



## **Timminco loses early skirmishes with alleged libellers**

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by Lee M. Webb

Timminco Ltd., a fading solar play trading on the Toronto Stock Exchange (TSX), has lost some preliminary legal skirmishes in its \$6-million libel suit against short seller Ravi Sood and Lawrence Asset Management Inc. of Toronto. The former TSX star has also come out on the wrong end of similar early scuffles in a previously unreported \$10-million libel action against New York-based short seller Manuel P. Asensio and Mill Rock LLC.

Timminco filed both lawsuits in the Ontario Superior Court of Justice in Toronto on May 2, 2008. Mr. Sood and his firm Lawrence Asset Management were served with the \$6-million statement of claim immediately, but Mr. Asensio and Mill Rock were not served with the statement of claim in the separate \$10-million libel suit until some time in June of last year.

Stockwatch has previously noted that the Toronto court has been revamping its records system, resulting in delays in updating files. In fact, the filing system seems to be a shambles and a number of documents are clearly missing from the Timminco litigation files. Nonetheless, after paying for numerous searches over the past 10 months, Stockwatch has managed to collect enough documentation to piece together developments in the lawsuits up to March 4.

Before turning to a review of Timminco's previously unreported libel action against Mr. Asensio, this article will provide a recap of the lawsuit against Mr. Sood, which received detailed coverage in Stockwatch reports published on June 27 and Aug. 22, 2008.

### **Sood suit**

As previously reported by Stockwatch, Timminco's displeasure with Mr. Sood traces back to unflattering comments that he made about the company during his April 21, 2008, appearance on Market Call, a Canadian television program on the Business News Network (BNN).

After declaring that his firm, Lawrence Asset Management, had a major short position in Timminco, Mr. Sood scoffed at the company's claims about having developed a proprietary process to produce low-cost solar-grade silicon.

"In fact, as far as I can tell in the work that we've done, there is no evidence that they have any sort of proprietary technology," Mr. Sood said after suggesting that there was every probability that the company was virtually worthless.

Mr. Sood was also dismissive of Timminco's patent application, claiming that the patent would not be

granted. He went on to opine that Timminco's entire story was "very suspicious."

"And, it's our belief that as the next year plays out, we'll see these guys fail to actually deliver on what they've claimed they can deliver and the market will start to catch up with these claims and this stock will be revalued significantly lower," Mr. Sood said last April when the stock was trading at more than \$20 per share and on its way to notching an all-time high of \$35.69 in early June.

Prompted by a question from Market Call host Michael Hainsworth, Mr. Sood went on to offer a comparison with Bre-X Minerals Ltd., the largest mining fraud in Canadian history.

"I think there's a lot -- you have to make a parallel to Bre-X," Mr. Sood said. "Obviously it's not mining and salting of assays but like I said, it's not a question is this thing 20-per-cent overvalued and just a little bit expensive here. I have some serious questions as to whether they can deliver on this at all."

Two days after his appearance on BNN, a Financial Post article carried some more of Mr. Sood's unflattering comments about the controversial TSX solar play. Timminco, represented by William C. McDowell of Lenczner Slaght Royce Smith Griffin LLP, took exception to those remarks, too.

In its lawsuit, Timminco alleges that Mr. Sood's defamatory words mean that the company defrauded the public; has made misrepresentations regarding its proprietary technology; does not in fact have a proprietary technology to produce solar-grade silicon; its patent applications amount to a sham; and its operations are shrouded in criminality or impropriety.

According to Timminco, Mr. Sood and Lawrence Asset Management "acted maliciously in their campaign of defamation."

"Their actions were undertaken for the improper collateral purpose of advancing their short selling strategy," the company claims. "They have cynically pursued their own financial gain, with reckless disregard for the injury they have caused Timminco."

Timminco is seeking \$3-million in general damages and another \$3-million in punitive damages for the defendants' allegedly "high-handed and malicious conduct."

On Aug. 7, 2008, Timminco filed an amended statement of claim, but there were no changes to the substantive allegations against Mr. Sood and his company.

Indeed, as will be discussed later in this article, the only changes to the lawsuit were with respect to an introductory section describing Timminco's business. First, however, Stockwatch will review the libel action against Mr. Asensio, which has rather surprisingly escaped any media coverage to this point.

