**CITATION:** Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc., 2016 ONSC 3235
**COURT FILE NO.:** 11-CV-424069CP
**DATE:** 20160524

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | ) | |
| TRUSTEES OF THE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO PENSION TRUST FUND<br>Plaintiff | ) | *Kirk M. Baert*, *Celeste Poltak*, and *Garth Myers*, for the Plaintiff |
| **– and –** | ) | |
| CELESTICA INC., STEPHEN W. DELANEY and ANTHONY P. PUPPI<br>Defendants | ) | *Andrea Laing*, *Ryan A. Morris*, and *Kiran Patel*, for the Defendants |
| | ) | **HEARD**: April 14, 2016 |

Proceeding under the *Class Proceedings Act, 1992*

**PERELL, J.**

## REASONS FOR DECISION

[1] In this hyper-litigated proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, the Defendants, Celestica Inc., Stephen W. Delaney, and Anthony P. Puppi, seek to quash a motion by the Trustees of the Millwright Regional Council of Ontario Pension Trust Fund (the "Millwrights"). The Millwrights, the last remaining Plaintiff, seek certification of a common law misrepresentation claim, and the Defendants seek to quash the Millwrights' motion on the three alternative and somewhat overlapping grounds that: (1) the court is *functus officio*; (2) the Millwrights' motion is *res judicata*; or (3) the Millwrights' motion is an abuse of process.

[2] For the reasons that follow, I do quash the Millwrights' certification motion, but I do so without prejudice to the Millwrights moving pursuant to s. 7 of the *Class Proceedings Act, 1992*, to continue their proposed class action with the joinder as co-plaintiffs of those Class Members who opt-into the Millwrights' action after a notice program to be approved by the court.

[3] By way of an overview of my reasoning, the Millwrights' argument to resist the motion to quash is that there is a major issue that has never been litigated. More precisely, the Millwrights submit that although there has been a determination in the case at bar that a common law misrepresentation claim does not satisfy the preferable procedure criterion of s. 5 of the *Class Proceedings Act, 1992*, when there is a statutory misrepresentation claim under Part XXIII.1 of the Ontario *Securities Act,* R.S.O. 1990, c. S.5, there has never been a determination

of whether a common law misrepresentation claim would satisfy the preferable procedure criterion if the statutory claim was statute-barred and where the only access to justice route for Class Members is by a common law misrepresentation claim.

[4] Thus, the Millwrights argue that since the preferability of a stand-alone common law misrepresentation claim has never been determined and since the other criteria for certification are satisfied for such a claim and since it is not the case that the court is *functus* under the *Class Proceedings Act, 1992*, there is no *res judicata* and no abuse of process in determining that the common law claim should be certified as a class action and a certification motion should be scheduled.

[5] However, as I shall explain below, the fundamental premise of the Millwrights' argument is incorrect. There has been a determination that a stand-alone common law misrepresentation claim does not satisfy the test for certification as a class proceeding. Thus, another certification motion should be barred as *res judicata* - technically an issue estoppel - or as an abuse of process. In the circumstances of the case at bar, it has already been determined that a stand-alone common law misrepresentation claim should not be certified.

[6] I do agree, however, with the Millwrights that the court is not *functus* to deal with the action. The court must still address s. 7 of the *Class Proceedings Act, 1992* and determine how the Millwrights' still outstanding action should be prosecuted. In this regard, it has been determined that preferable to a class action for common law misrepresentation would be joinder of claims by those Class Members whose losses were substantial enough to make it worthwhile to have a joinder action about the Defendants alleged misrepresentations with individual proofs to establish reliance and the quantification of damages for each co-plaintiff, Class Member.

[7] Section 7 of the *Class Proceedings Act, 1992*, is set out below. Also set out below are sections 10, 12, 19, and 20, which are relevant to the court's jurisdiction to managing the future of the Millwrights' action. These sections state:

> *Refusal to certify: proceeding may continue in altered form*
>
> 7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,
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> (a) order the addition, deletion or substitution of parties;
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> (b) order the amendment of the pleadings or notice of application; and
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> (c) make any further order that it considers appropriate.
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> ....
>
> *Where it appears conditions for certification not satisfied*
>
> 10. (1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect

to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.

....

*Court may determine conduct of proceeding*

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

....

*Notice to protect interests of affected persons*

19. (1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding. 1992, c. 6, s. 19 (1).

