Court File No.: CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Plaintiff (Moving Party)

MOTION RECORD
OF THE PLAINTIFF ST. CLAIR PENNYFEATHER

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Lawyers for the Plaintiff, St. Clair Pennyfeather in the class proceeding *Pennyfeather v. Timminco Limited et al.,* Ont. Sup. Court File No.: CV-09-378701-00CP

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TAB 1

Court File No.: CV-12-9539-00CL

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NOTICE OF MOTION

St. Clair Pennyfeather, the Plaintiff in the *Pennyfeather v. Timminco Limited, et al.* action, Court File No. CV-09-378701-00CP (the "Class Action"), will make a motion to Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) on Monday, March 26, 2012 at 10:00 a.m., or as soon thereafter as the motion may be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An order lifting the stay of proceedings, as provided by the Initial Order of January 3, 2012 and the order extending the stay dated January 27, 2012, and permitting Mr. Pennyfeather to continue the Class Action against Timminco Limited ("Timminco"), Dr. Heinz Schimmelbusch, Robert Dietrich, Rene Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich and John P. Walsh;

2. Costs of this motion; and,

3. Such other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. On May 14, 2009, the Plaintiff Ravinder Sharma commenced the Class Action alleging that the Defendants were responsible for misrepresentations in written disclosures, public oral statements and experts' reports. The Statement of Claim named as Defendants Timminco, its directors and officers, as well as Photon Consulting LLC, an expert firm that prepared a report on the validity of Timminco's solar silicon process (and related parties).

2. The Class Action has an extensive history involving multiple interlocutory motions and appeals, including a carriage motion, an insurance motion and motion for leave to appeal, a motion to substitute Mr. Pennyfeather for Mr. Sharma and to suspend the limitation period, along with subsequent appeal, and a motion for particulars.

3. On January 3, 2012, Timminco applied for, and received, protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("*CCAA*"), and a stay of Mr. Pennyfeather's action against Timminco, Dr. Heinz Schimmelbusch, Robert Dietrich, Rene Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich and John Walsh until February 2, 2012 which has since been extended to April 30, 2012 or such later date as the Court may order.

4. By decision dated February 16, 2012 the Court of Appeal set aside the decision of Justice Perell which had declared that section 28 of the *Class Proceedings Act* suspended the running of the three year limitation period under section 138.14 of the *Securities Act*. This decision has the potential to have a significant impact on the Class Proceeding, and in fact on all securities class actions in the country, and the representative plaintiff intends to seek leave to appeal to the Supreme Court of Canada.

5. There are sound reasons to lift the stay of Mr. Pennyfeather's action consistent with the objectives of the applicable legislation including:

a. The schedule for the leave to appeal and any other steps in the Class Proceeding is such that they will not interfere in any meaningful way with the CCAA process;

b. The debtor company does not appear to have any prospect of re-organizing, but instead is pursuing an orderly liquidation of assets which should be completed many months prior to the leave and certification motion;

c. Allowing the Class Action to proceed is consistent with the access to justice, behaviour modification and deterrence objectives of the *Class Proceedings Act* and the *Securities Act*;

d. A consideration of the balance of convenience and the relative prejudice to the parties favours the lifting of the stay; and

e. The proposed Class Action is meritorious and the Defendants to the action have no defence on the merits.

6. Sections 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

7. Rules 1.04, 2.03, 3.02, and 37 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended; and,

8. Such further and other grounds as counsel may advise and this Honourable Court may permit.

04

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of Victoria Paris, sworn March 8, 2012; and,

2. Such further and other grounds as counsel may advise and this Honourable Court may permit.

March 8, 2012

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Lawyers for the Applicants
Timminco Limited and Bécancour Silicon Inc.

Court File No.: CV-12-9539-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

NOTICE OF MOTION

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TAB 2

Court File No.: CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

AFFIDAVIT OF VICTORIA PARIS

(sworn March 8, 2012)

I, Victoria Paris, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am a principal of the law firm Kim Orr Barristers P.C. ("Kim Orr"), counsel to the Plaintiff St. Clair Pennyfeather in the putative class action against Timminco Limited ("Timminco") and other Defendants bearing court file number CV-09-378701-00CP (the "Class Action"), and as such, have knowledge of the matters to which I depose in this affidavit.

2. This affidavit is sworn in support of Mr. Pennyfeather's motion to lift the stay of proceeding granted pursuant to the *Companies' Creditors Arrangement Act*.

The Overview of the Claim

3. On May 14, 2009, our firm, on behalf of the Plaintiff Ravinder Sharma, commenced the Class Action alleging that the Defendants were responsible for misrepresentations in written disclosures, public oral statements and experts' reports. The Statement of Claim named as Defendants Timminco, its directors and officers, as

well as Photon Consulting LLC, an expert firm that prepared a report on the validity of Timminco's "proprietary process" for producing solar grade silicon (and related parties).

4. The Statement of Claim sought relief for Mr. Sharma and a proposed class of purchasers of Timminco's securities on the secondary market during the period from March 17, 2008, through November 11, 2008. A copy of the Statement of Claim issued May 14, 2009 is attached hereto as Exhibit "A".

5. The Statement of Claim focuses on public misrepresentations that Timminco had a "proprietary metallurgical base process" that provided a "significant cost advantage" over other producers in manufacturing commercial quantities of solar grade silicon for solar cells. Timminco claimed that, "[w]ith proven expertise in the silicon industry, proprietary technology and the ability to rapidly scale up production capacity, we are well-positioned to establish ourselves as a leading supplier of low-cost solar-grade silicon."

6. At the time the misrepresentations were first made in March 2008, a share of Timminco's common stock was selling for $17.29. After the Defendants' statements about Timminco's process, the market price rapidly rose to a high of $35.69 on June 5, 2008. In the following months, Timminco acknowledged contamination problems arising from the process and ultimately withdrew the Photon report from its website. The share price fell to $3.37 by the end of November 2008.

7. In March 2011, prior to the Timminco shares being delisted, Justice Perell described the value of the shares as "penny stocks". The Toronto Stock Exchange suspended the trading of Timminco shares on January 3, 2012 and delisted the stock

effective January 6, 2012. The Globe and Mail has described Timminco's decline as a "spectacular fall from grace".

8. This "spectacular fall from grace" was not the first time the Defendant Mr. Heinz Schimmelbusch, Timminco's Chief Executive Officer and Chairman of the Board of Directors during the Class Period, was involved in significant financial problems at a metals company. In December 1993, Mr. Schimmelbusch was fired as Chief Executive Officer of Metallgesellschaft AG, a German corporation, after the company suffered losses for the year of $1.1 billion, including $470 million from oil futures trading. Copies of news articles covering Mr. Schimmelbusch's tenure at Metallgesellschaft are attached hereto as Exhibit "B"

History of the Action

9. After we issued our Statement of Claim in the Class Action on May 14, 2009, Siskinds LLP on behalf of Robert Gowan commenced a similar proposed class action.

10. The two competing claims resulted in a carriage motion before Justice Perell. Justice Perell's reasons were released on October 29, 2009. Justice Perell granted carriage of the proposed class proceeding to Mr. Sharma and stayed Mr. Gowan's action. Attached hereto as Exhibit "C" is a copy of the reasons of Justice Perell dated October 29, 2009.

11. On January 22, 2010, we brought a motion for Mr. Sharma's withdrawal as a representative plaintiff and for the substitution of Mr. Pennyfeather and Mr. Gowan as plaintiffs. The motion to substitute representative plaintiffs was filed but did not proceed

because counsel for Timminco advised Kim Orr that it was possible that consent to the motion would be provided without the necessity and expense of a hearing.

12. On January 28, 2010, we brought a motion for the disclosure of certain insurance policies from Timminco, Heinz Schimmelbusch, Rene Boisvert, Robert Dietrich, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield and Mickey M. Yaksich (the "Timminco Defendants"). The motion to obtain insurance information proceeded and the Plaintiff was successful, both initially and on the leave to appeal motion. Attached hereto as Exhibits "D" and "E" respectively are copies of the reasons of Justice Perell dated February 3, 2010 and the decision of Justice McCombs denying leave to appeal dated April 22, 2010. Counsel for the Timminco Defendants delivered the insurance information on May 27, 2010.

13. After some correspondence and discussion between our firm and counsel for the Timminco Defendants between May 20, 2010 and June 3, 2010, we agreed to provide the Timminco Defendants with draft materials for the motion for certification and leave under Part XXIII.1 of the *Securities Act*, in furtherance of settlement discussions. Attached hereto as Exhibit "F" is a copy of letter from Mr. D'Silva dated June 7, 2010 related to these discussions.

14. On December 13, 2010, we delivered five volumes of materials, including a draft expert report on Timminco's solar silicon technology and a draft expert report on the range of damages suffered by class members.

15. After further correspondence between our firm and counsel for the Timminco Defendants in February 2011, we received two letters from counsel for the Timminco

Defendants on March 4, 2011 sent by fax, two minutes apart. In the first, Mr. D'Silva advised that his clients would not enter into settlement discussions. In the second, he advised that he would not agree to a tolling agreement, citing our failure to substitute a representative plaintiff as well as alleged inadequacies of the amendments to the Statement of Claim in relation to the Defendants' demand for particulars. Attached hereto as Exhibits "G" and "H" are copies of Mr. D'Silva's letters of March 4, 2011.

16. As a result, we asked Justice Perell to schedule the leave and certification motion on an expedited basis. Justice Perell declined to do so citing the need to be fair to the Defendants.

17. Pursuant to a case management direction, on March 25, 2011, we brought a motion for (1) an order removing Mr. Sharma and substituting Mr. Pennyfeather as plaintiff; (2) an order declaring that the limitation period in s. 138.14 of the *Securities Act* is suspended pursuant to s. 28 of the *Class Proceedings Act, 1992*; and, (3) "conditional leave" to commence an action under s. 138.3 of the *Securities Act*. Justice Perell granted the motion to substitute Mr. Pennyfeather for Mr. Sharma and declared that the limitation period in s. 138.14 of the *Securities Act* was suspended pursuant to s. 28 of the *Class Proceedings Act, 1992*. Attached hereto as Exhibit "I" is a copy of the reasons of Justice Perell dated March 31, 2011.

18. The Defendants appealed Justice Perell's March 31, 2011 decision declaring the limitation period to be suspended. The appeal was heard by the Court of Appeal on November 2, 2011 with the decision being reserved.

19. On May 17, 2011, we issued an Amended Statement of Claim substituting Mr. Sharma with Mr. Pennyfeather as plaintiff, along with other amendments including incorporating answers to particulars demanded by the Defendants. Attached hereto as Exhibit "J" is a copy of the Amended Statement of Claim issued May 17, 2011.

20. On May 31, 2011, we delivered our motion record for the motion for certification and leave to commence a claim under Part XXIII.1 of the *Securities Act*. The 1,969-page motion record included (1) the affidavit of the Plaintiff, Mr. Pennyfeather, (2) the affidavit of Megan B. McPhee, a principal of our law firm, (3) the affidavit of James Rand, a solar silicon expert, and (4) the affidavit of Lawrence Rosen, a forensic accounting expert. Copies of the affidavit of Dr. Rand, dated May 23, 2011, and the affidavit of Mr. Rosen, dated May 27, 2011, are attached hereto as Exhibits "K", and "L" respectively.

21. Counsel for all parties, including the Timminco Defendants, agreed to a timetable for the motion for leave and the motion for certification and advised the case management judge of the same. The agreed-upon schedule outlined the following:

a) The Plaintiff's motion record was delivered to all Defendants on May 31, 2011;

b) the Defendants would deliver responding material by December 30, 2011;

c) the Plaintiff would have until February 28, 2012 to deliver any reply material;

d) cross-examinations would take place in March and April of 2012, and would be completed by April 30, 2012; and,

e) the hearing would be scheduled for one week in June 2012, subject to the Court's availability.

22. On June 29, 2011, the Timminco Defendants brought a motion for particulars of the Amended Statement of Claim. Justice Perell ordered Mr. Pennyfeather to deliver a number of particulars and ordered the Defendants to deliver Statements of Defence once the particulars were provided and any motions to challenge the pleadings were resolved. Attached hereto as Exhibit "M" is a copy of the reasons of Justice Perell dated July 13, 2011.

23. We delivered answers to the Timminco Defendants' demand for particulars on September 15, 2011.

24. At a case conference on November 15, 2011, counsel for the Timminco Defendants sought to further extend the timetable to delay filing their responding material for the motion for leave and certification. Justice Perell relieved the Defendants of their obligation under the agreed-upon timetable and directed that the Defendants' proposed motion to strike the Statement of Claim be heard on January 25 and 26, 2012.

25. These motions were then delayed because Timminco, and related companies, applied for and were granted protection under the *Companies' Creditors Arrangement Act* on January 3, 2012. Pursuant to the Initial Order, Justice Morawetz ordered a stay of proceedings until February 2, 2012 or such later date as the Court may order. On January

27, 2012, Justice Morawetz extended the stay until April 30, 2012. Attached hereto as Exhibit "N" is a copy of the Initial Order of Justice Morawetz dated January 3, 2012.

26. At a case conference on January 25, 2012, Justice Perell, having been advised of the stay, rescheduled the Defendants' motion to strike to be heard on March 20 and 21, 2012. Justice Perell also maintained the seven court dates in November 2012 for the motions for certification and for leave under Part XXIII.1 of the *Securities Act*.

The Court of Appeal Decision

27. Pursuant to a decision released on February 16, 2012 the Court of Appeal set aside the decision of Justice Perell which had declared that section 28 of the *Class Proceedings Act* suspended the running of the three year limitation under section 138.14 of the *Securities Act*. A copy of the decision is attached as Exhibit "O".

28. This decision, depending upon its application, has the potential to eliminate the claims advanced on behalf of the tens to hundreds of thousands of members of the class not only in the Class Action, but in every secondary market securities class action in the country. As far as we have been able to determine not one of these cases has succeeded in having leave granted within the three year period.

29. The primary reasons for this are:

a) The period starts to run on the date of the first misrepresentation therefore all or a significant portion of the period can expire before discovery of the problem; and

b) Subsequent to commencement of the action, the litigation is case managed and procedurally no representative plaintiff has been able to obtain a timely leave decision under that system.

30. We have received instructions to seek leave to appeal the Court of Appeal decision to the Supreme Court of Canada. The probable timeline for this process is as follows:

April 16, 2012:	Applicants' deadline to serve and file application for leave to appeal.
May 16, 2012:	Respondents' deadline to serve and file a response.
May 28, 2012:	Applicants' deadline for serving and filing a reply.
November - December, 2012:	Anticipate time for release of decision on leave to appeal.

31. The lifting of the stay will facilitate dealing with the Court of Appeal decision that was released during the stay period. The issue concerns the appeal rights for this class of tens of thousands of individuals. There will be no requirement for any significant involvement of Timminco management in the leave to appeal process.

32. It is also probable that some or all of the defendants will take steps within the Class Action as a result of the Court of Appeal decision. The stay needs to be lifted to provide the plaintiffs with a fair opportunity to deal with the ramifications of the Court of Appeal decision in the context of the Class Action.

The Merits of the Action

33. Dr. Rand, whose report is attached as Exhibit "K", concluded that that Timminco's technology could not perform as claimed by Timminco and could not produce the results which were represented to the marketplace. Specifically, he concluded:

a) that Timminco's technologies "did not have many of the attributes that Timminco and its executives had indicated during the period between March 27, 2008 and November 11, 2008";

b) that Timminco's solar silicon patents did not provide the company with any competitive advantage;

c) that Timminco's production techniques would not be cost effective; and,

d) that Timminco's upgraded metallurgical-grade silicon or solar silicon would not be acceptable to solar cell manufacturers.

34. Mr. Rosen of Rosen & Associates Limited provided an estimate of damages suffered by class members and concluded that in his preliminary opinion, damages ranged from $196 million to $300 million, depending on the methodology employed. Mr. Rosen's affidavit is attached as Exhibit "P".

35. In the almost 3 ¾ years since the commencement of the Class Action, the Defendants have not put forward any representative of the company to swear under oath that Timminco's proprietary technology ever worked.

The Timminco Defendants' Insurance Policies

36. In January 2010, our primary concern in seeking production of the Timminco Defendants' insurance policies was the ability of Timminco to continue as a going concern. The Timminco Defendants resisted the motion, and filed a record on the motion seeking to rebut any inference that Timminco was in dire financial straits. It was clear even prior to receiving the policies that the insurance policies would form the primary basis for any recovery in the Class Action.

SWORN before me at the City of Toronto, in the Province of Ontario, this 8th day of March, 2012.

A Commissioner for taking affidavits.
NORMAN T. MIZOBUCHI

Victoria Paris

17

Court File No.: CV-12-9539-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

AFFIDAVIT OF VICTORIA PARIS
SWORN MARCH 8, 2012

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Lawyers for the Plaintiff St. Clair Pennyfeather in the class proceeding *Pennyfeather v. Timminco Limited, et. al.*, Ont. Sup. Court File No.: CV-09-378701-00CP

TAB A

This is Exhibit "A" referred to in the
affidavit of VICTORIA PHILLIS
sworn before me, this 9th
day of MARCH 2012

A COMMISSIONER FOR TAKING AFFIDAVITS

Court File No. CV-09-378701-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN

RAVINDER KUMAR SHARMA

Plaintiff

and

INMET MINING CORPORATION LIMITED, PHOTON CONSULTING LLC, ROGOL ENERGY CONSULTING LLC, MICHAEL ROGOL, DR. HEINZ SCHIMMELBUSCH, ROBERT DIETRICH, RENÉ BOISVERT, ARTHUR R. SPECTOR, JACK E. MESSMAN, JOHN C. FOX, MICHAEL D. WINFIELD, MICKEY M. YAKSICH, and JOHN P. WALSH

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent

to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFFS' CLAIM, and $5000.00 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiffs' claim and $500.00 for costs and have the costs assessed by the court.

Date May 14, 2009

Issued by .....

Local registrar

Address of Court Office:

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Toronto, ON
M5G 1E6

TO: **TIMMINCO LIMITED**
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AND TO: **ROGOL ENGERY CONSULTING LLC**
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AND TO: **MICHAEL ROGOL**
200 Clarendon St., 50th Floor
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CLAIM

DEFINITIONS

1. The following definitions apply for the purpose of this Statement of Claim:

(a) "**March 2008 Press Release**" means Timminco's press release dated March 17, 2008;

(b) "**March 2008 Conference Call**" means the conference call conducted by Timminco with investors and analysts on March 17, 2008;

(c) "**2007 Annual Information Form**" means Timminco's 2007 Annual Information Form published on SEDAR on March 28, 2008.

(d) "**2007 MD&A**" means Timinco's Management's Discussion and Analysis for Fiscal Year 2007 published on SEDAR on March 28, 2008;

(e) "**2007 Annual Report**" means Timminco's 2007 Annual Report published on SEDAR on March 31, 2008;

(f) "**Photon Report**" means the report of Photon Consulting dated May 8, 2008;

(g) "**2008 First Quarter Results**" means Timminco's first quarter results published on May 8, 2008;

(h) "**May 8, 2008 Press Release**" means the press release dated May 8, 2008 announcing the 2008 First Quarter Results;

(i) "**May 8, 2008 Conference Call**" means the conference call conducted by Timminco with investors and analysts on May 8, 2008;

(j) "**MD&A Q1 2008**" means Timminco's Management's Discussion and Analysis for Fiscal Year 2007 and First Quarter 2008 published on SEDAR on May 13, 2008;

(k) "**May 13, 2008 Conference Call**" means the conference call conducted by Timminco with investors and analysts on May 13, 2008; and,

(l) "**May 29, 2008 Conference Call**" means the conference call conducted by Timminco with investors and analysts on May 29, 2008.

RELIEF SOUGHT

2. The Plaintiff claims on his own behalf and on behalf of the other Class Members:

(a) an order pursuant to the CPA certifying this action as a class proceeding and appointing him as representative plaintiff;

(b) a declaration that the Defendants are liable for the Misrepresentations made during the Class Period;

(c) a declaration that the Misrepresentations were made negligently;

(d) a declaration that Timminco is vicariously liable for the acts and/or omissions of the Individual Defendants;

(e) an order allowing the Plaintiff to amend this Statement of Claim to assert the right of action provided for in Part XXIII.1 of the Securities Act, R.S.O. 1990, c. S.5 ("Securities Act");

(f) damages in the amount of $520,000,000.00 or such other amount as this court finds appropriate at the trial of the common issues or at a reference or references;

(g) punitive damages in the amount of $20,000,000.00;

(h) an order directing a reference or giving such other directions as may be necessary to determine issues not determined in the trial of the common issues;

(i) pre-judgement interest and post-judgement interest, compounded, or pursuant to sections 128 and 129 of the Courts of Justice Act, R.S.O.1990, c. C.43;

(j) costs of the action on a substantial indemnity basis or in an amount that provides full indemnity;

(k) costs of notice and of administering the plan to distribute the recovery in this action, pursuant to section 26 (9) of the Class Proceedings Act, 1992, S.O. 1992, c. 6, plus applicable taxes; and,

(l) such further and other relief as this Honourable Court deems just.

THE NATURE OF THE ACTION

3. Timminco Ltd. ("Timminco" or the "Company") is a publicly-traded company. Its shares trade on the Toronto Stock Exchange under the symbol TIM.

4. Until early 2007, Timminco's principal business involved the production and marketing of alloys for industrial applications. Its securities were trading at less than $1.00 per share at that time.

5. Beginning in March of 2007, Timminco announced that its wholly owned subsidiary, Bécancour Silicon Inc., (Bécancour), had entered into a series of commercial contracts to supply high purity silicon to solar cell manufacturers. Timminco stated that Bécancour had developed a proprietary "patent-pending process", which allowed it to produce solar-grade silicon for supply to the rapidly growing solar voltaic energy industry. Timminco announced that in response to the high demand for its product, it would begin to ramp up production by the end of 2007.

6. In early 2008, the Defendants began to describe Timminco as "a leader in the production and marketing of lightweight metals, specializing in solar grade silicon", and represented that it was able to process "metallurgical grade silicon into low cost solar grade silicon for use in the manufacture of solar cells." The Defendants also publicly stated that Timminco had a competitive advantage over other solar-grade silicon producers because of its proprietary technology and production capabilities.

7. As is particularized below, these statements by the Defendants were made in press releases, conference calls, Core Documents as defined in section 138.1 of the *Securities Act* ("Core Documents"), Public Oral Statements as defined in section 138.1 of the *Securities Act* ("Public Oral Statements"), and other documents that would reasonably be expected to affect the market price of Timminco shares. The share price was artificially inflated as a result of the Defendants' misrepresentations.

8. The Defendants' statements affected the market price of Timminco shares between the period from March 17, 2008 through November 11, 2008 (the "Class Period").

CLASS DEFINITION

9. The Plaintiff brings this action on behalf of all persons, other than the Excluded Persons, who acquired securities of Timminco during the Class Period ("Class Members"). The class excludes Timminco's past or present subsidiaries, officers, directors, affiliates, legal representatives, heirs, predecessors, successors and assigns, and all members of the individual defendants' families, and any entity in which any of the individual defendants has or had a controlling interest ("Excluded Persons").

10. The Defendants' statements during the Class Period that Timminco had a competitive advantage in the production of solar-grade silicon, as well as statements of revenue, future estimates of production volume, margins, and profits from that business, were materially false and misleading. The Defendants' omissions to state during the Class Period that the Company's solar-grade silicon production process was not capable of producing silicon at quantity, cost, and purity levels consistent with Company statements, and that such problems would have detrimental effects on revenues and profits, were also materially false and misleading. Those statements and omissions (collectively, the "Misrepresentations") were misrepresentations within the meaning of s. 138.3 of the Securities Act. The Misrepresentations were made negligently and recklessly and without regard for the truth of their contents.

11. The Plaintiff seeks damages in an amount equal to the losses that he and the other Class Members suffered as a result of purchasing or acquiring Timminco securities during the Class Period.

THE PLAINTIFF

12. The Plaintiff, Mr. Sharma, resides in the City of Richmond Hill, in the Province of Ontario. Mr. Sharma purchased shares of Timminco during the class period and suffered losses as a result of the Defendants' Misrepresentations.

THE DEFENDANTS

13. Timminco is a corporation continued under the *Canada Business Corporations Act* on July 23, 1980, which carries on the business of the production and marketing of various metals, alloys and silicon. The Company's business involves the production and marketing of solar-grade silicon for the solar photovoltaic energy industry.

14. Timminco's wholly-owned subsidiary, Bécancour, conducts Timminco's silicon production business and operates the Bécancour Plant, a solar-grade silicon production facility in Bécancour, Québec.

15. Photon Consulting LLC ("Photon Consulting") is a consulting firm based in Boston, MA, providing research and analysis to the solar power industry. Photon Consulting is an expert within the definition in s. 138.1 of the *Securities Act.*

16. Rogol Energy Consulting LLC ("Rogol Energy") is a consulting firm located in Boston, MA, providing research and analysis to the solar power industry. Rogol Energy is an expert within the definition in s. 138.1 of the *Securities Act.*

17. Dr. Heinz Schimmelbusch ("Schimmelbusch") is an individual resident of Pennsylvania, U.S.A., and served as Chief Executive Officer and Chairman of the Board of Directors of Timminco during the Class Period.

18. Robert Dietrich ("Dietrich") is an individual resident of Ontario, and served as the Executive Vice President and Chief Financial Officer of Timminco during the Class Period.

19. René Boisvert ("Boisvert") is an individual resident in the Province of Quebec and served as the President – Silicon of Timminco and was the President and Chief Executive Officer of Bécancour since 2004 and during the Class Period. Prior to that, Boisvert held various positions and offices with Bécancour, including President and Vice President – Operations & Technology.

20. Michael Rogol ("Rogol") is an individual resident of Boston, MA. Rogol was the Managing Director of Photon Consulting and was responsible for reviewing and reporting on Timminco's operations through Photon Consulting and Rogol Energy. Rogol is an expert within the definition in s. 138.1 of the *Securities Act*.

21. The remaining defendants (Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich and John P. Walsh) (collectively, "Directors") were directors of Timminco at all material times.

22. By virtue of their positions as senior officers and/or directors of Timminco, the individual defendants (Schimmelbusch, Dietrich and Boisvert) and Directors had actual, implied or apparent authority to act and speak on Timminco's behalf prior to and during the Class Period.

TIMMINCO'S DISCLOSURE OBLIGATIONS

23. Timminco is a reporting issuer in Ontario and as such, pursuant to the *Securities Act*, and as such Timminco is:

(a) required to file on SEDAR and deliver to the Company's security holders:

(i) annual financial statements and MD&A within 90 days from the end of its last financial year, pursuant to sections 78 and 79 of the *Securities Act* and

sections 4.1-4.2 and 5.1 of National Instrument 51-102, as the case may be;

(ii) quarterly interim financial statements and MD&A within 45 days of the end of each interim period pursuant to sections 4.3-4.4 and 5.1 of National Instrument 51-102; and,

(b) subject to the continuous disclosure provisions of Part XVIII of the *Securities Act* in accordance with section 1(1) of the *Securities Act.*

24. Timminco is also a "responsible issuer" in accordance with section 138.1(1) of the *Securities Act* and is therefore subject to civil liability provisions for secondary market disclosure of Part XXIII.1 of the *Securities Act.*

THE SOLAR-GRADE SILICON INDUSTRY

25. Solar cells are used to produce solar energy. The key component in solar cells is high purity silicon, called "solar-grade" silicon, defined as at least 99.999% (5-nines) pure. Ultra pure silicon (between 99.99999% or 7-nines and 99.9999999% or 9-nines pure), known as polysilicon, has been manufactured for use in the semiconductor industry for many years. This polysilicon is actually too pure for solar energy applications, and solar cell manufacturers must increase its conductivity by adding impurities, typically boron and phosphorous. The production of polysilicon requires significant capital investment and energy costs.

