CITATION : Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc., 2012 ONSC *
COURT FILE NO.:11-CV-424069CP
DATE: October 15, 2012

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
TRUSTEES OF THE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO PENSION TRUST FUND Plaintiffs	Kirk M. Baert and Jonathan Bida for the Plaintiffs
– and –	
CELESTICA INC., STEPHEN W. DELANEY and ANTHONY P. PUPPI Defendants	Nigel Campbell and Ryan A. Morris for the Defendants
AND BETWEEN:	
NABIL BERZI Plaintiff	
– and –	
CELESTICA INC., STEPHEN W. DELANEY and ANTHONY P. PUPPI Defendants	
AND BETWEEN:	
HUACHENG XING Plaintiff	
– and –	
CELESTICA INC., STEPHEN W. DELANEY and ANTHONY P. PUPPI Defendants	
Proceeding under the *Class Proceedings Act, 1992*	**HEARD:** October 3 and 4, 2012

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] In three proposed class actions under the *Class Proceedings Act, 1992*, S.O. 1990, c. C.6, which have been consolidated, Huacheng Xing, Nabil Berzi, and the Trustees of the Millwright Regional Council of Ontario Pension Trust Fund (the "Millwrights"), sue Celestica Inc., Stephen W. Delaney, and Anthony P. Puppi. The Plaintiffs' main allegation is that from January 27, 2005 to January 30, 2007, Celestica and two of its former officers, Messrs. Delaney and Puppi, misrepresented the progress of Celestica's restructuring of its operations in North America.

[2] Pursuant to rules 21.01(1)(a), 21.01(1)(b), 25.06, and 25.11 of the *Rules of Civil Procedure*, the Defendants make a motion to strike portions of the Plaintiffs' Fresh as Amended Statement of Claim. In addition, pursuant to this court's order of April 13, 2012, this motion will determine the cause of action criterion (s. 5 (1)(a)) of the test for certification under the *Class Proceedings Act, 1992*.

[3] The Defendants motion raises the question of whether this court has jurisdiction to relieve against the limitation period imposed by s. 138.14 of Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5. This question, which concerns the doctrine of special circumstances, arises because both the Plaintiffs and also the Defendants were thunderstruck (their words) by the Court of Appeal's decision in *Sharma v. Timminco Ltd.*, 2012 ONCA 107, reversing 2011ONSC 8024, leave to appeal to the S.C.C. refused, [2012] S.C.C.A. No. 157. Both parties were surprised to discover that s. 28 of the *Class Proceedings Act, 1992*, does not suspend the running of the limitation period in s. 138.14 of the Ontario *Securities Act* until leave to assert a claim under s. 138.8 of Part XXIII.1 is granted.

[4] Relying, in part, on Justice Strathy's decision in *Green and Bell v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, the Defendants submit that it is plain and obvious that the limitation period imposed by Part XXIII.1 of the Ontario *Securities Act* is absolute and invulnerable. They submits that judges have no discretion to extend the running of the limitation period by making orders *nunc pro tunc*.

[5] Further, the Defendants submit that Justice Van Rensburg's decision in *Silver v. IMAX Corp.*, 2012 ONSC 4881, where she made an order *nunc pro tunc* to make the assertion of the plaintiffs' action timely, is wrong or is distinguishable from the case at bar by the very rare circumstances of the *Imax* case.

[6] On this motion, the Defendants' main submissions are that: (a) The Plaintiffs' statutory cause of action under Part XXIII.1 of the Ontario *Securities Act*, should be struck because the Plaintiffs did not obtain leave under s. 138.8 before the expiry of the three-year limitation period of s. 138.14; (b) the Plaintiffs have not shown a reasonable cause of action; (c) some of the Plaintiffs' common law causes of action should be struck because they are statute-barred by operation of the *Limitations Act, 2002*, S.O. 2002, c. 24, sched. B; and (d) the actions against Stephen W. Delaney and Anthony P. Puppi should be struck because there is no reasonable cause of action as against Messrs. Delaney and Puppi.

[7] Save for some concessions made during the course of the argument, the Plaintiffs resist the attack made on their Fresh as Amended Statement of Claim. While submitting that *Timminco* was wrongly decided, the Plaintiffs' counter-argument is that it is not plain and obvious that this court does not have the jurisdiction pursuant to the special circumstances doctrine to make an order *nunc pro tunc* to make the Plaintiffs' proposed action under Part XXIII.1 of the Ontario *Securities Act* timely. Stated positively, the Plaintiffs submit that the special circumstances doctrine applies to the circumstances of the case at bar.

[8] For the reasons that follow, save for the matters conceded and save for the claim for negligent misrepresentation, which I strike with leave to amend, I dismiss the Defendants' Rule 21 motion, and I find that the Plaintiffs have satisfied the cause of action criterion for certification of this action as a class action.

B. FACTUAL BACKGROUND

[9] Celestica is an electronics manufacturer incorporated in Ontario. Its shares trade on the Toronto Stock Exchange ("TSX") and on the New York Stock Exchange ("NYSE").

[10] Huacheng Xing resides in Waterloo, Ontario. He purchased 1,000 Celestica shares over the Toronto Stock Exchange on August 24, 2006, and he continued to hold those shares as of January 31, 2007.

[11] Nabil Berzi is a resident of Toronto, Ontario. He purchased 4,700 Celestica shares over the TSX between July 22, 2005 and August 17, 2006, and he continued to hold 1,000 of those shares as of January 31, 2007.

[12] The Millwrights purchased 40,300 Celestica shares between September 30, 2005 and November 28, 2006 on both the TSX and the NYSE.

[13] Stephen W. Delaney, who lives in the State of Michigan, in the United States, was the Chief Executive Officer of Celestica from January 2004 until November 2006.

[14] Anthony P. Puppi, who lives in in Woodbridge, Ontario, was the Chief Financial Officer of Celestica from January 1994 until April 2007. He was also executive vice-president of Celestica from October 1999 until April 2007.

[15] In January 2005, Celestica announced a $225 to $275 million restructuring, which it claimed would see substantial improvements in its operating margins by December 2006. On this news, Celestica's share price increased by almost 6%.

[16] Over the next two years, Celestica reported positively about the progress of its restructuring. During this period, Celestica made representations about revenues and the financial treatment of its inventory.

[17] On January 30, 2007, it was revealed that Celestica's representations had been untrue. It was revealed that: (a) the timing and cost of the restructuring was understated; (b) the restructuring and its implementation had not been successful as previously reported; (c) Celestica's Monterrey facility did not have the capacity to accommodate the transfer of operations that the restructuring involved; (d) Celestica was losing customers; and (e) its inventory had not been properly recorded. It was revealed that there would be additional restructuring charges and that the restructuring would not be completed until the end of 2007.

[18] By January 31, 2007, Celestica's shares dropped in value by 23%. Overall from October 26, 2006 to January 31, 2007, the share price had dropped from $11.74 to $5.96, a nearly 50% decline, wiping out $1.3 billion in market capitalization.

[19] On March 2, 2007, in the United States, the Millwrights commenced a class action against the Defendants.

[20] On July 30, 2007, Mr. Xing brought a proposed class action against the Defendants, by Notice of Action issued in London, Ontario (Court File No. 54938CP). He filed a statement of claim on August 20, 2007.

[21] About a year later, on August 27, 2008, Mr. Berzi brought a proposed class action by Statement of Claim issued in Toronto, Ontario (Court File No. 08-CV-361468-CP).

[22] Mr. Xing's action and Mr. Berzi's action are similar. In both actions, the lawyers of record were Siskinds, LLP. The Class Period in each was from the opening of trading on the TSX and the NYSE on January 27, 2005 to the close of trading on the TSX and NYSE on January 30, 2007. Both actions pleaded negligent misrepresentation and gave notice of claims under Part XXIII.1 of the Ontario *Securities Act*. Both actions define the proposed class to be:

> ...all persons, other than Excluded Persons, who acquired either SVSs or Notes during the Class Period and who held some or all of those securities at the close of trading on the TSX and NYSE on January 30, 2007, or such other definition as may be approved by the court.

[23] In both Mr. Xing's action and Mr. Berzi's action, "Excluded Persons" was defined as follows:

> Celestica's past and present subsidiaries, affiliates, officers, directors, employees, legal representatives, heirs, predecessors, successors and assigns, and any member of the Individual Defendants' families, and any entity in which they have or had during the Class Period, any legal or de facto controlling interest, as well as Onex Corporation and past and present subsidiaries, affiliates, officers, directors, employees, legal representatives, heirs, predecessors, successors and assigns.

[24] In both actions, the alleged misrepresentations fall into one of two categories: (1) the Defendants' failure to make timely disclosure of materially adverse changes in the restructuring; and (2) the express or implied representation contained in Celestica's disclosures during the Class Period that the relocating of work from facilities in the United States to lost cost facilities in Mexico was proceeding smoothly and that the new facilities were able to and were performing the work assigned in a manner that reduced excess capacity, decreased costs, and increased profit margins.

[25] As already noted, both actions included references to claims being made under Part XXIII.1 of the Ontario *Securities Act*, which provides a statutory cause of action where there are misrepresentations in a company's continuous disclosure documents. Part XXIII.1 imposes liability on the issuer, each director and each officer who authorized, permitted or acquiesced in the making of the misrepresentation, subject to statutory defences.

[26] The Part XXIII.1 claims are subject to a leave requirement under s. 138.8 (1) of the *Act* and to a limitation period under s. 138.14 (a) of the *Act*. Sections 138.8 (1) and 138.14 (a) state:

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.

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,

(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 misrepresentations; ...

[27] It appears that Messrs. Xing and Berzi were not concerned about the limitation period under s.138.14 because they believed - wrongly as it turns out - that s. 28 of the *Class Proceedings Act, 1992* had suspended the running of the limitation period. Section 28 of the *Class Proceedings Act, 1992* states:

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.

[28] It is also apparent that Messrs. Xing and Berzi were content to let their Ontario actions idle as events unfolded in the United States and as the Millwrights took the fight to the Defendants in the United States.

[29] On October 11, 2007, the U.S. District Court consolidated all the American actions against Celestica under the name *In re Celestica Inc. Securities Litigation*, and the Court

appointed the Millwrights to serve as lead plaintiffs pursuant to the U.S. *Private Securities Litigation Reform Act of 1995*.

[30] On November 21, 2007, the Millwrights filed a consolidated complaint in the United States District Court, Southern District of New York. The complaint is 124 pages of detailed factual allegations and evidentiary support. It refers to the evidence of fourteen former Celestica employees who had direct dealings with Messrs. Delany and Puppi.

[31] On March 17, 2008, the defendants brought a motion seeking to dismiss the U.S. action for failure to state a claim and for failure to satisfy the pleadings requirements under U.S. law. Several years were to pass before there was a decision on this motion.

[32] While the decision on the Defendants' motion in the United States to strike was pending, there appears to have been little, if any, progress made on either side of the border in advancing the claims against the Defendants. This state of affairs lasted past June 24, 2010.

