TAB J

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

A COMMISSIONER FOR TAKING AFFIDAVITS

AMENDED THIS / MODIFIÉ CE May 17/2011 PURSUANT TO / CONFORMÉMENT À
☐ RULE/LA RÈGLE 26.02 (
☐ THE ORDER OF / L'ORDONNANCE DU Mr. J. Perell
DATED / FAIT LE March 31/2011
LOCAL REGISTRAR / GREFFIER LOCAL
SUPERIOR COURT OF JUSTICE / COUR SUPÉRIEURE DE JUSTICE

145

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

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN

ST. CLAIR PENNYFEATHER

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*

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

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 PLAINTIFF'S 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 plaintiff's claim and $500.00 for costs and have the costs assessed by the court.

Date May 14/2009

Issued by ~S. Desouza~

Local registrar

Address of Court Office:

393 University Avenue
10th Floor
Toronto, ON
M5G 1E6

TO: **TIMMINCO LIMITED**
150 King Street West, Suite 2401
Toronto, Ontario
M5H 1J9

AND TO: **DR. HEINZ SCHIMMELBUSCH**
C/O Timminco Limited
150 King Street West, Suite 2401
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AND TO: **ROBERT DIETRICH**
C/O Timminco Limited
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AND TO: RENÉ BOISVERT
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AND TO: ARTHUR R. SPECTOR
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AND TO: PHOTON CONSULTING LLC
200 Clarendon St., 50th Floor
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02169

AND TO: ROGOL ENGERY CONSULTING LLC
200 Clarendon St., 50th Floor
Boston, MA
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AND TO: MICHAEL ROGOL
200 Clarendon St., 50th Floor
Boston, MA
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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 Timminco'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 two Timminco press releases dated May 8, 2008, announcing ~~the~~ Timminco's 2008 First Quarter Results and the Photon Report;

(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~~14, 2008 Conference Call" means the conference call conducted by Timminco with investors and analysts on May ~~13~~14, 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 (as defined below):

(a) an order pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ("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 (as defined below) made during the Class Period (as defined below);

(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 Timminco Defendants (as defined below);

(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 CPA ~~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 PLAINTIFF

~~3. 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.~~

3. The Plaintiff St. Clair Pennyfeather resides in the City of Toronto, in the Province of Ontario. Mr. Pennyfeather purchased shares of Timminco during the Class Period and suffered losses as a result of the Defendants' Misrepresentations.

THE DEFENDANTS

4. Timminco Ltd. ("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.

5. Timminco's wholly-owned subsidiary, Bécancour Silicon Inc. ("Bécancour"), conducts Timminco's silicon production business and operates the Bécancour Plant, a solar-grade silicon production facility in Bécancour, Québec.

~~7. 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*.~~

~~8. 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*.~~

6. 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.

7. 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.

8. 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.

~~10. 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*.~~

9. 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.

10. By virtue of their positions as senior officers and/or directors of Timminco, ~~the individual defendants (Schimmelbusch, Dietrich and Boisvert) and Directors~~ Defendants Schimmelbusch, Dietrich, Boisvert, Spector, Messman, Fox, Winfield, Yaksich and Walsh (collectively, the "Individual Timminco Defendants") had actual, implied or apparent authority to act and speak on Timminco's behalf prior to and during the Class Period.

11. 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 LLC ("Photon Consulting") and Rogol Energy Consulting LLC ("Rogol Energy").

12. Both Photon Consulting and Rogol Energy are consulting firms located in Boston, MA, providing research and analysis to the solar power industry. Rogol, Photon Consulting and Rogol Energy (collectively, the "Photon Defendants") are experts within the definition of s. 138.1 of the *Securities Act*.

THE NATURE OF THE ACTION

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

14. 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.

15. 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.

16. As is particularized below, ~~I~~in early 2008, ~~the Defendants began to describe~~ Timminco, with the authorization, permission or acquiescence of the Individual Timminco Defendants, began to issue statements that described the company as "a leader in the production and marketing of lightweight metals, specializing in solar grade silicon"~~,~~ ~~and~~ These statements represented that ~~it~~ Timminco 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~~ and that Timminco had a competitive advantage over other solar-grade silicon producers because of its proprietary technology and production capabilities.

17. The Photon Defendants were experts retained by Timminco who made specific representations about the promise of Timminco's solar silicon production technology.

18. ~~As is particularized below, t~~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.

19. 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

20. The Plaintiff brings this action on behalf of all persons, other than the Excluded Persons (as defined below), 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").

21. As particularized below, all of ~~T~~the Defendants' ~~statements~~ made statements, or authorized, permitted or acquiesced in the release of statements, during the Class Period that Timminco had a competitive advantage in the production of solar-grade silicon, as well as released, or authorized, permitted or acquiesced in the release of statements of revenue, future estimates of production volume, margins, and profits from that business, which were materially false and misleading. All of ~~T~~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.

22. 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.

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 a press release dated March 15 ~~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 ~~Misrepesentations~~ Misrepresentations.

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[2], 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 the 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, Timminco issued a press release which stated that it was unaware of any corporate developments that would explain recent trading activity in Timminco's stock. On the same day, *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, Timminco and the Individual Timminco Defendants retained, or authorized, permitted or acquiesced in the retention of, 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 issued a press release ~~announced~~ announcing 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. In the May 8, 2008 press release 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 also announced its financial results for the first quarter ended March 31, 2008 by way of a separate press release. ~~The~~ This ~~P~~press ~~R~~release is a document that would reasonably be expected to affect the market price of the shares in Timminco.

59. The May 8, 2008 ~~P~~press ~~R~~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 through [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~~14, 2008 Conference Call

73. On May ~~13~~14, 2008, Schimmelbusch and Michael Rogol conducted the May ~~13~~14, 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~~14, 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~~14, 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~~14, 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~~14, 2008 Conference Call represented, falsely that Timminco's silicon production process "works." ~~Regel~~Rogol, 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~~14, 2008 Conference Call were Misrepresentations.

78. Following the MD&A and the May ~~13~~14, 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~~14, 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 Timminco 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 Photon Defendants were retained to prepare the Photon Report and make Public Oral Statements about Timminco's business and operations and they consented to the release of the Photon Report by Timminco and consented to Timminco's release of documents and Public Oral Statements that included, summarized or quoted from the Photon Report, or from Public Oral Statements made by Rogol. The Photon Defendants knew that these documents and Public Oral Statements would be relied on by investors and, as a result, they 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 contained in the Photon Report and in the Public Oral Statements of Rogol was truthful, complete, and accurate, and to immediately correct any such previously-issued material information that was no longer truthful, complete, and accurate.

99. 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.

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

(a) The Individual Timminco 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 Photon Defendants made Public Oral Statements and consented to the release of the Photon Report by Timminco when they knew or ought to have known that the Photon and the Public Oral Statements were false and materially misleading;

(c) Timminco and ~~T~~the Individual Timminco Defendants failed to correct the Misrepresentations in a timely manner;

(d) Timminco and ~~T~~the Individual Timminco Defendants maintained inaccurate revenue and production forecasts that were based on the Misrepresentations; and,

(e) 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.

101. 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.

102. 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.

103. 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~~ duties to the Plaintiff and other Class Members.

NEGLIGENT MISREPRESENTATION

104. ~~Timminco and the Individual~~ All of the Defendants were in a special relationship with the Plaintiff and other Class Members. ~~As a result, the~~ Timminco and the Individual Timminco Defendants owed the Plaintiff and other Class Members a duty of care in that the Timminco disclosure documents and Public Oral Statements 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.

105. The Photon Defendants owed the Plaintiff and the other class members a duty of care in that the Photon Report and Rogol's Public Oral Statements, particularized 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.

106. It was reasonable, and in fact expected, that the Plaintiff and other Class Members would rely on the Misrepresentations.

107. 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.

108. ~~The~~ Timminco and the Individual Timminco 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~~ other Individual Timminco Defendants 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.

109. The Photon Defendants made the Misrepresentations in Public Oral Statements by Rogol and by consenting to the release of the Photon Report by Timminco and consenting to Timminco's release of documents and Public Oral Statements that included, summarized, or quoted from the Photon Report, or from statements made by Rogol.

110. 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.

111. 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~~ securities; and

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

112. 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.

113. 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.

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

DAMAGES

115. 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.

116. 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.

117. 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.

118. 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

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

120. All acts and omissions of Timminco were authorized, ordered, and done by the Individual Timminco 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

121. 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

122. 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

123. 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

124. 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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Lawyers for the Plaintiff

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

PENNYFEATHER Plaintiff	- and -	**TIMMINCO LIMITED, et al.** Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto
Proceeding under the *Class Proceeding Act, 1992*

AMENDED STATEMENT OF CLAIM

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Lawyers for the Plaintiff

TAB K

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

A COMMISSIONER FOR TAKING AFFIDAVITS

May 23, 2011

Court file CV-09-378701-OOCP

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*

AFFIDAVIT OF JAMES A. RAND.

I, **JAMES A. RAND** of the City of Landenberg, in the State of Pennsylvania, **MAKE OATH AND SAY**

1. I am a consultant on solar cell materials and devices. As a result, I have knowledge of the matters to which I depose in this affidavit.

BACKGROUND AND QUALIFICATIONS

2. I have over 25 years of experience in the field of silicon-based photovoltaics. I have worked in senior scientific positions devoted to the commercial development of photovoltaic materials and devices.

3. I have taught at the University of Delaware as an adjunct professor in electrical engineering. I have a B.A. in physics with high distinction from the University of Virginia and a M.S. and Ph.D. in electrical engineering from the University of Delaware.

4. From 2004 to 2009, I was a Consulting Engineer at GE Energy ("GE"). In this role, I directed technical matters for GE's solar division, which manufactured solar modules using silicon solar cells and conducted research into silicon wafer-making processes.

5. I joined GE after it acquired my previous employer, AstroPower, Inc, where I had worked since 1985 and had been the Vice President of Research and Development. AstroPower was a publicly-traded solar company that was active in all areas of the solar cell value chain, from raw silicon to completed solar systems for residential rooftops.

6. While at AstroPower, I acted as a Program Manager for a $12 million Advanced Technology Program for the development of solar silicon. This project, which was done in partnership with the Dow Corning Corporation, involved the development of a number of furnaces that used a process called directional solidification to purify silicon for the solar industry. Prior to work with Dow Corning, I worked closely with Elkem on its silicon development effort in the same area. My work at AstroPower also involved the use of upgraded metallurgical silicon.

7. These projects involved similar technologies as those used by Timminco Ltd. ("Timminco") in its solar grade silicon production process. As a result, I am familiar with the scientific and business hurdles that Timminco faced in attempting to develop a commercially successful method of purifying upgraded metallurgical silicon.

8. Further information about my professional background is set forth in my Curriculum Vitae, which is attached hereto and marked as Exhibit A.

INVESTIGATION CONDUCTED

9. I have prepared this affidavit at the request of counsel for plaintiff. Plaintiff's counsel requested that I analyze certain statements made by or on behalf of Timminco Ltd.

("Timminco") during the period between March 17, 2008 and November 11, 2008 (the "Timminco Disclosures") concerning its silicon purification processes and its manufacture of solar grade silicon and evaluate whether these statements are supported by the available information on Timminco's technologies. A list of the documents I reviewed is attached hereto and marked as Exhibit B.

10. In order to conduct this evaluation, I reviewed the publicly available materials concerning Timminco's production of solar grade silicon, and the patent literature for Timminco and its associated inventors available from the U.S. Patent and Trademark Office, the Canadian Intellectual Property Office, the German Patent and Trademark Office, and the World Intellectual Property Office. As far as I can ascertain, Timminco did not publish its findings in conventional technical journals or present its work at the many technical conferences on this topic.

NATURE OF TIMMINCO REPRESENTATIONS

11. After reviewing the Timminco Disclosures, I believe that Timminco's representations regarding its solar grade silicon production technology can be grouped into three categories:

(a) **Representations regarding the innovative nature of its patents:** in Timminco's March 28, 2008 Annual Information Form ("2008 AIF"), which is attached hereto and marked as Exhibit C, it is stated that Timminco's "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";

(b) **representations regarding the cost advantage of its solar silicon production technology:** in the 2008 AIF Timminco stated that its "proprietary process offers significant cost advantage based on efficiencies in three main areas: capital expenditures, raw materials and electricity used in the solar grade silicon production process." The company also stated in the AIF that it's "process allows the use of less

expensive raw materials to produce solar grade silicon that meets our customers' specifications. The Company believes it can achieve an average cost of $12 per kilogram for 2008, approximately half that of the $20 to $25 kilogram that it generally costs existing polysilicon producers." In the report by Photon Consulting, which was released in May, 2008 [the "Photon Report"], it is stated that Timminco's "equipment [was] very impressive, very low cost"; and,

(c) **representations regarding the quality of Timminco's solar grade silicon and its acceptability to customers:** in the 2008 AIF Timminco stated that its upgraded metallurgical silicon had a purity level of 99.999% and an impurity count of 0.8 parts per million of boron and less than 5.0 parts per million of phosphorous and that these purity levels "are acceptable to existing customers." The Photon Report stated that "several customers have reported cell efficiencies above 14% and some above 15% utilizing 100% solar grade silicon" from Timminco.

12. In this affidavit, I will analyze the validity of each of these claims based on my analysis of Timminco's patent materials and my own experience with similar solar grade silicon production processes. As will be discussed in detail below, I do not believe Timminco's technology had the capability to cost effectively purify silicon to the level needed for the solar market. The technology described in Timminco's patents and disclosures is either well known in the industry or would not be cost effective and is not likely to offer any advantage over existing processes.

EXISTING SOLAR GRADE SILICON PRODUCTION TECHNIQUES

13. Silicon purity is normally described as a percentage. Metallurgical grade ("MG") silicon, which is presently produced in large quality, has a silicon purity of approximately 96%-99%, with an average purity of 98.5%. Electronics grade silicon typically must be 99.999999% pure (this is known in the industry as "eight nines" or "8N" purity). Electronics grade was originally developed for semiconductor integrated circuit applications. Standards for purity of

silicon used in the solar industry vary but are generally 99.9999% pure ("six nines" or "6N" purity").

14. As a result, there are two potential ways to utilize silicon for solar cell manufacturing. A manufacturer can either (a) utilize electronics grade silicon, or (b) purify MG silicon to the level of purity required. This latter material is known as upgraded metallurgical grade silicon ("UMG"). Timminco claimed to have developed a technology that enables it to manufacture UMG in a cost effective way. Timminco is not the first company to have made this attempt. In fact, significant efforts have been made in this area over the past 40 years, but a number of significant technological hurdles have limited the advances realized. Nevertheless, seeking improvements in methods for purifying MG is desirable, because the alternative, starting from electronics grade silicon, is costly.

15. Production of silicon begins with the mining of quartz. Naturally occurring quartz is available, but it is far from the purity levels required for electronic or solar applications.

16. Next, the quartz is stripped of its oxygen in a large-scale carbothermic reduction furnace. The resulting silicon is MG silicon, which is inexpensive (generally less than $2/kg, although recent market conditions have driven the cost to $4/kg).

17. Purifying MG silicon to the levels needed for solar focuses particularly on the removal of two impurities: boron and phosphorus. They are present in the low-cost MG silicon at levels approximately 50 to 100 times higher than the levels allowed for solar applications. The reduced levels required for solar applications are well understood by customers. Boron and phosphorus are particularly difficult to remove from silicon.

18. Others have been active in the development of UMG since the 1970s. The industry leaders have been Dow Corning Corporation (Midland, Michigan), Elkem (Kristansand, Norway), and Kawaski/JFE (Kurashiki, Japan).

19. I have dealt with each of those companies as a potential supplier of silicon at various times. Each has struggled to develop cost effective processes that result in the needed purity. To my knowledge, despite years of effort, and many, many millions of dollars expended

in development, none has truly succeeded. They have failed due to high levels of impurities remaining in their final product, or in the high cost of their proprietary processing, or both. The three companies are still present in the marketplace, albeit struggling.

20. The activity around upgrading metallurgical silicon peaked in the 2005-2009 timeframe, when the supply crisis for conventional high purity silicon became acute. At that point, customers were buying prime silicon for $250-$450/kg on the spot market -- a product that had sold for $25-$45/kg a few years earlier.

21. It was in that time frame that Timminco suddenly appeared and touted its own proprietary technology that it advertised as having solved the silicon purification problem at surprising low cost. To my knowledge, none of its technical achievements were described in peer reviewed technical literature. It was surprising to me, and many in the silicon community that the difficult technical problems associated with purifying MG silicon could be solved so quickly, with so little apparent research effort.

EXISTING USE OF DIRECTIONAL SOLIDIFICATION IN THE SOLAR INDUSTRY

22. The most popular method of manufacturing silicon wafers for solar applications is the casting of silicon into multicrystalline ingots using a directional solidification system furnace. The wide spread use of directionally solidified silicon dates from the 1970s. The process of directional solidification involves melting silicon in a silica crucible. The crucible has a release coating to limit the contamination that would occur with direct silicon-crucible contact. The melting of a typical silicon charge of 240-450kg occurs over many hours. Once melted, the liquid silicon is held near the melting point for a period of time to insure uniform temperature. Once uniform, crystallization is begun by slowly crystallizing silicon at the bottom of the crucible. This is achieved by a careful manipulation of the thermal environment (slightly cooler at the bottom, maintaining above melting point temperatures everywhere else). This process continues very slowly over many hours. The growth of good quality silicon is limited to

approximately 1 mm/min, although removing the heat from the growth front through the silicon that has already crystallized can limit the process to longer times.

23. During the crystallization process, many impurities in the silicon preferentially stay in the liquid as opposed to solidifying into the newly formed silicon. Each impurity reacts differently to this process, with some strongly segregating to the liquid (such as iron), and others only weakly segregating (such as boron). In most cases, any impurity segregation that takes place results in lower levels of the impurity in the initial material solidified, and higher levels in the remaining liquid (impurities do not leave the system, they simply become concentrated in ever shrinking volume of liquid). If purification is the intent of the directional solidification process, care must be taken to solidify the material very slowly, with a very well controlled solid/liquid interface. The last liquid to solidify will contain a large quantity of impurities and must be separated from the material initially crystallized, resulting in loss of material.

TIMMINCO'S PATENTS

24. To the best of the knowledge Timminco has one US patent and one US patent application in the area of solar grade silicon: U.S. Patent 7727502, which is attached hereto and marked as Exhibit D, involving a unidirectional solidification method (the "Unidirectional Patent") and U.S. Patent Application 20080253955, which is attached hereto and marked as Exhibit E, involving the use of a rotary drum furnace method for silicon purification (the "Rotary Drum Patent"). After reviewing them both, I have now concluded that neither patent provided the company with a competitive advantage over existing UMG silicon purification processes.

THE UNIDIRECTIONAL PATENT (US7727502)

25. This patent describes a "process for purifying low-purity metallurgical grade silicon" using a unidirectional solidification method. Directional solidification is very well known in the industry and has been used for decades.