26. Other methods for creating solar-grade silicon exist. One of these methods involves the conversion of metallurgical silicon directly into solar-grade silicon. Although this method has been known and understood in the industry for many years, no process has yet been created whereby it can be applied on a cost-efficient commercial scale.

27. In March of 2007, Timminco announced that it had developed a process to purify chemical grade silicon to meet the specifications of solar cell industry participants.

THE MISREPRESENTATIONS DURING THE CLASS PERIOD

The March 2008 Press Release

28. On March 17, 2008, Timminco issued the March 2008 Press Release announcing its results for the fourth quarter and fiscal year ended December 31, 2007. The March 2008 Press Release is a document that would reasonably be expected to affect the market price of the shares in Timminco.

29. The March 2008 Press Release states:

> Fiscal 2007 was a year of transition for Timminco as we focused on establishing production and securing our first customer contracts in our solar-grade silicon business, while at the same time positioning our silicon metal and magnesium businesses for improved performance going forward," said Heinz Schimmelbusch, Chairman of the Board and Chief Executive Officer of Timminco. "In December, less than six months after breaking ground on our 3,600 metric ton solar-grade silicon facility, we commenced production and now have all three lines operating. Before year end, we had also secured four long-term contracts that commit us to supply up to 6,000 metric tons per year of solar-grade silicon beginning in 2009. Based on our success to date, as well as a strong pipeline of prospective customers, we made the decision last month to expand our production capacity to 14,400 metric tons annually. Looking ahead, we are firmly focused on leveraging *our position as a low-cost producer of solar-grade silicon* to capitalize on the tremendous opportunity in the high growth solar photovoltaic energy industry.

[Emphasis added]

30. The statements made in the March 2008 Press Release misrepresented that Timminco "was a low-cost producer of solar grade silicon", and further misleadingly implied that it was capable of producing solar-grade silicon with commercially acceptable impurity composition, and of producing same at the quantity and cost as set out in the March 2008 News Release, and accordingly, these representations were Misrerpesentations.

The March 2008 Conference Call

31. On or about March 18, 2008, Schimmelbusch conducted the March 2008 Conference Call with analysts and investors wherein he made statements relating to the business, operations and affairs of Timminco. These statements constituted Public Oral Statements, and included the following:

> In the coming years, the growth of solar energy industry is expected to experience significant growth. *We believe that we are well positioned to be a leading supplier of solar-grade silicon to solar wafer and cell manufacturers.*
>
> Early in 2007 production began at our solar-grade silicon pilot facility, and by March we had secured our first commercial contract. We followed shortly thereafter with our second contract in April.
>
> In July 2007 we broke ground on our new three-line solar-grade silicon production facility. Less than six months later, in December, our first production line was up and running, and we had secured two more sales contracts. We are now contracted to supply up to 6,000 metric tons of solar-grade silicon per year, beginning in 2009 to four key customers.
>
> In February 2008 our second line was in production, with the start of the third line by the beginning of March. Given the market acceptance of our material, several weeks ago we announced that we will further expand our annual solar-grade silicon production capacity to 14,400 metric tons. I will elaborate on this later.
>
> Purity and the composition of impurities are key specifications for the manufacture of solar cells and modules. Each [*sic*] in 2007 we achieved a purity level of five 9s, generally considered to be the minimum requirement for the manufacture of solar cells and modules.
>
> Over the course of the year we continued to improve the purity composition at this level in order to expand our base of potential customers and command higher market price. By year end we achieved an impurity composition at the 99.999% level of 0.8 parts per billion of boron and less than 5 parts per million of phosphorus, which is a significant milestone.
>
> * * *
>
> We are proud of our achievements in 2007 and believe that fiscal 2008 holds significant promise as we continue to build our solar-grade silicon business.
>
> * * *

Clearly we are not satisfied with our financial performance in 2007. Looking ahead, *we see great opportunity and leverage on our solar silicon business to capitalize on high-growth opportunities.*

* * *

While we see strong prospects for our magnesium business to return to health and our aluminum wheels investments as I stated before, *our greatest opportunity for future growth lies in our silicon division, particularly the solar-grade silicon component of the business. We believe that this is a great time to be in business of silicon.*

* * *

Our historical silicon business with more than three decades of experience is already a North American leader in the manufacture of silicon metal and ferrosilicon products. We have an annual production capacity of 50,000 metric tons. We supply to four of the world's major silicon and polysilicon manufacturers.

We believe that strong results in our historical silicon business will be driven by favorable market conditions, in particular the rising price for silicon. But even more promising than price recovery is *our entry into the production of solar-grade silicon, which will provide tremendous upside.* We will transition increasing portions of our output from our historical silicon business to supply our solar-grade silicon operations.

* * *

The solar energy industry is still in its relative infancy, so there are no entrenched suppliers of solar-grade silicon. *We believe we are well positioned to capitalize on this largely untapped market. We aim to establish ourself as the leading global supplier of low-cost solar-grade silicon to the manufacturers of solar cells.*

Our proprietary metallurgical base process for the production of solar-grade silicon provides us with a significant cost advantage, based on required capital expenditures, electricity -- the single largest input cost in the production of solar-grade silicon -- and raw materials.

Our process, which has two patents pending, requires capital investment that is significantly lower than conventional polysilicon processes and electricity costs that can be as little as 1% of polysilicon [processing].

* * *

Our growth strategy for our solar silicon business is focused on two key areas -- developing long-term relationships with manufacturers of solar wafers and cells; and building our production capacity to meet existing and anticipated customer demand.

[Emphasis added].

32. These statements represented, falsely, that Timminco was "well positioned" as a low-cost producer of solar-grade silicon and had "a significant cost advantage" that was "a tremendous upside" for the Company. Accordingly, the representations made in the March 2008 Conference Call were Misrepresentations.

33. Following the March 2008 Press Release and the March 2008 Conference Call, the price of Timminco shares on the TSX increased from $17.29 on March 17, 2008 to $27.49 on March 27, 2008.

2007 Annual Information Form

34. On March 28, 2008, Timminco published its 2007 Annual Information Form on SEDAR. The 2007 Annual Information Form is a Core Document.

35. The 2007 Annual Information Form states:

> **Overview**
>
> The Company is a leader in the production and marketing of lightweight metals, specializing in solar grade silicon for the solar photovoltaic ("PV") energy industry.
>
> * * *
>
> *The Company has expanded its solar grade silicon production capacity to 3,600 metric tons per year, and plans to further increase capacity to meet current and anticipated demand.*
>
> * * *
>
> **Silicon Business**
> **Solar Grade Silicon**
> The Company uses a patent-pending process to purify low purity metallurgical grade silicon into higher purity solar grade silicon (also known as upgraded metallurgical silicon) for manufacturers of solar wafers and solar cells... *The*

Company's proprietary process requires significantly less capital investment and uses considerably less electricity than for the production of polysilicon.

* * *

The Company built a small scale production facility in late 2006 to test its proprietary purification process. Based on the initial success of this process, and the execution of initial long-term contracts with customers for the supply of the Company's solar grade silicon in early 2007, the Company commenced construction of a 3,600 metric ton production facility for solar grade silicon in August 2007, which facility was completed in February 2008. By the end of 2007, the Company had entered into four long-term contracts for the supply of solar grade silicon through 2012, and had received orders from customers, which accounted for all of the Company's planned production capacity in 2008. In February 2008, the Company announced plans to quadruple its production capacity of solar grade silicon from 3,600 to 14,400 metric tons by mid-2009, to meet customer commitments under long-term contracts and to satisfy anticipated further demand. In March 2008, the Company executed a fifth contract with the world's largest solar cell manufacturer, to supply solar grade silicon in 2008 and 2009, with a possibility to extend the term from 2010 to 2013 with increased volumes.

* * *

The Company produces solar grade silicon using a proprietary manufacturing process to purify low purity metallurgical grade silicon, which yields upgraded metallurgical silicon with a purity level of 99.999% or "5-nines", and an impurity count of 0.8 parts per million (ppm) of boron and less than 5.0 ppm of phosphorous. At these levels, the Company's solar grade silicon can be successfully used in the production of solar cells.

* * *

The Company manufactures solar grade silicon by purifying silicon metal. The purification process begins with molten silicon metal and consists of multiple steps to yield solar grade silicon with the desired purity level (99.999%, or "5-nines", pure) and impurity counts for phosphorous and boron. The equipment and methods used by the Company to purify silicon metal in its solar grade silicon production are based on two patents pending manufacturing processes. In particular, during 2007 the Company filed a formal patent application with the U.S. and international patent authorities in respect of one of its processes for purifying low-grade silicon metal. The Company has a 2006 priority date in respect of this patent application, and the international patent examiner has provided a positive report on such application. The Company has also filed a formal patent application in 2008 with the U.S. and international patent authorities in respect of another process for purifying low-grade silicon metal, which claims a 2007 priority date...*These patents are fundamental to the Company's purification processes and a key component in the competitive advantage of the Company's solar grade silicon business.* The Company has also

filed other informal (or provisional) patent applications relating to solar grade silicon production.

* * *

The following are competitive strengths of the Company's solar grade silicon business:

Proprietary Process for Purifying Metallurgical Grade Silicon. The Company's proprietary technology for purifying metallurgical grade silicon into high purity silicon metal is a significant competitive advantage of the Company. The most important specifications of solar grade silicon for manufacturers of solar cells is purity, in particular boron and phosphorous levels. The Company has been able to produce high purity silicon with 0.8 ppm boron and less than 5.0 ppm phosphorous using [sic]...

Cost Advantages Relative to Polysilicon. The Company's proprietary process offers significant cost advantages based on efficiencies in three main areas: capital expenditures, raw materials and electricity used in the solar grade silicon production process. The capital investment required for the production of solar grade silicon is not insignificant. Conventional polysilicon processes can require capital investments of as much $100 per kilogram of annual capacity (which equates to a $500 million investment for 5,000 metric tons of output), and even more for new entrants to the market, whereas the capital investment for the Company's process is up to 20 times lower (the Company invested $24 million to build 3,600 metric tons of annual capacity). The cost of electricity used in the Company's process is as little as 2% of that used in conventional polysilicon processes, which require up to 135 kilowatt hours per kilogram of output, compared to 2 kilowatt hours per kilogram of output required by the Company's process. Finally, the Company's process allows the use of less expensive raw materials to produce solar grade silicon that meets our customers' specifications. The Company believes that it can achieve an average cost of $12 per kilogram for 2008, approximately half that of the $2 to $25 per kilogram that it generally costs existing polysilicon producers.

Ability to Rapidly Increase Production Capacity. The Company also has a significant advantage in the time it takes to add production capacity for solar grade silicon. The Company can significantly expand capacity in less than one year, whereas polysilicon producers, in contrast, typically require at least three to four years to do the same. Moreover, despite the current shortage of supply in the marketplace, existing market participants are generally resistant to adding capacity due to both the significant investment and the long time horizon.

* * *

The Company's new solar grade silicon production facility in Becancour, having a production capacity of 3,600 metric tons per year, only started production on the third of its three 1,200 metric ton production lines in February 2008. *The Company has experienced and expects to continue to experience rapid growth rates in this business and the solar photovoltaic energy industry generally.*

* * *

The Company is currently able to produce solar grade silicon at a purity level of 99.999% or "five nines", with levels of phosphorous and boron that are acceptable to existing customers.

36. The 2007 Annual Information Form represented, falsely, that Timminco "is a leader in the production and marketing of lightweight metals, specializing in solar grade silicon for the solar photovoltaic ("PV") energy industry", and that it had "expanded its solar grade silicon production capacity to 3,600 metric tons per year". Furthermore, the 2007 Annual Information Form represented, falsely, that Timminco's "proprietary process requires significantly less capital investment and uses considerably less electricity than for the production of polysilicon", and that Timminco's solar grade silicon can be successfully used in the production of solar cells", with "levels of phosphorous and boron that are acceptable to existing customers."

37. The 2007 Annual Information Form also represented that Timminco's "proprietary technology for purifying metallurgical grade silicon into high purity silicon metal is a significant competitive advantage of the Company", that "[t]he Company's proprietary process offers significant cost advantages based on efficiencies in three main areas: capital expenditures, raw materials and electricity used in the solar grade silicon production process", and that "[t]he Company also has a significant advantage in the time it takes to add production capacity for solar grade silicon."

38. The above statements omitted to state that Timminco's solar-grade silicon production process was not capable of producing silicon at quantity, cost and impurity composition that would be commercially viable. While the impurity concentrations may have been acceptable to its existing customers, Timminco failed to disclose that this impurity composition was not generally commercially acceptable and that it could not produce solar-grade silicon at a generally commercially acceptable impurity composition in commercial quantity. This inability would

have a detrimental effect on the Company's revenues and profits. Accordingly, the representations made in the 2007 Annual Information Form were Misrepresentations.

2007 MD&A

39. On March 28, 2008, Timminco published its 2007 MD&A on SEDAR. The 2007 MD&A is a Core Document. The 2007 MD&A stated:

> Construction of the new 3,600 metric ton solar grade silicon manufacturing facility was completed on schedule with commissioning of the three 1,200 metric ton lines completed in February 2008.
>
> * * *
>
> The Company has constructed a new manufacturing facility at its Bécancour location having an annual capacity to produce 3,600 metric tons of solar grade silicon...The Company commenced construction of this new facility in August 2007, which consists of three separate production lines, each expected to yield at least 1,200 metric tons of annual capacity, for a total capacity of 3,600 metric tons per year. The first of the three lines was commissioned in December 2007 and the second and third lines came on stream in February 2008. *It is anticipated that full production capacity of these three production lines will be reached in the beginning of the third quarter 2008.*
>
> On February 22, 2008, *the Company announced plans to further expand its solar grade silicon production capacity, from 3,600 metric tons to 14,400 metric tons per year.*
>
> * * *
>
> The success of the Company's solar grade silicon business depends to a large degree on the protection of its intellectual property rights, including proprietary technology, information, processes and know-how. Such protection is based on trade secrets and patents, including two patents pending in respect of the Company's manufacturing process for the production of solar grade silicon.
>
> * * *
>
> The Company's growth strategy is straight forward: *Leverage its competitive advantages in the production of solar grade silicon to establish long-term relationships with major players in solar cell manufacturing, and continue to expand its capacity to meet this demand. With a significant shortage in today's solar grade silicon market, the Company's ability to offer an alternative source of supply provides an opportunity to capture market share.* During 2008, the

> Company expects to enter into additional long-term contracts for solar grade silicon that will be produced in its expanded solar grade silicon facilities in 2009.

40. The 2007 MD&A represented, falsely, that Timminco could "[l]everage its competitive advantages in the production of solar grade silicon". In addition, the Company characterized its process as unique and proprietary technology, when in fact the process utilized refurbished common industrial equipment. Timminco's solar-grade silicon production process was not capable of producing at commercially acceptable impurity composition, or at the quantity, cost and impurity composition consistent with the statements contained in the MD&A. The statements contained in the 2007 MD&A were Misrepresentations.

Certification of Filings

41. Schimmelbusch and Dietrich each certified that the 2007 MD&A, to their knowledge, did not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made.

42. At the time of the said certifications, Schimmelbusch and Dietrich knew or ought to have known or were reckless in not knowing, that the 2007 Annual Report, the 2008 First Quarter Results and the MD&A Q1 2008 contained untrue statements of material fact and further or in the alternative, omitted to state a material fact required to be stated or that was necessary to make a statement not misleading in light of the circumstances in which it was made, as set out above.

The 2007 Annual Report

43. On March 31, 2008, after the close of trading on the TSX, Timminco published its 2007 Annual Report on SEDAR. The 2007 Annual Report is a document that would reasonably be expected to affect the market price of the shares in Timminco.

44. The 2007 Annual Report states:

> We are a leader in the production and marketing of lightweight metals, specializing in solar-grade silicon for the rapidly growing solar photovoltaic energy industry. We produce approximately 50,000 metric tons of silicon metal per year, from which *we use our proprietary technology to produce low-cost solar-grade silicon for use in the manufacture of solar cells and modules. We have expanded our solar-grade silicon capacity to 3,600 metric tons per year, and plan to further increase capacity to 14,400 metric tons per year to meet anticipated demand.* We produce silicon metal, magnesium extrusions and other specialty metals for use in a broad range of industrial applications serving the aluminum, chemical, pharmaceutical, electronics and automotive industries. *With proven expertise in the silicon industry, proprietary technology and the ability to rapidly scale up production capacity, we are well-positioned to establish ourselves as a leading supplier of low-cost solar-grade silicon.*
>
> * * *
>
> Silicon Metal Business
>
> With more than 30 years of experience, we are one of North America's largest producers of silicon metal, as well as other forms of silicon, including ferrosilicon. Our 60-acre facility in Bécancour, Québec has an annual production capacity of 50,000 metric tons (mt) per year. Our products are used primarily in the chemical, electronics, aluminum, iron and steel industries, as well as for the production of polysilicon by suppliers to the manufacturers of solar cells for the solar photovoltaic (PV) energy industry. *Our proprietary compound electrode processes provide us with a significant cost advantage in the industry.*
>
> Solar-grade Silicon Business
>
> We are leveraging our experience and expertise in the production of metallurgical silicon to produce and market solar-grade silicon for the high growth solar photovoltaic (PV) energy industry. *Our proprietary technology enables us to process metallurgical grade silicon into higher purity solar-grade silicon (using a metallurgical process) for use in the manufacture of solar cells. The solar-grade purity level of our product provides an additional source of supply to manufacturers in today's supply-constrained market. Because our process requires significantly lower capital investment and uses considerably less electricity than conventional silicon purification processes, our solar-grade silicon is a low cost alternative to the industry's mainstay, polysilicon.* Our historical silicon metal business ensures that we will have the feedstock to support the expansion of our capacity to build long-term customer relationships.
>
> * * *
>
> As the solar PV energy industry realizes its projected growth, *we are well positioned to become a leading supplier of solar-grade silicon to the*

manufacturers of solar cells. Our proprietary technology for processing low-purity, metallurgical grade silicon into higher purity solar-grade silicon provides us with a considerable competitive advantage in the marketplace. Significantly lower capital costs and requirements for electricity, the largest input cost in the production of solar-grade silicon, compared to our competitors, positions us as a low-cost producer. In fact, the cost per kilogram of our process can be as much as half that of conventional processes. Furthermore, we have the advantage of security of supply of feedstock through our upstream integration.

* * *

The most important specification of solar-grade silicon for manufacturers of solar cells is purity, in particular boron and phosphorous levels. We are continually refining our production process to improve the purity of our product, which will not only expand our base of potential customers, but will also command higher prices in the market. Earlier this year, we achieved a significant milestone in this pursuit when we started to produce silicon with 0.8 parts per million (ppm) boron and less than 5.0 ppm phosphorous. We are confident that we can continue to improve upon this mark.

* * *

Increasing the Purity of Solar-grade Silicon

The Company is currently able to produce solar-grade silicon at a purity level of 99.999%, or "five nines", with levels of phosphorus and boron that are acceptable to existing customers. Achieving a higher purity level could enhance the Company's competitive advantage and may allow for increased selling prices and margins for the solar-grade silicon business. The Company intends to invest certain resources in an effort to achieve an improvement in, and maintain the consistency of, purity levels of its solar-grade silicon. However, there is no assurance that the Company will consistently achieve any higher purity level for its solar grade silicon.

* * *

We have developed a proprietary metallurgical-based process for the production of solar-grade silicon that has a number of important advantages over conventional chemical-based processes. Our process, which has two patents pending, begins with molten silicon and consists of multiple steps to yield solar-grade silicon with a purity of 99.999% and an impurity count of 0.8 parts per million (ppm) of boron and less than 5.0 ppm of phosphorous, which can be successfully used in the production of solar cells. Through continual refining of our process, we expect to further improve upon these levels.

Our process offers significant cost advantages based on efficiencies in three main areas: capital expenditures, raw materials and electricity used in the production process. The capital investment required for the production of solar-grade silicon is not insignificant. Conventional polysilicon processes can require capital

> investments of as much as $100 per kilogram (a $500 million investment for 5,000 mt of annual output), and even more for new entrants to the market. *The capital investment for our process is up to 20 times lower* – last year we invested just $21.7 million to build 3,600 mt of capacity.
>
> * * *
>
> The manufacture of solar cells requires silicon that is at least 99.999% (5-nines) pure. *Our proprietary metallurgical process enables us to achieve these levels with significantly lower capital investment and production costs than conventional chemical processes used for the semiconductor industry.*

[Emphasis added].

45. The statements in the 2007 Annual Report represented that:

(a) Timminco had a "competitive advantage" because its "proprietary process" enabled it "to process metallurgical grade silicon into higher purity solar-grade silicon" with "a significant cost advantage";

(b) Timminco's "proprietary technology and the ability to rapidly scale up production capacity" rendered the Company "well-positioned to establish [itself] as a leading supplier of low cost solar-grade silicon."; and,

(c) Timminco's process was state of the art and a unique technology.

46. Each of the said representations was false or misleading. In Fact Timminco was unable to produce solar-grade silicon at a commercially acceptable impurity composition, and its process utilized refurbished common industrial equipment, and so its processes could not be considered "state of the art" or unique technologies. Further, while the impurity composition of Timminco's solar-grade silicon production may have been acceptable to its existing customers, Timminco failed to disclose that this impurity composition was not generally commercially acceptable and that Timminco could not produce solar-grade silicon at a generally commercially acceptable impurity composition in commercial quantity, and accordingly the 2007 Annual Report contained Misrepresentations.

47. Following the issuance of the 2007 Annual Report, the price of Timminco shares on the TSX increased from $23.26 on April 1, 2008 to $28.00 on April 10, 2008.

Media Criticism of Timminco

48. In April 2008, negative media reports emerged questioning whether the Company's claims relating to its low-cost production of silicon were valid.

49. On April 21, 2008, Barron's Bill Alpert published an article entitled, "Timminco Generates More Heat Than Light - Are Timminco's claims of a low-cost way to purify silicon too good to be true?" According to the article, "[t]he justification for Timminco's share appreciation is supposed to be its invention of a low-cost way to purify the silicon needed for the booming solar-cell market. But so far, the evidence for Timminco's breakthrough appears in PowerPoint slides, not financial reports."

50. On April 23, 2008, Bloomberg published an article entitled, "Timminco Falls on Concern New Technology Won't Satisfy Clients," criticizing the Company's failure to respond to investor concerns that the Company's much publicized low-cost method of purifying silicon could possibly not meet customer demands. The article stated:

> The company hasn't dispelled claims in publications including Barron's and the Globe and Mail that the technology Timminco is using to supply the world's biggest solar-cell manufacturer may not meet specifications, said John Stephenson, who helps oversee about $1.62 billion as a portfolio manager at First Asset Investment Management Inc. in Toronto.
>
> "The best one can say is that Timminco's management has handled this poorly," Stephenson said. "It's a headscratcher. How does a company spending about C$2 million on R&D come up with something that Dow Corning can't do?"

51. Also on April 23, 2008, *Reuters* published an article entitled, "Update 2 - Timminco says can't explain volatility, stock up" addressing the Company's attempts at the request of TSX's Market Surveillance wing to "fend off aggressive short selling and assuage growing concerns over whether it will be able to satisfy customers in the burgeoning solar-cell industry." The article also reported that infamous short seller Manuel Asensio had "challenged Timminco's

assertions that it can purify metallurgical grade silicon in a cost-efficient way for use in solar power cells." Timminco issued the statement that it had no explanation for the volatility of the Company's stock.

The Photon Report

52. In response to this media criticism, the Defendants retained Photon Consulting, Rogol Energy, solar-power consulting and research firms, and Michael Rogol, to examine and evaluate the business. Their report (the "Photon Report") was issued on or about May 8, 2008.

53. On May 8, 2008, Timminco announced that it had received the Photon Report concerning its silicon production process and plant. The Photon Report was subsequently posted on Timminco's website on May 14, 2008. In the Report, Photon Consulting states that it "serves the solar and silicon sector by providing accurate information and analysis," and states that it has an "experienced, multi-disciplinary team". The Photon Report is a document that would reasonably be expected to affect the market price of the shares in Timminco.

54. The Photon Report was based on a one-day facility visit to the Bécancour facility by a Photon Consulting team in early May, 2008. Timminco stated that the Photon Consulting team was given full access to the solar grade silicon production facility and to information relating to accounting procedures, R&D efforts, human resource needs, intellectual property, and technical process that were requested to prepare the report.

55. The Photon Report indicated that the "[o]perations and processes have potential for massive growth and, possibly, for reshaping [the] industry", and that the "[e]quipment [was] very impressive, very low cost, 'beyond poly' scale...." The Photon Report also projected the

"potential for ~$270mn to ~$1bn in operating profit by 2010", and a operating margin of "50% to 80% in 2010".

56. The Photon Report contained the following positive statements regarding Timminco's operations in its review report:

(a) "Timminco's material works now and will work even better with practice";

(b) "Impressive operations today with significant improvement potential and manageable constraints"; and,

(c) "Transparency on accounting signals honest reporting. Accuracy will improve with scale & consistency of operations".

57. The Photon Report omitted to state that Timminco's solar-grade silicon production process was not capable of producing silicon at commercially acceptable impurity composition, or at the quantity, cost and impurity composition consistent with the statements contained in the Photon Report. The Photon Report therefore contained Misrepresentations.

2008 First Quarter Results

58. On May 8, 2008, Timminco announced its financial results for the first quarter ended March 31, 2008 by way of press release. The Press Release is a document that would reasonably be expected to affect the market price of the shares in Timminco.

59. The May 8, 2008 Press Release stated that:

(a) Timminco completed the commissioning of a solar-grade silicon production facility with nominal annual production output of 3,600 metric tons;

(b) Timminco shipped 100 metric tons of solar-grade silicon at an average selling price in excess of $60 per kilogram;

(c) cash and short-term investments as at March 31, 2008 were $11.3 million compared to $34.6 million at the end of 2007. During the quarter, $6.2 million was invested in working capital to support the 31% increase in sales volumes over the fourth quarter of 2007, $16.5 million was spent on capital expenditures

relating primarily to the solar grade silicon facilities and $1.9 million was invested in Fundo Wheels to support the turnaround of that business; and,

(d) sales of the Silicon Group were $34.7 million in the first quarter of 2008, an increase of 45.2% from $23.9 million of first quarter of 2007. The increase in sales was due to the growth in sales of solar grade silicon and an increase in sales volume of regular grade silicon metal.

The May 8, 2008 Conference Call

60. On May 8, 2008, Schimmelbusch and Boisvert conducted the May 8, 2008 Conference Call with analysts and investors. Throughout the May 8, 2008 Conference Call, Schimmelbusch and Boisvert made Public Oral Statements relating to the business, operations, and affairs of Timminco.

61. During the May 8, 2008 Conference Call, Schimmelbusch stated:

> *I believe we are uniquely positioned to become the leading provider of low-cost solar-grade silicon, and capitalize on a market where demand is high and is expected to grow. I believe we will realize our potential through our state-of-the-art production facilities, patent-pending processes, and pedigree in the silicon metal business.*

62. In response to a question relating to Timminco's competitive positioning and advantages relative to the other existing metallurgical companies and the other purification techniques disclosed by Timminco's competitors, Schimmelbusch stated:

> We know that there are two or three serious attempts in this area and more -- and maybe more which are not yet published. *We believe that we have a very competitive process and a very competitive product. And we believe that our CapEx per unit of capacity is especially competitive given the efficiency of our process and the -- if you allow me, the elegance of this technological concept. . . . But our competitiveness is certainly established at the unit cost level, in my estimation, in my opinion. And it is particularly established in the CapEx per capacity unit. And that is very important for the scalability of such an operation. We believe that we can model an add-on capacity in a very efficient way with very low -- or the relatively low additional CapEx needs. And that will ultimately be a big competitive instrument.*

[Emphasis added]

63. Schimmelbusch explained that he had commissioned the Photon Report in order to address media criticism questioning the Company's claims relating to its process, noting that the Company's process had never been independently verified, and observing that rival companies had spent far more trying to upgrade metallurgical silicon to solar-grade level with less success. Schimmelbusch further stated:

> We have been criticized consistently that we haven't invited, that we didn't have an open house policy and invite everybody to walk through the plants.
>
> I have been in the industry for a very long time, in the metal industry, in all aspects of it. It is so that a process technology, especially a process technology of this kind, is a key competitive instrument. The idea to show to an engineering firm, or to experienced engineers which might talk to the competition, if you have a breakthrough innovation like this, is detrimental to shareholder value.
>
> The -- we had advice -- or unasked for advice by the media to do that. So, the media were advising us to follow a strategy which will actually destroy shareholder value, inviting imitation of our -- the technology, competitive advantage in other plants and other companies. So, we have resisted that.
>
> We felt that the integrity and the reputation which they want to keep of Photon would shield us against any outflow of competitive important information while, at the same time, giving us -- giving a comfortable statement here. So, that was the fine line which we had to follow in making that decision.