[33] On June 24, 2010, the U.S. Supreme Court released its decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010). The effect of the *Morrison* judgment to the case at bar comes later. Before the *Morrison* decision, the law of the United States was that a foreign plaintiff could bring an action for securities purchased on a foreign exchange, even if the defendant's securities were not traded on a U.S. exchange. In *Morrison,* the U.S. Supreme Court held that foreign plaintiffs who purchased securities on foreign exchanges where there was no trading of those securities on any domestic U.S. exchange could no longer pursue actions under the U.S. *Securities and Exchange Act of 1934*.

[34] On October 14, 2010, Justice Daniels released his memorandum decision and order in the Millwrights U.S action. He granted the Defendants' motions and dismissed the U.S. action.

[35] While the Millwrights appealed Justice Daniel's decision, the inactivity of Mr. Xing's and Mr. Berzi's actions continued.

[36] On April 8, 2011, the Millwrights brought a proposed class action by statement of claim issued in Toronto (Court File No. 11-CV-424069CP). The allegations in the Millwright's Ontario action are the same as in its U.S. action. Both actions allege the same misrepresentations in Celestica's public disclosure documents. Both actions have the same defendants. It would appear that the Millwrights' Ontario action was a backstop to the possibility that the *Morrison* decision applied to the Millwrights' claims based on purchases on the TSX.

[37] In any event, after being commenced, the Millwrights' Ontario action was also left idling. The Millwrights Ontario action replicates some of the allegations of the *Xing* and *Berzi* actions. However, it is a matter of contention between the parties about whether the Millwrights' Fresh as Amended Statement of Claim adds new claims or causes of action not found in the *Xing* and *Berzi* actions.

[38] The Defendants submit that the Millwrights' Ontario action raised the causes of action that the defendants manipulated or did not properly account for Celestica's inventory and earnings during the class period. The Defendants submit that for the first time in the Millwrights' Ontario action, the Plaintiffs allege that:

> The defendants...wrongly provided a false view of Celestica's financial circumstances to its investors during the Class Period....They wrongly treated obsolete inventory as current inventory, recorded revenue for sales Celestica did not make, delayed recording new inventory until after reporting periods and physically removed inventory from Celestica's facilities so it could claim lower inventory levels...

[39] The Plaintiffs contend, however, that the *Millwright* action is an elaboration, not something new, and that the *Xing* action pleads facts that support the inventory and earnings allegations; namely, allegations that: (a) the Defendants did not disclose that Celestica's Mexico operations were "regularly operating as a material drag on Celestica's financial results and were reporting unreliable data that was being incorporated into Celestica's regular financial reporting (b) Celestica's financial data, such as inventory reporting from its operations in Mexico was not reliable and had been inaccurate throughout the Class Period; (c) the impact of problems at its operations in Mexico on Celestica's overall financial results was materially adverse and (d) "Celestica's financial reporting was materially false and misleading.

[40] Returning to the narrative, on December 29, 2011, the U.S. Court of Appeals for the Second Circuit unanimously reversed Justice Daniels' decision dismissing the Millwrights' U.S. action, and the Court remanded the action for further proceedings.

[41] Following the American appellate court's decision, the parties moved onto the discovery phase of the U.S. action. Meanwhile, in Ontario, on February 16, 2012, the Court of Appeal released its reasons in *Sharma v. Timminco Limited, supra.* In *Timminco*, the Court held that s. 28 of the *Class Proceedings Act, 1992,* which suspends the running of a limitation period, did not apply to a claim under Part XXIII.1 of the Ontario *Securities Act* until leave had been granted to assert an action under Part XXIII.1.

[42] Until the decision in *Timminco*, the Defendants were not aware that the limitation period was not tolled pending a leave motion for a Part XXIII.1 claim.

[43] On February 24, 2012 - it would seem spurred by the *Timminco* judgment - the Millwrights revved up the Ontario action, and they delivered notices of motion to certify their Ontario action as a class proceeding, and to obtain leave under s. 138.8 of the Ontario *Securities Act* or under the analogous provisions in other provinces.

[44] On March 12, 2012, in the U.S. action, the Defendants filed their Answer of Defendants, denying the allegations against them. In their defence, the Defendants challenged the U.S. court's subject matter jurisdiction over claims asserted by purchasers of Celestica securities on the TSX or any other non-U.S. stock exchange. Thus, it turns out that the Millwrights may have been correct in thinking that they needed an action in Ontario to backstop the American action.

[45] In Ontario, on April 13, 2012, I ordered Mr. Xing's, Mr. Berzi's, and the Millwrights' actions be consolidated without prejudice to the Defendants' limitation period arguments.

[46] On May 14, 2012, the plaintiffs served a Fresh as Amended Statement of Claim. In the consolidated action, the class definition is as follows:

> all persons or entities, other than Excluded Persons, who purchased or otherwise acquired Celestica shares during the period from January 27, 2005 through and including January 30, 2007 ("Class Period") by either a primary distribution in Canada or an acquisition on the Toronto Stock Exchange or other secondary market in Canada.

[47] The Defendants submit that the consolidated action's class definition expands the class to include persons or entities who purchased Celestica shares during the Class Period, but did not hold those shares as of the end of the class period on January 31, 2007. Further, the Defendants submit that the consolidated action expands the proposed class by narrowing the definition of Excluded Persons as compared to the definition in the *Xing* and *Berzi* Actions.

[48] During the course of the argument of the motion, the Plaintiffs conceded that that the class definition should return to the definition used in the *Xing* and *Berzi* actions. During the course of argument, the Plaintiffs also conceded that it was inappropriate to plead in their Fresh as Amended Statement of Claim the statutory secondary market liability provisions of provinces other than Ontario because these statutes had not been pleaded in the *Xing* or *Berzi* actions and because these statutes had not even been enacted at the time of the acts alleged to be culpable.

[49] As already noted above, the Defendants submit that in addition to expanding the definition of the class, the Millwrights' Action raises for the first time the allegations that the Defendants manipulated or did not properly account for Celestica's inventory and earnings during the class period. The Defendants submit that these allegations were not raised in the *Xing* or *Berzi* actions, which were limited to the allegations that Celestica misrepresented that the relocating of operations to Celestica's Mexico facilities was proceeding smoothly and that those facilities were performing in a manner that reduced excess capacity, decreased costs, and increased profit margins.

[50] On December 22, 2012, the Defendants delivered their Statement of Defence. Among other things, the Defendants plead that: (a) the Plaintiffs' causes of action are statute-barred; (b) Celestica's disclosure was complete, proper and timely; (c) the Millwrights' action is based almost entirely on forward-looking statements, which are not actionable; (d) the Defendants made no misrepresentations, or none that were relied on to the detriment of the plaintiffs; and (e) the Plaintiffs incurred no harm or damage as a result of any act or omission by the Defendants.

[51] On July 3, 2012, the Plaintiffs' delivered their Reply to the defence and pleaded answers to the Defendants' limitation period defences.

[52] On October 3 and 4, 2012, the Defendants moved to strike out portions of the Plaintiffs' Fresh as Amended Statement of Claim. If the Defendants were to succeed in all of their various attacks, there would be nothing left in this action to certify as a class action.

C. THE CAUSE OF ACTION CRITERION AND THE PLAIN AND OBVIOUS TEST

[53] The first criterion for certification is whether the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada,* [1990] 2 S.C.R. 959 is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5 (1)(a) of the *Class Proceedings Act, 1992*: *Anderson v. Wilson* (1999), 44 O.R. (3rd) 673 (C.A.) at p. 679, leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[54] Where a defendant submits that the plaintiff's pleading does not disclose a reasonable cause or action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim: *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.). Matters of law that are not fully settled should not be disposed of on a motion to strike: *Dawson v. Rexcraft Storage & Warehouse Inc., supra*, and the court's power to strike a claim is exercised only in the clearest cases: *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).

[55] In assessing the cause of action or the defence, no evidence is admissible and the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof; *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Canada v. Operation Dismantle Inc.*, [1985] 1 S.C.R. 441; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (C.A.); *Canadian Pacific International Freight Services Ltd. v. Starber International Inc.* (1992), 44 C.P.R. (3d) 17 (Ont. Gen. Div.) at para. 9.

[56] The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff: *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n. However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law: *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).

[57] Generally speaking, the case law imposes a very low standard for the demonstration of a cause of action, which is to say that, conversely, it is very difficult for a defendant to show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed with the claim.

[58] On a rule 21 motion or in considering the cause of action criterion of s. 5 (1)(a) of the *Class Proceedings Act*, 1992, a plaintiff's cause of action may be dismissed if 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: *Beardsley v. Ontario*, [2001] O.J. No. 4574 (C.A.) at para. 21; *Dugal v. Manulife*, [2011] O.J. No. 1240 (S.C.J.) at para. 38; *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (S.C.J.) at paras. 37-38.

[59] A statement of claim fails to disclose a reasonable cause of action if its claim is barred by a limitation period: *Coulson v. Citigroup Global Markets Inc.* [2010] O.J. No. 1109 (S.C.J.) at paras. 143-148.

D. PRELIMINARY AND ELIMINATORY ISSUES

[60] As a preliminary matter and keeping in mind that this hearing is also meant to resolve the cause of action criterion of the Plaintiffs' motion for certification, it is necessary to orientate, focus, and demarcate the Defendant's remaining arguments that the Plaintiffs have not satisfied the cause of action criterion of s. 5 (1)(a) of the *Class Proceedings Act, 1992*. I say "remaining arguments" because as noted above, during the argument, the Plaintiffs conceded that the class definition from the *Xing* and *Berzi* actions could not be extended by the new definition in the Millwrights' 2011 action and that they could not plead the securities statutes of other provinces.

[61] To focus and demarcate the Defendants' arguments that remain, four arguments can be identified.

[62] The Defendants' first and main argument is that the Plaintiffs' Part XXIII.1 claims are statute-barred by s. 138.14 of the Ontario *Securities Act*.

[63] The Defendants' second argument is that the Plaintiffs' common law claims fail to disclose a reasonable cause of action for a class proceeding because they have not pleaded and will not be able to plead a constituent element of the cause of action; namely reasonable reliance. The Defendants also argue that there is no duty of care owed the Plaintiffs and the class members and that the alleged misrepresentations are not actionable because there are not statements of past or present fact but rather forward looking statements that are not actionable.

[64] The Defendants' third argument is that assuming there is a common law cause of action for negligent misrepresentation, the Plaintiffs are left with the allegations contained in the *Xing* and *Berzi* actions and cannot add new causes of action in the Millwright Fresh as Amended Statement of Claim because the new common law claims are statute-barred by the *Limitations Act, 2002*.

[65] The Defendants' fourth argument is that no reasonable cause of action has been shown or could be shown against Messrs. Delaney and Puppi.

[66] With this demarcation of the Defendant's primary arguments, several arguments or counterarguments of the Plaintiffs should also be identified. The Plaintiffs' main argument is that the special circumstances doctrine may be applied in the circumstances of this case.