26. The assertedly novel element of the Unidirectional Patent was that the process solidified molten silicon to create an "exterior shell" of silicon instead of using an open ladle. During cooling, the shell would be the first to solidify, leaving the more impure liquid material trapped within the shell. The shell is then opened, the impure liquid is poured out, and the shell is retained as the purified material. The use of a complete shell appears to be the only novel element of the patent.

27. It is not clear how this process has any advantage over conventional unidirectional solidification, as taught in the Hall patent application, which is attached hereto and marked as Exhibit F. Critical elements of the process such as the furnace materials, solidification time, and overall material yields are determined by the basic material engineering involved in directional solidification. The patent adds nothing new to these critical elements of the directional solidification process. This process is well understood in the industry, and occurs in every casting ingot used to produce multicrystalline cast silicon today.

28. In fact, there is an error in the calculation of solidification times in the patent. The thermal conductivity of the shell is not accounted for correctly. Actual solidification times will be significantly longer those predicted by the patent calculations. Solidification times will be very similar to those achieved by other, well established methods.

29. In addition, Timminco's exterior shell process has a significant flaw. It is a well known material property of silicon that it undergoes a volume expansion of 9% when going from liquid to solid state. Following the process described in this patent, it is my opinion that the shell would be forced to crack soon after a complete shell was formed, due to this volume expansion effect. Shell cracking is mentioned as a problem in the patent. This cracking would lead to contamination, as mentioned, as well as make controlled growth after the shell was formed virtually impossible.

30. As a result, although the formation of a complete shell during the directional solidification process is unique to this patent, it does not offer any advantage to the purification process and contains a cracking flaw that drastically limits any usefulness. In my opinion, a

conventional open ladle process with impurity-laden solute removed by pouring is easier to control, cheaper to operate, and generates more pure material. As a result, the process described in the Unidirectional Patent could not be a key component in Timminco's competitive advantage.

THE ROTARY DRUM PATENT APPLICATION (20080253955)

31. The Rotary Drum patent application describes a "process and apparatus for purifying low-purity silicon material and obtaining a higher-purity silicon material." This application reviews many known methods of purifying silicon with various gases and slags. The application introduces the concept of carrying out these known processes in a furnace using an oxy-fuel burner. The application states that previously "it had not been seriously considered nor experimented to melt silicon in a furnace using an oxy-fuel burner."

32. The process of purifying liquid silicon with oxygen and water vapor and the process of using slags for purification have been known to the industry and practiced for over two decades.

33. Timminco's patent application introduces the concept of carrying out these processes in an atmospheric rotary drum furnace with an oxy-fuel burner. The oxy-fuel burner allows for the safe use of a gas mixture containing Ar-H_2-H_20. These gases, in unique environments, such as the presence of a plasma and/or vacuum, are known to assist in the reduction of boron in molten silicon. The rotary furnace also allows for the good mixing of the liquid silicon with the atmosphere and potentially with slags.

34. As demonstrated in a Kawaski Steel Corporation patent, which is attached hereto and marked as Exhibit G, a very unique environment is needed to remove boron from silicon in the presence of Ar-H_2-H_20, and the process takes hours to achieve only modest levels of purification. Although known for many years, this process has not been successfully implemented in any large scale application, largely for reasons of high capital cost and low throughput. The Rotary Drum patent application introduces the concept that these unique

conditions can be created in an oxy-fuel furnace, although no specific evidence that the conditions were achieved was provided.

35. Timminco's claim that an oxy-fuel torch environment achieves conditions, previously possible only in the presence of a plasma or vacuum, allowing significant boron reduction, was a surprise to me and to most in the industry. Under normal circumstances, such a result would be verified by independent laboratories, and duplicated in controlled laboratory conditions for reasons of optimization. To my knowledge, this was not done.

36. For these reasons, I am highly skeptical that the process described in the Rotary Drum Patent is viable for silicon manufacturing and could provide Timminco with a competitive advantage.

COST EFFECTIVENESS OF TIMMINCO'S PROCESS

37. I also have significant concerns about the cost effectiveness of Timminco's purification processes due to the long process times and low material yields that would be required to remove phosphorous and boron from Timminco's UMG silicon. The removal of boron and phosphorus has been the historical limiting factor in use of UMG silicon in solar applications.

38. Timminco's Unidirectional Patent describes a process for removing phosphorous that would require numerous purification steps and would yield only a fraction of the silicon useable when complete.

39. The patent correctly notes the level of phosphorus in MG silicon is 20 to 100 ppmw, and holds out hope for a 50% reduction in phosphorus with each directional solidification step. That would be a best case estimate, as a number of factors, including the presence of other impurities, lower the purification effect. In any case, even with the best case estimate for purification, the proposed process requires 20% of the resulting silicon to be discarded with each directional solidification step.

40. It is also known that to achieve the effects of directional solidification a growth rate of <=1.2 mm/min is typically required. If the ingot sizes follow convention, ingots would be approximately 420mm tall. This requires a growth time of 5.8 hours exclusive of heating, melting, and cooling time (and assumes that the 1.2 mm/min solidification rate could be maintained as the thickness of the shell increases, which, in fact, it could not). The industry standard for ingot casting is a cycle time of 50 hours start to finish to process a 440kg ingot. Using the best case values above, Table A estimates the number of melting-freezing cycles required to purify metallurgical silicon by direction solidification.

Table A. Removal of phosphorus by directional solidification

	Low Phosphorus Starting Silicon	High Phosphorus Starting Silicon
Starting Phosphorus Level	20 ppmw	100 ppmw
Phosphorus Level after Step #1	10 ppmw	50 ppmw
Silicon Remaining	80%	80%
Phosphorus Level after Step #2	5 ppmw	25 ppmw
Silicon Remaining	64%	64%
Phosphorus Level after Step #3	2.5 ppmw	15 ppmw
Silicon Remaining	51%	51%
Phosphorus Level after Step #4		7.5 ppmw
Silicon Remaining		41%
Phosphorus Level after Step #5		3.7 ppmw
Silicon Remaining		33%

41. Thus, even with the best case estimate for phosphorus purification with each successive solidification step (50% reduction), three to five heat treatments would be required and only 33% - 51% of the starting material would remain. Five directional solidification steps

using conventional equipment would take over 10 days to complete. Such long processing times would result in low throughput from the processing equipment, adding significant cost.

42. My experience in carrying out directional solidification steps in conventional equipment is that a fully loaded cost per directional solidification step is $20-35/kg. Using conventional methods, the cost of three process steps for phosphorus removal would be $60 to-$105 per kilogram, which is far more than the $12 per kilogram price that Timminco indicated in its 2008 AIF.

43. The process described in the Unidirectional Patent only addresses the removal of phosphorous. Timminco's Rotary Drum patent focuses on the removal of boron, describing a process that would remove 28% of boron in 80 minutes. That process must be carried out on liquid silicon with strong stirring to increase the interaction of the silicon with the atmosphere.

44. This level of purification is modest and an overall purification of at least 96% is required to achieve Timminco's stated goal (reducing boron from 20 ppmw to 0.8 ppmw). Given the equation stated in the patent application, a residence time of at least 13 hours would be required to reach the 96% reduction of boron needed.

45. It is generally known that the level of boron in MG silicon is 20 to 50 ppmw. Table B estimates the processing times required to reach the goals set out in the Timminco literature.

Table B. Details of the boron removal process as discussed in the Timminco patent literature

	Low Boron Starting Silicon	High Boron Starting Silicon
Starting Boron Level	20 ppmw	50 ppmw
Ending Boron Level	0.8 ppmw	0.8 ppmw
Process Time Required	13.0 hours	16.8 hours

46. This boron purification process would add significant expense to Timminco's UMG silicon production process. Although the boron removal could be carried out in the same

equipment as the directional solidification discussed above, it is unlikely that it could be carried out at the same time, due to the stirring requirement.

47. Timminco's claim that an oxy-fuel torch environment achieves the conditions required for boron removal has yet to be verified by others or well described in the literature.

48. In the 2008 AIF (Exhibit C), Timminco stated an advantage of "2 kilowatt hours per kilogram of output required by the Company's process." The energy (as measured in kilowatt hours) used to purify silicon is a critical element in the cost structure of the overall process of processing and purifying silicon. I find it unbelievable that the processes described in the Timminco patent literature could be carried out with only 2 kilowatt hours per kilogram (kwhr/kg). The energy required to heat a mass of silicon from room temperature to its melting point (1412 C) is **0.39** kWh/kg (heat capacity). The energy to convert a mass of solid silicon at its melting point (1412 C) into the liquid state is **0.50** kWh/kg (heat of fusion). The theoretical minimum needed to heat and melt silicon is therefore **0.89** kWh/kg. The actual energy to effect a melting process in practice requires making up for the losses that occur in a melting furnace due to unavoidable heat losses between the outer surface of the furnace and the surrounding environment. (And, if the silicon mass has a carrier, meeting its heat capacity need will require additional heat; as will all the other parts of the furnace that must reach operating temperature). As an example in point, the energy per mass required to produce metallurgical-grade silicon in a conventional (and highly developed manner, where one of their ongoing focuses is reducing the energy required) is **10- 11** kWh/kg in the best case, where the silicon is melted only once. The processes described in the patent literature require 4 to 5 distinct melting steps, and many hours of molten silicon processing. This is not theoretically possible with 2 kwhr/kg of energy use.

49. In conclusion, it is my opinion that the significant expense of removing phosphorus and boron would not make Timminco's process a cost effective way to produce solar grade silicon, much less provide the company with a very low-cost advantage, and would not enable Timminco's process to be profitable based on current and historical solar silicon prices.

QUALITY OF TIMMINCO'S SILICON

50. I also have doubts that Timminco's UMG silicon would be of sufficient quality to be acceptable to many solar cell manufacturers.

51. Timminco has indicated in its literature that its UMG silicon has an impurity count of 0.8 parts per million by weight (ppmw) of boron and less than 5.0 ppmw of phosphorous.

52. For making conventional multicrystalline silicon solar cells, the ideal level of phosphorous is zero. A generally accepted allowable level to have no deleterious effects on the final product is 0.1 ppmw to 0.6 ppmw. Timminco's silicon is 10 times the maximum level and could not be used directly for solar cells.

53. Timminco's UMG silicon could be blended with other more pure material until the overall phosphorous level is reduced to 0.6 ppmw or lower. As a result, Timminco's 5.0 ppmw UMG silicon could only be used for a maximum of 12% of the silicon stock needed for a solar cell. For material that has 3.0 ppmw of phosphorous the blendable level could be no more than 20% of the stock.

54. The same is also true of Timminco's boron levels, which are also too high to be used directly in solar cells. Timminco's boron impurity level of 0.8ppmw is higher than the 0.3 ppmw that is generally accepted as the highest level to be practically usable.

55. The fact that a number of Timminco customers subsequently cancelled their contracts may also be a further indicator that Timminco's UMG silicon had quality issues. On April 20, 2009, a Timminco news release stated that some of its solar grade silicon customers had cancelled their contracts due to non-compliance. The release, which is attached hereto and marked as Exhibit H, stated that:

> ...some of the Company's solar grade silicon customers have asserted that their contracts have been terminated due to non-compliance. We are in active discussions with each of these customers with respect to their positions and the terms of future relationships, including quality, quantity and pricing for solar grade silicon.

56. Other Timminco releases also seem to indicate that customers were not satisfied with the quality of Timminco's silicon. For instance, in a news release released May 25, 2009, which is attached hereto and marked as Exhibit I, Timminco announced that a contract with large solar cell manufacture Q-Cells for 3000 metric tons had been replaced with an agreement to deliver 100 metric tons. In the release Q-Cells SE CEO Anton Milner stated that:

> We believe in upgraded metallurgical silicon as an important resource for the production of solar cells in the mid-to long-term perspective... Our technical department is working closely with Timminco to ensure that the material consistently meets our high quality needs.

57. Timminco has subsequently suspended solar grade silicon production. In a news release dated March 16, 2010, which is attached hereto and marked as Exhibit J, Timminco CEO Heinz Schimmelbusch stated:

> "At the same time, we remain committed to opportunities in solar grade silicon, and continue to pursue our goal of enabling our customers to manufacture solar wafers and cells that are indistinguishable from those made with polysilicon... In the short term, we have suspended solar grade production pending evidence of sufficient customer demand and commitments to justify a resumption of production."

CONCLUSION

58. My review of Timminco's patent literature and other publicly available sources of information on the company's silicon purification technology have led me to conclude that the technologies did not have many of the attributes that Timminco and its executives had indicated during the period between March 17, 2008 and November 11, 2008.

59. I do not believe that the company's patents provide the company with any competitive advantage. The focus of both of the company's patents is the removal of impurities from UMG silicon. The company's Unidirectional Patent is similar to well established purification techniques. Its only unique element does not offer any advantage over these techniques and contains a significant flaw. I am also very skeptical about the boron removal technique described in the company's Rotary Drum Patent. Its results have not been independently tested or repeated by others.

60. Similarly, I do not believe that the company's production techniques would be cost effective. In fact, the techniques described in the company's patents are very time and cost intensive and require multiple steps to achieve sufficient purity levels, each step with low material yield significantly reducing the amount of usable silicon.

61. Lastly, I do not believe that Timminco's UMG silicon would be acceptable to many in the solar cell industry. The purity levels that Timminco indicated would not enable its UMG silicon to be directly used in solar cells. Instead, it would have to blended with more pure materials. Solar cells manufacturers would be unlikely to want to make this accommodation.

James A. Rand

Date 23 May 2011

Notary Public

CLIFFORD JAMES MURPHY
NOTARY PUBLIC, STATE OF DELAWARE
My Commission Expires March 4, 2013

TAB L

This is Exhibit "L" referred to in the
affidavit of Victoria Paris
sworn before me, this 6th
day of MARCH 20 12

A COMMISSIONER FOR TAKING AFFIDAVITS

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

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN

ST. CLAIR PENNYFEATHER

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*

AFFIDAVIT OF LAWRENCE S. ROSEN
(sworn May 27, 2011)

I, LAWRENCE S. ROSEN, of the City of Toronto, in the Province of Ontario,

MAKE OATH AND SAY:

1. I am a principal of Rosen and Associates Limited, an independent accounting firm specializing in forensic and investigative accounting.

2. I am a Fellow Chartered Accountant in the Provinces of Alberta and Ontario, a Certified Public Accountant (certified as a specialist in financial forensics) in the State of Illinois, and a Fellow Certified Public Accountant in Hong Kong. I am also a Certified Management Accountant, a Certified General Accountant and a Certified Fraud

Examiner. A copy of my curriculum vitae is attached as Appendix D to my expert report.

3. I have been retained by legal counsel to Mr. St. Clair Pennyfeather in this proceeding to provide an opinion on the damages that have been suffered by the Class Members, represented by Mr. Pennyfeather, in the litigation against Timminco Limited, Photon Consulting LLC, et al.

4. Attached hereto and marked as Exhibit A is a true copy of my expert report in this matter, dated May 26, 2011.

SWORN OR AFFIRMED before me at the City of Toronto, in the Province of Ontario, this 27th day of May, 2011.

A Commissioner for taking affidavits.

Lawrence S. Rosen

Lawrence S. Rosen

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Court File No. CV-09-37870100CP

PENNYFEATHER	- and -	**TIMMINCO LIMITED et al.**
Plaintiff		Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF LAWRENCE S. ROSEN

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Lawyers for the Plaintiff

This is Exhibit "A" referred to in the
affidavit of LAWRENCE S. ROSEN
sworn before me, this 27 day of May, 2011.

A COMMISSIONER FOR TAKING AFFIDAVITS

Rosen & Associates Limited
LITIGATION AND INVESTIGATIVE ACCOUNTANTS

Forensic
Business Va.
Quantification of Damages
Public Accountants' Negligence

May 26, 2011

Privileged & Confidential

Kim Orr Barristers P.C.
200 Front Street West
Suite 2300, P.O. Box #45
Toronto, Ontario
M5V 3K2

Attention: Messrs. Won J. Kim and James C. Orr

Re: St. Clair Pennyfeather v. Timminco Limited, Photon Consulting LLC, Michael Rogol, 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

I. INTRODUCTION

You have asked for our preliminary opinion, as independent accountants experienced in loss quantification, about the damages that have been suffered by Class Members[1], as represented by Mr. St. Clair Pennyfeather (the "Plaintiff"), in the litigation against Timminco Limited ("Timminco" or the "Company"), Photon Consulting LLC ("Photon") et al (herein collectively referred to as the "Defendants").

We understand that the Plaintiff was a Timminco shareholder who acquired common shares of the Company during the period from March 17, 2008 to November 11, 2008 (the "Class Period").[2] We further understand that the Plaintiff has commenced this litigation pursuant to the *Class Proceedings Act, 1992.*

[1] Class Members is defined at paragraph 20 of the Amended Statement of Claim.
[2] Amended Statement of Claim, paragraph 19.

The Plaintiff alleges that during the Class Period, the Defendants made materially false and misleading public statements and omissions regarding the Company's solar-grade silicon operations. In particular, the Plaintiff alleges that the Defendants:[3]

A. Misrepresented to the public that Timminco had a competitive advantage in producing solar-grade silicon;

B. Released revenue prospects, estimates of future production volume, margins, and profits from its solar-grade silicon business that were false and misleading; and,

C. Failed to announce, at appropriate times, that the Company's solar-grade silicon production process was not capable of producing silicon at quantities, costs and purity levels that were consistent with the Company's public statements.

The Plaintiff claims that the Defendants' assertions and omissions of fact (collectively referred to herein as "Misrepresentations") unfairly increased the market price of Timminco's shares during the Class Period. Consequently, purchasers of Timminco's securities during the Class Period suffered losses through acquiring the securities at artificially inflated prices.[4]

Our preliminary damages opinion is based solely upon publicly-available information. We have not reviewed Timminco's internal records, nor have we communicated directly or indirectly with Timminco's management. We reserve the right to amend, or revise our opinion should additional, material information become available to us subsequent to the date of this report.

The documents that we have relied upon in preparing our opinion are listed at **Appendix C**. Our professional qualifications are provided at **Appendix D.**

[3] Amended Statement of Claim, paragraph 21.
[4] Amended Statement of Claim, paragraphs 18 and 19.

1. Positioned itself as a low-cost producer of solar-grade silicon;[14]

2. Created a proprietary process that offered significant cost advantages based upon efficiencies in three areas: capital expenditures, raw materials and electricity used in the solar-grade silicon production process;[15]

3. Could add production capacity in a timely and efficient manner;[16]

4. Would realize its potential through its state-of-the-art production facilities, patent-pending process, and pedigree in the silicon metal business;[17]

5. Expanded its solar-grade silicon production capacity to 3,600 metric tons per year;[18]

6. Would expand the production capacity of its solar-grade silicon facilities to 14,400 metric tons from 3,600 metric tons;[19]

7. Failed to disclose that the Company's solar-grade silicon "impurity composition" was not commercially acceptable; and,[20]

8. Failed to disclose that it could not produce solar-grade silicon in commercial quantities.[21]

E. The Misrepresentations were disseminated to the public through various channels including: news releases, conference calls with analysts and investors, the Company's 2007 annual information form and annual report, personal certifications of senior officers and directors, quarterly financial reports and so forth.[22]

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[14] Amended Statement of Claim, paragraphs 30 and 32.
[15] Amended Statement of Claim, paragraph 37.
[16] Ibid.
[17] Amended Statement of Claim, paragraph 61.
[18] Amended Statement of Claim, paragraphs 35 and 36.
[19] Amended Statement of Claim, paragraph 70.
[20] Amended Statement of Claim, paragraph 38.
[21] Ibid.
[22] Amended Statement of Claim, paragraphs 28 to 84.

