CITATION: Timminco Limited (Re), 2012 ONSC 948
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120209

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **A. J. Taylor and M. Konyukhova, for the Applicants**

K. Stuebing and D. Wray, for Communications, Energy and Paperworkers' Union of Canada ("CEP")

L. Rogers, for FTI Consulting Canada Inc.

D. Bish, for QSI Partners Ltd.

C. Sinclair, for United Steelworkers' Union ("USW")

S. Scharbach and D. McPhail, for FSCO

H. Meredith, for AMG Advance Metallurgical Group NV

B. Boake, for Dow Corning

A. Kauffman, for Investissement Quebec

J. Orr and M. Spencer, for Class Action Plaintiffs

HEARD: **January 27 and February 6, 2012**

ENDORSEMENT

[1] Timminco Limited and Bécancour Silicon Inc. (together, the "Timminco Entities") brought this motion for an order approving the DIP Facility (defined below) and granting a

priority charge on the current and future assets, undertakings and properties of the Timminco Entities in favour of the DIP Lender (defined below).

[2] CEP and USW opposed the motion, especially the request to grant super priority to the DIP Lender.

[3] By way of background, the Timminco Entities stated that they attempted to secure DIP financing prior to commencing the CCAA proceeding, but were unable to do so. The affidavit of Mr. Kalins sworn January 20, 2012 states that the Timminco Entities had approached their existing stakeholders and third-party financing lenders in order to obtain a suitable DIP facility. Investissement Quebec ("IQ"), Bank of America, N.A. ("Bank of America"), AMG Advanced Metallurgical Group NV ("AMG") and two third-party lenders declined to advance any funds to the Timminco Entities. The affidavit also states that negotiations with another third-party lender failed to result in a DIP facility with mutually agreeable terms.

[4] Mr. Kalins went on to state that in light of the Timminco Entities precarious cash position, it was imperative that the Timminco Entities secured DIP financing as soon as possible after commencement of the CCAA proceedings. Following the grant of the stay of proceedings, the Timminco Entities, with the assistance of the Monitor, expanded their efforts to secure DIP financing by contacting parties who could not be contacted in advance of the filing.

[5] Mr. Kalins stated that the Timminco Entities pursued the arrangement of a DIP facility with a number of parties and five parties submitted indicative terms for a DIP facility. Following further discussion and negotiations, the Timminco Entities negotiated a DIP Agreement with QSI Partners Ltd. ("QSI" or the "DIP Lender") dated January 18, 2012 (the "DIP Agreement").

[6] The DIP Agreement is conditional, among other things, upon the issuance of a court-order approving the DIP Facility and granting the DIP Lender a priority charge in favour of the DIP Lender (the "DIP Lenders' Charge") over all of the assets, property and undertaking of the Timminco Entities (the "Property"), ranking ahead in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (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* ("OPBA"), or the *Quebec Supplemental Pension Plans Act* ("QSPPA"), other than the Administration Charge and the KERP Charge (as granted by my order dated January 16, 2012), and any valid purchase money security interests.

[7] Mr. Kalins stated that the DIP Lender was specifically asked whether it would advance under the DIP Facility if the DIP Lenders' Charge was not granted priority over the Encumbrances (other than any valid purchase money security interest), including without limitation any deemed trust created under the OPBA or the QSPPA. The DIP Lender indicated that they would not advance under the DIP Facility; and further, the DIP Lenders' Charge is not intended to secure obligations incurred prior to the CCAA proceeding.

[8] The DIP Agreement provides for a period of exclusivity during which the Timminco Entities may not 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 until January 31,

2012 (the "Exclusivity Period") in order to provide the DIP Lender with an opportunity to prepare a "stalking horse bid" for consideration by the Timminco Entities.

[9] Mr. Kalins went on to state that, if the order approving the DIP Facility was not granted in a form and substance satisfactory to the DIP Lender and the Timminco Entities, or if the DIP obligations are declared to be immediately due and payable, the Exclusivity period shall immediately terminate.

[10] Mr. Kalins also stated that the financial terms of the DIP Agreement are better than or not materially worse than those proposed in the competing term sheets. Some of the other term sheets provided were for an inadequate amount of funding, contained other disadvantageous terms or would not be available in a timely manner. Mr. Kalins states that, in the opinion of management, the DIP Agreement is the best available option. The special committee of the board has approved the execution of the DIP Agreement and the seeking of court approval.

[11] The Monitor filed its Third Report which addresses the request for approval of the DIP Agreement and the DIP Lenders' Charge. The Monitor has been providing the Timminco Entities with assistance in their attempts to obtain DIP financing. The Monitor reported that four of the indications of interests with respect to a DIP facility were either for an amount that was insufficient to provide the necessary liquidity, added more onerous financial terms than those contained in the DIP Agreement, or contained terms and conditions that, in the opinion of the Timminco Entities and the Monitor, made it unlikely that a binding agreement could successfully be negotiated within the time frame necessary to be able to access the funding when required, or a combination of these factors.

[12] The Monitor reports that the DIP Lender is a Cayman Islands company that the Monitor has been informed is a subsidiary of a major company with a strategic interest in the business and assets of the Timminco Entities. Pursuant to a non-disclosure agreement entered into between the Timminco Entities and the DIP Lender, neither the Timminco Entities nor the Monitor is at liberty to disclose the name of the ultimate parent company of QSI, although that information is known to the Timminco Entities and the Monitor. However, the Monitor does report that the DIP Lender has confirmed that the corporate group of which it is part is neither a shareholder nor a creditor of the Timminco Entities.

[13] The Monitor also reports that subject to the terms and conditions of the DIP Agreement, the DIP Lender has agreed to lend up to U.S. $4.25 million (the "Maximum Amount"). The Maximum Amount will be deposited in a segregated interest-bearing account of the Monitor within one business day of the granting of this order, with advances to draw from the Maximum Amount in accordance with the terms of the DIP Agreement.

