

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

**FACTUM OF THE MOVING PARTY,
ST. CLAIR PENNYFEATHER, PLAINTIFF IN THE CLASS ACTION**

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Timminco Limited, et. al., Ont. Sup. Court File
No.: CV-09-378701-00CP

TO: THE SERVICE LIST

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(Motion Returnable July 22, 2013)

Part I – OVERVIEW

1. The stay, as it relates to the class action, should be lifted. It has been in place for more than eighteen months.¹ The respondents have not filed any affidavit material indicating that it remains necessary.
2. The sole objection is the respondents' contention that the failure to file a claim under the Claims Procedure Order bars any claim against officers and directors or insurance proceeds.²
3. This represents an attempt to use the *CCAA* in a tactical and technical fashion to achieve a result unrelated to any legitimate aspect of either a restructuring or orderly liquidation. The position advanced by the respondents offends basic notions of fairness and is not reasonable.

¹ Order of Justice Morawetz dated January 3, 2012, Exhibit "B" to the Affidavit of Yonatan Rozenszajn sworn May 16, 2013["Rozenszajn Affidavit"], **Motion Record of the Plaintiff**, Vol. I, Tab 2B, pp. 15-20.

² Correspondence from Stikeman Elliott to Kim Orr dated December 7, 2012, Exhibit "Z" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2Z, pp. 282-284.

4. There is no evidence that any of the officers or directors who are defendants in the class action contributed anything to the *CCAA* process.³ The insurance proceeds are not available to other creditors, so a bar against pursuing these funds benefits only the insurance companies who are not stakeholders in the restructuring or liquidation.

5. The Timminco Entities now concede that they “never proposed to put forward a plan of arrangement and none is foreseen.”⁴ If they had been this forthright on January 3, 2012 they would have been unable to obtain the protection of a stay.⁵

6. This position was also not revealed to the Court on the prior hearing re: lifting of the stay where one of the arguments made was that the stay should remain in place because the officers and directors may be released in a plan sanction order.⁶

7. The Claims Procedure Order obtained by the Timminco Entities did not permit the filing of representative claims, unlike, for example the claims process in *Sino-Forest*.⁷ Representative claims are generally not permitted under the *CCAA*, and the solicitors for the representative plaintiff do not act for class members prior to certification.⁸ Therefore the omission of the type

³ The directors and officers have all resigned from the company. Affidavit of Peter M. Kalins sworn August 13, 2012 re CRO Appointment at para. 22, Exhibit “T” to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2T, p. 229.

⁴ Correspondence from Maria Konyukhova to James Orr dated May 6, 2013, Exhibit “CC” to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2CC, pp. 290-292.

⁵ *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758, [2011] B.C.J. No. 2467 at para. 21 (B.C.S.C.) citing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 (B.C.C.A.).

⁶ Factum of John P. Walsh filed by Bennett Jones for the motion to lift the stay returnable March 26, 2012 at para. 4, Exhibit “P” to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2I, p. 74; Factum of the defendant (applicants) Timminco for the motion to lift the stay returnable March 26, 2012 at para 32, Exhibit “J” to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2J, pp. 104-105.

⁷ Claims Procedure Order in the *Sino-Forest CCAA* proceeding dated May 14, 2013 at paras 27-28, Exhibit “GG” to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2GG, p. 347.

⁸ *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 3300 at para. 41(S.C.J.), leave to appeal ref’d, [2006] O.J. No. 4583 (C.A.); *Muscletech Research and Development Inc. (Re)* (2006), 153 A.C.W.S. (3d) 1032, [2006] O.J. No. 4974 at para. 19 (S.C.J.); *Lundy v. Via Rail Canada Inc.*, 2012 ONSC 4152, [2012] O.J. No. 3264 at paras. 28-29 (S.C.J.).

of provision contained in the Sino-Forest claims order obtained by the Timminco Entities precluded the action that they now assert should have been taken.

8. The Claims Procedure Order did, however, exclude claims that cannot be compromised as a result of the provisions of subsection 5.1(2) of the *CCAA*.⁹ The class action, which alleges, *inter alia* misrepresentations and breaches of the *Securities Act*, is therefore unaffected.

9. In addition, insofar as the class action seeks to recover insurance proceeds the Claims Procedure Order did not, and could not, affect that claim.¹⁰

10. If necessary, the Claims Procedure Order should be amended to clarify that the class action can continue in relation to the defendants who are officers and directors and against the insurance proceeds. The respondents had the opportunity to file affidavit material but did not file any material alleging prejudice.

11. The *CCAA* process should not be used in a tactical manner to achieve a result collateral to the proper purposes of the legislation. The rights of the putative class members should be determined on the merits of the class action which are considerable given the evidence before this Court. The lifting of the stay is fair and reasonable in all of the circumstances.

Part II – FACTS

12. The class action focuses on public misrepresentations that Timminco possessed a proprietary metallurgical process that provided a significant cost advantage in manufacturing solar grade silicon for use in manufacturing solar cells.¹¹

⁹ Order of Justice Morawetz re: claims procedure dated June 15, 2012, para. 2(s)(iv), Exhibit “R” to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2R, p. 177.