[67] The Plaintiffs also argue that fraudulent concealment, mistake, waiver or estoppel may apply to preclude the Defendants from asserting any limitation period defences and, therefore, it is not plain or obvious that the Plaintiffs' claims are statute-barred. The Defendants disagree, and also submit that these pleadings, by way of the Plaintiffs' Reply to the Statement of Defence, should be struck because the Plaintiffs have failed to plead the necessary material facts to support the Reply.

[68] Before the discussion and analysis of the arguments, counterarguments, and Defendants' motion to strike can get underway, there are several issues and arguments that need to be addressed and then eliminated as operative factors in the analysis that will follow.

[69] In response to the Defendants' main argument, the Plaintiffs argue that in *Timminco*, the Court erred in its interpretation of s.28 of the *Class Proceedings Act, 1992* and in its assessment of the nature of the operation of the limitation period and leave requirements of Part XXIII.1 of the Ontario *Securities Act*.

[70] The Plaintiffs argue that the Court of Appeal's judgment in *Timminco* overlooks several arguments that are not mentioned in its reasons for decision and that the Court of Appeal's judgment is inconsistent with its own judgment in *Logan v. Minister of Health*, [2004] O.J. No. 2769 (C.A.), affg. [2003] O.J. No. 418 (S.C.J.).

[71] However, it appears to me that these so-called overlooked arguments were considered by me in the judgment reversed by the Court of Appeal, and, thus, I reject the arguments that the Court of Appeal's judgment in *Timminco* was made in error because the Court did not consider these arguments. In any event, I am bound by the Court's judgment in *Timminco,* which was clear and emphatic.

[72] In their factum, the Plaintiffs make an elaborate argument that the leave requirement of s. 138.8 and the limitation period in 138.14 of the Ontario *Securities Act* are two distinct and unconnected preconditions to a claim under Part XXIII.1 of the *Act* that serve different legislative purposes. The Plaintiffs submit that the leave requirement is a precondition that ensures that Part XXIII.1 claims are not strike suits and the limitation period is a separate precondition that ensures that Part XXIII.1 claims are made expeditiously.

[73] The Plaintiffs submit that the Defendants' competing interpretation, making leave a precondition to the commencement of an action, rather than a discrete precondition, practically speaking, means that Plaintiffs will be unable to pursue meritorious claims or both parties will be confronted with hurried and procedurally unfair and substantively unjust leave motions.

[74] From these premises, the Plaintiffs argue that a plaintiff may commence an action making a Part XXIII.1 claim and then obtain leave later, with the result that the plaintiff will have satisfied both preconditions to a Part XXIII.1 claim.

[75] Although the Plaintiffs do not put their argument this way, the purport of their argument is that if the Ontario *Securities Act* is properly interpreted, then Part XXIII.1 claimants do not need the protection of s. 28 of the *Class Proceedings Act, 1992*.

[76] I agree that the leave requirement of s. 138.8 is designed to screen out strike suits. A strike suit is a class proceeding where the merits of the claim are not apparent but the nature of the claim and targeted transaction is such that a sizeable settlement can be achieved with some degree of probability because the defendant is confronted with the unpalatable choice of a very expensive court battle or the payment of significant settlements irrespective of the underlying merits of the lawsuit: *Epstein v. First Marathon Inc.*, [2000] O.J. No. 452 (S.C.J.). In *Ainslie v. C.V. Technologies Inc.*, (2008), 93 O.R. (3d) 200 at paras. 10-15, Justice Lax concluded that the purpose of the leave motion was to prevent strike suits.

[77] The s. 138.14 limitation period serves the different purposes of a limitation period, which purposes are described later in these reasons. Thus, I agree with the premise of the Plaintiffs' argument that the leave requirement and the limitation period for Part XXIII.1 claims serve different purposes.

[78] I also agree that, practically speaking, a consequence of the *Timminco* decision is very rushed leave motions, unless the parties agree to toll the limitation period. However, I disagree with the conclusion that a plaintiff can commence a Part XXIII.1 claim without first obtaining leave and by commencing the action without leave avoid his or her claim being statute-barred. Upon analysis, this argument is just the argument that the Court of Appeal's judgment in *Timminco* is wrong, which argument I reject.

[79] I am bound by *Timminco,* and in the analysis that follows, I will apply *Timminco,* which clearly holds that leave must be obtained before a Part XXIII.1 claim can be asserted.

E. THE PURPOSE OF LIMITATION PERIODS

[80] Before discussing the nature and operation of the special circumstances doctrine and whether it applies in the circumstances of the case at bar, some context is necessary and it is necessary to review the purpose of limitation periods. For this purpose, I borrow what I wrote

in Morden and Perell, *The Law of Civil Procedure in Ontario* (1st ed.) (Markham: NexisLexis, 2010) at p. 98, as follows:

> *The Purpose of Limitation Periods*
>
> Limitation periods exist for three purposes: (1) to promote accuracy and certainty in the adjudication of claims; (2) to provide fairness to persons who might be required to defend against claims based on stale evidence; and (3) to prompt persons who might wish to commence claims to be diligent in pursuing them in a timely fashion: *Frohlick v. Pinkerton Canada Ltd.* (2008), 88 O.R. (3d) 401 (Ont. C.A.); *Novak v. Bond*, [1999] 1 S.C.R. 808; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.). These purposes are described as the certainty, evidentiary and diligence rationales.
>
> Limitation periods enhance certainty in adjudication. Limitation periods are designed to reduce the risk of adjudication errors and miscarriages of justice. It can be difficult for triers of fact to determine what happened with the passage of time because memories fade and documentary records may be lost or destroyed. Although courts are often required to determine cases on imperfect factual records, there is a public interest in reducing the challenges and the risks of error and injustice associated with adjudicating stale claims.
>
> Limitation periods provide fairness because with the passage of time, it may be unfair for a person accused of causing harm to be required to defend a claim where the evidence to do so has been lost or destroyed. In some situations, potential defendants may be unaware of the need to preserve evidence that might vindicate them or that might assist the court in arriving at an accurate determination of the facts and a just determination of the case. Further, there is sometimes the unfairness of adjudicating, in effect, retroactively. The wrongfulness of conduct and the expectations for compensation for harms may change over time. What at the time may have been regarded as appropriate conduct may be regarded as wrongful if considered many years later, after standards have changed. Thus, limitation periods help ensure that claims are litigated in accordance with the public policy standards at the time of the events and before evidence is lost.
>
> As for diligence, limitation periods recognizes the societal need to provide an incentive to plaintiffs to act diligently to commence a claim within a reasonable time after becoming aware of it. In *Deaville v. Boegeman* (1984), 48 O.R. (2d) 725 (C.A) in discussing the purpose of limitation periods, the Court of Appeal noted that it was in the public interest that there be an end to the threat of litigation. Limitation statutes, sometimes called statutes of repose, produce the broader social benefit of barring ancient claims.

F. OVERVIEW OF THE ANALYSIS OF THE PARTIES' MAIN ARGUMENTS

[81] The Defendants' main argument is that it is plain and obvious that the Plaintiffs have not yet obtained leave to commence an action under Part XXIII.1 of the Ontario Securities Act and it is plain and obvious that under s. 138.14 of the *Act,* the claim is now statute-barred. A related argument is that where there is a leave requirement, it would be contrary to the purposes of limitation periods, to allow the operation of the special circumstances doctrine that ameliorates the strict effect of limitation periods.

[82] The Plaintiffs' main counterargument is that it is not plain and obvious that the court does not have the jurisdiction under the common law's special circumstances doctrine to make an order *nunc pro tunc* granting leave under s. 138.8 (1) of the Ontario *Securities Act* so that the action is not statute-barred under s. 138.14, notwithstanding that leave is granted three years after the date on which the document containing the misrepresentation was first released; i.e., after the limitation period has already run its course.

[83] Since, it is my opinion that the court does have this jurisdiction, it follows that I agree with the Plaintiff's main counterargument.

[84] My opinion is based on the following line of argument, which, I emphasize at the outset, accepts and indeed modestly relies on the Court of Appeal's decision in *Timminco*. I will return to this point below, but my own argument accepts that s. 28 of the *Class Proceedings Act, 1992* did not suspend the operation of s. 138.14 of the Ontario *Securities Act* and subject to the possible application of the special circumstances doctrine or fraudulent concealment, mistake, waiver, or estoppel, the Plaintiffs' Part XXIII.1 claims are already statute-barred. One need only read the Fresh as Amended Statement of Claim and do the s.138.14-math to know that s. 138.14 has already barred the Plaintiffs' Part XXIII.1 claim.

[85] Accepting that the Plaintiffs Part XXIII.1 claims are currently statute-barred, it is my argument that: (1) as a matter of statutory interpretation, the limitation period established by 138.8 (1) of the Ontario *Securities Act* is subject to the special circumstances doctrine; (2) the special circumstances doctrine provides a limited jurisdiction to make orders *nunc pro tunc* that have the effect of reviving a still-borne and statute-barred cause of action; (3) the special circumstances doctrine could and should be applied in the circumstances of this case; and (4) in the case at bar, if the court grants leave under s.138.8 (1) of the Ontario *Securities Act* to commence an action under s. 138.3 of the Act, it would be appropriate for the court to exercise its special circumstances jurisdiction. Therefore, it is not plain and obvious that the Plaintiffs' Part XXIII.1 claims are statute-barred.

[86] Some aspects of this line of arguments accord with the opinions of my colleagues, Justices Van Rensburg and Strathy, in the *Imax* and *Green and Bell* cases, but some aspects of this line of argument part company with their views in those cases. Some aspects of this line of arguments parts company with Justice Strathy's judgment in *Dugal v. Manulife Financial Corp.* 2011 ONSC 1764. I will point out the points of accord and discord as I go along in the discussion that follows. I will also discuss the various arguments and counterarguments of the parties as I go along in my own analysis.

G. THE AVAILABILITY OF THE SPECIAL CIRCUMSTANCES DOCTRINE

[87] I turn now to the issue of whether the special circumstances doctrine is available for limitation periods under the Ontario *Securities Act.* I emphasize that this is a matter of statutory interpretation. In applying limitation periods, the court must be authorized to employ the special circumstances doctrine. As will be seen, the special circumstances doctrine involves judicial discretion, but with the enactment of the *Limitations Act, 2002,* the court must be empowered to exercise that discretion.

[88] Before the enactment of the *Limitations Act, 2002*, at common law and under the *Rules of Civil Procedure*, in "special circumstances" and with the absence of prejudice, a party could be added to a proceeding after the expiration of a limitation period: *Zapfe v. Barnes* (2003), 66 O.R. (3d) 397 (C.A.); *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768 (C.A.); *Swain Estate v. Lake of the Woods Hospital* (1992), 9 O.R. (3d) 74 (C.A.), leave to appeal refused [1992] S.C.C.A. No. 467; *Deaville v. Boegeman* (1984), 48 O.R. (2d) 725 (C.A.); *Ladouceur v. Howarth*, [1974] S.C.R. 1111; G.D. Watson, "Amendments of Proceedings after Limitation Periods" (1975) 53 Can. Bar. Rev. 237.

[89] In the seminal English case of *Weldon v. Neal*, (1887), 19 Q.B.D. 394 (C.A.), Lord Esher M.R. described what came to be known as the special circumstances doctrine, and he stated a p. 395:

> We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the *Statute of Limitations*, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.