[14] The DIP Facility is to bear interest at the Bank of Canada prime rate plus 5% per annum payable monthly in arrears. A commitment fee of U.S. $100,000 is payable from the first DIP advance. In addition, the Timminco Entities are obligated to pay all reasonable out of pocket expenses.

[15] The Timminco Entities' obligations under the DIP Facility (the "DIP Obligations") are repayable in full on the earlier of:

(a) the occurrence of an event of default which is continuing and has not been cured; and

(b) June 20, 2012.

[16] The DIP Agreement does provide for the mandatory repayment of the DIP Obligations from the net proceeds of any sale of collateral, subject to the first $1,269,000 of such net proceeds being paid to and held by the Monitor as the Priority Charge reserve.

[17] The Monitor is of the view that the DIP Agreement contains affirmative covenants, negative covenants, events of default and conditions customary for this type of financing, including the granting of the DIP Lenders' Charge having priority over all other Encumbrances against the assets of the Timminco Entities other than the Administration Charge, the KERP charge and purchase money security interests that are permitted Encumbrances.

[18] The Monitor specifically notes that the DIP Agreement provides that DIP advances cannot be used to make special payments in respect of pension plans. During the negotiation of the DIP Agreement, the Monitor reports that the DIP Lender was asked whether it would allow DIP advances to be used to pay special payments and whether it would allow DIP advances to be used for claims in respect of pension plans ranked in priority to the DIP Lenders' Charge. The Monitor states that the DIP Lender was not prepared to do so.

[19] The revised Cash Flow Forecast filed in the Second Report indicates that the Timminco Entities become cash flow negative during the third week of February 2012. Mr. Kalins states that without additional funding, the Timminco Entities will be forced to cease operating in February.

[20] Further, Mr. Kalins states that the DIP Facility is expected to provide sufficient liquidity to conduct an orderly marketing process of the Timminco Entities' business following expiry of the Exclusivity Period, whether or not a "stalking horse bid" is negotiated.

[21] The motion materials have been served on, among others:

(a) IQ, Bank of America, Dow Corning, all registrants shown on searches of the personal property security and real property registers in Ontario and in Quebec;

(b) the members of the pension plan committees for the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan, Financial Services Commission of Ontario; Régie de rentes du Québec, the USW and the Bécancour Union; and

(c) various government entities, including Ontario and Quebec environmental agencies and federal and provincial taxing authorities.

[22] In addition, all of the directors and officers of the Timminco Entities were served with the motion record in connection with the request for the DIP Lenders' Charge to rank ahead of, among other things, the D&O Charge.

[23] The Monitor recommended that the requested relief be granted. The motion was not opposed by IQ or any other secured creditor.

[24] The motion was opposed by CEP and the USW.

[25] The financial positions of the various pension plans for the benefit of members of CEP and USW have been set out in previous decisions and are not repeated here.

[26] Mr. Simoneau, President of CEP, Local 184, states in his affidavit that since the commencement of the CCAA proceedings, CEP and the pension committee have been excluded from all aspects of the Applicant's restructuring activities, details of which are contained at paragraphs 7 – 15 of his affidavit.

[27] The CEP also takes the position that neither the pension committee nor the CEP were consulted during the negotiation of the DIP Agreement and that the Applicants have not disclosed specific reasons for their electing not to pursue negotiations with any of the other parties that expressed interest in entering into a DIP agreement.

[28] The issue on this motion is whether the court should approve the DIP Facility and grant the DIP Lenders' Charge.

[29] In respect of this issue, counsel to the Timminco Entities submits that to the extent that the request for the DIP Lenders' Charge is a request for the court to override the provisions of the QSPPA or the OPBA, the court has the jurisdiction to do so. I agree with this submission. This issue was analyzed in *Timminco Limited (Re)* 2012 ONSC 506, which considered the court's jurisdiction to grant super priority to the Administration Charge and D&O Charge, and is incorporated by reference to this decision and attached as Appendix A. The analysis of the court's jurisdiction in that case is also applicable here.

[30] The Timminco Entities seek approval of the DIP Facility in the amount of U.S. $4,250,000. The Timminco Entities also seek a granting of the DIP Lenders' Charge securing the DIP Facility ranking immediately behind the Administration Charge and the KERP Charge.

[31] Section 11.2 of the CCAA provides the court with the express jurisdiction to grant a DIP financing charge and provides, in part, as follows:

> 11.2(1) Interim Financing – on application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> 11.2(2) Priority – Secured Creditors – the court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[32] Subsection 11.2(4) sets out the factors to be considered by the court in deciding whether to grant a DIP Financing Charge:

> 11.2(4) – Factors to be Considered – in deciding whether to make an order, the court is to consider, among other things:
>
> (a) the period during which the company is expected to be subject to proceedings under the CCAA;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report.

[33] Counsel to the Timminco Entities referenced *Canwest Global Communications Corp. (Re)* (2009), 59 C.B.R. (5th) 72 (Ont. S.C.J.) (Commercial List)), where Pepall J. stressed the importance of meeting the criteria set out in s. 11.2(1), namely:

> (a) whether notice has been given to secured creditors likely to be affected by the security charge or charge;
>
> (b) whether the amount to be granted under the DIP Facility is appropriate and required having regard to the debtor's cash-flow statement; and
>
> (c) whether the DIP Charge secures an obligation that existed before the order was made (which it should not).