¹⁰ Order of Justice Morawetz re: claims procedure dated June 15, 2012, paras. 27, Schedule “1”, Exhibit “R” to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2R, pp. 186, 196; *Algoma Steel Corp. v. Royal Bank of Canada*, [1992] O.J. No. 889 at paras. 9, 13-15 (O.N.C.A.) [“*Algoma*”]; *Carey Canada Inc. (Re)*, [2006] O.J. No. 4905 at paras. 7, 16-17 (S.C.J.).

13. The misrepresentations were first made in March of 2008.¹² After the misrepresentations the shares of Timminco rapidly gained more than \$18.00 per share by June 5, 2008.¹³ As Timminco began to acknowledge problems with the alleged proprietary process the share price fell to the point where the equity was described as a penny stock prior to its delisting in January of 2012. The decline was described as a spectacular fall from grace by The Globe and Mail.¹⁴

14. The class action plaintiff has filed expert evidence from Dr. Rand who concluded that Timminco's technology could not perform as claimed by Timminco and could not produce the results that were represented to the marketplace.¹⁵ No significant recovery was made in the *CCAA* for this alleged proprietary technology.

15. The Defendants have never provided any contrary evidence or even asserted under oath that the maligned statements were accurate. Most remarkably, Mr. Walsh filed an affidavit on this motion and did not seek to defend Timminco's statements about the proprietary technology.¹⁶ Instead the purpose of his evidence seemed to be to distance himself from the assertions by emphasizing that he resigned as a director of Timminco shortly after the first misstatements were made.¹⁷

¹¹ Statement of Claim issued May 14, 2009, Exhibit "A" to the Affidavit of Victoria Paris sworn March 8, 2012 ["Paris Affidavit"], **Motion Record of the Plaintiff**, Vol. II, Tab 4A, pp. 541-585; Amended Statement of Claim filed May 17, 2011 ["Amended Claim"], Exhibit "J" to the Paris Affidavit, **Motion Record of the Plaintiff**, Vol. II, Tab 4J, pp. 667-713.

¹² Paris Affidavit at para. 6, **Motion Record of the Plaintiff**, Vol. II, Tab 4, p. 530.

¹³ Paris Affidavit at para. 6, **Motion Record of the Plaintiff**, Vol. II, Tab 4, p. 530.

¹⁴ Paris Affidavit at para. 7, **Motion Record of the Plaintiff**, Vol. II, Tab 4, pp. 530-531.

¹⁵ Affidavit of James Rand dated May 23, 2011 at para. 12, Exhibit "K" to the Paris Affidavit, **Motion Record of the Plaintiff**, Vol. II, Tab 4K, p. 718. The class action plaintiff has also filed expert evidence from Mr. Lawrence Rosen on the calculation of the class' damages from the alleged misrepresentations. See the Affidavit of Lawrence Rosen dated May 27, 2011, Exhibit "L" to the Paris Affidavit, **Motion Record of the Plaintiff**, Vol. II, Tab 4L, pp. 732-773.

¹⁶ Affidavit of John P. Walsh sworn June 7, 2013 in the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, Court File No. CV-12-9539-00CL ["Walsh Affidavit"].

¹⁷ Walsh Affidavit, *ibid.* at para. 9.

16. There has been no affidavit from Mr. Schimmelbusch, the CEO and Chairman of the Board of Directors of Timminco throughout the class period. This is not the first massive loss for Mr. Schimmelbusch. In 1993, Mr. Schimmelbusch was fired as CEO of a German corporation after the company suffered losses for the year of \$1.1 billion.¹⁸

17. In the class action which had been case managed by Justice Perell, there had been a carriage motion,¹⁹ a motion and appeal of an order to provide insurance policies,²⁰ the provision of five volumes of certification motion material as well as motions²¹ and appeals heard regarding limitation issues.²² By the date of the commencement of the *CCAA* proceedings Timminco and its officers and directors as well as their insurers were well aware of the class action.

18. The application for protection under the *CCAA* was brought without notice to the class action plaintiff on January 3, 2012. In the initial order Timminco sought and obtained stays of all proceedings including the class action. Paragraph 24 of the Initial Order provides that all proceedings against officers and directors are stayed “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.”²³

¹⁸ News Articles covering Schimmelbusch’s tensure at Metallgesellschaft, Exhibit “B” to the Paris Affidavit, **Motion Record of the Plaintiff**, Vol. II, Tab 4B, p. 591.

¹⁹ Reasons for Decision of Justice Perell dated October 29, 2009, Exhibit “C” to the Paris Affidavit, **Motion Record of the Plaintiff**, Vol. II, Tab 4C, pp. 604-625.

²⁰ Reasons for Decision of Justice Perell dated February 3, 2010, Exhibit “D” to the Paris Affidavit, **Motion Record of the Plaintiff**, Vol. II, Tab 4D, pp.626-634; Reasons for Decision of Justice McCombs denying leave to appeal dated April 22, 2010, Exhibit “E” to the Paris Affidavit, **Motion Record of the Plaintiff**, Vol. II, Tab 4E, pp.635-640.

²¹ Letter from Alan D’Silva dated March 4, 2011 re: settlement discussions, Exhibit “G” to the Paris Affidavit, **Motion Record of the Plaintiff**, Vol. II, Tab 4G, p. 821.