### **Asensio action**

As noted in previous Stockwatch articles, Mr. Asensio gained notoriety in the 1990s for his abrasive, confrontational and high-profile attacks on his short-selling targets, many of which subsequently collapsed.

Short sellers are widely despised and Mr. Asensio arguably has more than his fair share of detractors,

many of whom believe that he is little more than a vicious attack dog for unscrupulous hedge funds that profit from the destruction of promising public companies.

Timminco, represented this time by Peter Downard and Catherine Wiley of Fasken Martineau DuMoulin LLP, claims that it was falsely and maliciously attacked by Mr. Asensio.

As in the lawsuit against Mr. Sood, Timminco outlines the mechanics of short selling in its May 2, 2008, lawsuit against Mr. Asensio and Mill Rock, noting that the "short seller's strategy can only succeed if the market price of the securities declines after the original sale by the short seller."

"It is in the interest of a short seller of a particular company's shares to spread information about that company in the securities markets which will tend to lower that company's reputation and lead to the market placing a lower value on the company's shares," Timminco claims.

"Asensio has accordingly adopted a system of launching campaigns of defamation against companies he has sold short," the statement of claim continues. "He has done so through Internet communications (including an established website at [www.asensio.com](http://www.asensio.com)) and other communications.

"Asensio's campaigns have been characterized by repeated examples of disregard for the truthfulness of the information disseminated and disregard for the appropriate standards of conduct."

In support of those allegations, Timminco notes that Mr. Asensio's former firm, Asensio & Company, was found by a U.S. jury, in a verdict affirmed by the U.S. Court of Appeals in 2004, to have fraudulently made public derogatory claims about a company in which it had a significant short interest.

Timminco also cites a 2005 National Association of Securities Dealers (NASD) disciplinary proceeding against Mr. Asensio and his company in which he was found "to have made exaggerated, unwarranted and misleading statements in a series of 'research reports'" that recommended short selling a security.

According to Timminco, the NASD hearing panel found that Mr. Asensio "had testified untruthfully before it, and in particular had given testimony that was 'nonsense,' 'double talk,' 'unbelievable' and 'contrived.'" The NASD panel also concluded that Mr. Asensio had "deliberately obstructed" the investigation of the matter in an "egregious" manner.

After providing a bit of the short seller's background, Timminco goes on to claim that Mr. Asensio and Mill Rock have short positions in the company's stock and have launched a campaign to manipulate the share price downward in order to advance their financial interests.

Timminco alleges that Mr. Asensio made false and malicious statements about the company during an appearance on BNN on March 31, 2008. That was three weeks before Mr. Sood used the same platform for his allegedly defamatory comments about Timminco.

Parenthetically noting that Mr. Asensio pronounced "silicon" as "silicone" throughout the BNN broadcast, Timminco alleges that the short seller said the company cannot claim that metallurgical silicon can be refined through a metallurgical process and then used successfully to produce efficient,

durable solar cells.

"If that was the case, then any metallurgical company on earth, and all of them are better than and larger than, than Becancour, the subsidiary of Timminco that has this metallurgical process, than Timminco itself," Mr. Asensio reportedly said.

"In the world there's five million tons of metal, of metal, of metal silicon that's been produced metallurgically," Mr. Asensio continued. "A lot of that, most of it is at a better quality than Timminco can make to begin with. Any one of those players could implement the same process to refining metallurgical silicon and then claim that their produce could be used to create solar cells.

"Um, I don't know if that answers your question, but I think most investors should know that the process by which the silicon that is used for a cell that can turn electricity into sunlight is chemical.

"If you can create silicon through a metallurgical process, which we've been doing since we were cavemen, um, if you can do that then you would be able to, anyone that had the metallurgical plant can do it.

"You can't say that you have a proprietary process that's metallurgical, it's going to replace chemical.

"Either it's chemical or metallurgical."

Timminco also took exception to Mr. Asensio's comments involving Q-Cells AG. As followers of Timminco know, Q-Cells is the TSX solar player's most important customer and the relationship has frequently been invoked by the company as validation of its secret proprietary process and its upgraded metallurgical silicon product.

"Q-Cells in fact said that Timminco has nothing special, that they're buying metallurgical silicon," Mr. Asensio reportedly said in his BNN interview. "In fact, they said they can make solar cells out of paper and their customers would buy it.

