

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**RAVINDER KUMAR SHARMA**

Plaintiff

- and -

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

Defendants

*Proceeding under the Class Proceedings Act, 1992*

**AND BETWEEN:**

**ROBERT GOWAN**

Plaintiff

- and -

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

Defendants

*Proceeding under the Class Proceedings Act, 1992*

**COUNSEL:**

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

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

**HEARING DATE:** October 26, 2009

## REASONS FOR DECISION

**PERELL, J.**

### Introduction and Overview

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

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

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

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

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

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

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

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

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

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

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

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

#### Carriage Motions

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

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

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

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

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

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

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

#### The Personae

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*The Claim and Proceedings Against Timminco*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tale of the Tape

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

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

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

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

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

- Between March 17, 2008 and November 11, 2008 (the "Class Period"), class members purchased shares in Timminco, and during this approximately 8-month period, the defendants made misrepresentations.
- The defendants legally responsible for the misrepresentations were: Timminco, a "responsible issuer: under s. 138.1 of the *Ontario Securities Act*; Schimmelbusch, the CEO of Timminco; Deitrich the CFO of Timminco; Boisvert, the CEO of the production subsidiary; Spector, Messman, Fox, Winfield, Yaksich, Walsh (the outside directors of Timminco); and Photon Consulting, Rogol Energy and Rogol, "experts" within the meaning of s. 138.1 of the *Ontario Securities Act*.
- The misrepresentations were about the revenues, production volume, margins, profits of Timminco and were to the affect that Timminco had a competitive advantage in the production of solar-grade silicon. These misrepresentations affected the market price of Timminco shares.
- The misrepresentations consisted of: (1) The March 17, 2008 Press Release; (2) The March 17, 2008 Conference Call with Schimmelbusch; (3) The 2007 Annual

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

- On August 11, 2008 in a press release and a press conference with Schimmelbusch and Dietrich, Timminco partially corrected the misrepresentations, which caused a next day drop in its share price from \$19.97 to \$12.25.
- On November 11, 2008, when its shares were trading at \$7.93, Timminco removed the Photon Report from its website and made a corrective statement. By November 19, 2008, the share price had dropped to \$3.37. The share price continued to decline thereafter.
- Timminco and the other defendants breached their duty of care to the class members who purchased shares during the class period and are liable for negligence and negligent misrepresentation having caused the class members damages and loss.
- The plaintiff and the class will seek leave to assert the statutory causes of action under Part XXIII.1 of the *Ontario Securities Act*.

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

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

- The misrepresentations were about the cost, reliability, and efficacy of Timminco's process for producing solar grade silicon. Many other misrepresentations are alleged with respect to such statements as: whether Timminco had created a paradigm shift in the solar grade silicon market; whether Timminco was a specialist in the production of solar grade silicon; whether Timminco had the technological expertise to transition its business to capitalize on demand for solar grade silicon; whether Timminco's process was a breakthrough innovation; whether Timminco had resolved its production challenges in 2008 Q2; and whether Timminco had a prospect of becoming a leading supplier.
- The misrepresentations by Timminco that affected the price of Timminco shares during the class period consisted of: (1) The December 19, 2007 Press Releases; (2) the February 22, 2008 Press Release; (3) the March 17, 2008 Press Release; (4) the March 18, 2008 Earnings Conference Call with Schimmelbusch; (5) the March 26, 2008 Press Release; (6) the 2007 AIF filed with SEDAR on March 28, 2008; (7) The Fiscal 2007 Annual Report and MD&A 2007 Q4 filed with SEDAR on March 28, 2008; (8) the Form 52-109F1 Filings filed on March 28, 2008 certified by Schimmelbusch and Dietrich; (9) the May 8, 2008 Press Releases filed with SEDAR; (10) the May 8, 2008 Conference Call with Schimmelbusch; (11) the May 13, MD&A 2008 Q1 filed with SEDAR and certified by Schimmelbusch and Dietrich; (12) the May 14, 2008 Conference Call with Schimmelbusch, Dietrich, Boisvert and Rogol and the posting of the Photon Report on the Timminco website; (13) the MD&A 2008 Q2 filed on August 12, 2008; (14) the Investor Presentations of September 2008; (15) the November 11, 2008 Conference Call with Schimmelbusch; (16) the November 11, 2008 Press Release and withdrawal of the Photon Report; (17) The Quarterly Report 2008 Q2 filed on December 4, 2008; (18) the 2008 Q2 Form 52-109F2 Filings certified by Schimmelbusch and Dietrich on December 4, 2008; (19) the February 3, 2009 Offering Memorandum; (20) the March 17, 2009 Press Releases; (21) the March 27, 2009 Annual Report and AIF 2008; (22) the Form 52-109F1 Filings of March 27, 2009 certified by Schimmelbusch and Dietrich; and (23) the April 20, 2009 Press Release.
- During the class period, to attract investment in Timminco, AMG Advanced Metallurgical Group N.V, the parent company of Timminco, issued press releases containing misrepresentations.
- During the class period, AMG's misrepresentations that affected the price of Timminco shares consisted of: (1) the December 19, 2007 Press Release; (2) the February 22, 2008 Press Release; (3) the March 26, 2008 Press Release; (4) the May 8, 2008 Press Releases; and (5) the March 17, 2009 Press Releases.
- On August 11, 2008, Timminco disclosed flaws in its process for producing solar grade silicon and its share price fell from \$19.97 on August 11, 2008 to \$15.10 on August 14, 2009 (the next trading day).

- On November 11, 2008, Timminco removed the Photon Report from its website. Over the next 10 trading days the price of Timminco's shares fell from \$7.93 to \$3.10.
- On April 20, 2009, Timminco disclosed that certain customers had terminated their contracts due to non-compliance.
- Timminco, AMG Advanced Metallurgical Group N.V and the individual defendants are liable for negligence and negligent misrepresentation for having caused damage and loss to the class members.
- The plaintiff and the class will seek leave to assert the statutory causes of action under Part XXIII.1 of the *Ontario Securities Act*. If leave is granted actions will be brought against Spector, Messman, Fox, Winfield, Yaksich, Walsh (outside directors of Timminco); and Photon Consulting, Rogol Energy and Rogol, "experts" within the meaning of s. 138.1 of the *Ontario Securities Act*

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

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

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

#### *Analysis and Discussion – The Non-Critical or Neutral Factors*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### *Analysis and Discussion – The Critical Factors*

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

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

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

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

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

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

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

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

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

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

#### Conclusion

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

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



Perell, J.

Released: October 20, 2009

**COURT FILE NO.: 09-CV-378701-00CP  
COURT FILE NO.: CV-09-380757-00CP  
DATE: October 209, 2009**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN**

**RAVINDER KUMAR SHARMA**

Plaintiff

- and -

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

Defendants

**AND BETWEEN:**

**ROBERT GOWAN**

Plaintiff

- and -

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

Defendants

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**REASONS FOR DECISION**

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**Perell, J.**

Released: October 29, 2009