Court File No. CV-11-424069-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

TRUSTEES OF THE MILLWRIGHT REGIONAL COUNCIL
OF ONTARIO PENSION TRUST FUND

Plaintiffs

- and -

CELESTICA INC., STEPHEN W. DELANEY and ANTHONY P. PUPPI

Defendants

A N D B E T W E E N :

NABIL BERZI

Plaintiff

- and -

CELESTICA INC., STEPHEN W. DELANEY and ANTHONY P. PUPPI

Defendants

A N D B E T W E E N :

HUACHENG XING

Plaintiff

- and -

CELESTICA INC., STEPHEN W. DELANEY and ANTHONY P. PUPPI

Defendants

Proceeding under the *Class Proceedings Act, 1992*

REPLY FACTUM OF THE MOVING DEFENDANTS
(returnable October 3, 2012)

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PART I - INTRODUCTION

1. This Reply Factum supplements the moving defendants' factum dated August 17, 2012 and replies to the plaintiffs' factum dated September 17, 2012.

2. The moving defendants maintain their original arguments that portions of the plaintiffs' Fresh as Amended Statement of Claim should be struck pursuant to rules 21.01(1)(a), 21.01(1)(b), 25.06 and 25.11 of the *Rules of Civil Procedure* on the grounds that many of the plaintiffs' causes of action are barred by operation of the applicable limitation periods, disclose no reasonable cause of action, and are not supported by the minimum level of fact disclosure. This Reply Factum focuses on the following issues: (i) the plaintiffs misstate the test to be applied on this motion; (ii) the doctrine of special circumstances has no application; (iii) the pleadings in the parallel U.S. action are not relevant; and (iv) the plaintiffs have not satisfied the requirements of section 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended (the "CPA").

3. The plaintiffs commenced two class actions in Canada in respect of the matters in issue in 2007 and 2008, and failed to pursue these actions until the spring of 2011—more than four years after the occurrence of the latest alleged misrepresentation. Rather, the plaintiffs appear to have chosen to advance U.S. proceedings to the exclusion of Canadian proceedings. Now that the proceedings in the U.S. may not offer the plaintiffs the remedy they seek, the plaintiffs are attempting to advance and augment the Canadian proceedings that have been neglected for four years. This is the very type of litigation that the limitation periods at issue are designed to prevent.

4. Striking the plaintiffs' clearly statute-barred causes of action, pleadings that disclose no reasonable cause of action, and pleadings that are not supported by the minimum level of fact disclosure at this stage of the proceeding will not only foreclose the plaintiffs' attempts to use Ontario as a fall-back forum, but will dispose of a significant part of the action and result in substantial savings of time and costs to all parties.

PART II - THE FACTS

5. The essential facts remain as summarized in the moving defendants' factum dated August 17, 2012. The terms defined therein continue to have the same meaning in this factum.

6. At paragraphs 52-96 of their factum, the plaintiffs state their arguments as to why the Court of Appeal for Ontario was incorrect in its decision in *Sharma v. Timminco Ltd.* The defendants disagree with the plaintiffs' arguments in their entirety. The Court of Appeal's decision is binding authority and has not been distinguished by the plaintiffs. The moving defendants repeat and rely on their submissions dated August 17, 2012.

> *Sharma v. Timminco Ltd.*, 2012 ONCA 107 (C.A.); leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 157; Moving Parties' Book of Authorities, Tab 7.

PART III - ISSUES AND THE LAW

A. Correct Test on this Motion

7. The correct test on this motion is whether "it is plain and obvious from a review of the statement of claim that no additional facts could be asserted that would alter the conclusion that a limitation period had expired" The law is also clear that a putative class action can be dismissed, prior to certification where, as here, the claim is time-barred on the face of the pleading and no factual inquiry is required.

Beardsley v. Ontario, [2001] O.J. No. 4574 (C.A.) at para. 21, Moving Parties' Book of Authorities, Tab 1.

Dugal v. Manulife, [2011] O.J. No. 1240 (S.C.J.) ["*Dugal*"] at para. 38, Moving Parties' Book of Authorities, Tab 5.

McKenna v. Gammon Gold Inc., [2010] O.J. No. 1057 (S.C.J.) ["*Gammon Gold*"] at paras. 37-38, Book of Authorities of the Plaintiffs, Tab 47.

