

**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 TAMERLANE VENTURES INC. and  
PINE POINT HOLDING CORP.

**FACTUM OF THE APPLICANTS**  
**(Initial Order Returnable August 23, 2013)**

August 22, 2013

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**PART I: OVERVIEW**

1. The Applicants, Tamerlane Ventures Inc. ("**Tamerlane**") and Pine Point Holding Corp. ("**Tamerlane Pine Point**"), seek an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C. 36 (the "**CCAA**") containing, among other things, a stay of proceedings against the Applicants and their property.
2. Tamerlane is a publicly traded company whose shares are listed and posted for trading on the TSX Venture Exchange. Tamerlane and its subsidiaries (collectively, the "**Tamerlane Group**"), including Tamerlane Pine Point, Tamerlane Ventures USA Inc. ("**Tamerlane USA**") and Tamerlane Ventures Peru SAC ("**Tamerlane Peru**") are engaged in the acquisition, exploration and development of base metal projects in Canada and Peru.
3. This is a consensual CCAA proceeding that is designed to give the debtors sufficient time to run a process to obtain offers for financing and/or purchase of some or all of the Applicants'

assets. The Applicants' assets are worth more than the outstanding debt and as such there is equity value in the assets. Notwithstanding the Applicants' balance sheet solvency, like many junior mining companies, the Applicants are facing liquidity constraints and have insufficient cash to meet current liabilities as they come due. Having regard to the interests of all of the Applicants' stakeholders, a stay of proceedings is necessary and appropriate in order to undertake a sale and investment solicitation process (the "**SISP**") to avoid a fire-sale liquidation of the Applicants' assets.

4. The Applicants' only secured creditor (other than counsel and the proposed Monitor) supports the debtor in this CCAA proceeding. The Secured Lender (defined below) is providing debtor in possession ("**DIP**") financing to allow the Applicants sufficient time to run the SISP with the oversight of the Court-appointed Monitor.

## **PART II:THE FACTS**

### **A. THE APPLICANTS**

5. Tamerlane is a corporation continued under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 (the "**CBCA**"), whose shares are publicly traded on the TSX Venture Exchange. Its registered office is located in Toronto, Ontario, and its executive office is located in Blaine, Washington.

Affidavit of Margaret M. Kent, signed August 22, 2013 (the "Kent Affidavit") at para. 5, Application Record Tab 2.

6. Tamerlane is the parent company in the Tamerlane Group. Tamerlane Pine Point is one of its wholly-owned direct subsidiaries. Tamerlane Pine Point is also a CBCA company, which has a registered office in Toronto, Ontario.

Kent Affidavit, paras. 10-12, Application Record Tab 2.

7. Tamerlane also owns: (i) 100% of the shares of Tamerlane USA, a company incorporated under the laws of Washington State, USA; (ii) Tamerlane Peru, a company incorporated under the laws of Peru, and (iii) Minera Los Pinos de Cañete SAC ("**Tamerlane Minera**"), a company incorporated under the laws of Peru. None of these entities is an applicant in these proceedings.

Kent Affidavit, paras. 13-14, Application Record Tab 2.

**B. THE APPLICANTS' BUSINESS**

8. The Tamerlane Group is engaged in the acquisition, exploration and development of base metal projects in Canada and Peru. Its two major assets are the Pine Point Property in Canada and the Los Pinos mining concession in Peru.

**1. Pine Point**

9. The Applicants' flagship property is the Pine Point Property, a project located near Hay River in the South Slave Lake area of the Northwest Territories of Canada. The mine at Pine Point was the largest and most profitable zinc-lead mine in Canadian history. From 1964 to 1987 more than 64 million tonnes of ore were extracted. It was ultimately shut down in 1987 due to the high costs of maintaining a townsite and exhaustion of near-plant resources.

Kent Affidavit, paras. 19-20, Application Record Tab 2.

10. Originally the Applicants had only an option to acquire a 60% interest in the Pine Point Property, but after completing significant exploration efforts from 2004 to 2006, and agreeing to provide a 3% net smelter return ("**NSR**") royalty to an entity controlled by the family trusts of

two insiders of Tamerlane, the Applicants, through Tamerlane Pine Point, acquired 100% of the property.

Kent Affidavit, para. 22, Application Record Tab 2.

11. The conditions that led to the closure of Pine Point in 1987 are no longer present today. The Applicants have completed a NI 43-101 Technical Report which shows 10.9 million tonnes of measured and indicated resources in the "R-190" zinc-lead deposit. The Applicants have obtained a full environmental assessment and all necessary permits for mill construction and infrastructure and to operate the R-190 deposit in the area.

Kent Affidavit, paras. 23-25, Application Record Tab 2.

12. By 2008, the Applicants had significantly advanced the project but ultimately put the project on hold because of lower metal prices at the time. With rising commodity prices in 2012, the project was restarted, with additional permits and licenses being obtained in the Spring of 2012. All permits remain in good standing. The Applicants also obtained an updated NI 43-101 Technical Report along with another NI 43-101 Technical Report on an additional deposit in the area. This latter report confirms the feasibility of the second deposit as well.

Kent Affidavit, paras. 25-27, Application Record Tab 2.

13. The Applicants firmly believe that there is substantial value in the Pine Point Property. The project has been determined to be feasible and licenses have already been obtained to put the first deposit into production. All of the expensive infrastructure, such as roads, powerlines and railheads, are already in place, minimizing the capital cost necessary to commence operations. The Applicants only need to raise the financing necessary to be able to exploit the value of the

project, a task made more difficult by, among other things, the problems experienced generally in the mining sector thus far in 2013.

Kent Affidavit, paras. 29, Application Record Tab 2.

## **2. Los Pinos**

14. The Tamerlane Group's other significant assets are the Los Pinos mining concessions south of Lima in Peru, which host a historic copper resource. The Tamerlane Group acquired the Los Pinos assets in 2007 through one of its subsidiaries, Tamerlane Peru, and it currently holds the mining concessions through another of its subsidiaries, Tamerlane Minera.

Kent Affidavit, paras. 30-31, Application Record Tab 2.

15. The Los Pinos deposit is a 790 hectare porphyry (a type of igneous rock) copper deposit. It has an extensive cap of oxide copper, changing to mixed oxides and sulfides, and eventually by sulfides to depth. Originally investigated in the 1990s when the price of copper was a quarter of its price today, Los Pinos has historically been viewed as a valuable property. With rising copper prices in 2012, it is now viewed as being even more valuable.

Kent Affidavit, paras. 30-33, Application Record Tab 2.