[34] Counsel to the Timminco Entities submits that a number of factors support the granting of the DIP Lenders' Charge and satisfy the criteria set out in s. 11.2(1) of the CCAA and the factors to be considered as outlined in s. 11.2(4) of the CCAA:

> (a) the Timminco Entities expect to continue operating during the term of the DIP Facility and attempt to negotiate a "stalking horse bid" and complete a bidding procedure or, if a "stalking horse bid" cannot be negotiated, complete a stand-alone sales process and return to court for approval, which the Timminco Entities expect to complete before June 2012;
>
> (b) the management of the Timminco Entities' business will be overseen by the Monitor. In this respect, counsel submits that neither IQ nor any other major

creditor has expressed any concern in respect of the Timminco Entities' management;

(c) without the DIP Facility, the Timminco Entities will not have the funding necessary to meet their obligations and will have to cease operations by the third week of February. Counsel further submits that the Timminco Entities and the Monitor are of the view that the continuation of operations would likely enhance the prospects of the sales process succeeding and would maximize recoveries for stakeholders;

(d) secured creditors have been given notice of the motion and IQ is not opposed to the granting of the DIP Lenders' Charge;

(e) directors and officers of Timminco, as beneficiaries of the D&O Charge, received notice of the request for an order granting the DIP Lenders' Charge ranking in priority to the D&O Charge;

(f) the Monitor is supportive of the requested relief and is of the view that any potential detriment caused to the Timminco Entities' creditors by the DIP Lenders' Charge should be outweighed by the benefits that it creates;

(g) the DIP Lender indicated that it will not provide the DIP Facility if the DIP Lenders' Charge is not granted; and

(h) the DIP Lenders' Charge does not secure an obligation that existed before the granting of the Initial Order.

[35] Counsel to IQ does not oppose the requested relief, but did make submissions to oppose the outcome sought by CEP, on the basis that such an outcome would provide enhanced priority to CEP and USW, at the expense of IQ.

[36] Not surprisingly, counsel for CEP takes a different approach and submits that in order to resolve the issue, consideration must be given to whether the evidentiary record discloses that the DIP Agreement is the result of a negotiation process that was fair and reasonable and that satisfies the statutory and common law obligations to act in the best interests of the union pension plans and their beneficiaries.

[37] Counsel to CEP submits that in addition to the listed factors noted above, it is incumbent upon the court to consider whether the Applicants, as members of the pension committee, have satisfied their fiduciary duties to the union pension plans both under the statute and at common law during the negotiation of the DIP Agreement. Counsel submits that a failure of the Timminco Entities in this regard would render the DIP Agreement itself unfair and unreasonable and the product of an unlawful process in which the Timminco Entities breached their duties to the union pension plans.

[38] Counsel to CEP submits that the Applicants, as members of the pension committee, are subject to fiduciary obligations in respect of the plan members and beneficiaries and that these obligations arise both at common law and by virtue of the QSPPA.

[39] Counsel to CEP contends that at the time the Applicants initiated the CCAA proceedings, the evidence confirmed that the union pension plans and the Haley pension plan were underfunded. The decisions that the Timminco Entities have made since the commencement of the CCAA proceedings have the potential to affect the plan members and beneficiaries at a time when they are peculiarly vulnerable. Counsel contends that the Timminco Entities have failed to consider their fiduciary obligations or consider the best interests of the plan members or beneficiaries and that this includes the negotiation of the DIP Agreement.

[40] A key component of the argument is the contention that the Timminco Entities were not at liberty to resolve the conflict by simply ignoring their role as a fiduciary to the pension plan. Counsel argues that when the Applicants' duty to the corporation conflicted with their fiduciary duties, including the negotiation of the DIP Agreement, it was incumbent on the Applicants to take steps to address the conflict and they failed to do so.

[41] Counsel to CEP also submits that there was insufficient evidence to justify the requested order.

[42] There is no doubt that the position of those represented by CEP and USW is impaired. However, the effect of acceding to the arguments put forth by counsel to CEP and supported by USW will do nothing, in my view, to improve the position of the members they represent.

[43] The stark reality of the situation facing the Timminco Entities is that without the approval of the DIP Facility and the granting of the DIP Charge, there simply will be no money available.

[44] The uncontradicted evidence is clear:

(i) in the third week of February 2012, the Timminco Entities will become cash flow negative;

(ii) without additional funding, the Timminco Entities will be forced to cease operating;

(iii) the Timminco Entities, with the assistance of the Monitor, have attempted to secure DIP financing, both prior to and after commencement of CCAA proceedings;

(iv) there was insufficient liquidity or unfavourable terms associated with the rejected DIP proposals;

(v) the DIP Lender will not permit DIP advances to be used to pay special payments or for claims in respect of pension plans ranked in priority to the DIP Lenders' Charge;

(vi) the DIP Facility is expected to provide sufficient liquidity to conduct an orderly marketing process of the Timminco Entities' business.

[45] I have taken the above findings into consideration, as well as the factors set out at [34] above. A review of these factors leads to the conclusion that the DIP Facility is necessary. The requirements of s. 11.2 of the CCAA have, in my view, been satisfied.

[46] It is unrealistic to expect that any commercially motivated DIP Lender will advance funds without receiving the priority that is being requested on this motion. It is also unrealistic to expect that any commercially motivated party would make advances to the Timminco Entities for the purpose of making special payments or other payments under the pension plans.

[47] The alternative proposed by CEP – of a DIP Charge without super priority – is not, in my view, realistic, nor is directing the Monitor to investigate alternative financing without providing super priority. If there is going to be any opportunity for the Timminco Entities to put forth a restructuring plan, it seems to me that it is essential and necessary for the DIP Financing to be approved and the DIP Charge granted. The alternative is a failed CCAA process.

[48] This underscores the lack of other viable options that was fully considered in the first Timminco endorsement (*Timminco Limited (Re)* 2012 ONSC 506). The situation has not changed. The reality, in my view, is that there is no real alternative. The position being put forth by CEP does not, in my view, satisfactorily present any viable alternative. In this respect, it seems to me that the challenge of the unions to the position being taken by the Timminco Entities is suspect, as the only alternative is a shutdown. It is impossible for me to reach any conclusion other than the fact that there simply is no other viable alternative.