8. In their factum, the plaintiffs misstate the test to be applied (see paragraphs 7, 43-45, and 49). The plaintiffs state that it must be "plain and obvious" that a court will not grant them *relief* from a limitation period that has expired. If the plaintiffs' articulation of the test is applied, Rule 21 will cease to have any application to cases where a limitation period has clearly and indisputably expired on the face of the pleadings.

9. In this case, as set out in the moving defendants' factum dated August 17, 2012, it is plain and obvious on the face of the pleadings that no additional facts could be asserted to show that the limitation period has not expired. Indeed, the plaintiffs do not dispute that the limitation period has expired. The enforcement of the limitation period in this case would be consistent with the purpose of the limitation period at section 138.14 of the Ontario *Securities Act*, R.S.O. 1990, c.S.5, as amended (the "OSA"): to require that claims be pursued with dispatch, and to discourage parties from commencing secondary market securities class actions and then not pursuing them. As Justice Strathy states in *Green*,

> Part of the concern of the Court of Appeal in *Timminco* was that a plaintiff might simply 'assert' the *Securities Act* claim, thereby suspending the limitation period, and then do nothing, leaving the action to languish, to the detriment of class members.

That is exactly what the plaintiffs have attempted here. The plaintiffs started claims in multiple jurisdictions, only to suspend their Ontario claim for more than four years.

Green v. Canadian Imperial Bank of Commerce, [2012] O.J. No. 3072 (S.C.J.) ["*Green*"] at para. 504, Moving Parties' Book of Authorities, Tab 7.

10. Contrary to the plaintiffs' submission at paragraph 54 of their factum, section 138.14 of the OSA does not create a "technical defence with no apparent purpose". Rather, the apparent purpose is to prevent exactly what has occurred in this case. Contrary to the plaintiffs' submission at paragraph 64 of their factum, it is neither unreasonable nor unfair to dismiss an action for being statute-barred. The limitation period under section 138.14 of the OSA expired more than two-and-a-half years ago. The initial alleged misrepresentations were made almost eight years ago. The plaintiffs took no steps to advance their claims in this entire period.

> *Turon v. Abbot Laboratories Ltd.*, [2011] O.J. No. 3512 (S.C.J.) at para. 14, Supplementary Book of Authorities of the Moving Defendants, Tab 1.

B. Doctrine of "Special Circumstances" has no Application

11. The plaintiffs argue at paragraphs 97-124 of their factum that the doctrine of "special circumstances" should apply to relieve them from compliance with the limitation period. For the reasons set out at paragraphs 57-60 of the moving defendants' factum dated August 17, 2012, the plaintiffs are incorrect. In addition, the doctrine of "special circumstances", which circumstances do not often occur, has no application to the limitation period under section 138.14 of the OSA for the following two reasons.

> *Dugal, supra* at paras. 66 and 90-91.

12. First, the "special circumstances" doctrine operates only to enable the amendment of an existing statement of claim to add new parties or actions. It does not provide general authority to extend a limitation period. The plaintiffs in this case are not seeking to add additional parties or actions to an existing claim. Rather, they are seeking to advance a claim for which leave is required but has not been obtained. They are seeking to use the "special

circumstances" doctrine as general authority to extend a limitation period, which is not permissible.

> *Silver v. IMAX*, [2012] O.J. No. 4002 (S.C.J.) ["*IMAX S.J.*"] at paras. 69-77, Book of Authorities of the Plaintiffs, Tab 21.

13. Unlike common law claims, statutory claims under Part XVIII.1 of the OSA cannot simply be asserted in a statement of claim. Leave is required. This is part of the *quid pro quo* for the statutory abolition of the reliance requirement. Because the claim at issue is not simply a matter of pleading, the doctrine of "special circumstances" does not apply. As Justice Van Rensberg recently stated, "the limitation period for a statutory secondary market misrepresentation claim requires leave to have been granted, so that the existence, or not, of 'special circumstances' is analytically irrelevant."

> *IMAX S.J.*, *supra* at paras. 69-77.

14. Second, the "special circumstances" doctrine is confined to cases where the limitation provision at issue is expressly preserved by being listed in the schedule to the Ontario *Limitations Act, 2002*, S.O. 2002, c.24, sched. B, as amended (the "OLA 2002") and: (i) includes a discretionary extension provision; or (ii) had historically been subject to a "special circumstances" exemption. Section 138.14 of the OSA is listed in the schedule to the OLA 2002, but does not satisfy either of the other two criteria. Section 138.14 is devoid on its face of any suggestion of a discretionary exemption provision. Moreover, it is a new provision that has not historically been subject to a "special circumstances" exception. Accordingly, the "special circumstances" doctrine has no application to cases involving section 138.14.