16. The Los Pinos assets have been the subject of an ownership dispute since 2008 when the general manager of Tamerlane's subsidiaries in Peru became disgruntled and illegally transferred the shares of Tamerlane Peru to himself. Civil and criminal proceedings followed and Tamerlane obtained both an injunction and administrative control over the Los Pinos site. While criminal proceedings against the former employee are continuing, Tamerlane is able to move the

project forward and to apply for necessary permits. Given the current copper prices and the current status of the proceedings, material value can be realized from the Los Pinos property.

Kent Affidavit, paras. 34-38, Application Record Tab 2.

### **3. Operations and Administration**

17. The exploration and development activities described above have been generally carried out by employees of Tamerlane USA. The Applicants' management team consists of four individuals who are employees of Tamerlane USA, which provides management services by contract to the Applicants.

Kent Affidavit, para. 39, Application Record Tab 2.

18. The Company formerly employed additional individuals, but has proactively reduced its workforce to the greatest extent possible in order to minimize expenses. The Applicants engage advisors, agents and consultants in respect of additional work that cannot be done by management.

Kent Affidavit, para. 40, Application Record Tab 2.

19. Tamerlane's main bank is the National Bank of Canada. The Tamerlane Group manages a centralized cash management system, whereby Tamerlane lends cash to other inter-company entities as needed. It is anticipated that the existing cash management system will continue to be used during the *CCAA* proceedings, so as to minimize disruption to business operations and to provide the necessary accounting controls to provide appropriate reporting to stakeholders and the Court.

Kent Affidavit, paras. 41-42, Application Record Tab 2.



## C. THE APPLICANTS' BALANCE SHEET

### 1. Assets

20. As at March 31, 2013 the Tamerlane Group had total consolidated assets with a net book value of \$24,814,433. The assets included consolidated current assets of \$2,007,406, and consolidated non-current assets with a net book value of \$22,807,027. Non-current assets included primarily the investment in the Pine Point property of \$20,729,551 and the Los Pinos property of \$1,314,936. As discussed above, the Applicants believe that the Los Pinos property is worth more than its net book value as a result of, among other things, recent increases in copper prices.

Kent Affidavit, para. 44, Application Record Tab 2.

21. Tamerlane previously requested that a reputable institution with significant mining experience perform valuations of both Los Pinos and the Pine Point Property. The Los Pinos valuation was completed in May 2013 and indicates a preliminary valuation of \$12 to \$15 million using a 0.3% copper cut-off grade, or \$17 to \$21 million using a 0.2% copper cut-off grade. The Pine Point valuation was completed in July 2013 and indicates a valuation of \$30 to \$56 million based on market comparables, with a value as high as \$229 million considering precedent transactions.

Kent Affidavit, para. 84, Application Record Tab 2.

### 2. Secured Debt

22. Pursuant to a Credit Agreement between Tamerlane and Global Resource Fund, a fund managed by Renvest Mercantile Bancorp Inc. (the "**Secured Lender**") made as of December 16, 2010, as amended by a First Amending Agreement dated June 30, 2011 and a Second Amending

Agreement dated July 29, 2011 (the "**Credit Agreement**"), Tamerlane became indebted to the Secured Lender for USD \$10,000,000 . The secured indebtedness under the Credit Agreement (the "**Secured Debt**") is guaranteed by both Tamerlane Pine Point and Tamerlane USA, and each of Tamerlane, Tamerlane Pine Point and Tamerlane USA has executed a general security agreement in favour of the Secured Lender in respect of the Secured Debt.

Kent Affidavit, paras. 45-46, Application Record Tab 2.

23. The Secured Lender is, and has always been, fully secured by the Tamerlane's Pine Point assets.

Kent Affidavit, para. 47, Application Record Tab 2.

24. As at August 20, 2013, the only parties that have registrations against the Applicants pursuant to the *PPSA* are (i) the Secured Lender and (ii) the Applicants' counsel, the Monitor and the Monitor's counsel in respect of the fees and disbursements owing to each. The Applicants are not aware of any other party claiming to be a secured creditor of one or both of the Applicants.

Kent Affidavit, paras. 63-64, Application Record Tab 2.

### **3. Unsecured Creditors**

25. The Applicants' unsecured creditors are principally trade creditors. Collectively, the Applicants' accounts payable were approximately CAD \$850,000 as at August 13, 2013, in addition to accrued professional fees in connection with issues related to the Secured Debt and this proceeding.

Kent Affidavit, paras. 65, Application Record Tab 2.

**D. EVENTS LEADING UP TO THE FILING**

26. As a result of liquidity constraints facing Tamerlane (and many other junior mining companies) in the fall of 2012, it failed to make four regularly scheduled monthly interest payments in respect of the Secured Debt beginning on September 25, 2012 and failed to repay the principal balance of the Secured Debt on the maturity date of October 16, 2012, each of which was an "Event of Default" under the Credit Agreement.

Kent Affidavit, para. 48, Application Record Tab 2.

27. Tamerlane and the Secured Lender then negotiated and entered into a Forbearance Agreement made as of December 31, 2012 (the "**Forbearance Agreement**") wherein, among other things, Tamerlane agreed to make certain payments to the Secured Lender, including a \$1,500,000 principal repayment on March 31, 2013 (the "**March 31 Payment**").

Kent Affidavit, para. 49, Application Record Tab 2.

28. Once again as a result of liquidity constraints, Tamerlane was unable to, and did not, make the March 31 Payment, which failure resulted in an "Event of Default" under the Credit Agreement and the Forbearance Agreement. Shortly after Tamerlane failed to make the March 31 Payment, Tamerlane and the Secured Lender entered into negotiations with respect to a further forbearance arrangement.

Kent Affidavit, paras. 50-51, Application Record Tab 2.

29. On May 24, 2013, Tamerlane also failed to make the May interest payment, and on May 29, 2013, the Applicants received a letter from the Secured Lender's counsel (the "**May 29**

**Letter**") enclosing: (i) a Notice of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "**BIA**"); and (ii) a Notice of Intention to Dispose of Collateral pursuant to section 63 of the *Personal Property Security Act*, R.S.O. 1990, Chapter P.10 (the "**PPSA**"). According to the May 29 Letter, the total amount of the Secured Debt as at May 29, 2013 was \$11,631,948.90.

Kent Affidavit, paras. 52-53, Application Record Tab 2.

30. Negotiations continued between Tamerlane and the Secured Lender in respect of a further forbearance, and on June 10, 2013, the Secured Lender and Tamerlane entered into an amendment to the Forbearance Agreement (the "**Forbearance Agreement Amendment**"). Pursuant to the Forbearance Agreement Amendment, among other things, the Secured Lender withdrew the May 29 Letter (including the statutory notices) and agreed to capitalize the May interest payment in exchange for Tamerlane agreeing to pay certain fees to the Secured Lender (which fees were capitalized) and resuming making cash interest payments to the Secured Lender with the June 25, 2013 interest payment.

Kent Affidavit, para. 54, Application Record Tab 2.