[90] In the leading Canadian case, *Basarsky v. Quinlan*, [1972] S.C.R. 380, Hall J. stated: "The adjective 'peculiar' in the context of Lord Esher, M.R.'s judgment and at the date thereof may be equated with 'special' in current usage." At p. 384, Justice Hall stated that: "the power to allow an amendment after the time limited by a Statute of Limitations will necessarily be infrequently invoked as the circumstances warranting its use will not often occur."

[91] In *Basarsky*, the dependants of the plaintiff who had been injured in an automobile accident were added as co-plaintiffs after the expiry of the limitation period, and the special circumstances were as follows: the plaintiff had already pleaded all the relevant facts about the tort and the defendant's liability; the defendant had admitted liability; and during discoveries, which had taken place before the expiry of the limitation period, the defendant's counsel had asked questions about the dependants' claims.

[92] In *Mazzuca v. Silvercreek Pharmacy Ltd., supra,* a majority of the Court of Appeal confirmed that where a plaintiff seeks to amend his or her pleading to join a party after the expiry of a limitation period, the plaintiff must show both the absence of prejudice to the defendant and also special circumstances. Under the former law, i.e. before the enactment of the *Limitations Act, 2002,* the joinder of a party after the expiry of a limitation period is a discretionary matter where the most important consideration is the facts of the particular case: *Deaville v. Boegeman, supra.*

[93] Under the law before the enactment of the *Limitations Act, 2002*, the case law established that special circumstances are the facts of the particular case that make it in the interests of justice, in effect, to displace the defendant's entitlement to rely upon a limitation period defence: *Ioannnou v. Evans*, [2008] O.J. No. 21 (S.C.J.); *Pal v. Powell*, [2008] O.J. No. 3139 (S.C.J.). There is no exhaustive list of what constitutes special circumstances: *Frohlick v. Pinkerton Canada Ltd.* (2008), 88 O.R. (3d) 401 (C.A.), and the examination of special circumstances involves consideration of the knowledge of both the moving party and his or her agents at the time of the commencement of the proceedings regarding proper parties to be named and of the opposing party in relation to the nature of the true claim intended to be advanced: *Mazzuca v. Silvercreek Pharmacy Ltd., supra*; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.).

[94] For claims exclusively governed by the *Limitations Act, 2002,* subject to the provisions of *Limitations Act, 2002* that preserve the special circumstances doctrine, under the transition provisions of s. 21(1) of the *Limitations Act, 2002*, courts no longer have a discretion to extend a limitation period to allow a claim to be commenced after the period has

expired by applying the principle of special circumstances: *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401 (C.A.); *Meady v. Greyhound Canada Transportation Corp.* (2008), 90 O.R. (3d) 774 (C.A.), affg on different grounds [2007] O.J. No. 1850 (S.C.J.).

[95] Subsection 21 (1) of the *Limitations Act, 2002* has the purpose of precluding the special circumstances doctrine from operating for claims purely governed by the *Act.* Subsection 21(1) states:

> 21(1) If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding.

[96] However, the doctrine of special circumstances survives the enactment of the *Limitations Act, 2002* for actions governed by limitation periods outside of the *Limitations Act,* 2002: *Bikur Cholim Jewish Volunteer Services v. Langston* (2009), 94 O.R. (3d) 401 (C.A.); G.*B. v. Fortin*, 2011 ONSC 3197 at para. 28.

[97] With some qualifications, the *Limitations Act, 2002* applies to govern limitation periods in other statutes. Section 19 of the *Act* nullifies limitation periods in other legislation, unless the limitation period is listed in the schedule to the *Act*. Sections 129.1, 136 (5), 138, and 138.14 of the Ontario *Securities Act* are listed in Schedule A to the *Limitations Act, 2002.* Section 20 the *Limitations Act, 2002* preserves statutory provisions in the listed statutes that can extend the running of limitation periods. Sections 19 (1) and 20 state:

> *Other Acts, etc.*
>
> 19. (1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,
>
> (a) the provision establishing it is listed in the Schedule to this Act; ...
>
> *Interpretation*
>
> (4) If there is a conflict between a limitation period established by a provision referred to in subsection (1) and one established by any other provision of this Act, the limitation period established by the provision referred to in subsection (1) prevails.
>
> *Statutory variation of time limits*
>
> 20. This Act does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act.

[98] In *Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341 (C.A.), the Court of Appeal held that a limitation period from a statute listed in Schedule A to the *Limitations Act*, 2002 preserved its common law status with respect to the running of limitation periods. *Giroux* concerned an absolute limitation period in s. 38 (3) of the *Trustee Act*, R.S.O. 1990, c. T.23 that was listed in Schedule A to the *Limitations Act, 2002.* The *Trustee Act* did not contain an express provision authorizing extensions of the limitation period, but the Court held that s. 38 (3) remained subject to common law principles, including the doctrine of fraudulent concealment.

[99] In *Giroux Estate*, The Court held that the *Trustee Act* was listed in the schedule precisely so that its common law status would be preserved. Justice Moldaver, stated at para. 33:

> In my view, s. 38(3) was exempted from the new Act so that its common law status would be preserved and it would remain immune from the discoverability rule. In other words, the legislature intended that s. 38(3) should continue to be governed by common law principles. The doctrine of fraudulent concealment is one such principle.

[100] *Bikur Cholim Jewish Volunteer Services v. Langston, supra,* also concerned s.38 (3) of the *Trustee Act*, and the issue was whether the special circumstances doctrine was available. Applying the reasoning from *Giroux Estate*, the Court held that the special circumstances doctrine was available. Justice Rosenberg stated at para. 51:

> Applying the reasoning in *Giroux Estate*, the doctrine of special circumstances also survives the enactment of the *Limitation Act, 2002*, despite the fact that the doctrine has been abolished by s. 20 of that Act for cases governed by the limitation periods set out in that Act. Also see *Meady v. Greyhound Canada Transportation Corp.* (2008), 90 O.R. (3d) 774 (C.A.), at para. 22.

[101] I take from *Giroux Estate, supra*, *Bikur Cholim Jewish Volunteer Services v. Langston, supra*, and *Meady v. Greyhound Canada Transportation Corp.,* the general principle that the common law doctrine of special circumstances is available for statutes listed in Schedule A to the *Limitations Act, 2001* and, therefore, the special circumstances doctrine applies to the limitation periods under Part XXIII.1 of the Ontario *Securities Act*.

[102] In *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2006] O.J. No. 3748 (S.C.J.) at para. 59-63, Justice Hoy applied the special circumstances doctrine to allow an amendment after the limitation period (s. 138) had passed for a misrepresentation claim (s. 130) in the primary market under Part XXIII of the Ontario *Securities Act.* In *Silver v. IMAX Corp.*, 2012 ONSC 4881, which I will discuss further below, Justice Van Rensburg held that the court's ability to extend limitation periods by making orders *nunc pro tunc* also continues for actions governed by limitation periods outside of the *Limitations Act, 2002*.

[103] However, in *Dugal v. Manulife Financial Corp., supra*, and *Green and Bell v. Canadian Imperial Bank of Commerce, supra,* Justice Strathy, held that the special circumstances doctrine was not available to circumvent the absolute limitation period of s.138.14 of the *Securities Act*. In *Dugal,* he stated at paragraphs 87 to 90:

> 87. The *Bikur Cholim* case leaves open the question of whether the application of the special circumstances doctrine should be confined to cases where the statutory provision in the Schedule to the *Limitations Act, 2002* either contains its own discretionary extension provision or has historically been subject to a special circumstances exception. This would be consistent with the words of s. 20 which refer to "the extension, suspension or other variation of a limitation period or other time limit by or under another Act." In the case before me, it is difficult to understand why the legislature would have preserved the relatively short limitation period in s. 138.8 of the *Securities Act*, with its more stringent regime with respect to discoverability, but at the same time have left open the possibility of its extension by the special circumstances doctrine.
>
> 88. Not surprisingly, the parties have different interpretations of this line of cases. The plaintiffs say that the effect of *Giroux Estate* and *Bikur Cholim* is that "those cases governed by limitations provisions listed on the Schedule to the *Limitations Act, 2002* continue to be governed by the common law, including the special circumstances doctrine."
>
> 89. Manulife and the other defendants say that the holding in these cases is not quite as general as the plaintiffs urge. They say that the by exempting the *Trustee Act* limitation period from the *Limitations Act, 2002*, the legislature intended to permit the court to continue to apply the existing body of law, including the fraudulent concealment doctrine, which mitigated the potential harshness of an absolute limitation period that is unrelated to discoverability. They say that in the

> case of the *Securities Act* limitation period, there is a built-in discoverability provision and no body of law relating to special circumstances. They submit that it makes no sense to preserve the *Securities Act* limitation period and at the same time erode it through the application of the special circumstances rule.
>
> 90. In my respectful view, given the injunction that the special circumstances rule will be "infrequently invoked" as well as the philosophy of certainty and finality in the *Limitations Act, 2002*, it would make sense to confine the special circumstances rule to existing statutory exceptions, such as that contained in the *Solicitors Act*, or pre-existing common law exceptions engrafted on the legislative limitation period, such as that contained in the *Trustee Act*.

[104] In this passage, Justice Strathy says that it is difficult to understand why the legislature would have a short limitation period but at the same time leave open the possibility of its extension by the special circumstances doctrine. In my opinion, it is precisely because the legislature was imposing a short limitation period that it would intend that the special circumstances doctrine should be available. Like s. 138.14 of the Ontario *Securities Act*, *s.*38 of the *Trustee Act* imposes a short and absolute limitation period, and, by analogy, if the special circumstances doctrine is applicable to the *Trustee Act,* it should apply to the Ontario *Securities Act* and other statute listed in the schedule to the *Limitations Act, 2002.*

[105] Indeed, the need for a doctrine to ameliorate the rigours of an absolute limitation period in appropriate circumstances is stronger for Part XXIII.1 claims under the Ontario *Securities Act* with its leave requirement. The Plaintiffs provide an illustration in their factum of an investor discovering 2 years and 11 months after the representation was first released that it was a misrepresentation. In this circumstance, it would be, practically speaking imposssible to even give notice for a leave motion, let alone: prepare and serve a statement of claim; appoint and schedule a class action judge to hear the motion; prepare and serve motion records including expert evidence; prepare and serve responding records; conduct cross-examinations; prepare and serve facta; argue the motion; release reasons; and if leave is denied, prepare an appeal record; argue the appeal; and release appellate reasons. In regard to the fairness and expedition of the leave motion, it should also be noted that the plaintiff must present evidence and the defendant may present evidence going to the merits of the claim and to any defences to the statutory claims.

[106] In my opinion, the Legislature had a considered purpose in adding s. 138.14 of the *Securities Act* to the schedule to the *Limitations Act, 2001* and that purpose was precisely to make the special circumstances doctrine available in circumstances where it would be needed.