> *Dugal, supra* at 90.

C. Pleadings in U.S. Action are Irrelevant

15. At several places in their factum,[1] the plaintiffs make the untenable assertion that the pleadings in the ongoing U.S. action in respect of certain of the matters at issue should be treated as if they were pleadings in this action. They should not. There is no basis in fact or law for the approach proposed by the plaintiffs and they provide no authority for the proposition. Rather the plaintiffs' proposal highlights that they are simply attempting to use Ontario as a fall-back jurisdiction following certain developments in the U.S. action that may make the plaintiffs' case in the U.S. more difficult.

16. In particular, the plaintiffs allege that section 28 of the CPA is triggered with respect to their common law claims by the pleading in the U.S. action. In addition to the fact that the pleadings in a U.S. action have no status in Ontario proceedings generally, on the face of the CPA, section 28 is only triggered by actions in Ontario courts under the CPA.

17. The CPA is clear at section 2(1) that a class proceeding is a "proceeding in the court on behalf of the members of the class". The CPA defines "court" to mean "the Superior Court of Justice" in Ontario (s. 1). In all sections of the CPA except section 29, the CPA refers to "class proceedings" to mean proceedings in the Ontario Superior Court of Justice under the CPA. For example, at section 5(1), "The court shall certify a class proceeding on a motion…" At section 9, "Any member of a class involved in a class proceeding may opt out…" In these sections, as with all others in the CPA, it is clear on the face of the CPA that a class proceeding is a proceeding commenced in the Ontario Superior Court of Justice under the CPA.

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[1] See, among others, paragraphs 5, 8, 123-133, 143 and 144.

18. Section 29 is the only section of the CPA that uses the terms "a proceeding commenced under this Act" and "a proceeding certified as a class proceeding under this Act" rather than simply "class proceeding". A reading of section 29 reveals that it uses this terminology in order to distinguish between class proceedings that have merely been commenced, and those that have been certified. Section 29 does not purport to distinguish between proceedings commenced in Ontario under the CPA, and proceedings commenced elsewhere, as the plaintiffs suggest at paragraph 143 of their factum.

D. Plaintiffs have not Satisfied s. 5(1)(a) of the CPA

19. Contrary to the plaintiffs' submissions at paragraphs 146 through 154 of their factum, the plaintiffs have not satisfied their onus to plead a reasonable cause of action against the defendants. In addition to the arguments set out in the moving defendants' initial factum dated August 17, 2012, and above, the plaintiffs have failed to plead any reasonable cause of action for the following reasons:

(a) the plaintiffs' statutory claim cannot be certified until leave has been granted and their pleading amended to reflect a permissible cause of action;

(b) with respect to the plaintiffs' common law misrepresentation claim:

(i) no duty of care can exist as pleaded by the plaintiffs;

(ii) a significant number of the alleged misrepresentations are forecasts, opinions or statements about the future, which cannot sustain a negligent misrepresentation claim; and

(iii) in any event, the plaintiffs have failed to plead actual detrimental reliance by themselves and by each class member.

i. Statutory Claim Cannot be Certified without Leave

20. Courts have recognized that a statutory claim under Part XXIII.1 of the OSA must be granted leave to proceed before certification. In exchange for not having to show individual reliance, the legislature has determined that a plaintiff must meet the criteria set out in Part XXIII.1 of the OSA, including obtaining leave. Without the plaintiffs first obtaining leave to proceed and then amending their pleading to assert their statutory cause of action, an assessment as to whether the plaintiffs' pleading is appropriate for certification cannot be performed.

Gammon Gold, supra at para. 74.
Green, supra.

ii. No Duty of Care

21. No duty of care can exist as pleaded by the plaintiffs, such that their pleading of common law misrepresentation does not satisfy section 5(1)(a) of the CPA. The plaintiffs' pleading of a duty of care is not determinative. The existence of a duty of care is a question of law that is capable of being determined on this motion. That the court does not have the benefit of a full factual record is not a sufficient reason for deferring consideration of the duty of care until trial. If it is plain and obvious that, at law, no such duty of care can be recognized, then the cause of action must be struck.