"What Q-Cells told the world is, hey, we don't have any polysilicon. We know you think we're in trouble.

"But guess what, we have developed this plant over here that will be able to pick up Timminco's cheap, dirty silicon, as well as anybody else's cheap, dirty silicon, and turn it into a wafer that we can use to make a cell that turns sunlight into electricity.

"That's what Q-Cells is saying.

"I don't believe that Q-Cells is correct, and we have some issues with Q-Cells in and of itself, some very serious issues which we've gone into.

"But beside, aside from Q-Cells, remember Timminco is a small, insignificant player in a very large commodity business, metallurgical silicon.

"They are doing nothing different than anyone else is.

"They have to melt it, when it's melted you solidify it fractionally, and as it's solidifying certain things separate, and you take the impurities that separate off.

"That has physical limitations."

Timminco takes further issue with Mr. Asensio's comments regarding a price prediction for the company's shares.

"Timminco is probably one of the, in my career, and as you know I've been in it not a year, not two years, but a decade and a half, and I haven't done companies like this once, twice, or a dozen or two dozen time, but over three dozen times," Mr. Asensio proclaimed. "This is probably the most overvalued situation and the most easily identifiable questions that I've ever run into in my career.

"I can't see this stock ever being, not being back to 30 cents."

According to the TSX solar player, Mr. Asensio's statements in the BNN interview "were false and seriously defamatory of Timminco in their plain and ordinary meaning, including their implied meanings."

Timminco claims that any reasonable viewer of the BNN program would have understood Mr. Asensio's statements to mean that the company has knowingly or recklessly made misrepresentations to the public about its proprietary technology for the production of solar-grade silicon and in fact does not have such a proprietary technology.

Moreover, the lawsuit alleges that reasonable viewers would have understood Mr. Asensio was claiming that Q-Cells acknowledged that Timminco did not possess such a proprietary technology.

Finally, the allegedly false and defamatory statements meant that Timminco, as a result of its misrepresentations, had wrongfully induced members of the public to purchase the company's shares.

Timminco goes on to claim that Mr. Asensio made further defamatory statements about the company in a telephone conversation with Jim Christodoulis of Clarus Securities Inc. shortly after the BNN broadcast last March. It is not clear just who initiated the call, but evidently Clarus, which employs Timminco's most bullish analyst, Carolina Vargas, passed Mr. Asensio's comments on to the TSX solar player.

According to Timminco, Mr. Asensio told Clarus's Mr. Christodoulis that the solar player's proprietary process for the manufacture of solar-grade silicon is a "complete fraud" and that the process is "easily repeatable."

Mr. Asensio also allegedly said that Timminco's solar-grade silicon is not acceptable for solar use.

Among other things, Mr. Asensio allegedly told Mr. Christodoulis that Timminco's variable costs are substantially higher than the company has claimed, by a multiple of four to five times.

Timminco alleges that Mr. Asensio said that the Q-Cells contract was simply an extension of the fraud; the company's shares were worth "zero"; and that he would "short \$100-million" in Timminco

shares, if he could.

According to Timminco, Mr. Asensio's "false and seriously defamatory" statements to Clarus's Mr. Christodoulis meant that the company has defrauded the public regarding its business; has made statements regarding the Q-Cells contract in order to advance its fraudulent design; and has wrongfully induced members of the public to purchase Timminco shares.

Among other things, Mr. Asensio's statements to Mr. Christodoulis also meant that Timminco either does not have a proprietary process for producing solar-grade silicon or has a manufacturing process that is inadequate for that purpose; its process does not involve any special knowledge or information worthy of protection; and what the company markets as solar-grade silicon is not acceptable for solar use.

Rounding out the grievances about Mr. Asensio's telephone conversation with Mr. Christodoulis, the company claims that the short seller's statements meant that "Timminco's shares are worthless, or of little true value."

Timminco claims that it has suffered damage to its reputation and goodwill as a result of Mr. Asensio's allegedly false and defamatory statements, which were maliciously made as part of a campaign to drive down the company's share price.

Mr. Asensio and Mill Rock have refused to retract their statements or apologize to Timminco.

Timminco is asking for \$5-million in general damages and \$5-million in punitive damages, the latter for the "malicious, high-handed and arrogant conduct of the defendant."