[107] The common law doctrines of fraudulent concealment and special circumstances would ameliorate the randomness and unfairness of barring the Plaintiffs from access to justice. The Legislature intended by including s. 138.14 in the schedule of the *Limitations Act*, 2002 to provide courts with the jurisdiction to employ the fraudulent concealment and special circumstances doctrines in appropriate circumstances.

[108] In *Timminco,* Justice Goudge stated at para. 26 that: "Section 138.14 was clearly designed to ensure that secondary market claims be proceeded with dispatch. That requires the necessary leave motion to be brought expeditiously." I accept the truth of this interpretation of the Legislature's purpose, but, in my opinion, the Legislature did not intend to sacrifice access to justice on the altar of expeditiousness.

[109] Relying on Justice Strathy's decision in *Dugal*, the Defendants submit that the the "special circumstances" doctrine is confined to cases where: (a) the limitation provision at issue is listed in the schedule to the Ontario *Limitations Act, 2002* and (b) includes either (i) a discretionary extension provision; or (ii) had historically been subject to a "special circumstances" exemption. Then, the Defendants argue that since the second precondition has not been satisfied for s. 138.14 of the Ontario *Securities Act*, the special circumstances doctrine is not available.

[110] For the reasons and based on the case law noted above, I disagree. The special circumstances doctrine is not needed in situations where a statute expressly confers a jurisdiction to extend the limitation period and apart from being unworkable and capricious, the availability of the special circumstances doctrine has never been a categorical doctrine available for some limitation periods and not others.

[111] As I understand the above case law about the *Limitations Act, 2002,* the special circumstances doctrine is no longer available for claims exclusively governed by the *Act*, but the doctrine is available for former limitation periods applicable by the transition provisions of the Act and, most importantly for present purposes, the special circumstances doctrine is available for limitation periods listed in the schedule to the *Act*.

[112] I do agree with the Defendants' submission that Part XXIII.1 is a complete and carefully calibrated code. (In this regard, see my judgment in *Frank v. Farlie, Turner & Co., LLC*, 2011 ONSC 5519.) However, I disagree with the submission that the availability of the fraudulent concealment and special circumstances doctrines would be inconsistent with the policies of and purposes of Part XXIII.1 of the Ontario *Securities Act* or the policies and purposes of limitation provisions and would introduce uncertainty and unpredictable judicial discretion to ruin a strict statutory provision.

[113] As I will explain below, the special circumstances doctrine is a principled, limited, and narrow doctrine that has within it restraints that ensure that the policies and purposes of the *Securities Act* and the *Limitations Act, 2002* are respected. In this regard, it should be noted that the special circumstances doctrine does not operate if the defendant is prejudiced apart from the prejudice of having to defend an action on its merits.

[114] Moreover, the special circumstance doctrine comes from the common law and equity, and as a matter of statutory interpretation, it is presumed that the legislature does not change the common law unless it does so explicitly. See R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed) (Markham, LexisNexis, 2008) at pp. 431-432.

[115] In *Silver v. IMAX Corp.*, 2012 ONSC 4881, Justice Van Rensburg disagreed with Justice Strathy's conclusion that the court did not have any jurisdiction to make orders *nunc pro tunc,* but in *obiter* she agreed with Justice Strathy on the particular point that the special circumstances doctrine was not available to ameliorate the effects of s. 138.14 of the Ontario *Securities Act*.

[116] As I will explain below, I agree with the decision in *IMAX,* and I share the view from *IMAX* that the court has the jurisdiction to make orders *nunc pro tunc* that would affect the operation of the limitation periods in the Ontario *Securities Act*. I believe that the *IMAX* decision supports my decision in the case at bar. See also *Nor-Dor Developments Ltd. v. Redline Communications Group Inc.*, 2011 ONSC 591. I do, however, disagree with Justice

Van Rensburg's *obiter* about the availability of the special circumstances doctrine. On this point, at paragraphs 72-77of her judgment, she stated:

> 72. The special circumstances doctrine operates in the context of a limitation period that is suspended by the commencement of an action. By adding the new claim to an existing statement of claim *nunc pro tunc*, the limitation period can be avoided. By contrast, the limitation period in s. 138.14 of the OSA includes a leave requirement, so that it cannot be defeated simply by the commencement of an action, or the amendment of an existing statement of claim to include the statutory claim.
>
> 73. There is another difference between the usual case where a party seeks to invoke the special circumstances doctrine, and the present case. Typically, a plaintiff arguing special circumstances will seek to add an entirely new cause of action after the expiry of a limitation period, where the claim ought to have been included in the original pleading. If the original pleading had included the facts relevant to the amendment, and only sought, for example, to include a new head of damages or claim for relief, there would be no need for special circumstances, as there is no question of the expiry of a limitation period. It is only when the amendment seeks to add a new cause of action (or party) that the question of special circumstances arises.8
>
> 74. In the present case, by contrast, the original pleading sets out the facts in support of the s. 138.3 claim. Unlike *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1764, [2011] O.J. No. 1240, where the plaintiff sought to add a claim under s. 130 for prospectus misrepresentation to an action based on secondary market misrepresentation, the common law and statutory claims in this case are based on substantially the same facts. Leave was required in *Dugal* to add a truly "new" claim to an existing pleading, which in turn required consideration of special circumstances.
>
> 75. In *Dugal,* Strathy J. declined to apply the doctrine of special circumstances. In arriving at his decision, he considered a line of cases from the Court of Appeal, including *Joseph v. Paramount*, which held that the doctrine of special circumstances no longer exists for limitation periods governed by the *Limitations Act, 2002*; and *Bikur Cholim Jewish Volunteer Services v. Langston*, 2009 ONCA 196, 94 O.R. (3d) 401 and *Chimienti*, which held that limitation periods exempted from the Act (under s. 38(3) of the *Trustee Act* and s.7 of the *Public Authorities Protection Act* respectively) retained their common law status such that the common law doctrine of special circumstances continued to apply. While he did not have to decide the issue, Strathy J. was of the view that the special circumstances doctrine should be confined to cases where the statutory provision in the schedule to the *Limitations Act, 2002* either contained its own discretionary extension provision or had historically been subject to a special circumstances exception. He would not have found special circumstances in any event.
>
> 76. The question whether special circumstances was available to permit the amendment of a statement of claim, was directly engaged in the *Dugal* case because the limitation period for a s. 130 cause of action runs from the earlier of when the plaintiff knew of the misrepresentation and three years from the transaction giving rise to the claim, and is suspended as soon as an action is commenced. The addition of the new cause of action to the existing claim would have avoided the intervening limitation period.
>
> 77. By contrast, the plaintiffs in this case cannot seek to add the statutory claim to the Statement of Claim *nunc pro tunc*, so as to shelter under the original claim, because that would ignore the leave requirement. They are not seeking to add a new and unrelated claim to an existing action, but to add a related claim (arguably an additional form of relief based on substantially the same facts), which requires leave of the court. 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. The special circumstances doctrine does not fit within the framework of a limitation period such as that provided for in s. 138.14.

[117] As I will discuss further below, I agree with Justice Van Rensburg's ultimate conclusion that the jurisdiction associated with the Latin maxim *actus curiae neminem gravabit* ("an act of the court shall not prejudice no man") along with the court's power to make orders *nunc pro tunc* can be used to extend the time for bringing a Part XXIII.1 claim, for which leave is required under s. 138.8 of the Ontario *Securities Act*. However, I do not agree with her that the special circumstances doctrine is not also available in appropriate circumstances.

[118] In the above passage, which is *obiter dictum* from *Imax*, Justice Van Rensburg would limit the special circumstances doctrine to circumstances where a plaintiff seeks to amend his or her pleading to add a genuinely new, i.e. different, cause of action that does not require leave to be asserted. Given, as will be explained further below, the special circumstances doctrine considers whether the defendant was aware or ought to have been aware of the likelihood of the claim, the difference of the new claim is not a reason to preclude the availability of the doctrine nor is the factor that leave is required a reason to preclude the special circumstances. The leave requirement just intensifies the operation of the limitation period, and thus a leave requirement is not a reason for precluding the operation of the special circumstances doctrine, assuming it was otherwise available.

[119] Indeed, I would argue that the presence of the factors that Justice Van Rensburg identifies as precluding the availability of the special circumstances are *a fortiori* factors that justify extending the doctrine if it were necessary to do so. If the special circumstances can be fairly employed in circumstances where a genuinely different cause of action is being added by amendment to the plaintiff's pleading, then, *a fortiori,* it should be employed in circumstances where the defendant is confronting a claim that he or she expected to confront if leave were granted.

[120] In the situation of the case at bar, which I will also discuss further below, the Defendants reliance on the limitation period defence is entirely technical and the statute bar is empty of the purposes served by a limitation period because the Defendants can and undoubtedly have preserved their evidence and the Defendants did not expect to have repose from the Plaintiffs' claim.

[121] Putting aside Justice Van Rensburg *obiter*, the *Imax* decision actually supports my decision that the special circumstances doctrine is potentially available for the circumstances of the case at bar.

[122] The facts of *Imax* were that the defendants allegedly made misrepresentations in the secondary market for securities in March 2006. In September 2006, the plaintiffs commenced an action asserting common law claims and pleaded that a claim would be made under s.138.3 of the *Ontario Securities Act*. The motion for leave and the motion for certification of the action as a class proceeding was argued in December 2008. A year later, in December 2009, Justice Van Rensburg granted leave and certified the action as a class proceeding. At the time when she released her decision, although nobody was aware of it, the Part XXIII.1 claim was already statute-barred. The Divisional Court dismissed the defendants' motion for leave to appeal in February 2011. The plaintiff delivered an amended statement of claim, and the defendants delivered their defence in February 2012, around the same time as the Court of Appeal delivered its decision in *Timminco*. Informed with the wisdom of the *Timminco* decision, the defendants moved for an order dismissing the Part XXIII.1 claims as statute-

barred. The plaintiffs responded by moving for an order *nunc pro tunc* that the leave order be deemed to have been granted and the Statement of Claim deemed amended to have included the claim under s. 138.3, as of the commencement of this proceeding or as of such other date as the court may deem just. Justice Van Rensburg dismissed the defendants' motion, granted the plaintiffs' request and made an order *nunc pro tunc* giving life to the still borne Part XXIII.1 claim.

[123] Justice Van Rensburg agreed with the defendants in *Imax* that in the light of the *Timminco* decision, the plaintiffs' action under the Ontario *Securities Act* was already statute-barred when she granted leave under s. 138.8. She said at paragraph 33 of her judgment, and I agree with her, that the effect of *Timminco* is that, no matter what the plaintiff pleads in the original statement of claim in relation to the statutory cause of action, the limitation period continues to run at least until leave is granted. The issue then for Justice Van Rensburg was whether the court could amend the leave order so that it was effective *nunc pro tunc* before the limitation period had run its course. She noted that Justice Strathy had concluded in *Green and Bell* that this was not possible, but she said in paragraph 41 that she would take a more expansive approach to the court's authority to grant orders *nunc pro tunc* and that she did not interpret *Timminco* as foreclosing leave being granted *nunc pro tunc* under s. 138.8 of the Ontario *Securities Act*.