Silver v. IMAX Corp., [2009] O.J. No. 5585 (S.C.J.) at para. 26, Book of Authorities of the Plaintiffs, Tab 48.

Bonaparte v. Canada (A.G.), [2003] O.J. No. 1046 (C.A.) at para. 30, Supplementary Book of Authorities of the Moving Defendants, Tab 2.

Klein v. American Medical Systems Inc. [2006] O.J. No. 5181 (Div. Ct.), paras. 18-21, 40 and 43, Supplementary Book of Authorities of the Moving Defendants, Tab 3.

22. The Supreme Court of Canada has adopted the two-stage *Anns* test to identify the existence and scope of a duty of care. The first stage of the test requires that the plaintiffs plead material facts to establish a "special relationship" of proximity with the defendants, which is grounded in reliance. The second stage of the test considers whether any *prima facie* duty of care established in the first stage of the test is limited by policy considerations. The plaintiffs' pleadings do not establish a relationship of proximity, and raise the spectre of indeterminate liability to the entire secondary market.

Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165 ["*Hercules*"] at para. 21, Supplementary Book of Authorities of the Moving Defendants, Tab 4.

23. With respect to the first stage of the *Anns* test, the plaintiffs' pleading fails to establish any relational proximity between the defendants and the plaintiffs or the rest of the proposed class, and fails to establish any causal proximity between the defendants' alleged misrepresentations and the plaintiffs' or proposed class members' losses. The plaintiffs do not plead that the plaintiffs or proposed class members were the subject of Celestica's continual disclosure, nor do they plead that the plaintiffs or other class members were part of any existing contractual or other relationship with the defendants. The plaintiffs cannot, therefore, maintain that the alleged class members, as opposed to the market at large, were the beneficiaries of the alleged duty.

Haskett v. Equifax Canada Inc. [2003] O.J. No. 771 (C.A.) at paras. 39-40, Supplementary Book of Authorities of the Moving Defendants, Tab 5.

Hercules, supra at paras. 22-30.

Fresh as Amended Statement of Claim, paras. 121-125, Motion Record, Tab 7.

24. The plaintiffs also fail to plead any direct causal proximity. The injury alleged by the plaintiffs is a decline in the price of Celestica shares on the open market. Courts have recognized that there are a multitude of factors that may cause or contribute to a decline in share prices. It was the market itself, influenced by numerous forces and events, that set the price of the Celestica shares. Moreover, as set out further below, there is no proper pleading of reliance by the plaintiffs and the proposed class, let alone a pleading that such reliance was reasonable. This indirect relationship between the defendants' alleged conduct and the proposed class members' losses is insufficient to ground a finding of proximity.

> *Colborne Capital Corp. v. 542775 Alberta Ltd.* [1999] A.J. No. 33 (Alta. C.A.) at paras. 266 and 275, Supplementary Book of Authorities of the Moving Defendants, Tab 6.
>
> *Hercules, supra* at paras. 26-30.
>
> *Statement of Defence*, para. 26, Motion Record, Tab 8.
>
> *Fresh as Amended Statement of Claim*, paras. 121-125, Motion Record, Tab 7.

25. With respect to the second stage of the *Anns* test, recognizing a *prima facie* duty of care to the entire secondary market would raise the spectre of indeterminate liability, as the entire investing public is not a limited class that was known to the plaintiffs. In *Hercules*, the Supreme Court states "...in cases where the defendant knows the identity of the plaintiff (or of a class of plaintiffs) and where the defendant's statements are used for the specific purpose of a transaction for which they were made, policy considerations surrounding indeterminate liability will not be of any concern since the scope of liability can readily be circumscribed." This is not such a case. For the plaintiffs to succeed a duty would need to be imposed on all public issuers, their directors and officers to the entire investing public, the scope of which opens a door for liability to an indeterminate number of people, for an indeterminate sum, over an indeterminate time.

Hercules, supra at paras. 31-41.

iii. Forward-Looking Statements Not Misrepresentations

26. Virtually all of the statements alleged to be misrepresentations in the *Millwrights'* Claim are forward-looking, or matters of forecast, projection or opinion.[2] As a matter of law, the forward-looking statements, forecasts or opinions pleaded by the plaintiffs to constitute misrepresentations cannot support a claim for negligent misrepresentation. To support a claim for negligent misrepresentation, a statement or representation must be a matter of ascertainable fact, as distinguished from opinion or expectation. Accordingly, the plaintiffs have not disclosed a reasonable cause of action in respect of these statements, and the statements should be struck in respect of the plaintiffs' common law misrepresentation claim.