²² Decision of the Court of Appeal dated February 16, 2012, *Sharma v. Timminco Ltd.*, 2012 ONCA 107 (ONCA), Exhibit “O” to the Paris Affidavit, **Motion Record of the Plaintiff**, Vol. II, Tab 4O, p. 821 (The appeal was heard November 2, 2011).

²³ Order of Justice Morawetz dated January 3, 2012 at para. 24, Exhibit “B” to the Rozenszajn Affidavit, **Motion Record of the Plaintiffs**, Vol. I, Tab 4B, pp. 32-33.

19. In the more than eighteen months that have passed since the granting of the stay no plan has been put forward by Timminco. In fact it is now conceded that there was never any intention to advance a plan. Apparently the stay was meant to be perpetual.

20. In a letter dated May 6, 2013 Stikeman Elliott, solicitors for all of the defendants in the class action except Mr. Walsh, and their insurers as well as the Timminco Entities and the Restructuring Officer in the *CCAA* proceedings said:

You state that you have refrained from interfering in the proceeding in order to let the Restructuring Officer do his work and await 'the proposed plan of arrangement'. The Timminco Entities never proposed to put forward a plan of arrangement and no plan is foreseen.²⁴

21. Since the implementation of the stay the class action plaintiff has persistently attempted to have the stay lifted as it relates to the class action:

- a) In January and February of 2012 the plaintiff's class action counsel corresponded with Stikeman Elliott to determine if the stay could be lifted by agreement;²⁵
- b) A motion to lift the stay was heard on March 26, 2012;²⁶
- c) A partial lifting of the stay to permit a motion for leave to appeal to the Supreme Court of Canada was granted on April 10, 2012 with the remainder of the motion

²⁴ Correspondence from Maria Konyukhova to James Orr dated May 6, 2013, Exhibit "CC" to Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2CC, p. 291.

²⁵ Correspondence from Kim Orr to Stikeman Elliott dated January 17, 2012, Exhibit "C" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2C, pp. 44-45; Correspondence from Kim Orr to Stikeman Elliott dated January 20, 2012, Exhibit "D" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2D, pp. 46-47; Correspondence from Stikeman Elliott to Kim Orr dated February 8, 2012, Exhibit "E" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2E, pp.48-50; Correspondence from Kim Orr to Stikeman Elliott dated February 9, 2012, Exhibit "F" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2F, pp. 51-53.

²⁶ See Factum of the Plaintiff for the motion to lift the stay returnable March 26, 2012, Exhibit "H" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2H, p. 57; Factum of John P. Walsh filed by Bennett Jones for the motion to lift the stay returnable March 26, 2012, Exhibit "I" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2I, p. 70; Factum of the defendant (applicants) Timminco for the motion to lift the stay returnable March 26, 2012, Exhibit "J" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2J, p. 90.

being dismissed on April 27, 2012 with permission to renew a request to lift the stay in no sooner than 75 days;²⁷

- d) Prior to the release of the April 27, 2012 reasons, Timminco sought to extend the stay and the class action plaintiff filed a factum opposing the extension as it related to the class action;²⁸
- e) In September 2012 plaintiffs' class counsel had discussions with Stikeman Elliott about lifting the stay. Stikeman Elliott agreed this could occur but on terms which were not acceptable to the plaintiff;²⁹
- f) The stay came up for renewal again in December 2012 and once again a factum was filed opposing the extension as it related to the class action.³⁰ The issue was adjourned.³¹ At that attendance counsel for certain insurers and Mr. Walsh advised that they would be asserting that the failure to file a claim under the claims procedure order barred the class action; and,
- g) By letter dated December 7, 2012, Stikeman Elliott echoed this position although it was unclear from the correspondence whether this was being done in their

²⁷ Endorsement of Justice Morawetz dated April 10, 2012, Exhibit "K" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2K, p. 110; Endorsement of Justice Morawetz dated April 27, 2012, Exhibit "L" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2L, pp.112-117.

²⁸ Factum of the Plaintiffs opposing the extension to extend the stay dated April 26, 2012, Exhibit "M" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2M, pp. 118-128.

²⁹ E-mail from Kathryn Esaw to James Orr with attached draft Order dated September 27, 2012, Exhibit "V" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2V, pp. 250-254.

³⁰ Factum of the Plaintiff dated November 29, 2012, Exhibit "W" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2W, pp.256-262.

³¹ Correspondence from James Orr to Justice Morawetz dated December 11, 2012, Exhibit "AA" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2AA, pp.288-289.

capacity as solicitor for the Restructuring Officer, the class action defendants, the Timminco Entities or some combination of those clients or their insurers.³²

22. With respect to the hearing to lift the stay on March 26, 2012, no one advised the Court that there was no intention to put forward a plan of arrangement. In fact, Mr. Walsh's counsel argued that one reason to leave the stay in place was that the officers and directors may be released pursuant to a plan sanction order.³³ This position was adopted at the hearing by the Timminco Entities.³⁴

23. The Court issued the Claims Procedure Order on June 15, 2012.³⁵ The material filed did not indicate that there was no intention to put forward a plan of arrangement.