F. From the beginning of the Class Period (March 17, 2008) to mid-April 2008, Timminco's stock price increased from approximately $17 per share to over $28 per share.[23]

G. In April 2008, reports emerged in the media questioning the validity of Timminco's solar-grade silicon production capabilities. The media reports made reference to various short-sellers of Timminco's stock who were skeptical of the Company's solar-grade silicon operations. Certain investors and analysts took issue with the Company's prospects for success in the solar-grade silicon manufacturing industry.[24]

H. In or around May 2008, Timminco retained Photon to perform an operational review on its solar grade silicon business at BSI.[25] Based upon its review, which included a one-day site visit of the BSI facility, Photon expressed the following comments for the Company's solar-grade silicon growth prospects for 2010, which the Plaintiff claims were also false and misleading:[26]

1. Timminco's solar-grade silicon operations and processes have the potential for massive growth, and possibly for reshaping the industry;

2. Timminco's equipment was very impressive, very low cost and "beyond poly[silicon]" scale;

3. Annual production volume for Timminco's solar-grade silicon business was projected to be 12,000 to 20,000 tons;

4. Annual revenue would range from $540 million to $1.3 billion;

5. Operating profits would grow to between $270 million and $1 billion; and,

6. Operating margins would range from 50% to 80%.

---

[23] Bloomberg data for Timminco (daily close).
[24] The media reports will be discussed in further detail in a Section V-B-2 of this report.
[25] Amended Statement of Claim, paragraph 52.
[26] Amended Statement of Claim, paragraph 76. Photon presentation entitled "Operational Review Report on Bécancour Silicon Inc.", dated May 14, 2008.

I. From early May 2008 to early June 2008, Timminco's stock price increased from approximately $20 per share to over $34 per share.[27]

J. At the close of trading on August 11, 2008, the Company issued a news release for its financial results for the second quarter ended June 30, 2008. The news release was followed by a conference call with investors and analysts, in which Timminco's senior executives disclosed production problems and contamination issues with regard to its solar-grade silicon production process.[28]

K. In a news release issued on November 11, 2008, Timminco stated that it would remove the Photon report from its web-site as the forward-looking information contained therein was no longer valid.[29]

L. At the end of the Class Period (November 11, 2008), Timminco's shares were trading at approximately $8 per share.[30]

M. The price of Timminco's shares continued to decline subsequent to the Class Period, trading at approximately $0.40 per share as of the date of this report.[31]

N. In 2009 and 2010, Timminco and certain of its solar-grade silicon customers had terminated their existing supply contracts.[32] Timminco suspended its solar-grade silicon operations in January 2010.[33] As of the second quarter of 2010, Timminco's solar-grade silicon operations remained largely inactive, with negligible shipments and revenues (nil shipments/revenue for the second quarter of 2010 and approximately one metric ton shipped, and $15,000 in total sales, for the first quarter of 2010).[34]

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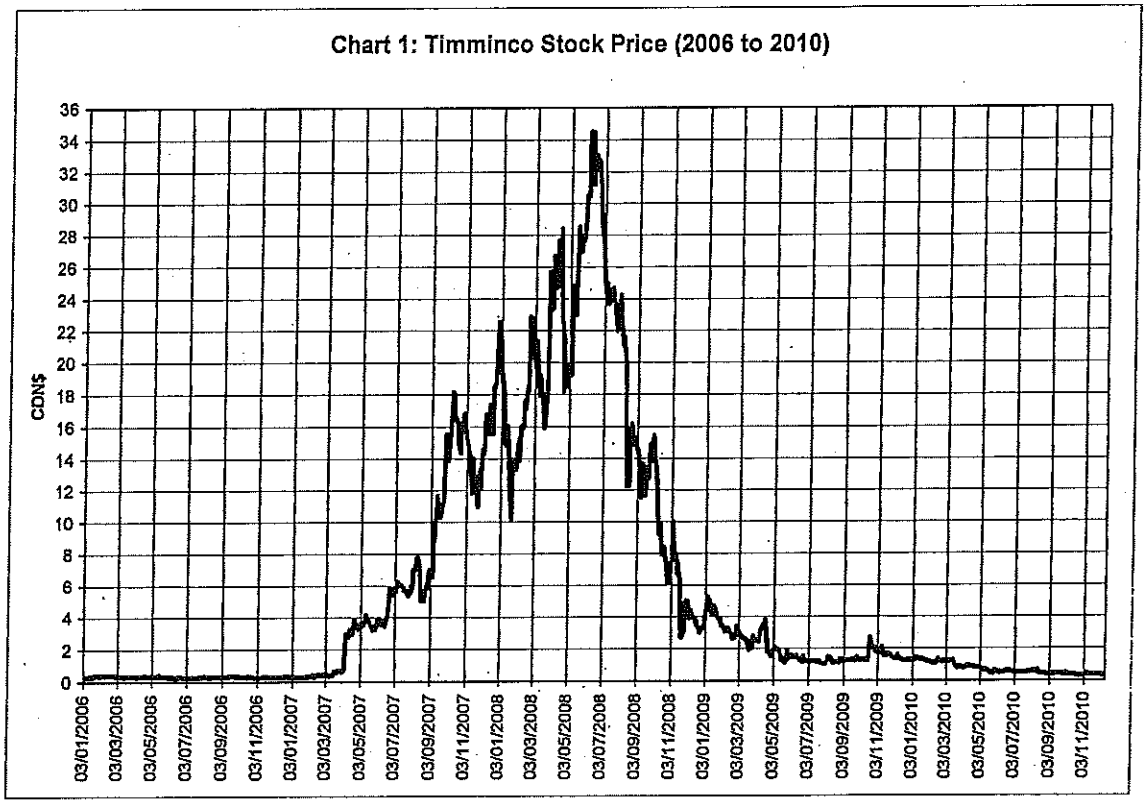
[27] Bloomberg data for Timminco (daily close).
[28] The August 11, 2008 conference call will be discussed in greater detail in Section V-B-2 of this report.
[29] Timminco news release, November 11, 2008 (pages 5 and 6).
[30] Bloomberg data for Timminco (daily close).
[31] Ibid.
[32] Timminco news release, April 20, 2009; Hoffman, Andy. "Timminco trading volume surges – Former customers behind the selling, sources say". The Globe and Mail. August 13, 2010.
[33] Timminco interim report, first quarter fiscal 2010, page 6, 2nd paragraph.
[34] Timminco interim report, second quarter fiscal 2010, page 3 (last paragraph) and page 6 (chart and fourth paragraph).

IV. ANALYSIS OF TIMMINCO'S STOCK PRICE

The following section of our report provides a brief analysis of the trends in Timminco's stock price and trading activity.

A. Timminco Stock Price: 2006 to 2010

Timminco's stock price at the close of trading on each day from 2006 to the date of this report is set out in Chart 1:



The overall trend in the Company's share price corresponds with the disclosures of Timminco's solar-grade silicon operations:

1. From January 2006 to the Company's March 15, 2007 announcement of its first solar-grade silicon supply contract, Timminco's (daily close) stock price was largely flat, ranging from a low of $0.20 per share to a high of

$0.64 per share, with average monthly trading volume of approximately 685,000 shares.[35]

2. From March 2007 to early 2009, Timminco's stock price entered a period of substantial volatility with large and frequent fluctuations. Timminco's stock traded from a low of $0.35 per share (close) to a high of $34.50 per share (close), with average monthly trading volume of approximately 33.8 million shares.[36] During this time:

   a. The Company had announced its first sales contract in the solar-silicon business (March 15, 2007);

   b. Timminco made Misrepresentations regarding the quantity, cost and purity levels associated with its solar-silicon product (the Class Period);

   c. Media reports emerged questioning the validity of Timminco's solar-grade silicon production capabilities (April 21 and 22, 2008);

   d. The Company disclosed problems with its solar-grade silicon operations (August 11, 2008); and,

   e. The Company withdrew a report that had been prepared by an outside consultant (Photon), which was retained to perform an operational review of Timminco's solar-grade silicon business (November 11, 2008).

3. In April 2009, Timminco announced that some of its customers were terminating their solar-grade silicon supply contracts due to non-compliance. In January 2010, Timminco suspended its solar-grade silicon operations pending a recovery in the demand for its product. From January 2009 to December 2009, the stock closed at a low of $1.05 per

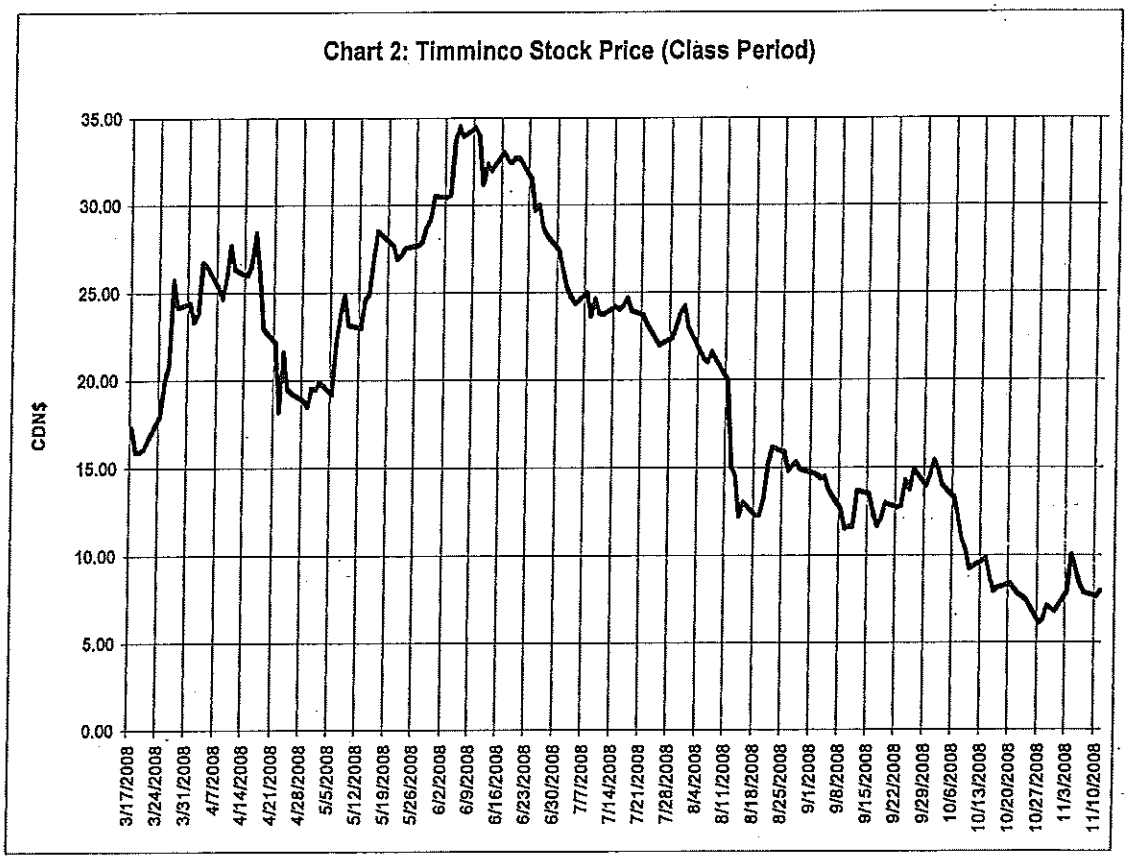
[35] Source: Bloomberg.
[36] Ibid.

share and peaked at $5.25 per share.[37] As of the date of this report, the Company's shares were trading at $0.40 per share.

A more detailed examination of Timminco's stock price trends during the Class Period and certain of the Company's disclosures is set out below.

B. Timminco Stock Price: Class Period

The following chart presents Timminco's share price at the close of trading on each day of the Class Period:



Timminco's shares traded in high quantities and with large price fluctuations during the Class Period. At its peak, Timminco's stock closed at a price of $34.50 per share (June 5, 2008). The lowest point at which the stock closed during the Class Period was $6.12 (October 27, 2008). The average monthly trading volume

[37] Ibid.

of Timminco's shares during the Class Period was approximately 33.8 million shares.

The various spikes in Timminco's share price and trading activity coincided with the disclosure and revelation of the Company's Misrepresentations. For example:

1. At the close of trading on March 26, 2008, Timminco issued a news release stating that the Company had entered into a solar-grade silicon supply agreement with Q-Cells AG (the world's largest manufacturer of solar cells). The news release also made reference to Timminco's expansion of its solar grade silicon production capacity to 14,400 tons by the second quarter of 2009. At the close of trading on the following day (March 27, 2008), Timminco's stock price had increased from $20.89 to $25.70 (i.e., 23%). Trading volume on March 27, 2008 exceeded 10.9 million shares, compared with a daily average of 2.4 million traded shares for the month of March 2008.

2. At the close of trading on March 31, 2008, Timminco published its 2007 Annual Report, which contained various Misrepresentations.[38] The price of Timminco's shares increased by 9.4%, from $24.40 at the close of March 31, 2008 to $26.70 on April 3, 2008.

3. On April 21, 2008, various media reports emerged that questioned the validity of Timminco's solar-grade silicon operations and prospects.[39] The price of Timminco's shares declined by 17.7% from $22.15 at the close of trading on April 21, 2008 to $18.23 at the close of trading on April 22, 2008. On April 22, 2008, trading volume exceeded 7.3 million shares. The daily average trading volume for the month of April 2008 was 3.6 million shares.

4. At the close of trading on April 22, 2008, Timminco provided an update on its solar-grade silicon operations and included representations regarding the Company's expected production capacity. In particular, Timminco reiterated

[38] Amended Statement of Claim, paragraphs 44 and 45.
[39] The specific media reports will be discussed in further detail in Section V (Analysis of Damages) to this report.

its expectation of being able to produce 14,400 tons of solar-grade silicon per year by the second quarter of 2009. At the close of trading on the following day, Timminco's stock price had increased by approximately 18.5% (i.e., from $18.23 on April 22, 2008 to $21.60 on April 23, 2008). On April 23, 2008, trading volume exceeded 12.0 million shares, compared with a daily average of 3.6 million shares traded for the month of April, 2008.

5. At the close of trading on May 14, 2008, Timminco held a conference call with investors and analysts to discuss the Photon report. During the conference call, Mr. Michael Rogol of Photon made various positive statements about the prospects of Timminco's solar-grade silicon operations. Timminco's stock price increased by 8.4%, from $24.90 on May 14, 2008 to $27.00 on May 15, 2008. The Company's stock price increased by a further 5.6% to $28.50 at the close of trading on May 16, 2008. Trading volume on May 14, 2008 and May 15, 2008 was 4.5 million shares and 4.8 million shares, respectively, compared with the daily average of 3.1 million traded shares for the month of May, 2008.

6. On May 29, 2008 (end of day), Timminco held a conference call with analysts and investors in which the Company made various Misrepresentations regarding its solar-grade silicon operations.[40] At the close of trading on June 2, 2010, the Company issued a news release stating that Canadian Solar Inc. was expected to purchase 5,000 tons of solar-grade silicon through 2011. Timminco also stated that it expected to deliver 450 to 500 tons of solar grade silicon to Canadian Solar Inc. in 2008. Timminco's share price at the close of May 29, 2008 was $29.18. At the close of trading on June 5, 2008, the shares traded at $34.50, an increase of 18.2%.

7. At the close of trading on August 11, 2008, Timminco held a conference call with analysts and investors during which Timminco disclosed contamination

[40] Amended Statement of Claim, paragraphs 80 to 82.

and equipment problems with its solar-grade silicon operations.[41] Timminco's stock price dropped by approximately 24.4%, from $19.97 at the close of trading on August 11, 2008 to $15.10 at the close of trading on August 12, 2008. On August 12, 2008, trading volume was approximately 4.5 million shares compared with a daily average of 1.5 million shares traded for the month of August, 2008.

8. In the evening of November 11, 2008, Timminco issued a press release stating that it had withdrawn the Photon report from its web-site on the basis that the factors and assumptions upon which the forecasts for revenue, production volume and costs had been based were no longer valid. Timminco's stock price fell by over 15.4% on the following day, from $7.93 at the close of trading on November 11, 2008 to $6.71 at the close of trading on November 12, 2008.

V. ANALYSIS OF DAMAGES

A. Approach to Damages Quantification

Our analysis of the Plaintiff's damages is premised upon the theory of stock price inflation, which maintains that the market price of the Company's shares was artificially inflated during the Class Period due to the Misrepresentations. The artificial inflation was removed once the Misrepresentations were revealed to the market (herein referred to as the "Revelations"). The resulting impact was a decline in the price of the Company's securities, to the level that the shares would have traded absent the Misrepresentations.

Damages are equal to the stock price inflation at the time that the affected shares were acquired, less the stock price inflation at the time that the affected shares were sold. Hence, there are two key components to computing aggregate, class-wide, damages: (1) identifying total share purchases affected by the

[41] The problems that were disclosed by Timminco will be explained in further detail in Section V (Analysis of Damages) to this report.

Misrepresentations; and (2) quantifying stock price inflation. A brief discussion of these components follows.

1. Total Shares Affected

In order for shares to be affected by the Misrepresentations, the Company's shares had to have been acquired during the Class Period, prior to a Revelation date, and held subsequent to that Revelation date. Shares of Timminco that were purchased prior to the Class Period (i.e., prior to the commencement of the Misreprentations) are not eligible for damages. This is because the shares would have been purchased before the presumed introduction of stock price inflation.

Similarly, if shares were acquired at the beginning of the Class Period, but sold prior to the Revelation date, no damages would result to the shareholder as the stock price inflation that existed at the time the shares were acquired also existed at the time the shares were sold.

Once a share is acquired subsequent to the commencement of Misrepresentations and held subsequent to a Revelation date, the share has been affected by the Misrepresentations. Note that a share affected by the Misrepresentations can result in damages only once for a particular Revelation, regardless of the number of times the specific share has traded (or exchanged hands) during the Class Period. As discussed below, the implied loss is transferred from the seller to the purchaser, until the Revelations emerge.

2. Stock Price Inflation

Stock price inflation is the difference between the Company's actual stock price and what the stock price would have been absent the Misrepresentations. Stock price inflation is estimated using two widely-applied approaches:

a. Constant Dollar: This approach assumes that stock price inflation is measured as the observed *dollar* decline in the price of Timminco's shares that followed each Revelation.

b. Constant Percentage: Assumes that inflation is measured as the observed *percentage* decline in the price of Timminco's shares subsequent to each Revelation.

We have quantified stock price inflation using both the Constant Dollar and Constant Percentage methods. Both approaches assume that the Misrepresentations caused the stock to be inflated at a fixed (or constant) level throughout the Class Period (or during the periods between the Revelation dates, assuming that more than one revelation date exists). When multiple Revelations exist, the aggregate stock price inflation is reduced as the Misrepresentations are revealed (i.e., inflation declines as the misstatements or omissions become known to the market).