Deep v. M.D. Management, [2007] O.J. No. 2392 (S.C.J.) ["*Deep*"] at paras. 12-18, aff'd [2008] O.J. No. 961 (C.A.), Supplementary Book of Authorities of the Moving Defendants, Tab 7.

Hembruff v. Ontario Municipal Employees Retirement Board, [2005] O.J. No. 4667 (C.A.) at paras. 76-77. Supplementary Book of Authorities of the Moving Defendants, Tab 8.

iv. No Detrimental Reliance

27. Finally, the plaintiffs have failed to satisfy section 5(1)(a) of the CPA because they have failed to plead actual detrimental reliance on the alleged misrepresentations by themselves or other class members. Actual reliance is a necessary element of a claim for negligent misrepresentation and in its absence the plaintiffs cannot succeed.

Hercules, supra at para. 18.

Deep, supra at paras. 19-26.

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[2] See paragraphs 45, 46, 50, 51, 53, 55, 58, 59, 61, 65-68, 70, 71, 74, 75-78, 82-84, 87, 91 and 95-98.

28. The detrimental reliance element of a negligent misrepresentation claim requires that a pleading contain assertions by the plaintiff that he altered his position by relying on the misrepresentation and that he suffered resulting loss or damage. Moreover, in a class action, a representative plaintiff must plead for both itself and for the proposed class, reliance upon specific statements in making specific purchases of the company's shares, which result in losses.

> *Lysko v. Braley*, [2006] O.J. No. 1137 (C.A.) at para. 30, Supplementary Book of Authorities of the Moving Defendants, Tab 9.
>
> *Deep, supra* at paras. 20-26.

29. Here, the plaintiffs do not explicitly plead that any specific statement by the defendants caused the plaintiffs or anyone else to make a specific purchase of Celestica shares which then sustained a loss. Rather, the plaintiffs' pleading is akin to what the court in *Deep* refers to as "inappropriately general":

> 125. The plaintiffs and Class Members relied on these misrepresentations to their detriment by the act of purchasing or acquiring Celestica's shares. They also relied on the defendants' obligation to make timely disclosure of all material facts, to comply with securities law and to prepare quarterly and annual reports in accordance with generally accepted accounting principles.
>
> *Deep, supra* at paras. 24-25.
>
> *Fresh as Amended Statement of Claim*, para. 125, Motion Record, Tab 7.

30. This is not the required, specific pleading of causative reliance. The plaintiffs are required to plead that it was a particular misrepresentation or misrepresentations, out of any or all information that they may have obtained in respect of Celestica shares, which caused them to make specific purchases within the Class Period, which led to their alleged loss. They have failed to do so.

31. Ontario courts have rejected attempts to substitute a presumption of reliance created by the "fraud on the market" theory for actual reliance. To the extent that the plaintiffs plead that reliance should be inferred from the plaintiff's acquisition of shares, this pleading is not sufficient to sustain a claim of negligent misrepresentation.

> *Carom v. Bre-X Minerals Ltd.*, [1998] O.J. No. 4496 (Gen. Div.) ["*Carom*"] at paras. 31-40, Supplementary Book of Authorities of the Moving Defendants, Tab 10.
>
> *Fresh as Amended Statement of Claim*, paras. 119-120, Motion Record, Tab 7.

32. As set out above, it is a mandatory prerequisite in Canadian law that actual detrimental reliance on an alleged misrepresentation must be pleaded and ultimately proven before liability will be imposed on the party making the alleged misrepresentation. Any assertion of presumed or inferred reliance based on "efficient markets" is simply a re-packaging of the "fraud on the market" theory, which has been rejected in Canada. As Justice Winkler stated in *Carom*, "...the presumption of reliance created by the fraud on the market theory can have no application as a substitute for the requirement of actual reliance....to import such a presumption would amount to a redefinition of [negligent misrepresentation]."

> *White v. Colliers Macaulay Nicholls Inc.*, [2009] O.J. No. 2188 (C.A.) at paras. 23-24, Supplementary Book of Authorities of the Moving Defendants, Tab 11.
>
> *Carom, supra* at paras. 31-40.