31. Tamerlane was then unable to, and therefore did not, make the July 25 payment, which failure resulted in an "Event of Default" under the Credit Agreement and the Forbearance Agreement Amendment.

Kent Affidavit, para. 55, Application Record Tab 2.

32. On July 26, 2013, the Applicants' counsel received by email a letter from the Secured Lender's counsel (the "**July 26 Letter**") enclosing: (i) a Notice of Intention to Enforce Security

pursuant to section 244 of the *BIA*; and (ii) a Notice of Intention to Dispose of Collateral pursuant to section 63 the *PPSA*. According to the July 26 Letter, the total amount of the Secured Debt as at July 26, 2013 was \$12,100,254.26.

Kent Affidavit, paras. 56-57, Application Record Tab 2.

33. Both before and after the delivery of the July 26 Letter, the Secured Lender (through its counsel) advised the Applicants (through their counsel) that, immediately after the expiry of the prescribed ten-day period under section 244(2) of the *BIA* (the "**NITES Period**"), it intended to bring an application to seek the appointment of a receiver in respect of the Applicants.

Kent Affidavit, para. 58, Application Record Tab 2.

34. At that time, the Applicants informed the Secured Lender that they were considering commencing a CCAA proceeding prior to the expiry of the NITES Period, and proposed that the Applicants and Secured Lender agree to a consensual CCAA proceeding, which the Applicants believed (and continue to believe) to be in the best interests of all stakeholders, including the Secured Lender.

Kent Affidavit, para. 59, Application Record Tab 2.

35. The Secured Lender expressed a willingness to negotiate with the Applicants with a view to determining whether a CCAA proceeding could proceed on consent based upon consensual terms that protect the interests of the Secured Lender. The Secured Lender firmly stated, however, that as a key term of consenting to any CCAA initial order, it required a fixed "sunset date" for the CCAA proceeding beyond which stay extensions could not be sought without the Secured Lender's consent unless the Secured Lender had been repaid in full, as well as a

provision in the initial order directing that a receivership order would issue after that date in the event that the Secured Debt was not paid in full by that date, unless the Secured Lender consented otherwise. The Secured Lender also required the Company to undertake a thorough marketing process run by PriceWaterhouseCoopers LLP (the "**Financial Advisor**") to sell assets or obtain financing so that, among other things, the Secured Debt could be repaid in full.

Kent Affidavit, para. 60, Application Record Tab 2.

36. The NITES Period was set to expire at 11:59 p.m. EDT on August 6, 2013. However, leading up to August 6, 2013, Tamerlane and the Secured Lender continued to be in discussions regarding this consensual proceeding. Accordingly, the Applicants and the Secured Lender agreed to extend the expiry of the Notice of Intention to Enforce Security on multiple occasions. The current Notice of Intention to Enforce Security is set to expire at 11:59 p.m. EDT on August 23, 2013.

Kent Affidavit, para. 61, Application Record Tab 2.

37. On August 22, 2013, the Secured Lender and Tamerlane entered into a second amendment to the Forbearance Agreement (the "**Second Forbearance Agreement Amendment**"). Pursuant to the Second Forbearance Agreement Amendment, among other things, (i) the Secured Lender agreed, subject to certain conditions, to forbear from exercising its rights against the Applicants until January 7, 2014, and to consent to the relief sought in this proceeding, and (ii) Tamerlane agreed to pay an additional fee to the Secured Lender.

Kent Affidavit, para. 62, Application Record Tab 2.

**E. COMPANY EFFORTS TO FIND SOLUTIONS**

38. Given that the Tamerlane Group is in the exploration stage with its assets, it does not yet generate cash flow from operations. Accordingly, its only potential source of cash is from financing activities, which have been problematic in light of the current market for junior mining companies.

Kent Affidavit, para. 66, Application Record Tab 2.

39. It was always contemplated when the Credit Agreement was entered into that the take-out financing would be in the form of construction financing for Pine Point. Tamerlane's primary focus until the early part of the summer of 2012 was on obtaining that construction financing.

Kent Affidavit, para. 67, Application Record Tab 2.

40. In that regard, in or about January, 2011, advisors retained by Tamerlane to assist in sourcing a debt deal for the financing of the Pine Point Project were successful in obtaining a term sheet for a \$60 million debt financing, and Tamerlane also received a term sheet from an offtaker for \$40 million of offtake. However, Tamerlane still needed to raise approximately \$30-40 million of equity, and was ultimately unsuccessful in doing so. Therefore, that deal could not proceed.

Kent Affidavit, para. 68, Application Record Tab 2.

41. There was also a negotiation with an interested strategic purchaser in mid-2012 that ultimately did not proceed because of an unrelated financial setback suffered by the purchaser.

Kent Affidavit, para. 69, Application Record Tab 2.

42. Following that, in or about September 2012, Tamerlane's focus shifted from finding project financing to finding financing to simply repay the Secured Lender. There was interest from at least one Toronto-based mezzanine fund, but no deal was ultimately reached.

Kent Affidavit, para. 70, Application Record Tab 2.

43. Throughout the latter half of 2012, Tamerlane tried to raise equity through private placements, and/or to sell an interest in the Pine Point project to a partner that would be able to arrange financing for mine development. During December 2012, Tamerlane completed a CAD \$160,000 equity private placement on a "flow-through" basis, meaning that the funds were required to be used for qualified Canadian exploration expenditures. This investment came from a Tamerlane director and his family.

Kent Affidavit, para. 71, Application Record Tab 2.

44. Also in December, 2012, Tamerlane agreed to a share issuance to a sophisticated investor, which was completed in January 2013. The share issuance was originally agreed for a CAD \$2,000,000 equity investment, but was ultimately approximately CAD \$1,700,000 because of certain agreed ownership limitations.

Kent Affidavit, para. 72, Application Record Tab 2.

45. In or about December, 2012, Tamerlane was negotiating with an arm's length potential purchaser which was interested in the Los Pinos property. The negotiations were at a relatively advanced stage, and the gross purchase price being discussed was approximately \$13 million to \$15 million. However, no agreement was entered into.

Kent Affidavit, para. 73, Application Record Tab 2.



46. Tamerlane has continued to search for financing for the construction of the Pine Point Property, a purchase for Los Pinos, and/or to repay the Secured Lender. While there continues to be significant interest from potential purchasers/investors in respect of the Applicants and their assets, the Applicants have been unsuccessful to date.

Kent Affidavit, para. 74, Application Record Tab 2.

47. For instance, the Applicants have been in discussions with a foreign state-owned entity that has a successful track record of executing M&A, strategic investments and offtake agreements in multiple countries, to produce a transaction that raised the funds needed to repay the Secured Lender in full.

Kent Affidavit, para. 75, Application Record Tab 2.