64. During the May 8, 2008 Conference Call, Boisvert stated that the Company had provided open access to the Photon Consulting team:

> The due diligence performed by Photon Consulting was done by a team of people that were given access to all of our production facility. They reviewed the process. They reviewed the accounting in detail. They met with all the different management people on one-to-one sessions, interviewing them to the point where some people even felt uneasy about the amount of information that was transferred. So, we were completely transparent and open, answered all of their questions, and just received their report this morning.

65. The Public Oral Statements made by Schimmelbusch and Boisvert in the May 8, 2008 Conference Call represented, falsely, that Timminco was competitive as a low-cost silicon provider and that Timminco "will realize [its] potential though [its] state-of-the-art production

facilities", and misleadingly implied that it was capable of producing solar-grade silicon with commercially acceptable impurity composition, and of producing same at the quantity and cost as set out in the May 8, 2008 Conference Call, and, accordingly, the representations made during the May 8, 2008 Conference Call were Misrepresentations.

66. Timminco's financial statements, including the 2007 Annual Report and the 2008 First Quarter Results, were approved by the company's board of directors before the statements were filed, pursuant to the requirements of s. 4.5 of National Instrument 51-102.

67. On May 8, 2008, following the public release of the First Quarter Results, the Photon Report, and the May 8, 2008 Conference Call, the price of Timminco shares on the TSX increased from $23.70 to $24.60.

MD&A Q1 2008

68. On May 13, 2008, Timminco published its MD&A discussing financial results for fiscal year 2007 and first quarter 2008 on SEDAR. The MD&A is a Core Document.

69. The MD&A stated:

> *The first quarter of 2008 saw continued progress towards the Company's goal of increasing solar-grade silicon production and sales and continuing towards the further expansion of the Company's solar-grade silicon manufacturing facility.*
>
> Sales for the first quarter were $47.6 million compared with $42.8 million in the first quarter of 2007, an increase of 11.2%. The increase is attributable to growth in the sales of the Company's solar grade silicon and silicon metal products. For the first quarter, the net loss was $0.6 million or ($0.01) per share, compared with a loss of $3.1 million in the first quarter of 2007 ($0.04) per share.
>
> * * *
>
> On February 22, 2008, the Company announced its plans to expand capacity for the production of solar-grade silicon at its wholly owned subsidiary, Bécancour Silicon Inc. ("BSI"), at its location in Bécancour, Québec. *The expansion is*

expected to raise the total annual production capacity of its solar-grade silicon facilities to 14,400 metric tons from 3,600 metric tons. The expansion is expected to have a capital cost of approximately $65 million and will be completed by mid 2009, on a schedule that will enable BSI to meet all current customer commitments.

* * *

Increasing the Purity of Solar Grade Silicon

The Company is currently able to produce solar grade silicon at a purity level of 99.999%, or "five nines", with levels of phosphorus and boron that are acceptable to existing customers. The Company has targeted to improve the boron impurity level from 0.8 parts per million to 0.5 parts per million and the phosphorous impurity level from 3.0 parts per million to 1.5 parts per million by the end of the year. Achieving a higher purity level could allow customers to increasingly utilize unblended versions of the Company's solar grade silicon in their manufacturing activities, which could enhance the Company's competitive advantage and may allow for increased selling prices and margins. The Company intends to invest certain resources to achieve these improvements in purity levels of its solar grade silicon. However, there is no assurance that the Company will consistently achieve any higher purity level for its solar grade silicon.

[Emphasis added]

70. The MD&A Q1 2008 misrepresented that Timminco had made "progress towards the Company's goal of increasing solar-grade silicon production" and that "[t]he expansion is expected to raise the total annual production capacity of its solar-grade silicon facilities to 14,400 metric tons from 3,600 metric tons." Timminco falsely implied that it was capable of producing solar-grade silicon with commercially acceptable impurity composition, and of producing same at the quantity and cost as set out in the MD&A Q1 2008, and, accordingly, the representations made in the MD&A Q1 2008 were Misrepresentations.

Certification of Filings

71. Schimmelbusch and Dietrich each certified that the 2007 Annual Report, the 2008 First Quarter Results and the MD&A Q1 2008, to their knowledge, did not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is

necessary to make a statement not misleading in light of the circumstances under which it was made.

72. At the time of the said certifications, Schimmelbusch and Dietrich knew or ought to have known or were reckless in not knowing, that the 2007 Annual Report, the 2008 First Quarter Results and the MD&A Q1 2008 contained untrue statements of material fact and further or in the alternative, omitted to state a material fact required to be stated or that was necessary to make a statement not misleading in light of the circumstances in which it was made, as set out above.

The May 13, 2008 Conference Call

73. On May 13, 2008, Schimmelbusch and Michael Rogol conducted the May 13, 2008 Conference Call with analysts and investors. Rogol had the actual, implied or apparent authority to speak on behalf of Timminco by virtue of the Company's issuance of the Photon Report and its inclusion of Rogol on the conference call to speak for the Company. Rogol was the expert hired by Timminco through Photon Consulting and Rogol Energy. Rogol was the Managing Director of Photon Consulting. Throughout the May 13, 2008 Conference Call, Schimmelbusch and Rogol made Public Oral Statements relating to the business, operations, and affairs of Timminco. Schimmelbusch and Rogol quoted from and summarized the Photon Report.

74. During the May 13, 2008 Conference Call, Rogol described the preparation of the Photon Report and Timminco's silicon production process. He downplayed analyst questions relating to the quality and purity of the solar-grade silicon being produced by Timminco.

75. Rogol stated that Photon Consulting had interviewed customers who were satisfied with the product and unconcerned with boron and phosphorous impurity levels because "it works." While declining to make any "robust statements" without further data, Rogol explained that if

customers were concerned with the purity level of the solar-grade silicon they would be requesting significant discounts, and he reported that was not the case, thereby plainly implying that phosphorous contamination was not an issue for Timminco.

76. A slide presentation accompanied the May 13, 2008 Conference Call. The slide presentation summarized and quoted from the Photon Report and stated in relevant part:

(a) Impressive operations, Equipment: Very Impressive, very low cost, beyond "poly" scale;

(b) 2010 UMG-Si outlook, production volume, 12,000 to 20,000 ton/year in 2010;

(c) Revenue: $540 million to $1.3 billion in 2010;

(d) Operational profit: $270mn to ~ $1 billion in operating profit in 2010*;

(e) Operational margin: 50% - 80% in 2010*;

(f) Potential for ~ $270mn to ~ $1bn in operating profit by 2010.

77. The representations made by Schimmelbusch and by Rogol as an expert and on behalf of the Company (including the slide presentation) made during the May 13, 2008 Conference Call represented, falsely that Timminco's silicon production process "works." Rogel, on behalf of the Company, omitted to state that Timminco's solar-grade silicon process was not capable of producing solar-grade silicon with commercially acceptable impurity composition, and of producing same at the quantity and cost as stated by him, and accordingly, the representations made in the May 13, 2008 Conference Call were Misrepresentations.

78. Following the MD&A and the May 13, 2008 Conference Call, the price of Timminco shares on the TSX increased from $23.27 on May 13, 2008 to $28.95 on May 16, 2008.

The May 29, 2008 Conference Call

79. On May 29, 2008, Schimmelbusch conducted the May 29 Conference Call with analysts and investors. Throughout the May 29 Conference Call, Schimmelbusch made Public Oral Statements relating to the business, operations, and affairs of Timminco.

80. During the May 29, 2008 Conference Call, Schimmelbusch stated:

> Our Bécancour facility has a number of strategic advantages. It has ready access to hydroelectricity, needed for our production of silicon metal, is core located with our silicon metal business for process efficiency, has a 30-year history with an experienced staff, and has easy access to transportation routes. *Our competitive advantage is clear. We have a patent-pending process, we employ low cost production technologies, as evidenced by our capital investments in a new facility, lower energy costs, and less costs for raw materials, we have the ability to add capacity, we have constant access to raw materials, and ready access to electricity. Combined, these make Timminco a force to be reckoned with in the solar energy industry.*
>
> We are receiving validation and positive feedback from the industry. We have six long-term contracts in place to supply more than 9,000 metric tons annual beginning in 2009. In 2010, this number will grow to 15,000 metric tons. In the first quarter, we signed a major long-term agreement with Q-Cells, the world's largest manufacturing of -- manufacturer of solar cells to supply more than 3,400 metric tons of solar-grade silicon by the end of 2009, with the potential of increasing that total to 6,000 metric tons per year beginning 2010. We received an extremely positive endorsement of our manufacturing process and production capabilities from Photon Consulting, the leading analysts for the solar energy industry. Some of our customers are using Timminco material 100% unblended with other elements. This results in reduced costs for our customers, and strengthens our position in terms of their supply chain.

[Emphasis added].

81. Schimmelbusch also placed emphasis on the Company's proprietary purification process, stating: ". . . it is important to note that the Company's technology is also protected by the fact that one key element, one key equipment, which is necessary to operate our purification process is very proprietary equipment where we have exclusive use, which is sort of a second level of protection beyond patent." He also touted the Company's "state-of-the-art facilities" as a reason

for its "considerable progress towards our vision of becoming a leading low-cost provider of solar-grade silicon."

82. The Public Oral Statements made during the May 29, 2008 Conference Call represented, falsely, that Timminco was a low-cost producer of solar-grade silicon, and further misleadingly implied that it was capable of producing solar-grade silicon with commercially acceptable impurity composition, and of producing same at the quantity and cost as set out in the May 29, 2008 Conference Call, and accordingly, these representation were Misrepresentations.

83. Following the May 29, 2008 Conference call the price of Timminco shares on the TSX increased from $28.00 to $35.69 on June 5, 2008.

84. The statements contained in each of the March 2008 Press Release, the March 2008 Conference Call, the 2007 Annual Information Form, the 2007 MD&A, the 2007 Annual Report, the Photon Report, the 2008 First Quarter Results, the May 8, 2008 Press Release, the May 8, 2008 Conference Call, the MD&A Q1 2008, the May 13, 2008 Conference Call, and the May 29, 2008 Conference Call omitted to state that Timminco's solar-grade silicon production process was not capable of producing silicon at quantity, cost, and purity levels consistent with Company statements, and that this inability would have a detrimental effect on the Company's revenues and profits. Instead, Timminco retained its existing revenue and production forecasts. Each of these written representations and Public Oral Statements were Misrepresentations.

THE TRUTH BEGINS TO EMERGE

85. On August 11, 2008, after the TSX closed, Timminco issued the August 11, 2008 News Release, announcing its financial results for the second quarter ended June 30, 2008, and conducted a follow-up August 11, 2008 conference call with investors and analysts. In the

conference call, Schimmelbusch and Boisvert conceded that Timminco's solar-grade silicon production process had experienced contamination problems resulting from the use of equipment that was not intended for use in the manufacture of silicon and that these contamination problems in turn impaired the Company's financial performance. In response to questions from Michael Willemse, an analyst with CIBC World Markets, Schimmelbusch and Boisvert for the first time disclosed that Timminco's technology was not perfected, its silicon production equipment was designed for "different purposes, namely for ... the aluminum industry,", that the use of such equipment had caused phosphorus contamination problems in the silicon production process, and that the Company had to undertake "debugging" operations, which the Company knew would be required.

86. Timminco's share price dropped from $19.97 on August 11, 2008 to $12.25 on August 14, 2008, as a result of the disclosure that the Company's proprietary process used to produce low-cost solar-grade silicon was flawed.

87. The August 11, 2008 News Release and the August 11, 2008 Conference Call did not fully correct the Misrepresentations made by Timminco in its previous public and financial disclosure as set out above. Among other things, Timminco maintained the Photon Report posted on its website, including its "extremely positive endorsement" of the Company and its manufacturing process and production capabilities, and the Company did not revise its previously released production and revenue forecasts.

88. On November 11, 2008, after the TSX closed, Timminco announced that it was removing the Photon Report and related documents (which had been posted on May 14 and August 12, 2008) from its website on the ground that "some of the material factors or assumptions originally

used to develop the forward-looking information in the Photon Report, including in respect of revenues, production line volumes and costs, may no longer be valid."

89. The Company's share price dropped from $7.93 on November 11, to $6.71 on November 12, and further to $3.37 on November 19, 2008.

90. On November 15, 2008, the *Financial Post* published an article on Timminco which referenced concern about Timminco's disclosure record, and stated that the Company was removing the positive Photon Report from its website, which "the company said it 'originally commissioned ... to support due-diligence efforts for strategic discussions beyond normal supplier-customer relationships and made it publicly available to enhance the investing public's understanding of the potential future performance for Timminco's solar-grade silicon product line.'". The Photon Report was removed from the website on the basis that "Timminco (now) 'believes that some of the material factors or assumptions originally used to develop the forward-looking information in the Photon Report, including in respect of revenues, production volumes and costs, may no longer be valid'".

SUBSEQUENT EVENTS

91. Since the corrective statements were made, Timminco's share price has continued to drop. In April 2009 Timminco announced that certain of its solar-grade silicon customers had terminated their contracts for non-compliance. In May 2009 Timminco released its first quarter results for 2009. On May 12, 2009, the share price had dropped to $1.84 per share.

THE RELATIONSHIP BETWEEN THE MISREPRESENTATIONS AND THE PRICE OF TIMMINCO'S SECURITIES

92. Timminco's securities were and are publicly traded on the TSX, which is a highly efficient and automated market. Any and all public information regarding Timminco is promptly

incorporated into, and has as direct effect upon, the price of Timminco's shares. As such, the price of Timminco's publicly-traded securities was directly affected by the press releases, conference calls, quarterly reports, annual reports, MD&A, and the Photon Report described herein.

93. The disclosure documents and statements referenced above, and all the information contained therein, including the Misrepresentations, were immediately made available to the Plaintiff, other Class Members, other members of the investing public, financial analysts, and the financial press. The Defendants were aware of this fact at all material times, as evidenced by the following:

(a) the disclosure documents were filed with SEDAR and the TSX and were immediately accessible by the public;

(b) copies of the disclosure documents, or links to them, were provided by Timminco on its website; and,

(c) the Defendants regularly communicated with the investing public and financial analysts through press releases on newswire services and other established market communication mechanisms.

94. Any and all analysis undertaken by the Plaintiff and other Class Members in determining whether to purchase Timminco securities was directly influenced by the disclosure documents and statements referenced above, which incorporated the Misrepresentations.

95. Any analyst reports relied upon by the Plaintiff and other Class Members similarly relied upon material financial information containing the Misrepresentations, with the effect that any recommendation to purchase Timminco securities during the Class Period was based, in whole or in part, upon material over-statements of Timminco's financial results.

96. Therefore, as a result of the Misrepresentations, the price of Timminco's securities was artificially inflated and remained so during the Class Period.

NEGLIGENCE

97. Timminco and each of the Individual Defendants owed the Plaintiff and the other Class Members a duty of care, both at common law and under provisions of the Securities Act to ensure that all material information regarding the business, operations, or capital of Timminco was immediately communicated to the investing public in a truthful, complete, and accurate manner, and to immediately correct any such previously-issued material information that was no longer truthful, complete, and accurate.

98. The standard of care in the circumstances required the Defendants to act fairly, honestly, candidly, openly, in accordance with the Securities Act requirements, and in the best interests of the Plaintiff and other class members.

99. For the following reasons, among others, the Defendants failed to meet the required standard of care:

(a) The Defendants authorized the release of press releases, information regarding conference calls, quarterly reports, annual reports, MD&A, the Photon Report, and other public documents containing the Misrepresentations when they knew, or ought to have known, that they were false and materially misleading;

(b) The Defendants failed to correct the Misrepresentations in a timely manner;

(c) The Defendants maintained inaccurate revenue and production forecasts that were based on the Misrepresentations; and,

(d) The Defendants failed to establish and maintain disclosure control and procedures to provide assurance that material information relating to Timminco's business and affairs was accurately and fairly presented.

100. By the actions and omissions particularized above, the Defendants violated their duty to the Plaintiff and other Class Members. The Defendants were negligent in doing so.

101. As further particularized in this Statement of Claim, it was reasonably foreseeable that the Defendants' breach of their duty would cause damage to the Plaintiff and other Class Members.

102. As further particularized in this Statement of Claim, the Plaintiff and other Class Members did suffer damage as a result of the Defendants' failure to meet their duty to the Plaintiffs and other Class Members.

NEGLIGENT MISREPRESENTATION

103. Timminco and the Individual Defendants were in a special relationship with the Plaintiff and other Class Members. As a result, the Defendants owed the Plaintiff and other Class Members a duty of care in that the Timminco disclosure documents referenced above were prepared, at least in part, with the intention they would attract the investing public to purchase Timminco securities and that they would be relied upon by the Plaintiff and other Class Members in making the decision to purchase Timminco securities. It was reasonable, and in fact expected, that the Plaintiff and other Class Members would rely on the Misrepresentations.

104. The Timminco news releases, conference calls, quarterly reports, annual reports, MD&A, and the Photon Report, as set out herein, contained the Misrepresentations, whether implicitly or explicitly, and such Misrepresentations were materially false and/or materially misleading when made.

105. The Defendants made the Misrepresentations by issuing, or authorizing, permitting, and/or acquiescing in the issuance of the documents and statements referenced above. Dietrich

and Schimmelbusch and the remaining Directors made the Misrepresentations by issuing, or authorizing, permitting, and/or acquiescing in the issuance of such documents and statements, and by signing certifications for Timminco's quarterly filings that contained the Misrepresentations.

106. The Defendants acted negligently in making the Misrepresentations, as particularized above. The Defendants made the Misrepresentations while knowing, while reckless in not knowing, or while they ought to have known that the Misrepresentations were false and/or materially misleading.

107. The Defendants knew or ought to have known that:

(a) by making the Misrepresentations, the price of Timminco's publicly-traded securities would be artificially inflated and remain at levels above their true value;

(b) investors would rely upon the Misrepresentations in making their decisions to purchase Timminco shares; and

(c) as a result, the Plaintiff and other Class Members would pay a higher price for the securities than their true value.

108. The Plaintiff relied upon the Misrepresentations by hearing, reading and acting upon press releases, conference calls, quarterly reports, annual reports, MD&A, and the Photon Report containing the Misrepresentations, or alternatively, by reading and acting upon documents that contained information derived from the Misrepresentations.

109. As further particularized above, the Plaintiff and other Class Members relied upon the Misrepresentations by the act of purchasing or acquiring Timminco securities on the TSX.

110. As further particularized herein, as a result of their reliance on the Misrepresentations, the Plaintiff and each other Class Member suffered damages and loss.

DAMAGES

111. During the Class Period, the Plaintiff and other Class Members purchased Timminco securities at an inflated price in reliance upon the Misrepresentations. They continued to hold the securities at an inflated price until the correction of the Misrepresentations, at which time the market adjusted the price of the securities downward to reflect the true value of Timminco shares.

112. As a result of the facts pleaded above, the Plaintiff and other Class Members have suffered damages equivalent to the loss in market value that occurred when Timminco corrected the Misrepresentations.

113. The Plaintiff and other Class Members are also entitled to recover, as damages or costs in accordance with the CPA, the costs of administering the plan to distribute the recovery in this action.

114. The Plaintiff pleads that the conduct of the Defendants was high-handed, reckless, wanton, and entirely without care, and that the Defendants were motivated by economic self-interest. Such conduct renders the Defendants liable to pay punitive damages.

VICARIOUS LIABILITY OF TIMMINCO

115. Timminco is vicariously liable for the acts and omissions of the Individual Defendants and other directors, officers, and employees of Timminco whose conduct is particularized herein.

116. All acts and omissions of Timminco were authorized, ordered, and done by the Individual Defendants and other directors, officers, and employees while in their capacity as employees or representatives of Timminco, and while engaging in the management, direction, and control of

its business and operations, and as such are acts and omissions for which Timminco is vicariously liable.

PART XXIII.1 OF THE SECURITIES ACT

117. The Plaintiff intends to deliver a notice of motion seeking, among other things, an Order permitting the Plaintiff to assert the statutory causes of action particularized in Part XXIII.1 of the Securities Act, and if granted, to amend this Statement of Claim to plead these causes of action.

REAL AND SUBSTANTIAL CONNECTION TO ONTARIO

118. This action has a real and substantial connection to Ontario because, among other things:

(a) Timminco is a reporting issuer in Ontario;

(b) the shares of Timminco trade on the TSX, which is located in Toronto;

(c) the Misrepresentations and omissions were disseminated in Ontario; and,

(d) the Plaintiff resides in Ontario.

SERVICE OUTSIDE OF ONTARIO

119. This originating process may be served without court order outside Ontario in that the claim is:

(a) in respect of a tort committed in Ontario (rule 17.02(g));

(b) in respect of damages sustained in Ontario arising from a tort wherever committed (rule 17.02(h));

(c) against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario (rule 17.02(o)); and,

(d) against a person carrying on business in Ontario (rule 17.02(p)).

THE RELEVANT LEGISLATION

120. The Plaintiff pleads and relies upon the *Securities Act*, the *Courts of Justice Act, supra,* and the *Class Proceedings Act, 1992, supra*, all as amended.

The Plaintiff proposes that this action be tried at the City of Toronto.

Date: May 14, 2009

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Solicitors for the Plaintiffs

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Court File No.: CV-12-9539-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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Lawyers for the Plaintiff St. Clair Pennyfeather in the class proceeding *Pennyfeather v. Timminco Limited, et. al.*, Ont. Sup. Court File No.: CV-09-378701-00CP

TAB B

This is Exhibit "B" referred to in the
affidavit of Victoria Paris
sworn before me, this 8th
day of March 20 12

A COMMISSIONER FOR TAKING AFFIDAVITS

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BUSINESSWEEK: JANUARY 24, 1994

INTERNATIONAL BUSINESS

THE MELTDOWN AT METALLGESELLSCHAFT...

The bulletproof Mercedes sedan pulled up onto the sidewalk within inches of the front door of a Frankfurt restaurant. Heinz Schimmelbusch, chief executive of Metallgesellschaft, jumped out and strode to his favorite table. Over prawns by candlelight, he spoke ardently of his vision to create a technology powerhouse out of a loss-making metals company. "We have an unprecedented environmental lead," he said. "We have the biggest technology bank in the world."

In those heady days in 1990, Schimmelbusch capitivated the imagination of Germany. Volatile and charismatic, he had just recently been named CEO of the Frankfurt-based Metallgesellschaft. A confidant of Chancellor Helmut Kohl, he was widely believed to be building a model for German corporations as he changed the troubled metals-mining and trading company into an international conglomerate. "We are the most foolproof company in all of Germany," he said then.

Schimmelbusch's bold gamble has now failed (table). In December, he was fired as Metallgesellschaft suffered losses for the year of $1.1 billion--including $470 million from oil-futures trading--on sales of $16 billion. With creditors haggling over a $1.9 billion bailout on Jan. 12, Germany's 14th largest industrial group teetered on the brink of becoming that country's largest post-World War II bankruptcy.

WEAKNESS. Metallgesellschaft's collapse highlights a devastating weakness in German corporate governance. Like many German blue chips, the company boasted a supervisory board made up of the pinnacle of the country's banking and industrial Establishment. Shareholder-rights groups have long said that the clubby ties among corporate leaders result in lax oversight. Now, they have some dramatic proof. "The

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supervisory board and the banks failed to oversee management," explains Ekkehard Wenger, a professor at the University of W urzberg.

Before his fall, Austrian-born Schimmelbusch, 49, was considered a pioneer in Germany's drive to embrace new technologies and rebuild its competitiveness. As CEO, he steered billions of dollars into "green technologies." To accelerate the move away from dependence on metals and mining, he embarked on a relentless acquisition drive. He spent more than $2 billion on companies he planned to infuse with new materials technology, including Sweden's Dynamit Nobel.

Schimmelbusch, who declined to speak to BUSINESS WEEK for this article, aimed to speed the creation of a global conglomerate by melding Anglo-American financial engineering with German industrial knowhow. He floated hot spin-offs on the Frankfurt stock market and bought and sold assets feverishly. His made-over Metallgesellschaft included 258 companies scattered from Latin America to Kazakhstan and businesses from auto parts to radiators. And though critics questioned the links among his far-flung businesses, Schimmelbusch saw them converging in a high-tech future. "We are a miniature version of Mitsubishi," he expounded in 1990. "With environmental services and materials technology, it will be very difficult to make this company unstable."But Schimmelbusch spoke too soon. As early as 1990, the company's traditional metals business was being slammed by a flood of cheap imports from former East bloc countries, dragging prices down as much as 60%. The prices for the metals cleaned and resold by Metallgesellschaft also dropped precipitously. So while the investments in environmental technology had produced cutting-edge processes to clean and recycle factory waste such as aluminum sludge, it was too early for Metallgesellschaft to reap big gains on theinvestment.

VISIONS APLENTY. Meanwhile an additional $600 million bet on high-tech environmental gear to clean up copper and zinc mines began looking like a mistake, as governments backed away from costly regulations. That left Metallgesellschaft as the high-cost supplier in a business that still made up about 40% of its revenues. But instead of retrenching, Schimmelbusch used up liquidity with purchases of Dynamit Nobel and Buderus for $706 million. "If he hadn't done the deal, he could have held out longer on the oils-futures markets," says Thomas Michaelson, investment fund manager for Munich-based Parzival.

The beginning of the end came in late 1992, when Schimmelbusch used his skills at financial engineering to book a profit of $147 million for the year. Critics charged that the profits were generated largely through sales of real estate and other assets. Analysts demanded to know how much of the gain was from operating earnings rather than one-time gains. Schimmelbusch withheld details, claiming all the gains should be considered operating earnings.

To generate quick revenues, Schimmelbusch turned to oil

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futures and his U.S. financial subsidiary, MG Corp. That ultimately brought down his house of cards. "Schimmelbusch needed money and a good economy," says Andreas Heine, analyst at Munich-based Bayerische Hypo & Wechselbank, a creditor of Metallgesellschaft. "The company never had money. He tried every method he could to generate it but failed."

Inheriting the mess is Kajo Neukirchen, the CEO appointed by Deutsche Bank. He is likely to slash nearly one third of the company's 58,000 workers and sell assets unrelated to its core businesses. That will bring the company back to a lackluster metals-mining, trading, and engineering company.

Corporate Germany may read the wrong message from the Metallgesellschaft collapse by seeking to avoid risk. Analysts would like to see greater transparency, and they also think heads should roll at the company's supervisory board. But they won't. Germany Inc. would sooner rally together and pick up the pieces of Metallgesellschaft than look at its own shortcomings.

Gail E. Schares in Bonn

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Metallgesellschaft AG sues former executives.

Date: *Feb 6, 1995*
Words: *644*
Publication: *Business Wire*

NEW YORK--(BUSINESS WIRE)--Feb. 6, 1995--Attached is an English translation of a German press release issued Friday, February 3 from Frankfurt.

The release announced that Metallgesellschaft AG (MGAG) has brought suit against former CEO Heinz Schimmelbusch and former CEO Meinhard Forster in District Court in Frankfurt am Main, Germany.

The suit charges the two former executives with breach of duty and other infractions. In the suit the company seeks DM 25 million from Dr. Schimmelbusch, and DM 2 million from Dr. Forster.

