However, when an order is sought that does realistically advance the CCAA's purposes, the ability to make it is within the discretion of a CCAA court. [Citations omitted]*

*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 70-71, Applicants' Book of Authorities, Tab 1.

15. In *Lehndorff General Partner Ltd. (Re)*, Justice Farley described the CCAA as a statute intended to “*facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy*” and, as such, is “*remedial legislation entitled to a liberal interpretation*”. Justice Farley stated, *inter alia*:

*The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA.*

*Re Lehndorff General Partner Ltd. (1993), 17 C.B.R. (3rd) 24 at para. 6 (Ont. Gen. Div. [Comm. List]), Applicants’ Book of Authorities, Tab 2 [“Lehndorff”].*

16. Justice Farley also expressly recognized one of the purposes of the CCAA to be the facilitation of ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. He stated:

*The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.*

*...It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally.*

*Lehndorff at para. 7, Applicants’ Book of Authorities, Tab 2.*

17. The Stay Period expires on April 30, 2012. An extension of the Stay Period up to and including June 20, 2012 would advance the policy objectives underlying the CCAA



by allowing the Timminco Entities to continue working diligently towards a sale of their business for the benefit of their stakeholders. An extension is necessary in order to give the Timminco Entities the time required to finalize the transactions associated with the Successful Bid, return to this Court for approval of same and close the transaction(s). Further, the extension of the Stay Period allows the Timminco Entities to continue to benefit from a stay of proceedings through to the expiry of the DIP Facility on June 20, 2012.

April 23 Affidavit at para. 28, Motion Record, Tab 2

18. In *Canwest Global Communications Corp. (Re)*, Justice Pepall granted an extension of the stay of proceedings for a group of debtors that were continuing to work with their stakeholders. Justice Pepall found that the extension would provide the necessary stability to allow the debtors to continue working towards a resolution that would result in the continuation of their businesses as a going concern. The factors which supported her decision were (a) the cashflow forecast indicated that the debtors had sufficient cash resources to operate throughout the extension of the stay period, (b) the monitor supported the extension, (c) there was a lack of opposition to the motion, and (d) the debtors had acted and were continuing to act in good faith and with due diligence.

*Re Canwest Global Communications Corp.*, [2009] O.J. No. 4788 (Ont. S.C.J. [Comm. List]) at para. 43, Applicants' Book of Authorities, Tab 3.

19. The cash flow forecast attached to the Sixth Report projects that the Timminco Entities will have sufficient liquidity to fund operations until June 20, 2012.

Sixth Report at para. 17.

20. The Monitor supports the motion to extend the Stay Period and the Timminco Entities are unaware of any creditor who opposes this relief being granted. It is not believed that any creditor will suffer any material prejudice if the Stay Period is extended as requested.

April 23 Affidavit at para. 31, Motion Record, Tab 2  
Sixth Report at paras. 16-20.

21. The Timminco Entities have acted and continue to act in good faith and have been working toward selling their business for the benefit of their stakeholders with due diligence.

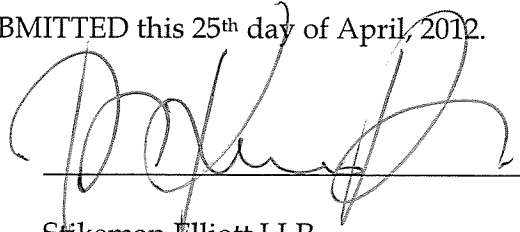
April 23 Affidavit at para. 29, Motion Record, Tab 2

22. For the foregoing reasons, it is respectfully submitted that the Stay Period should be extended to June 20, 2012.

#### **PART V - ORDER REQUESTED**

23. The Timminco Entities therefore request an Order substantially in the form of the draft Order attached at Tab 3 of the Timminco Entities' Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of April, 2012.

A handwritten signature in black ink, consisting of several loops and flourishes, positioned above a horizontal line.

Stikeman Elliott LLP

Lawyers for the Applicants

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
2. *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div. [Comm. List])
3. *Re Canwest Global Communications Corp.*, [2009] O.J. No. 4788 (Ont. S.C.J.) [Comm. List])

**SCHEDULE "B"**  
**RELEVANT STATUTES**

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

...

**11. General power of court**

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. – other than initial application**

11.02 (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**

11.02 (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.

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 BECANCOUR SILICON INC.

**ONTARIO  
SUPERIOR COURT OF JUSTICE - COMMERCIAL  
LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS  
(RETURNABLE APRIL 27, 2012)**

**STIKEMAN ELLIOTT LLP**  
Barristers & Solicitors  
5300 Commerce Court West  
199 Bay Street  
Toronto, Canada M5L 1B9

**Ashley J. Taylor** LSUC#: 39932E  
Tel: (416) 869- 5246

**Maria Konyukhova** LSUC#: 52880V  
Tel: (416) 869-5230

**Kathryn Esaw** LSUC# 58264F  
Tel: (416) 869-6820

Fax: (416) 947-0866

Lawyers for Applicants