48. In addition, a number of other interested parties have come forward very recently and are each in early stage discussions with the Applicants and the Secured Lender with respect to transactions involving Pine Point.

Kent Affidavit, para. 76, Application Record Tab 2.

**F. THE FINANCIAL ADVISOR AND THE SISP**

49. In order to consummate a transaction to, among other things, repay the Secured Debt in full as soon as possible, the Applicants, in consultation with the Secured Lender, have engaged the Financial Advisor. The role of the Financial Advisor will be to, under the oversight of the Monitor, implement the SISP. The SISP has been agreed among the Financial Advisor, the Monitor, the Applicants and the Secured Lender.

Kent Affidavit, paras. 77-78, Application Record Tab 2.

50. Pursuant to the SISP, the Financial Advisor will seek to identify one or more financiers or purchasers of, and/or investors in, the key assets / entities that comprise the Tamerlane Group. The SISP will include broad marketing to all potential financiers, purchasers and investors and will consider offers for proposed financing (that will, among other things, repay the Secured Debt), an investment in the Applicants' business and/or a purchase of some or all of the Applicants' assets.

Kent Affidavit, para. 79, Application Record Tab 2.

51. The SISP is intended to maximize value for the Applicants and all of their stakeholders, including the Secured Lender. It will be a fair and transparent process run by the Financial Advisor, under the oversight of the Monitor.

Kent Affidavit, para. 83, Application Record Tab 2.

52. The Applicants believe it is critically important that the SISP be approved at this time for a variety of reasons. First and most importantly, the negotiated deal between the Applicants and the Secured Lender only provides the Applicants until January 7, 2014 to close one or more transactions to pay out the Second Lender in full. Accordingly, time is of the essence, and the process must begin immediately. In addition, the Applicants' business and assets are complex, and interested parties will want to undertake substantial due diligence. Lastly, the Applicants' financing under the Term Sheet is conditional on the SISP being approved at this time.

Kent Affidavit, paras. 80-82, Application Record Tab 2.

**G. 13 WEEK CASH FLOW FORECAST**

53. As set out in the cash flow forecast included in the Application Record, the Applicants' principal uses of cash during the next 13 weeks will consist of the payment of ongoing day-to-day operational expenses, such as payroll and office related expenses, and a portion of the professional fees and disbursements in connection with these *CCAA* proceedings.

54. As at August 19, 2013, the Applicants' had approximately \$3,500 available cash on hand. The Applicants' cash flow forecast projects that, subject to obtaining the relief outlined herein, it will have sufficient cash to fund its projected operating costs until the end of the stay period.

Kent Affidavit, para. 122, Application Record Tab 2.

**H. THE PROPOSED INITIAL ORDER**

55. The Applicants are concerned that in light of its financial circumstances and the section 244 notice that has been provided, without the benefit of *CCAA* protection, there could be a sudden and significant erosion of the value of Tamerlane to the detriment of all stakeholders. In particular, enforcement of rights by the Secured Lender outside of a *CCAA* process could result in very significant disruption to the Financing / Sale Process at a time that is critical and could even jeopardize the ability to repay the Secured Lender in full. This would have a decidedly negative impact on Tamerlane's value, to the detriment of all stakeholders.

56. The paramount goal of the Applicants is to preserve, maximize and realize upon value for the benefit of all of their stakeholders, including the Secured Lender. The preliminary objective of the restructuring is to secure sufficient funds to repay the Secured Lender in full.

Kent Affidavit, para. 92, Application Record Tab 2.

## **1. The Stay of Proceedings**

57. The Applicants seek a stay of proceedings as against the Applicants, the Business and the Property, all of which are defined in the proposed order. This stay is needed to provide the Financial Advisor with the necessary time to implement the SISP with the oversight of the proposed Monitor, and the Applicants with the opportunity to engage in discussions with its stakeholders with respect to a potential plan of compromise or arrangement and to avoid a distressed liquidation of their assets.

Kent Affidavit, para. 93, Application Record Tab 2.

58. Because of the integration of the Tamerlane Group, it would be detrimental to the Applicants' ability to successfully restructure if anyone were to commence proceedings, or rights and remedies were exercised against Tamerlane USA or Tamerlane Peru. Accordingly, the Initial Order contains provisions enjoining the exercise of rights and remedies against Tamerlane USA and Tamerlane Peru in order to preserve the value of the Applicants while they undertake to restructure under the *CCAA*.

Kent Affidavit, para. 94, Application Record Tab 2.

59. The Secured Lender consents to the stay of proceedings sought in this proceeding.

Kent Affidavit, paras. 4, 117-118, Application Record Tab 2.

## **2. Appointment of Monitor**

60. The Applicants seek the appointment of Duff & Phelps Canada Limited ("**Duff & Phelps**"), a recognized leader in the areas of valuation, transactions and financial restructuring,

to act as the *CCAA* monitor in these proceedings (the "**Monitor**"). Duff & Phelps has extensive experience acting as a court-appointed Monitor.

61. Duff & Phelps has consented to act as the Monitor of the Applicants in the *CCAA* proceedings. Duff & Phelps has filed a Pre-Filing Report with this Honourable Court.

Kent Affidavit, paras. 95-96, Application Record Tab 2.

Pre-Filing Report of Duff & Phelps

### **3. Payments During the *CCAA* Proceeding**

62. During the course of this *CCAA* proceeding, the Applicants intend to make payments for goods and services supplied post-filing as set out in the cash flow projections referred to above and as permitted by the Initial Order.

Kent Affidavit, para. 97, Application Record Tab 2.

### **4. Charges for Professionals**

63. It is contemplated that the Monitor, counsel to the Monitor, and counsel to the Applicants would be granted a first priority Court-ordered charge on the assets, property and undertakings of the Applicants in priority to all other charges (the "**Administration Charge**") up to the maximum amount of CAD \$300,000 in respect of their respective fees and disbursements, in connection with these proceedings. The Applicants believe the Administration Charge is fair and reasonable in the circumstances.

Kent Affidavit, para. 98, Application Record Tab 2.

64. The proposed Administration Charge, plus the portion of the financing utilized to pay professional fees, is unlikely to be more than would be the cost if these assets were to be monetized and sold in a Court receivership.

65. It is also contemplated that the Financial Advisor would be granted a second priority Court-ordered charge on the assets, property and undertakings of the Applicants in priority to all other charges other than the Administration Charge (the "**Financial Advisor Charge**") up to a maximum amount of CAD **\$300,000**, in respect of the Financial Advisor's fees and disbursements in connection with these proceedings. The Applicants believe the Financial Advisor Charge is fair and reasonable in the circumstances.

Kent Affidavit, para. 99, Application Record Tab 2.