Where a Revelation occurred simultaneously with the disclosure of other (unrelated) new information, we evaluated the significance of the disclosure and assessed the impact (if any) on our calculation of stock price inflation.[42] This was performed in order to limit the estimate of share price inflation to the Misrepresentations only.

Our analysis of Timminco's stock price declines and the Revelations is set out below. A discussion of the technical components of our damages calculations follows.

[42] For example, Timminco reiterated the restructuring of its magnesium business in or around one of the Revelation dates (August 11, 2008). Based upon our analysis (in section V-C-1 below), this event did not have a significant impact on the price of Timminco's stock.

B. Analysis of Stock Price Declines and Revelations

We performed "event analysis" in which we analyzed the Company's stock price reaction to specific events. The objective of the event analysis was to:

1. Identify statistically significant declines in Timminco's stock price; and,
2. Determine whether any such declines resulted from the disclosure of material news, such as the Revelations (i.e., identification of Revelation dates).

Our findings are set out below.

1. Statistically Significant Declines in Timminco's Stock Price

In order to identify the statistically significant declines that occurred in Timminco's stock price during the Class Period, the Company's actual daily stock prices (and movements) were compared to the Company's predicted daily stock prices (and movements). Such a comparison was made to determine whether a significant deviation existed from the "normal" stock price. The effect is to identify price fluctuations that exceeded the company's predicted stock price movements based upon market- and industry-wide effects.

The predicted daily prices of Timminco's shares during the Class Period were derived from a statistical procedure called a "regression analysis". Regression analysis determines the statistical correlation between two (or more) sets of data, and generates a formulaic relationship.

We compared Timminco's actual daily share price to market and industry indices as the benchmarks. The analysis was based upon a timeframe that was outside of the Class Period, so as to avoid the effects of the Misrepresentations. The resultant regression formula was used to determine Timminco's predicted daily share price during the Class Period.

The predicted share prices were calculated as a function of the corresponding daily benchmark values.

Our regression model examined the correlation between:

a. The actual daily returns (or percentage changes) observed in Timminco's stock for the three-month period subsequent to the Class Period; and,

b. The actual daily returns observed in the following relevant market and industry stock indices during the same time period:

   i. The S&P/TSX Equity Total Return Index (the "Market Index") – A broad-based composite index of equities trading on the TSX, excluding income trusts. The index provides a cross-section of equities traded in various industries; and,

   ii. The S&P/TSX Metals & Mining Total Return Index (the "Industry Index") – An index of equity performance for companies engaged in the diversified production or extraction of metals and minerals.[43]

Differences between Timminco's actual daily share returns and its predicted daily share returns were then evaluated for statistical significance. Some deviation from predicted values is expected because regression is an estimation, and statistical variation is expected. "Significant" differences suggest that company-specific events occurred, which caused the actual share price to move more than predicted if it were affected only by market- or industry-specific factors.

[43] Timminco was a constituent of the S&P/TSX Capped Metals & Mining Index from March 24, 2008 to December 19, 2008 (Source: Bloomberg).

The threshold for statistical significance depends on the predictive ability of the regression model. A high degree of correlation between data points would result in stronger predictive ability (and lower thresholds for deviations).

The threshold for statistical significance that was formulated from our regression analysis was 12.9%. Accordingly, any deviations between the actual and predicted daily returns that were in excess of 12.9% were considered to be statistically significant. This and other technical aspects of our regression model are set out in **Appendix B**.

Our regression analyses examined data for the three-month period of November 12, 2008 to February 11, 2009. This timeframe falls outside of the Class Period. By then, the investment market had substantial knowledge of the Misrepresentations, and the share prices presumably had been "corrected".

Based upon our regression analysis, we identified the following two dates during the Class Period, in which there were statistically significant declines in Timminco's share price:

a. *April 21, 2008 to April 22, 2008* - Timminco's share price at the close of trading on April 21, 2008 was $22.15. At the close of trading on April 22, 2008, the Company's stock was priced at $18.23 per share, or a decline of 17.7%. For the same period, the Market Index and Industry Index declined by 0.5% and 1.5%, respectively. The predicted decline for Timminco's share price (according to our regression analysis) was 2.9%. Hence, the actual decline in Timminco's share price (i.e., 17.7%) was statistically significant in comparison to the predicted movement. The difference between the actual and predicted declines (14.8%) exceeded the threshold for statistical significance (12.9%).

b. *August 11, 2008 to August 12, 2008* - The Company's share price at the close of trading on August 11, 2008 was $19.97. On August 12, 2008, Timminco's shares closed at $15.10 per share, or a decline of 24.4%. For the same period, the Market Index and Industry Index declined by 0.3% and 1.4%, respectively. The predicted decline in Timminco's share price (based upon our regression model) was 2.8%. The difference between the actual and predicted declines (21.6%) was greater than the threshold for statistical significance (12.9%).

The above observations are summarized in Chart 3:

Chart 3: Summary of Statistically Significant Declines

Date of Statistically Significant Decline	Timminco closing share price	Timminco share price at close of following day	Actual change in Timminco share price	Change in Market Index	Change in Industry Index	Expected change in Timminco share price	Statistically Significant difference (Yes / No)
April 21, 2008	$22.15	$18.23	-17.7%	-0.5%	-1.5%	-2.9%	YES
August 11, 2008	$19.97	$15.10	-24.4%	-0.3%	-1.4%	-2.8%	YES

2. The Revelations

Based upon our event analysis, it is our view that the statistically significant declines in Timminco's stock price can be attributed to the Revelations. We noted the following publicly-disclosed information that emerged in or around these dates:

a. Media Reports: April 21, 2008 to April 22, 2008

The April Revelation is unique in the originating source of relevant information. Doubts as to Timminco's operations were raised by the business media. This information did not come as a clarification disclosed by the Company.

The following media reports emerged from April 21, 2008 to April 22, 2008, questioning the validity of the prospects for Timminco's solar-grade silicon operations:

i. An article in Barron's, entitled "Timminco Generates More Heat Than Light", dated April 21, 2008 stated:

> "The 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. The Toronto company's sales fell from C$190 million in 2005 to C$166 million in 2007, while operating losses grew from C$8 million in 2005 to C$16 million in 2007. The stock is far ahead of reality and vulnerable if solar silicon disappoints."[44]

ii. An article, entitled "Light shed on Timminco's high-flying stock", published by the National Post stated:

> "Meanwhile, other potential investors continue to do their analysis. One of the country's sharpest, who requested anonymity, has not yet made up his mind. 'These guys come out of nowhere, managed to find the holy grail that nobody else could possibly do with no research and development and hardly any capital expenditure. And [there] has been no outside corroboration. I think they are heavily overstating the probability of success,' he said.
>
> Among the investor's concerns is whether Timminco can achieve its long term purity levels, which means producing silicon that has a very low percentage of phosphorous and boron. As well, the investor asks if [the company can] generate success once it gets fully operational and is producing 14,400 tonnes per year, up

[44] Alpert, Bill. "Timminco Generates More Heat Than Light". Barron's. April 21, 2008.

> from [300] tonnes at present. There's also a question of timing, with producers rushing to get supply because of tax incentives in Europe."[45]

iii. An article, entitled "From hot stock to target", published by ReportonBusiness.com on April 21, 2008 states that the Company was under mounting pressure from one of "Wall Street's most feared short sellers to defend claims that the Company had developed a breakthrough process for producing solar grade silicon". In particular, the short seller (Mr. Manuel Asensio) questioned how Timminco could claim that its unique production process allowed it to refine silicon at half the cost of its competitors.[46]

iv. An article published by the Financial Post on April 22, 2008, entitled "Timminco declared a short", states:

> "Ravi Sood, president of Lawrence Asset Management, believes Timminco Ltd. is so overvalued that it's a short. 'I know the story very well and it's just that, a story,' he claimed yesterday, one working day after the short position rose to 1.179 million shares – the year's second-highest.
>
> Sood said he has seen nothing to suggest Timminco has any sort of proprietary technology or process that could allow it to deliver what are 'fantastic claims'. 'They are just not grounded in reality,' said Sood, who argues that Timminco's process to upgrade metallurgical silicon 'is no different from things people have been doing for many years. And worse, their patent application, [which has] not

[45] Critchley, B. "Light shed on Timminco's high-flying stock". National Post. [Date not known]. Although the article is not dated, it was likely published in or around April 21, 2008, based upon: (a) the stock price information referenced in the article; and, (b) the fact that the author had published another article on Timminco on April 22, 2008.

[46] Hoffman, Andy and McNish, Jacquie. "From hot stock to target – Timminco defends itself against short seller's allegations." Reportonbusiness.com. April 21, 2008.

> [been] granted, is based on prior art, much of [which] has been rejected in previous attempts.'
>
> Sood is dismissive of what Timminco says it has created, given that it spent only $1.2 million on technology. 'They must have the best scientists in history collaborating on this. [But] small companies like Dow Corning, which knows nothing about chemical processes or metallurgy, managed to spend hundreds of millions of dollars and not come up with this.' "[47]

b. Conference Call with Investors and Analysts, and Q2 MD&A: August 11, 2008

At the close of trading on August 11, 2008, Timminco held a conference call with investors and analysts regarding the Company's financial results for the second quarter of 2008. During its conference call, Timminco acknowledged the following:

i. Its solar silicon business had encountered production challenges.[48]

ii. Contamination issues arose in the production of Timminco's solar-grade silicon, which lowered the Company's production volume by 70 tons (or approximately 32% of total volume shipped in the second quarter of 2008).[49]

iii. The contamination issues were expected to affect production volumes in the third quarter of 2008.[50]

[47] Critchley, Barry. "Timminco declared a short". Financial Post. April 22, 2008.
[48] Final transcript of Timminco's Q2 2008 earnings conference call occurring on August 11, 2008. (Page 2)
[49] Ibid.
[50] Ibid.

iv. The Company faced equipment problems, which halted one of the Company's production lines. In addition, there was a transformer problem that affected primary production.[51]

v. Much of the equipment that was being used to produce the solar-grade silicon was originally designed for use in the aluminum industry, and not for silicon production. As a result, there was phosphorous contamination.[52]

vi. Timminco refused to comment on when it would have the new equipment to correct the contamination problems.[53]

We further note that Timminco's Management's Discussion and Analysis for the second quarter of 2008 (filed with SEDAR on August 12, 2008) made reference to the following:

i. A "number of production issues" associated with the solar-grade silicon production process that were resolved in the second quarter;[54]

ii. "[I]dentified enhancements" to solar-grade silicon operations that were to be addressed in the third quarter;[55] and,

iii. The "failure of a transformer which has reduced the efficiency of one of the electric arc furnaces…".[56]

Based upon our event analysis, we have assumed that the Company's Misrepresentations were revealed to the market on two occasions: (a) Partially, though the negative media reports that

[51] Ibid. (Page 7)
[52] Ibid. (Pages 8 and 9)
[53] Ibid. (Page 10)
[54] Timminco Interim Report for the Second Quarter Fiscal 2008. (Page 5, second paragraph).
[55] Ibid.
[56] Ibid.

emerged on April 21, 2008 and April 22, 2008 (which were falsely rebutted by the Company at the close of trading on April 22, 2008); and, (b) Fully, subsequent to the Company's August 11, 2008 conference call with investors. The release of the foregoing information coincided with the statistically significant declines in Timminco's share prices. Accordingly, we have included the stock price declines on these dates in our damages analysis.

C. Technical Components of Damages Calculations

Damages under the Constant Dollar and Constant Percentage approaches to stock price inflation are calculated as the product of (1) The stock price decline; and, (2) total shares affected. The technical factors that comprise these components are discussed below.

1. Constant Dollar and Constant Percentage Stock Price Declines

The Constant Dollar and Constant Percentage approaches to quantifying stock price declines were calculated as the difference between:

a. The actual decline experienced in Timminco's share price on the day following each Revelation date; and,

b. The predicted change in Timminco's share price (for the same dates), based upon our regression analysis.

A comparison of the Constant Dollar and Constant Percentage approaches to damages follows.

a. Constant Dollar

Under the Constant Dollar method, stock price inflation is a fixed *dollar* amount, regardless of the price at which the affected shares had been acquired. The Constant Dollar inflation is then

multiplied by the total affected shares in order to arrive at an estimate of aggregate, class-wide, damages.

The Constant Dollar decline in Timminco's share price on each of the Revelation dates that are included in our damages analysis were quantified as follows:

i. The April 21, 2008 Revelation Date: $3.28 per share – Please refer to **Schedule 1 to Appendix A** for our detailed calculations;

ii. The August 11, 2008 Revelation Date: $4.31 per share – Please refer to **Schedule 2 to Appendix A.**

b. Constant Percentage

In contrast to the Constant Dollar approach, stock price inflation under the Constant Percentage method is a fixed *percentage* that is dependent upon the price (in dollars) at which the affected shares had been purchased. In the absence of individual class-member share purchase data, it is necessary to estimate the average price that all class members had paid to acquire Timminco's shares prior to each Revelation date. The resulting inflation is then multiplied by the total affected shares in order to arrive at an estimate of aggregate, class-wide, damages.

The Constant Percentage decline in Timminco's share price on each of the Revelation dates were quantified as follows:

i. The April 21, 2008 Revelation Date: $3.47 per share – Please refer to **Schedule 3 to Appendix A** for our detailed calculations;

ii. The August 11, 2008 Revelation Date: $5.42 per share – Please refer to **Schedule 4 to Appendix A.**

c. Impact of New Information Unrelated to the Misrepresentations

In arriving at our estimates of stock price inflation, we considered whether the difference in price changes could have been significantly impacted by new information, unrelated to the Misrepresentations, that was simultaneously disclosed in or around the Revelation dates. If so, the stock price impact of such information would have to be removed from the damages analysis. The purpose is to focus our estimate of damages that strictly flow from the Misrepresentations.

We performed an event analysis to:

i. Determine the existence of new information (unrelated to the Misrepresentations) that was disclosed in or around the Revelation dates; and,

ii. Assess the impact, if any, of such information on Timminco's stock price.

Based upon our analysis, we observed that during the Class Period, the focus of media commentary and Timminco's own press releases was virtually always on Timminco's solar-silicon business. There was far less emphasis on Timminco's other businesses (e.g., magnesium operations) relative to the solar-silicon business both in terms of analyst coverage and information released by the Company:[57]

i. In or around the April 21, 2008 and August 11, 2008 Revelation dates, analysts commented only minimally on

[57] The Company's press releases and other public disclosures as well as the analyst reports (set out in Appendix C) focused primarily on Timminco's solar-grade silicon operations with relatively few comments on non-solar-grade silicon operations.

certain aspects of Timminco's business that were not related to solar-grade silicon operations:

(a) An analyst report prepared by Mr. Michael Willemse of CIBC (dated April 20, 2008), stated:

> "Key risks at Timminco's other businesses include increased competition from low-cost producers (particularly from China), prolonged challenges at Fundo Wheels, and a decline in end-market demand for silicon metal and magnesium due to economic weakness. Note that these businesses comprise a minor portion of our valuation for Timminco and unforeseen events should not have a significant impact on our overall price target."[58]
>
> [Emphasis added.]

(b) An analyst report, dated August 11, 2008, also prepared by Mr. Michael Willemse of CIBC contained the same note (as above) regarding the relatively minor impact that Timminco's other operations (i.e., non-solar-grade silicon businesses) had on the stock's valuation.[59]

(c) In a report from Clarus Securities, dated August 12, 2008, author Ms. Carolina Vargas, stated the following with regard to the Company's magnesium operations:

> "Results of $18.3 million were above our $11.0 million estimates as well

[58] CIBC World Markets analyst report by Michael Willemse and Jesse Ahlan, entitled: "Timminco Limited: Update from Management Meetings", dated April 20, 2008 (page 7).
[59] CIBC World Markets analyst report by Michael Willemse and Jesse Ahlan, entitled. "Timminco Limited: Q2/08 Review: Still Working Toward Full Production", dated August 11, 2008 (page 4).

> as gross margins of 11.9%. The increase in sales is attributable to price increases across most of the Group's product lines to offset higher magnesium metal costs. The segment continues to be challenged by competition, (sic) increased costs for magnesium feedstock partially offset by improved cost structure. We expect this segment to continue to be EBITDA neutral."[60]
>
> [Emphasis added.]

(d) In a report from Paradigm Capital, dated August 12, 2008, author Mr. Marvin Wolff stated:

> "The magnesium assets are being restructured for profitability and eventual sale, or divestiture. To that end the company took a reorganization charge against the assets of $9.8m in the quarter or $0.10 per share."[61]

We note that Company first announced its intention to restructure its magnesium business in a press release dated June 6, 2008.[62] At that time, the Company expected to incur a restructuring charge in its second quarter of approximately $15 million to $17 million[63]. The actual charge incurred in the second quarter (as disclosed in the Paradigm Capital analyst report) was approximately 35% to 42% lower than the expected charge for the second quarter. Further,

[60] Clarus Securities analyst report by Carolina Vargas and Aman Atwal, entitled "Timminco Ltd.: Q2/08 Results; Purity Levels Improved Significantly", dated August 12, 2008 (third page).
[61] Paradigm Capital analyst report by Marvin Wolff, entitled "Timminco Ltd. Solar Silicon Having a Bumpy Start – But on Track", dated August 12, 2008 (page 2).
[62] Timminco news release, June 6, 2008.
[63] Ibid.

> Timminco's Interim Report for Q2 2008 stated that the total costs for restructuring the Company's magnesium operations would eventually be at the lower end of the $15 million to $17 million range that had been originally announced on June 6, 2008.[64] Presumably, the foregoing would have positively impacted the Company's stock price, but not significantly.

Based upon the above information, we have assumed that the public discourse regarding the Company's non-solar-grade silicon operations did not have a significant impact on Timminco's stock prices surrounding the Revelation dates.

d. 90-day Look-back at Timminco's Share Prices

In certain circumstances, damages may be mitigated if the subject company's share price recovers from a decline following a material disclosure. We performed a review of Timminco's stock price for the 90 days following the Revelation dates in our analysis of damages.

We observed a recovery (or "bounce-back") in the price of Timminco's securities in the ninety-day period subsequent to the April 21, 2008 Revelation date. In particular, the Company's mean share price over the ninety-day period following the first Revelation date exceeded the share price at the close of April 22, 2008. However, we do not believe that this share price recovery offsets the initial decline. The recovery appears to have been premised upon the Company's denial of the media's concerns, as well as making additional claims, which contributed to the gravity of the Misrepresentations.

[64] Timminco interim report for the second quarter of 2008, page 6.