The suit followed by one week the release of a special auditor's report on the oil trading losses sustained by MGAG and its subsidiaries in late 1993.

An English translation of the special auditor's report is available upon request. (It is about 200 pages.) We expect to have an English translation of key portions of the lawsuit in several days.

If you wish to receive the special auditor's report or any other information, or have any questions, please call Clark & Weinstock.

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Metallgesellschaft AG Brings Charges Against Former Executive Board Members Dr. Schimmelbusch and Dr. Forster

FRANKFURT AM MAIN, Germany--Feb. 3, 1995--Metallgesellschaft brought today an action for damages against its former Executive Board Chairman, Dr. Heinz Schimmelbusch, and its former Chief Financial Officer, Dr. Meinhard Forster, in the District Court of Frankfurt am Main, Germany.

The action focuses on the most flagrant violations of duty of the two defendants. These relate to their irresponsible conduct and breaches of their legal duties in connection with high-risk oil transactions in the U.S. and losses resulting from the involvement of the

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American subsidiaries of Metallgesellschaft AG with Castle Energy Corp.

Dr. Schimmelbusch and Dr. Forster allowed a hazardous expansion of the U.S. oil business to occur which created the risk - and, ultimately, the reality - of losses that threatened the very existence of the Metallgesellschaft AG group.

Beginning in 1989, Metallgesellschaft AG's U.S. subsidiaries also entered into a complicated series of contracts with the Castle Energy group which proved to be a disastrous investment. Instead of terminating this involvement as soon as it became clear it was a mistake, Schimmelbusch and Forster permitted offtake agreements to be concluded which unilaterally subsidized the Castle Energy group at the expense of the American subsidiaries of Metallgesellschaft AG.

Dr. Schimmelbusch and Dr. Forster are legally responsible for all this. They committed gross violations of their legal duties by permitting the irresponsible oil transactions and the one-sided relationship with Castle which together brought Metallgesellschaft to the point of near ruin.

The irresponsible oil transactions led to losses of more than DM 1.6 billion - an amount which exceeded the available resources of even a world-class group like Metallgesellschaft - while the involvement with Castle had a negative impact of some DM 1.1 billion.

Dr. Schimmelbusch caused additional losses to Metallgesellschaft AG by the unauthorized purchase and renovation of a house in Frankfurt, which was intended in part for his personal use, and by the renovation of his private apartment in New York at the expense of Metallgesellschaft Corporation. Moreover, Dr. Schimmelbusch violated his legal duties by taking stock options for the acquisition of 600,000 shares of Methanex Corp., a company in which Metallgesellschaft was investing, without informing the Supervisory Board and obtaining its approval.

Metallgesellschaft AG is initially claiming DM 25 million in damages from Dr. Schimmelbusch and DM 2 million from Dr. Forster. While at present only a small part of the total amount of the losses caused by the defendants' irresponsible and unlawful behavior is being claimed for, the Company reserves the right to assert further claims at a later time.

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The New York Times

FRANKFURT — Heinz Schimmelbusch still keeps an apartment here, insisting he feels at home in a city where he was once the toast of the local elite and then, seemingly overnight, the villain in one of the most notorious corporate scandals of the 1990s in Germany.

"I am much less history-oriented than people in Frankfurt," Schimmelbusch, 63, said over coffee in the gilded lobby of the Frankfurter Hof hotel. "I never think about the old days anymore."

In December 1993, Schimmelbusch, then something of a wunderkind, was abruptly ousted as the chief executive of Metallgesellschaft, the metal-working conglomerate, after the company ran up $1.3 billion in losses on oil futures trading and nearly went bankrupt.

Now, after more than a decade of self-imposed exile in the United States, he has returned to Europe, raising €314 million, or $430 million, last month in an initial public offering of his newest company, Advanced Metallurgical Group, on the Euronext exchange in Amsterdam.

The offering, which was heavily oversubscribed and sold just before the market chaos set off by the home lending crisis in the United States, could be regarded as a sort of redemption for Schimmelbusch. But the German corporate establishment has a long memory. A leading German business publication, Manager Magazin, which named him its manager of the year in 1991, greeted his return to prominence with a lengthy, unflattering article in the current issue, under a headline that suggested he was little more than a trickster.

"There were some people here who were not fond of me," Schimmelbusch said. "They are still here."

Regardless, he is back at the helm of a publicly traded company, albeit a smaller one than Metallgesellschaft. Advanced Metallurgical Group, which produces specialty metals like titanium alloys, has sales of $928 million. At its peak, Metallgesellschaft commanded a $15 billion empire, with 258 subsidiaries in businesses ranging from copper and zinc to explosives.

"My life seems to be running backwards," Schimmelbusch said with a rueful laugh. "Maybe if this company does well, a company like Metallgesellschaft might even offer me a job."

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Born in Vienna to an Austrian-German family, Schimmelbusch began his career at Metallgesellschaft, also known as MG, in 1973. By 1989, at the age of 44, he had become the youngest chief executive in its history. He went on a shopping spree, turning the company into a colossus, but leaving its core metals franchise vulnerable to cheaper imports from Eastern Europe.

To offset that, Metallgesellschaft ventured into the oil business. Through its American subsidiary, MG Refining and Marketing, it sold fuel to customers on long-term, fixed-price contracts, hedging its exposure to rising oil prices by buying contracts in the futures market. When those prices fell instead of rising in 1993, the company faced vast potential trading losses.

Spooked, Metallgesellschaft's largest shareholder, Deutsche Bank, pushed for Schimmelbusch's ouster and liquidated the company's positions, turning the paper losses into real ones. With investigators searching his Frankfurt home and his former employer threatening lawsuits, Schimmelbusch moved to a suburb of Philadelphia and tried to pick up the pieces.

"Usually, a person would never come back from that, but he is a fighter," said Norbert Quinkert, a board member of Schimmelbusch's company and the former head of Motorola in Germany.

Working from his home base in Wayne, Pennsylvania, Schimmelbusch assembled a portfolio of holdings through his fund, Safeguard International, and a privately held company, Allied Resource. Several of his managers used to work at Metallgesellschaft.

Some here view the Metallgesellschaft debacle as a forerunner to the risky trading schemes that sunk Enron. But experts in derivatives, notably the late Merton Miller, a Nobel Prize-winning economist, argued Deutsche Bank bore the blame by panicking and getting out of the positions prematurely.

That defense helped salvage Schimmelbusch's reputation, especially in the United States, where he was raising money from investors for a private equity fund to get back into the metals industry. Metallgesellschaft later settled a lawsuit against him, even helping to pay his legal fees.

Advanced Metallurgical Group was ripe for a public listing, Schimmelbusch said, because it is in markets, like aerospace and solar energy, that have huge growth potential. He said he chose to list the firm in Amsterdam rather than Frankfurt because it offered tax advantages.

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Last year, Schimmelbusch said, he had hoped to take public another of his companies, PFW Aerospace, in Germany. He put off the sale because of troubles at one of his customers, Airbus.

"It's hard to stand there and say, 'Gentlemen, this is a great business,' and then they go home and read in the paper about the A380," he said, referring to the troubled Airbus jumbo jet.

Still, Schimmelbusch said he looked forward to returning to the Frankfurt market someday. He said he had repaired his ties to Deutsche Bank, with which he now does investment banking. He even recently acquired the Metallgesellschaft name, retired after a series of corporate overhauls. He said he had not decided what to do with it, although given his background, one can bet it will have something to do with metals.

"I'm a fully depreciated metals guy," he said.

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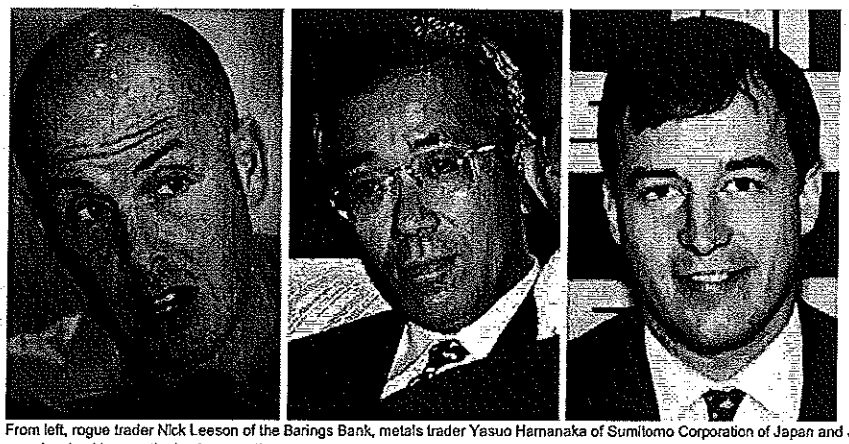
Financial Post

Canada's source for market intelligence

The world's biggest trading debacles

Bloomberg News Sep 15, 2011 – 2:47 PM ET | **Last Updated: Sep 15, 2011 3:15 PM ET**



From left, rogue trader Nick Leeson of the Barings Bank, metals trader Yasuo Hamanaka of Sumitomo Corporation of Japan and John Rusnak a trader employed by Allied Irish Bank - all three were involved in unauthorised transactions.

By Jon Menon

UBS AG, Switzerland's-biggest bank, disclosed one of the biggest trading losses and said it had discovered unauthorized dealing at its investment bank.

UBS said in a statement that it may be unprofitable in the third quarter after a US$2-billion loss in its securities division. London police arrested Kweku Adoboli, a UBS employee, in connection with the loss, according to a person with knowledge of the matter who declined to be identified.

Following is a time-line of previous losses.

Company (Year) Detail

UBS (2011) Bank estimates loss of about US$2-billion on unauthorized trades.

Credit Suisse (2008) Writes down US$2.65-billion over fourth quarter of 2007 and first quarter of 2008 after discovering debt securities mis-priced by employees

Societe Generale (2008) Lost 4.9-billion euros (US$7.2-billion) before taxes after trader went beyond permitted limits on European stock index futures

Bank of Montreal (2007) Wrong-way bets on natural gas led to a pretax loss of about $680-million

Amaranth Advisors LLC (2006) Trader Brian Hunter's bad bets on natural gas triggered US$6.6-billion of losses

Refco Inc. (2005) Declared bankruptcy after hiding US$430-million of debt

China Aviation Oil (Singapore) Corp. (2004) Lost US$550-million on speculative oil-futures trades, forcing debt restructuring

Allied Irish Banks Plc (2002) Trader hid US$691-million in currency market losses

Plains All American Pipeline LP (1999) Lost US$160-million because of unauthorized crude-oil trading by an employee

Long-Term Capital Management (1998) Lost US$4-billion after a debt default by Russia

Peregrine Investments Holdings Ltd. (1998) Collapsed from at least US$300-million of debt bought from insolvent companies

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National Westminster Bank Plc (1997) Disclosed US$125-million charge to cover options-trading loss

Deutsche Morgan Grenfell (1996) Fired fund manager Peter Young for unauthorized trading and paid US$279-million to bail out investors

Sumitomo Corp. (1996) Disclosed a US$2.6-billion loss on unauthorized copper trades by Yasuo Hamanaka

Daiwa Bank (1995) Disclosed a US$1.1-billion loss from unauthorized trades

Barings Plc (1995) Collapsed after trader Nick Leeson racked up US$1.4-billion in losses

Orange County (1994) Lost US$1.7-billion from debt California and derivatives used to expand its investment fund

Kidder Peabody & Co. (1994) Took a US$210-million charge to reflect what it said were false bond trading profits by trader Joseph Jett

Codelco (1994) Trader Juan Pablo Davila lost more than US$200-million speculating on copper

Metallgesellschaft AG (1993) Lost more than US$1.5-billion trading oil futures contracts

Drexel Burnham Lambert Inc. (1990) Filed for bankruptcy after pleading guilty to charges of insider trading and stock manipulation

Merrill Lynch & Co. (1987) Mortgage trader accused of racking up US$377-million loss in unauthorized trades

Bloomberg News

Posted in: FP Street, Investing Tags: Amaranth Advisors LLC, China Aviation Oil Holding Company, Kidder Peabody & Co., Merrill Lynch & Co. Inc., Metallgesellschaft AG, National Westminster Bank Plc, Nick Leeson, Orange County, Refco Group Ltd., Societe Generale SA, Switzerland, UBS AG, Yasuo Hamanaka

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Rutter Associates LLC, 1995 Financial Products Institute Yearbook, Chapter 2, Part 2 "End Users", pp. 60-87

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In February 1995, the Piper Jaffray Co. agreed to pay $70 million to settle a class-action lawsuit by investors in its Institutional Government Income Portfolio mutual fund. The proposed $70-million settlement was the largest ever between a mutual fund company and investors when it was announced. Almost 95% of the shareholders voted to approve the settlement. (For the settlement to hold, 90% had to accept.) Each shareholder is expected to recover 40%–42% of the amount lost.[5]

In May, bond prices recovered to their March 1994 levels; the yield on the benchmark 30-year Treasury bond dipped below 7%. As bond prices recovered, many bond mutual funds recorded gains, but the Institutional Government Income Portfolio managed by Piper Jaffray Co. still hadn't recouped its 1994 losses. First, the value of the principal-only strips in the Piper Jaffray portfolio had not recovered, because mortgage prepayments remained low. Second, although long-term interest rates had recovered, short-term rates were higher, so the value of inverse floaters in the Piper Jaffray portfolio remained depressed.

In July, Piper Capital Management announced plans to terminate early its American Government Term Trust and return the fund's $70 million in net assets to shareholders. The fund is scheduled to terminate in 2001, but Piper Capital, a unit of Piper Jaffray Cos., said that the fund's reduced earning capacity due to 1994 losses would likely affect its ability to return $10 a share to holders—one of the fund's investment objectives. As of July 13, the fund's per-share net asset value was $8.74.

In September, Piper Jaffray Cos. agreed to pay just under $2 million to settle *another* shareholder class-action lawsuit sparked by "derivative-related losses" in 1994.

This suit alleged that Piper misled stockholders about the investment strategy of some of its mutual funds.

In November, Piper Jaffray disclosed that it had to pay a $6-million arbitration award to the Minnesota Orchestral Association.

METALLGESELLSCHAFT

In *Managing Financial Risk*, we described the $1.3-billion loss Metallgesellschaft AG (MG) suffered in 1993. The *1995 Yearbook* provided an update on the events in 1994. Looking at 1995, all I can say is that the saga *still* continued.

Suits and Countersuits

On January 25, Heinz Schimmelbusch, former chief executive of Metallgesellschaft, filed a $10-million suit in New York Supreme Court, contending that Deutsche Bank used MG's troubles to profit financially and needlessly brought it to the point of bankruptcy. The lawsuit asserted that there had been no crisis at MG until the head of the company's supervisory board, Deutsche Bank executive Ronaldo

5. Piper Jaffray took a $56.1-million charge in the second quarter to settle this lawsuit; the charge was partially offset by $13.9 million in insurance proceeds.

Schmitz, caused one by leaking information to a German newspaper that led to an article about MG's liquidity problems. Mr. Schimmelbusch, who was dismissed in late 1993 along with most of the senior management, accused his successor at Metallgesellschaft, Rolando Schmitz, and Deutsche Bank of conducting a "systematic campaign of defamation" that left him unable to get a job. (Mr. Schimmelbusch is the second former executive to file a suit against Metallgesellschaft. Arthur Benson, its former head oil trader, had already filed a $1-billion suit, contending that the new management had sabotaged his efforts to stop the losses.)

Two-days later—on January 27—the results of a special investigatory audit into the events surrounding the near bankruptcy of Metallgesellschaft AG were released. The auditor's report absolved Metallgesellschaft's supervisory board of responsibility for the oil-trading losses and declared that Heinz Schimmelbusch, Metallgesellschaft's former chairman, and Meinhard Forster, previously chief financial officer, had "gravely neglected their duties." The report accused Schimmelbusch and Forster of having had "inadequate coordination and control" over their duties and accused Schimmelbusch of deliberately misleading the board as to the risks involved in oil-futures trading.

Debate about the Audit

The auditors' report on Metallgesellschaft Refining & Marketing (MGRM) was commissioned in 1994 by the shareholders of MGRM's parent, Metallgesellschaft, AG (MG AG) and was prepared by auditors C&L Treuarbeit Deutsche Revision and Wollert-Elmendorff Industrie Treuhand.

Writing in the April issue of *Risk*, Chris Culp and Merton Miller noted that the auditors' estimate of MGRM's total losses from June 1, 1992, to December 31, 1993, was $1.277 billion gross ($1.06 billion net) broken down as:

	$ million
Loss in capital	1,277
Interest expense based on loss of capital	13
Losses from physical deliveries	3
Negative market value of firm-flexible contracts	12
Positive market value of firm-fixed contracts	– 245
Total net loss	**1,060**

In contrast, Culp and Miller's calculation of the net 1993 loss for MGRM as the initial capital asset value of the program less unexpected rollover costs and the change in conditional expected rollover costs:

$$\$450 \text{ million} - \$250 \text{ million} - \$370 \text{ million} = -\$170 \text{ million}$$

was just a fifth of the auditors' estimate.

Also on January 27, the *Wall Street Journal* reported on records that had been released by MG. The released records document a series of directives and warnings about the growing credit crunch—resulting from "margin calls"—that flew back and forth among MG managers from June through December 1993. On June 11, MG's chief financial officer, Meinhard Forster, sent a memo to his counterpart at MG Corp. saying that "immediate introduction of a crisis management is required" because of liquidity problems caused by a drop in oil prices. In a June 30 memo, Mr. Schimmelbusch asked Mr. Forster to take "draconian" measures, if necessary, to curtail the credit needed to finance the derivatives positions. But the situation continued to deteriorate; the records indicate that MG's derivatives positions actually grew. At the October 5 meeting of MG Corp.'s board of directors, Mr. Kremer reported that Mr. Benson's oil operation had lost $600 million in the fiscal year ended September 30. At that meeting, Mr. Schimmelbusch said the derivatives position should be reduced because "financing room to maneuver" had been "exhausted." Again, however, the position actually continued to increase, peaking at about 185 million barrels in late November. The documents released indicate that in December 1993, Heinz Schimmelbusch told fellow managers that a "complete breakdown of control" had occurred at MG's U.S. oil-trading and hedging operation.

On February 2, Metallgesellschaft AG's supervisory board voted to file a lawsuit against both Heinz Schimmelbusch, former chairman of the management board, and Meinhard Forster, former chief financial officer.

In April, Castle Energy's Indian Refinery LP (IRLP) terminated a natural gas swap with MG Natural Gas (MGNG) that had been entered into in October 1994 as part of a restructuring of the relationship between Castle and Metallgesellschaft. IRLP terminated the swap based on purported breaches of other agreements by MG and its affiliates. MGNG disregarded IRLP's termination notice and sent IRLP a termination notice of its own alleging that IRLP was the defaulting party and claiming a loss of $1.2 million. IRLP refused to pay. In June, MGNG filed suit and applied a $707,000 receivable owed by MG Refining & Marketing to IRLP against the claim.

Another Bailout

On February 2, Metallgesellschaft AG's supervisory board announced that its U.S. unit, MG Corp., was deeper in the red than previously estimated. The unit's pretax loss had widened to 3.32 billion deutsche marks ($2.19 billion) in the year ended September 30, 1994, from the 2.86 billion deutsche marks announced in November 1994.[6]

Metallgesellschaft's board asked shareholders and creditors for concessions and fresh cash—for the second time in just over a year. The measures called for

6. The larger-than-expected loss at MG Corp. grew because of more reserves being set aside and because of foreign exchange movements. For the year ended September 30, 1993, MG Corp. had a loss of 770 million deutsche marks.

creditor banks to waive their conversion rights to half of the convertible profit-sharing certificates created in the 1994 bailout. The plan also included a capital writedown that wiped out half of the existing Metallgesellschaft share.

The CFTC Fines MG

As will be discussed in more detail in Chapter 6 of this *Yearbook*, in July, the CFTC issued an enforcement action against two U.S. affiliates of MG. The CFTC order fined the subsidiaries $2.25 million for failure to report weaknesses in their internal controls and required the establishment of an oversight committee for internal controls before MG could resume trading oil futures in the United States. The basis for the CFTC's action was its finding that the MG subsidiaries were selling what amounted to illegal, off-exchange futures contracts.

The Ongoing Academic Debate

The paper by Chris Culp and Merton Miller that had received such wide attention was finally published in the Winter 1995 issue of the *Journal of Applied Corporate Finance*. Culp and Miller argued that the transactions undertaken by MG Refining & Marketing were to hedge its business risk rather than to speculate:

> MG Refining & Marketing, Inc. (MGRM), is a contender for the world's record in derivatives-related losses: $1.3 billion by press accounts at year end 1993. Unlike many of its rivals for that record, however, MGRM was not using derivatives as part of a treasury function with a view to enhancing the return on an investment portfolio or to lowering the firm's interest expense.
>
> MGRM's derivatives were part and parcel of its marketing program, under which it offered long-term customers firm price guarantees for up to 10 years on gasoline, heating oil, and diesel fuel purchased from MGRM. The firm hedged its resulting exposure to spot price increases to a considerable extent with futures contracts. Because futures contracts must be marked to market daily, cash drains must be incurred to meet variation margin payments when futures prices fall. After several consecutive months of falling prices in the autumn of 1993, MGRM's German parent reacted to the substantial margin calls by liquidating the hedge.

Culp and Miller continued to argue that the real problem began when MG decided to liquidate its futures contracts:

> Whatever the reason, the decision to liquidate the futures leg proved unfortunate on several counts, turning paper losses into realized losses, sending a distress signal to MGRM's over-the-counter (OTC) derivatives counterparties, and leaving MGRM exposed to rising prices on its remaining fixed-price contracts.

And Culp and Miller assigned the blame to MG's senior management:

> [A] synthetic storage program like MGRM's...is neither inherently unprofitable no fatally flawed, provided top management understands the program and the long-term funding commitments necessary to make it work.
>
> The supervisory board may not have understood that MGRM was hedging and not speculating.... The team the supervisory board called in to liquidate the futures positions had also

been used to resolve the Klockner speculative episode for Deutsche Bank. The supervisory board may have interpreted MGRM's appeals for more cash as "doubling-up" or, at least, as the all-too-typical symptom of an imminent business failure. Or perhaps the supervisory board, in light of the power struggles then going on within MG AG, may have deliberately chosen not to understand MGRM's program.

In any case, unwinding MGRM's futures positions, though widely applauded in some parts of the press then and now, proved unfortunate on several counts. By the time MGRM began to unwind its positions in mid-December, the price of oil had fallen to its low of roughly $14 per barrel. The precipitous liquidation of MGRM's futures hedge thus turned paper losses on that leg into realized losses and left MGRM exposed to rising spot prices on its still-outstanding flow delivery contracts.... When the new management awakened to its naked price exposure following the liquidation, it began negotiating unwinds of its flow contracts without demanding any compensation for its positive expected future cash flows.

If MGRM had not unwound its futures, the positive daily pays received when prices recovered in 1994 would have given it a substantial positive cash inflow. MGRM's forced liquidation, moreover, sent a signal to MGRM's OTC derivatives counterparties that its credit standing might be in jeopardy, thereby increasing calls for collateral to keep its OTC positions open.[7]

Antonio Mello and John Parsons entered the debate both in the May 1995 issue of *Risk* magazine and in the spring 1995 issue of the *Journal of Applied Corporate Finance*.[8] In *Risk*, Mello and Parsons argued that the "rolling stack" hedge strategy was flawed:

The critical problem with this strategy was the mismatch in the maturity structure of MG's delivery obligations and its futures portfolio. This had two consequences.

First, the rolling stack can dangerously increase the variability of a company's cashflow at the start of the programme, even if it succeeds in locking in the programme's total value.... A small movement in oil prices within a month produces enormous losses or gains on the entire stack, which are realised immediately. In contrast, counterbalancing losses or gains on the delivery contracts are largely unrealised until scheduled deliveries are made, months or years later. The result for MG was a much greater variability of monthly cashflows initially than if it had been completely unhedged.... As the MG case demonstrates, the shortrun consequences of a cash flow deficit this large can be disastrous even if delivery contracts generate a compensating but unrealised gain of an equal amount.

7. Writing in *Risk* in April, Culp and Miller used the audit report to quantify the loss MG suffered by closing out its program inappropriately: "That MG AG in effect blundered into this worst case for a substantial fraction of its programme is now a matter of record in the auditors' report. The supervisory board ordered a substantial unwinding of the futures positions, and subsequently began canceling many of its forward contracts with no payment required from customers. How much money MGRM threw away in the process cannot be estimated with exactitude. The $788 million it might have received from the sale of its programme was clearly foregone."
8. Mello is at the University of Wisconsin, and Parsons is at Columbia University. *The Wall Street Journal* reported that subsequent to writing these articles, Professor Parsons was hired by Charles River Associates, a consultant to Metallgesellschaft.

> Second, since long- and short-term oil prices are only imperfectly correlated, the rolling stack hedge does not guarantee that the company has locked in the value of the delivery contracts. ["Basis risk" has been introduced.]

However, more importantly, Mello and Parsons argue that the transactions undertaken by MG Refining & Marketing, Inc. were indeed intended as a speculation on the shape of the oil price term structure (opposite to the Culp/Miller argument):

> Why did MG's New York subsidiary run a hedge with a mismatched maturity structure? Certainly the management was aware that the long- and short-term prices of oil do not always move in step and therefore that it would be exposed to basis risk.
>
> The answers to these questions reveal the real source of MG's blunder. Not only did the management appreciate the difference between long- and short-term oil prices, but the motivation for its entire strategy was to profit from this difference, including signing up customers for the long-term delivery contracts.
>
> It was a set of profitable delivery contracts that motivated MG to buy one-month futures as a hedge. Instead, it was the profitability of holding one-month futures contracts that made oil delivery over the long term appear to be a sensible business.
>
> This is a question about whether or not the speculation is a good speculation and not about whether or not the rolling stack is a good hedge.
>
> If the company's business exposes it to short-term oil price movements, then the right hedge is a set of securities tied to movements in the short-term oil price, whether futures or swaps. If the company's business exposes it to long-term oil price movements, then the right hedge is a set of securities tied to movements in the long-term oil price. If the company's business exposes it to long-term oil price movements and it hedges with securities tied to short-term oil prices, then it has bought a combination of a hedge and a bet on the yield curve of oil.
>
> By management's own calculations, if the delivery contracts had been hedged with long-term instruments, the entire programme would have been unprofitable. In retrospect this is clear since it is impossible to think of the New York subsidiary as a company with competitive advantage in the costs and techniques of oil supply and delivery. The physical assets at its disposal were minimal and generally inefficient. The subsidiary's only claim to competitive advantage was in its financial trading skills.
>
> The front-to-back hedging strategy developed at MG's New York office was the oil market equivalent of riding the yield curve. When the curve shifted unfavorably, the company lost its shirt. Whether it was a good bet when it started can be debated indefinitely. But what is clear is that it was not a hedge in the proper sense.

Miller and Culp issued a direct reply to Mello and Parsons in the following (Summer 1995) issue of the *Journal of Applied Corporate Finance*. Miller and Culp disagree with the premise that the only real "hedge" is one that eliminates basis risk, arguing that hedging is a much richer concept. In particular they cite Working's analysis of carrying charge hedging as the analogous concept to MGRM's synthetic storage strategy.

Referring to the much earlier work of Hulbrook Working, Miller and Culp argue that many firms seek out basis risk, in effect seeking profit from superior information about the relationship of prices to each other rather than the level of prices.

> That carrying-charge hedging may be under-taken by value maximizing firms principally if not wholly to exploit perceived informational advantage does *not* [emphasis theirs] mean that carrying-charge hedging is "speculation." And Working argues that risks are, in fact, reduced by carrying-charge hedging, even though its primary motivation need not be risk reduction:

Miller and Culp go on to cite excerpts from MG AG's Annual Report showing supervisory board members understood MGRM's hedging strategy as one of seeking attractive "arbitrage" opportunities in the basis between a commodity's spot price, its own forward curve, or the forward curve of other commodities or markets.