33. While it has been posited that proof of reliance can be made by inference from the surrounding circumstances as opposed to direct evidence, this still requires a pleading of the circumstances from which the inference is sought. The plaintiffs' pleading fails to plead the circumstances on which to base the inference of reliance on particular misrepresentations for themselves or other class members, as described above. The plaintiffs merely plead reliance as a "basket clause".

Mondor v. Fisherman, [2001] O.J. No. 4620 (S.C.J.) at paras. 61-67, Supplementary Book of Authorities of the Moving Defendants, Tab 12.

Fresh as Amended Statement of Claim, paras. 119-120, Motion Record, Tab 7.

34. As Justice Strathy held in *Gammon Gold*, "...there is authority, binding on me, that makes proof of reliance a necessary requirement of a misrepresentation claim. This is why the legislature has seen fit to relieve the investing public of this onerous requirement..." Without a pleading to found such proof of reliance for the plaintiffs and other class members, the common law claim of misrepresentation does not satisfy s. 5(1)(a) of the CPA, and must be struck.

Gammon Gold, supra at para. 159.

PART IV - ORDER REQUESTED

35. The defendants respectfully request that the court grant the relief set out in the Notice of Motion and order the plaintiffs to pay the defendants their costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of September, 2012.

Nigel Campbell

Ryan A. Morris
Blake, Cassels & Graydon LLP
Lawyer for the Defendants

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *Turon v. Abbot Laboratories Ltd.*, [2011] O.J. No. 3512 (S.C.J.)
2. *Bonaparte v. Canada (A.G.)*, [2003] O.J. No. 1046 (C.A.)
3. *Klein v. American Medical Systems Inc.* [2006] O.J. No. 5181 (Div. Ct.)
4. *Hercules Managements Ltd. v. Ernst & Young,* [1997] 2 S.C.R. 165
5. *Haskett v. Equifax Canada Inc.* [2003] O.J. No. 771 (C.A.)
6. *Colborne Capital Corp. v. 542775 Alberta Ltd.* [1999] A.J. No. 33 (Alta. C.A.)
7. *Deep v. M.D. Management*, [2007] O.J. No. 2392 (S.C.J.), aff'd [2008] O.J. No. 961 (C.A.)
8. *Hembruff v. Ontario Municipal Employees Retirement Board*, [2005] O.J. No. 4667 (C.A.)
9. *Lysko v. Braley*, [2006] O.J. No. 1137 (C.A.)
10. *Carom v. Bre-X Minerals Ltd.*, [1998] O.J. No. 4496 (Gen. Div.)
11. *White v. Colliers Macaulay Nicholls Inc.*, [2009] O.J. No. 2188 (C.A.)
12. *Mondor v. Fisherman*, [2001] O.J. No. 4620 (S.C.J.)

SCHEDULE "B"
RELEVANT STATUTES

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

DETERMINATION OF AN ISSUE BEFORE TRIAL
WHERE AVAILABLE

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

RULES OF PLEADING — APPLICABLE TO ALL PLEADINGS

Material Facts

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. R.R.O. 1990, Reg. 194, r. 25.06 (1).

Pleading Law

(2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded. R.R.O. 1990, Reg. 194, r. 25.06 (2).

Condition Precedent

(3) Allegations of the performance or occurrence of all conditions precedent to the assertion of a claim or defence of a party are implied in the party's pleading and need not be set out, and an opposite party who intends to contest the performance or occurrence of a condition precedent shall specify in the opposite party's pleading the condition and its non-performance or non-occurrence. R.R.O. 1990, Reg. 194, r. 25.06 (3).

Inconsistent Pleading

(4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative. R.R.O. 1990, Reg. 194, r. 25.06 (4).

(5) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading. R.R.O. 1990, Reg. 194, r. 25.06 (5).

Notice

(6) Where notice to a person is alleged, it is sufficient to allege notice as a fact unless the form or a precise term of the notice is material. R.R.O. 1990, Reg. 194, r. 25.06 (6).

Documents or Conversations

(7) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material. R.R.O. 1990, Reg. 194, r. 25.06 (7).

Nature of Act or Condition of Mind

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. O. Reg. 61/96, s. 1.

Claim for Relief

(9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

(a) the amount claimed for each claimant in respect of each claim shall be stated; and

(b) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial. R.R.O. 1990, Reg. 194, r. 25.06 (9).

STRIKING OUT A PLEADING OR OTHER DOCUMENT

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court. R.R.O. 1990, Reg. 194, r. 25.11.