[124] Justice Van Rensburg analyzed whether the court had the authority to make orders *nunc pro tunc*. She discussed this topic in general, but, for present purposes, the important part of her analysis comes at paragraphs 80 to 87 where she disagreed with Justice Strathy about *nunc pro tunc* orders and their availability for Part XXIII.1 of the Ontario *Securities Act*.

[125] With one augmentation, I agree with her analysis, and I would adopt it as a part of my analysis of the availability of the doctrine of special circumstances. The augmentation is that, in my opinion, everything she has to say about the potential availability of orders *nunc pro tunc* is equally true about the potential availability of the doctrine of special circumstances. I agree with her analysis as to why the court has the jurisdiction to make leave orders for s.138.8 *nunc pro tunc,* and I add that the same analysis shows that the court has the jurisdiction to make these orders as an aspect of the special circumstances doctrine.

[126] With this augmentation, I adopt paragraphs 80 to 87 of the *Imax* judgment, which state:

> 80. In *Green and Bell*, Strathy J. offered three principal reasons for his decision: First, Part XXIII.1 of the OSA is a complete code governing the statutory remedy of civil liability for secondary market disclosure which includes unique procedural requirements including leave and a "special and rather unusual limitation period", and there is nothing in the statute to suggest that the limitation period can be extended as a result of common law principles. Second, there is nothing in the judicial interpretation of the statutory remedy to suggest that the doctrine applies. Timminco "contains no suggestion at all that there may be scope for judge-made exceptions". Third, the general philosophy of the *Limitations Act, 2002* reflects the desirability that limitation periods be clearly defined and not subject to judicially-crafted exceptions that can lead to the uncertainty and unfairness they are designed to prevent: paras. 521 to 526.
>
> 81. The defendants urge this court to follow Strathy J.'s analysis to conclude the there is no authority to grant *nunc pro tunc* relief in this case. I would however come to a different conclusion as to the ability of the court to grant *nunc pro tunc* relief when dealing with the limitation period under s. 138.14 of the OSA. I regard the authority of the court to make an order granting leave

nunc pro tunc as an inherent jurisdiction which is also rooted in rule 59.02 and is subject to the principles described earlier in this decision. In my view that jurisdiction is not inconsistent with the provisions of the *Limitations Act, 2002*, as interpreted by the Court of Appeal and Part XXXIII.1 of the OSA, as interpreted in *Timminco*.

82. Section 138.14 is a limitation period listed in the schedule to the *Limitations Act, 2002*. As such, its common law status is preserved and it continues to be governed by common law principles: *Bikur Cholim and Chimienti*. ...

83. To the extent that a *nunc pro tunc* order would serve to vary or extend the s. 138.14 limitation period, in my view such relief is not precluded by the *Limitations Act, 2002* and the *Joseph v. Paramount* line of cases.

84. There is also nothing in Part XXIII.1 of the OSA that would preclude the court's jurisdiction to grant leave *nunc pro tunc*, where appropriate to do so. The court has authority under rule 59.01 to make an order with retroactive effect. The *nunc pro tunc* authority is also recognized under common law to permit the court to do justice between the parties. The question is whether the statute itself that provides for the granting of leave contains a prohibition against an order *nunc pro tunc*: *Re New Alger Mines Limited and McKenna Estate*. If not, the court is not obliged to grant such relief, but can do so if warranted "in the interests of justice".

85. The defendants assert that recognizing the authority of the court to grant leave *nunc pro tunc* in a leave application under s. 138.8, would defeat the very purpose of the limitation period in s. 138.14. I disagree. Limitation periods exist to ensure that lawsuits are brought within a reasonable period of time so that defendants are not subject to liability for an unlimited duration, so that cases do not proceed on stale evidence, and as incentives to plaintiffs to pursue their claims in a timely fashion: *K.M. v. H.M.*, [1992] 3 S.C.R. 6, at paras. 21 to 24. In *Timminco*, Goudge J.A. described the purpose of the limitation period in s. 138.14 to "ensure that secondary market claims be proceeded with dispatch" (at para. 26). Limitation periods are not intended to arbitrarily bring to an end a cause of action that has been actively and vigorously pursued. The finality that a limitation period may offer is not an end in itself.

86. Recognizing the ability to grant leave *nunc pro tunc* does not mean that such relief would be warranted in every case. ....

87. Finally, I do not regard *Timminco* as precluding an order granting leave *nunc pro tunc*, where the question of such relief was not before the court. The Court of Appeal considered only the specific question of the interplay between s. 28 of the CPA and s. 138.14 of the OSA. The result was a determination of the issue before the court, namely whether the limitation period had been suspended when the action was first commenced, and not what the defendants are seeking here, which is a complete dismissal of the statutory claim.

[127] Thus, in *Imax*, having concluded that the jurisdiction to make orders *nunc pro tunc* was available, and having concluded earlier in her judgment at paragraph 58 that the case fit within authorities for making a *nunc pro tunc* order where the plaintiffs' rights have abated through no fault of their own, Justice Van Rensburg made an order *nunc pro tunc* with the result that the plaintiffs' action was not statute-barred.

[128] Although the case was decided on the basis of the court's *nunc pro tunc* jurisdiction, I think that the *Imax* case equally could have been decided the same way based on the special circumstances doctrine. I also think that the *Imax* decision supports my own analysis in the case at bar.

[129] I conclude that the special circumstances doctrine potentially applies to the limitation period in s. 138.14 of the Ontario *Securities Act.* The next questions are what is the nature of the doctrine and can the doctrine be applied in the circumstances of the case at bar.

H. THE NATURE OF THE SPECIAL CIRCUMSTANCES DOCTRINE

[130] The discussion above, about whether the special circumstances doctrine is available for the s. 138.14 limitation period of the Ontario *Securities Act* has already revealed a great deal about the nature of the special circumstances doctrine; however, it is necessary to explore its nature more closely.

[131] The Defendants submit that the special circumstances doctrine does not provide judges with a general authority to extend a limitation period. I agree. Indeed, that is what Lord Escher, M.R. said in *Weldon v. Neal*, supra. To quote him: "under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so." So, the questions to consider are: what more precisely is the nature of the special circumstances doctrine? And, what are those very peculiar circumstances that characterize the doctrine of special circumstances?

[132] In *Deaville v. Boegeman, supra* at pp. 729-30, MacKinnon A.C.J.O. stated with reference to "special circumstances":

> A number of courts have made rather heavy weather out of the meaning of "special circumstances" and have sought to establish conditions or detailed guide-lines for the granting of relief after the expiry of the limitation period. This is a discretionary matter where the facts of the individual case are the most important consideration in the exercise of that discretion. While it is true that the discretion is not one that is to be exercised at the will or caprice of the court, it is possible to outline only general guide-lines to cover the myriad of factual situations that may arise.

[133] I extract three points from Associate Chief Justice MacKinnon's comments. First, the special circumstances doctrine is a principled discretionary doctrine. Second, it is not a formulaic doctrine and rather must adapt to myriad factual circumstances. Third, examining the case law is helpful in extracting various elements to guide the court's discretion, but ultimately each case must be considered in the light of its own facts.

[134] In *Denton v. Jones (No. 2)* (1976), 14 O.R. (2d) 382 (H.C.J.), Justice Grange stated in para. 8 of his judgment:

> But even if the amendment here asked does constitute a new cause of action, I consider that there are circumstances justifying a departure from the general rule. In *Basarsky v. Quinlan et al.*, [1972] S.C.R. 380, Hall, J., equated the word "peculiar" in Lord Esher, M.R.'s exception with "special" in current usage and found that circumstances existed to justify an amendment, after the expiration of the limitation period, setting up a claim .... Among those circumstances were many that apply equally here. There as here, all the facts upon which the later claim could be based were already pleaded. There as here, there was no need to reopen discoveries and most important there as here, there was no possibility of prejudice to the defendants other than the inevitable prejudice of what might turn out to be the successful plea. ....

[135] There have been many cases where courts have applied or refused to apply the special circumstances doctrine, and having read quite a few of them, I believe that I can identify certain factors or themes. One factual theme is whether or not the defendant knew or anticipated that the plaintiff's claim would be coming. Another theme is whether or not the

defendant had lost evidence or in some other way had suffered a diminished ability to defend himself or herself because of the late arriving claim.

[136] Another related theme is the extent to which the newly arriving claim has the same factual footprint as the claim already before the court. In this last regard, it is important to remember that the special purposes doctrine is tethered to amending an existing claim, and it is not available to commence an action after the expiry of a limitation period. Thus, one sees in cases like *Basarsky*, *supra,* the circumstance that the defendant has examined for discovery the original plaintiff about the tort and the defendant's liability and during the course of doing so asked questions about the dependants' claims that were being advanced after the applicable limitation period.

[137] Another theme is the extent to which the purposes of limitation periods would be frustrated if the special purposes doctrine were applied to extend the running of the limitation period. In other words, was the plaintiff diligent in giving notice and in prosecuting his or her claim, and, on the other side of the coin, was the defendant unaware of the claim and compromised in his or her ability to make full answer and defence.

[138] Yet another theme is that the onus is on the claimant to establish special circumstances: *Frohlick v. Pinkerton Canada Ltd.*, *supra* at para. 22 (C.A.); *Bikur Cholim Jewish Volunteer Services v. Langston, supra*, at para. 57.

[139] I will conclude this part of the reasons by discussing *Green and Bell v. Canadian Imperial Bank of Commerce*, *supra*. *Green and Bell* had causes of action quite similar to those in the case at bar, and Justice Strathy said that he would have applied the special circumstances doctrine, but he had concluded that the doctrine was not available against s.183.14 of the Ontario *Securities Act*. Since he would otherwise have applied the special circumstances doctrine, Justice Strathy's judgment on this point, with which I agree, is informative about the nature of the special circumstances doctrine.

[140] In *Green and Bell*, which is another case about misrepresentations about stocks trading in the marketplace for securities, the misrepresentations occurred between May and December 2007, and the statement of claim was issued in July 2008 claiming common law damages. The pleading indicated that a claim under s. 138.3 of the Ontario *Securities Act* would be made and the plaintiffs would request leave be granted *nunc pro tunc*. The notice of motion for leave was delivered in January 2010, and the leave motion was heard in February 2012. On the penultimate day of argument, *Timminco* was released, and the defendants submitted that it was now too late to grant leave because the action was statute-barred.

[141] The defendants in *Green and Bell* always knew that the plaintiffs were in the process of seeking leave, and there was no evidence of prejudice to the defendants because of the pace of the proceedings. The plaintiffs were diligent in pursuing their claims, and the defendants had no reason to think that the claim would not be prosecuted. Neither party was prescient about the implications of the *Timminco* decision. The defendants had no reason to expect repose from a claim, and there was no risk of evidence becoming stale or lost.

[142] What emerges from the factual background in *Green and Bell* is that *Timminco* was a miracle or a dream come true for the defendants, who up until the penultimate day of the leave motion had been defending the claim on its merits and who suffered no prejudice whatsoever by the delay in the plaintiffs' efforts to obtain leave under s. 138.8 of the Ontario

Securities Act. It is understandable that Justice Strathy would have applied the special circumstances if he thought that it was available in the circumstances.