As with its lawsuit against Mr. Sood and Lawrence Asset Management, Timminco amended its statement of claim against Mr. Asensio and Mill Rock on Aug. 7, 2008. Once again, there were no changes to the substantive allegations against the defendants.

In fact, the only, and identical, changes to the statements of claim were with respect to the 10-paragraph description of Timminco's business in the original lawsuits.

### **The dodge**

As noted in Stockwatch's earlier reports of Timminco's litigation against Mr. Sood and Lawrence Asset Management, stripped of the context of a lawsuit, the description of Timminco's business in the original statement of claim might easily be mistaken for the type of promotional material served up at dog-and-pony shows. Exactly the same description was offered in the original statement of claim against Mr. Asensio and Mill Rock.

In the amended statements of claim, Timminco edited out three consecutive paragraphs from the description of its business.

The first edit consisted of the removal of a one-sentence claim that Timminco had entered into four long-term commercial contracts for the sale of solar-grade silicon metal in 2007.

The next two edited paragraphs involved claims regarding Q-Cells.

"In March of 2008 Timminco entered into a major contract (the 'Q-Cells contract') with Q-Cells AG ('Q-Cells') of Germany, the world's largest manufacturer of solar cells," the original statements of claim reported. "Under the terms of the Q-Cells contract, Timminco will supply Q-Cells with contractually fixed supplies of 410 metric tons ('mt') of solar-grade silicon in 2008, and 3,000 mt of solar-grade silicon in 2009, at fixed prices."

That paragraph vanished from the amended statements of claim.

"In April of 2008, Q-Cells publicly stated that Timminco's solar-grade silicon is "very good and we are happy with the (Q-Cells contract)," the third paragraph removed from the original lawsuits stated.

Subsequent court documents make it clear that by removing those three paragraphs from its statements of claim, Timminco was attempting to dodge requests by the defendants to inspect the four long-term contracts mentioned in one paragraph and the Q-Cells contract mentioned in the following two paragraphs.

On May 12, 2008, Mr. Sood's lawyer, Clifford Lax of Lax O'Sullivan Scott LLP, served Timminco with a request to inspect those five contracts. Timminco's counsel responded on May 23, 2008, suggesting they discuss the matter the following week. However, it was not until July 25, 2008, that Timminco's lawyer actually got back to Mr. Lax in a letter refusing the request to inspect the contracts.

"We are unwilling to provide you with the documents which you have requested," Timminco's lawyer advised. "Having considered the matter carefully, we do not believe that you are entitled to them at this stage of the action taking into account all of the circumstances of this case.

"Your clients are not entitled to 'fish' for documents in order to justify their defamatory statements.

"Further, even if the documents were produced, we understand that you are not prepared to recommend to your client that it agree to a protective order."

On Aug. 7, 2008, Timminco amended its statement of claim to delete the references to the requested documents.

Meanwhile, Mr. Asensio, represented by Lorne Honickman of McCague Peacock Borlack McInnis & Lloyd LLP, served Timminco with a request to inspect the same documents on July 17, 2008. On July 24, 2008, Timminco's lawyer replied that the request to inspect documents was refused and called upon Mr. Asensio to file a statement of defence.

On Aug. 7, 2008, Timminco amended its statement of claim against Mr. Asensio, too, deleting the references to the requested documents.

"I trust you will now agree that your proposed motion would have no reasonable prospect of success," Timminco's lawyer wrote to Mr. Asensio's counsel on Aug. 8, 2008.

As it turned out, Mr. Sood and Mr. Asensio separately filed identical motions for an order compelling Timminco to produce the contracts for inspection. Not surprisingly, after attempting to dodge the

requests by amending its statements of claim, Timminco opposed the motions.

### **Crystal clear**

Master Thomas R. Hawkins heard the parallel motions by the defendants on Oct. 15, 2008.

Timminco offered two main arguments to resist producing the five contracts requested by the defendants. First, Timminco argued that by amending its statements of claim to remove the references to the requested documents, it freed itself from the obligation to respond to the request to inspect those documents. Second, the company claimed that it was not under an obligation to produce the documents because of the practice in defamation cases not to permit a defendant to use the discovery process to find a defence of which it was not aware.