66. It is further contemplated that the Monitor, counsel to the Monitor, counsel to the Applicants and the Financial Advisor would be granted an additional Court-ordered charge on the assets, property and undertakings of the Applicants in priority to all other charges other than the Administration Charge, the Financial Advisor Charge, the DIP Lender's Charge, the Directors' Charge and the security interest of the Secured Lender (the "**Subordinated Administration Charge**", and together with the Administration Charge and the Financial Advisor Charge, the "**Professional Charges**") in respect of their respective additional fees and disbursements in connection with these proceedings not covered by the Administration Charge or the Financial Advisor Charge.

Kent Affidavit, para. 100, Application Record Tab 2.

67. As is customary, a significant component of the Financial Advisor's fee is a success fee which is only payable in certain circumstances. Similarly, in order to assist the Applicants with

their liquidity constraints, counsel to the Applicants has agreed to discount its billing rates provided that it too be provided with a success fee to compensate it for the risk taken. Those success fees, as well as any additional ordinary fees and disbursements of the Monitor, its counsel, and the Applicants' counsel, are the subject of the Subordinated Administration Charge. The Applicants believe the Subordinated Administration Charge is fair and reasonable in the circumstances and is further evidence that there is value beyond the Secured Debt.

Kent Affidavit, para. 101, Application Record Tab 2.

68. The Applicants require the expertise, knowledge and continuing participation of the proposed beneficiaries of the Professional Charges in order to realize sufficient proceeds to repay the Lender and then to complete a successful restructuring. The Professional Charges are necessary to ensure their continued participation, particularly in light of the Applicant's current liquidity position.

Kent Affidavit, para. 102, Application Record Tab 2.

69. The Applicants have sought to ensure that there is no unwarranted duplication of roles so as to minimize the professional fees associated with these proceedings.

Kent Affidavit, para. 103, Application Record Tab 2.

70. The Secured Lender consents to the quantum and ranking of the Professional Charges.

Kent Affidavit, para. 104, Application Record Tab 2.

## 5. **DIP Financing and the DIP Lender's Charge**

71. The Applicants' principal use of cash during these proceedings will consist of the payment of ongoing, but minimized, day-to-day operational expenses, such as regular remuneration for those individuals providing services to the Applicants, office related expenses, and professional fees and disbursements in connection with these *CCAA* proceedings. As indicated in the cash flow forecast, it is projected that the Applicants will require additional borrowings during these proceedings, notwithstanding that the Applicants are seeking to complete these proceedings as quickly as reasonably possible in order to minimize professional costs and the impact on Tamerlane's business.

Kent Affidavit, para. 105, Application Record Tab 2.

72. The DIP Loan is to be governed by a debtors-in-possession term sheet between the Applicants and Global Resource Fund (in such capacity, the "**DIP Lender**"), the material terms of which include:

- (a) The DIP Lender will lend an aggregate principal amount of CAD \$1,047,500 to the Applicant;
- (b) The DIP Lender will receive a setup fee of CAD \$30,000, resulting in net proceeds of CAD \$1,017,500 to the Applicants;
- (c) The Applicants will use the proceeds for general working capital purposes and to pay a portion of the fees and expenses relating to the *CCAA* proceeding;
- (d) Advances will be made every two weeks based on the cash needs of the Applicants;



- (e) Interest will accrue on the principal outstanding amount of the DIP Loan outstanding at the rate of 12% per annum calculated monthly, and payable on the maturity date. Interest will not compound.
- (f) The Applicants may prepay the advances under the DIP Loan, in full or in part, at any time and from time to time without bonus or penalty; and
- (g) The DIP Loan will mature on January 7, 2014.

73. It is contemplated that the DIP Lender would be granted by a third priority Court-ordered charge on the assets, property and undertakings of the Applicants in priority to all other charges other than the Administration Charge and the Financial Advisor Charge (the "**DIP Lender's Charge**"). The DIP Lender will not provide the DIP Loan if the DIP Lender's Charge is not granted.

Kent Affidavit, paras. 106-107, Application Record Tab 2.

74. The financing provided by the DIP Lender is essential to a successful restructuring of the Applicants. Given the current financial situation of the Applicants (including its dire cash situation and the lack of availability of alternate financing), the Applicants believe the DIP Loan is the best alternative for the Applicants and its stakeholders in the circumstances. Accordingly, the directors of the Applicants exercised their business judgment to enter into the Term Sheet. The Applicants believe the Term Sheet and the DIP Lender's Charge are fair and reasonable in the circumstances.

Kent Affidavit, para. 108, Application Record Tab 2.

75. Based on the books and records of the Applicants and the *PPSA* searches conducted by counsel to the Applicants, the only secured creditors which are likely to be affected by the Administration Charge, the Financial Advisor Charge, the Directors' Charge and the DIP Lender's Charge are the Secured Lender and certain professionals retained in respect of this proceeding, who all consent to the charges being sought.

Kent Affidavit, para. 113, Application Record Tab 2.

#### **6. Directors' Charge**

76. It is contemplated that the Applicants' directors and officers would be granted a fourth priority Court-ordered charge on the assets, property and undertakings of the Applicants in priority to all other charges other than the Administration Charge, the Financial Advisor Charge and the DIP Lender's Charge (the "**Directors' Charge**") up to the maximum amount of CAD \$45,000. The amount of the Directors' Charge has been calculated based on the estimated exposure of the directors and officers of the Applicants in the event of a sudden shut-down of the Tamerlane Group. The Applicants believe the Directors' Charge is fair and reasonable in the circumstances.

Kent Affidavit, para. 109, Application Record Tab 2.

77. A successful restructuring of the Applicants will only be possible with the continued participation of the Applicants' directors and officers. The individuals have specialized expertise and relationships with the Tamerlane's stakeholders and potential third party financiers, investors and purchasers. In addition, the directors and officers have gained significant knowledge that cannot be easily replicated or replaced.

Kent Affidavit, para. 110, Application Record Tab 2.

78. Tamerlane maintains an insurance policy in respect of the potential liability of its directors and officers (the "**D&O Insurance Policy**"). The D&O Insurance Policy insures the directors and officers of Tamerlane for certain claims that may arise against them in their capacity as directors and/or officers of Tamerlane. However, the D&O Insurance Policy contains several exclusions and limitations to the coverage provided, and there is a potential for there to be insufficient coverage in respect of the potential director and officer liabilities. The directors and officers of Tamerlane have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities in the context of a *CCAA* proceeding.

Kent Affidavit, para. 112, Application Record Tab 2.

**I. SISP**

79. As discussed above, the Secured Lender has required that the Company undertake a thorough marketing process run by a qualified financial advisor to sell assets or obtain financing so that, among other things, the Secured Debt could be repaid in full.