> MGRM's strategy of carrying-charge hedging, rather that standard finance risk-avoidance hedging, makes perfect sense under the assumption that basis risk exposed MGRM to no real threat of bankruptcy, while naked spot price exposure might well have...
>
> As a stand-alone firm MGRM and its outside creditors might well have been concerned with the costs of bankruptcy or depleted cash for investment expenditures, especially after the large margin calls of late 1993. But MGRM was *not* [emphasis theirs] a standalone firm. Deutsche Bank was not only the principal inside creditor and principal shareholder of MG AG, but thanks to cross-holdings, it was also effectively the *controlling* [emphasis theirs] shareholder.
>
> With Deutsche Bank thus standing *in loco parentis*, as it were, what sense does it make to assume that MGRM could be brought to ruin by the cash margin calls on the futures leg of a combined program *hedged* against spot price risk?
>
> As for the assertion that the MGRM's entire program would have been unprofitable had it been hedged by a strip of futures rather than a stack, Miller and Culp respond
>
> ...A pure strip, even if it had been available (which it was not), would not only have been inconsistent with MGRM's business objectives, but would have made it unnecessary for customers to turn to MGRM for fixed-price forward delivery contracts in the first place. After all, the customers could have strip-hedged their purchase requirements directly.

Although Miller and Culp use the following as the introduction to their response to Mello and Parsons, it seems a fitting conclusion to our section of MG Refining and Manufacturing.

> William Makepeace Thackeray, on observing two London housewives shouting at each other across a courtyard, concluded that they would never agree because they were arguing from different premises.

ORANGE COUNTY

The problems of Orange county and its investment pool were but one of many losses we first described in the 1995 edition of this Yearbook. On December 1, 1994, the world heard Robert Citron, treasurer of Orange County, California, announce that the value of the county's investment fund had dropped by $1.5 billion. This represented a 20% decline in the value of funds managed by the county on behalf of some 200 California municipalities and government agencies. By the end of December, the loss had grown to $2 billion and the county and its investment pool had filed petitions for bankruptcy under Chapter 9 of the federal bankruptcy laws. As it turns out, this was only the beginning of the story.

TAB C

This is Exhibit "C" referred to in the
affidavit of VICTORIA PARIS
sworn before me, this 8th
day of MARCH, 20 12

A COMMISSIONER FOR TAKING AFFIDAVITS

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COURT FILE NO.: 09-CV-378701-00CP
COURT FILE NO.: 09-CV- 380757-00CP
DATE: October 29, 2009

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

RAVINDER KUMAR SHARMA

Plaintiff

- and -

TIMMINCO LIMITED, PHOTON CONSULTING LLC, ROGOL ENERGY CONSULTING LLC, MICHAEL ROGOL, DR. HEINZ SCHIMMELBUSCH, ROBERT DIETRICH, RENÉ BOISVERT, ARTHUR R. SPECTOR, JACK L. MESSMAN, JOHN C. FOX, MICHAEL D. WINFIELD, MICKEY M. YAKSICH, and JOHN P. WALSH

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AND BETWEEN:

ROBERT GOWAN

Plaintiff

- and -

TIMMINCO LIMITED, AMG ADVANCED METALLURGICAL GROUP N.V., RENÉ BOISVERT, ROBERT J. DIETRICH and HEINZ C. SCHIMMELBUSCH

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

James C. Orr, and Alex Dimson for the Plaintiff, Ravinder Kumar Sharma

C. Scott Ritchie, Q.C., Michael A. Eizenga, A. Dimitri Lascaris, for the Plaintiff, Robert Gowan

HEARING DATE: October 26, 2009

REASONS FOR DECISION

PERELL, J.

Introduction and Overview

[1] Part XXIII.1 of the *Ontario Securities Act*, R.S.O. 1990, c. S.5 came into force on December 31, 2005, and since its enactment, entrepreneurial class actions law firms have been interested in pursuing an action under it. This is a motion to determine which of two firms will have carriage of an action against Timminco Ltd., a Canadian metals company listed on the TSX. Between 2007 and April 2008, after announcing a series of contracts to sell silicon, Timminco saw its $0.30 share price climb skyward. The two law firms' proposed Part XXIII.1 actions, which were commenced in the late spring of 2009, followed the crash of Timminco's share price.

[2] In April, 2008, Kim Orr Barristers P.C., a Toronto-based class actions law firm, on its own behalf - and without any client, began investigating to determine whether an action could be brought against Timminco at common law and under Part XXIII.1 of the *Ontario Securities Act*. At the time when Kim Orr's investigation began, Timminco's shares were trading at around $23.00 per share.

[3] In August 2008, Siskinds, a London-based class action law firm, on its own behalf, and without any client - began a similar investigation with a similar purpose. When Siskinds began its investigation, Timminco's shares were trading at a price of $23.00 per share.

[4] On November 11, 2008, Timminco released its quarterly results and reported that previously released information about costs, production volumes, and revenues might no longer be valid. Over the next ten trading days, Timminco's share price dropped from $7.93 to $3.10.

[5] On May 14, 2009, when Timminco's shares were trading at $1.55 per share, Kim Orr commenced a proposed class action against Timminco and others. The statement of claim advanced claims for negligence and negligent misrepresentation and subject to the leave being granted an action under Part XXIII.1 of the *Ontario Securities Act*.

[6] On June 11, 2009, when Timminco's shares were trading at $1.58 per share, on behalf of Robert Gowan, Siskinds commenced a proposed class action against Timminco. The statement of claim advanced claims for negligence and negligent misrepresentation, and if leave of the court is granted, Siskinds intends to amend the pleading to pursue the statutory claims under Part XXIII.1 of the *Ontario Securities Act*.

[7] Now Kim Orr and Siskinds respectively bring carriage motions and move for orders staying the other firm's proposed class action.

[8] Kim Orr, which has a relationship with the American law firm Milberg LLP submits that it would be in the best interests of the class members to grant it carriage of the class action because with its expertise in class actions, knowledge of the relevant

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securities laws, association with a pre-eminent American class action law firm, it is in the best position to prosecute the action.

[9] Siskinds submits that having regard to the criteria that the court has developed to choose between rival class counsel, it is in the class' best interest that it be granted carriage of the action against Timminco. Unkindly, Siskinds draws attention to a serious stain on the reputation of Milberg LLP, and Siskind raises concerns about the American law firm's involvement in an Ontario class action.

[10] To resolve this carriage dispute, I shall: (1) set out the law about carriage disputes; (2) describe the law firms, persons and parties involved; (3) describe the general factual background to the proposed class actions and to the carriage dispute; (4) set out in a chart some of the contrastable features of the rival actions; (5) describe the nature of the rival causes of action and the theories of the claims (6) explain my conclusion, which will involve an analysis of the competing theories (or battle plans) of the rival law firms; and (7) conclude and set out the court's order.

[11] Although it was a very difficult decision and a very close call, for the reasons that follow, I conclude that Kim Orr should have carriage of the class proceedings.

Carriage Motions

[12] Where two or more class proceedings are brought with respect to the same subject matter, a proposed representative plaintiff in one action may bring a carriage motion to stay all other present or future class proceedings relating to the same subject matter: *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.) at para. 9-11; *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (S.C.J.).

[13] There should not be two or more class actions that proceed in respect of the same putative class asserting the same cause(s) of action and one action must be selected: *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at para. 14. See also *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2001] O.J. No. 3682 (S.C.J.), aff'd [2002] O.J. No. 2010 (C.A.).

[14] The primary consideration on a class action carriage motion is arriving at a solution that is in the best interests of all class members, is fair to the defendants, and consistent with the policy objectives of the *Class Proceedings Act, 1992*: *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 at para 48 (S.C.J.); *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.); *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (S.C.J.); *Gorecki v. Canada (Attorney-General)*, [2004] O.J. No. 1315 (S.C.J.); *Whiting v. Menu Foods Operating Limited Partnership*, [2007] O.J. No. 3996 (S.C.J.).

[15] On a carriage motion, it is inappropriate for the court to embark upon an analysis as to which claim is most likely to succeed unless one is "fanciful or frivolous": *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.) at para. 19.

[16] Where there is a competition for carriage of a class proceeding, the circumstance that one competitor joins more defendants is not determinative; rather, what is important is the rationale for the joinder and whether or not it is advantageous for the class to join the additional defendants: *Genier v. CCI Capital Canada Ltd.*, [2005] O.J. No. 1135 (S.C.J.); *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.).

[17] In determining who should be appointed as lawyer of record in a class action, the court may consider, among other things: (1) the nature and scope of the causes of action advanced; (2) the theories advanced by counsel as being supportive of the claims advanced; (3) the state of each class action, including preparation; (4) the number, size and extent of involvement of the proposed representative plaintiffs; (5) the relative priority of commencing the class action; (6) the resources and experience of counsel; and (7) the presence of any conflicts of interest. See: *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 and [2001] O.J. No. 3673 (S.C.J.); *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (S.C.J.); *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.); *Whiting v. Menu Foods Operating Limited Partnership*, [2007] O.J. No. 3996 (S.C.J.); *Genier v. CCI Capital Canada Ltd.*, [2005] O.J. No. 1135 (S.C.J).

[18] I foreshadow the discussion and analysis below to say that for the case at bar, I do not find particularly helpful factors numbered 3, 4, 5, 6, and 7. I also do not find helpful for the case at bar, a comparison between the retainer agreements and what I will later refer to as the "beauty pageant" factors of a carriage motion, where the rival law firms describe their current talents and past accomplishments. I regard the involvement of Milberg LLP as a sterile or neutral factor. This carriage motion turns on factors 1 and 2.

ThePersonae

[19] **Siskinds** is a London, Ontario, based law firm with offices in London, Toronto, and Windsor. It has an affiliate, Siskinds, Desmeules, in Quebec. It has 70 plus lawyers. At Siskinds, 15 lawyers focus their practices exclusively or almost exclusively on class actions.

[20] Siskinds was one of the pioneer law firms in class action litigation in Ontario. It has expertise and experience in the full range of class proceedings, and its reputation is as one of the pre-eminent class action firms in Canada. It has been lead or co-lead in approximately 70 class proceedings. In the past six years, it has commenced over 20 securities class actions, including approximately 14 claims under Part XXIII.1 of the *Ontario Securities Act*.

[21] **Dimitri Lascaris** is the Siskinds' partner in charge of Siskinds' securities class actions group, and he is the partner in charge of the Timminco file. His partner, **Charles M. Wright** swore an affidavit in support of Siskinds' motion for carriage.

[22] **Kim Orr** is a Toronto-based class action firm that was founded in January, 2008. Its lineage includes other class action firms, including Roy Elliott Kim O'Connor LLP (REKO), McGowan, Elliott & Kim LLP, and Elliott & Kim LLP. These firms also were

pioneers of class action litigation, and they are regarded as among the pre-eminent class action firms in Canada.

[23] **Won Kim** is the Kim Orr partner in charge of the Timminco file. **Victoria Paris**, another partner, swore an affidavit in support of her firm's motion for carriage.

[24] Kim Orr has a relationship with **Milberg, LLP**, a New York City-based law firm. The American law firm has agreed to assist Kim Orr in the prosecution of the Timminco class action. How Milberg LLP is to be paid is to be made a matter of court approval at some future time. In the meantime, Milberg LLP will keep track of its work in progress.

[25] Milberg, LLP and its predecessor law firms have been recognized as one of the leading class action law firms in the United States. In the securities area, it has recently been involved in several humungous cases including: *In re Vivendi Universal, S.A. Securities Litigation, In re Tyco International Ltd. Securities Litigation, In re American Express Financial Advisors Securities Litigation,* and *In re Nortel Networks Corp. Securities Litigation.*

[26] Milberg LLP currently has 76 attorneys, most of whom represent plaintiffs in complex litigation. With one exception, none of the attorneys are licensed to practice law in Ontario. Milberg LLP has a support staff including investigators, forensic accountants, financial analysts, legal assistants, litigation support analysts, and information technology technicians.

[27] Milberg, LLP is a successor firm to **Milberg Weiss Bershad Hynes & Lerach LLP**, which had approximately 250 attorneys. In October 2004, the predecessor firm was indicted in the United States District Court for the Central District of California. Four senior partners pled guilty to criminal charges relating to payments made to class action representative plaintiffs. The law firm was indicted based on its vicarious or derivative liability for the indicted partners' criminal misconduct.

[28] In May 2004, Milberg Weiss Bershad Hynes & Lerach LLP split into two new firms. What is now Milberg LLP saw additional departures that reduced its complement to its current 76 attorneys.

[29] On June 16, 2008, Milberg LLP and the United States Government entered into a Case Disposition Agreement under which the charges against the firm were dismissed, but the firm agreed to pay a $75 million fine in installments. The firm also agreed to maintain a Best Practices Program to be overseen by a Compliance Monitor, which program is still in place. In his statement to U.S. District Judge, John F. Walker, made when the United States Attorney sought approval of the dismissal of the charges against the firm, the United States Attorney stated that: "no attorney currently a partner or associate with Milberg LLP is criminally culpable with respect to the" subject conduct. The United States Attorney also stated (with my emphasis added):

> Your Honor, from our perspective we had a very strong case against the firm, there's no question. But, here was the situation we faced. We had reached a point where all the individual attorneys at the firm for whom we

had solid evidence of being participants in the conspiracy had ceased being a part of the firm. They were no longer part of the firm management. They were no longer part of the control of the firm. And we had the remaining partners come to us and implore us, I don't think is too strong a term -- and implore us to reach an agreement with the firm that would enable them -- people who had not been implicated in the scheme -- to carry on the firm's nationwide practice, which involves representation of thousands and thousands of members in class actions around the country.

They implored us to give them the opportunity to carry on the work of the firm by the people who had not been charged in this case or otherwise indicated to be culpable in a substantial way, coupled with implementing a best practices program that appeared to us to be very robust and to protect against many of the concerns that the government had about the firm's past conduct, plus they were willing to pay a very substantial monetary penalty. Clearly short of the amount we could have sought based on our forfeiture charges if we went to trial, but not -- but we took into account what the firm's financial condition is.

[30] Following these remarks, the following exchange took place between the United States Attorney and Judge Walker (with my emphasis added):

Mr. Robinson [United States Attorney]: They were gone. They were no longer controlling the firm, and we were left with an organization that was not being dominated by culpable targets.

The Court [The Honourable U.S. District Judge, John F. Walker]: Which has many, many fine lawyers and many, many fine men and women who work in nonlawyer capacity to the firm. And I commend the government for its – for its approach to allowing those good people who didn't have any involvement in the conspiracy to continue to earn a living, because they shouldn't – it's – it's harsh enough that they're going to have to bear the results of this conduct by paying $75 million penalty. ... But I commend the government in its use of its discretion in that regard.

[31] In March 2006, **Michael C. Spencer**, a partner of Milberg LLP, who is untainted by the wrongdoing that had occurred at his firm, met Mr. Kim when they were both panellists at a continuing legal education conference in Toronto. Mr. Spencer also met Ms. Paris. In the years that followed, Mr. Spencer and Mr. Kim have met from time to time to discuss the prospect of working together on a securities class action asserting a claim under Part XXIII.1 of the *Ontario Securities Act*. Mr. Spencer swore an affidavit in support of Kim Orr's motion for carriage.

[32] Kim Orr and Milberg LLP have agreed to co-operate in the prosecution of the claim against Timminco. The participants from Milberg LLP will include Mr. Spencer and Professor **Arthur Miller,** who is special counsel and head of the firm's appellate practice group. Professor Miller is a professor at New York University School of Law

formerly was the Bruce Bromley Professor of Law at Harvard Law School. He is a renowned civil procedure scholar.

[33] In her affidavit, Ms. Paris deposed:

> [Kim Orr's] relationship with Milberg LLP will greatly benefit the class. In our experience, large class actions tend to be lengthy and bitterly fought and Canadian plaintiff firms have generally been unable to match the extensive resources that defendants can deploy against them. Defendants know this and will simply try to outlast plaintiff's firms by engaging in protracted litigation involving extensive documentary disclosure and procedural motions. As a result, many cases that are resolved typically settle for a fraction of their potential value. We believe Milberg's experience and resources will greatly enhance our ability to prosecute this case.

[34] **Ravinder Sharma** is the proposed representative plaintiff in the action brought by Kim Orr. He is a principal of a technology company, has over a decade of experience in the investment banking industry, and since February, 2009, is a member of the Ontario Judicial Council. Mr. Sharma, however, recently indicated that he wishes to withdraw as representative plaintiff because of a concern that his work on the Judicial Council would interfere with his ability to serve as an adequate representative plaintiff.

[35] Kim Orr proposes to substitute **St. Clair Pennyfeather** as representative plaintiff in the place of Mr. Sharma. Mr. Pennyfeather is a University of Toronto student who purchased shares of Timminco during the proposed class period. On June 17, 2009, Mr. Pennyfeather signed a retainer agreement with Kim Orr.

[36] **Timminco** is a corporation incorporated under the *Canada Business Corporations Act*, R.S., 1985, c. C-44 with its head office in Toronto, Ontario. Its shares trade on the TSX under the symbol "TIM." As of September 17, 2009, Timminco's market capitalization was approximately $149 million. Timminco's net losses for the first two quarters of 2009 exceeded $46 million. There is a belief shared by Kim Orr and Siskinds that Timminco may not survive.

[37] **AMG Advanced Metallurgical Group N.V.**, a specialty metals company, is Timminco's parent corporation. It is incorporated pursuant to the laws of the Netherlands, with offices in the State of Pennsylvania, United States of America. Its shares are listed on the NYSE Euronext and the Amsterdam Stock Exchange under the symbol "AMG". It conducts business in Canada. As at September 14, 2009, AMG's market capitalization was approximately $470 million.

[38] At the relevant time, **Dr. Heinz Schimmelbusch** was the CEO of both Timminco and AMG, and he was Chairman of Timminco's Board of Directors and of AMG's Management Board. **Robert Dietrich** was Timminco's CFO, and **René Boisvert** was President and CEO of Timminco's wholly owned subsidiary, Becancour Silicon Inc., which was the silicon manufacturer. **Arthur R. Spector, Jack L. Messman, John C.**

Fox, Michael D. Winfield, Mickey M. Yakisch and **John P. Walsh** (the "Outside Directors") are or were directors of Timminco.

[39] The Timminco directors carry insurance policies that may be available to partially compensate class members if the litigation is resolved in their favour.

[40] **Photon Consulting LLC** and **Rogol Energy Consulting LLC** are consulting firms based in Boston, Massachusetts. **Michael Rogol**, an individual residing in Boston, is associated with both firms. Photon Consulting and Rogol Energy may be experts within the meaning of s. 138.1 of the *Ontario Securities Act* and their activities are connected to the alleged false information disseminated about Timminco's silicon production capabilities.

The Claim and Proceedings Against Timminco

[41] In 2007, Timminco announced that it had developed a technological process that would purify low grade silicon into an upgraded metallurgical grade silicon known as "UMG-Si". The process would enable Timminco to manufacture UMG-Si much cheaper than its competitors.

[42] Between 2007 and June 2008, after announcing a series of contracts to sell UMG-Si, Timminco saw its $0.30 share price climb skyward, eventually peaking at $34.50 on June 6, 2008.

[43] On March 17, 2008, Timminco issued a press release announcing its year-end results and characterizing itself as a "low-cost producer of solar grade silicon." On March 28, 2008, Timminco released its 2007 Management Discussion and Analysis and Annual Information Form, which contained statements about Timminco's ability to produce solar grade silicon on a commercial scale acceptable to existing customers.

[44] In April, 2008, there were news reports that raised questions about the production claims of Timminco. Noting the news, Kim Orr, on its own behalf - and without any client, began an investigation to determine whether a claim could be brought against Timminco under Part XXIII.1 of the *Ontario Securities Act*. At the time when Kim Orr's investigation began, Timminco's shares were trading at around $23.00 per share.

[45] Subject to obtaining the leave of the court to bring the action, s. 138.3 (1) of the *Ontario Securities Act* creates a statutory cause of action against both the "responsible issuer" and every director of the responsible issuer at the time a misrepresentation was made and against "influential persons" who knowingly influenced the company to release a misrepresentation. Under s. 138 (3), an influential person can also incur liability in respect of documents released by the influential person that relate to the responsible issuer and that contain a misrepresentation. Section 138.3 (1) (e) also creates a cause of action against experts if an expert report contains a misrepresentation, or if the company's document quotes from the expert's opinion or report.

[46] As part of its ongoing investigation, Kim Orr reviewed Timminco's public statement on the System for Electronic Document Analysis and Retrieval (SEDAR) and

the System for Electronic Disclosure for Insiders (SEDI), and it contacted Mr. Ravi Sood, the CEO of Lawrence Asset Management. At this time, Timminco was suing Mr. Sood for defamation. Mr. Sood had publicly expressed doubts about Timminco's production process. During the summer and fall of 2008, Kim Orr watched for developments at Timminco.

[47] On May 8, 2008, Timminco issued a press release announcing that it had commissioned a report by Photon Consulting (the "Photon Report") on the company's UMG-Si process. The press release quoted Michael Rogol, the Managing Director of Photon Consulting, who indicated that Timminco's "[o]perations and processes have potential for massive growth and, possibly, for reshaping the silicon industry" and that Timminco's "equipment is very impressive, very low-cost." Timminco placed the Photon Report on its website.

[48] In August 2008, an investigator provided Siskinds with non-public information regarding Timminco process for producing solar grade silicon. The investigator also provided Siskinds with non-public information regarding Timminco's Becancour facility where it was producing the silicon. So apprised, Siskinds, on its own behalf - and without any client, began an investigation to determine whether a claim could be brought against Timminco pursuant to Part XXIII.1 of the *Ontario Securities Act* and under the common law. Siskinds commissioned the investigator to continue its work, including identifying potential witnesses. When Siskinds' investigation began, Timminco's shares were trading at around $23.00 per share.

[49] On November 11, 2008, Timminco released its quarterly results, and it also announced that it was removing the Photon Report from its website as "some of the material factors or assumptions originally used to develop the forward-looking information in the Photon Report including in respect of revenues, production volumes and costs, may no longer be valid." Over the next ten trading days, Timminco's share price dropped from $7.93 to $3.10.

[50] Timminco's announcement of November 11, 2008 led Kim Orr to conclude that it had found the Part XXIII.1 of the *Ontario Securities Act* claim that it had been waiting for. It updated its research, began to draft a statement of claim, began to look for a representative plaintiff, continued to look for evidence and experts, and had discussions with Milberg LLP about working together on the case.

[51] Although the timing is unclear, it would appear that around this time Siskinds also decided to move forward in preparing proceedings against Timminco and others.

[52] By the end of November, 2008, Milberg LLP agreed to assist Kim Orr with an action against Timminco, and Kim Orr continued its search for a representative plaintiff.

[53] In December 2008, Mr. Gowan, who had heard of Siskinds as a result of the settlement of the Southwestern Resources class action (a securities action), discussed a possible class action against Timminco. Mr. Gowan and the firm discussed this possibility again in April 2009.

[54] In May of 2009, Mr. Kim and Ms. Paris of Kim Orr met Ravinder Sharma, a Timminco shareholder. Mr. Sharma agreed to be the representative plaintiff that the firm had been looking for. On May 14, 2009, Mr. Sharma signed a retainer agreement. During the month of May 2009, Kim Orr was also contacted by St Clair Pennyfeather, another shareholder, who expressed an interest in being involved in an action against Timminco.

[55] By May 14, 2009, Timminco's shares were trading at $1.55 per share, and on that day Kim Orr, on behalf of Ravinder Sharma, commenced a proposed class action against Timminco, Dr. Heinz Schimmelbusch, Robert Deitrich, René Boisvert, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich, and John P. Walsh. The Sharma statement of claim pleads negligence, negligent misrepresentation, and seeks leave to assert a claim under Part XXIII.1 of the *Ontario Securities Act*.

[56] Notably absent from the defendants is AMG Advanced Metallurgical Group N.V., but Kim Orr says at the time the claim was issued, it did not have sufficient evidence to establish that AMG knowingly influenced the release of the Timminco statements and it says that including AMG as a defendant could result in a potential jurisdictional battle that would add unnecessary expense and delay to the litigation with little corresponding benefit. (I will say more about the scope of the rival actions below.)

[57] By the time it issued the statement of claim, Kim Orr had spent approximately $400,000 in expenses and lawyers' fees. After the issuance of the claim, it incurred an additional $75,000 in expenses and lawyers' fees before it became aware that Siskinds had issued a second claim against Timminco.

[58] On June 11, 2009, when Timminco's shares were trading at $1.58 per share, on behalf of Robert Gowan, Siskinds commenced a second proposed class action against Timminco Limited, Dr. Heinz Schimmelbusch, Robert Deitrich, René Boisvert, and AMG Advanced Metallurgical Group N.V. The statement of claim pleads negligence, negligent misrepresentation, and Mr. Gowan will seek leave to assert a claim pursuant to Part XXIII.1 of the *Ontario Securities Act*. The statement of claim alleges that, at various points during the class period, AMG incorporated into its own press releases certain of the misrepresentations alleged to have been made by Timminco.

[59] Notably absent from the claim brought by Siskinds are the defendants Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol and the Timminco Outside Directors. However, Siskinds always planned to add these defendants once the leave of the court to bring an action under Part XXIII.1 had been obtained.

[60] Before their respective carriage motions, there were discussions between Kim Orr and Siskinds about jointly prosecuting the class action. In mid-June, 2009, Mr. Orr, Mr. Kim and Ms. Paris met with Mr. Lascaris to discuss the possibility of working together. Those discussions were not successful, and for the purposes of this motion nothing turns on how or why the negotiations failed.

Tale of the Tape

[61] I will have much more to say about the two rival statements of claim below, but the following chart compares and contrasts some of the core elements of the rival proposed class proceedings:

Class Counsel	**Kim, Orr Barristers P.C.** An 8-member class action boutique law firm. The firm includes: James C. Orr (1983 call) Won J. Kim (1992 call) Megan McPhee (2003 call) Victoria Paris (2002 call) (The firm will be assisted by Milberg LLP.)	**Siskinds LLP** A 15-member class action department in a firm of 70+ lawyers. The department includes: C. Scott Ritchie, Q.C. (1967 call) Michael A. Eizenga (1991 call) Michael J. Peerless (1993 call) Charles M. Wright (1995 call) Demitri Lascaris (2004 call)
Plaintiff	Ravinder Kumar Sharma to be replaced by St. Clair Pennyfeather	Robert Gowan
Background of the Plaintiff	Mr. Pennyfeather is a 26-year old student at the University of Toronto.	Mr. Gowan is a retiree residing in Manitouwadge, Ontario.
Plaintiff's Loss	$1,066 (57 shares at $20 per share, worth $1.28 per share)	$3,258 (150 shares at $23 per share, worth $1.28 per share)
Defendants	Timminco Limited Dr. Heinz Schimmelbusch Robert Deitrich René Boisvert Photon Consulting LLC Rogol Energy Consulting LLC Michael Rogol Arthur R. Spector Jack L. Messman John C. Fox Michael D. Winfield Mickey M. Yaksich John P. Walsh	Timminco Limited Dr. Heinz Schimmelbusch Robert Deitrich René Boisvert AMG Advanced Metallurgical Group N.V
Other Possible Defendants	AMG Advanced	Photon Consulting LLC

	Metallurgical Group N.V	Rogol Energy Consulting LLC Michael Rogol Arthur R. Spector Jack L. Messman John C. Fox Michael D. Winfield Mickey M. Yaksich John P. Walsh
Commencement Date	May 14, 2009	June 11, 2009
Nature of Claim	Negligence and negligent misrepresentation and liability under Part XXIII.1 of *Ontario's Securities Act*	negligence and negligent misrepresentation and liability under Part XXIII.1 of *Ontario's Securities Act*
Quantum	$540 million plus $20 million punitive damages	$700 million
Class Period	March 17, 2008 to November 11, 2008.	December 19, 2007 to April 20, 2009
Class Definition	All persons, other than the Excluded Persons, who acquired securities of Timminco during the Class Period	All persons, other than the Excluded Persons, who acquired securities of Timminco during the Class Period

The Nature of the Rival Causes of Action and the Theories of the Claims

[62] From my reading the statement of claim and from the argument during the hearing of the motion, I understand the Kim Orr theory of the case to be as follows:

- Between March 17, 2008 and November 11, 2008 (the "Class Period), class members purchased shares in Timminco, and during this approximately 8-month period, the defendants made misrepresentations.

