

Timminco slapped with \$520-million suit ahead of AGM

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by Lee M. Webb

Timminco Ltd	
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Timminco Ltd., a fallen Toronto Stock Exchange (TSX) star headed by Heinz Schimmelbusch, faces a \$520-million class action lawsuit over allegedly false and misleading promotional claims regarding its solar-grade silicon operation. The lawsuit, which is also seeking \$20-million in punitive damages, was filed by Kim Orr Barristers P.C. in the Ontario Superior Court of Justice in Toronto on May 14.

Kim Orr is a boutique litigation firm with seven lawyers that was formed in 2008. Its areas of practice include securities litigation, corporate litigation and class action lawsuits.

"We are the market makers in class action litigation in Canada," the law firm proclaims on its website.

The firm has separately been involved in class action lawsuits and securities litigation, but it does not appear to have participated in any shareholder class action against a publicly traded company. However, Kim Orr might be tapping into the expertise of a U.S. firm with an abundance of shareholder class action experience, Milberg LLP, the successor to Milberg Weiss Bershad & Schulman LLP.

In a March 3 Globe and Mail article, Sandra Rubin reported that Kim Orr and Milberg had been quietly working together on some joint filings, at least one of which was expected to be made public soon.

Won Kim, one of the founders of Kim Orr, was evidently enthusiastic about the association and Milberg's foray into Canada.

"Canadian investors haven't been particularly well served over the years when it comes to market misconduct," Mr. Kim reportedly told Ms. Rubin, adding that "Milberg can help enormously in terms of experience and advice, not to mention resources and infrastructure."

At this point, of course, it is not clear whether Milberg had any involvement at all in preparing the lawsuit against Timminco.

On May 14, Stockwatch contacted Victoria Paris, a 34-year-old lawyer and principal of Kim Orr, but she would not offer any comments on the case, remarking that it was still very early in the proceedings. She did, however, quickly provide a copy of the statement of claim that had been filed earlier that day.

The parties

The lead plaintiff, Ravinder Kumar Sharma of Richmond Hill, Ont., is suing on behalf of himself and other class members who purchased Timminco shares during the class period, which is identified as falling between March 17, 2008, and Nov. 11, 2008.

In addition to Timminco, the lawsuit names 12 other defendants including Mr. Schimmelbusch, the company's chief executive officer and chairman of the board of directors. Robert Dietrich, Timminco's chief financial officer and executive vice-president, and Rene Boisvert, president and chief executive officer of the company's silicon operation in Becancour, Que., round out the list of company officers being sued.

Timminco directors Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich and former director John Walsh are also named as defendants. Conspicuously missing from the list of director defendants is Jay C. Kellerman, a lawyer and partner in Stikeman Elliott LLP. Mr. Kellerman served as a Timminco director since 2004, but is not standing for re-election at the company's annual general meeting scheduled for today.

Michael Rogol, a consultant who prepared a glowing "operational review report" on Timminco last year, is also named as a defendant along with his firms, Photon Consulting LLC and Rogol Energy Consulting LLC.

The allegations

At the outset, it should be noted that the allegations have not been proven in court and the defendants have not yet filed a statement of defence.

The 44-page statement of claim draws heavily on Timminco press releases, regulatory filings including management's discussion and analysis, conference calls and the Photon report compiled by Mr. Rogol. The lawsuit tracks Timminco's share price in the wake of the release of those documents and public statements.

The thrust of the lawsuit is that the defendants made false and misleading claims about Timminco's proprietary technology and competitive advantage in the production of solar-grade silicon. Moreover, the plaintiff claims, the defendants made false and misleading claims regarding statements of revenue, future estimates of production volume, margins and profits from the solar-grade silicon business.

The defendants allegedly omitted to state "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."

"The misrepresentations were made negligently and recklessly and without regard for the truth of their contents," the statement of claim alleges.

The lawsuit turns first to an excerpt from a March 17, 2008, Timminco press release reporting the company's financial results for the fourth quarter and year ended Dec. 31, 2007. The statement of claim alleges that the statements made in that press release misrepresented that Timminco "was a low-cost producer of solar-grade silicon" and misleadingly implied that the company was capable of producing solar-grade silicon with commercially acceptable impurity composition at the quantity and cost set out in the news release.

The statement of claim then quotes extensively from a March 18, 2008, conference call with analysts and investors in which Mr. Schimmelbusch made a number of statements.

"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," the lawsuit alleges.

Following the March 17, 2008, press release and subsequent conference call, the lawsuit notes, Timminco's share price climbed from \$17.29 on the day of the news release to \$27.49 on March 27, 2008.

Moving on to the annual information form and management's discussion and analysis (MD&A) filed on March 28, 2008, the lawsuit alleges that those documents also contained false and misleading claims.

Among other things, the statement of claim alleges that the annual information form falsely represented that Timminco's solar-grade silicon could be successfully used in the production of solar cells, with "levels of phosphorous and boron that are acceptable to existing customers."

"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," the lawsuit claims. "This inability would have a detrimental effect on the company's revenues and profits."

The lawsuit also takes issue with the allegedly false claim in Timminco's MD&A filing that the company could leverage 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," the lawsuit states.

According to the lawsuit, similar false and misleading claims about the company's "competitive advantage," "proprietary process" and "state of the art" technology were made in Timminco's annual report filed on March 31, 2008. Following the filing of the annual report, the stock price increased from \$23.26 on April 1, 2008, to \$28 on April 10, 2008.