Master Hawkins rejected both arguments.

"In my view, the defendants' entitlement to inspect these documents crystallized as soon as the defendants served the plaintiff with their request to inspect documents," Master Hawkins wrote in his Nov. 17, 2008, ruling.

"The plaintiff cannot defeat the defendants' crystallized rights by amending the statement of claim," he went on to state.

According to Master Hawkins, the applicable subrule of the rules of civil procedure is clear and unequivocal with respect to the request to inspect documents and "does not set forth any defamation action exception."

Master Hawkins ordered Timminco to produce the requested contracts for inspection by the defendants within 30 days. He also ordered Timminco to pay the defendants the costs of the hearing.

### **Live with it**

On Dec. 10, 2008, Timminco filed a notice of appeal seeking to have the Nov. 17, 2008, orders of Master Hawkins set aside. According to Timminco, in making the orders "the Master was clearly wrong, and erred in principle."

"If the order of the Master is not set aside, his reasons for decision will stand as an anomalous exception to over 100 years of jurisprudence in defamation actions," Mr. McDowell wrote.

Mr. Justice David M. Brown heard the appeals on Feb. 5 and issued his decision on March 4.

According to Judge Brown, the issue at the centre of the appeals was whether, under the relevant rule of civil procedure, a plaintiff can avoid its obligation to produce a requested document for inspection by amending its statement of claim to delete any references to that document.

Judge Brown noted that the facts in both actions, specifically Timminco's separate defamation lawsuits against Mr. Asensio and Mr. Sood, are very similar. The judge went on to offer a one-sentence summary of the defendants' allegedly defamatory statements.



"The gist of the allegedly defamatory statements attributed to Asensio and Sood was that they questioned the commercial value of a technology which Timminco claimed was proprietary to the company, and they both stated they thought Timminco shares were over-priced," Judge Brown wrote.

The judge observed that portions of the statements of claim in both actions were "very similar, in some respects identical" and each pleading contained a section describing Timminco's business in which identical paragraphs referred to the contracts that the defendants asked to inspect.

After sketching the efforts of Mr. Sood and Mr. Asensio to obtain copies of the contracts referred to in the statements of claim, Judge Brown turned to a review of the decisions of Master Hawkins.

"Master Hawkins concluded that the defendants' entitlement to inspect the requested documents 'crystallized' as soon as the requests were served, and the plaintiff's subsequent amendment of its pleadings could not defeat the request," Judge Brown wrote. "In reaching that conclusion Master Hawkins did not err; indeed, I agree with his analysis."

According to Judge Brown, once the defendants served the plaintiff with requests to inspect the contracts, Timminco became subject to an obligation to make the documents available for inspection within five days.

"Timminco could not relieve itself unilaterally from that obligation by amending its statement of claim," the judge wrote. "I say this for two reasons. First, courts should not interpret the Rules of Civil Procedure in a manner that would countenance their breach, which essentially is the position advocated by Timminco.

"Second, as the case law has made clear, the intent of the Rule is to provide the opposite party with the same advantage as if the other had reproduced the contents of the document in the pleading.

"Timminco's position runs counter to that purpose of the Rule."

Judge Brown also agreed with Master Hawkins's observation that the relevant rules did not set forth "any defamation action exception."

"Carve-outs have not been made for certain types of documents referred to in pleadings in certain kind of cases," Judge Brown wrote.

"I do not accept Timminco's argument that the master's decision overturned a century of principle and policy regarding the scope of discovery in defamation actions," Judge Brown subsequently wrote. "It was Timminco's choice to refer to the contracts in its pleading; it has to live with the consequences of that choice."

On March 4, Judge Brown dismissed Timminco's appeals from the Nov. 17, 2008, orders.

It is not clear whether Timminco, having lost those early skirmishes, has yet produced the five contracts for inspection by the alleged libellers Mr. Sood and Mr. Asensio.

Meanwhile, Timminco's share price, which has plunged more than \$33 since last June, may well have some investors wishing they had been able to take a peek at those touted contracts before piling into

the solar play.

With 307,700 shares changing hands in TSX trading, Timminco closed at \$2.09 on March 25.

Stockwatch will continue to follow developments.

Comments regarding this article may be sent to [lwebb@stockwatch.com](mailto: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; and March 19, 2009.)