*Idem*

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

*Approval of notice by the court*

20. A notice under section 17, 18 or 19 shall be approved by the court before it is given.

[8] Underlying my conclusions that certification for an opt-out class action is barred; i.e. "off" but an opt-in joinder action is possibly "on" is a complicated history in what I have already described as a hyper-litigated proceeding. The history begins on March 2, 2007, in the United States, where the Millwrights commenced a class action against the Defendants. The action concerned alleged misrepresentations in Celestica's corporate filings that affected the trading in its securities in the stock market.

[9] While proceedings got underway in the United States, meanwhile, in Canada, on July 30, 2007, Huacheng Xing brought a proposed misrepresentation class action against the Defendants by Notice of Action issued in London, Ontario (Court File No. 54938CP). Mr. Xing filed a Statement of Claim on August 20, 2007. And, on August 27, 2008, Nabil Berzi brought a proposed misrepresentation class action by Statement of Claim issued in Toronto, Ontario (Court File No. 08-CV-361468-CP). And, on April 8, 2011, the Millwrights brought a proposed misrepresentation class action by Statement of Claim issued in Toronto (Court File No. 11-CV-424069CP). The Millwrights sought to represent those who purchased Celestica shares between January 27, 2005 and January 30, 2007.

[10] In the eventually consolidated actions, the Millwrights pleaded that during the proposed

class period, they purchased 49,000 Celestica shares and sold 6,300 of them, leaving them with 42,700 shares at an acquisition cost of $515,230.61. The Millwrights advanced a common law misrepresentation claim and also a statutory misrepresentation claim under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5.

[11] From July 2007 to April 2011, very little was done to advance the Canadian proposed class actions while attention was focused on the class action in the United States.

[12] In 2012, certain events compelled the Millwrights to pay attention to their action in Ontario. In 2012, as a result of the Court of Appeal's decision in in *Sharma v. Timminco Limited*, 2012 ONCA 107, reversing 2011 ONSC 8024, leave to appeal to the S.C.C. refused, [2012] S.C.C.A. No. 157, the Defendants indicated that they would move to have the Millwrights' statutory actions under Part XXIII.1 of the Ontario *Securities Act* against Celestica struck out as statute-barred. More precisely, on February 16, 2012, the Court of Appeal released its reasons in *Sharma v. Timminco Limited, supra,* where the Court held that s. 28 of the *Class Proceedings Act, 1992,* which normally 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 actually been granted to assert an action.

[13] Until the decision in *Sharma v. Timminco*, the parties to the case at bar were not aware that the running of the limitation period for the statutory misrepresentation claim was not suspended by the *Class Proceedings Act, 1992*.

[14] Animated by the Court of Appeal's decision in *Sharma v. Timminco* decision and the U.S. Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), which 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,* on February 24, 2012, 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 Part XXIII.1 of the Ontario *Securities Act* or under the analogous provisions in other provinces.

[15] On April 13, 2012, I ordered Mr. Xing's, Mr. Berzi's, and the Millwrights' actions consolidated without prejudice to the Defendants' limitation period arguments. On May 14, 2012, the Plaintiffs delivered a Fresh as Amended Statement of Claim. On June 22, 2012, the Defendants delivered their Statement of Defence. On July 3, 2012, the Plaintiffs delivered their Reply.

[16] In October 2012, relying on the limitation period defence and the Court of Appeal's decision in *Sharma v. Timminco, supra,* the Defendants brought a motion to dismiss the Plaintiffs' statutory claims under the Ontario *Securities Act*.

[17] However, by order dated October 15, 2012, in *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2012 ONSC 6083, although I found that the Plaintiffs' claim was technically statute-barred, I, nevertheless, dismissed the Defendants' motion holding that the court had the jurisdiction to apply the special circumstances doctrine, and with this jurisdiction, the court could make an order *nunc pro tunc* ("then as now")

making the Millwrights' action timely if leave were eventually granted under the Ontario *Securities Act*.

[18] I also granted the Plaintiffs leave to amend their Statement of Claim to plead reliance as an element of their common law negligent misrepresentation claim, and I decided that the Plaintiffs had satisfied the cause of action criterion for certification as a class action. The balance of the certification motion and the leave motion remained to be scheduled.