80. Accordingly, Tamerlane, in consultation with the Secured Lender and the Monitor, solicited interest from qualified financial advisors, and ultimately selected the Financial Advisor as a result of, among other things, its significant experience in restructurings, its strong presence and reputation in the global markets, and its experience in the mining sector.

**J. RESTRICTIONS ON EXTENSIONS OF THE CCAA PROCEEDINGS**

81. As a condition to the Secured Lender's consent to the relief sought herein, the Applicants have agreed that the Applicants may not seek or obtain any extension of the stay of proceedings beyond the Outside Date unless they have repaid the Secured Lender in full or received the prior

written consent of the Secured Lender and the Monitor prior to such date (the "**Sunset Clause**"). Immediately following the Outside Date: (i) these proceedings shall terminate, (ii) the Monitor shall be released and discharged, and (iii) the Initial Order (except for certain specified paragraphs thereof) shall be of no further force or effect.

Kent Affidavit, para. 117, Application Record Tab 2.

82. The Applicants have further agreed that pursuant to the Initial Order, immediately following the Outside Date, a receiver will be appointed, without security, over all assets and undertakings of the Applicants pursuant to section 243 of the *BIA* and section 101 of the Courts of Justice Act, and a receivership order shall issue immediately upon the Secured Lender filing with the Court a written consent of a licensed bankruptcy trustee to act as receiver.

Kent Affidavit, para. 118, Application Record Tab 2.

83. As discussed above, the Secured Lender has advised the Applicants that it insists on these terms relating to the termination of the CCAA proceedings and the appointment of a receiver immediately after the Outside Date being included in the Initial Order. Given the financial circumstances of the Applicants, there were significant cost-savings and other benefits to the Applicants and all of the stakeholders for this proceeding to be consensual rather than contentious. Accordingly, the directors of the Applicants exercised their business judgment to agree to the provision in the Initial Order in respect of the Outside Date.

Kent Affidavit, paras. 119-120, Application Record Tab 2.

### **PART III: ISSUES AND THE LAW**

#### **A. THE APPLICANTS SHOULD BE GRANTED PROTECTION UNDER THE CCAA**

##### **1. The Applicants are "Debtor Companies" to which the CCAA Applies**

84. The CCAA applies in respect of a "debtor company" or "affiliated debtor companies" where the total of claims against the debtor or its affiliates exceeds five million dollars.

*CCAA*, s. 3(1).

85. The terms "company" and "debtor company" are defined in section 2 of the CCAA:

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, except banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

"debtor company" means any company that

- (a) is bankrupt or insolvent,
- (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,
- (c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or
- (d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent.

86. Each of the Applicants is a "company" as defined in the CCAA. Each of them is incorporated under the CBCA, and neither falls within any of the excluded categories listed above.

Kent Affidavit, para. 86, Application Record Tab 2.

87. Insolvency is not defined in the *CCAA*. The courts have interpreted this term by reference to the three tests of insolvency set out in section 2(1) of the *BIA*. A company is an insolvent "debtor company" under the *CCAA* if any one of the following conditions exist:

- (i) The company is for any reason unable to meet its obligations as they generally become due;
- (ii) The company has ceased paying its current obligations in the ordinary course of business as they generally become due; or
- (iii) The aggregate of the company's property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.

*Re Stelco Inc.*, [2004] O.J. No. 1257 at paras. 21-22, 28 (Sup. Ct.) [*Re Stelco*]; leave to appeal to C.A. refused, [2004] O.J. No. 1903; leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 336, Book of Authorities of the Applicants dated August 22, 2013 ("BOA"), Tab 1.

88. Consistent with the remedial purposes of the *CCAA*, the first branch of the test has been found wide enough so that a financially troubled corporation will be insolvent if it is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring".

*Re Stelco, supra*, at para. 26, BOA, Tab 1.

89. The Applicants have total claims/liabilities against it substantially in excess of \$5 million and has insufficient assets with which to satisfy those claims/liabilities as they come due.

Kent Affidavit, para. 87, Application Record Tab 2.

90. Accordingly, it is respectfully submitted that the Applicants are "debtor companies" to which the *CCAA* applies.

## **2. An Order Granting a Stay of Proceedings is Appropriate**

91. The *CCAA* reflects public policy favoring compromise and consensual restructuring over piecemeal liquidation. It is designed to encourage and facilitate consensual compromises and arrangements between a debtor company and its creditors for the benefit of both.

*Crystallex International Corp. (Re)*, 2011 ONSC 7701 at para. 20, BOA, Tab 2.

*Re Lehndorff*, [1993] O.J. No. 14 (Gen. Div.), BOA, Tab 3.

92. The overarching goal of an interim order is to maintain the *status quo* while the debtor develops a plan. The Court should exercise its power under the *CCAA* and at common law in order to maintain the *status quo* allowing the debtor to develop a plan and obtain consensus for its creditors.

*Re Royal Oak Mines, Inc.*, [1999] O.J. No. 709 (Gen. Div.), BOA, Tab 4.

93. It is well-established that under section 11 of the *CCAA* the court has broad jurisdiction to grant a stay of proceedings to give a debtor company a chance to put forward a plan of compromise or arrangement that will be acceptable to its creditors and the court:

The *CCAA* is 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. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the *CCAA* to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed

compromise or arrangement which will be to the benefit of both the company and its creditors.

*Re Lehndorff, supra* at para. 31, BOA, Tab 4.

*CCAA*, s. 11.

94. The *CCAA* is remedial legislation, and is intended to facilitate compromises and arrangements. The Court should give the statute a broad and liberal interpretation so as to encourage and facilitate new and creative ways to successfully restructure whenever possible.

*Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384 at paras. 10 and 17 (C.A.), BOA, Tab 5.

*Re Canadian Red Cross Society*, [1998] O.J. No. 3306 at para. 44 (Gen. Div.), BOA, Tab 6.

95. The Applicants require the protection of the *CCAA* to allow them to pursue the SISP. The Applicants have no ability to generate revenue at this point in time, until they can develop the properties. They can only repay the Secured Lender by raising new financing or by selling off part of their assets. The Applicants do not envisage that a complete sale of their assets will be necessary in this process; rather, they expect to be able to satisfy the Secured Debt through some combination of sale and refinancing and then to complete their restructuring for the benefit of the other remaining stakeholders through this process.

96. The *CCAA* proceedings are necessary to preserve the value of the Applicants. The valuations discussed above indicate that the value of the Applicants' business is greater than the amount owed to the Secured Lender. The SISP will result in the Financial Advisor exploring all strategic options available.



**3. The Stay Should Extend to Tamerlane USA and Tamerlane Peru**

97. Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, and where it is just and reasonable to do so. This power has been exercised where the business operations of the Applicant and the third parties are intertwined, and where the third party is not subject to the jurisdiction of the *CCAA*.

