

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

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

Plaintiff (Moving Party)

**FACTUM
OF THE PLAINTIFF ST. CLAIR PENNYFEATHER**

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

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

(Motion Returnable March 26, 2011)

Part I – OVERVIEW

1. This is a motion to lift the stay to permit the Class Action to be dealt with on its merits.
2. As long as any potential recovery in the Class Action excludes the assets of the Timminco Entities which are being dealt with in the *CCAA* proceedings, an order lifting the stay:
 - a) is consistent with the purpose of each of the three relevant pieces of legislation, the *CCAA*, *Securities Act* and *Class Proceedings Act*;
 - b) is favoured by a consideration of the balance of convenience and/or the relative prejudice to the parties; and
 - c) avoids the stay provision being used to achieve an improper purpose by insulating insurers from providing appropriate indemnification.

Part II – FACTS

3. Timminco suffered what the Globe and Mail termed “a spectacular fall from grace” when it was determined that its “proprietary process” for manufacturing solar grade silicon cheaper than anyone else in the world, did not work as represented.¹

4. The shares of Timminco traded at a high of \$35.69 in June of 2008, fell to \$3.37 by November 2008 and were ultimately delisted on January 3, 2012.²

5. The evidence before the Court is that:

- a) the technology was incapable of performing as represented,³ and
- b) there are resulting damages from the misrepresentations to the putative class members of between \$196 million and \$300 million.⁴

6. The Class Action was commenced on May 14, 2009 and has been case managed by Justice Perell from that point to the present. In that time, among others, the following steps took place in the litigation:

- a) there was a carriage motion;
- b) there was a motion to substitute the representative plaintiff;
- c) there was a motion to force disclosure of insurance policies;
- d) there was a motion for leave to appeal the result of the insurance motion which was heard by the Divisional Court and dismissed;

¹ Affidavit of Victoria Paris, paras. 5, 6, and 7, Motion Record, pages 7 and 8.

² Affidavit of Victoria Paris, paras. 6 and 7, Motion Record, pages 7 and 8.

³ Report of Dr. Rand, Exhibit “K” to the Affidavit of Victoria Paris, Motion Record Pages 191 through 207.

⁴ Report of Mr. Rosen, Exhibit “L” to the Affidavit of Victoria Paris, Motion Records, pages 208 through 250.

- e) there were settlement discussions pursuant to which the Plaintiff delivered five volumes of draft leave and certification material, including expert reports;
- f) when settlement discussions were terminated, Justice Perell declined an expedited leave hearing as being unfair to the defendants and instead declared any limitation period to be stayed;
- g) there was a motion for particulars; and
- h) there was a motion served but not heard to strike portions of the Statement of Claim.⁵

7. Timminco was granted protection under the *CCAA* pursuant to an *ex parte* order dated January 3, 2012. This order contains the stay provision.⁶

8. On February 16, 2012, the Court of Appeal set aside the decision of Justice Perell declaring that section 28 of the *Class Proceedings Act* suspended the running of the three year limitation period under section 138.14 of the *Securities Act*.⁷

9. As the three-year limitation period runs not from discoverability, but from the date of the first misrepresentation, and because all securities class actions have been case managed by judges who apparently did not share the Court of Appeal's interpretation of the legislation, not one securities class action has had leave granted within the three year

⁵ Affidavit of Victoria Paris, paras. 9-26, Motion Record, pages 8 through 13

⁶ Affidavit of Victoria Paris, para. 25, Motion Record, page 12

⁷ Affidavit of Victoria Paris, para. 27, Motion Record, page 13

period.⁸ The Court of Appeal decision, depending upon its application, has the potential to render all secondary market securities class actions in Canada extinct.