[49] In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders, including CEP and USW.

[50] The analysis in the present motion is the same as that set out in *Timminco Limited (Re)*, 2012 ONSC 506. The outcome of this motion is consistent with that analysis. I am satisfied that bankruptcy is not the answer and, in order to ensure that the objectives of the CCAA are fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of the QSPPA and the OPBA.

[51] On the facts before me, I am satisfied that it is both necessary and appropriate to approve the DIP Facility. It is also, in my view, both necessary and appropriate to grant the D&O Charge and to provide that the D&O Charge has priority over the Encumbrances, including without limitation any deemed trust created under the OPBA or the QSPPA.

[52] The motion is, therefore, granted. The DIP Facility is approved and the DIP Charge is granted with the requested super priority.

"G. B. Morawetz J."

MORAWETZ J.

Date: February 9, 2012

APPENDIX A

CITATION: Timminco Limited (Re), 2012 ONSC 506
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120202

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **A. J. Taylor, M. Konyukhova and K. Esaw, for the Applicants**

D.W. Ellickson, for Communications, Energy and Paperworkers' Union of Canada

C. Sinclair, for United Steelworkers' Union

K. Peters, for AMG Advance Metallurgical Group NV

M. Bailey, for Superintendent of Financial Services (Ontario)

S. Weisz, for FTI Consulting Canada Inc.

A. Kauffman, for Investissement Quebec

HEARD: **January 12, 2012**
RELEASED: **January 16, 2012**
REASONS: **February 2, 2012**

ENDORSEMENT

[1] This motion was heard on January 12, 2012. On January 16, 2012, the following endorsement was released:

> Motion granted. Reasons will follow. Order to go subject to proviso that the Sealing Order is subject to modification, if necessary, after reasons provided.

[2] These are those reasons.

Background

[3] On January 3, 2012, Timminco Limited ("Timminco") and Bécancour Silicon Inc. ("BSI") (collectively, the "Timminco Entities") applied for and obtained relief under the *Companies' Creditors Arrangement Act* (the "CCAA").

[4] In my endorsement of January 3, 2012, (*Timminco Limited (Re)*, 2012 ONSC 106), I stated at [11]: "I am satisfied that the record establishes that the Timminco Entities are insolvent and are 'debtor companies' to which the CCAA applies".

[5] On the initial motion, the Applicants also requested an "Administration Charge" and a "Directors' and Officers' Charge" ("D&O Charge"), both of which were granted.

[6] The Timminco Entities requested that the Administration Charge rank ahead of the existing security interest of Investissement Quebec ("IQ") but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the *Ontario Pension Benefit Act* (the "PBA") or the *Quebec Supplemental Pensions Plans Act* (the "QSPPA") (collectively, the "Encumbrances") in favour of any persons that have not been served with this application.

[7] IQ had been served and did not object to the Administration Charge and the D&O Charge.

[8] At [35] of my endorsement, I noted that the Timminco Entities had indicated their intention to return to court to seek an order granting super priority ranking for both the Administration Charge and the D&O Charge ahead of the Encumbrances.

[9] The Timminco Entities now bring this motion for an order:

(a) suspending the Timminco Entities' obligations to make special payments with respect to the pension plans (as defined in the Notice of Motion);

(b) granting super priority to the Administration Charge and the D&O Charge;

(c) approving key employee retention plans (the "KERPs") offered by the Timminco Entities to certain employees deemed critical to a successful restructuring and a charge on the current and future assets, undertakings and properties of the Timminco Entities to secure the Timminco Entities' obligations under the KERPs (the "KERP Charge"); and

(d) sealing the confidential supplement (the "Confidential Supplement") to the First Report of FTI Consulting Canada Inc. (the "Monitor").

[10] If granted, the effect of the proposed Court-ordered charges in relation to each other would be:

- first, the Administration Charge to the maximum amount of $1 million;
- second, the KERP Charge (in the maximum amount of $269,000); and
- third, the D&O Charge (in the maximum amount of $400,000).

[11] The requested relief was recommended and supported by the Monitor. IQ also supported the requested relief. It was, however, opposed by the Communications, Energy and Paperworkers' Union of Canada ("CEP"). The position put forth by counsel to CEP was supported by counsel for the United Steelworkers' Union ("USW").

[12] The motion materials were served on all personal property security registrants in Ontario and in Quebec: the members of the Pension Plan Committees for the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan; the Financial Services Commission of Ontario; the Regie de Rentes du Quebec; the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union; and La Section Locale 184 de Syndicat Canadien des Communications, De L'Energie et du Papier; and various government entities, including Ontario and Quebec environmental agencies and federal and provincial taxing authorities.

[13] Counsel to the Applicants identified the issues on the motion as follows:

(a) Should this court grant increased priority to the Administration Charge and the D&O Charge?

(b) Should this court grant an order suspending the Timminco Entities' obligations to make the pension contributions with respect to the pension plans?

(c) Should this court approve the KERPs and grant the KERPs Charge?

(d) Should this court seal the Confidential Supplement?

[14] It was not disputed that the court has the jurisdiction and discretion to order a super priority charge in the context of a CCAA proceeding. However, counsel to CEP submits that this is an extraordinary measure, and that the onus is on the party seeking such an order to satisfy the court that such an order ought to be awarded in the circumstances.

[15] The affidavit of Peter A.M. Kalins, sworn January 5, 2012, provides information relating to the request to suspend the payment of certain pension contributions. Paragraphs 14-28 read as follows:

> 14. The Timminco Entities sponsor the following three pension plans (collectively, the "**Pension Plans**"):
>
> (a) the Retirement Pension Plan for The Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco Limited (Ontario Registration Number 0589648) (the "**Haley Pension Plan**");

(b) the Régime de rentes pour les employés non syndiqués de Silicium Bécancour Inc. (Québec Registration Number 26042) (the "**Bécancour Non-Union Pension Plan**"); and

(c) the Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (Québec Registration Number 32063) (the "**Bécancour Union Pension Plan**").