*Re Lehndorff, supra* at paras. 10, 14-16, 21, BOA, Tab 3.

*Re Canwest Publishing Inc.*, 2010 ONSC 222 at paras. 33-34, BOA, Tab 7.

*Cinram International Inc. (Re)*, 2012 ONSC 3767, BOA, Tab 8.

*Sino-Forest Corporation (Re.)*, 2012 ONSC 2063, BOA, Tab 9.

*Skylink Aviation Inc. (Re)*, 2013 ONSC 1500, BOA, Tab 10.

98. The Applicants submit that it is appropriate in the circumstances to extend the stay of proceedings to Tamerlane USA and Tamerlane Peru. The business operations of the Applicants, Tamerlane USA and Tamerlane Peru are intertwined, and the stay of proceedings needs to be extended to Tamerlane USA and Tamerlane Peru to maintain stability and value for the benefit of the Applicants' stakeholders, as well as allow for the continuation of an orderly SISP.

**B. THE DIP FACILITY AND DIP LENDER'S CHARGE SHOULD BE APPROVED**

99. Section 11.2 of the *CCAA* provides statutory jurisdiction to grant a debtor-in-possession financing charge:

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.

*CCAA*, s. 11.2.

100. Subparagraph 11.2(4) of the *CCAA* sets out the factors to be considered by the Court in determining 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 this Act;

(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 referred to in paragraph 23(1)(b), if any.

*CCAA*, s. 11.2(4).

101. It is submitted that the DIP Lender's Charge is appropriate in this case, based on the subparagraph 11.2(4) factors, because:

- (a) The Applicants do not anticipate a lengthy *CCAA* process particularly in light of the Sunset Clause. The predominant purpose of this *CCAA* proceeding is to give

the Applicants sufficient time to complete the SISP so as to pay their creditors in full;

- (b) The Applicants' business is intended to continue to operate on a going concern basis during the *CCAA* proceedings under the direction of existing management with the assistance of the Applicants' advisors and the Monitor;
- (c) The DIP Loan does not just enhance the prospects for a viable compromise or arrangement; it is absolutely essential for one. The DIP Loan is needed to "keep the lights on" and to allow the Applicants to continue functioning for the next thirteen weeks or more;
- (d) The nature and value of the Applicants' assets as set out in their financial statements can support the requested DIP Lender's Charge;
- (e) The only party to be affected by the DIP Lender's Charge is the Secured Lender, who is consenting to the relief sought;
- (f) The DIP Lender will not provide the DIP Loan if the DIP Lender's Charge is not approved;
- (g) The amount of the DIP Loan is a fraction of the total value of the Applicants' assets, even at book value (the actual realizable value of such assets believed to be significantly higher than book value); and
- (h) The proposed Monitor has stated that the terms of the DIP Loan and the DIP Lender's Charge are, in its opinion, fair and reasonable.

**C. THE PROFESSIONAL CHARGES SHOULD BE GRANTED**

102. Section 11.52 of the *CCAA* expressly provides the court with the jurisdiction to grant the Professional Charges sought herein:

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*

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

*CCAA*, ss. 11.52(1) and (2).

103. In *Canwest Publishing*, this Court noted that Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. The list of factors to consider in approving an administration charge include:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

- (c) whether there is unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.

*Re Canwest Publishing Inc.*, *supra* at para. 54, BOA, Tab 7.

*Re Timminco Ltd.*, 2012 ONSC 948 at paras. 26-29, BOA, Tab 11.

104. The Professional Charges sought by the Applicants are warranted and necessary and it is appropriate to grant the Professional Charges:

- (a) the restructuring of the Applicants and the SISP to be undertaken by the Applicants is sufficiently large and complex to warrant Professional Charges in the amount sought;
- (b) the professionals that are to be the beneficiaries of the Professional Charges have contributed and will continue to contribute to the refinancing of the Applicants' debt and the restructuring of the Applicants;
- (c) there is no unwarranted duplication of the roles so as to minimize the professional fees associated with these proceedings;
- (d) the secured creditors affected by the charge have been provided with notice of these *CCAA* proceedings and are consenting to the Professional Charges; and
- (e) the proposed Monitor supports the proposed Professional Charges.

**D. THE DIRECTORS' CHARGE SHOULD BE GRANTED**

105. Section 11.51 of the *CCAA* affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

*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 -- 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.

*11.51(2) Priority*

The court may order that the security or charge rank in priority over the claim of any secured creditors of the company

*11.51(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.

*11.51(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.

*CCAA*, s. 11.51.

106. The test for granting a directors charge was described in *Canwest Global* as follows:

I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

*Re Canwest Global Communications Corp.*, [2009] O.J. No. 4286 (S.C.J.) at para. 27, BOA, Tab 11.

*Canwest Publishing, supra* at paras. 56-57, BOA, Tab 7.

*Timminco, supra* at paras. 30-36, BOA, Tab 11.

107. The Court should also consider whether the proposed Monitor has reviewed the quantum of the Directors' Charge and whether the proposed Monitor considers the amount to be reasonable.

*iMarketing Solutions Group (Re)*, 2013 ONSC 2223 at para. 20, BOA, Tab 13.

108. The Applicants submit that the Directors' Charge is appropriate and necessary and that the Court should exercise its powers to grant the Directors' Charge, for the following reasons:

- (a) the directors of the Applicant may be subject to potential liabilities in connection with these *CCAA* proceedings and have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;
- (b) the Applicants' D&O Insurance Policy contains several exclusions and limitations to the coverage provided, and there is a potential for there to be insufficient coverage in respect of potential liabilities;
- (c) the Directors' Charge would only cover obligations and liabilities that the directors may incur after the commencement of these proceedings, and is not intended to apply to wilful misconduct or gross negligence;
- (d) the Applicants' directors have been actively involved in the efforts taken by the Applicants to address their current financial circumstances and difficulties;

- (e) in order to continue to carry on business during the *CCAA* proceedings and in order to implement the *SISP* effectively, the Applicants require the continued active and committed involvement of their directors;
- (f) the amount of the Directors' Charge has been calculated based on the estimated exposure of the directors in the event of a sudden shut-down of the Applicant, and has been reviewed with the proposed Monitor;
- (g) the secured creditors affected by the charge have been provided with notice of these *CCAA* proceedings and are consenting to the Directors' Charge; and
- (h) the proposed Monitor supports the proposed Directors' charge.

**E. THE *SISP* SHOULD BE APPROVED**

109. As described above, pursuant to the *SISP*, the Financial Advisor will seek to identify one or more financiers or purchasers of, and/or investors in, the key assets / entities that comprise the Tamerlane Group, through broad marketing to all potential financiers, purchasers and investors and will consider offers for proposed financing, investments and/or a purchase of some or all of the Applicants' assets.