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Ontario Securities Act, R.S.O. 1990, CHAPTER S.5

Liability for secondary market disclosure
Documents released by responsible issuer

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

(a) the responsible issuer;

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

(c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;

(d) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (1, 2).

Public oral statements by responsible issuer

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

(a) the responsible issuer;

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

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

(d) each influential person, and each director and officer of the influential person, who knowingly influenced,

(i) the person who made the public oral statement to make the public oral statement, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and

(e) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the person making the public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (3).

Influential persons

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

(a) the responsible issuer, if a director or officer of the responsible issuer, or where the responsible issuer is an investment fund, the investment fund manager, authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

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

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

(d) the influential person;

(e) each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement; and

(f) each expert where,

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document or public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (4).

Failure to make timely disclosure

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

(a) the responsible issuer;

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

(c) each influential person, and each director and officer of an influential person, who knowingly influenced,

(i) the responsible issuer or any person or company acting on behalf of the responsible issuer in the failure to make timely disclosure, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (5); 2006, c. 33, Sched. Z.5, s. 15.

Multiple roles

(5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (6).

Multiple misrepresentations

(6) In an action under this section,

(a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and

(b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 12 (7).

No implied or actual authority

(7) In an action under subsection (2) or (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that

were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation. 2004, c. 31, Sched. 34, s. 12 (8).

Leave to proceed

138.8 (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

(a) the action is being brought in good faith; and

(b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 17.

Same

(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely. 2002, c. 22, s. 185.

Same

(3) The maker of such an affidavit may be examined on it in accordance with the rules of court. 2002, c. 22, s. 185.

Copies to be sent to the Commission

(4) A copy of the application for leave to proceed and any affidavits and factums filed with the court shall be sent to the Commission when filed. 2009, c. 34, Sched. S, s. 6 (1).

Requirement to provide notice

(5) The plaintiff shall provide the Commission with notice in writing of the date on which the application for leave is scheduled to proceed, at the same time such notice is given to each defendant. 2009, c. 34, Sched. S, s. 6 (2).

Same, appeal of leave decision

(6) If any party appeals the decision of the court with respect to whether leave to commence an action under section 138.3 is granted,

(a) each party to the appeal shall provide a copy of its factum to the Commission when it is filed; and

(b) the appellant shall provide the Commission with notice in writing of the date on which the appeal is scheduled to be heard, at the same time such notice is given to each respondent. 2009, c. 34, Sched. S, s. 6 (2); 2010, c. 1, Sched. 26, s. 7.

Limitation period

138.14 No action shall be commenced under section 138.3,

(a) in the case of misrepresentation in a document, later than the earlier of,

(i) three years after the date on which the document containing the misrepresentation was first released, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

(b) in the case of a misrepresentation in a public oral statement, later than the earlier of,

(i) three years after the date on which the public oral statement containing the misrepresentation was made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same misrepresentation; and

(c) in the case of a failure to make timely disclosure, later than the earlier of,

(i) three years after the date on which the requisite disclosure was required to be made, and

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same failure to make timely disclosure. 2002, c. 22, s. 185; 2004, c. 31, Sched. 34, s. 23.

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

Definitions

1. In this Act,

"common issues" means,

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; ("questions communes")

"court" means the Superior Court of Justice but does not include the Small Claims Court; ("tribunal")

"defendant" includes a respondent; ("défendeur")

"plaintiff" includes an applicant. ("demandeur") 1992, c. 6, s. 1; 2006, c. 19, Sched. C, s. 1 (1).

Plaintiff's class proceeding

2. (1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class. 1992, c. 6, s. 2 (1).

Motion for certification

(2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff. 1992, c. 6, s. 2 (2).

Idem

(3) A motion under subsection (2) shall be made,

(a) within ninety days after the later of,

(i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and

(ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or

(b) subsequently, with leave of the court. 1992, c. 6, s. 2 (3).

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

Opting out

9. Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order. 1992, c. 6, s. 9.

Limitations

28. (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;

(b) an amendment that has the effect of excluding the member from the class is made to the certification order;

(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is abandoned or discontinued with the approval of the court; or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise. 1992, c. 6, s. 28 (1).

Idem

(2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of. 1992, c. 6, s. 28 (2).

Discontinuance, abandonment and settlement

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

TRUSTEES OF THE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO PENSION TRUST FUND et al. Plaintiffs	and	CELESTICA INC. et al. Defendants

Court File No: CV-11-424069-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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