Haley Pension Plan

15. The Haley Pension plan, sponsored and administered by Timminco, applies to former hourly employees at Timminco's magnesium facility in Haley, Ontario.

16. The Haley Pension Plan was terminated effective as of August 1, 2008 and accordingly, no normal cost contributions are payable in connection with the Haley Pension Plan. As required by the Ontario *Pension Benefits Act* (the "**PBA**"), a wind-up valuation in respect of the Haley Pension Plan was filed with the Financial Services Commission of Ontario ("**FSCO**") detailing the plan's funded status as of the wind-up date, and each year thereafter. As of August 1, 2008, the Haley Pension Plan was in a deficit position on a wind-up basis of $5,606,700. The PBA requires that the wind-up deficit be paid down in equal annual installments payable annually in advance over a period of no more than five years.

17. As of August 1, 2010, the date of the most recently filed valuation report, the Haley Pension Plan had a wind-up deficit of $3,922,700. Contributions to the Haley Pension Plan are payable annually in advance every August 1. Contributions in respect of the period from August 1, 2008 to July 31, 2011 totalling $4,712,400 were remitted to the plan. Contributions in respect of the period from August 1, 2011 to July 31, 2012 were estimated to be $1,598,500 and have not been remitted to the plan.

18. According to preliminary estimates calculated by the Haley Pension Plan's actuaries, despite Timminco having made contributions of approximately $4,712,400 during the period from August 1, 2008 to July 31, 2011, as of August 1, 2011, the deficit remaining in the Haley Pension Plan is $3,102,900.

Bécancour Non-Union Pension Plan

19. The Bécancour Non-Union Pension Plan, sponsored by BSI, is an on-going pension plan with both defined benefit ("**DB**") and defined contribution provisions. The plan has four active members and 32 retired and deferred vested members (including surviving spouses).

20. The most recently filed actuarial valuation of the Bécancour Non-Union Pension Plan performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Non-Union Pension Plan was $3,239,600.

21. In 2011, normal cost contributions payable to this plan totaled approximately $9,525 per month (or 16.8% of payroll). Amortization payments owing to this plan totaled approximately $41,710 per month. All contributions in respect of the plan were paid when due in accordance with the Québec *Supplemental Pension Plans Act* (the "**QSPPA**") and regulations.

Bécancour Union Pension Plan

22. The BSI-sponsored Bécancour Union Pension Plan is an on-going DB pension plan with two active members and 98 retired and deferred vested members (including surviving spouses).

23. The most recently filed actuarial valuation performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Union Pension Plan was $7,939,500.

24. In 2011, normal cost contributions payable to the plan totaled approximately $7,083 per month (or 14.7% of payroll). Amortization payments owing to this plan totaled approximately $95,300 per month. All contributions in respect of the plan were paid when due in accordance with the QSPPA and regulations.

25. BSI unionized employees have the option to transfer their employment to QSLP, under the form of the existing collective bargaining agreement. In the event of such transfer, their pension membership in the Bécancour Union Pension Plan will be transferred to the Quebec Silicon Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). Also, in the event that any BSI non-union employees transfer employment to QSLP, their pension membership in the Bécancour Non-Union Pension Plan would be transferred to the Quebec Silicon Non-Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). I am advised by Andrea Boctor of Stikeman Elliott LLP, counsel to the Timminco Entities, and do verily believe that if all of the active members of the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan transfer their employment to QSLP, the Régie des rentes du Québec would have the authority to order that the plans be wound up.

Pension Plan Deficiencies and the Timminco Entities' CCAA Proceedings

26. The assets of the Pension Plans have been severely impacted by market volatility and decreasing long-term interest rates in recent years, resulting in increased deficiencies in the Pension Plans. As a result, the special payments payable with respect to the Haley Plan also increased. As at 2010, total annual special payments for the final three years of the wind-up of the Haley Pension Plan were $1,598,500 for 2010, $1,397,000 for 2011 and $1,162,000 for 2012, payable in advance annually every August 1. By contrast, in 2011 total annual special payments to the Haley Pension Plan for the remaining two years of the wind-up increased to $1,728,700 for each of 2011 and 2012.

Suspension of Certain Pension Contributions

27. As is evident from the Cashflow Forecast, the Timminco Entities do not have the funds necessary to make any contributions to the Pension Plans other than (a) contributions in respect of normal cost, (b) contributions to the defined contribution provision of the BSI Non-Union Pension Plan, and (c) employee contributions deducted from pay (together, the "**Normal Cost Contributions**"). Timminco currently owes approximately $1.6 million in respect of special payments to the Haley Pension Plan. In addition, assuming the Bécancour Non-Union Pension Plan and the Bécancour Union Pension Plan are not terminated, as at January 31, 2012, the Timminco Entities will owe approximately $140,000 in respect of amortization payments under those plans. If the Timminco Entities are required to make the pension contributions other than Normal Cost Contributions (the "**Pension Contributions**"), they will not have sufficient funds to continue operating and will be forced to cease operating to the detriment of their stakeholders, including their employees and pensioners.

28. The Timminco Entities intend to make all normal cost contributions when due. However, management of the Timminco Entities does not anticipate an improvement in their cashflows that would permit the making of Pension Contributions with respect to the Pension Plans during these CCAA proceedings.

The Position of CEP and USW

[16] Counsel to CEP submits that the super priority charge sought by the Timminco Entities would have the effect of subordinating the rights of, *inter alia*, the pension plans, including the statutory trusts that are created pursuant to the QSPPA. In considering this matter, I have proceeded on the basis that this submission extends to the PBA as well.