24. Any remaining officers and directors resigned in or about August 17, 2012³⁶ requiring the Timminco Entities to incur the expense of retaining a Restructuring Officer.³⁷

Part III – ISSUES AND LAW

A.) Mr. Pennyfeather has met the test to lift the stay of proceedings

25. The test to lift a *CCAA* stay of proceedings is well established:

(a) the relative prejudice to parties;

³² Correspondence from Stikeman Elliott to Kim Orr dated December 7, 2012, Exhibit "Z" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2Z, pp.282-284; Correspondence from James Orr to Maria Konyukhova dated May 3, 2013, Exhibit "BB" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2BB, pp. 288-289.

³³ Factum of John P. Walsh filed by Bennett Jones for the motion to lift the stay returnable March 26, 2012 at para. 4, Exhibit "P" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2I, p. 74.

³⁴ Factum of the defendant (applicants) Timminco for the motion to lift the stay returnable March 26, 2012 at para. 32, Exhibit "J" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2J, pp. 104-105.

³⁵ Order of Justice Morawetz re: claims procedure dated June 15, 2012, Exhibit "R" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2R, pp. 172-205.

³⁶ Affidavit of Peter M. Kalins sworn August 13, 2012 re CRO Appointment at para. 22, Exhibit "T" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2T, p. 229.

³⁷ Order (CRO Appointment) of Justice Newbould dated August 17, 2012, Exhibit "U" to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2U, pp. 238-248.

(b) the balance of convenience; and

(c) where relevant, the merits.³⁸

26. There is no practical or legal reason to maintain the stay. The sale process is almost complete. Timminco has now admitted it has no intention to propose a Plan.³⁹ There will be no compromise of substantive rights presented to the Court for sanction.

27. The directors have resigned some time ago.⁴⁰ When the directors of the company have resigned and the *CCAA* process is a liquidation it is appropriate to lift the stay against the absent directors.⁴¹ This is consistent with Parliament's legislative intention.⁴²

28. There is no prejudice to the parties, including the Timminco Entities and creditors, since the class action claims seek to access insurance moneys and potentially the assets of the defendant officers and directors which are not available to any other creditors.

B.) Claims Procedure Order does not affect the class action against the directors

29. The Claims Procedure Order specifically excludes from the definition of "Claim" any claim against a Director that cannot be compromised due to the provisions of subsection 5.1(2) of the *CCAA*:

"Excluded Claim" means... (iv) any claim against a Director that cannot be compromised due to the provisions of subsection 5.1(2) of the *CCAA*.⁴³

³⁸ *Canwest Global Communications Corp. (Re)*, 2011 ONSC 2215, [2011] O.J. No. 1590 at para. 27 (S.C.J.).

³⁹ Correspondence from Maria Konyukhova to James Orr dated May 6, 2013, Exhibit "CC" to the Rozenszajn Affidavit, *Motion Record of the Plaintiff*, Vol. I, Tab 2CC, pp. 290-292.

⁴⁰ Affidavit of Peter M. Kalins sworn August 13, 2012 re CRO Appointment at para. 22, Exhibit "T" to the Rozenszajn Affidavit, *Motion Record of the Plaintiff*, Vol. I, Tab 2T, p. 229.

⁴¹ *Papiers Gaspésia Inc. c. Ernst & Young Inc.*, 2005 CanLII 8605, [2005] J.Q. no. 2453 at paras. 41-44 (Que S.C.).

⁴² See for example the statement of the Hon. Mr. Morris Bodnar, House of Commons, March 20, 1997 and the statements of the Hon. Mr. Michael Kirby, Senate Debates, February 11, 1997. Debates of the Senate, 35th Parl, 2nd Sess, 135(69) (11 Feb 1997) at 1529 (Hon Michael Kirby); House of Commons Debates, 35th Parl, 2nd Sess, 148 (20 Mar 1997) at 9288 (Hon Morris Bodnar).

⁴³ Order of Justice Morawetz re: claims procedure dated June 15, 2012 at para. 2(s) ("Excluded Claim"), Exhibit "R" to the Rozenszajn Affidavit, *Motion Record of the Plaintiff*, Vol. I, Tab 2R, p. 177.

30. Section 5.1(2) covers claims in relation to misrepresentation of wrongful or oppressive conduct by directors:

5.1 (2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.⁴⁴

31. The purpose of section 5.1, which came into force in 1997, was not to provide directors relief from the consequences of any past breaches of their statutory or common law duties. Rather the purpose was to protect directors from misrepresentations that may have been made during the restructuring process.⁴⁵

32. The class action asserts that the directors misrepresented, in breach of their statutory and common law duties, that Timminco had a “propriety process” for producing solar grade silicon at a significant cost advantage.⁴⁶ The Ontario *Securities Act* imposes liability directly on directors by granting investors a right of action, for the purpose of instituting adequate checks and balances so that issuers, directors and officers would be deterred from inadequate or untimely disclosure.⁴⁷

33. The defendants have never substantively responded to the merits of the class action claims, including on this motion.

⁴⁴ *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 5.1(2)(b).

⁴⁵ Kevin P. McElcheran, “Directors’ Liabilities: The Effect of Pending Amendments to the BIA and CCAA” in *National Insolvency Review*, November 1996, vol. 13, no. 5 at p. 71.