After a one-page review of some early media criticism in April of last year including articles in Barron's, Bloomberg and Reuters that raised questions about Timminco's solar-grade silicon claims, the lawsuit alleges that the defendants hired Mr. Rogol and his two consulting firms to examine and evaluate the business. To that end, Mr. Rogol made a one-day visit to Timminco's silicon plant in Becancour.

The resulting Photon report, received by Timminco on May 8, 2008, and posted to the company's website on May 14, 2008, figures rather prominently in the lawsuit. Among other things, things Mr. Rogol's rather optimistic report projected operating margins of 50 per cent to 80 per cent and potential operating profit from \$270-million to \$1-billion by 2010.

According to the lawsuit, the Photon report contained misrepresentations and Mr. Schimmelbusch and Mr. Rogol made further misrepresentations during a conference call relating to the report that was held on May 13, 2008.

Following the filing of the company's MD&A for the first quarter of 2008 and the Photon report conference call, Timminco's share price moved from \$23.27 on May 13, 2008, to \$28.95 on May 16, 2008.

In the wake of a May 29, 2008, conference call in which Mr. Schimmelbusch allegedly made more false and misleading representations about the company's solar-grade silicon business, Timminco's stock price jumped from \$28 to its all-time high of \$35.69 on June 5, 2008.

According to the statement of claim, the truth began to emerge when Timminco announced its financial results for the second quarter of last year and held a conference call with investors and analysts on Aug. 11, 2008.

"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," the suit alleges.

The lawsuit goes on to claim that in response to a question from CIBC World Markets analyst Michael Willemse, "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 phosphorous contamination problems in the silicon production process, and that the company had to undertake 'debugging' operations, which the company knew would be required."

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

According to the statement of claim, the Aug. 11, 2008, news release and subsequent conference call did not fully correct the misrepresentations made in Timminco's previous public and financial disclosures.

"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," the lawsuit alleges.

On Nov. 11, 2008, Timminco announced that it was removing the Photon report and related documents 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," the lawsuit states.

"The company's share price dropped from \$7.93 on Nov. 11 to \$6.71 on Nov. 12, and further to \$3.37 on Nov. 19, 2008," the statement of claim notes.

While the identified class period ends on Nov. 19, 2008, it is clear that the Kim Orr lawyers have been keeping tabs on subsequent developments.

"Since the corrective statements were made, Timminco's share price has continued to drop," the lawsuit notes. "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."

According to the lawsuit, Timminco's share price was artificially inflated as a result of the misrepresentations made in press releases, conference calls, quarterly reports, annual reports, MD&A and the Photon report. Moreover, any and all analysis undertaken by the plaintiff and other class members was directly influenced by those disclosures, which allegedly contained misrepresentations.

"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," the lawsuit states.

Once again, it is important to note that the lawsuit contains allegations that have not been proven in court and the defendants have not yet filed statements of defence.

The screw turns

While it might understandably be lost on the defendants, some observers may find at least a touch of irony in the timing of the lawsuit, which was filed just a day ahead of Timminco's annual general meeting.

Mr. Schimmelbusch opened last year's annual general meeting, which was held on May 29, 2008, with an apology for any inconvenience that had been caused by some last-minute room shuffling and rescheduling of the meeting time.

"I won't apologize for the fact that Timminco's share price today, at the date of the annual meeting, has reached its all-time high and costs \$30 per share," Mr. Schimmelbusch went on to a round of applause last year.

After offering his sunny perspective on the future of the solar industry in general and Timminco in particular, Mr. Schimmelbusch went on to field a question from an investor about some negative media coverage that had emerged last spring.

"There are short sellers running up and down the streets here telling idiotic, bizarre -- my English is not good, in German I would be much more eloquent on this -- statements on the company because they were short," Mr. Schimmelbusch said last May. "And when you are short in a volatile stock which has a rising trend it is dangerous. And I really hope that they are still short."

"So some journalists obviously have been influenced by these guys."

"And the matter is, by the way, before courts because we are following such statements very carefully."

"If somebody oversteps a certain line, he's over the line, its straight going to the courts."

Indeed, as subsequently reported by Stockwatch, Timminco had filed separate defamation suits against two outspoken critics, Toronto-based Ravi Sood and New York-based Manuel Asensio. At last report, those lawsuits were still slowly wending their way through the Ontario court.

It is unlikely that this year's annual general meeting will be a happy event and it is even more unlikely that Mr. Schimmelbusch, who now finds himself on the business end, so to speak, of a \$520-million lawsuit that could drag on for years, will be offering any gleeful remarks about Timminco's stock price.

Late in the TSX trading session on May 15, Timminco was changing hands for less than \$1.20 per share.

Comments regarding this article may be sent to lwebb@stockwatch.com.

(More information regarding Timminco Ltd. is available in Stockwatch articles published on May 14, 16 and 27; June 4, 20, 27 and 30; July 2 and 31; Aug. 14, 20 and 22; Sept. 25; Oct. 9; Nov. 11, 19, 20 and 26, 2008; March 19 and 26; April 21; and May 12 and 14, 2009.)

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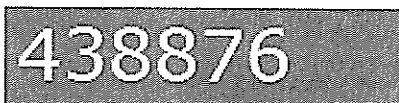
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