- The defendants legally responsible for the misrepresentations were: Timminco, a "responsible issuer: under s. 138.1 of the *Ontario Securities Act*; Schimmelbusch, the CEO of Timminco; Deitrich the CFO of Timminco; Boisvert, the CEO of the production subsidiary; Spector, Messman, Fox, Winfield, Yaksich, Walsh (the outside directors of Timminco); and Photon Consulting, Rogol Energy and Rogol, "experts" within the meaning of s. 138.1 of the *Ontario Securities Act*.

- The misrepresentations were about the revenues, production volume, margins, profits of Timminco and were to the affect that Timminco had a competitive advantage in the production of solar-grade silicon. These misrepresentations affected the market price of Timminco shares.

- The misrepresentations consisted of: (1) The March 17, 2008 Press Release; (2) The March 17, 2008 Conference Call with Schimmelbusch; (3) The 2007 Annual

Information Form published on March 28, 2008; (4) The 2007 MD&A filings on SEDAR, which were certified by Schimmelbusch and Dietrich published on March 28, 2008; (5) The 2007 Annual Report published on March 31, 2008, which was approved by the board of directors and certified by Schimmelbusch and Dietrich; (6) The Photon Report dated May 8, 2008; (7) 2008 First Quarter Results dated May 8, 2008, which was approved by the board of directors and certified by Schimmelbusch and Dietrich; (8) The May 8, 2008 Conference Call with Schimmelbusch and Boisvert; (9) The MD&A Q1 2008 published on May 13, 2008 which was certified by Schimmelbusch and Dietrich; (10) The May 13, 2008 Conference Call with Schimmelbusch and Rogol; and (11) The May 29, 2008 Conference Call with Schimmelbusch and Dietrich.

- On August 11, 2008 in a press release and a press conference with Schimmelbusch and Deitrich, Timminco partially corrected the misrepresentations, which caused a next day drop in its share price from $19.97 to $12.25.

- On November 11, 2008, when its shares were trading at $7.93, Timminco removed the Photon Report from its website and made a corrective statement. By November 19, 2008, the share price had dropped to $3.37. The share price continued to decline thereafter.

- Timminco and the other defendants breached their duty of care to the class members who purchased shares during the class period and are liable for negligence and negligent misrepresentation having caused the class members damages and loss.

- The plaintiff and the class will seek leave to assert the statutory causes of action under Part XXIII.1 of the *Ontario Securities Act*.

[63] From my reading the statement of claim and from my hearing the argument during the hearing of the motion, I understand the Siskinds theory of the case to be as follows:

- Between December 19, 2007 and April 20, 2009, (the "Class Period), class members purchased shares in Timminco and during this approximately 16-month period, defendants associated with Timminco made misrepresentations giving rise to causes of action in negligence and negligent misrepresentation against them and during this period, AMG Advanced Metallurgical Group N.V also made misrepresentations giving rise to a distinct common law cause of action against it.

- The defendants legally responsible for the misrepresentations were: Timminco; Schimmelbusch, the CEO of Timminco; Deitrich, the CFO of Timminco; Boisvert, the CEO of the production subsidiary, and AMG Advanced Metallurgical Group N.V.

- The misrepresentations were about the cost, reliability, and efficacy of Timminco's process for producing solar grade silicon. Many other misrepresentations are alleged with respect to such statements as: whether Timminco had created a paradigm shift in the solar grade silicon market; whether Timminco was a specialist in the production of solar grade silicon; whether Timminco had the technological expertise to transition its business to capitalize on demand for solar grade silicon; whether Timminco's process was a breakthrough innovation; whether Timminco had resolved its production challenges in 2008 Q2; and whether Timminco had a prospect of becoming a leading supplier.

- The misrepresentations by Timminco that affected the price of Timminco shares during the class period consisted of: (1) The December 19, 2007 Press Releases; (2) the February 22, 2008 Press Release; (3) the March 17, 2008 Press Release; (4) the March 18, 2008 Earnings Conference Call with Schimmelbusch; (5) the March 26, 2008 Press Release; (6) the 2007 AIF filed with SEDAR on March 28, 2008; (7) The Fiscal 2007 Annual Report and MD&A 2007 Q4 filed with SEDAR on March 28, 2008; (8) the Form 52-109F1 Filings filed on March 28, 2008 certified by Schimmelbusch and Dietrich; (9) the May 8, 2008 Press Releases filed with SEDAR; (10) the May 8, 2008 Conference Call with Schimmelbusch; (11) the May 13, MD&A 2008 Q1 filed with SEDAR and certified by Schimmelbusch and Dietrich; (12) the May 14, 2008 Conference Call with Schimmelbusch, Dietrich, Boisvert and Rogol and the posting of the Photon Report on the Timminco website; (13) the MD&A 2008 Q2 filed on August 12, 2008; (14) the Investor Presentations of September 2008; (15) the November 11, 2008 Conference Call with Schimmelbusch; (16) the November 11, 2008 Press Release and withdrawal of the Photon Report; (17) The Quarterly Report 2008 Q2 filed on December 4, 2008; (18) the 2008 Q2 Form 52-109F2 Filings certified by Schimmelbusch and Dietrich on December 4, 2008; (19) the February 3, 2009 Offering Memorandum; (20) the March 17, 2009 Press Releases; (21) the March 27, 2009 Annual Report and AIF 2008; (22) the Form 52-109F1 Filings of March 27, 2009 certified by Schimmelbusch and Dcitrich; and (23) the April 20, 2009 Press Release.

- During the class period, to attract investment in Timminco, AMG Advanced Metallurgical Group N.V, the parent company of Timminco, issued press releases containing misrepresentations.

- During the class period, AMG's misrepresentations that affected the price of Timminco shares consisted of: (1) the December 19, 2007 Press Release; (2) the February 22, 2008 Press Release; (3) the March 26, 2008 Press Release; (4) the May 8, 2008 Press Releases; and (5) the March 17, 2009 Press Releases.

- On August 11, 2008, Timminco disclosed flaws in its process for producing solar grade silicon and its share price fell from $19.97 on August 11, 2008 to $15.10 on August 14, 2009 (the next trading day).

- On November 11, 2008, Timminco removed the Photon Report from its website. Over the next 10 trading days the price of Timminco's shares fell from $7.93 to $3.10.

- On April 20, 2009, Timminco disclosed that certain customers had terminated their contracts due to non-compliance.

- Timminco, AMG Advanced Metallurgical Group N.V and the individual defendants are liable for negligence and negligent misrepresentation for having caused damage and loss to the class members.

- The plaintiff and the class will seek leave to assert the statutory causes of action under Part XXIII.1 of the *Ontario Securities Act*. If leave is granted actions will be brought against Spector, Messman, Fox, Winfield, Yaksich, Walsh (outside directors of Timminco); and Photon Consulting, Rogol Energy and Rogol, "experts" within the meaning of s. 138.1 of the *Ontario Securities Act*

[64] Generally speaking, the Siskind statement of claim pleads both: (a) causes of action of joint liability against tortfeasors who are alleged to have made a diverse set of misrepresentations about Timminco and also (b) a distinct cause of action against AMG for similar misrepresentations although made on fewer occasions. The Siskind statement of claim starts the class period earlier and extends its longer. The Siskind theory seems to favour comprehensiveness over cohesiveness.

[65] In its factum, Siskinds criticizes Kim Orr for its failure to join AMG and says that such a claim could succeed irrespective of whether AMG knowingly influenced the making of alleged misrepresentations by Timminco because AMG incorporated certain of the alleged misrepresentations into its own press releases.

[66] In contrast, generally speaking, the Kim Orr statement of claim pleads causes of action of joint liability against tortfeasors who are alleged to have made a more discrete set of misrepresentations about Timminco. The Kim Orr theory of the case starts the class period later and ends it sooner. It is half as long as the Siskinds' class period. The Kim Orr theory seems to favour cohesiveness over comprehensiveness.

Analysis and Discussion – The Non-Critical or Neutral Factors

[67] As mentioned above, the primary responsibility of the court on a carriage motion is to make a choice that is in the best interests of all class members, fair to the defendants, and consistent with the policy objectives of the *Class Proceedings Act, 1992*, and in making this choice, the court has developed a set of factors, not meant to be comprehensive, that will help it decide.

[68] Also as mentioned above, in the particular circumstances of this case, there are several factors that I do not find helpful in coming to a decision. In the next parts of these Reasons, I will first discuss the factors that were not critical to this carriage motion and then turn to the two critical factors; namely: (1) the nature and scope of the causes of

action advanced; (2) the theories advanced by counsel as being supportive of the claims advanced.

[69] I begin the discussion of the non-critical factors by noting that neither firm has a disqualifying conflict of interest.

[70] Next, given that both actions are very much the invention or discovery of the law firms, the number, size, and extent of involvement of the proposed representative plaintiffs (whom each firm enlisted after the idea of a class proceeding was developed) is not a meaningful factor.

[71] Similarly, the relative priority of commencing the class actions does not influence my decision, because neither firm can be accused of expropriating the creativity or initiative of the other. Kim Orr was just a little faster out of the starting blocks.

[72] In arriving at my decision, I regard the proposed involvement of Milberg LLP as a neutral or sterile factor. I begin discussing this point by saying that Milberg LLP does not bear the mark of Cain. A review of the transcript of the hearing for court approval of the Case Disposition Agreement reveals that Judge Walker grilled the United States Attorney about the propriety of the agreement but ultimately was satisfied that the attorneys who did not have any involvement in the criminal conduct should be allowed to continue to earn a living and serve the firm's class action clients. Mr. Spencer and Professor Miller were not parties to any wrongdoing and have fine reputations and excellent credentials, and thus no more needs to be said about this aspect of the matter.

[73] The involvement of Milberg LLP, however, does involve other issues, but, in my opinion, ultimately in the competition between Kim Orr and Siskinds for carriage, this involvement neither adds nor detracts in the court's decision calculus. Putting this point somewhat differently, in the case at bar, I regard Milberg LLP's involvement as not a reason to qualify Kim Orr to be class counsel and it is not a reason to disqualify Kim Orr.

[74] What is significant is not that an American law firm would be involved in an Ontario class action but how that American law firm would be involved. While one can posit examples where the involvement of an American law firm would be grounds for disqualifying an Ontario firm seeking carriage of a proposed class proceeding, in my opinion, the case at bar is not one of those cases.

[75] In my opinion, it would be grounds for disqualification of an Ontario law firm seeking carriage of an Ontario class proceeding if the Ontario firm entered into an arrangement where an American law firm, or any foreign law firm for that matter, assumed *de jure* or *de facto* the role of the lawyer of record for the representative plaintiff, unless the foreign law firm obtained permission to practice law in Ontario with a right of audience before the court. Further, it would be grounds for disqualification of the Ontario firm, if a foreign law firm in any other way usurped the role of the Ontario lawyer of record as the lawyer for the representative plaintiff and the class or if the foreign firm had a proprietary interest in the claims of the representative plaintiff and the class.

[76] However, in the case at bar, I do not understand Milberg LLP's proposed involvement as usurping the role of Kim Orr, as negating the court's ability to manage and adjudicate the proceedings, or as asserting a propriety interest in the client's litigation.

[77] I understand Ms Paris' evidence about the role of Milberg LLP as going no further than that Milberg LLP would provide Kim Orr with investigative services, document management service, and strategic advice based on Milberg LLP's experience in comparable American class actions. As I see it, the fact that Kim Orr will have these services available from an American law firm is not a reason to disqualify Kim Orr. It is also not a reason to choose Kim Orr as potential class counsel.

[78] In my opinion, it would be grounds to disqualify an Ontario firm seeking carriage if it purported to partner with an American law firm so that the American firm had a proprietary interest in the Ontario law suit, because this would take the foreign firm's involvement into the territory of champerty and maintenance and impermissible fee splitting, but I do not understand this to be the case at bar.

[79] At this juncture, it would appear that some of Milberg LLP's services might be chargeable as disbursements to be paid by the representative plaintiff and some of its services might be chargeable exclusively to Kim Orr, which would not be able to pass on the charges to the representative plaintiff no more than it could charge the class members for attendances at continuing legal education conferences.

[80] During argument, Mr. Orr for Kim Orr pointed out that American law firms are frequently the instructing solicitors for the Canadian lawyers who are on the record for defendants in class proceedings and that the American firms provide services for the Canadian defendants that are similar to the services proposed to be provided by Milberg LLP to the plaintiffs in this class action. This may be true, but the situations are not comparable because the Canadian defendants have a pre-existing lawyer and client relationship with their American lawyers and there are no comparable problems of unauthorized practice of law in Ontario, of champerty and maintenance, or of fee-splitting. That said, there is nothing inherently wrong with Ontario class counsel who are acting for plaintiffs in obtaining services from foreign law firms so long as there is no interference with or usurpation of the lawyer and client relationship between the Ontario lawyer of record and his or her clients.

[81] Thus, based on my understanding of it, I regard Milberg LLP's involvement to be a neutral factor. Kim Orr's relationship with Milberg LLP does not give it a competitive advantage and tip the scale in a carriage dispute. Kim Orr's relationship with Milberg LLP does not tip the scale the other way either.

[82] I also regard the retainer agreements in the case as a neutral factor. I have reviewed the agreements, and both firms have entered into contingency fee agreements. The financial terms of the Siskinds' agreement are more favourable to the class, but ultimately, it will be for the court to determine whether the fees charged by class counsel

are fair and reasonable to the class. See *Lawrence v. Atlas Cold Storage*, [2009] O.J. No. 4067 (C.A.), aff'g 2009 CanLII 55128 (Ont. S.C.J.).

[83] In the circumstances of the case at bar, the resources and experience of counsel are also a neutral factor. To assist the court in making its choice, both Kim Orr and also Siskinds have put on a beauty pageant of evidence parading their past and present accomplishments in class action litigation. They both have considerable experience. They both have fine reputations. They both have been pioneers in the class action field. They both have produced authors and lecturers. They both have lawyers who have had admirable careers with notable cases. They both made admirable presentations during the argument of the carriage motion. They both are ambitious and energetic. Both firms have had successes, and based on the material presented to the court, apparently both have no reason to be humble.

[84] From this understandably self-serving evidence, the most that I can conclude is that the best interests of the class members could be satisfied by choosing either firm to be class counsel. While Siskinds has more experience in the emerging area of Part XXIII.1 of the *Ontario Securities Act*, it does not have a monopoly, patent, or trade secret, and it appears that Kim Orr is up to speed and capable of providing a similar quality of service to the class.

[85] In the circumstances of the case at bar, the state of each class action including preparation is another neutral factor. From the evidentiary record, it appears that both law firms began preparing and they undertook exploratory work when a class proceeding was just in their mind's eye. Both firms continued their work up until it was interrupted by this carriage dispute.

[86] Because it was less guarded about revealing some of its work product to the court – and the defendants – Kim Orr presented this factor better, but I am not in a position to grade the quality of either firm's preparatory work, which will be better tested in the crucible of battle with the defendants. It does appear that both actions are ready to proceed and both are well advanced in their preparation.

[87] This completes my discussion of the non-critical factors, and I turn now to the factors that will decide this carriage motion.

Analysis and Discussion – The Critical Factors

[88] The determinative factors in this case are: (1) the nature and scope of the causes of action advanced; and (2) the theories advanced by counsel as being supportive of the claims advanced. These factors are connected and can be discussed together.

[89] My discussion of these factors, however, must necessarily be circumspect and qualified. Nothing I say about the causes of action and the theories supporting them should be taken as affecting the rights of the defendants, whose lawyers, it may be noted, have a watching brief on these carriage motions and were in attendance.

[90] On this motion, both law firms raised issues about the comparative merits and demerits of the pleadings, legal theories, and strategic battle plans of their rival. I am not to be taken as scolding them for this approach, but such an approach to a carriage motion puts the court in a difficult position because at this point in the respective proceedings, without hearing from the defendants, it is inappropriate and, practically speaking, not possible to say much about: (a) the substantive merits of the competing theories and their chances of success; (b) substantive legal weaknesses in the causes of action and theories advanced; (c) whether the court would certify either action as a class proceeding; and (d) whether the court would grant leave to bring actions under Part XXIII.1 of the *Ontario Securities Act*.

[91] With these reservations and qualifications and strictly for the purposes of deciding this carriage motion, some opinion can nevertheless be expressed about the causes of action and supporting theories developed by the rival law firms. By way of overview, my opinion is that without prejudice to what the defendants may be able to demonstrate, both sides have shown tenable causes of action for negligence and negligent misrepresentation and the difference between the causes of action is that Siskinds develops a more comprehensive and more complex theory than the cohesive and more straightforward theory developed by Kim Orr.

[92] My opinion is also that the joinder of AMG Advanced Metallurgical Group N.V. by Siskinds and the non-joinder of AMG by Kim Orr is not a reason to favour Siskinds' statement of claim and theory. Kim Orr was of the view that it was improper to join a person in order to probe for a sustainable cause of action against a party with deeper financial pockets. Siskinds was of the view that there was at the outset a sustainable cause of action in common law negligence against AMG. All I can say at this point is that they are both entitled to their opinions, and I cannot say at this point who is correct. In any event, I do not regard the non-joinder of AMG as a mistake, and if it is, then it may be a correctable one.

[93] Moving on to more substantive matters, my opinion is that Siskinds' theory and the nature and scope of the causes of action it develops sets a higher and more challenging legal bar for the representative plaintiff and for the class to vault over. In my opinion, Siskinds' theory is more problematic than the Kim Orr theory with respect to such matters as class definition, commonality, and preferable procedure. I, however, do not say Siskinds' theory is wrong or not capable of success.

[94] Siskinds' theory, with its substantially longer class period and broader class definition confronts challenges that do not confront the Kim Orr theory of the case. There are challenges with the front end of the extension of the class period, but the challenges are perhaps more profound in the extension of the class period to include purchasers of shares after Timminco made public announcements to correct the alleged misrepresentations. This extension of class membership differentiates class members between those who purchased their shares without any corrective information and those who purchased shares after Timminco had made public announcements withdrawing its mis-statements and this, in turn, creates difficult factual issues about the efficacy of the corrective announcement or announcements, which may further divide the class, and

about the legal interpretation of certain sections of Part XXIII.1 of the *Ontario Securities Act*. Notwithstanding Siskinds' arguments to the contrary, I do not see these extensions as being helpful to the case to be made for the class members who purchased shares before corrective announcements were made.

[95] Siskinds submits that its approach to the class action is preferable because with a larger class definition more purchasers of Timminco will have access to justice. Speaking generally, this type of argument may not be helpful for resolving a carriage motion. If class actions are the mass transit to access to justice, sometimes it is not doing justice to push more passengers onboard the subway train. I wish to be clear, I am not saying that Siskinds' class definition is wrong, nor am I saying that Kim Orr's definition is correct in that it is neither over nor under-inclusive. All I am saying is that an argument about potential class size may not be helpful to resolve a carriage dispute, and I do not find the argument helpful in the case at bar.

[96] Noting that it was a very tough decision to make, my overall conclusion is that having regard to: (a) the factors of the nature and scope of the causes of action advanced; (b) the theories advanced in support of those causes of action; (c) the best interests of all class members; (d) to what is fair to the defendants, and (e) what is consistent with the policy objectives of the *Class Proceedings Act, 1992*, Kim Orr should be granted carriage.

Conclusion

[97] Accordingly, I dismiss the Siskinds carriage motion and I stay the *Gowan* action. I order that no other actions may be commenced in respect of Timminco securities purchased during the class period proposed in the *Sharma* action.

[98] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Kim Orr within 20 days of the release of these Reasons for Decision to be followed by Siskinds within a further 20 days.

Perell, J.

Released: October 29, 2009

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COURT FILE NO.: 09-CV-378701-00CP
COURT FILE NO.: CV-09-380757-00CP
DATE: October 29, 2009

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN

RAVINDER KUMAR SHARMA

Plaintiff

- and -

TIMMINCO LIMITED, PHOTON CONSULTING LLC, ROGOL ENERGY CONSULTING LLC, MICHAEL ROGOL, DR. HEINZ SCHIMMELBUSCH, ROBERT DIETRICH, RENÉ BOISVERT, ARTHUR R. SPECTOR, JACK L. MESSMAN, JOHN C. FOX, MICHAEL D. WINFIELD, MICKEY M. YAKSICH, and JOHN P. WALSH

Defendants

AND BETWEEN:

ROBERT GOWAN

Plaintiff

- and -

TIMMINCO LIMITED, AMG ADVANCED METALLURGICAL GROUP N.V., RENÉ BOISVERT, ROBERT J. DIETRICH and HEINZ C. SCHIMMELBUSCH

Defendants

REASONS FOR DECISION

Perell, J.

Released: October 29, 2009

TAB D

This is Exhibit "D" referred to in the
affidavit of Victoria Paris
sworn before me, this 8th
day of March 20 12

A COMMISSIONER FOR TAKING AFFIDAVITS

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CITATION: Sharma v. Timminco, 2010, ONSC 790
COURT FILE NO.: 09-CV-378701CP
Date: February 3, 2010

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Ravinder Kumar Sharma

Plaintiff

- and -

Timminco Limited, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Dr. Heinz Schimmerlbusch, Robert Dietrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich and John P. Walsh

Defendants

COUNSEL:
James Orr and Victoria Paris for the Plaintiff
Alan L.W. D'Silva, Daniel S. Murdoch, and Lesley Mercer for the Timminco defendants
Brendan van Niejenhuis for the Phelan Defendants

HEARING DATE: January 28, 2010

REASONS FOR DECISION

PERELL, J.

[1] Under the *Class Proceedings Act, 1992*, S.O. 1992, c.5, Ravinder Kumar Sharma brings a proposed class action that involves, among other things, a common law negligent misrepresentation claim against the Timminco Ltd. Defendants and also a statutory misrepresentation claim under Part XXIII.1 of the *Ontario Securities Act.*, R.S.O. 1990, c. C.5. The statutory claim can be brought only with leave, and leave has not yet been obtained.

[2] Recently, there was a carriage motion, and Mr. Sharma's lawyers were successful, and a rival class action was stayed. See *Sharma v. Timminco Ltd.*, [2009] O.J. No. 4511 (S.C.J.). In the carriage motion, Mr. Sharma's lawyers stated that they had information about the insurance coverage available to some of the defendants in their proposed class action.

[3] After the carriage motion, notwithstanding having this information, Mr. Sharma's lawyers asked the Timminco Defendants to disclose any insurance policies that provided coverage for the litigation.

[4] The request by Mr. Sharma's lawyers was made soon after a press release raised concerns about the financial capability of Timminco Ltd. to continue as a going concern.

[5] The Timminco Defendants' lawyers responded that their clients would not agree to produce the policies unless ordered to do so

[6] Mr. Sharma now makes a motion for the production from the Timminco Defendants of their insurance policies and related information about coverage conditions.

[7] The Timminco Defendants resist the motion, and they have filed a voluminous reply record to rebut any inference that Timminco is in dire financial straits.

[8] Normally, insurance policies are disclosed in an affidavit of documents as an aspect of the documentary discovery stage of an action. Under rule 30.03 (1), "a party to an action shall serve on every other party an affidavit of documents disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession control or power."

[9] The presence of insurance is not necessarily relevant to any matter in issue, and rule 30.02 (3) addresses the production of insurance policies, as follows:

> 30.02 (3) A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,
>
> (a) to satisfy all or part of a judgment in the action; or
>
> (b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment,
>
> but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

[10] Rules 31.06 (4) and (5) address the matter of questions about insurance being asked during oral examinations for discovery. These rules state:

> 31.06 (4) A party may on an examination for discovery obtain disclosure of,
>
> (a) the existence and contents of any insurance policy under which an insurer may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment; and

(b) the amount of money available under the policy, and any conditions affecting its availability.

(5) No information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

[11] Formerly, the affidavit of documents was delivered within 10 days after the close of pleadings. Rule 30.03 (1) no longer specifies the timing, and instead, rule 29.1 sets out the requirement that the parties prepare a discovery plan. Under rule 29.1.03 (2), "the discovery plan shall be agreed to before the earlier of, (a) 60 days after the close of pleadings or such longer period as the parties may agree to; and (b) attempting to obtain the evidence."

[12] The proposed class action is some distance away from the close of pleadings and oral examinations for discovery. There are pending amendments to the statement of claim to add a new proposed representative plaintiff, and there is the yet to be arranged motion for leave under the *Ontario Securities Act* for the statutory misrepresentation claim, which, if granted, will precipitate further amendments to the statement of claim. Further, as in the case at bar, it is not uncommon in class proceedings that the statement of defence is not demanded until after the outcome of the certification motion is determined.

[13] Thus, technically speaking, Mr. Sharma's request for the insurance policy information is premature. However, there is precedent that supports the early production of insurance policies. In *Pysznyj v. Orsu Metals Corporation* (May 21, 2009, London File No. 59650CP), Justice Rady ordered insurance policies produced in a proposed class action. Further, it was conceded by the Timminco Defendants that under the court's authority provided by s. 12 of the *Class Proceedings Act, 1992*, the court has the jurisdiction to make an order requiring the production of the insurance policies at this early stage of the proceedings.

[14] Although the Timminco Defendants do not say that they would be harmed, prejudiced, or even inconvenienced by the early production of the insurance policies, they submit that the court ought not to make the production order for two reasons.

[15] First, the Timminico Defendants submit that the order should be made only in extraordinary circumstances; however, in the case at bar, they submit that given what Mr. Sharma's counsel already knows about the insurance coverage, there are no extraordinary circumstances. Moreover, the Timminco Defendants submit that an early order for production is unnecessary because Mr. Sharma and his lawyers already have all the information they currently need.

[16] Second, the Timminco Defendants submit that it would be contrary to the public policy associated with the proper operation of Part XXIII.1 of the *Ontario Securities Act* to order the production of the insurance information before the leave motion is decided.

[17] I disagree with both submissions.

[18] I see no basis in principal, precedent, or based on the facts of this case for the conclusion that the early production of the insurance policies must be justified by extraordinary or special circumstances.

[19] Although Mr. Sharma's lawyers have some knowledge about the insurance policies, that information is neither comprehensive nor adequate. Requiring disclosure of insurance information encourages the parties to make practical or pragmatic decisions about the likelihood of recovery on the claims, which, in turn, may influence their decisions about prosecuting or attempting to settle the litigation: *Sabatino v. Gunning* (1985), 50 O.R. (2d) 171 (C.A.); *Pysznyj v. Orsu Metals Corporation, supra*. With the patchy information available to them, Mr. Sharma's lawyers would be irresponsible if they provided advice or made a decision based on the current state of information. Similarly, if the availability of insurance coverage were to be a factor in settlement discussions, the current state of information is insufficient.

[20] But there is more to Mr. Sharma's request for information about insurance coverage. The information would be relevant to settlement discussions, but it is also relevant to whether it makes sense to prosecute the action. The relationship between the costs of litigation and the collectable amount of recovery is a matter of concern to a plaintiff and to his or her counsel acting under a contingency fee arrangement, and this concern is particularly intense in a proposed class proceeding where the costs and the risks associated with the litigation will be high.

[21] Putting aside for the moment, the Timminco Defendant's second reason for refusing to produce the insurance policies and the associated information, in my opinion, it would be productive to order their production.

[22] I shall move on to consider the Timminco Defendants' second submission, but, before doing so, it is necessary to address the matter of the relevance, if any, of the defendant's financial circumstances to Mr. Sharma's request for early disclosure of information about insurance policies. In my opinion, the financial health of the defendant is a neutral or irrelevant factor.