⁴⁶ Amended Statement of Claim filed May 17, 2011, Exhibit “J” to the Paris Affidavit, **Motion Record of the Plaintiff**, Vol. II, Tab 4J, pp. 668-713.

⁴⁷ Canadian Securities Administrators Notice 53-302, Report of the Canadian Securities Administrators – Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of “Material Fact” and “Material Change”, (2000) 23 OSCB 3; *Securities Act*, R.S.O. 1990, c. S.5, ss. 138.3(1)(b), 138.3(2)(b), 138.3(4)(b).

34. The class action claims against the directors fit within section 5.1(2) of the *CCAA*: 1) as claims that are based on allegations of misrepresentations; and, 2) as claims based on allegations of wrongful or oppressive conduct.

35. While the *CCAA* does not define “creditor”, it is clear from the purposeful reading of the new amendments to the *CCAA* that equity claimants such as Mr. Pennyfeather are considered a species of creditors, albeit subordinate in priority to non-equity claimants and without voting rights. Sections 6(1) and 22.1 of the *CCAA* recognize that equity claimants are creditors that are classifiable under their own class:

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims...

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.⁴⁸

36. Under the tenets of statutory interpretation, the language in those sections must inform the definition of creditor in section 5.1(2).⁴⁹ It is evident that Parliament intended that equity claimants should be considered creditors for the purposes of this statute.

37. Even if Mr. Pennyfeather and other class members are not “creditors” pursuant to section 5.1(2), Parliament has clearly intended to exclude claims for misrepresentation by directors regardless of who brought them:

¶5 While there may be room for argument as to whether the prospective Plaintiffs are “creditors” within the meaning of sub-section (b), it seems clear that the claims are based upon allegations of wrongful or oppressive conduct, to wit, fraudulent or intentional misrepresentation. On my reading of the section in the context of the *Act* as a whole, claims against directors upon allegations of such conduct are not to be included in the

⁴⁸ *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, ss. 6(1), 22.1.

⁴⁹ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27 at paras. 18-19, 21, 31.

compromise or arrangement, whether brought by a “creditor” or any other party. Parliament has clearly excluded them.⁵⁰

38. Narrowly interpreting the misrepresentation exclusion would be contrary to the intention of Parliament in enacting section 5.1(2) and good public policy as held by the Court of Appeal for Ontario in *NBD Bank, Canada v. Dofasco Inc.*:

¶54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA... [T]he policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.⁵¹

39. Independent of the misrepresentation, Mr. Pennyfeather’s claims relate to allegations of wrongful conduct, which are not delimited to being directed solely to “creditors”. Wrongful conduct has been interpreted by this Court as “conduct which would be tortious (or akin thereto) as well as any conduct which was illegal”.⁵² Claims that are based on fraudulent or intentional misrepresentation fall within the ambit of wrongful or oppressive conduct.⁵³ These decisions are consistent with the definition of wrongful conduct in other contexts such as in the tort of conspiracy, which encompasses even non-actionable breach of statute.⁵⁴

⁵⁰ *Liberty Oil & Gas Ltd.*, 2002 ABQB 949, [2002] A.J. No. 1302 at para. 5 (Alta. Q.B.).

⁵¹ *NBD Bank, Canada v. Dofasco Inc.*, [1999] O.J. 4749 at para. 54 (C.A.).

⁵² *BlueStar Battery Systems International Corp. (Re)*, [2000] O.J. No. 4587 at para. 14 (S.C.J.).

⁵³ *Liberty Oil & Gas Ltd.*, 2002 ABQB 949, [2002] A.J. No. 1302 at para. 5 (Alta. Q.B.).

⁵⁴ *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 at para. 37 (O.N.C.A.).

40. In addition to the breaches of the *Securities Act*, which generally fall within the ambit of “wrongful conduct” as actionable breaches of statute, the obligations under section 138.3 of the *Securities Act* are also of a tortious nature. Section 138.3 is not simply a provision that imposes liability upon directors for the obligations of the company.⁵⁵ The class action claims would therefore be excluded as allegations relating to wrongful conduct by the directors.

C.) The Claims Procedure Order cannot affect insured claims

41. The protection granted by the *CCAA* is for the purpose of allowing the debtor, Timminco, to restructure. In *Algoma Steel Corp. v. Royal Bank of Canada*, the Court of Appeal held that the purpose of *CCAA* protection is not to insulate insurers from providing appropriate indemnification.⁵⁶ A *CCAA* debtor suffers no prejudice if a claim against insurance proceeds is allowed to proceed, even once a plan has been sanctioned:

¶9 ...On the premise that only the insurance proceeds were to be made potentially available to satisfy any judgment that Kelsey-Hayes may be awarded in its claim over against Algoma, it cannot be said that any interest is affected adversely except possibly that of Royal and that of Dofasco Inc. (Dofasco).⁵⁷

42. The Court of Appeal also held that it would be unjust to force such insured claims to be valued and determined in the summary proceeding developed by the debtor without a trial.⁵⁸

⁵⁵ Other than in relation to core documents, liability in section 138.3 will not be asserted for non-core documents and public oral statements against a director unless the director had knowledge of the misrepresentation, unless they deliberately avoided acquiring knowledge or they were guilty of gross misconduct. The misrepresentations alleged against the Timminco directors go beyond representations in core documents. Committee on Corporate Disclosure, “Responsible Corporate Disclosure: A Search for Balance”, Final Report (March 1997) at p. x.; *Securities Act*, R.S.O. 1990, c. S.5, ss. 138.3(1)(b), 138.3(2)(c), 138.3(3)(c), 138.4(1).