We note that the Company issued assurances during this 90-day period, which the Plaintiff claims contained Misrepresentations associated with Timminco's solar-grade silicon operations:

i. A press release issued after the close of trading on April 22, 2008, entitled "Timminco Provides Update on Stock Trading Activity", summarized the progression of the Company's solar-grade silicon operations up to April 2008. The press release repeated one of the Misrepresentations that have been claimed by the Plaintiff. In particular, the following reference was made to Timminco's expected expansion of annual solar-grade silicon capacity (to 14,400 tons):

> "Based on its own analysis and the acceptance of its product by leading companies in the solar industry, Timminco announced the expansion of BSI's solar grade silicon capacity to 14,400 mt per year, with the incremental capacity on stream by the end of the second quarter of 2009."[65]

Heightened and unusual trading activity in Timminco's stock followed on April 23, 2008, prompting inquiry by the Market Surveillance division of the TSX.[66]

ii. The company issued a press release, dated May 8, 2008, and held a follow-up conference call with investors and analysts regarding Timminco's financial results for the first quarter ended March 31, 2008. The press release and follow-up conference call included some of the Misrepresentations.[67]

[65] Timminco news release, dated April 22, 2008, 4th paragraph.
[66] Timminco news release, dated April 23, 2008.
[67] Amended Statement of Claim, paragraphs 59 to 67.

iii. On May 8, 2008, the Company issued a press release, entitled "Timminco announces Solar Silicon Operational Review by Photon Consulting". The following is an excerpt from the press release:

> " 'Operations and processes have potential for massive growth and, possibly, for reshaping the silicon industry', declared Michael Rogol Managing Director of PHOTON Consulting. 'The equipment is very impressive, very low-cost, beyond poly-scale. In interviews, several customers have reported cell efficiencies above 14% and some above 15% utilizing 100% (unblended) solar grade silicon from Bécancour.' "[68]

The Photon report contained various Misrepresentations.[69]

iv. On May 13, 2008, Timminco published its Management Discussion & Analysis for the first quarter of 2008, which contained various Misrepresentations.[70]

v. On May 14, 2008, Timminco and Mr. Rogol of Photon held a conference call with analysts and investors in regards to Photon's operational review of the Company's solar-grade silicon operations. The conference call and accompanying summary of the Photon report included the statements that form the Misrepresentations.[71]

vi. On May 29, 2008, Timminco held a conference call with analysts and investors, stating several of the

[68] Timminco press release, dated May 8, 2008.
[69] Amended Statement of Claim, paragraphs 52 to 57.
[70] Amended Statement of Claim, paragraphs 68 to 70.
[71] Amended Statement of Claim, paragraphs 73 to 78.

Misrepresentations that have been claimed by the Plaintiff.[72]

We understand that it is the Plaintiff's position that the rebound in share price was the result of the public repetition of the Misrepresentations. This is consistent with the observed trading activity. Hence, we have not adjusted our calculation of share price inflation or total damages due to the Company's apparent false rebuttals of the media's concerns regarding Timminco's solar-grade silicon operations.

2. *Total Shares Affected*

The total shares affected by the Misrepresentations for purposes of our damages analysis was calculated by:

a. Estimating the number of Timminco shares available for trading on each day (commonly referred to as the "float") of the Class Period;

b. Adjusting the Company's reported share volume to remove:

   i. Purchases made by short sellers to cover their short positions (commonly referred to as "covering their positions");

   ii. Shares acquired by insiders on the open market; and,

   iii. The double-counting effect of intermediaries who facilitate share transactions in the market (commonly referred to as "market makers").

c. Formulating a model to estimate the trading pattern of Timminco's shares during the Class Period.

[72] Amended Statement of Claim, paragraphs 79 to 82.

Each of these factors is discussed in greater detail below.

a. Timminco Share Float

The share float represents an estimate of the number of shares available for trading by the Class Members on any given day. We calculated Timminco's daily share float as:

i. The Company's total issued and outstanding shares;

ii. Less: shares held continuously by institutions and insiders (as these shares were not available for trading by the general public)[73];

iii. Plus: the number of shares sold short at any given time (short selling effectively places borrowed shares back on the market and thus increases the share float).

Once Timminco's float had been calculated, we adjusted the Company's reported trading volume in order to estimate the amount of shares that were actually traded by the Class Members. The specific adjustments to Timminco's reported trading volume are discussed below.

b. Adjusted Trading Volume

Adjustments were required to the Company's daily reported share trading volume in order to remove share activity that was associated with: (i) short sellers covering their positions; (ii) shares acquired by insiders; and, (iii) market maker activity. A brief description of the necessary adjustments is set out below:

[73] In certain instances, assumptions were required due to a lack of available information on the actual insiders and institutional investors that existed during the Class Period. We reserve the right to amend our report if additional information becomes available.

i. *Short Sellers' Covering Their Positions*

In order for shares to be affected by the Misrepresentations, the Company's shares had to have been acquired during the Class Period, prior to a Revelation date, and held subsequent to the Revelation date. Short sellers who acquired Timminco's stock to cover their short positions could not have held the shares during the forgoing period because any shares acquired would not have been owned (or retained) by the short sellers themselves. Rather, shares that were purchased by short sellers would have immediately been returned to the lender (i.e., the original investor) from whom the shares had been borrowed.

Given that share activity from short sellers is accumulated in Timminco's reported daily trading volume figures, an adjustment was required to exclude such transactions in quantifying the total affected shares that are eligible for damages.

ii. *Shares Acquired by Insiders*

Insiders are excluded from the definition of Class Members.[74] Hence, an adjustment to the Company's reported daily share volume was required to remove the impact of stock purchases by Timminco's insiders.

iii. *Market Maker Adjustment*

Market makers are intermediaries who facilitate the purchase and sale of shares between buyers and sellers, but are not buyers or sellers themselves. The TSX states:

[74] Amended Statement of Claim, paragraph 20.

> "The role of the Market Maker on [the] Toronto Stock Exchange (TSX) is to augment liquidity .... In the TSX environment, a Market Maker manages market liquidity through a passive role. Market Makers are visible only when necessary to provide a positive influence when natural market forces cannot provide sufficient liquidity."[75]

When market makers transact, the share trade is double-counted in the reported trading volume of a stock: once when the market maker purchases the share from the seller; and again when the share is sold to the buyer. Accordingly, an adjustment is required in order to eliminate this double-counting effect.

We understand that the TSX does not provide market maker activity statistics for the exchange. We have assumed that market maker activity accounted for 10% of the reported daily volume of Timminco's trading activity, based upon the New York Stock Exchange (NYSE) accumulated data for market maker activity.[76] Accordingly, a corresponding adjustment has been made to reduce Timminco's daily reported share volume.

c. Trading Pattern

Once a share has been acquired for the first time in the Class Period, prior to a Revelation, it has been affected by the Misrepresentations. If that same share subsequently trades, it cannot be affected again (i.e., the damages are passed from shareholder to shareholder). Accordingly, a share affected by the Misrepresentations results in damages only once, regardless of the

[75] TMX Group web-site - "Market Maker System (www.tmx.com/en/trading/products_services.html.)
[76] Barclay, Michael and Torchio, Frank C. "A comparison of trading models used for calculating aggregate damages in securities litigation" Law and Contemporary Problems Vol. 64: No. 2 and 3, 2001. (Page 106)

number of times that particular share is traded (or exchanged hands) during the Class Period. Hence, in order to arrive at an estimate of total shares affected by the Misrepresentations, it is necessary to separate Timminco's adjusted volume by:

i. Shares that have traded for the first time ("Newly Traded Shares"); and,

ii. Shares that have previously traded at least once during the Class Period ("Previously Traded Shares").

The total shares affected by the Misrepresentations is the accumulation of Newly Traded Shares only.

Our damages analysis includes a high and low range, in order to account for the range of possible outcomes in predicting the trading pattern of Timminco's shareholders. In particular, we have estimated the likelihood that a Timminco share was traded for the first time as opposed to whether that share had been previously traded in the Class Period.

In the absence of specific data on Timminco's share trading characteristics, we have made the following assumptions in our damages analysis, which are based upon broad market studies:

i. In our high estimate of damages, we have assumed that the Newly Traded Shares were equally as likely to be traded as Previously Traded Shares.[77]

[77] McCann, Craig J. "A Note On Stock Trading Models" Securities Litigation & Consulting Group 2001 (first page); Barclay, Michael and Torchio, Frank C. "A Comparison of Trading Models used for Calculating Aggregate Damages in Securities Litigation" Law and Contemporary Problems Vol. 64: No. 2 and 3, 2001. (Page 107)

ii. In our low estimate of damages, we have assumed each Previously Traded Share was five times more likely to trade than a Newly Traded Share. [78]

Based upon our calculations, we estimated total affected shares to be 29.8 million shares in the low estimate and 35.8 million in our high estimate. Please refer to **Schedules 2 and 4 to Appendix A.**

D. Opinion of Damages

Based upon our analysis, it is our preliminary opinion that the Plaintiff's damages range from **$196 million** to **$254 million** under the Constant Dollar approach and **$233 million** to **$300 million** under the Constant Percentage approach (please refer to **Appendix A**). The range of damages dollars reflects the assumptions that are applied in our analysis. A point value of damages will be determined by the assumptions that are found to be most appropriate by the Court.

[78] Beaver, William H and Malernee, James K. "Estimating Damages in Securities Fraud Cases" Cornerstone Research Publication 1990. (Page 11)

VI. RESTRICTIONS

This report is not intended for general circulation or publication nor is it to be reproduced for any purpose other than as outlined above without our written permission in each specific instance. We will not be responsible for losses occasioned to any party as a result of the circulation, publication, reproduction or use of this report contrary to the provisions of the paragraph.

As stated at the outset of this report, commentary had to be based on available public information. We reserve the right to revise our analysis in light of any facts, trends, or changing circumstances that become known to us subsequent to the date of this report.

Respectfully submitted,

ROSEN & ASSOCIATES LIMITED

L.S. Rosen

A. T. Mak

TAB M

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

A COMMISSIONER FOR TAKING AFFIDAVITS

252

CITATION: Pennyfeather v. Timminco Limited, 2011 ONSC 4257
COURT FILE NO.: 09-CV-378701CP
DATE: July 13, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

St. Clair Pennyfeather

Plaintiff

- and -

Timminco Limited, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Dr. Heinz Schimmelbusch, Robert Deitrich, 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 and Victoria Paris for the Plaintiff
- Alan D'Silva and Lesley Mercer for the Defendants Timminco Limited, Heinz Schimmelbusch, Rene Boisvert, Robert Dietrich, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield and Mickey M. Yaksich

HEARING DATE: June 29, 2011

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Defendants, Timminco Ltd., Dr. Heinz Schimmelbusch, Robert Dietrich, Rene Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield and Mickey M. Yaksich, (the "Timminco Defendants") bring a motion for particulars of the Plaintiff St. Clair Pennyfeather's Amended Statement of Claim in a proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6.

[2] With a few exceptions, Mr. Pennyfeather and his predecessor plaintiff, Mr. Sharma, refused to provide particulars after the Timminco Defendants served a Demand for Particulars that contained some 58 requests. Mr. Pennyfeather now resists the motion for particulars.

[3] In resisting the motion, Mr. Pennyfeather's two major arguments raise doubts about the convention that a defendant in a class action is not required to deliver a pleading until after the certification motion.

[4] Mr. Pennyfeather's first major argument is the categorical argument that since particulars of a Statement of Claim are ordered only if the defendant shows that he or she needs the particulars in order to plead and since pre-certification, the Defendants are not yet pleading a defence, therefore, the Timminco Defendants do not need particulars and, thus, their motion for particulars is premature. He also submits that ordering the plaintiff before certification to provide particulars would not advance the proceeding, would provide a tactical manoeuvre for defendants, and would delay the hearing of the leave and certification motion, causing prejudice to the plaintiff and class members.

[5] Mr. Pennyfeather's first argument has some added weight because of the circumstance that his proposed action includes a claim under Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c.S-5, for which leave is required to bring the claim. Thus, his argument goes that since a Statement of Defence cannot be delivered until the matter of leave is determined, it is premature for a defendant to demand particulars.

[6] As a second and alternative major argument, Mr. Pennyfeather submits that if in the case at bar, the demand for particulars is not premature, then, the Defendants have not satisfied the test for the court to order particulars because the Defendants did not deliver an affidavit attesting to their need for the particulars and the evidentiary record for the certification and leave motion reveals that they do not need any more information from Mr. Pennyfeather.

[7] As will be seen in the discussion that follows, the Defendants have answers to Mr. Pennyfeather's arguments. The Defendants' main answers are that while, technically, they do not need the particulars to plead, they eventually will need the particulars, and, in any event, they need particulars now in order to know the case they must meet for the imminent certification and leave motion, which they do not seek to delay.

[8] Therefore, I conclude that the Defendants' Demand for Particulars should be determined on its merits. In this regard, I conclude that the Defendants' proper demands for particulars should be answered by Mr. Pennyfeather. I say proper demands, because some of the 58 demands are overbroad or not proper demands for particulars, and I will need to specify what demands should be answered. Further, some of the Defendants' demands are mischaracterized as a demand for particulars but reveal different problems with Mr. Pennyfeather's Statement of Claim that require attention.

[9] Thus, for the reasons that follow, I grant the motion for particulars. However, as a term of my order, I direct that after the particulars are delivered, the Timminco

Defendants must deliver a Statement of Defence. As I will also explain in my Reasons for Decision, it is time to revisit the convention that defendants do not deliver a Statement of Defence before the certification motion.

[10] My experience as a case management judge in class proceedings reveals to me that as a general rule, it would be preferable that pleadings be closed before the action moves to a certification motion.

[11] In any event, for the case at bar, once the matter of particulars and other challenges to the Statement of Claim are resolved, I am ordering the Timminco Defendants to deliver their Statements of Defence. As a matter of my case management powers, I am also directing the other Defendants to delivery any challenges they may have to Mr. Pennyfeather's Statement of Claim or to deliver their Statement of Defence. I direct Mr. Pennyfeather to serve a copy of these Reasons for Decision on the other Defendants who did not appear on this motion.

[12] In the discussion that follows, I will also discuss the consequences to the certification motion of closing the pleadings. I foreshadow to say that completing the pleadings will influence the determination of the s. 5 (1)(a) criterion for certification and, in my opinion, facilitate the hearing of the certification motion.

B. FACTUAL AND PROCEDURAL BACKGROUND TO THE MOTION FOR PARTICULARS

[13] On May 12, 2009, Ravinder Kumar Sharma commenced a proposed class action on behalf of persons who purchased securities of Timminco during the period from March 17, 2008 to November 11, 2008. His claim is for negligence and misrepresentation and for damages of $520 million and punitive damages of $20 million.

[14] Timminco produces and sells metals, alloys, including silicon. Some of the silicon is sold to the solar photovoltaic energy industry. In March 2007, Timminco announced it had developed a proprietary process to produce solar-grade silicon. It is pleaded that the Defendants made misrepresentations in Timminco's public documents, in public oral statements, and in expert's opinions about its proprietary process and the significance of it to Timminco's business prospects and profitability. The Statement of Claim alleges that the misrepresentations would reasonably be expected to affect the market price of the shares of Timminco.

[15] The Statement of Claim also mentions the Plaintiff's intention to bring a motion seeking leave of the Court to assert secondary market claims pursuant to Part XXIII.1 of the *Securities Act*. The Statement of Claim alleges negligence, negligent

misrepresentation, reckless misrepresentation, as well as the statutory causes of action contained in Part XXIII.1.

[16] On November 25, 2009, at a case conference, the Timminco Defendants advised that they would be serving a Demand for Particulars, and on December 11, 2009, the Demand was served.

[17] The Timminco Defendants sought particulars in respect of 58 paragraphs of the Statement of Claim. Six Demands, numbered 1, 3, 5, 11, 26 and 57, are no longer in issue.

[18] Demands for Particulars were also delivered by other Defendants on December 22, 2009 (Photon Defendants) and January 8, 2010 (Mr. Walsh). On the motion now before the court, the other Defendants are not pursuing their demands for particulars.

[19] On January 8, 2010, Plaintiff's counsel wrote counsel for the Timminco Defendants and advised that the Plaintiff would not be providing a further response to the Demand for Particulars since the demand was premature.

[20] In the winter of 2010, Mr. Sharma's counsel asked the Defendants to consent to an order substituting Mr. Pennyfeather as proposed Representative Plaintiff, and by letter dated June 10, 2010, the Defendants' counsel indicated that any consent would need to reserve the Defendants' position "that any proposed pleading must incorporate the answers to the Demand for Particulars, or, alternatively, that [the Defendants] are still entitled to Particulars (on consent or by order) prior to any further step in this proceeding".

[21] Following a case conference held March 10, 2010, Mr. Sharma brought a motion for, among other things, removal of himself and the substitution of Mr. Pennyfeather as the proposed Representative Plaintiff. Mr. Pennyfeather had purchased 57 shares of Timminco Ltd. in 2008, for a $1,041.43. As of June 24, 2011, his shares were valued at $21.09, representing a loss of 98%.

[22] On March 31, 2011, I allowed the substitution of Mr. Pennyfeather as Plaintiff, 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*.

[23] At a case conference held May 16, 2011, I directed Mr. Pennyfeather to deliver the motion material for his motions for leave to assert secondary market *Securities Act* claims and class certification in this proceeding, as well as "a further reply to the Demand for Particulars as the Plaintiff may be advised."

[24] On May 17, 2011, Mr. Pennyfeather delivered an Amended Statement of Claim. With a few exceptions, the Amended Statement of Claim did not provide the particulars requested in the Timminco Defendants' Demand for Particulars.

[25] On May 31, 2011, Mr. Pennyfeather served motion materials on the leave and certification motions. There are six fat volumes of evidentiary material. However, no formal Reply to the Demand for Particulars has been received by the Timminco Defendants, and the Timminco Defendants brought this motion to compel answers to the Demand for Particulars. They did not file any affidavits or any other evidence, in support of their motion. Mr. Pennyfeather has filed an affidavit stating that he is not in a position to furnish further particulars, and that the particulars are within the knowledge of the Timminco Defendants.

C. THE ARGUMENT PREMISED ON PREMATURITY

[26] Mr. Pennyfeather has delivered an Amended Statement of Claim, and the Timminco Defendants demand particulars, but Mr. Pennyfeather submits that the demand is premature because a Statement of Defence is not due for delivery and, therefore, he submits that particulars are not needed and ought not to be ordered. He regards the Demand for Particulars as a tactical manoeuvre to delay the class proceeding that ought not to be permitted.

[27] In my opinion, the hidden premise of this argument - that the determination of the certification motion is a prerequisite for the Defendants' pleading its defence - is wrong, the ultimate conclusion that particulars are premature is wrong, and, in any event, I am removing the prematurity point by imposing as a term of my Order for particulars that the Timminco Defendants deliver a Statement of Defence after the matter of particulars and any other challenges to the Statement of Claim have been resolved.

[28] In this last regard, I note that there may be an issue about whether Mr. Pennyfeather has a negligence claim independent of his claims of misrepresentation.

[29] Mr. Pennyfeather begins his argument with the premise that the reason that defendants are permitted to deliver a Statement of Defence after the certification motion is that the certification motion will determine the causes of action and the common issues that will proceed to trial and therefore influence and prescribe the content of the Statement of Defence.

[30] This premise, however, is false. All the causes of action that are pleaded have the potential to be tried not just the ones that are certified for the common issues trial. The non-certified causes of action are not struck out of the plaintiff's pleading. The defendant pleads to the original statement of claim and not some truncated version of it.