[23] While information about available insurance coverage might be more interesting in circumstances where a defendant is in poor financial health, the information remains useful and necessary regardless of the defendant's financial health. Thus, I need not and I do not make any finding about the financial health of Timminco Ltd. My opinion, which is independent of the financial status of the Timminco Defendants, is that there were good reasons for Mr. Sharma's lawyers to request early production of the insurance policies and apart from the public policy argument, to which I will turn next, there is no reason to refuse ordering the disclosure of the information now.

[24] The Timminco Defendants relied on the uncontested evidence of Mr. Thomas Allen to submit that early disclosure of insurance policies is inconsistent with the Legislature's intentions about the pursuit of a statutory misrepresentation claim under Part XXIII.1 of the *Ontario Securities Act*. Mr. Allen, who is a lawyer with a very admirable reputation in the investment industry and in the legal profession as securities

and corporate law lawyer, was the chair of a renowned committee of the Toronto Stock Exchange that did the pioneering work that eventually led to the Ontario Government enacting Part XXIII.1 of the *Act*. The Committee's work is commonly referred to as the "Allen Report." See TSE Committee on Corporate Disclosure, *Responsible Corporate Disclosure: A Search for Balance*, Final Report (Toronto: Toronto Stock Exchange, 1997).

[25] Mr. Sharma objected to the admission of Mr. Allen's evidence on the grounds that it was not proper opinion evidence. Since, as I will shortly explain, I do not think Mr. Allen's evidence, which is largely argument, helps the Timminco Defendants or harms Mr. Sharma, I am not going to rule on his objection, and I will simply address Mr. Allen's evidence on its merits.

[26] As I understand Mr. Allen's evidence or argument, it is as follows. The Allen Committee was of the view that introducing a statutory misrepresentation claim would be desirable to regulate the secondary market in securities in Canada. However, observing problems in the United States about such claims, the Committee was concerned about exposing corporations and their directors and officers to speculative and extortionate class actions known as "strike suits," and this concern weighed against recommending that a statutory claim be introduced in Canada. A strike suit is a class proceeding where the merits of the claim are not apparent but the nature of the claim and targeted transaction is such that a sizeable settlement can be achieved with some degree of probability because the defendant is confronted with the unpalatable choice of a very expensive court battle or the payment of significant settlements irrespective of the underlying merits of the lawsuit: *Epstein v. First Marathon Inc.*, [2000] O.J. No. 452 (S.C.J.). However, notwithstanding its concerns about strike suits, the Allen Committee decided to recommend the introduction of a statutory claim because the Canadian litigation environment was different than in the United States, in part, because in Canada, discovery comes after the close of pleadings, and thus, unlike the United States, Canada does not have liberal discovery rules that would facilitate strike suits.

[27] Mr. Allen acknowledged that his committee did not, in particular, consider the timing of the disclosure of insurance policies. However, it was his opinion that a requirement that insurance policies and policy limits be disclosed before the leave motion and the close of pleadings might motivate the prosecution of actions based on insurance proceeds and not the merits and this would encourage strike suits and be inconsistent with the policy underpinning the statutory misrepresentation claim.

[28] With respect, I do not see how the disclosure of insurance policies encourages strike suits, nor do I see how disclosure of insurance would have any adverse impact on the statutory regime.

[29] In *Ainslie v. C.V. Technolgies Inc.*, (2008), 93 O.R. (3d) 200 at paras. 10-15, Justice Lax reviewed the legislative history to Part XXIII.1 of the Act, including the Allen Committee Report, and she concluded that the purpose of the leave motion (which was not suggested by the Allen Committee) was to prevent strike suits.

[30] The statutory leave test under s. 138.8 of the Act, which Justice Van Rensburg discusses in considerable depth in *Silver v. Imax Corp*, [2009] O.J. No. 5573 (S.C.J.), provides that the court shall grant leave only where it is satisfied that (a) the action is brought in good faith, and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. Thus the test for leave probes the merits of the proposed action.

[31] The presence or absence of insurance, however, is usually irrelevant to the merits of a lawsuit. It is precisely because of this irrelevancy that it was necessary to add rules 30.02 (3) and 31.06 (4) to the Rules of Civil Procedure to provide for the disclosure of insurance policies. The disclosure of insurance policies will not assist Mr. Sharma in obtaining leave to prosecute an action under Part XXIII.1 of the Act. All the disclosure of information, might do is encourage him to have informed settlement discussions or dissuade him from even seeking leave because of concerns about whether there was a collectable financial recovery.

[32] In *Ainslie v. C.V. Technolgies Inc.*, *supra*, Justice Lax stated that the essence of the leave motion was that the putative plaintiff was required to demonstrate the propriety of his or her claim before the defendant was required to respond. I agree with Justice Lax, but I note that the disclosure of the insurance policies will not assist Mr. Sharma in obtaining leave because the presence or absence of insurance is irrelevant to the propriety of his claim.

[33] In *Ainslie v. C.V. Technolgies Inc.*, Justice Lax stated that there is no onus on the proposed defendants to assist the plaintiff in securing evidence upon which to base an action under Part XXIII.1. Again I agree, but I point out again that the disclosure of insurance does not provide evidence upon which to base an action under Part XXIII.1 of the Act.

[34] In *Silver v. IMAX Corporation*, *supra*, Justice Van Resburg confirmed that there is no discovery of the defendant before the leave motion. I agree, but the purpose of precluding discovery before the leave motion is to preclude the putative plaintiff from "fishing for facts" that would support what was a speculative lawsuit of the strike suit type. Asking for disclosure of insurance information, however, is not fishing for facts but rather provides information for entirely different purposes.

[35] Once again, with due respect to Mr. Allen's argument, it seems unlikely to me that a litigant would be encouraged to advance a baseless lawsuit for which leave is required because he or she might obtain early disclosure of the proposed defendant's insurance policies. Contrary to Mr. Allen's argument, in the context of misrepresentation claims, the stimulant is not the possible presence of insurance but the stimulant for the strike suit is the presence of a plaintiff suffering a loss, a scapegoat defendant, and the plaintiff rushing to the courthouse without considering the merits of the claim.

[36] Put shortly, admitting the evidence of the public policy argument, I am not convinced by it, and I conclude that Mr. Sharma's motion should be granted, and

therefore, the Timminco Defendants are ordered to produce the information that should be produced under rules 30.02 (3) and 31.06 (4).

[37] If the parties cannot agree on the matter of costs, they may make submissions in writing beginning with Mr. Sharma within 20 days of the release of these Reasons for Decision followed by the Timminco Defendants' submissions within a further 20 days.

[38] Order accordingly.

Perell, J.

Released: February 3, 2010

111

CITATION: Sharma v. Timminco, 2010, ONSC 790
COURT FILE NO.: 09-CV-378701CP
Date: February 3, 2010

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Ravinder Kumar Sharma

Plaintiff

- and -

Timminco Limited, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Dr. Heinz Schimmerlbusch, Robert Dietrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich and John P. Walsh

Defendants

REASONS FOR DECISION

Perell, J.

Released: February 3, 2010

TAB E

This is Exhibit "E" referred to in the
affidavit of Victoria Paris
sworn before me, this 8th
day of MARCH 2012

A COMMISSIONER FOR TAKING AFFIDAVITS

113

CITATION: Sharma v. Timminco Ltd. et al 2010 ONSC 2395
COURT FILE NO.: 79/2010
DATE: 20100422

SUPERIOR COURT OF JUSTICE – ONTARIO – DIVISIONAL COURT

RE: RAVINDER KUMAR SHARMA,

Plaintiff (Respondent on Motion)

AND:

TIMMINCO LIMITED, PHOTON CONSULTING LLC, ROGOL ENERGY CONSULTING LLC, MICHAEL ROGOL, Dr. Heinz SCHIMMELBUSCH, ROBERT DIETRICH, RENE BOILVERT, ARTHUR R. SPECTOR, JACK MESSMAN, JOHN C. FOX, MICHAEL D. WINFIELD, MICKEY M. YAKSICH and JOHN P. WALSH

Defendants/Applicants on Motion

BEFORE: McCOMBS J.

COUNSEL: Alan D'Silva and Simon Bieber for the Defendants/Applicants

James C. Orr and Victoria Paris for the Plaintiff/Respondent

HEARD: April 12, 2010

RELEASED: April 22, 2010

McCOMBS J.

ENDORSEMENT

Introduction

[1] This is a motion for leave to appeal the interlocutory order of Perell J. dated February 3, 2010 (reported at [2010] O.J. No. 469), ordering the Timminco defendants to produce their insurance policies to the plaintiffs. The order was made under the authority of s. 12 of the Class Proceedings Act which confers broad discretionary power upon the court dealing with a class action proceeding to make orders it considers appropriate and just.

[2] I have concluded that the motion should be dismissed.

Overview

[3] The underlying dispute involves a proposed class action under the *Class Proceedings Act*, 1992 S.O. 1992, C.5 ("*CPA*"). Perell J. has been managing this matter and on October 29, 2009, in a decision reported at [2009] O.J. 4511, he decided a carriage motion determining that the law firm of Kim Orr PC would have carriage of the class action proceedings.

[4] The proposed class action involves, among others, a common law negligent misrepresentation claim against the Timminco Limited defendants, and also a statutory misrepresentation claim under part XXIII.1 of the Ontario Securities Act., R.S.O. 1990, c.C.5. The statutory claim requires leave under s. 138.8 of the OSA. The class action certification hearing and the s. 138.8 leave application are to be heard together, but the hearing has not yet been scheduled.

[5] As noted by Perell J. at para. 3 of the decision under appeal, "after the carriage motion, notwithstanding having this information, Mr. Sharma's lawyers asked the Timminco defendants to disclose any insurance policies that provided coverage for the litigation". The Timminco defendants' refusal to do so led to the motion before Perell for production and the subsequent order which is the subject of this application for leave to appeal.

[6] At the hearing that gave rise to the order now under appeal, the Timminco defendants conceded that "under the court's authority provided by s. 12 of the *Class Proceedings Act, 1992*, the court has the jurisdiction to make an order requiring the production of the insurance policies at this early stage of the proceedings". (See decision under review, at para. 13)

[7] S. 12 of the *CPA* confers broad discretionary powers upon a class proceedings judge. It provides:

> The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 1992, c. 6, s. 12.

[8] The narrow issue before Perell J. concerned whether the defendants should be required to provide information about insurance coverage available to some of the defendants in their proposed class action. Perell J. said that they were required to disclose the information.

[9] The defendants now apply under Rules 62.02(4)(a) and (b) for leave to appeal Perell J's order.

Discussion

[10] Rules 62.02(4)(a) & (b) provide that leave to appeal to the Divisional Court shall not be granted unless:

> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

Have the criteria in either R. 62.02(4)(a) or (b) been met?

[11] The moving parties submit that the motion judge erred in rejecting the submission that ordering the disclosure of insurance information prior to discoveries and at this early stage in the process should be done only in exceptional circumstances. They further submit that there is good reason to doubt the correctness of the motion judge's conclusion. Finally, they submit that the issue is of sufficient general importance that leave to appeal should be granted.

[12] The moving parties rely on *Stern v. Imasco* [1999] O.J. No. 4235; 1 B.L.R. (3d) 198; 38 C.P.C. (4th) 34; 92 A.C.W.S. (3d) 756 (S.C.J.). At para. 35 of *Stern*, Cumming J. noted that under s. 35 of the *CPA*, "the rules of court apply to class proceedings", and that under s. 15(1) of the *CPA*, the "parties to a class proceeding have the same rights of discovery under the rules of court against one another as they would have in any other proceeding." After reproducing s. 12 of the *CPA*, Cumming J. stated, at paras. 27-29:

> **27** In my view, to the extent that it is necessary, the discretion conferred by s. 12 of the *CPA* is intended to supplement the Rules by accommodating the special nature of class proceedings. However, s. 12 is not designed to circumvent the normative Rules.
>
> **28** It is not normal under the Rules to provide pre-discovery disclosure of information and documentation: Endean v. Canadian Red Cross [1997] B.C.J. No. 295 (B.C.S.C.) at paras. 6-10; Matthews v. Servier Canada [1999] B.C.J. No. 435 (B.C.S.C.) at paras. 12-14, 17. Section 12 confers a broad discretion upon the court to depart from the Rules. This would require extraordinary circumstances due to the specific "class" nature of the proceedings. Otherwise, the usual rules of court apply.
>
> **29** There is no evidence in the case at hand to suggest that the alleged "class" nature of the claim calls for any departure from the discovery procedures set out in the Rules. Accordingly, in my view, the plaintiff is not entitled to additional or accelerated rights of discovery under s. 12 of the *CPA*.

[13] I read the analysis of Cumming J. as essentially stating that although s. 12 of the *CPA* confers broad discretion to depart from the Rules, it would not be appropriate to do so unless there are extraordinary circumstances with respect to the "specific 'class' nature" of the proceedings. Cumming J. went on in para. 29 to conclude that the "class" nature of the proceedings in the case before him did not call for any departure from the discovery procedure set out in the Rules.

[14] In the ruling under consideration here, Perell J. provided, at paras. 8-11, a thoughtful and learned discussion of the Rules and practice respecting the timing of production of documents, including insurance policy information. At the conclusion of this discussion, he stated at para. 11:

> Formerly, the affidavit of documents was delivered within 10 days after the close of pleadings. Rule 30.03(1) no longer specifies the timing, and instead, rule 29.1 sets out the requirement that the parties prepare a discovery plan. Under rule 29.1.03(2), "the discovery plan shall be agreed to before the earlier of, (a) 60 days after the close of pleadings or such longer period as the parties may agree to; and (b) attempting to obtain the evidence." (emphasis added)

[15] Perell J.'s decision to order production at this early stage was based on practical, common-sense considerations, as his observations in paras. 12-18 demonstrate:

> **12** The proposed class action is some distance away from the close of pleadings and oral examinations for discovery. There are pending amendments to the statement of claim to add a new proposed representative plaintiff, and there is the yet to be arranged motion for leave under the *Ontario Securities Act* for the statutory misrepresentation claim, which, if granted, will precipitate further amendments to the statement of claim. Further, as in the case at bar, it is not uncommon in class proceedings that the statement of defence is not demanded until after the outcome of the certification motion is determined.
>
> **13** Thus, technically speaking, Mr. Sharma's request for the insurance policy information is premature. However, there is precedent that supports the early production of insurance policies. In *Pysznyj v. Orsu Metals Corporation* (May 21, 2009, London File No. 59650CP), Justice Rady ordered insurance policies produced in a proposed class action. Further, it was conceded by the Timminco Defendants that under the court's authority provided by s. 12 of the *Class Proceedings Act, 1992*, the court has the jurisdiction to make an order requiring the production of the insurance policies at this early stage of the proceedings.
>
> **14** Although the Timminco Defendants do not say that they would be harmed, prejudiced, or even inconvenienced by the early production of the insurance policies, they submit that the court ought not to make the production order for two reasons.
>
> **15** First, the Timminco Defendants submit that the order should be made only in extraordinary circumstances; however, in the case at bar, they submit that given what Mr. Sharma's counsel already knows about the insurance coverage, there are no extraordinary circumstances. Moreover, the Timminco Defendants submit that an early order for production is unnecessary because Mr. Sharma and his lawyers already have all the information they currently need.
>
> **16** Second, the Timminco Defendants submit that it would be contrary to the public policy associated with the proper operation of Part XXIII.1 of the *Ontario Securities Act* to order the production of the insurance information before the leave motion is decided.
>
> **17** I disagree with both submissions.
>
> **18** I see no basis in principle, precedent, or based on the facts of this case for the conclusion that the early production of the insurance policies must be justified by extraordinary or special circumstances.

[16] A fair reading of Perell J.'s reasons reveals that he undertook the very type of careful balancing of competing interests and nuanced evaluation that is required of a judge dealing with the complexities involved in managing a proposed class action proceeding.

[17] I have not been persuaded that either of the criteria in Rule 62.02(4) have been met in this case. I do not read the views of Cumming J. as differing from those of Perell J. on any significant matter of principle. Any differences in approach taken by Cumming J. and Perell J. were, in my view, fact-driven. Moreover, there is no good reason to doubt the correctness of Perell J.'s ruling. On the contrary, as I have indicated, Perell J.'s reasons show that he brought a creative and practical approach to this issue early in the proceedings because in his judgment, a ruling requiring production of the insurance policies at this early stage did not prejudice the defendants; was consistent with to the purposes and objectives of the *CPA*; and was in the interests of moving the litigation forward. Although Perell J. departed from normal practice concerning disclosure of insurance documents, he did so for solid, practical reasons; moreover, he did not ignore the Rules of Civil Procedure in doing so.

[18] As I have already noted, the parties conceded before Perell J. that he had jurisdiction under s. 12 of the *CPA* to make the order sought. S. 12 confers broad discretion on a judge to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". Perell J. acted in the exercise of the discretion conferred by s. 12 of the *CPA*.

[19] It is trite to state that a decision of an experienced class action judge is entitled to substantial deference: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 at para. 33 (C.A.) , rev'g (2005), 78 O.R. (3d) 39 (Div. Ct.) , which aff'd (2004), 71 O.R. (3d) 741, (S.C.J.), leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Cassano v. Toronto-Dominion Bank* (2008), 87 O.R. (3d) 401 (C.A), at para. 23, rev'g [2006] O.J. No. 2930 (Div. Ct.), which aff'd [2005] O.J. No. 845 (S.C.J), leave to appeal to S.C.C. ref'd [2008] S.C.C.A. No. 15; *Ayrton v. PRL Financial (Alta.) Ltd.*, [2006] A.J. No. 296 (C.A.) at para. 3

[20] The court will be reluctant to interfere with the exercise of judicial discretion on the part of a case management judge in the context of complex litigation: *Halvorson v. British Columbia (Medical Services Commission)* [2008] B.C.J. No. 2364 (B.C.C.A.) at para. 17.

[21] The motion for leave to appeal is dismissed.

[22] In light of the result, and in accordance with counsel's agreement, I order costs be paid to the successful party, the plaintiff/responding party by the defendants/moving parties, fixed at $10,000 payable forthwith.

McCOMBS J.

Date: April 22, 2010

TAB F

This is Exhibit "F" referred to in the
affidavit of Victoria Paris
sworn before me, this 8th
day of MARCH 2012

A COMMISSIONER FOR TAKING AFFIDAVITS

STIKEMAN ELLIOTT

119

Stikeman Elliott LLP Barristers & Solicitors

5300 Commerce Court West, 199 Bay Street, Toronto, Canada M5L 1B9
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Alan L. W. D'Silva
Direct: (416) 869-5204
E-mail: adsilva@stikeman.com

BY FACSIMILE & EMAIL

June 7, 2010
File No. : 121219.1009

WITHOUT PREJUDICE

James Orr
Kim Orr Barristers P.C.
200 Front Street West, Suite 2300
Toronto, ON M5V 3K2

Dear Jim:

Re: Sharma v. Timminco Limited et al.
Court File No. CV-09-378701-00CP

I am writing further to your letter dated June 3, 2010. I only intend to respond to the last paragraph of your letter, as the other issues are covered in my letter of May 28, 2010, or are otherwise irrelevant for current purposes.

Our clients have asked us to inform you that they are always willing to engage in reasonable settlement negotiations, having regard to the merits of the case. As you can now appreciate, we are instructed by multiple clients and their respective insurers who are well versed in complicated litigation matters. Our clients will weigh the settlement value of this case based on the factual and expert evidence your clients advance. They simply cannot assess the case based on broad and vague allegations from a pleading. In this regard, we look forward to receiving the without prejudice expert evidence as discussed.

Yours truly,

Alan L. W. D'Silva

/kb

cc: Won Kim, *Kim Orr Barrister P.C.*
Victoria Paris, *Kim Orr Barrister P.C.*
Patrick O'Kelly, *Stikeman Elliott LLP*

TAB G

This is Exhibit "G" referred to in the affidavit of Victoria Paris sworn before me, this 5th day of MARCH 2012

A COMMISSIONER FOR TAKING AFFIDAVITS

121

STIKEMAN ELLIOTT

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5300 Commerce Court West, 199 Bay Street, Toronto, Canada M5L 1B9
Tel: (416) 869-5500 Fax: (416) 947-0866 www.stikeman.com

FAX

2 pages including this one
If transmission is not clear or complete, please call Kelly Luis at (416) 869-7736 or call the fax operator at (416) 869-5609

Date:	March 4, 2011	**File No.:**	121219.1009
To:	Jim C. Orr Won J. Kim Victoria Paris		
Firm:	Kim Orr Barristers P.C.		
City:	Toronto		
Fax No:	(416) 598-0601		
From:	Alan L. W. D'Silva		adsilva@stikeman.com
Tel:	(416) 869-5204		
Fax No:	(416) 947-0866		

Please see attached.

TORONTO
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5693193 v1

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BY FACSIMILE

March 4, 2011

WITHOUT PREJUDICE

Won J. Kim
Kim Orr Barristers P.C.
200 Front Street West, 23 Floor
P.O. Box 45, Toronto, ON M5V 3K2

Dear Mr. Kim:

Re: Timminco et al ats. Sharma
Court File No. CV-09-378701-00CP

We write regarding our clients' position on the without prejudice materials delivered to our firm on December 13, 2010.

On May 20, 2010, prior to your receipt of any information relating to the insurance policies, you sent us an email and advised that any settlement would have to include the whole limits of the insurance policies with any monies spent on defence costs to be paid by our client(s). By way of letter dated May 28, 2010, we advised you that your position was, amongst other things, wholly disproportionate in the context of the merits of the claim and, in particular, the complete absence of any supporting information to back up the serious allegations in the Statement of Claim and that, accordingly, our clients rejected your proposal to discuss settlement on the terms that you indicated.

On June 2, 2010, you advised Patrick O'Kelly that you would provide us with without prejudice expert material for our clients' review in order to provide a potential basis for conducting settlement discussions. You made no request for any tolling agreement at that time and, in fact, Mr. O'Kelly stated that any settlement discussions should proceed on a "parallel track" to the ongoing litigation. By way of letter dated June 3, 2010, you acknowledged that we had advised you that our clients required that motions be heard regarding the substitution of plaintiffs and the demand for particulars.

On December 13, 2010, we received the without prejudice material. At that time you advised that you reserved the right to amend these materials for the purposes of the motions for certification and leave and, moreover, were not in a position to engage in settlement discussions until you had resolved the question of

replacing the representative plaintiff. You again requested our client's consent to the replacement of the representative plaintiff despite the fact that, on June 10, 2010, we wrote your firm a detailed letter advising you that we did not have enough information on the proposed representative plaintiffs to consent to the motion to substitute and, in particular, would need current affidavit evidence from Mr. Pennyfeather and Mr. Gowan in order to assess whether we would consent to the substitution of Mr. Sharma with the proposed representative plaintiffs.

By way of letter dated February 10, 2011, you then demanded our clients' position with respect to the without prejudice material, in eight days (by February 18, 2011), failing which you would serve the leave and certification material, as well as a motion to add parties and would schedule a case conference. We responded that same day and advised you that our clients' experts were reviewing your material and that we would be in a position to advise you of our clients' position by the end of March 2011. You now seem to be unilaterally linking the without prejudice material to the limitation problem.

In light of the history of the proceeding and your recent positions, and after further consideration of the without prejudice material, we can now advise you that our clients are not willing to engage in settlement discussions at this time.

Yours truly,

Alan L. W. D'Silva

/kb

cc: James C. Orr, *Kim Orr Barristers P.C.*
Victoria A. Paris, *Kim Orr Barristers P.C.*
Patrick O'Kelly, *Stikeman Elliott LLP*

TAB H

This is Exhibit "H" referred to in the
affidavit of Victoria Paris
sworn before me, this 8th
day of March 20 17

A COMMISSIONER FOR TAKING AFFIDAVITS

125

STIKEMAN ELLIOTT

Stikeman Elliott LLP Barristers & Solicitors

5300 Commerce Court West, 199 Bay Street, Toronto, Canada M5L 1B9
Tel: (416) 869-5500 Fax: (416) 947-0866 www.stikeman.com

FAX

2 pages including this one
If transmission is not clear or complete, please call Kelly Luis at (416) 869-7736 or call the fax operator at (416) 869-5609

Date: March 4, 2011 **File No.:** 121219.1009

To: Jim C. Orr
Won J. Kim
Victoria Paris
Firm: Kim Orr Barristers P.C.
City: Toronto
Fax No: (416) 598-0601

From: Alan L. W. D'Silva adsilva@stikeman.com
Tel: (416) 869-5204
Fax No: (416) 947-0866

Please see attached.

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BY FACSIMILE

March 4, 2011

Won J. Kim
Kim Orr Barristers P.C.
200 Front Street West, 23 Floor
P.O. Box 45, Toronto, ON M5V 3K2

Dear Mr. Kim:

Re: Timminco et al ats. Sharma
Court File No. CV-09-378701-00CP

We write regarding your email dated February 25, 2011 wherein you request that the defendants consent to a tolling of the limitation period under subsection 138.14 of the *Securities Act*.

We can advise you that our clients are not willing to consent to the tolling of any limitation periods. Moreover, contrary to your email, there is no basis to link the limitation issues to the without prejudice materials that you sent to us on December 13, 2010. At no time has there been an agreement of any kind in respect of the limitation issues and our client will not now agree to a tolling agreement, particularly where you have failed to take any steps to add the representative plaintiff(s) and address the demand for particulars that was delivered to you on December 11, 2009.

In this regard, we note that on June 10, 2010, we wrote a detailed letter to Mr. Orr advising that we did not have enough information on the proposed representative plaintiffs to consent to the motion to substitute and, in particular, we advised that we would need current affidavit evidence from Mr. Pennyfeather and Mr. Gowan in order to assess whether we would consent to the substitution of Mr. Sharma with the proposed representative plaintiffs. A copy of that letter is attached. We also advised that the proposed amendments to the Statement of Claim do not address the Timminco Defendants' Demand for Particulars, as was specifically considered and discussed before Justice Perell during the November 25, 2009 case conference. The Timminco Defendants' Demand for Particulars was delivered to you on December 11, 2009. To date, we have not received any further affidavits from Mr. Pennyfeather or Mr. Gowan nor a response to our clients' Demand for Particulars.

Yours truly,

Alan L. W. D'Silva

/kb

cc: James C. Orr, *Kim Orr Barristers P.C.*
Victoria A. Paris, *Kim Orr Barristers P.C.*
Patrick O'Kelly, *Stikeman Elliott LLP*

TAB I

This is Exhibit "F" referred to in the
affidavit of Victoria Parris
sworn before me, this 6th
day of March 2012

A COMMISSIONER FOR TAKING AFFIDAVITS

129

CITATION: Sharma v. Timminco Limited 2011 ONSC 2040
COURT FILE NO.: 09-CV-378701CP
DATE: March 31, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Ravinder Kumar Sharma

Plaintiff

- and -

Timminco Limited, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Dr. Heinz Schimmerlbusch, Robert Dietrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich, and John P. Walsh

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:
Won J. Kim, Victoria Paris, and Norman Mizobuchi for the Plaintiff
Alan L. W. D'Silva and John Finnigan for the Defendants Timminco Limited, Dr. Heinz Schimmerlbusch, Robert Dietrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, and Mickey M. Yaksich
Paul Le Vay for the Defendants Photon Consulting LLC, Rogol Energy Consulting LLC and Michael Rogol
Robert W. Staley for the Defendant John P. Walsh

HEARING DATE: March 25, 2011

PERELL, J.

REASONS FOR DECISION

A. *Introduction and Overview*

[1] On May 14, 2009, Ravinder Sharma commenced a proposed class action about alleged misrepresentations affecting the secondary market value in shares of Timminco Limited. The action was against Timminco Limited, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Dr. Heinz Schimmerlbusch, Robert Dietrich,

René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich, and John P. Walsh.

[2] Mr. Sharma retained the Kim Orr P.C. law firm as his lawyers of record.