⁵⁶ *Algoma Steel Corp. v. Royal Bank of Canada*, [1992] O.J. No. 889 at paras. 13-15 (O.N.C.A.) [“*Algoma*”]; *Re Carey Canada Inc.*, [2006] O.J. No. 4905 at paras. 7, 16-17 (S.C.J.).

⁵⁷ *Algoma*, *ibid.* at para. 9.

⁵⁸ *Algoma*, *ibid.* at para. 14.

43. More recent case law has expanded on the reasoning in *Algoma*, denying insurers a role in the determination and/or manner of adjudication of insured claims under the *CCAA* to prevent any “sculpting” of cases to benefit insurers’ own commercial interests.⁵⁹

44. The Claims Procedure Order notice to creditors recognizes that insured claims are excluded and do not require a proof of claim:

A Claim is defined as a Prefiling Claim, a D&O Claim or a Restructuring Claim but does not include Excluded Claims. An Excluded Claim includes, among other things, the claim of any Person which is secured by a Charge, claim determined to be unaffected as arising from a cause of action for which the applicable Applicant is fully insured and any D&O Claim determined to be unaffected by the Claims Procedure Order.⁶⁰

45. Mr. Pennyfeather, had direct information on the available insurance coverage and consistently advised the Court that he was making no claim against Timminco’s assets, only against the insurance and the assets of the defendant officers and directors.⁶¹ The insurance proceeds are funds that are not available to other creditors of Timminco; they are not accessible within the *CCAA* to pay secured or unsecured creditors. They are however available to Mr. Pennyfeather and class members if they succeed in proving the liability of Timminco and the defendant officers and directors.

⁵⁹ *Pope & Talbot Ltd. (Re)*, 2011 BCSC 548, [2011] B.C.J. No. 793 at para. 18 (B.C.S.C.).

⁶⁰ Order of Justice Morawetz re: claims procedure dated June 15, 2012 at Schedule 1, Exhibit “R” to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2R, pp. 196-197.

⁶¹ Order of Justice Morawetz re: claims procedure dated June 15, 2012 at para. 27, Schedule 1, Exhibit “R” to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2R, pp. 187, 196-199; Paris Affidavit at para. 12, **Motion Record of the Plaintiff**, Vol. II, Tab 4, p. 532; Reasons for Decision of Justice Perell dated February 3, 2010, Exhibit “D” to the Paris Affidavit, **Motion Record of the Plaintiff**, Vol. II, Tab 4D, pp. 625-634; Reasons for Decision of Justice McCombs denying leave to appeal dated April 22, 2010, Exhibit “E” to the Paris Affidavit, **Motion Record of the Plaintiff**, Vol. II, Tab 4E, pp. 636-640.

D.) Fairness and reasonableness require that the stay be lifted and if necessary, that the Claims Procedure Order be amended to exclude insured claims and claims against directors or to allow the filing of a class proof of claim

46. It is not fair and reasonable to allow the defendants to bar and extinguish the class action claims through the use of an interim and procedural Court order. The operation of the fair and reasonable standard under the *CCAA* calls for the exercise of this Court's discretion to lift the stay and, if necessary, amend the Claims Procedure Order to either exclude the class action claims or permit submission of a class proof of claim.

47. In *Olympia & York Developments Ltd. v. Royal Trust Co.*,⁶² Justice Blair as he then was, held that the overarching analysis in all discretionary orders under the *CCAA* is fairness and reasonableness.

“Fairness” and “reasonableness” are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the *Companies' Creditors Arrangement Act*. “Fairness” is the quintessential expression of the court's equitable jurisdiction — although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity — and “reasonableness” is what lends objectivity to the process.⁶³

48. The concepts of fairness and reasonableness are always at the heart of the Court's exercise of discretion and are the driving force behind the *CCAA*.⁶⁴ The issue of whether claims are ultimately compromised against directors is specifically subject to the fairness and reasonableness test by the *CCAA*.⁶⁵

⁶² *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Gen. Div.).

⁶³ *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500, 1993 CarswellOnt 182 at para. 28 (Gen. Div.).

⁶⁴ *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, [2000] A.J. No. 771 at para. 94 (Alta. Q.B.); *Ontario v. Canadian Airlines Corp.*, 2001 ABQB 983, [2001] A.J. No. 1457 at para. 47 (Alta. Q.B.).

⁶⁵ *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 5.1(3).