The pleadings are then closed, and the litigation plan and the certification order will define the nature of the common issues trial, which may be followed by individual issues trials or procedures. All of this is based on the original Statement of Claim, which may or may not have to be augmented by pleadings and discoveries in the individual issues trial, if there are any.

[31] Depending on the litigation plan and the certification order, the representative plaintiff could try all of his or her own claims at the common issues trial, which in many respects will be a normal trial between a plaintiff and a defendant. In a comprehensive trial, the result of a common issues trial is a judgment that is: (a) binding on the representative plaintiff and the defendant with respect to all of the pleaded claims and defences that are tried; and (b) binding on the class members to the extent of the determination of the causes of action and common issues that have been certified.

[32] I appreciate that a common issues trial and the examinations for discovery that proceed it can - and usually are - restricted to just the issues that have been certified. Master McLeod explained the rationale for this approach in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*, [2003] O.J. No. 5703 (Master) at paras. 6 and 9 as follows:

> 6. In any proceeding the starting point to determine relevance is the pleadings. Relevance of course is the touchstone in determining whether or not a question is proper. A class proceeding, however, takes place in two stages. Firstly there is a trial on the common issues. Thereafter a mechanism is established for resolution of the issues that have not been defined as common issues. Discovery of the representative plaintiffs at the present stage in the case before me is limited by the definition of common issues. In other words, the pleadings inform interpretation of the common issues and set out the facts to be relied upon but a question is only a proper question in this phase of the action if it relates to the common issues and not the individual claims. It is therefore the certification order as informed by the pleadings and not the pleadings at large that define relevance for the first phase of the trial.
>
> 9. ... The certification motion is procedural but, like any order defining the issues for trial, it limits the scope of relevant inquiry. What a definition of issues for trial does is to remove other items from consideration at that trial. In that sense the certification order defining the common issues is similar to an order for trial of an issue on an application or to an order under Rule 20.05(1) defining the issues to be tried. The issues that are not to be tried do not exist for purposes of discovery at this time. Defining and narrowing the issues, does not guarantee success on the issues and it narrows the issues for both parties. ...

[33] See also: *Andersen v. St. Jude Medical Inc.*, [2006] O.J. No. 3659 (Master), aff'd [2006] O.J. No. 5769 (S.C.J.); *T.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2010 ABQB 203 at para. 18; *Abdulrahin v. Air France*, 2010 ONSC 3953.

[34] However, the approach of restricting the scope of the common issues trial and the associated discovery process to the certified questions is not an absolute rule and much will depend upon the exigencies of each particular class action. A products liability class action without personal injury claims may not need individual trials and is different from a products liability action where there are individual damage assessments because of personal injuries. And, of course, a products liability class action with personal injury claims is a different species from a *Competition Act* class action. Different types of class actions may take different approaches to what is tried at the common issues trial.

[35] The rule that non-certified issues are not tried at the common issues trial is not an absolute rule. In *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2008] O.J. No. 3304 (S.C.J.), the plaintiff sought to limit the examinations for discovery in a class action to the common issues. Justice Sanderson, however, ruled that when Justice Winkler had certified the class action, he also held that the scope of the discoveries should cover all the issues in the action and not just those associated with the common issues. Justice Sanderson ruled that restricting the defendant's discovery rights would prejudice the defendant's rights without substantially promoting judicial economy.

[36] In any event, in the case at bar, with my order that the Defendants deliver a Statement of Defence before the certification motion, they will be pleading an answer to all of the Statement of Claim.

[37] Class actions are subject to the *Rules of Civil Procedure*, and there is nothing in the *Class Proceedings Act, 1992* that precludes defendants from pleading before the certification motion. It is informative that the convention of not closing the pleadings is not a statutory rule, and if the Plaintiff insists on the delivery of a pleading, a defendant may need to seek the permission of the court to delay the delivery of the pleading.

[38] Moreover, the provisions of the *Class Proceedings Act, 1992* indicate that it was the Legislature's intention that the general rule is that the Statement of Defence should be delivered before the certification motion. Section 2 (3) of the Act indicates that the timing of the certification motion is measured by the delivery of the Statement of Defence. Section 2 (3) states:

> 2 (3) A motion under subsection (2) shall be made,
>
> (a) within ninety days after the later of,
>
> (i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and
>
> (ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or

(b) subsequently, with leave of the court.

[39] In the case at bar, as a term of my Order requiring particulars to be brought, I am directing that the Defendants, all of them, be required to deliver their Statements of Defence. Practically speaking, this direction removes Mr. Pennyfeather's argument that the particulars are premature. At the end of these Reasons for Decision, I will discuss the advantages of the approach of completing the pleadings before the certification motion.

[40] Independent of the direction to deliver Statements of Defence, I also would have ordered the delivery of particulars in the case at bar. As noted above, the main explanation for the Order is that the Defendants need the particulars now in order to know the case they must meet for the imminent certification and leave motion, which they do not seek to delay.

[41] For many of the demands for particulars, answers will be helpful in determining whether the criteria for certification have or have not been satisfied. The criteria for certification are heavily influenced by the nature of a plaintiff's case, and this is true for the case at bar which is about alleged misrepresentations by the various Defendants. Having particulars is a matter of procedural fairness for the Defendants in order for them to know the case they must meet at the certification motion.

[42] In my opinion, the fact that Mr. Pennyfeather is also seeking leave to assert a statutory cause of action under Part XXIII.1 of the *Securities Act* is not a reason to delay particulars of the Statement of Claim nor the delivery of a Statement of Defence to the claim as currently pleaded. If leave is granted, Mr. Pennyfeather will amend his Statement of Claim and the Defendants will have a right to amend their Statement of Defence if they need to do so. In the meantime, particulars can be provided to the current Statement of Claim and then the Defendants can challenge the particularized pleading or deliver a Statement of Claim. The Statement of Claim with particulars will be helpful for determining the motion for leave under Part XXIII.1 of the *Securities Act*.

[43] Thus, I conclude that Mr. Pennyfeather's argument based on the premise of prematurity fails. I also foreshadow to say that Mr. Pennyfeather's second argument also fails. That argument is based on the usual law associated with providing particulars and the absence of an affidavit from the Defendants attesting to their need for particulars in order to plead. In my opinion, the deficiencies of the current Statement of Claim are such that particulars should be ordered.

D. THE MERITS OF THE DEMAND FOR PARTICULARS

1. Introduction

[44] The outcome of the above analysis is that I reject Mr. Pennyfeather's first major argument and the Timminco Defendants' Demand for Particulars should be considered for its merits as should Mr. Pennyfeather's second major argument that the Timminco Defendants have not satisfied the test for when particulars are ordered.

[45] Fifty-two demands remain in issue, but, for analytical purposes, some of them can be grouped, and this grouping will economize the determination of whether the court should order that particulars be provided.

[46] In order to make a determination of the merits of the Demand for Particulars, it is necessary to describe some of the law about proper pleadings, about the role of particulars, and about pleading negligence, negligent misrepresentation, and fraudulent misrepresentation claims. This description of the pleading points will be the starting point of the analysis. After the discussion of the pleading principles, I will apply the law about pleadings to the various demands or groups of demands and make an order requiring that Mr. Pennyfeather answer various of the demands for particulars.

[47] I say at the outset of the discussion in this section of my Reasons for Decision that my analysis will reveal that some of the Defendants' demands for particulars are proper, some of the demands are not proper but expose defects in Mr. Pennyfeather's Statement of Claim that require attention, and some of the Defendants' demands are overbroad or not proper.

[48] I wish to make it clear that I am only deciding whether particulars should be ordered. I am not deciding whether the s. 5 (1)(a) criterion of showing a cause of action has been satisfied in the case at bar.

2. Pleading Principles and Cause of Action Fundamentals

[49] The following principals about pleadings are relevant to determining the merits of the Timminco Defendants' Demand for Particulars.

[50] Rule 25.06(1) requires that a Statement of Claim "contain a concise statement of the material facts on which the party relies for the claim". This is the most important rule. It directs the disclosure of the "material" facts, which include facts that establish the constituent elements of the claim or defence: *Philco Products, Limited v. Thermionics, Limited*, [1940] S.C.R. 501 at p. 505.

[51] The material facts are to be stated concisely, which is to say that they should be set out with precision and clarity. If a material fact necessary for a cause of action is

omitted, the statement of claim is bad and the remedy is a motion to strike the pleadings, not a motion for particulars.

[52] In a point that is particularly important for the case at bar, before particulars are ordered, the pleadings themselves should satisfy the requirements of the rules: *Copland v. Commodore Business Machines Ltd., supra.* When a pleading fails to meet the requirements of the rules, the appropriate remedy is not particulars but the striking out of the pleading usually with leave to amend: *Regional Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)*, (1990), 12 O.R. (3d) 750 (Gen. Div.); *Balanyk v. University of Toronto* (1999), 1 C.P.R. (4th) 300 (Ont. S.C.J.); *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684 (Gen. Div.); *Henrickson v. Henrickson,* [1962] O.W.N. 75 (H.C.J.); *Magill v. Expedia Canada Corp.*, 2010 ONSC 5247 at paras. 40-41.

[53] A pleading of a cause of action may not be based on speculation. It is not proper to plead breach of duty, conspiracy, malice, intention to injure etc. baldly and without pleading material facts to support the allegation: *Region Plaza Ltd. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Gen. Div.) at p. 56; *Rogagnuolo v. York (Regional Municipality) Police,* [2001] O.J. No. 3537 (S.C.J.) at paras. 58-61.

[54] I foreshadow to say that several of the Timminco Defendants' demands for particulars are rather challenges that a constituent element of the misrepresentation cause of action is missing.

[55] Rule 25.06(8) provides that "[w]here fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred."

[56] I foreshadow to say that several of the Timminco Defendants' demands for particulars rely on rule 25.06 (8) and its requirement of "full particulars." However, in my view, the Timminco Defendants overlook the qualifier that "knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred."

[57] If a statute is pleaded, the particular sections relied on should be identified: *Magill v. Expedia Canada Corp.*, 2010 ONSC 5247 at para. 131.

[58] Rule 25.10 provides that where "a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within seven days, the court may order particulars to be delivered within a specified time".

[59] In *Antonacci v. Great Atlantic & Pacific Co. of Canada Ltd.* (2000), 181 D.L.R. (4th) 577 (Ont. C.A.) at para. 34, the Court of appeal explained the role of particulars. The Court stated:

> [t]he function of particulars is to limit the generality of pleadings and thus to define the issues which have to be tried and as to which discovery must be given. Each party is entitled to know the case to be made against him at the trial and to have such particulars of his opponent's case as will prevent him from being taken by surprise.

[60] In J.W. Morden and P.M. Perell, *The Law of Civil Procedure in Ontario* (1st ed.) (Markham, LexisNexis Canada Inc., 2010) at p. 347, I describe the role of particulars as follows:

> In between material facts and evidence, is the concept of "particulars". Particulars are additional details that enhance the material facts, and particulars have a role to play different from just being evidence: *Copland v. Commodore Business Machines Ltd.* (1985), 3 C.P.C. (2d) 77 at 80-81 (Ont. S.C.J.), affd (1985), 3 C.P.C. (2d) 77n (Ont. H.C.J.). Particulars are ordered primarily to clarify a pleading sufficiently to enable the adverse party to frame his or her answer, and their secondary purpose is to prevent surprise at trial: *Steiner v. Lindzon*, (1976), 14 O.R. (2d) 122 (H.C.J.). Particulars have the effect of providing information that narrows the generality of pleadings: *Mexican Northern Power Co. v. Pearson* (1913), 25 O.L.R. 422 (Ont. S.C.). Particulars define the issues, enable preparation for trial, prevent surprise at trial and facilitate the hearing: *Physicians' Services Inc. v. Cass*, [1971] 2 O.R. 626 (C.A.) at p. 627; *Areva NP GmbH v. Atomic Energy of Canada Ltd.*, [2009] O.J. No. 4372 (S.C.J.) at paras.39-40; *Obonsawin v. Canada*, [2001] O.J. No. 369 (S.C.J.) at para. 33. A function of particulars to a statement of claim is to define the claim sufficiently to allow a defendant to respond intelligently to it: *International Nickel Co. v. Travelers Indemnity Co.*, [1962] O.J. No. 56 (C.A.); *Hou v. Wesbild Holdings Ltd.*, [1994] B.C.J. No. 2021 (B.C.S.C.); *Blatt Holdings Ltd. v. Traders General Insurance Co.*, [2001] O.J. No. 949 (S.C.J.).
>
> In *Cansulex Ltd. v. Perry*, [1982] B.C.J. No. 369 at para. 15 (B.C.C.A.), the British Columbia Court of Appeal identified six functions for particulars: (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved; (2) to prevent the other side from being taken by surprise at the trial; (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial; (4) to limit the generality of the pleadings; (5) to limit and decide the issues to be tried, and as to which discovery is required; and (6) to tie the hands of the party so that he or she cannot without leave go into any matters not included.

[61] Particulars for pleadings are normally ordered only if: (a) they are not within the knowledge of the party demanding them; and (b) they are necessary to enable the other party to plead his or her response: *Fairbairn v. Sage* (1925), 56 O.L.R. 462 (C.A.); *Physicians' Services Inc. v. Cass*, [1971] 2 O.R. 626 (C.A.); *Obonsawin v. Canada, supra; Blatt Holdings Ltd. v. Traders General Insurance Co.*, [2001] O.J. No. 949 (Ont. S.C.J.);*Lana International Ltd. v. Menasco Aerospace Ltd.*, (1996), 28 O.R. (3d) 343 (Gen. Div.); *George v. Harris*, [2000] O.J. No. 1762 (S.C.J.); *Jane Doe v. Escobar*, [2004] O.J. No. 2760 (S.C.J.); *Ontario (Minister of Health) v. Wilston*, (1975), 11 O.R. (2d) 631 (Div. Ct.).

[62] A motion for particulars usually will not be granted unless the moving party deposes that the particulars are not within his or her knowledge and that they are needed to plead; however, a supporting affidavit is not required if the allegations are so general and bald that it is clear that particulars of them are necessary: *Steiner v. Lindzon* (1976), 14 O.R. (2d) 122 (H.C.J.); *Wood Gundy Inc. v. Financial Trustco Capital Ltd.*, [1988] O.J. No. 275 (H.C.J.); *Curry v. Advocate General Insurance Co. of Canada,* [1986] O.J. No. 2564 (H.C.J.).

[63] Moving from the general rules about pleadings to the specifics of different causes of action, the Supreme Court of Canada described the elements of a negligent misrepresentation claim in *Queen v. Cognos Inc.* (1993) 99 D.L.R. (4th) 626. Justice Iacobucci stated at p. 643:

> The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this court cited above suggest five general requirements:
>
> (1) there must be a duty of care based on a 'special relationship' between the representor and the representee;
>
> (2) the representation in question must be untrue, inaccurate, or misleading;
>
> (3) the representor must have acted negligently in making said misrepresentation;
>
> (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
>
> (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[64] See also *Hughes v. Sunbeam Corp. (Canada)* (2000), 2 C.P.C. (5th) 335 (Ont. S.C.J.), at para. 22, aff'd in part and rev'd in part on other grounds (2002), 61 O.R. (3d) 433 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 466 (S.C.C.).

[65] A plaintiff must establish the following elements to succeed in a claim of fraudulent misrepresentation: (1) that the representor knowingly made a false representation, or made the representation recklessly, caring not whether it was true or false; (2) that the representation was intended to induce reliance; and (3) the plaintiff relied upon the representation to his or her detriment and suffered loss and damage. See *Mondor v. Fisherman*, [2001] O.J. No. 4620 (S.C.J.) at para. 33.

3. Rulings on the Demand for Particulars

[66] Turning now to the details of the Demand for Particulars, for the purposes of their motion, the Timminco Defendants divided their Demand for Particulars into five categories; namely: (1) requests for particulars concerning the alleged

misrepresentations; (2) requests for particulars of facts supporting allegations of the defendants' recklessness or negligence; (3) requests for particulars concerning the plaintiff's alleged reliance and causation of damages; (4) requests for particulars concerning the meaning of vague terms or phrases used by the Plaintiff in the Amended Statement of Claim, which are undefined therein; and (5) requests for identification of the specific statutory provisions on which the plaintiff relies in its pleading.

[67] For the purposes of their motion, the Timminco Defendants submitted a chart using the above five categories. I will use their chart to make my own rulings about the various Demands for Particulars. The Defendants' Chart, which has been expanded by a column setting out my rulings, is set out below. In the chart and in the paragraphs following the chart, I will set out my reasons for my rulings.