[17] In order to grant a super priority charge, counsel to CEP, supported by USW, submits that the Timminco Entities must show that the application of provincial legislation "would frustrate the company's ability to restructure and avoid bankruptcy". (See *Indalex (Re)*, 2011 ONCA 265 at para. 181.)

[18] Counsel to CEP takes the position that the evidence provided by the Timminco Entities falls short of showing the necessity of the super priority charge. Presently, counsel contends that the Applicants have not provided any plan for the purpose of restructuring the Timminco Entities and, absent a restructuring proposal, the affected creditors, including the pension plans, have no reason to believe that their interests will be protected through the issuance of the orders being sought.

[19] Counsel to CEP takes the position that the Timminco Entities are requesting extraordinary relief without providing the necessary facts to justify same. Counsel further contends that the Timminco Entities must "wear two hats" and act both in their corporate interest and in the best interest of the pension plan and cannot simply ignore their obligations to the pension plans in favour of the corporation. (See *Indalex (Re)*, *supra*, at para. 129.)

[20] Counsel to CEP goes on to submit that, where the "two hats" gives rise to a conflict of interest, if a corporation favours its corporate interest rather than its obligations to its fiduciaries,

there will be consequences. In *Indalex (Re), supra*, the court found that the corporation seeking CCAA protection had acted in a manner that revealed a conflict with the duties it owed the beneficiaries of pension plans and ordered the corporation to pay the special payments it owed the plans (See *Indalex (Re), supra*, at paras. 140 and 207.)

[21] In this case, counsel to CEP submits that, given the lack of evidentiary support for the super priority charge, the risk of conflicting interests and the importance of the Timminco Entities' fiduciary duties to the pension plans, the super priority charge ought not to be granted.

[22] Although counsel to CEP acknowledges that the court has the discretion in the context of the CCAA to make orders that override provincial legislation, such discretion must be exercised through a careful weighing of the facts before the court. Only where the applicant proves it is necessary in the context and consistent with the objects of the CCAA may a judge make an order overriding provincial legislation. (*See Indalex (Re), supra*, at paras. 179 and 189.)

[23] In the circumstances of this case, counsel to CEP argues that the position of any super priority charge ordered by the court should rank after the pension plans.

[24] CEP also takes the position that the Timminco Entities' obligations to the pension plans should not be suspended. Counsel notes that the Timminco Entities have contractual obligations through the collective agreement and pension plan documents to make contributions to the pension plans and, as well, the Timminco Entities owe statutory duties to the beneficiaries of the pension funds pursuant to the QSPPA. Counsel further points out that s. 49 of the QSPPA provides that any contributions and accrued interest not paid into the pension fund are deemed to be held in trust for the employer.

[25] In addition, counsel takes the position that the Court of Appeal for Ontario in *Indalex (Re), supra*, confirmed that, in the context of Ontario legislation, all of the contributions an employee owes a pension fund, including the special payments, are subject to the deemed trust provision of the PBA.

[26] In this case, counsel to CEP points out that the special payments the Timminco Entities seek to suspend in the amount of $95,300 per month to the Bécancour Union Pension Plan, and of $47,743 to the Silicium Union Pension Plan, are payments that are to be held in trust for the beneficiaries of the pension plans. Thus, they argue that the Timminco Entities have a fiduciary obligation to the beneficiaries of the pension plans to hold the funds in trust. Further, the Timminco Entities' request to suspend the special payments to the Bécancour Union Pension Plan and the Quebec Silicon Union Pension Plan reveals that its interests are in conflict.

[27] Counsel also submits that the Timminco Entities have not pointed to a particular reason, other than generalized liquidity problems, as to why they are unable to make special payments to their pension plans.

[28] With respect to the KERPs, counsel to CEP acknowledges that the court has the power to approve a KERP, but the court must only do so when it is convinced that it is necessary to make such an order. In this case, counsel contends that the Timminco Entities have not presented any meaningful evidence on the propriety of the proposed KERPs. Counsel notes that the Timminco Entities have not named the KERPs recipients, provided any specific information regarding their

involvement with the CCAA proceeding, addressed their replaceability, or set out their individual bonuses. In the circumstances, counsel submits that it would be unfair and inequitable for the court to approve the KERPs requested by the Timminco Entities.

[29] Counsel to CEP's final submission is that, in the event the KERPs are approved, they should not be sealed, but rather should be treated in the same manner as other CCAA documents through the Monitor. Alternatively, counsel to CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

The Position of the Timminco Entities

[30] At the time of the initial hearing, the Timminco Entities filed evidence establishing that they were facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume, long-term supply contract at below market prices, a decrease in the demand and market price for solar grade silicon, failure to recoup their capital expenditures incurred in connection with the development of their solar grade operations, and the inability to secure additional funding. The Timminco Entities also face significant pension and environmental remediation legacy costs, and financial costs related to large outstanding debts.

[31] I accepted submissions to the effect that without the protection of the CCAA, a shutdown of operations was inevitable, which the Timminco Entities submitted would be extremely detrimental to the Timminco Entities' employees, pensioners, suppliers and customers.

[32] As at December 31, 2011, the Timminco Entities' cash balance was approximately $2.4 million. The 30-day consolidated cash flow forecast filed at the time of the CCAA application projected that the Timminco Entities would have total receipts of approximately $5.5 million and total operating disbursements of approximately $7.7 million for net cash outflow of approximately $2.2 million, leaving an ending cash position as at February 3, 2012 of an estimated $157,000.

[33] The Timminco Entities approached their existing stakeholders and third party lenders in an effort to secure a suitable debtor-in-possession ("DIP") facility. The Timminco Entities existing stakeholders, Bank of America NA, IQ, and AMG Advance Metallurgical Group NV, have declined to advance any funds to the Timminco Entities at this time. In addition, two third-party lenders have apparently refused to enter into negotiations regarding the provision of a DIP Facility.[1]

[1] In a subsequent motion relating to approval of a DIP Facility, the Timminco Entities acknowledged they had reached an agreement with a third-party lender with respect to providing DIP financing, subject to court approval. Further argument on this motion will be heard on February 6, 2012.