49. The purpose of claims procedure orders is generally summary in nature. It is designed to classify and streamline creditors for the purpose of voting on a plan and ultimately to determine how to distribute any funds.⁶⁶ It is not designed to extinguish claims in isolation, without a plan, creditor vote, and sanction hearing. Such use of a Claims Procedure Order would amount to an impermissible “confiscation” of substantive rights.⁶⁷

50. The Claims Procedure Order recognizes that amendments may be required to its terms by the Court from time to time.⁶⁸ Reasonableness and fairness requires that the Claims Procedure Order be amended to exclude the class action claims or if necessary to allow a class proof of claim to be filed in relation to those claims. The following circumstances favour amending the Claims Procedure Order:

- a) Timminco’s directors have not contributed to the restructuring of Timminco and have resigned early in the process. They have left the “sinking ship”⁶⁹ and should now face the class action claims against them⁷⁰;
- b) the class action claims are known to the defendants. Mr. Pennyfeather’s evidence in support of the class action claims is uncontested and is in the Court record;
- c) Mr. Pennyfeather was not authorized file a class proof of claims on behalf of thousands of unrelated parties⁷¹ prior to certification or appointment as a

⁶⁶ *Canwest Global Communications Corp.*, 2011 ONSC 2215, [2011] O.J. No. 1590 at paras. 33, 40 (S.C.J.).

⁶⁷ *T. Eaton Co. (Re)* (1999), 95 A.C.W.S. (3d) 219, [1999] O.J. 5322 at para. 5 (S.C.J.).

⁶⁸ Order of Justice Morawetz re: claims procedure dated June 15, 2012 at para. 57, Exhibit “R” to the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2R, p. 194.

⁶⁹ For a discussion about the purpose of maintaining stays in favour of directors see: Kevin P. McElcheran, “Directors’ Liabilities: The Effect of Pending Amendments to the BIA and CCAA” in *National Insolvency Review*, November 1996, vol. 13, no. 5, at p. 66; House of Commons Debates, 35th Parl, 2nd Sess, 148 (20 Mar 1997) at 9288 (Hon Morris Bodnar); *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 at paras. 53-54 (C.A.) citing L.W. Houlden and G.B. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192.

⁷⁰ *Papiers Gaspésia Inc. c. Ernst & Young Inc.*, 2005 CanLII 8605, [2005] J.Q. no. 2453 at paras. 41-44 (Que. S.C.).

representative. Representative or class claims *per se*, have not been recognized in Canadian jurisprudence in the context of CCAA proceedings.⁷² Specific wording is required to allow class proof of claims to be filed.⁷³ Such wording was not contained in the Claims Procedure Order.

- d) Mr. Pennyfeather has not sat in the weeds. Mr. Pennyfeather was notorious and persistent in asserting the class action claims, filing evidence in support of the those claims, and moving to lift the stay;
- e) The absence of an intention to propose a plan creates an anomalous situation where substantive rights are adversely affected without the supervisory elements of a democratic vote by creditors or a sanction hearing in open court;
- f) Extinguishing the class action claims as they relate to recovery of the insurance proceeds would only benefit the insurers which have no interest in the CCAA proceedings. The insurance proceeds are inaccessible to the other creditors; and,
- g) No prejudice will accrue to Timminco, the directors, or any other defendant.

⁷¹ A solicitor is not allowed to commence a proceeding without authority of a client. Failure to obtain the requisite authority can lead to a stay of proceedings and an award of costs against the solicitor personally: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 15.02; *Caribbean Cultural Committee v. Toronto (City)*, [2002], O.J. No. 2022, 2002 CarswellOnt 1612 (S.C.J.); *Poulin v. Ford Motor Co. of Canada Ltd.*, 2007 CarswellOnt 8255, [2002] O.J. No. 4988 at para. 71 (S.C.J.); *Chaplin v. Sun Life Assurance Co. of Canada*, 2004 BCSC 116, 2004 CarswellBC 159 at paras. 71-76 (B.C.S.C.).


⁷² *Muscletech Research & Development Inc., Re*, [2006] O.J. No. 3300, 2006 CarswellOnt 4929 at para. 41 (S.C.J.).

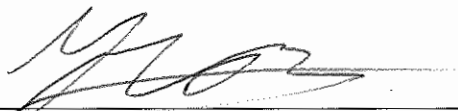
⁷³ Claims Procedure Order in the Sino-Forest CCAA proceeding dated May 14, 2012 at paras. 27-28, Exhibit "GG" in the Rozenszajn Affidavit, **Motion Record of the Plaintiff**, Vol. I, Tab 2GG, p. 347.

Part IV – ORDER REQUESTED

51. St. Clair Pennyfeather, the Plaintiff in the Class Action, requests an order lifting the stay to permit Mr. Pennyfeather to allow the Class Action to be dealt with on its merits against all named defendants. If this Honourable Court finds it necessary, the Plaintiff requests an Order amending the Claims Procedure Order dated June 15, 2012, excluding the Class Action claims as they relate to the insurance proceeds and/or the individual Class Action Defendants or to allow the filing of a class proof of claim in relation to those claims.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF JULY, 2013


James C. Orr


Yonatan Rozenszajn


Tanya T. Jemec

Lawyers for the Plaintiff, St. Clair Pennyfeather, in
the class proceeding *Pennyfeather v. Timminco Ltd.*,
S.C.J. Court File No.: CV-09-378701-00CP