[19] The Defendants appealed my October 2012 decision to the Court of Appeal, and it was argued in the Court of Appeal in May 2013, along with the appeals in two other class actions where there was an issue about whether an Ontario *Securities Act* claim was statute-barred. Those cases were *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 and *Silver v. IMAX Corporation*, 2012 ONSC 4881. The Court of Appeal, which sat in a panel of five judges, reserved judgment on this trilogy of cases.

[20] While the Court of Appeal's decision was under reserve, at a May 21, 2013 case conference, the Defendants sought to adjourn the leave and certification motion pending the release of the Court of Appeal decision. The Plaintiffs, however, insisted on proceeding.

[21] As part of seeking certification and leave, the Plaintiffs proposed a Second Fresh as Amended Statement of Claim that was similar to the October 2012 pleading but that addressed the reliance issue of the common law negligence claim.

[22] The leave and certification motions were argued on December 8-10, 2013. The Millwrights sought: (a) certification of the action as a class proceeding pursuant to the *Class Proceedings Act, 1992*; and (b) leave to proceed with statutory claims for misrepresentation and failure to make timely disclosure under the Ontario *Securities Act*.

[23] The Plaintiffs sought to advance claims under Part XXIII.1 of the Ontario *Securities Act* and for negligent misrepresentation at common law. They alleged that between January 2005 to the end of January 2007, Celestica, its Chief Executive Officer, Stephen W. Delaney, and its Chief Financial Officer, Anthony P. Puppi, misrepresented the progress of a restructuring that would close plants and transfer much of Celestica's operations to its plants in lower-cost regions. The Plaintiffs also alleged that the Defendants' announcements and financial statements misrepresented its inventory and its revenue.

[24] I reserved judgment, which I held off releasing pending the Court of Appeal's decision about whether the Millwrights' statute-barred statutory misrepresentation claim under Part XXIII.1 of the Ontario *Securities Act* was saved by a *nunc pro tunc* order and the special circumstances doctrine.

[25] On February 3, 2014, the Court of Appeal released its decision in the appeal of my October 2012 decision along with its judgments in the two companion appeals. See *Green v. CIBC*, 2014 ONCA 90 (the "Trilogy"). The Court of Appeal overturned its decision in *Sharma v. Timminco*, *supra,* which meant that the statutory claim was not statue-barred.

[26] Thus, the Court of Appeal dismissed the Defendants' appeal of the October 2012 decision without actually opining about whether I was correct in my potential application of the special

circumstances doctrine. Rather, the Court held that the Millwrights' action was timely, and that it was not necessary to rely on the special circumstances doctrine and an order *nunc pro tunc*.

[27] In an important point, the significance of which to the class action against Celestica will become apparent in the discussion below, it should be noted and kept in mind that within the Trilogy, the *Green v. CIBC* appeal raised some additional issues that were not part of the appeal in *Silver v. Imax* and the Millwright's appeal; namely: the Court of Appeal addressed Mr. Green's common law misrepresentation claim and held that issues of reliance and damages were not suitable for certification; but other issues in common law misrepresentation claims may be certified as a class action alongside the statutory claim under the Ontario *Securities Act*. The intersection of common law and statutory misrepresentation claims was not raised in *Silver v. IMAX* or in the Millwrights' appeal, both of which appeals focussed on the *Sharma v. Timminco* issue about the operation of s. 28 of the *Class Proceedings Act, 1992*. For present purposes, the important point is that the Court of Appeal accepted that for the purposes of certification as a class action, a statutory misrepresentation claims and also a common law misrepresentation claims could be certified together.

[28] On February 19, 2014, after the Court of Appeal's decision in the Trilogy, I released my decision on the leave and certification motion. See *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2014 ONSC 1057. My decision was not appealed, and it is a final order.

[29] I concluded that leave should be granted to the Millwrights under Part XXIII.1 of the Ontario *Securities Act* and that the Millwrights' statutory claims should be certified as a class proceeding under the *Class Proceedings Act, 1992*. (I concluded, however, that leave should not be granted with respect to the alleged misrepresentations about Celestica's inventory and reporting of revenue and with respect to non-compliance with GAAP.)

[30] For present purposes what is important to note is that I also concluded that the Millwrights' common law negligent misrepresentation claim should <u>not</u> be certified.