110. The *CCAA* is to be given a broad and liberal interpretation to achieve its objectives and to facilitate the restructuring of an insolvent company. A sale by a debtor, which preserves its businesses as a going concern, is consistent with these objectives, and the court has the jurisdiction to authorize such a sale under the *CCAA* in the absence of a plan.

*Re Sino-Forest, supra* at para. 40, BOA, Tab 9.

*Re Nortel Networks Corp.*, [2009] O.J. No. 3169 (S.C.J.) at paras. 47-48, BOA, Tab 14.



111. The following questions may be considered when determining whether to authorize a sale under the CCAA in the absence of a plan:

- (a) Is the sale transaction warranted at this time?
- (b) Will the sale benefit the "whole economic community"?
- (c) Do any of the debtors' creditors have a bone fide reason to object to the sale of the business?
- (d) Is there a better alternative?

*Re Sino-Forest, supra* at para. 41, BOA, Tab 9.

*Re Nortel Networks Corp., supra* at para. 49, BOA, Tab 14.

112. Like in *Sino-Forest*, the Applicant is not asking for the approval of an actual sale: it is only seeking approval for a sale *process* by which offers will be elicited in the marketplace. The process is warranted at the present time given the extreme time constraints facing the Applicants. The purpose of the SISP is to identify financiers or purchasers to enter into a transaction that will serve the whole economic community by paying off the Applicants' creditors in full. As described above, there have already been multiple expressions of interest from credible purchasers. The Applicants' secured creditors support the SISP, and there is no evidence of any better alternative. Accordingly, it is respectfully requested that the SISP be approved.

#### **F. THE SUNSET CLAUSE SHOULD BE GRANTED**

113. As explained above, the Secured Lender required the Sunset Clause in order to provide its consent to the relief sought in this proceeding. Given the financial circumstances of the Applicants, there were significant cost-savings and other benefits to the Applicants and all of the

stakeholders for this proceeding to be consensual rather than contentious. Accordingly, the directors of the Applicants exercised their business judgment to agree to the Sunset Clause.

114. There is statutory authority to grant the Sunset Clause in connection with the stay of proceedings, and rational reasons to do so in the present case. The statutory power to grant the Sunset Clause relief is found in section 11.02 of the CCAA, which confers the power to issue a stay "on any terms that it may impose." This gives the Court "wide discretion" and "extraordinarily broad" powers to fashion terms appropriate to the circumstances. Moreover, the Sunset Clause is consistent with the purposes of the CCAA in general and this proceeding in particular.

CCAA, s. 11.02

*Dondeb Inc. (Re.)*, [2012] O.J. No. 5853 (S.C.J.) at para. 14, BOA, Tab 15.

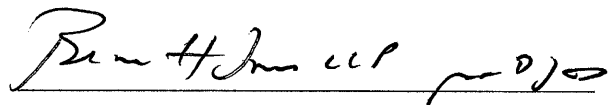
*Canwest Global Communications Corp. (Re.)*, *supra* at para. 27, BOA, Tab 12.

#### **PART IV:RELIEF SOUGHT**

115. For the reasons set out above, the Applicants respectfully request that this Honourable Court grant the proposed form of the Initial Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**THIS 22<sup>nd</sup> DAY OF AUGUST 2013.**

A handwritten signature in black ink, appearing to read "Bennett Jones LLP" followed by a flourish, is written over a horizontal line.

BENNETT JONES LLP  
Lawyers for the Applicants

## SCHEDULE "A"

### AUTHORITIES CITED

1. *Re Stelco Inc.*, [2004] O.J. No. 1257 (Sup. Ct.)
2. *Crystallex International Corp. (Re)*, 2011 ONSC 7701
3. *Re Lehndorff*, [1993] O.J. No. 14 (Gen. Div.)
4. *Re Royal Oak Mines, Inc.*, [1999] O.J. No. 709 (Gen. Div.)
5. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384 (C.A.)
6. *Re Canadian Red Cross Society*, [1998] O.J. No. 3306 (Gen. Div.)
7. *Re Canwest Publishing Inc.*, 2010 ONSC 222
8. *Cinram International Inc. (Re.)*, 2012 ONSC 3767
9. *Sino-Forest Corporation (Re)*, 2012 ONSC 2063
10. *Skylink Aviation Inc. (Re)*, 2013 ONSC 1500
11. *Re Timminco Ltd.*, 2012 ONSC 948
12. *Re Canwest Global Communications Corp.*, [2009] O.J. No. 4286 (S.C.J.)
13. *iMarketing Solutions Group (Re)*, 2013 ONSC 2223
14. *Re Nortel Networks Corp.*, [2009] O.J. No. 3169 (S.C.J.)
15. *Dondeb Inc. (Re.)*, [2012] O.J. No. 5853 (S.C.J.)

## SCHEDULE "B"

### STATUTES AND REGULATIONS CITED

#### ***Companies' Creditors Arrangement Act, R.S.C. 1985 c. C. 36, Section 2 "company"***

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, except banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

#### ***Companies' Creditors Arrangement Act, R.S.C. 1985 c. C. 36, Section 2 "debtor company"***

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

#### ***Companies' Creditors Arrangement Act, R.S.C. 1985 c. C. 36, Section 3(1)***

3(1) This Act applies in respect of a debtor company or affiliated debtor companies where the total of claims, within the meaning of section 12, against the debtor company or affiliated debtor companies exceeds five million dollars.

***Companies' Creditors Arrangement Act, R.S.C. 1985 c. C. 36, Section 11.***

Powers of the court

11(1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Initial application

(2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

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

(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 or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

(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 or proceeding with any other action, suit or proceeding against the company.

Notice of orders

(5) Except as otherwise ordered by the court, the monitor appointed under section 11.7 shall send a copy of any order made under subsection (3), within ten days after the order is made, to every known creditor who has a claim against the company of more than two hundred and fifty dollars.

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

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

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

***Companies' Creditors Arrangement Act, R.S.C. 1985 c. C. 36, Section 11.2.***

Interim financing

11.2 (1) 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.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) 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 this Act;

(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 referred to in paragraph 23(1)(b), if any.

***Companies' Creditors Arrangement Act, R.S.C. 1985 c. C. 36, Section 11.51.***

Security or charge relating to director's indemnification

11.51 (1) 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.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) 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.

Negligence, misconduct or fault

(4) 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.

***Companies' Creditors Arrangement Act, R.S.C. 1985 c. C. 36, Section 11.52(1) and (2).***

Court may order security or charge to cover certain costs

11.52 (1) 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.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

***Bankruptcy and Insolvency Act, R.S., 1985, c. B-3 section 2 "insolvent person"***

"insolvent person"

«*personne insolvable* »

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;



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

Court File No. CV-13-10228-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceedings commenced in Toronto

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