[3] Mr. Sharma now brings a motion for: (1) an order that he be removed as plaintiff and St. Clair Pennyfeather be substituted; (2) an order declaring that the limitation period in s. 138.14 of the *Securities Act*, R.S.O. 1990, s. S.5 is suspended pursuant to s. 28 of the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6; or (3) "conditional leave" to commence an action under section 138.3 of the *Securities Act*.

[4] At the hearing, Mr. Sharma abandoned his request for "conditional leave" and at the hearing, the Defendants did not oppose an order substituting Mr. Pennyfeather for Mr. Sharma, subject to certain terms that, in turn, were unopposed by Mr. Sharma.

[5] The motion narrowed and the argument at the hearing focused on Mr. Sharma's request for an order declaring that the limitation period in s. 138.14 of the *Securities Act* is suspended pursuant to s. 28 of the *Class Proceedings Act, 1992*.

[6] The recasting of the motion at the hearing reduced the need of the parties to discuss the particular factual background of the case at bar and elevated the debate to the plane of interpreting the operation of s. 28 of the *Class Proceedings Act, 1992* generally. The general issue became, how does s. 28 of the *Class Proceedings Act, 1992* operate in a case where an action requires leave under s. 138.8 of the *Securities Act*?

[7] For the reasons set out below, my answer to that question is that if a statement of claim in a proposed class action mentions an action provided for under Part XXIII.1 of the *Securities Act*, which includes an action for which leave is required under s.138.8 of the *Act*, then s. 28 of the *Class Proceedings Act, 1992* becomes operative and s. 28 suspends the operation of the limitation period found in s. 138.14 of the *Securities Act*.

[8] To explain my order and my reasons, I will next discuss the factual background that gives rise to the order to replace Mr. Sharma and the reasons why Mr. Sharma, before his departure as plaintiff, seeks a declaration about the operation of s. 28 of the *Class Proceedings Act, 1992*. Then, I will address the terms of the order that will provide for Mr. Sharma's departure and for the introduction of Mr. Pennyfeather as Plaintiff. The Reasons will then turn to the parties' arguments and my own analysis of the operation of s. 28 of the *Class Proceedings Act, 1992* as it intersects with the operation of the *Securities Act*. I will include with some directions about costs and about the further carriage of this action.

B. Factual Background

[9] In the action, Mr. Sharma alleged that the Defendants made misrepresentations in Timminco's public documents, in public oral statements, and in expert opinions. These misrepresentations are alleged to have been made beginning on or about March 17, 2008 and continuing until November 11, 2008.

[10] Mr. Sharma's Statement of Claim alleges common law negligence and negligent misrepresentation. The claim is for more than $500 million plus punitive damages. The pleading indicates that claims will be made pursuant to the statutory cause of action provided by Part XXIII.1 (secondary market disclosure) of the *Securities Act*. To be more precise, in paragraph 2 (e) of his Statement of Claim, Mr. Sharma pleads:

> 2. The Plaintiff claims on his own behalf and on behalf of other Class Members: ...
>
> (e) an order allowing the Plaintiff to amend this Statement of Claim to assert the right of action provided for in Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5.

[11] Mr. Sharma then mentions Part XXIII.1 of the *Securities Act* in para. 117 of his Statement of Claim, which states:

> PART XXIII.1 OF THE *SECURITIES ACT*
>
> 117. The Plaintiff intends to deliver a notice of motion seeking, among other things, an Order permitting the Plaintiff to assert the statutory causes of action particularized in Part XXIII.1 of the *Securities Act*, and if granted, to amend this Statement of Claim to plead these causes of action.

[12] Mr. Sharma defined the class for his proposed class proceedings as "all persons, other than the Excluded Persons" who acquired securities of Timminco between March 17, 2008 through November 11, 2008.

[13] Mr. St. Clair Pennyfeather is a member of the class defined in Mr. Sharma's Statement of Claim. Mr. Pennyfeather bought 10 shares of Timminco on May 9, 2008, 12 shares on May 21, 2008, and 35 shares on September 3, 2008. He still holds the shares, which are now penny stocks.

[14] The Defendants have some questions about whether Mr. Sharma was a class member, but for present purposes I need not decide this factual point, and whether this point needs to be determined will also await another day.

[15] On June 11, 2009, Robert Gowan commenced a similar proposed class action. In that action, Siskinds LLP was the lawyer of record. With two rival class proceedings, a motion to determine who should have carriage was commenced. Between June and October 2009, Kim Orr and Siskinds were preoccupied with this carriage fight

[16] In mid-July 2009, before the carriage motion was heard, Mr. Sharma advised his lawyers of record that he was concerned that his work on the Ontario Judicial Council would interfere with his ability to serve as an adequate representative plaintiff and he requested that he eventually be removed.

[17] Mr. Pennyfeather swore an affidavit for the carriage motion in anticipation of eventually becoming a representative plaintiff.

[18] On October 29, 2009, I granted carriage of the proposed class proceedings to Mr. Sharma and stayed Mr. Gowan's action. See *Sharma v. Timminco Ltd.* (2009), 99 O.R. (3d) 260 (S.C.J.).

[19] On January 22, 2010, Mr. Sharma brought a motion at a date to be determined for his withdrawal as representative plaintiff and for the substitution of Messrs. Pennyfeather and Gowan as plaintiffs. The motion record did not contain affidavits from Messrs. Sharma, Pennyfeather, or Gowan, but it did contain a proposed Amended Statement of Claim in which Mr. Ponnyfeather was a plaintiff.

[20] On January 28, 2010, Mr. Sharma brought a motion for disclosure from the Timminco Defendants of their insurance policies.

[21] On February 3, 2010, I granted Mr. Sharma's motion; see: *Sharma v. Timminco Ltd.*, [2010] O.J. No. 469 (S.C.J.), and the Timminco Defendants shortly moved for leave to appeal.

[22] On April 22, 2010, Justice McCombs refused leave. See *Sharma v. Timminco Ltd.*, [2010] O.J. No. 2161 (Div. Ct.).

[23] Between April 2010 and March 2011 depending on their differing perspectives, Mr. Sharma's action was perceived as active or it was perceived as inactive and inexcusably dormant.

[24] From Mr. Sharma's perspective during this period, he was energetically engaged in settlement discussions with the Timminco Defendants, who are Timminco Limited, Dr. Heinz Schimmerlbusch, Robert Dietrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, and Mickey M. Yaksich with much less attention been given to the Photon Defendants, who are Photon Consulting LLC, Rogol Energy Consulting LLC and Michael Rogol, and to the Defendant Mr. Walsh.

[25] From the perspective of the Timminco Defendants, during the 12 months between April 2010 and March 2011, they were willing to entertain settlement negotiations but without relieving Mr. Sharma from the risks of not promptly advancing his proposed class proceeding or the risks of not promptly seeking the leave required by the *Securities Act*.

[26] From the perspectives of the Photon Defendants and Mr. Walsh, the proposed class action has been dormant or inactive since the carriage motion in the fall of 2009.

[27] For present purposes, because of how the issues have narrowed, it is not necessary for me to resolve whose perspective is correct, nor is it necessary to resolve the merits of the finger pointing and the barbs of the competing lawyers about the proper carriage of the proceedings.

[28] For present purposes, what is important is that for whatever reasons, after the carriage motion in the fall of 2009, Mr. Sharma: (a) did not set down his motion to substitute Mr. Pennyfeather; (2) did not deliver his motion material for leave under the

Securities Act; and (3) did not deliver his motion material for certification under the *Class Proceedings Act, 1992*.

[29] For present purposes, what is also important is that around the end of February 2011, Mr. Sharma and his lawyers recalled that his action involved alleged misrepresentations made on March 17, 2008. The third anniversary of those alleged misrepresentations was shortly to be celebrated and this prompted Mr. Sharma and his lawyers to request a case conference to deal with the prospect that there might be a limitation period problem in advancing Class Members' claims.

[30] On March 10, 2011, there was a case conference, and I made the following direction:

> This is a case conference to respond to the plaintiff's request to accelerate the leave motion under the *Securities Act* and the certification motion because of the possibility of a limitation period defence becoming available, which may or may not be the case. It would not be procedurally fair to agree to this request. However, certain steps can be taken in the short term that may address the risk and that need to be done in any event. I, therefore, direct the plaintiff to bring a motion to join new plaintiffs and to seek conditional leave of the court to commence an action under the *Securities Act*. The plaintiff's material shall be delivered before noon on March 14, 2011. Responding materials shall be delivered before noon on March 18, 2011. No factums are required. Cross-examinations to take place between March 18 and March 23, 2011.

[31] The parties followed the direction and also delivered factums, for which I am grateful, and the motion was argued on March 25, 2011.

[32] The factums had the effect of narrowing the issues, and as I noted at the outset of these reasons, the parties focused their attention on the operation of s. 28 of the *Class Proceedings Act, 1992*.

C. ***The Motion to Substitute Mr. Pennyfeather for Mr. Sharma***

[33] As I noted at the outset, the Timminco Defendants and the Photon Defendants do not oppose the substitution of Mr. Pennyfeather effective March 25, 2011, provided that the substitution is without prejudice to their respective rights to assert that both Mr. Sharma and also Mr. Pennyfeather are not or never have been an appropriate representative plaintiff. The Defendant Mr. Walsh takes no position with respect to the request that Mr. Pennyfeather be substituted for Mr. Sharma.

[34] Accordingly, I make the following order: (1) Mr. Sharma shall be removed as plaintiff effective March 25, 2011; (2) Mr. Pennyfeather shall be added as plaintiff effective March 25, 2011; (3) the style of cause and statement of claim shall be amended accordingly; and (4) this order is without prejudice to the rights of the parties to assert or challenge respectively whether Mr. Sharma and Mr. Pennyfeather qualify as plaintiffs or representative plaintiffs under the *Class Proceedings Act, 1992*.

D. Discussion

a. The Relevant Statutory Provisions

[35] I turn now to the major issue that preoccupied this motion and which concerns the interaction of s. 28 of *Class Proceedings* Act, *1992* with the limitation period found in Part XXIII.1, s. 138.8 of the *Securities Act* and the leave requirement found in s.138.14 of that Act.

[36] In order to discuss that major issue, it is also necessary to discuss the interaction of s. 28 of the *Class Proceedings Act, 1992* with the limitation period found in Part XXIII.1, s. 138 of the *Securities Act,* which bars a statutory cause of action for which no leave requirement is imposed.

[37] Section 28 of the *Class Proceedings Act, 1992* states:

> *Limitations*
>
> 28. (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,
>
> (a) the member opts out of the class proceeding;
>
> (b) an amendment that has the effect of excluding the member from the class is made to the certification order;
>
> (c) a decertification order is made under section 10;
>
> (d) the class proceeding is dismissed without an adjudication on the merits;
>
> (e) the class proceeding is abandoned or discontinued with the approval of the court; or
>
> (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.
>
> *Idem*
>
> (2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

[38] Section 138.8 of the *Securities Act* states:

> *Leave to proceed*
>
> 138.8 (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,
>
> (a) the action is being brought in good faith; and

(b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

Same

(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

Same

(3) The maker of such an affidavit may be examined on it in accordance with the rules of court.

[39] Section 138.14 of the *Securities Act* states:

Limitation period

138.14 No action shall be commenced under section 138.3,

(a) in the case of misrepresentation in a document, later than the earlier of,

(i) three years after the date on which the document containing the misrepresentation was first released, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

(b) in the case of a misrepresentation in a public oral statement, later than the earlier of,

(i) three years after the date on which the public oral statement containing the misrepresentation was made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same misrepresentation; and

(c) in the case of a failure to make timely disclosure, later than the earlier of,

(i) three years after the date on which the requisite disclosure was required to be made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same failure to make timely disclosure.

[40] Section 138 of the *Securities Act*, which is applicable to the cause of action set out in s. 130 of the Act states:

Limitation periods

138. Unless otherwise provided in this Act, no action shall be commenced to enforce a right created by this Part more than,

(a) in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action; or

(b) in the case of any action, other than an action for rescission, the earlier of,

(i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or

(ii) three years after the date of the transaction that gave rise to the cause of action.

b. *The Competing Arguments about the Application of s. 28 of the Class Proceedings Act, 1992*

[41] Relying on my decision in *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596 and of Justice Winkler and of the Court of Appeal in *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (C.A.), which judgments, I will discuss later, Mr. Sharma argues that the limitation period in s. 138.14 of the *Securities Act* was suspended by s. 28 of the *Class Proceedings Act, 1992*.

[42] Mr. Sharma's argument is that: (a) s.28 (1) of the *Class Proceedings Act, 1992* suspends any limitation period applicable to a cause of action asserted in a class proceeding; (b) s.138.3 of the *Securities Act* is a cause of action; (c) s.138.8 of the *Securities Act* is a limitation period applicable to the s. 138.3 cause of action; (c) the s.138.3 cause of action has been asserted with the commencement of Mr. Sharma's class proceeding because the action is mentioned in the statement of claim; therefore, since s.138.8 is a limitation period applicable to a cause of action asserted in a class proceeding, the limitation period was suspended on May 14, 2009 when Mr. Sharma commenced his proposed class action. (The suspension will end and the limitation period will resume running when one of the events listed in s. 29 (1) (a) to (f) is satisfied.)

[43] The Defendants counter-argument is that s. 28 (1) of the *Class Proceedings Act, 1992* does not apply to protect Mr. Sharma's s. 138.3 cause of action from the operation of the s. 138.14 limitation period, because the s. 138.3 cause of action has not and cannot be asserted in the class proceeding until leave is granted under s. 138.14 of the Act, which has not yet occurred. The Defendants submit that the Part XXIII.1 claim cannot be asserted because it has not been commenced.

[44] During the course of the argument, I asked the lawyers for the various Defendants if there was any way that a plaintiff in a proposed class action who wished to assert a claim under Part XXIII.1 of the *Securities Act* could stop the running of the limitation period short of obtaining leave under s. 138.14 of the *Securities Act*. The answer was a categorical no.

[45] It was the Defendants' categorical submission of the Defendants that a Part XXIII.1 cause of action cannot be asserted in a proposed class action without leave having being granted under s. 138.14 of the *Securities Act*.

[46] I asked this question about the manner of pleading because I wanted to determine whether the Defendants were making a technical argument that Mr. Sharma had not asserted his Part XXIII.1 cause of action because of the particular manner in which his pleading refers to or mentions the Part XXIII.1 cause of action. Thus, I asked whether s. 28 of the *Class Proceedings Act, 1992* would have been triggered and the limitation period suspended, if para. 2 (e) of Mr. Sharma's Statement of Claim read:

> 2. The Plaintiff claims on his own behalf and on behalf of other Class Members: ...
>
> (e) the right of action provided for in Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5.

[47] The answer I received was that there was no way that a plaintiff can assert a Part XXIII.1 cause of action without leave having been first granted under 138.14 of the *Securities Act*.

c. ***Analysis and Discussion***

[48] I begin my analysis and discussion by saying that I agree with Mr. Sharma's argument and I disagree with the Defendants' argument.

[49] To explain why I disagree with the Defendants' argument, I begin by noting two problematic consequences of their argument.

[50] First, it follows from the Defendants' argument that the interpretation and operation of s. 28 of the *Class Proceedings Act, 1992* becomes inconsistent. On the one hand, by its express terms, s. 28 applies to "any limitation period applicable to a cause of action" but on the other hand, under the Defendants' interpretation, s. 28 does not apply to a cause of action under Part XXIII.1 of the *Securities Act*.

[51] Under the Defendants' interpretation, s. 28 does not have any meaningful operation for causes of action that have a leave requirement under Part XXIII.1. Visualize, the Defendants argue that before leave is obtained, there is nothing that can be pleaded that would trigger the operation of s. 28, but after leave is obtained, whatever is pleaded will either be timely and toll the limitation period without triggering s. 28 or the pleading will come too late because the limitation period will not have been suspended. Under the Defendants' argument, despite its express language applying to any cause of action, s. 28 does not apply to causes of action that require leave.

[52] A second problematic consequence of the Defendants' argument and interpretation of s. 28 is that s.28 can apply to suspend the three-year absolute limitation period for causes of action under Part XXIII (for the primary market), but s. 28 does not apply to suspend the three-year absolute limitation period for causes of action under Part XXIII.1 (for the secondary market). I see no sense or justification for interpreting s. 28 to operate for Part XXIII causes of action but not Part XXIII.1 causes of action, and, in my opinion, the Defendants did not offer an explanation.

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[53] The Legislature intended both Part XXIII and also Part XXIII.1 causes of action to be advanced in a timely way, and an absolute limitation period applies to both, and the Legislature added a leave requirement for Part XXIII.1 causes of action. The leave requirement, however, serves a different purpose than the temporal purposes of a limitation period.

[54] The leave requirement serves the gatekeeper, qualitative, or substantive purpose of barring frivolous and abusive claims (so-called strike suits), and the leave requirement is never suspended. In other words, there is no reason to remove Part XXIII.1 causes of action from the operation of s.28 of the *Class Proceedings Act, 1992* because of the leave requirement that will remain operative in any event.

[55] In still other words, s. 28 applies to suspend the temporal filter of "any limitation period" and the existence of additional substantive filters, which will be applied in any event is not a reason to diminish the operation of s. 28 of the *Class Proceedings Act, 1992*.

[56] The existence of a leave requirement is a distinction without a difference to the operation of s. 28 of the *Class Proceedings Act*. Had Mr. Sharma sought leave for his Part XXIII.1 cause of action before he commenced his class proceeding, he would have had to satisfy the filter of s. 138.8 of the *Securities Act*. And, in the case at bar, having commenced his class proceeding, he still must subject his Part XXIII.1 cause of action to the filter of s. 138.8 of the *Securities Act*.

[57] It escapes me why the existence of a leave requirement that will be unaffected by s. 28 of the *Class Proceedings Act, 1992* should be a distinction that would differentiate the operation of s. 28 as the Defendants would have it. The Defendants pointed out that the leave requirement was a distinctive feature of some causes of action, but they never explained why this distinction should made a difference to the operation of s. 28 of the *Class Proceedings Act, 1992*.

[58] Returning to the language of s. 28 and other weaknesses or problems with the Defendants' argument, it is important to always keep in mind that s. 28 of the *Class Proceeding Act, 1992* speaks about "a cause of action asserted in a class proceeding" while, in contrast, the leave requirement of s. 138.8 of the *Securities Act* does not speak about "asserting a cause of action" but rather speaks about the commencement of the cause of action; that is, under s. 138.8, "no action may be commenced ... without leave".

[59] The important point to keep in mind is that the legal problem is that of interpreting s. 28, which applies to suspend temporal bars to causes of action, and the legal problem is not how s. 138.8 should be interpreted to apply to a different substantive qualitative bar to a cause of action.

[60] Given that a cause of action exists before litigation is commenced and given that limitation periods begin to operate with the existence of the cause of action precisely to require the timely commencement of litigation, the "assertion of a cause of action" does

not depend upon the commencement of litigation as the Defendants' argument would have it. The Defendants' argument is that a Part XXIII.1 action cannot be asserted in a class proceeding until after leave is granted. This argument conflates the assertion of a cause of action with the litigation (the action or application) that enforces the cause of action.

[61] To make this last point, I return to the Defendants' categorical assertion that there is no Part XXIII.1 cause of action that could be asserted in a statement of claim of a class proceeding before leave was granted under s. 138.8 of the *Securities Act*. Thus, under the Defendants' argument without leave having been first granted under s. 138.8 of the *Securities Act*, the pleading "The Plaintiff claims the right of action provided for in Part XXIII.1 of the *Securities Act*" would not be the assertion of a cause of action. However, in my opinion, claiming the right of action provided by Part XXIII.1 is to assert a cause of action in a class proceeding regardless whether leave has been granted or not under the provisions of the *Securities Act*.

[62] In still another problem, the Defendants' argument defeats the purpose of s. 28 of the *Class Proceedings Act, 1992* which brings me to my judgment in *Coulson v. Citigroup Global Markets Canada Inc.*, which concerned whether a suspension of a Part XXIII cause of action under s. 28 of the *Class Proceedings Act, 1992* had come to an end and the limitation period had resumed running.

[63] In the context of the operation of a cause of action that did not have a leave requirement, I discussed the purpose of s. 28. In the case at bar, the Defendants would have it that the rationale for s. 28 that applies for causes of action without leave does not apply to causes of action for which leave is required. Once again, I disagree with the Defendants; the difference that the Defendants rely on is a distinction that does not make a difference to the rationale for s. 28 of the *Class Proceedings Act, 1992*.

[64] In *Coulson*, I explained the rationale behind s. 28 for Part XXIII causes of action and, in my opinion, the same rationale applies to Part XXIII.1 claims for which leave is an additional requirement. In paragraphs 43 to 45 and 48 to 50, I stated (with new emphasis added):

> 43. The Ontario Law Reform Commission in chapter 17 in its *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) discussed the relationship between limitation periods and class actions and asked the question of what would be the effect, if any, of the putative plaintiff commencing an action before the expiry of the limitation period for his or her cause of action on the limitation periods of the claims of the putative class members. The Commission asked whether time would cease to run for the individual claims and if so, when did this occur: upon the commencement of the class action; upon the granting of certification; or, upon the filing of a motion to intervene?
>
> 44. The Commission decided that statutory guidance was required to answer these questions and that guidance was also required to answer the question of when the limitation period, if suspended, would resume running against absent class members. The Commission explained the policy behind what would become s. 28 of the *Class Proceedings Act, 1992* at pp. 779-80 of its report, as follows:

> [T]he Commission sees the main policy objectives of class actions to be judicial economy and increased access to the courts. A general rule that the commencement of a class action suspends the running of limitation periods against absent class members, whether certification is granted or denied, would serve to promote the most efficient use of judicial resources. If the commencement of a class action did not have this effect, absent class members, where a class suit is filed shortly prior to the expiration of the statutory limitation period, would be forced to institute precautionary individual actions or to file formal motions to intervene as parties in order to preserve their legal rights. Moreover, even where, at the filing of a class action, the running of the limitation period had only commenced, protective measures would still be encouraged. Absent class members would be unsure whether certification would be granted and, in addition, they would be unable to ascertain with certainty the time that would elapse between the filing of the suit and the final resolution of the certification motion, particularly bearing in mind the possibility of appeal proceedings. In our view, such a result would be in direct contradiction to the class action goals of efficiency and economy of litigation.
>
> It is also apparent that this approach would militate against the policy of increased access to the courts and the vindication of small claims. It would be uneconomical for absent class members with individually nonrecoverable claims to incur the expense of filing precautionary motions to intervene. Furthermore, requiring absent class members so to act would frustrate one of our fundamental recommendations. In chapter 12, we recommend that class members should not be required to opt in to a class suit prior to a determination of the common questions in order to protect their right to participate in a favourable judgment. For the reasons advanced in support of that recommendation, we are of the opinion that a class member should not be required to indicate formally his participation in a putative class action in order to avoid the adverse effects of the running of a statute of limitations.
>
> It seems clear to the Commission that the approach that would most clearly further the policies underlying class actions would be one that called for a general suspension of the limitation period upon the commencement of an action in class form. ....

45. Thus, having regard to the access to justice policies of a class action regime, the Ontario Law Reform Commission reasoned that, putative class members injured by a mass wrong should be entitled to wait and see whether a class action would be available to them without fear of the expiry of a limitation period. Further, putative class members should not have to take steps to prevent a limitation period from barring individual causes of action that might turn out to be necessary if a class action was determined to be unavailable. Thus, the Commission recommended that limitation periods should be suspended with the commencement of a class action until the availability of a class action was determined. This recommendation has been implemented by s. 28 of the *Class Proceedings Act, 1992* that provides that: "any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumed running against a class member when ...."

48. I take the Ontario Law Reform Commission to be recommending the proposition that if a putative class member's cause of action is expressly mentioned in the statement of claim of a proposed class action, then that cause of action is suspended until the suspension is lifted by certain events, including a determination that dismisses the asserted cause of action without a determination of its merits. ....

> 49. The purpose of s. 28 of the *Class Proceedings Act, 1992* is to protect class members from the operation of limitation periods until it has been determined whether class members may obtain access to justice through membership in a class proceeding as an alternative to obtaining access to justice by pursuing individual actions. In the absence of s. 28, class members would have to commence a multitude of individual actions and then, if a class action was certified, the class members who have the choice of opting out or of abandoning or having their individual actions stayed. The operation of s. 28 makes it unnecessary for class members to commence multitudes of individual claims by protecting them from the operation of limitation periods until it is determined whether they actually have the option of membership in a class proceeding that mentions their claim.
>
> 50. I would not read into s. 28 of the *Class Proceedings Act, 1992* any qualification to the language "a cause of action asserted in a class proceeding." In the case at bar, a s. 130 claim was asserted on behalf of the class members identified in the statement of claim in a proposed class proceeding. In my opinion, s. 28 temporarily or conditionally suspended the running of the limitation period in respect of that claim.

[65] In *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.) at para. 23, aff'd [2004] O.J. No. 2769 (C.A.), Justice Winkler described the purpose of s. 28 of the *Class Proceedings Act* as follows:

> .... The CPA is remedial legislation aimed at providing judicial economy for the court system and access to that system for plaintiffs with non-economic claims. If potential class members are forced to commence individual actions while awaiting certification of class proceeding to protect individual limitation periods, it would defeat these purposes. The court system could be potentially burdened with volumes of claims, all of which would be redundant should the proceeding be certified as a class proceeding. Further, requiring each class member to file an individual claim could go a long way toward eliminating the economic advantage of class proceedings for any class member with a small claim.

[66] During the course of argument, I asked the Defendants' lawyers whether they agreed that a practical consequence of their argument was that putative class members with causes of action under Part XXIII.1 would have to commence individual leave motions to protect their claims from the operation of the absolute three-year limitation period regardless of whether the Part XXIII.1 cause of action was mentioned in the proposed class action. They agreed that this was true, which I took to be a concession or a submission that the purposes of s. 28 of the *Class Proceeding Act, 1992* protecting class members from the operation of limitation periods until it could be determined whether there was a viable class action did not apply when the proposed cause of action was for misrepresentations in the secondary market.

[67] With respect, it seems to me, that the distinction between these two statutory causes of action; namely, that one is actionable without leave and the other is actionable only with leave, does not and should not make a difference to the interpretation and operation of s.28 of the *Class Proceedings Act, 1992*. The purported distinction between Part XXIII and Part XXIII.1 causes of action should not require putative class members, be they a single soldier, a platoon, or division, to go on the march to seek leave to commence an action under Part XXIII.1 of the *Securities Act* once a class action mentioning the Part XXIII.1 claim has been commenced.

E. Conclusion

[68] For the above reasons, I grant Mr. Sharma's motion for the joinder of Mr. Pennyfeather, and I declare that in the case at bar the limitation period in s. 138.14 of the *Securities* Act, R.S.O. 1990, s. S.5 is suspended pursuant to s. 28 of the *Class Proceedings Act, 1992.*

[69] With respect to costs, it is my opinion that the costs of this motion should be in the cause.

[70] To be blunt, this motion was brought either because the Defendants were wrong about the operation of s. 28 of the *Class Proceedings Act, 1992* and Mr. Sharma was unsure about whether the Defendants were wrong, or because Mr. Sharma was unaware or unsure about whether s. 28 of the *Class Proceedings Act, 1992* was available to protect Class Members from what appeared to be a possible limitation period problem. In my opinion, the fairest costs award in these circumstances is to order costs in the cause.

[71] Finally, it is time for all the parties to move both the leave motion and the certification motion forward. The parties should settle on a timetable, failing which a case conference should be arranged to set a timetable.

Perell, J.

Released: March 31, 2011

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CITATION: Sharma v. Timminco Limited 2011 ONSC 2040
COURT FILE NO.: 09-CV-378701CP
DATE: March 31, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Ravinder Kumar Sharma

Plaintiff

- and -

Timminco Limited, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Dr. Heinz Schimmerlbusch, Robert Dietrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich, and John P. Walsh

Defendants

REASONS FOR DECISION

Perell, J.

Released: March 31, 2011