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SCHEDULE "A" – AUTHORITIES

Jurisprudence

1. *Agribands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 (C.A.)
2. *Algoma Steel Corp. v. Royal Bank of Canada* (1992), 8 O.R. (3d) 449, [1992] O.J. No. 889 (C.A.)
3. *BlueStar Battery Systems International Corp. (Re)*, [2000] O.J. No. 4587 (S.C.J.)
4. *Caribbean Cultural Committee v. Toronto (City)*, [2002] O.J. No. 2022, 2002 CarswellOnt 1612 (S.C.J.)
5. *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, [2000] A.J. No. 771 (Alta. Q.B.)
6. *Canwest Global Communications Corp. (Re)*, 2011 ONSC 2215, [2011] O.J. No. 1590 (S.C.J.)
7. *Carey Canada Inc. (Re)* (2006), 153 A.C.W.S. (3d) 777, [2006] O.J. No. 4905 (S.C.J.)
8. *Chaplin v. Sun Life Assurance Co. of Canada*, 2004 BCSC 116, 2004 CarswellBC 159 (B.C.S.C.)
9. *Liberty Oil & Gas Ltd.*, 2002 ABQB 949, [2002] A.J. No. 1302 (Alta. Q.B.)
10. *Lundy v. Via Rail Canada Inc.*, 2012 ONSC 4152, [2012] O.J. No. 3264 (S.C.J.)
11. *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 3300, 2006 CarswellOnt 4929 (S.C.J.), leave to appeal ref'd, [2006] O.J. No. 4583 (C.A.)
12. *Muscletech Research and Development Inc. (Re)* (2006), 153 A.C.W.S. (3d) 1032, [2006] O.J. No. 4974 (S.C.J.)
13. *NBD Bank, Canada v. Dofasco Inc.*, [1999] O.J. 4749 (C.A.)
14. *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Gen. Div.)
15. *Ontario v. Canadian Airlines Corp.*, 2001 ABQB 983, [2001] A.J. No. 1457 (Alta. Q.B.)
16. *Papiers Gaspésia Inc. c. Ernst & Young Inc.*, 2005 CanLII 8605, [2005] J.Q. no. 2453 (Que S.C.)
17. *Pope & Talbot Ltd. (Re)*, 2011 BCSC 548, [2011] B.C.J. No. 793 (B.C.S.C.)
18. *Poulin v. Ford Motor Co. of Canada Ltd.*, 2007 CarswellOnt 8255, [2007] O.J. No. 4988 (S.C.J.)
19. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27
20. *T. Eaton Co. (Re)* (1999), 95 A.C.W.S. (3d) 219, [1999] O.J. 5322 (S.C.J.)
21. *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758, [2011] B.C.J. No. 2467 (B.C.S.C.)

Secondary Sources

22. Canadian Securities Administrators, Notice 53-302, “Report of the Canadian Securities Administrators – Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of ‘Material Fact’ and ‘Material Change’”, (2000) 23 OSCB 3.
23. Debates of the Senate, 35th Parl, 2nd Sess, 135(69) (11 Feb 1997) at 1529 (Hon Michael Kirby)
24. House of Commons Debates, 35th Parl, 2nd Sess, 148 (20 Mar 1997) at 9288 (Hon Morris Bodnar)
25. Kevin P. McElcheran, “Directors’ Liabilities: The Effect of Pending Amendments to the BIA and CCAA” (1996) 13 National Insolvency Review 5
26. Toronto Stock Exchange, Committee on Corporate Disclosure, *Toward Improved Disclosure – A Search for Balance in Corporate Disclosure* (Allen Committee Final Report) (Toronto: Toronto Stock Exchange, March 1997)

SCHEDULE "B" – STATUTES

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

...

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

Class Proceedings Act, 1992, S.O. 1992, c. 6

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

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended

15.02 (4) If a lawyer has commenced a proceeding without the authority of his or her client, the court may, on motion, stay or dismiss the proceeding and order the lawyer to pay the costs of the proceeding.

Securities Act, R.S.O. 1990, c. S. 5

138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against, ...

(b) each director of the responsible issuer at the time the document was released;

...

(2) Where a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the public oral statement was made and the time when the misrepresentation contained in the public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

(b) the person who made the public oral statement;

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the making of the public oral statement;

...

(3) Where an influential person or a person or company with actual, implied or apparent authority to act or speak on behalf of the influential person releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released or the public oral statement was made and the time when the misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,...

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

...

(4) Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act or the regulations and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against, ...

(b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure

138.4 (1) In an action under section 138.3 in relation to a misrepresentation in a document that is not a core document, or a misrepresentation in a public oral statement, a person or company is not liable, subject to subsection (2), unless the plaintiff proves that the person or company,

(a) knew, at the time that the document was released or public oral statement was made, that the document or public oral statement contained the misrepresentation;

(b) at or before the time that the document was released or public oral statement was made, deliberately avoided acquiring knowledge that the document or public oral statement contained the misrepresentation; or

(c) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document or the making of the public oral statement that contained the misrepresentation. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 13 (1).

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

FACTUM OF THE MOVING PARTY, ST.
CLAIR PENNYFEATHER, PLAINTIFF IN
THE CLASS ACTION

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Limited, et. al.*, Ont. Sup. Court File No.: CV-09-
378701-00CP