[34] The Monitor, in its Second Report, dated January 11, 2012, extended the cash forecast through to February 17, 2012. The Second Report provides explanations for the key variances in actual receipts and disbursements as compared to the January 2, 2012 forecast.

[35] There are some timing differences but the Monitor concludes that there are no significant changes in the underlying assumptions in the January 10, 2012 forecast as compared to the January 2, 2012 forecast.

[36] The January 10 forecast projects that the ending cash position goes from positive to negative in mid-February.

[37] Counsel to the Applicants submits that, based on the latest cash flow forecast, the Timminco Entities currently estimate that additional funding will be required by mid-February in order to avoid an interruption in operations.

[38] The Timminco Entities submit that this is an appropriate case in which to grant super priority to the Administration Charge. Counsel submits that each of the proposed beneficiaries will play a critical role in the Timminco Entities' restructuring and it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

[39] Statutory Authority to grant such a charge derives from s. 11.52(1) of the CCAA. Subsection 11.52(2) contains the authority to grant super-priority to such a charge:

> 11.52(1) Court may order security or charge to cover certain costs — On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[40] Counsel also submits that the Timminco Entities require the continued involvement of their directors and officers in order to pursue a successful restructuring of their business and/or finances and, due to the significant personal exposure associated with the Timminco Entities'

liabilities, it is unlikely that the directors and officers will continue their services with the Timminco Entities unless the D&O Charge is granted.

[41] Statutory authority for the granting of a D&O charge on a super priority basis derives from s. 11.51 of the CCAA:

> 11.51(1) Security or charge relating to director's indemnification — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> (2) Priority — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) Restriction — indemnification insurance — The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) Negligence, misconduct or fault — The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Analysis

(i) Administration Charge and D&O Charge

[42] It seems apparent that the position of the unions' is in direct conflict with the Applicants' positions.

[43] The position being put forth by counsel to the CEP and USW is clearly stated and is quite understandable. However, in my view, the position of the CEP and the USW has to be considered in the context of the practical circumstances facing the Timminco Entities. The Timminco Entities are clearly insolvent and do not have sufficient reserves to address the funding requirements of the pension plans.

[44] Counsel to the Applicants submits that without the relief requested, the Timminco Entities will be deprived of the services being provided by the beneficiaries of the charges, to the company's detriment. I accept the submissions of counsel to the Applicants that it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. I also accept the evidence of Mr. Kalins that the role of the advisors is critical to the efforts of the Timminco Entities to restructure. To expect

that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic.

[45] Likewise, I accept the submissions of counsel to the Applicants to the effect that the directors and officers will not continue their service without the D&O Charge. Again, in circumstances such as those facing the Timminco Entities, it is neither reasonable nor realistic to expect directors and officers to continue without the requested form of protection.

[46] It logically follows, in my view, that without the assistance of the advisors, and in the anticipated void caused by the lack of a governance structure, the Timminco Entities will be directionless and unable to effectively proceed with any type or form of restructuring under the CCAA.

[47] The Applicants argue that the CCAA overrides any conflicting requirements of the QSPPA and the BPA.

[48] Counsel submits that the general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalf & Mansfield Alternative Investment II Corp*., (2008), 45 C.B.R. (5^{th}) 163 (Ont. C.A.) at para. 104. In addition, in *Nortel Networks Corporation (Re)*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory position are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Nortel Networks Corporation (Re)*, (2009), 59 C.B.R. (5^{th}) 23 (Ont. C.A.).

[49] It has long been stated that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, with the purpose of allowing the business to continue. As the Court of Appeal for Ontario stated in *Stelco Inc., (Re)* (2005), 75 O.R. (3d) 5, at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

[50] Further, as I indicated in *Nortel Networks Corporation (Re)*, (2009), 55 C.B.R. (5^{th}) 229 (Ont. S.C.J.), this purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders. Based on this reasoning, the fact that Timminco has not provided any plan for restructuring at this time does not change the analysis.

[51] The Court of Appeal in *Indalex Ltd. (Re)* (2011), 75 C.B.R. (5^{th}) 19 (Ont. C.A.) confirmed the CCAA court's ability to override conflicting provisions of provincial statutes where the application of the provincial legislation would frustrate the company's ability to

restructure and avoid bankruptcy. The Court stated, *inter alia*, as follows (beginning at paragraph 176):

> The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. …
>
> …
>
> What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

[52] The Timminco Entities seek approval to suspend Special Payments in order to maintain sufficient liquidity to continue operations for the benefit of all stakeholders, including employees and pensioners. It is clear that based on the January 2 forecast, as modified by the Second Report, the Timminco Entities have insufficient liquidity to make the Special Payments at this time.

[53] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA granting, in the present case, super priority over the Encumbrances for the Administration Charge and the D&O Charge, even if such an order conflicts with, or overrides, the QSPPA or the PBA.

[54] Further, the Timminco Entities submit that the doctrine of paramountcy is properly invoked in this case and that the court should order that the Administration Charge and the D&O Charge have super priority over the Encumbrances in order to ensure the continued participation of the beneficiaries of these charges in the Timminco Entities' CCAA proceedings.

[55] The Timminco Entities also submit that payment of the pension contributions should be suspended. These special (or amortization) payments are required to be made to liquidate a going concern or solvency deficiency in a pension plan as identified in the most recent funding valuation report for the plan that is filed with the applicable pension regulatory authority. The requirement for the employer to make such payments is provided for under applicable provincial pension minimum standards legislation.

[56] The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater Inc*., (Re) (2009) 57 C.B.R. (5th) 285 (Q.S.C.); *Collins & Aikman Automotive Canada Inc*. (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.).