[31] Thus, I certified one statutory misrepresentation claim under Part XXIII.1 of the Ontario *Securities Act*, but I did not certify the companion common law misrepresentation claim. In this regard, the following paragraphs from my Reasons for Decision are pertinent (with emphasis added):

> 156. As noted above, in October 2012, as a part of deciding the Defendants' motion to have the Plaintiffs' action dismissed, I granted the Plaintiffs leave to amend their Statement of Claim to plead reliance as an element of their common law negligent misrepresentation claim, and I decided that the Plaintiffs had satisfied the cause of action criterion for certification.
>
> 157. I have now decided that leave should be granted to advance the statutory misrepresentation claim with respect to the 2005 restructuring.
>
> 158. The cause of action criterion is, therefore, satisfied.
>
> ....

169. In my opinion, the identifiable class criterion is satisfied.

....

172. In light of my conclusions that only the statutory misrepresentation claim about the 2005 restructuring should be certified, the proposed common issues must be revised to remove statutory misrepresentation issues that will not be certified.

....

174. In the next part of these reasons, I conclude that the common law misrepresentation action does not satisfy the preferential procedure for a class action. It follows that the common issues associated with the common law negligence claim should also be removed from the list of certifiable common issues.

175. With the necessary deletions, I am satisfied that the following revised list of common issues satisfies the common issues criterion.

(a) Did the Defendants' statements during the Class Period about restructuring its operations constitute misrepresentations within the meaning of the *OSA*?

....

176. Because there may be an appeal, I note that had I been satisfied that the common law negligence claim satisfied the preferable procedure criterion, I would not have certified the following questions from the original list because, in my opinion, these questions do not satisfy the commonality criteria but rather are individual issues:

(g) If the answer to (f) is yes, can each class member's reliance be inferred from the fact of the class member having acquired Celestica shares in an efficient market?

(h) Can the amount of damages for negligent misrepresentation ... be determined on an aggregate basis? If so, in what amount and who should pay it to the class?

...

181. The Defendants submitted that if leave were granted for the statutory claims, then certifying parallel common law claims would be unmanageable and would undermine the purpose of Part XXIII.1 of the Ontario *Securities Act* by impeding the efficient resolution of the statutory claims. Therefore, the Defendants submit that the common law misrepresentation claim does not satisfy the preferable procedure criterion.

182. I agree with the Defendants' argument. And, I agree with the Defendants' second argument that leads to the conclusion that the common law misrepresentation claim does not satisfy the preferable procedure criterion.

183. The Defendants argue, and I agree, that where there is a statutory misrepresentation claim and also a common law misrepresentation claim for the same misrepresentation, the statutory claim is the preferable way to resolve the Class Members' claims; indeed, the statutory claim was introduced precisely to overcome the difficulties of a class action for negligent misrepresentation with respect to the distribution of debt and equity instruments in the primary and secondary market for securities.

184. Part XXIII.1 of the Ontario *Securities Act* was designed to be the preferable procedure for misrepresentation claims in the marketplace for shares.

185. A common law misrepresentation class action with respect to the sale of securities, unless it settles, may lead to economically unfeasible or non-viable individual issues trials where the Class Members are confronted with the enormous difficulty of proving reliance, (the surrogate of causation) and damages.

186. In the immediate case, the Plaintiffs' Litigation Plan does not adequately address how the individual issues are to be determined or what effect they will have on the resolution of the statutory claims. The proposed plan does not address who will represent the individual Class Members and who would cover the cost of that representation or other costs associated with the individual trials.

187. While the resolution of the common issue of whether the Defendants made a misrepresentation would undoubtedly be productive for Class Members with a parallel common law negligent misrepresentation claim, it is doubtful that many would be motivated, willing, or able to perfect their common law claims at an individual issues trial especially when Class Counsel may no longer be acting on their behalf.

188. Significantly and ironically, in the case at bar, a common law negligent misrepresentation class action would be preferable only for those persons with significant enough claims that it would be worthwhile for them to opt out of the statutory misrepresentation class action.

189. My conclusion is that in the circumstances of the case at bar, the common law misrepresentation claim does not satisfy the preferable procedure criterion.

190. The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

....

194. In my opinion, the Representative Plaintiff criterion is satisfied for the claims that have been certified.

....

> 196. For the above reasons, I grant the Plaintiffs' motion with respect to the statutory claim for alleged misrepresentations about the 2005 restructuring.