I. APPLICATION OF THE SPECIAL CIRCUMSTANCES DOCTRINE TO THE CIRCUMSTANCES OF THIS CASE

[143] The Defendants submit that there are no special circumstances in the case at bar. The Defendants say that on the face of the claim, the Plaintiffs and the entire market had been in possession of the material facts since no later than January 31, 2007, and the Plaintiffs, represented by experienced class action counsel throughout the material time, simply chose not to pursue their claims in Ontario with due diligence. The Defendants say that they did nothing to mislead the Plaintiffs about the need to obtain leave under s. 138.8, and now it is too late for the Plaintiffs to obtain leave for an already statute-barred Part XXIII.1 claim.

[144] The Defendants submit that assuming the special circumstances doctrine was available, which they dispute, then there is a factual and legal continuum for the doctrine and on that continuum there is a dividing line between cases where the court can make orders *nunc pro tunc* and cases where it would be inappropriate to do so. The Defendants submit that the case at bar is less favourable than *Imax* and *Green and Bell* and the case at bar is inappropriate for resort to the special circumstances doctrine.

[145] The Plaintiffs, however, submit that there are special circumstances in as much as: (1) the Defendants have known of the factual allegations against them since 2007, including the Part XXIII.1 claims; (2) the Defendants have had a full opportunity to investigate the claims against them; (3) there is no prejudice to the Defendants; (4) the law has changed unexpectedly – twice – each time to the plaintiffs' and class' detriment; (5) the Plaintiffs' Part XXIII.1 claims do not raise new factual allegations; and (6) the Defendants did not raise limitation periods in any of the class proceedings until now.

[146] In my opinion, I agree with the Plaintiffs. In my opinion, the case at bar would be an appropriate case to apply the special purposes doctrine were the court to grant leave under s.138.8 of the Ontario. Thus, I agree with the Plaintiffs that there are special circumstances that would justify an order granting leave *nunc pro tunc* assuming that leave under s. 138.8 were granted.

[147] *Deaville v. Boegeman, supra* and the many cases that have referred to it suggest that a continuum analysis is not helpful and in exercising the court's discretion it is not all that helpful to compare and contrast cases. Rather, my analysis is that having regard to the various themes that can be noted in the case law there are special circumstances in the case at bar.

[148] I do agree that relatively or comparatively speaking *Imax* and *Green and Bell* are stronger cases for the application of the special circumstances doctrine, but that is as far as it goes in drawing comparisons. The circumstances of the case at bar are compelling enough to have little sympathy for the Defendants, who, since 2007, in the United States, have been defending the very claims in Ontario brought by Messrs. Xing and Berzi and by the Millwrights that the Defendants now submit are statute-barred.

[149] The Defendants accuse the Plaintiffs, most particularly Messrs. Xing and Berzi, for not being diligent in prosecuting their Ontario actions. The irony of that submission is that not only were the Defendants not prejudiced by the idling of the Ontario actions, they would have

been discomfited and harried, as they now must be, by litigation activity in both New York and Ontario. Had the *Timminco* judgment not presented itself as a way to arrest the Ontario action, the Defendants would undoubtedly have been content not to do battle on two fronts over the same facts.

[150] It follows that I dismiss that part of the Defendants' Rule 21 motion that asserts that the Part XXIII.1 claims are statute-barred.

J. THE PLAINTIFFS FRAUDULENT CONCEALMENT, MISTAKE, WAIVER, AND ESTOPPEL ARGUMENTS

[151] In addition to their arguments based on the special circumstances doctrine, the Plaintiffs attempt to defeat the Defendants' plea that the Part XXIII.1 claim is statute-barred by pleading fraudulent concealment, mistake, waiver, and estoppel. These defences or counters to a limitation period defence are pleaded in the Plaintiffs' Reply.

[152] Because of my finding about the special circumstances doctrine, it is now not necessary for the Plaintiffs to rely on these pleadings. However, as there undoubtedly will be an appeal, I will address the Plaintiffs' fraudulent concealment, mistake, waiver, and estoppel arguments and the Defendants' counterarguments. I can do this relatively quickly because I agree with the Defendants' counterarguments that these doctrines would not resuscitate the statute-barred claims.

[153] In general, the Defendants argue that the Plaintiffs have failed to plead the necessary material facts to support these claims or defences and, therefore, these allegations should be struck from the Reply. See *Balanyk v University of Toronto*, [1999] O.J. No. 2162 (S.C.J.) at paras. 29 and 153.

[154] With respect to fraudulent concealment, the Defendants say that there is no pleading of what was concealed, how, or by whom and no pleading of how any alleged concealment prevented the Plaintiffs from discovering their causes of action. Therefore, the Defendants submit that this plea is untenable. I agree.

[155] With respect to mistake, the Defendants say that there is no pleading of what mistake was made, when, by whom, or when it was discovered, and there is no pleading as to how any mistake prevented the plaintiffs from learning that they had a cause of action. Therefore, the Defendants submit that this plea is untenable. I agree.

[156] With respect to waiver, the Defendants submit that it is plain and obvious that the plea of waiver is untenable because they could not waive a right of which they were unaware. For waiver, the party waiving must have full knowledge of the right that it is waiving and the conduct or words of that party must show an unequivocal, conscious intention to abandon the right. See: *Saskatchewan River Bungalows Ltd. v. Maritime Life Insurance Co.*, [1994] S.C.J. No. 59 at paras. 19-20; *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61 at 65-66; *Green and Bell v. Canadian Imperial Bank of Commerce*, *supra* at paras. 536-37.

[157] The Defendants say that until the Court of Appeal's *Timminco* decision, the Defendants were not aware that they had a right to rely on a limitation period defence in the context of a pending action seeking leave. Further, there is no pleading or evidence of conduct or words on the part of the defendants demonstrating an unequivocal and conscious intention

to abandon their right to raise the limitations defence. The Defendants, therefore, submit that a plea of waiver is untenable. I agree.

[158] With respect to promissory estoppel, the Defendants submit that it is plain and obvious that the plea of estoppel is untenable because to establish a promissory estoppel or estoppel by representation, the plaintiffs must establish: (a) that the defendants, by their words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on; and (b) that, in reliance on the representation, the plaintiffs acted on it or in some way changed their position: *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at 57-59; and *Green and Bell v. Canadian Imperial Bank of Commerce*, *supra* at paras. 529-30. The Defendants submit that the pleadings show that the preconditions for a promissory estoppel cannot be satisfied. Once again, I agree with the Defendants.

[159] To establish estoppel by convention, the plaintiffs must show that the parties agreed or mutually assumed that the limitation defences would not be raised or that the applicable limitation periods would be tolled. See *Ryan v. Moore*, [2005] 2 S.C.R. 53 at paras. 4 and 61-62 and *Green and Bell v. Canadian Imperial Bank of Commerce*, *supra* at paras. 532-535. The Defendants submit that the pleadings show that the preconditions for an estoppel by convention cannot be satisfied. I agree with the Defendants.

K. DO THE PLAINTIFFS COMMON LAW CLAIMS SHOW A REASONABLE CAUSE OF ACTION?

[160] Turning now to the various arguments that concern the Plaintiffs' common law claims of negligent misrepresentation, it is necessary, and it will prove helpful, to introduce an element of candour to the parties' arguments and counterarguments. It will, I believe, prove helpful to introduce some transparency and to point out what is often really going on when a defendant attacks a plaintiff's pleadings in a class action where the plaintiff is attempting to advance a common law negligent misrepresentation claim.

[161] The constituent elements of a claim for negligent misrepresentation are well established and well known. The elements of a claim of negligent misrepresentation are: (1) duty of care based on a special relationship between the plaintiff and the defendant; (2) an untrue, inaccurate, or misleading representation; (3) the defendant making the representation negligently; (4) the plaintiff having reasonably relied on the misrepresentation; and, (5) the plaintiff suffering damages as a consequence of relying on the misrepresentation: *Queen v. Cognos*, [1993] 1 S.C.R. 87.

[162] In the case at bar, the Defendants submit that the Plaintiffs have not shown a reasonable cause of action at common law for negligence misrepresentation because: (1) the Plaintiffs have failed to plead actual detrimental reliance by themselves and by each class member; (2) a significant number of the alleged misrepresentations are forecasts, opinions or statements about the future, which cannot sustain a negligent misrepresentation claim; and (3) the Defendants do not have a proximate relationship or duty of care to the Plaintiffs and the putative class members.

[163] More particularly, the Defendants submit that the Plaintiffs do not satisfy s. 5(1)(a) of the *Class Proceedings Act, 1992* because they have failed to plead actual detrimental reliance on the alleged misrepresentations by themselves or other class members and actual reliance is

a necessary element of a claim for negligent misrepresentation. The Defendants say that Ontario courts have rejected attempts to substitute a presumption of reliance based on "fraud on the market" or "efficient market" theories or based on reliance inferred from the acquisition of shares on a marketplace.

[164] Further, relying on *Deep v. M.D. Management*, [2007] O.J. No. 2392 (S.C.J.) at paras. 12-18, aff'd [2008] O.J. No. 961 (C.A.) and *Hembruff v. Ontario Municipal Employees Retirement Board*, [2005] O.J. No. 4667 (C.A.), the Defendants submit that the nature of the alleged misrepresentations makes it plain and obvious that the Plaintiffs' negligent misrepresentation claims are not actionable. The Defendants say that virtually all of the statements alleged to be misrepresentations are forward-looking, or matters of forecast, projection or opinion and as a matter of law, these types of statements cannot support a claim for negligent misrepresentation.

[165] Further still, the Defendants say that the Plaintiffs and the putative class members do not have any contractual relationship with the Defendants or any other relationship that would give rise to a duty of care. The Defendants submit the Plaintiffs and the putative Class Members cannot maintain that they were owed a duty of care and that the Defendants duties, if any, were to the market at large. The Defendants submit that the indirect relationship between the Defendants and the putative Class Members is insufficient to ground a finding of proximity. The Defendants argue that if there was a duty of care, then policy reasons would negate the duty of care. The suggested policy reasons are the imposition of a duty of care would raise the spectre of indeterminate liability, as the entire investing public is not a limited class that was known to the plaintiffs.

[166] Candour in the analysis of these arguments may begin with the observation that the Plaintiffs – as individuals – are perfectly capable of pleading a common law action for negligent misrepresentation. The Plaintiffs are also perfectly capable of pleading a common law action on behalf of class members.

[167] The candid truth of the matter, however, is that in the context of a class proceeding, the Plaintiffs are confronted with the problem that the constituent element in a negligent misrepresentation claim of the class members having reasonably relied on the misrepresentation would appear to want for commonality and, therefore, the reliance element is not certifiable as a common issue, and, worse, from a representative plaintiff's perspective, the lack of commonality for this issue may be used by defendants to argue that a class action is not the preferable procedure.

[168] However, a plaintiff's pragmatic need for a certifiable common issue about the reliance element of the tort of negligent misrepresentation should not obscure the analysis of whether or not the plaintiff has properly pleaded the constituent elements of the tort of negligent misrepresentation.

