CASE UPDATE

[RE TIMMINCO LIMITED]

MARY PICARD
FRASER MILNER CASGRAIN LLP

JANE DIETRICH
FRASER MILNER CASGRAIN LLP

Re Timminco Limited (2012) ONSC 506 (Ont. Commercial List) and (2012) ONSC 948 (Ont. Commercial List).

Timminco Limited and Bécancour Silicon Inc. (together the "Timminco Entities") sought and were granted protection under the CCAA on January 3, 2012. On January 12, 2012 the Timminco Entities brought a motion for an order, among other things:

> (a) suspending the Timminco Entities' obligations to make special payments with respect to the pension plans; and
>
> (b) granting super priority to charges over the assets of the Timminco Entities to secure (i) the fees of the FTI Consulting Canada Inc. as monitor (the "Monitor") and other professionals engaged by the Timminco Entities for the purpose of the CCAA proceedings (the "Administration Charge") and (ii) an indemnity given by the Timminco Entities to their directors and officers (the "D&O Charge").

The Order requested by the Timminco Entities was granted on January 16, 2012 by Justice Morawetz with reasons to follow. Reasons were released on February 2, 2012.

The Timmnico Entities also brought a motion seeking approval of a debtor-in-possession lending facility (the "DIP Facility") and granting a priority charge (the "DIP Charge") over the assets of the Timminco Entities to QSI Partners Ltd. (the "DIP Lender"). This motion was granted by Justice Morawetz with reasons released on February 9, 2012.

These decisions both dealt with matters previously addressed by the Ontario Court of Appeal in Re Indalex 2001 ONCA 265 (leave to appeal granted by the Supreme Court of Canada with a hearing scheduled for June 5, 2012).

The Court applied the reasoning of the Court of Appeal in *Re Indalex*, but came to a different conclusion, based on the facts of the Timminco case. The Court concluded that in the circumstances of the Timminco Entities it was both necessary and appropriate for the provincial statutory deemed trusts in respect of pension amounts to rank subordinate to the Administration Charge, the D&O Charge and the DIP Charge. The Court also concluded that it was both necessary and appropriate to suspend special payment contributions to the pension plans during the course of the CCAA proceeding.

Background

The Timminco Entities sponsored three registered pension plans. One pension plan was registered under *the Pensions Benefits Act* (Ontario), and two were registered under the *Supplemental Pensions Plan Act* (Quebec).

The administrator of the Ontario plan was Timminco Limited (the "Ontario Plan"). That Ontario Plan was in the course of being wound-up at the time of the commencement of the CCAA proceedings, with an effective wind-up date in 2008. Timminco Limited had missed a special payment contribution that was due to be made to the Ontario plan in August, 2011 of approximately $1.6 million. It was estimated that the deficit in the Ontario plan was approximately $3.1 million.

The administrators of each of the two Quebec pension plans (the "Quebec Plans") were, pursuant to the unique requirements of Quebec pension benefits legislation, members of a pension committee. The Communications, Energy and Paperworkers' Union of Canada (the "CEP") represented members of one of the Quebec Plans. The estimated deficit of the Quebec Plans was $3.2 million and $8 million, respectively. All contribution payments required to be made to the Quebec Plans were up to date. Ongoing special payments were required to be made to both Quebec Plans of approximately $137,000 per month.

The Decision

The Court made several critical findings of fact which formed the basis of its conclusion that, although there may be circumstances where it would be appropriate to grant a super-priority to pension amounts in a CCAA proceeding, those circumstances did not exist in this particular case.

The Court noted that the motion materials had been served on the Ontario and Quebec pension regulators, the two unions (the United Steelworkers' Union [the "USW"] and the CEP) and all of the members of the two pension committees that were the administrators of the two Quebec pension plans. Materials were also served on the secured creditors of the Timminco Entities and various government entities.

Although the CEP (supported by the USW) conceded that the Court had the authority to suspend pension payments and grant priority charges, the motions were opposed by the CEP and the USW. The arguments put forward by the CEP were similar in both motions and the decision by the Court for the later motion (DIP Priority Charge) incorporated by reference the reasons from the first decision (Administration and D&O charges). The Quebec pension regulator and the pension committee members did not appear at the hearings. Counsel for the Ontario pension regulator appeared, but took no position at the hearings.

The CEP opposed the priming charges on the basis that the Timminco Entities must show that complying with the provincial pension legislation would "frustrate the company's ability to restructure and avoid bankruptcy" (see *Re Indalex* at para 181). The CEP argued that as the Timminco Entities had not put forward a restructuring plan, the creditors, including the pension plan had no reason to believe that their interests would be protected through the orders sought. Essentially, they argued that the order was premature. The CEP also argued that the priming charges should not be granted because:

> (a) since the commencement of the CCAA proceedings, the CEP and the pension committee of the union pension plan had been excluded from all aspects of the restructuring activities;
>
> (b) neither the pension committee nor the CEP were consulted during the negotiation of the agreement regarding the DIP Facility;
>
> (c) the evidentiary record did not disclose that the DIP Facility agreement was the result of a negotiation process that was fair and reasonable, and that satisfied the statutory and common law obligations to act in the best interests of the members of the pension plans; and

(d) it was incumbent on the Court to consider whether the employer representatives on the pension committees had satisfied their fiduciary duties to the members of the plans.

The Court noted that the Timminco Entities were clearly insolvent and did not have sufficient available funds to make the pension contributions. The Court accepted the evidence of the Timminco Entities that if the requested priority over pension amounts was not granted, the professional advisors would not incur the risk of not being paid for their services and would not participate in the CCAA proceedings, the directors and officers would not continue their service, and the DIP Lender would not fund the Timminco Entities under the DIP Facility.

The Court was satisfied that if the relief requested by the Timminco Entities was not granted, the alternative would be a shutdown and bankruptcy. In particular, the Court noted the following:

(a) without additional funding, the companies would be forced to cease operations;

(b) the Timminco Entities and the Monitor had attempted to secure debtor in possession financing from several other sources, all of which had unfavourable terms; and

(c) the DIP Lender had been asked if it would advance under the DIP Facility if the DIP Charge was not granted super priority over the provincial statutory deemed trust in respect of pension amounts, and the answer was "no".

The Court stated (at paragraph 46 of the February 9th decision):

> "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."

The Court invoked the doctrine of paramountcy, confirmed as applicable by the Ontario Court of Appeal in *Indalex*, in order to prevent the rehabilitative purpose of the CCAA being frustrated. The Court specifically noted that a CCAA court has the ability to override the provincial statutory deemed trust in respect of pension amounts, where the deemed trust would frustrate the debtor company's ability to restructure and avoid bankruptcy. In Timminco, the Court concluded that the only way to avoid bankruptcy was to grant the requested super-priority status to the DIP Charge, Administration Charge and D&O Charge over the deemed trust pension amounts.

Importantly, the Court specifically noted that the employees and former employees were 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." At paragraph 59 of the February 2nd decision, the Court stated:

> "Thus, the 'two hats' doctrine from *Indalex*…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."

In its February 9th decision (at paragraph 42) the Court also observed:

> "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."

The CEP and USW did not propose an alternative to the relief requested by the Timminco Entities which would have the result of avoiding bankruptcy. As a result, the relief requested by the Timminco Entities on both motions was granted.