[57] I accept the submission of counsel to the Applicants to the effect that courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the

context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.

[58] The Timminco Entities also submit that there should be no director or officer liability incurred as a result of a court-ordered suspension of payment of pension contributions. Counsel references *Fraser Papers*, where Pepall J. stated:

> Given that I am ordering that the special payments need not be made during the stay period pending further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the CCAA process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Director's Charge.

[59] Importantly, *Fraser Papers* also notes that there is no priority for special payments in bankruptcy. In my view, it follows that the employees and former employees are not prejudiced by the relief requested since the likely outcome should these proceedings fail is bankruptcy, which would not produce a better result for them. Thus, the "two hats" doctrine from *Indalex (Re), supra*, discussed earlier in these reasons at [20], would not be infringed by the relief requested. Because it would avoid bankruptcy, to the benefit of both the Timminco Entities and beneficiaries of the pension plans, the relief requested would not favour the interests of the corporate entity over its obligations to its fiduciaries.

[60] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.

[61] The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[62] On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[63] In my view, this is exactly the kind of result the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order

suspending the requirement to make special payments is appropriate (see *ATB Financial* and *Nortel Networks Corporation (Re)*).

[64] In my view, the circumstances are such that the position put forth by the Timminco Entities must prevail. I am satisfied that bankruptcy is not the answer and that, in order to ensure that the purpose and objective of the CCAA can be fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of QSPPA and the PBA.

[65] There is a clear inter-relationship between the granting of the Administration Charge, the granting of the D&O Charge and extension of protection for the directors and officers for the company's failure to pay the pension contributions.

[66] In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

[67] If bankruptcy results, the outcome for employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners. The lack of a desirable alternative to the relief requested only serves to strengthen my view that the objectives of the CCAA would be frustrated if the relief requested was not granted.

[68] For these reasons, I have determined that it is both necessary and appropriate to grant super priority to both the Administrative Charge and D&O Charge.

[69] I have also concluded that it is both necessary and appropriate to suspend the Timminco Entities' obligations to make pension contributions with respect to the Pension Plans. In my view, this determination is necessary to allow the Timminco Entities to restructure or sell the business as a going concern for the benefit of all stakeholders.

[70] I am also satisfied that, in order to encourage the officers and directors to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities' failure to make pension contributions during the CCAA proceedings. At this point in the restructuring, the participation of its officers and directors is of vital importance to the Timminco Entities.

(ii) The KERPs

[71] Turning now to the issue of the employee retention plans (KERPs), the Timminco Entities seek an order approving the KERPs offered to certain employees who are considered critical to successful proceedings under the CCAA.

[72] In this case, the KERPs have been approved by the board of directors of Timminco. The record indicates that in the opinion of the Chief Executive Officer and the Special Committee of

the Board, all of the KERPs participants are critical to the Timminco Entities' CCAA proceedings as they are experienced employees who have played central roles in the restructuring initiatives taken to date and will play critical roles in the steps taken in the future. The total amount of the KERPs in question is $269,000. KERPs have been approved in numerous CCAA proceedings where the retention of certain employees has been deemed critical to a successful restructuring. See *Nortel Networks Corporation (Re)*, (2009) O.J. No. 1044 (S.C.J.), *Grant Forest Products Inc. (Re)*, (2009) 57 C.B.R. (5th) 128 (Ont. S.C.J.) [Commercial List], and *Canwest Global Communications Corp. (Re)*, (2009) 59 C.B.R. (5th) 72 (Ont. S.C.J.).

[73] In *Grant Forest Products*, Newbould J. noted that the business judgment of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge.

[74] The Monitor also supports the approval of the KERPs and, following review of several court-approved retention plans in CCAA proceedings, is satisfied that the KERPs are consistent with the current practice for retention plans in the context of a CCAA proceeding and that the quantum of the proposed payments under the KERPs are reasonable in the circumstances.

[75] I accept the submissions of counsel to the Timminco Entities. I am satisfied that it is necessary, in these circumstances, that the KERPs participants be incentivized to remain in their current positions during the CCAA process. In my view, the continued participation of these experienced and necessary employees will assist the company in its objectives during its restructuring process. If these employees were not to remain with the company, it would be necessary to replace them. It is reasonable to conclude that the replacement of such employees would not provide any substantial economic benefits to the company. The KERPs are approved.

[76] The Timminco Entities have also requested that the court seal the Confidential Supplement which contains copies of the unredacted KERPs, taking the position that the KERPs contain sensitive personal compensation information and that the disclosure of such information would compromise the commercial interests of the Timminco Entities and harm the KERPs participants. Further, the KERPs participants have a reasonable expectation that their names and salary information will be kept confidential. Counsel relies on *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522 at para. 53 where Iacobucci J. adopted the following test to determine when a sealing order should be made:

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[77] CEP argues that the CCAA process should be open and transparent to the greatest extent possible and that the KERPs should not be sealed but rather should be treated in the same manner as other CCAA documents through the Monitor. In the alternative, counsel to the CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

[78] In my view, at this point in time in the restructuring process, the disclosure of this personal information could compromise the commercial interests of the Timminco Entities and cause harm to the KERP participants. It is both necessary and important for the parties to focus on the restructuring efforts at hand rather than to get, in my view, potentially side-tracked on this issue. In my view, the Confidential Supplement should be and is ordered sealed with the proviso that this issue can be revisited in 45 days.

Disposition

[79] In the result, the motion is granted. An order shall issue:

(a) suspending the Timminco Entities' obligation to make special payments with respect to the pension plans (as defined in the Notice of Motion);

(b) granting super priority to the Administrative Charge and the D&O Charge;

(c) approving the KERPs and the grant of the KERP Charge;

(d) authorizing the sealing of the Confidential Supplement to the First Report of the Monitor.

"G. B. Morawetz J."

MORAWETZ J.

Date: February 2, 2012