[169] In *Hercules Management Ltd. v. Ernst & Young,* [1997] 2 S.C.R. 165, the Supreme Court of Canada said at para. 18 that "actual reliance is a necessary element of an action in negligent misrepresentation and its absence will mean that the plaintiff cannot succeed in holding the defendant liable for his or her losses." The Supreme Court's decision in *Sharbern Holdings Inc. v. Vancouver Airport Centre Ltd.*, [2011] 2 S.C.R. 175 has re-affirmed that reasonable reliance is a constituent element of the tort that must be pleaded and proven.

[170] *Green and Bell v. Canadian Imperial Bank of Commerce, supra* at paras. 599-600; *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591; *Carom v. Bre-X Minerals Ltd.*, [1998] O.J. No. 4496 (Gen. Div.) at paras. 31-40; *White v. Colliers Macaulay Nicholls Inc.*, [2009] O.J. No. 2188 (C.A.) at paras. 23-24 hold that "Fraud on the market" or the "efficient market" theories cannot supplant the need for representative plaintiffs to plead as individuals the material facts of their individual reliance on the defendant's representations.

[171] I appreciate that there are decisions like *McCann v. CP Ships Ltd.*, [2009] O.J. No. 5182 (S.C.J.) that suggest that the winds of change in the law are blowing and that these cases support the argument that it is not plain and obvious that the common law will not fashion a negligent misrepresention claim as it has been formulated by the Plaintiffs. See also: *Mondor v. Fisherman* [2001] O.J. No. 4620 (S.C.J.); *Lawrence v. Atlas Cold Storage Holdings Inc., supra; Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.); *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 2, leave to appeal to the Div. Ct. granted 2012 ONSC 773. However, I do not agree with these cases on this point, and, in my opinion, it is plain and obvious that the Plaintiffs have failed to plead the constituent elements of a negligent misrepresentation claim.

[172] In my opinion, it is plain and obvious that it would take a legislated change, not a judge made change in the law, to dispense with or alter the reliance element of the common law tort of negligent misrepresentation. Indeed, that legislated change has occurred with the statutory causes of action under the Ontario *Securities Act,* and it is not for a court to, in effect, expand the common law tort of negligent misrepresentation so that it circumvents the carefully calibrated law reform with its checks and balances for claims for damages for misrepresentation in the securities markets.

[173] It follows that I shall strike the Plaintiffs' common law negligence claim but with leave to amend. The Plaintiffs should plead the particulars of how each of them reasonably relied on the alleged misrepresentations.

[174] Assuming, however, that I am incorrect in striking the common law negligence claim because of the failure to plead the reasonable reliance element, I would not strike the claim based on the Defendants' argument that the alleged misrepresentations are not actionable because they are forward looking statements. This argument may ultimately succeed, but it is not plain and obvious that it will succeed.

[175] I accept that not all types of statements are actionable. This follows because a truth value cannot be assigned to some statements at the time when they are uttered. That it is raining can immediately be assigned a truth value; that it will rain tomorrow cannot at the time of utterance be described as true or false. In *Hinchey v. Gonda*, [1955] O.W.N. 125 (H.C.) Justice Schroeder stated at p. 128

> It is, of course, well settled that a representation, to be of effect in law, should be in respect of an ascertainable fact as distinguished from a mere matter of opinion. A representation which amounts merely to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its nature and terms, or is merely a loose, conjectural or exaggerated statement, goes for nothing, though it may not be true, for a man is not justified in placing reliance on it

[176] See also: *Foster Advertising v. Keenberg* (1987), 35 D.L.R. (4th) 521 (Man. C.A.) at 525-26; leave to appeal refused [1987] S.C.C.A. No. 177; *Datile Financial Corp. v. Royal Trust Corp. of Canada* (1991), 5 O.R. (3d) 358 (Gen. Div.) at 379; aff'd 11 O.R. (3d) 224

(C.A.); *Lee v. 1071397 Ontario Inc.*, [1999] O.J. No. 8 (Gen. Div.) para. 13; aff'd [2000] O.J. No. 4389 (C.A.); P.M. Perell, "False Statements" (1996), 18 Adv. Q. 232.

[177] Generally speaking, opinions and prognostications are not actionable, but there are exceptions. The existence of the opinion may be a fact and to the extent that the opinion or prognostication presupposes a factual foundation, the opinion or prognostication may constitute a statement of fact and the speaker must exercise due care in ascertaining the facts upon which his or her opinion is based: *Dart v. Rogers* (1911), 19 W.L.R. 326 (Man. K.B.); *Northern & Central Gas Corp. v. Hillcrest Collieries; Byron Creek Collaries Ltd. v. Coleman Collieries Ltd.* (1976), 59 D.L.R. (3d) 533 (Alta. S.C.); *Bisset v. Wilkinson*, [1927] A.C. 177 (P.C.);

[178] In *Esso Petroleum Co. Ltd. v. Mardon*, [1976] 2 All E.R. 5 (C.A.) at p. 16. a leading case about negligent misrepresentation claims, Denning, M.R. did not differentiate between advice, information, or opinion; he stated:

> *Hedley Byrne* properly understood covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another - be it advice, information or opinion- with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and the advice, information, or opinion is reliable.

[179] In the case at bar, it is not plain and obvious that the Defendants' representations are not actionable.

[180] Assuming that I am incorrect in striking the common law negligence claim because of the failure to plead the reasonable reliance element, I would also not strike the claim based on the Defendants' argument that there is no duty of care or proximate relationship or that the duty of care has been negated for policy reasons. These arguments may ultimately succeed, but it is not plain and obvious that they will succeed.

[181] Putting aside the problem of whether there can be a substitute for the reasonable reliance component of the tort of negligent misrepresentation, several class action certification judgments have concluded that there is a duty of care and a common law negligent misrepresentation claim in the context of the primary and secondary market for securities. See *Mondor v. Fisherman, supra*; *Lawrence v. Atlas Cold Storage Holdings Inc., supra; Silver v. Imax Corp., supra.*

[182] In the case at bar, putting aside the issue of whether there can be a substitute for the reasonable reliance component of the tort of negligent misrepresentation, it is not plain and obvious that the Plaintiffs' common law negligent misrepresentation claims are untenable.

L. HAVE THE PLAINTIFFS ADDED STATUTE-BARRED COMMON LAW CLAIMS TO THE FRESH AS AMENDED STATEMENT OF CLAIM?

[183] As noted above in the discussion of the factual background, there is a dispute between the parties about whether there are allegations in the Millwrights' Fresh as Amended Statement of Claim that are not in the *Xing* or *Berzi* pleadings.

[184] The Defendants submit that while both the *Xing* and *Berzi* actions mention inventory write-downs and corollary inventory issues at Celestica's Mexican facility, neither the *Xing*

Action nor the *Berzi* Action alleges that the defendants engaged in manipulation or misreporting, which allegations border on a pleading of fraudulent conduct. The Defendants submit that these allegations are new causes of action that the defendants manipulated or did not properly account for Celestica's inventory and earnings during the Class Period. They argue that these causes of action were raised for the first time after the expiry of the applicable limitation period and, therefore, must be struck for being out of time.

[185] There are, in my opinion, two discrete reasons for dismissing the Defendants' arguments. These reasons can be briefly stated.

[186] First, if the Defendants are correct and the Plaintiffs have pleaded in the Fresh as Amended Statement of Claim causes of action not found in the *Xing* or *Berzi* actions, which are statute-barred, then these causes of action are subject to the special circumstances doctrine and now may be pleaded.

[187] Second, I agree with the Plaintiffs' counterargument, which, in effect, is that the *Xing* and *Berzi* actions included the claims or causes of action found in the Millwrights' Fresh as Amended Statement of Claim.

[188] It follows that the Defendants' argument that the Plaintiffs have added statute-barred common law claims to the Fresh as Amended Statement of Claim fails.

M. IS THERE A COMMON LAW ACTION AGAINST MESSRS. DELANEY AND PUPPI?

[189] The Defendants submit that no reasonable common law action has been pleaded against Messrs. Delaney and Puppi in their individual capacity. The Defendants say that the individual defendants are never personally implicated beyond their role as managers at Celestica and it is not a civil wrong simply to manage or control an incorporated business.

[190] Relying on *A-C-H International Inc. v. Royal Bank of Canada*, [2005] O.J. No. 2048 (C.A.), *Henry v. 1213962 Ontario Ltd.*, [2005] O.J. No. 2132 (S.C.J.) at para. 9, *Normart Management Ltd. v. West Hill Redevelopment Co.*, [1998] O.J. No. 391 (C.A.) at paras. 17-19, and *ScotiaMcLeod v. Peoples Jewellers Limited*, [1995] O.J. No. 3556 (C.A.) at paras. 25-26, the Defendants argue that causes of action against individuals as directors or officers must be specifically pleaded and that the directing minds of a corporation cannot be held civilly liable for the tortious actions of the corporations they control and direct, unless there is some conduct on their part that exhibits a separate identity or interest from the corporation and constitutes a tort in itself.

[191] In *Green and Bell v. Canadian Imperial Bank of Commerce, supra*, at paragraphs 560-73, the individual defendants made an argument identical to the argument advanced by Messrs. Delaney and Puppi in the case at bar.

[192] Justice Strathy rejected the argument. He noted that in *Scotia McLeod Inc. v. Peoples Jewellers Ltd.*, all the directors of Peoples Jewellers had been sued and the Court of Appeal struck out the claims against the directors with two exceptions; namely the CEO and the Vice-president finance, who were the two most senior executives at Peoples Jewellers. Justice Strathy also noted that in the *Scotia McLeod* case, although the Court of Appeal thought the

plaintiffs might be stretching the available jurisprudence, it was not plain and obvious that the claims against CEO and the Vice-president finance should be dismissed.

[193] I think the legal situation of Messrs. Delaney and Puppi in the case at bar is similar to the situation of the individual defendants in *Green and Bell supra* and, I would adopt Justice Strathy's analysis and his conclusion that it is not plain and obvious that the claim against the individual defendants is untenable. Therefore, I conclude that a reasonable cause of action has been pleaded against Messrs. Delaney and Puppi.

N. CONCLUSION

[194] With an exception for the Plaintiffs' pleading of negligent misrepresentation, for which I strike the negligent misrepresentation claim with leave to amend, the Defendants' Rule 21 motion should be dismissed. An amended pleading should include the particulars of each Plaintiff's reasonable reliance on the alleged misrepresentations.

[195] In any event, having regard to the concessions made during the argument of the motion, the Plaintiffs should deliver an Amended Fresh as Amended Statement of Claim.

[196] I further hold that the Plaintiffs' consolidated action satisfies the s. 5(1)(a) criterion for certification as a class proceeding.

[197] I defer the matter of costs to the leave motion and the balance of the certification motion.

Perell, J.

Released: October 15, 2012

CITATION : Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc., 2012 ONSC *

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

TRUSTEES OF THE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO PENSION TRUST FUND

Plaintiff

- and -

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

Defendants

REASONS FOR DECISION

Perell, J.

Released: October 15, 2012.