[68] Category 1: Particulars Concerning Alleged Misrepresentations

Paragraph	Page	Particulars Sought	Ruling
1	16	Form, content, date and identity of defendant(s) making alleged statements	[Withdrawn]
3	21	Form, content, date and identity of defendant(s) making alleged statements	[Withdrawn]
9	42	Specifics as to which statements were material and untrue in identified documents; specifics as to alleged omissions from same	Identify: (a) the statements (s) alleged to be false; and who made them (b) the unexpressed qualifying or discrediting information not disclosed.
12	52	The identities of Defendants who retained Photon consultants.	No particulars required since the allegation is that all Defendants retained the Photon consultants.
15 (b)(c)	65	Which statements on the conference call were allegedly false or misleading	Identify the statements alleged to be false.
16 (c)	70	Which statements are alleged to have falsely implied Timminco's production capability	Identify the statements alleged to be false.
17	72	Specifics as to which statements were material and untrue in identified documents; specifics as to alleged omissions from same	Identify: (a) the statement(s) alleged to be false; and who made them (b) the unexpressed qualifying or discrediting information not disclosed.
18	74	Specifics of which questions posed by analysts on the conference call were allegedly "downplayed"	Identify the questions posed by the analysts or strike the second sentence from paragraph 74 as argument or colour.
19	77	Specifics of which representations on the conference call were allegedly false and the exact representations made as to quantity and cost	Identify the false statements and the statements about quantity and cost.
20 (c)	82	Which statements on the conference call misleadingly implied Timminco's	Identify the statements alleged to be false and who made

		production capability	them.
21	85	The exact statements allegedly made on the conference call regarding contamination in production process	Identify the statements alleged to be false and who made them.
22	86	The exact statement allegedly made which disclosed Timminco's process was "flawed", who made the statement, and how.	Identify the statements that disclosed that Timminco's process was flawed and who made them.
23	87	Which alleged misrepresentations were uncorrected by the August 11, 2008 News Release and conference call	Identify the false statements that were not corrected by the August 11 2008 News Release and conference call.
24	93	What "other established market communication mechanisms" were allegedly used	Identify the other established market communication mechanisms
26	100	Form, content, date and manner of disclosure of allegedly inaccurate "revenue and production forecasts"	[Withdrawn]
27	107	Form, content, date, and manner of disclosure of alleged misrepresentations "implicitly" made by Timminco	No particulars required; rather, paragraph 107 should be struck out as redundant and as argument inserted for colour.
49	107	Specific facts relied upon for allegation that the referenced documents/communication contained misrepresentations or "were false and materially misleading"	No particulars required; rather, paragraph 107 should be struck out as redundant and as argument inserted for colour.
57	115	When and how securities price became inflated; dates on which alleged misrepresentations were corrected and market adjusted downward	[Withdrawn]

[69] Category 2: Particulars Concerning Recklessness or Negligence

Request No.	Amended SOC Para.	Brief Description of Request	Response
29	21	Particulars of facts to support allegation that Defendants made alleged misrepresentations "negligently"	Particulars required.
30	42	Particulars of facts to support allegation that Mr. Schimmelbusch and/or Mr. Dietrich "ought to have known" referenced documents contained misrepresentation	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
31	72	Particulars of facts to support Mr. Schimmelbusch and/or Mr. Dietrich "ought to have known" referenced documents contained misrepresentation	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
34	99	Particulars of facts to support allegation that Defendants "ought to have known" that the disclosure documents referenced	No particulars required because under rule 25.06(8) knowledge may be alleged

		were "false or materially misleading"	as a fact without pleading the circumstances from which it is to be inferred.
35	101	Particulars of facts to support allegation that defendants were "negligent"	No particulars required because para. 101 does not contain allegation that defendants were "negligent."
36	110	Particulars of facts to support allegation that Defendants made alleged misrepresentation while they "ought to have known" the statements were false and/or materially misleading	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
37	111	Particulars of facts to support allegation that Defendants "ought to have known" that securities would be artificially inflated and documents would be relied upon by investors.	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
38	21	Particulars of facts to support the allegation that Defendants made misrepresentation "recklessly"	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
39	32	Particulars of facts to support the allegation Mr. Schimmelbusch "falsely" represented company's position	Identify the statements of Mr. Schimmelbusch alleged to be false
40	36	Particulars of facts to support the allegation that defendants "falsely" made representations in the 2007 Annual Information Form	Identify the statements alleged to be false and who made them.
41	40	Particulars of facts to support allegation that the defendants "falsely" made representations in 2007 MD&A	Identify the statements alleged to be false and who made them.
42	42	Particulars of facts to support allegation that Mr. Schimmelbusch and/or Mr. Dietrich knew or were reckless as to whether the referenced documents contained untrue material facts	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
43	65	Particulars of facts to support allegation that Mr. Schimmelbusch and/or Mr. Dietrich "falsely" represented the company's competitive position	Identify the statements alleged to be false and who made them.
44	70	Particulars of facts to support allegation that the Defendants "falsely" implied production capability	Identify the statements alleged to be false and who made them.
45	72	Particulars of facts to support allegation that Mr. Schimmelbusch and/or Mr. Dietrich knew or were reckless as to whether the referenced documents contained untrue material statements	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from

			which it is to be inferred.
46	77	Particulars of facts to support allegation that Mr. Schimmelbusch and/or Mr. Rogol "falsely" represented that the production process "works"	Identify the statements alleged to be false and who made them.
47	82	Particulars of facts to support allegation that Mr. Schimmelbusch "falsely" represented Timminco was a "low cost producer"	Identify the statements alleged to be false and who made them.
48	100	Particulars of facts to support allegation that the Defendants "knew" the referenced public disclosure documents contained misrepresentations or were false and materially misleading	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
50	110	Particulars of facts to support allegation that Defendants "knew" or "were reckless in not knowing" their alleged misrepresentations were false and misleading when made	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
51	111	Particulars of facts to support allegation that the Defendants "knew" plaintiff would rely on alleged misrepresentations, and that share price would be "artificially inflated"	No particulars required because under rule 25.06(8) knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.
55	104	Particulars of facts to support allegation that a special relationship existed and defendants intended disclosures to be relied upon	No particulars required; rather the paragraph should be struck out as argument and not a pleading of material facts.
58	118	Particulars of facts to support allegations that Defendants were "motivated by self-interest"	No particulars required; rather the statement that the Defendants were motivated by self-interest should be struck out as argument and not a pleading of a material fact.

[70] Category 3: Particulars Concerning Plaintiff's Reliance/Causation

25	95	Which analyst reports were allegedly relied on by the plaintiff	Identify the analyst's reports.
52	92	Particulars of facts to support allegation of efficient market and effect on share price	No particulars required as information not necessary in order for Timminco to plead.
53	111	Particulars of facts to support allegation of artificial inflation of share price	No particulars required; rather this conclusionary statement should be struck out as argument.
54	94	Particulars of the "analysis" allegedly	No particulars required as

		undertaken by the plaintiff and other class members	information not necessary in order for Timminco to plead.
56	112	The specific documents or oral statement, the plaintiff heard, read, relied or acted upon, and when	Identify the statements relied upon and who made them and when they were made.

[71] Category 4: Particulars Concerning Clarification of Undefined Terms/Phrases

Demand No.	Paragraph No.	Brief Description of Request	Ruling
2	20, 22, 92, 94, 95, 96, 111, 113, 115	Meaning of the term "securities" as used by the plaintiff	No particulars required.
4	26	Meaning of the phrase "cost-efficient commercial scale"	Particulars required.
6, 10, 14, 15(a), 16(a)/(b), 20(a)/(b)	30, 46, 57, 65, 70, 82	Meaning of the phrase "commercially acceptable impurity composition"	Particulars required.
7	38	Meaning of the phrase "commercially viable"	Particulars required.
8	40	Meaning and specifics as to the "refurbished common industrial equipment" allegedly used	Particulars required.
10	46	Meaning of the term "commercial quantity"	Particulars required.

[72] Category 5: Particulars Concerning Sections of Legislation Relied upon by the Plaintiff

Demand No.	Paragraph No.	Brief Description of Request	Ruling
28	121, 124	The specific subsections of *Securities Act* relied upon	Particulars required
32	97	The specific subsections of *Securities Act* relied upon regarding duty of care	Particulars required
33	98	The specific subsections of *Securities Act* relied upon regarding standard of care	Particulars required

4. Explanation for the Rulings

[73] In the above chart, I have offered some explanation for my rulings. In this section, I will supplement that explanation as follows.

[74] For Demand #2 particulars are not required because the statement of claim refers to securities or shares purchased by class members and that description is adequate for the Defendants to plead and to respond to the certification and leave motions.

[75] Demand #9 concerns paragraph 42 of the Statement of Claim which states:

> 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.

[76] Paragraph 42 states that various documents contained untrue statements of material fact but does not identify the specific statements nor does it identify which of the Defendants made the statements. If the untrue statements are to be attributed to particular Defendants - as opposed to being statements made by the Defendant Timminco in its various documents and regulatory filings - then paragraph 42 does not identify the speaker of the allegedly untrue statements. With respect to its alternative pleading of an omission to state a required material fact, the non-disclosed material fact is not identified.

[77] In my opinion, although the problems of paragraph 42 can be solved by providing particulars, the absence of the identification of the statement and the maker of it or the absence of the identification of the non-disclosed fact are really substantive defects that go to the constituent elements of Mr. Pennyfeather's misrepresentation causes of action and go beyond a failure to provide particulars.

[78] In any event, each individual Timminco Defendant is entitled to know the case against him. He is entitled to know what is the basis of his alleged liability be it direct liability for his own words or conduct or be it vicarious liability for the words or conduct of other Defendants, including Timminco, which must act through its human agents. Therefore, demand #9 should be answered, and Mr. Pennyfeather should identify: (a) the statement(s) alleged to be false and who made them; and (b) the unexpressed qualifying or discrediting information not disclosed by the Defendant(s).

[79] Demands #15(b)(c), #16(c), #17, #18, #19, #20 (c), #21, #22, #23, #24, #25, #39, #40, #41, #43, #44, #46, #47 and #56 should be answered for reasons similar to those provided for Demand #9, set out above.

[80] Demand #29 concerns paragraph 21 of the Statement of Claim, which concludes with the following sentence: "The Misrepresentations were made negligently and recklessly and without regard for the truth of their contents." Demand #29 asks for "particulars of facts to support allegation that Defendants made alleged misrepresentations 'negligently'." The third constituent element of a negligent misrepresentation claim is that the representor must have acted negligently in making the misrepresentation. The Timminco Defendants are entitled to particulars of the discrete acts of each Defendant that are the acts of negligence that would constitute the third constituent element of the tort.

[81] Demands #4, #6, #7,# 8, #10, #14, #15 (a), #16 (a)(b), and #20 (a)(b) concern the following undefined terms in the Statement of Claim: "cost efficient commercial sale," "commercially acceptable impurity composition," "commercially viable," "refurbished common industrial equipment" and "commercial quantity." The Timminco Defendants are entitled to know whether these terms are being used argumentatively or rhetorically or are being used as material facts, in which case the meaning of these terms has not yet been made clear. Unless, the use and meaning of these words becomes clear from the answers to the other demands for particular, particulars should be provided.

[82] For Demands #28, #32, and #33 particulars are required because of the principle that if a statute is pleaded, the particular sections relied on should be identified.

E. CLOSING THE PLEADINGS BEFORE THE CERTIFICATION MOTION

[83] In the case at bar, as discussed above, I am ordering the Defendants to deliver their Statements of Defence before the certification motion. This order is useful and necessary for the immediate case.

[84] Moreover, in my opinion, it would be advantageous for the immediate case and for other cases, if the current convention ended and defendants were required in the normal course to deliver a Statement of Defence before the certification motion. As I will illustrate, there would be several advantages to this approach, and as I mentioned above, the Legislature intended that the general rule should be that the pleadings should be completed before the certification motion.

[85] Before I provide some examples of the advantages of closing the pleadings before certification, it is helpful to recall that under s. 5 (1) of the *Class Proceedings Act, 1992*, a plaintiff must satisfy five interdependent criteria for his or her action or application to be certified as a class proceeding. The Plaintiff must: (1) show a cause of action; (2) identify a class; (3) define common issues; (4) show that a class proceeding would be the preferable procedure; and (5) qualify as a representative plaintiff with a litigation plan and adequate Class Counsel.

[86] A major advantage of closing the pleadings is that controversies about the first of the five criteria for certification might be resolved or at least narrowed or confined before the certification motion.

[87] The delivery of a Statement of Defence could be a fresh step that could foreclose any subsequent attack by the defendant for any pleadings irregularities and, more to the point, typically defendants do not deliver a statement of defence if there is a substantive challenge to the Statement of Claim. Rather, they bundle all their challenges to the Statement of Claim and bring a motion to have the Statement of Claim or portions of it

struck out on both technical and substantive grounds. (In the immediate case, however, as noted above, the Timminco Defendants' attack is only about pleading deficiencies, not about whether the s. 5 (1)(a) criterion has been satisfied.)

[88] In other words, the requirement of delivering a Statement of Defence will call out the defendant to make its challenges to the Statement of Claim and, thus, the s. 5 (1)(a) criterion might be removed as an issue as would any challenge to the pleading for wanting in particulars or for breaching the technical rules for pleading. The s. 5 (1)(a) criterion for certification might be decided before the certification motion.

[89] If the defendant brings a comprehensive pleadings challenge before the certification motion, then, the s. 5 (1)(a) criterion would be resolved before the certification hearing one way or the other. It would be particularly useful to resolve a s. 5 (1)(a) challenge before the certification motion when the challenge is based on the court not having subject-matter jurisdiction over the plaintiff's claim. If that challenge is upheld, then the class action would be dismissed or stayed and the enormous costs of a comprehensive certification motion is avoided.

[90] Further, hearing an interlocutory motion about the sufficiency of the pleading might be preferable to having the challenge heard at the certification motion as an aspect of the s. 5 (1)(a) analysis because a common outcome of this analysis is to grant the plaintiff leave to amend his or her Statement of Claim, which outcome, at a minimum, exacerbates the complexities of determining the certification motion because of the interdependency of the certification criteria.

[91] In many cases, the technical or substantive adequacy of a plaintiff's statement of claim is not an issue and, therefore, requiring the completion of the pleadings will involve no interlocutory steps and the analysis of the other four certification criteria would be facilitated by a completed set of pleadings.

[92] For instance, having the Statement of Defence before the certification motion would provide useful information for analyzing the preferable procedure criterion and the plaintiff's litigation plan. Moreover, it may emerge that there are issues worthy of certification in the defendant's Statement of Defence.

F. CONCLUSION

[93] For the above reasons, I order Mr. Pennyfeather to respond to the demand for particulars as identified above and for the Defendants once the particulars have been provided and any motions to challenge the Statement of Claim have been resolved to deliver their Statements of Defence. All of this is to be completed before the return date of the scheduled motion for certification and for leave under Part XXIII.1 of the *Securities Act*.

[94] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Timminco Defendants within 15 days of the release of these Reasons for Decision followed by Mr. Pennyfeather's submissions within a further 15 days.

[95] As it may assist the parties, my tentative view is that the costs of this motion should be in the cause.

Perell, J.

Released: July 13, 2011

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CITATION: Pennyfeather v. Timminco Limited, 2011 ONSC 4257
COURT FILE NO.: 09-CV-378701CP
DATE: July 13, 2011

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

St. Clair Pennyfeather

Plaintiff

- and -

Timminco Limited, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Dr. Heinz Schimmelbusch, Robert Deitrich, 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: July 13, 2011

TAB N

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

A COMMISSIONER FOR TAKING AFFIDAVITS

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 3RD
	)	
JUSTICE MORAWETZ	)	DAY OF JANUARY, 2012

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

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

Applicants

INITIAL ORDER

THIS APPLICATION, made by Timminco Limited ("**Timminco**") and Bécancour Silicon Inc. ("**BSI**" and, together with Timminco, the "**Timminco Entities**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Peter A.M. Kalins sworn January 2, 2012 and the Exhibits attached thereto (the "**Kalins Affidavit**"), and on being advised that Investissement Québec ("**IQ**") was given notice of this application, and on hearing the submissions of counsel for the Timminco Entities and FTI Consulting Canada Inc. and on reading the consent of FTI Consulting Canada Inc. to act as the Monitor (the "**Monitor**"),

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Timminco Entities are companies to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that one or both of the Timminco Entities shall have the authority to file and may, subject to further order of this Court, file with this Court a plan or plans of compromise or arrangement (hereinafter referred to as the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. **THIS COURT ORDERS** that the Timminco Entities shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Timminco Entities shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Timminco Entities shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively, the "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. **THIS COURT ORDERS** that the Timminco Entities shall be entitled to continue to utilize the central cash management system currently in place as described in the

Kalins Affidavit or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Timminco Entities of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Timminco Entities, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. **THIS COURT ORDERS** that, notwithstanding anything to the contrary contained herein, the Timminco Entities are authorized and empowered to continue to negotiate discounts on their invoices with customers in exchange for early payment at discount rates consistent with rates previously provided by the Timminco Entities ~~of~~ and as approved by the Monitor or the Court and is authorized and empowered to continue to accept such discounted amounts in full satisfaction of the associated gross amount owing by such customer.

7. **THIS COURT ORDERS** that the Timminco Entities shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses, and similar amounts owed to any Assistants, payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

b) the fees and disbursements of any Assistants retained or employed by the Timminco Entities in respect of these proceedings, at their standard rates and charges.

8. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Timminco Entities shall be entitled but not required to pay all reasonable expenses incurred by the Timminco Entities in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

b) payment for goods or services actually supplied to the Timminco Entities following the date of this Order.

9. **THIS COURT ORDERS** that the Timminco Entities shall remit, in accordance with legal requirements, or pay:

a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) income taxes;

b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Timminco Entities in connection with the sale of goods and services by the Timminco Entities, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the

date of this Order but not required to be remitted until on or after the date of this Order, and

c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Timminco Entities.

10. **THIS COURT ORDERS** that until a real property lease or a lease with respect to use of a portable structure is assigned, disclaimed or resiliated in accordance with the CCAA, the Timminco Entities shall pay all amounts constituting rent or payable as rent under real property leases or a lease with respect to use of portable structure (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Timminco Entities and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

11. **THIS COURT ORDERS** that, except as specifically permitted herein, the Timminco Entities are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Timminco Entities to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

12. **THIS COURT ORDERS** that Québec Silicon Limited Partnership ("**QSLP**") and Québec Silicon General Partner Inc. ("**QSGP**") shall provide access to the Timminco Entities or permit the Timminco Entities to make, retain and take away copies of books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of QSLP, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**QSLP Records**") and grant to the Timminco Entities unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 12 or in paragraph 13 of this Order shall require the delivery of QSLP Records, or the granting of access to QSLP Records, which may not be disclosed or provided to the Timminco Entities due to privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

13. **THIS COURT ORDERS** that QSLP and QSGP shall provide access to the Timminco Entities or permit the Timminco Entities to make, retain and take away copies of books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of BSI, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**BSI Records**") and grant to the Timminco Entities unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 13 or in paragraph 12 of this Order shall require the delivery of BSI Records, or the granting of access to BSI Records, which may not be disclosed or provided to the Timminco Entities due to privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

14. **THIS COURT ORDERS** that if any QSLP Records or BSI Records are stored or otherwise contained on a computer or other electronic system of information storage,

whether by independent service provider or otherwise, all individuals, firms, corporations, or any other entities in possession or control of such QSLP Records or BSI Records shall forthwith give unfettered access to the Timminco Entities for the purpose of allowing the Timminco Entities to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Timminco Entities deem expedient, and shall not alter, erase or destroy any QSLP Records or BSI Records without the prior written consent of the Timminco Entities. Further, for the purposes of this paragraph, all Persons shall provide the Timminco Entities with all such assistance in gaining immediate access to the information in the records as the Timminco Entities may require including providing the Timminco Entities with instructions on the use of any computer or other system and providing the Timminco Entities with any and all access codes, account names and account numbers that may be required to gain access to the information.

RESTRUCTURING

15. **THIS COURT ORDERS** that the Timminco Entities shall, subject to such requirements as are imposed by the CCAA, have the right to:

a) permanently or temporarily cease, downsize or shut down any of its business or operations and to dispose of redundant or non-material assets not exceeding $100,000 in any one transaction or $1,000,000 in the aggregate,

b) terminate the employment of such of its employees or Assistants or temporarily lay off such of its employees or Assistants as it deems appropriate, and

c) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

d) all of the foregoing to permit the Timminco Entities to proceed with an orderly restructuring of the Business (the "**Restructuring**").

16. **THIS COURT ORDERS** that the Timminco Entities shall provide each of the relevant landlords with notice of the Timminco Entities' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Timminco Entities' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Timminco Entities, or by further Order of this Court upon application by the Timminco Entities on at least two (2) days' notice to such landlord and any such secured creditors. If the Timminco Entities disclaim or resiliate the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the Timminco Entities' claim to the fixtures in dispute.

17. **THIS COURT ORDERS** that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Timminco Entities and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Timminco Entities in respect of such lease or leased premises and such landlord shall be entitled to notify the Timminco Entities of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers

advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE TIMMINCO ENTITIES OR THE PROPERTY

18. **THIS COURT ORDERS** that until and including February 2, 2012, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Timminco Entities or the Monitor, or affecting the Business or the Property, except with the written consent of the Timminco Entities and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Timminco Entities or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

19. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Timminco Entities or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Timminco Entities and the Monitor, or leave of this Court, provided that nothing in this Order shall (a) empower the Timminco Entities to carry on any business which the Timminco Entities are not lawfully entitled to carry on, (b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (c) prevent the filing of any registration to preserve or perfect a security interest, or (d) prevent the registration of a claim for lien.