10. Plaintiff's counsel has received instructions to seek leave to appeal this decision to the Supreme Court of Canada. The leave material is to be served and filed by April 16, 2012. A decision on leave is not expected until at least November 2012.⁹

Part III – ISSUES AND LAW

11. The purpose of the *CCAA* is to facilitate the making of a compromise or arrangement between an insolvent company and its creditors to the end that the company is able to continue in business.¹⁰ The three principle objectives of the *Class Proceedings Act* are judicial economy, access to justice, and behaviour modification.¹¹ Under the *Securities Act*, the deterrence represented by private plaintiffs armed with a realistic remedy is important in ensuring compliance with continuous disclosure rules.¹²

12. In this situation, where the three pieces of legislation intersect, there is only one result that will not do violence to a primary legislative purpose. That is to lift the stay to permit the Class Action to proceed on the condition that any potential execution excludes Timminco's assets.

13. As a practical matter, this would limit recovery in the Class Action to the proceeds of the insurance policies, or in the event that the insurers decline coverage

⁸ Affidavit of Victoria Paris, paras. 28 and 29, Motion Record, pages 13 and 14

⁹ Affidavit of Victoria Paris, para. 30, Motion Record, page 14

¹⁰ *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1692 at para. 12 (Q.B.)

¹¹ *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 27-29 (S.C.C.)

¹² Report of the Committee on Corporate Disclosure, *Responsible Corporate Disclosure: A Search for Balance* (Toronto Stock Exchange: 1997), at para. 5.14

because of fraud, to the personal assets of those officers and directors found responsible for the fraud.

14. This is consistent with the judicial principle that the *CCAA* is not meant as a refuge insulating insurers from providing appropriate indemnification.¹³

15. In considering whether to lift a stay, the Court will examine the balance of convenience, which is also expressed as weighing the relative prejudice to the parties.¹⁴

16. In the present case, that examination strongly favours lifting the stay in the manner proposed. On the one hand, the insurance proceeds are not available to other creditors and there is no financial unfairness to lifting the stay. On the other hand, if the thousands of class members are barred from seeking leave to the Supreme Court of Canada, their substantive rights may be effectively terminated.

17. Apart from the leave to appeal issues, there are steps that may occur before Justice Perell as a result of the Court of Appeal ruling. Defendants may bring motions for partial judgment and the plaintiff can seek to have the Court proceed with leave and certification with any order to be granted *nunc pro tunc* pursuant to section 12 of the *Class Proceedings Act*. It is uncertain whether any of these steps will be permitted by the Court while the leave request is outstanding.

18. Given the defendants' complaint, agreed to by the Court of Appeal, that they are entitled to have the Class Action dealt with expeditiously, there is a serious concern that

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

¹⁴ *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 313 at para. 68 (Sask. C.A.).

any further delay occasioned by the stay may be used by the defendants against the plaintiffs and prejudice the plaintiff's right to pursue this case.

19. There is no evidence before this Court that having the Class Action proceed concurrently with the sale process will pose any significant practical difficulty with respect to the sale. In response to this motion, no company representative has provided evidence either directly or on the basis of information and belief that there is likely to be any meaningful problem if the Class Action proceeds.

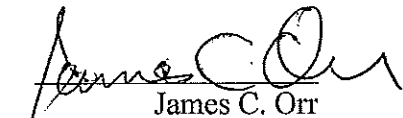
20. In the event that a real, as opposed to theoretical problem ever arises, it should be capable of common sense resolution within the scheduling of the Class Action.

Part IV – ORDER SOUGHT

21. St. Clair Pennyfeather, the Plaintiff in the Class Action, requests an order lifting the stay to permit the Class Action to be dealt with on its merits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 20, 2012



James C. Orr

Lawyers for the Moving Parties,
Kim Orr Barristers P.C.

SCHEDULE "A" – AUTHORITIES

1. *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 1692 (Q.B.)
2. *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.)
3. *Algoma Steel Corp. v. Royal Bank of Canada*, [1992] O.J. No. 889 (C.A.)
4. *Re Carey Canada Inc.*, [2006] O.J. No. 4905 (S.C.J.)
5. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No.313 (Sask. C.A.)

SECONDARY SOURCES

1. 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, 1997)

SCHEDULE "B" – STATUTES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 11 and 11.02

General power of court

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.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

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

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

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

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).

2. *Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 12, 14, 28*

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.

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Proceeding commenced at Toronto

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