20. **THIS COURT ORDERS** that, without limiting anything contained in paragraphs 19 and 21 hereof, any and all rights, remedies, modifications of existing rights and events deemed to occur pursuant to the QSLP Agreements (as defined in the paragraph 23 of the Kalins Affidavit) upon or as a result of (a) an Act of Insolvency (as

that term is used in the Kalins Affidavit) occurring with respect to BSI, (b) any default or non-performance by the Timminco Entities, (c) the making or filing of these proceedings, or (d) any allegation, admission or evidence in these proceedings, are hereby stayed and suspended except with the written consent of the Timminco Entities and the Monitor, or leave of this Court. Without limiting the foregoing, the operation of any provision of any QSLP Agreement that purports to (y) effect or cause a cessation of any rights of the Timminco Entities, or (z) to accelerate, terminate, discontinue, alter, interfere with, repudiate, cancel, suspend or modify such agreement or arrangement as a result of any default or non-performance by or the insolvency of the Timminco Entities, the making or filing of these proceedings, or any allegation, admission or evidence in these proceedings, is hereby stayed and restrained and any steps or actions purported to be taken by any counterparty to any of the QSLP Agreements and any event that is deemed to have occurred in respect of the QSLP Agreements shall be null and void and of no effect.

NO INTERFERENCE WITH RIGHTS

21. **THIS COURT ORDERS** that during the Stay Period, no Person having oral or written agreements with the Timminco Entities shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform or provide any right, renewal right, contract, agreement, licence, permit or access right in favour of or held by the Timminco Entities, including without limitation, access rights held by BSI with respect to the Quebec Silicon Real Property and the Becancour Properties (as these terms are defined in the Kalins Affidavit), except with the written consent of the Timminco Entities and the Monitor, or leave of this Court.

CONTINUATION OF SUPPLY

22. **THIS COURT ORDERS** that during the Stay Period, all Persons, including QSLP and QSGP, having oral or written agreements with the Timminco Entities or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services,

centralized banking services, payroll services, insurance, transportation services, utility, customs clearing or other services to the Business or the Timminco Entities, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Timminco Entities, and that the Timminco Entities shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Timminco Entities in accordance with normal payment practices of the Timminco Entities or such other practices as may be agreed upon by the supplier or service provider and each of the Timminco Entities and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

23. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Timminco Entities. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

24. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Timminco Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Timminco Entities whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or

arrangement in respect of the Timminco Entities, if one is filed, is sanctioned by this Court or is refused by the creditors of the Timminco Entities or this Court.

25. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors of QSGP serving as BSI's nominated or appointed representatives on the Board of Directors of QSGP or any of the former, current or future officers of the Timminco Entities also serving as officers of QSGP (collectively, the "**QSGP/BSI Directors**") with respect to any claim against the QSGP/BSI Directors that arose before the date hereof and that relates to any obligations of QSGP or QSLP whereby the QSGP/BSI Directors are alleged under any law to be liable in their capacity as directors or officers of QSGP for the payment or performance of such obligations, until a compromise or arrangement in respect of the Timminco Entities, if one is filed, is sanctioned by this Court or is refused by the creditors of the Timminco Entities or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

26. **THIS COURT ORDERS** that the Timminco Entities shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Timminco Entities after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

27. **THIS COURT ORDERS** that the directors and officers of the Timminco Entities shall be entitled to the benefit of and are hereby granted a charge (the "**D&O Charge**") on the Property, which charge shall not exceed an aggregate amount of $400,000, as security for the indemnity provided in paragraph 26 of this Order. The D&O Charge shall have the priority set out in paragraphs 38 and 40 herein.

28. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the D&O Charge, and (b) the Timminco Entities' directors and officers shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 26 of this Order.

APPOINTMENT OF MONITOR

29. **THIS COURT ORDERS** that FTI Consulting Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Timminco Entities with the powers and obligations set out in the CCAA or set forth herein and that the Timminco Entities and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Timminco Entities pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

30. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Timminco Entities' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) advise the Timminco Entities in the development of the Plan and any amendments to the Plan;

(d) assist the Timminco Entities, to the extent required by the Timminco Entities, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Timminco Entities, to the extent that is necessary to adequately assess the Timminco Entities' business and financial affairs or to perform its duties arising under this Order;

(f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(g) hold and administer funds in connection with arrangements made among the Timminco Entities, any counter-parties, and the Monitor, or by Order of this Court; and

(h) perform such other duties as are required by this Order or by this Court from time to time.

31. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

32. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or

other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Civil Code of Québec, the Québec *Environment Quality Act*, the Ontario *Mining Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

33. **THIS COURT ORDERS** that that the Monitor shall provide any creditor of the Timminco Entities with information provided by the Timminco Entities in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Timminco Entities is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Timminco Entities may agree.

34. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

35. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Timminco Entities shall be paid their reasonable fees and disbursements, in each

case at their standard rates and charges, by the Timminco Entities as part of the costs of these proceedings. The Timminco Entities are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Timminco Entities on a weekly basis and, in addition, the Timminco Entities are hereby authorized and directed to pay to the Monitor, counsel to the Monitor, and counsel to the Timminco Entities, retainers in the amounts of $75,000, $30,000 and $100,000, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

36. **THIS COURT ORDERS** that ~~at the request of the Timminco Entities, any party of interest, or this Court,~~ the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

37. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor, if any, and the Timminco Entities' counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $1 million, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 38 and 40 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

38. **THIS COURT ORDERS** that the priorities of the Administration Charge and the D&O Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First – the Administration Charge (to the maximum amount of $500,000);

Second – the D&O Charge (to the maximum amount of $400,000); and

Third - the Administration Charge (to the maximum amount of $500,000) ranking behind all Encumbrances (as defined below) pending return of the Comeback Motion (as defined below).

39. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

40. **THIS COURT ORDERS** that, the Charges shall constitute a charge on the Property and the D&O Charge and the Administration Charge to a maximum amount of $500,000 shall rank ahead in priority to the existing security interests of IQ, but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the Ontario *Pension Benefits Act* or the Quebec *Supplemental Pension Plans Act* (collectively, the "**Encumbrances**") in favour of any Persons that have not been served with notice of this application. The Applicants and the beneficiaries of the Charges shall be entitled to seek priority ahead of the Encumbrances on notice to those parties likely to be affected by such priority (it being the intention of the Timminco Entities to seek priority for the Charges ahead of all such Encumbrances at the Comeback Motion.

41. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Timminco Entities shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges unless the Timminco Entities also obtain the prior written consent of the Monitor and the beneficiaries of the D&O Charge and the Administration Charge, or further Order of this Court.

42. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the

Charges (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Timminco Entities, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by the Timminco Entities of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Timminco Entities pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

43. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Timminco Entities' interest in such real property leases.

SERVICE AND NOTICE

44. **THIS COURT ORDERS** that the Monitor shall (a) without delay, publish in *The Globe and Mail*, National Edition, and *La Presse*, in French, once a week for two weeks a notice containing the information prescribed under the CCAA, and (b) within five

business days after the date of this Order (i) make this Order publicly available in the manner prescribed under the CCAA, (ii) send, in the prescribed manner, a notice to every known creditor who has a claim against the Timminco Entities of more than $1,000, and (iii) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make the names and addresses of individuals who are creditors publicly available.

45. **THIS COURT ORDERS** that the Timminco Entities and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Timminco Entities' creditors or other interested parties at their respective addresses as last shown on the records of the Timminco Entities and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

46. **THIS COURT ORDERS** that the Timminco Entities, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor may post a copy of any or all such materials on its website at http://cfcanada.fticonsulting.com/timminco.

47. **THIS COURT ORDERS** that the Timminco Entities are authorized to serve their court materials with respect to the comeback motion expected to be heard ~~the week of~~ January 12, 2012 (the "**Comeback Motion**") by forwarding a copy of this Order and any additional materials to be filed with respect to the Comeback Motion by electronic transmission, where available, or by courier to the parties likely to be affected by the

relief to be sought on the Comeback Motion at such parties' respective addresses as last shown on the records of the Timminco Entities as soon as practicable. The Timminco Entities shall serve the beneficiaries of the BSI Non-Union Pension Plan, the BSI Union Pension Plan and the Haley Pension Plan by serving in the manner described above the pension plan committees for the BSI Non-Union Pension Plan and the BSI Union Pension Plan, Financial Services Commission of Ontario, and the Régie Des Rentes Du Québec.

GENERAL

48. **THIS COURT ORDERS** that the Timminco Entities or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

49. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Timminco Entities, the Business or the Property.

50. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Timminco Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Timminco Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Timminco Entities and the Monitor and their respective agents in carrying out the terms of this Order.

51. **THIS COURT ORDERS** that each of the Timminco Entities and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order

and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

52. **THIS COURT ORDERS** that any interested party (including the Timminco Entities and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

53. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JAN 3 2012

PER / PAR:

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

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

(Applicants)

Court File No. 12-CL-9539-00

ONTARIO
SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

Proceeding commenced at Toronto

INITIAL ORDER

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Lawyers for the Monitor

TAB O

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

A COMMISSIONER FOR TAKING AFFIDAVITS

COURT OF APPEAL FOR ONTARIO

CITATION: Sharma v. Timminco Limited, 2012 ONCA 107
DATE: 20120216
DOCKET: C53624

Goudge, Armstrong and Lang JJ.A.

BETWEEN

Ravinder Kumar Sharma

Plaintiff (Respondent)

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 (Appellants)

Proceedings under the *Class Proceedings Act, 1992*

Alan L.W. D'Silva, Daniel S. Murdoch and Lesley Mercer, for the appellants Timminco Limited, Dr. Heinz Schimmelbusch, Robert Dietrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield and Mickey M. Yaksich

Paul Le Vay and Brendan Van Niejenhuis, for the appellant Photon Consulting LLC

Derek J. Bell, for the appellant John P. Walsh

Michael C. Spencer, Won J. Kim and Victoria Paris, for the respondent

Heard: November 2, 2011

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated March 31, 2011, with reasons reported at 2011 ONSC 2040.

Goudge J.A.:

[1] The issue raised by this appeal is whether s. 28 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the *CPA*) can operate to suspend the limitation period applicable to the statutory cause of action for misrepresentation provided by s. 138.3 of Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (the *OSA*) before an action under that part is commenced.

[2] At first instance the motion judge answered that question affirmatively. For the reasons that follow, I have come to the opposite conclusion and I would therefore allow the appeal.

[3] The essential facts are easily stated. On May 14, 2009 the respondent commenced a proposed class action alleging misrepresentations by the appellants that adversely affected the value of shares of Timminco Limited in the secondary market. These misrepresentations are alleged to have commenced on March 17, 2008 and continued until November 11, 2008.

[4] The respondent's statement of claim alleges two common law causes of action, negligence and negligent misrepresentation. It also indicates that the

respondent will seek an order granting leave to assert the statutory cause of action for misrepresentation provided by s. 138.3 of Part XXIII.1 of the *OSA*.

[5] By the end of February 2011, the respondent had not yet sought that leave and, as a result, was faced with a possible limitation issue. Part XXIII.1 imposes a limitation period of three years from the misrepresentation for the commencement of an action under this Part. It also provides that such an action can be commenced only with leave.

[6] Faced with this, the respondent moved for an order declaring that this limitation period is suspended pursuant to s. 28 of the *CPA*. The result was the order that is now appealed.

[7] The relevant statutory provisions in the *OSA* are found in Part XXIII.1 of the legislation, which was proclaimed in effect on December 31, 2005. Part XXIII.1 provides for statutory civil liability where misrepresentations are made that adversely affect the value of securities purchased in the secondary market (as opposed to purchases from an issuer in a primary distribution). Enacted after much careful study, this Part provided the counterpart to Part XXIII, which, for some time, has provided a statutory cause of action for misrepresentation to purchasers of securities in the primary market.

[8] In Part XXIII.1, section 138.3 provides a statutory cause of action against an issuer and those acting on its behalf for misrepresentation to persons who acquire the issuer's securities in the secondary market.

[9] Section 138.8(1) provides that an action under s. 138.3 may not be commenced without leave of the court. This differs from Part XXIII, which does not require leave for commencement of an action. Section 138.8(1) reads as follows:

> **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.

[10] Section 138.14 provides that an action under s. 138.3 must be commenced within three years of the misrepresentation:

> **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.

[11] The relevant provision of the CPA is s. 28(1). It provides for the suspension of the limitation period applicable to a cause of action asserted in a class proceeding, and for the circumstances under which it resumes running:

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.

[12] The motion judge granted the respondent's motion. His order declares that the limitation period in s. 138.14 of the *OSA* is suspended pursuant to s. 28 of the *CPA,* effective as of the date of the issuance of the statement of claim on May 14, 2009.

[13] At para. 50 of his reasons, the motion judge held that s. 28 of the *CPA* applies to "any limitation period applicable to a cause of action" and that this includes a cause of action under Part XXIII.1 of the *OSA.* He saw no justification for s. 28 to operate for Part XXIII causes of action, but not for Part XXIII.1 causes of action just because of the leave requirement for the latter. He pointed to s. 28

speaking of a cause of action being "asserted" and concluded that this did not depend on the commencement of litigation. Rather, in his view, s. 28 requires only that a cause of action be mentioned in an already commenced class proceeding for the limitation period applicable to it to be suspended. He held that to require that leave be granted before s. 28 of the *CPA* applied would defeat its purpose.

[14] He therefore concluded that because the class proceeding commenced by the respondent for common law negligence and negligent misrepresentation mentioned the s. 138.3 cause of action, the limitation period applicable to it was suspended.

ANALYSIS

[15] It is not disputed that there has been no leave granted pursuant to s. 138.8 of the *OSA*, that the respondent's class proceeding is not an action commenced under s. 138.3, and that leave is required to add the s. 138.3 cause of action to the respondent's class proceeding. The question is whether the respondent's mention in his class proceeding of his intention to seek leave is enough to activate s. 28 of the *CPA*, so as to suspend the limitation period applicable to the s. 138.3 cause of action. Is it enough to be able to say that this cause of action has been asserted in the respondent's class proceeding?

[16] The suspension provision in s. 28(1) of the *CPA* 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". These words must be read in their grammatical and ordinary sense, in the full context of the scheme of the *CPA*, its object and the intention of the legislature. See: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

[17] *The Canadian Oxford Dictionary*, 2d ed., defines "assert" as "make or enforce a claim to (*assert one's rights*)". *Black's Law Dictionary* defines "assert" as "to invoke or enforce (a legal right)": see Henry C. Black, *Black's Law Dictionary*, 8th ed. (St. Paul: Thomson West, 2004). By contrast, *The Canadian Oxford Dictionary* defines "mention" as "refer to or remark on incidentally". *Black's Law Dictionary* does not include the word. Clearly, "assert" is a significantly more forceful concept.

[18] Without leave having been granted, a s. 138.3 cause of action cannot be enforced. It cannot be invoked as a legal right. Section 138.14 says as much. Thus, giving the suspension provision in s. 28(1) of the *CPA* its ordinary meaning, the s. 138.3 cause of action cannot be said to be asserted in the respondent's class proceeding since no leave has been granted.

[19] The respondent argues that it is significant that s. 28(1) requires not that a cause of action be "commenced", but only that it be "asserted". However, this choice of language is entirely appropriate. A cause of action is not commenced. That is a concept applicable not to a cause of action but to the litigation in which it is asserted.

[20] Thus, in my view as applied to the s. 138.3 cause of action, the grammatical and ordinary meaning of the s. 28(1) suspension provision is that without leave being granted the cause of action cannot be said to be asserted in a class proceeding.

[21] Indeed, the mention of the s. 138.3 cause of action in the respondent's statement of claim appears to reflect this view, namely that leave is required before this cause of action can be asserted in the respondent's class proceeding.

[22] Paragraph 117 of the statement of claim reads as follows:

> 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.

[23] The statutory context of the suspension provision in s. 28(1) of the CPA provides additional support for this interpretation. The balance of the subsection

lists the various circumstances that cause the suspended limitation period to resume running. They do not include any reference to the leave motion required to add the s. 138.3 cause of action to the respondent's class proceeding. If mention of the intention to seek leave were enough to trigger the suspension of the applicable limitation period, surely the failure to proceed with the leave motion or the denial of leave would be included as circumstances causing its resumption. Assume, for instance, that having pleaded his intention to seek leave, the respondent decides not to do so. The consequence of his argument would mean that since the statutory cause of action is mentioned in his pleading, the limitation period applicable to it is suspended and remains so even though the class proceeding could never be the vehicle to vindicate the class members' rights under Part XXIII.1. That cannot have been the legislature's intention.

[24] It is also clear that the interpretation I propose is consistent with the purpose of s. 28(1) of the *CPA*. In *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596, at para. 49, Perell J. described this purpose to be to protect class members from the operation of limitation periods without the need to themselves pursue individual actions in order to avoid being out of time until it has been determined whether they can get access to justice through the class proceeding. That purpose was approved in this court in *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONCA **. In the context of this case, the

respondent's class proceeding gives class members no possibility of access to justice for their s. 138.3 causes of action because no leave to assert it has been granted. The purpose of s. 28(1) of the *CPA* does not therefore require that the limitation period applicable to these causes of action be suspended pending the outcome of this class proceeding, since that action cannot give class members access to justice for their claims.

[25] Indeed, the respondent's proposal would reflect a different purpose that cannot have been intended by the legislature. It would suspend the applicable limitation period for the s. 138.3 cause of action on the mere mention of that cause of action. This is a benefit that would not come to the respondent if he were suing in an individual capacity and did the same thing. It cannot have been the purpose of s. 28(1) of the *CPA* to put the class plaintiff in a better position than he would have been had he commenced an individual action.

[26] The purpose of s. 138.14 of the *OSA* is also served by the interpretation of s. 28(1) of the *CPA* that I have described. Section 138.14 was clearly designed to ensure that secondary market claims be proceeded with dispatch. That requires the necessary leave motion to be brought expeditiously. To suspend that limitation period with no guarantee that the s. 138.3 cause of action, including the prerequisite leave motion, will be proceeded with expeditiously is inconsistent with that purpose.

[27] Finally, the interpretation I have given for s. 28(1) of the *CPA* does not make it inapplicable to a s. 138.3 cause of action under Part XXIII.1 of the *OSA*. It simply requires that leave be granted before that happens. The fact that by comparison no leave is required for s. 28(1) to apply to Part XXIII causes of action is simply a reflection of the legislative policy to require leave for secondary market causes of action but not for their primary market counterparts.

[28] In summary, I conclude for a s. 138.3 cause of action to be asserted in a class proceeding, so as to trigger the suspension provision in s. 28(1) of the *CPA*, leave must be granted. Since the respondent has not obtained leave, s. 28(1) has not been activated.

[29] I would therefore allow the appeal and dismiss the respondent's motion for an order declaring that the limitation period in s. 138.14 of the *OSA* is suspended.

[30] As we indicated during argument, the parties may make written submissions of no more than eight pages addressing costs here and below. These are to be filed within 30 days of the release of these reasons.

Released: February 16, 2012 "STG"

"S.T. Goudge J.A."
"I agree Robert Armstrong J.A."
"I agree S.E. Lang J.A."

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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