[32] Not mentioned in these excerpts from my Reasons for Decision are several proposed common issues that I did not include in the questions that I certified. Those questions had been eliminated from the list because I had decided not to certify one of the statutory misrepresentation claims and the common law misrepresentation claim. It may be inferred, however, from paragraph 176 of my decision that I would have found these not-mentioned questions to have satisfied the common issues criterion. The not-mentioned questions insofar as they related to the common law claim were as follows:

> (e) If the answer to (a) is yes, did the Defendants owe a duty of care to the class members?
>
> (f) If the answer to (e) is yes, did the Defendants act negligently in making the misrepresentations?

[33] But it may be taken from paragraphs 187 to 189 of my decision, that I concluded that notwithstanding that all of the other criteria for certification were satisfied, in the circumstances of this case, the common law misrepresentation claim did not satisfy the preferable procedure criterion and, therefore, the common law misrepresentation claim should not be certified.

[34] After my decision on the leave and certification motion, the Defendants in the immediate case and the Defendants in *Green v. Canadian Imperial Bank of Commerce* and *Silver v. IMAX* sought and in August 2014, were granted leave to appeal to the Supreme Court of Canada, and on February 9, 2015, the Supreme Court heard the appeals in the Trilogy, and it reserved judgment. On December 4, 2015, the Supreme Court released its judgment, reported as *CIBC v. Green,* 2015 SCC 60. The Supreme Court, among other things, restored the original ruling from *Sharma v. Timminco, supra*

[35] To regroup, with the release of the Supreme Court of Canada's decision, the situation for the Millwrights was that it was theoretically possible to have a class action with a statutory claim and/or a common law misrepresentation claim, but the Millwrights' statutory claim was statute-barred and its common law claim did not satisfy the preferable procedure criterion for certification as a class action. As the emphasized passages above indicate, it had already been determined that with a statutory claim under the Ontario *Securities Act* (the Defendants' first argument) or without a statutory claim (the Defendants' second argument), the common law misrepresentation claim did not satisfy the preferable procedure criterion.

[36] Thus, in my opinion, it is now a matter of issue estoppel or it would be an abuse of process to re-litigate whether the common law misrepresentation claim is certifiable as a class action.

[37] *Res judicata*, issue estoppel, and abuse of process, which are related and partially overlapping legal doctrines, are bars to litigation that preclude a party from re-litigating a claim, a defence, or an issue that has already been determined. Cause of action estoppel, which is a branch of *res judicata*, precludes a litigant from asserting a claim or a defence that: (a) it asserted; or (b) had an opportunity of asserting and should have asserted in past proceedings,

which is the rule from *Henderson v. Henderson* (1843), 67 E.R. 313, 3 Hare 100. Issue estoppel, another branch of *res judicata*, precludes a litigant from asserting a position that is inconsistent or contrary to a fundamental point already decided in a proceeding in which the litigant participated. The requirements for an issue estoppel are: (1) the parties must be the same; (2) the same question must be involved in the initial and subsequent hearing; (3) the question must have been actually litigated and determined in the first hearing and its determination must have been necessary to the result; and (4) the decision on the issue must have been final: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44. Abuse of process is a doctrine that a court may use to preclude re-litigation. The court has an inherent jurisdiction to prevent the misuse of its process that would be manifestly unfair to a party to the litigation or would in some other way bring the administration of justice into disrepute, and the court can and has used this jurisdiction to preclude re-litigation when the strict requirements of *res judicata* are not satisfied: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.) at paras. 55-56, *per* Goudge J.A., dissenting, approved [2002] 3 S.C.R. 307.

[38] The doctrine of abuse of process is a flexible doctrine whose aim is to protect litigants from abusive, vexatious or frivolous proceedings or otherwise prevent a miscarriage of justice, and its application will depend on the circumstances, facts and context of a given case: *Hanna v. Abbott* (2006), 82 O.R. (3d) 215 (C.A.) at paras. 29-32. The doctrine of abuse of process precludes re-litigation in circumstances where the strict requirements of *res judicata* are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality, and the integrity of the administration of justice.

[39] An interlocutory motion in the same proceeding can raise an issue estoppel or abuse of process bar for later in that proceeding or other proceedings: *Ward v. Dana G. Colson Management Ltd.*, [1994] O.J. No. 5339 (Div. Ct.), at para. 12; aff'd [1994] O.J. No. 2792 (C.A.).

[40] In my opinion, in the case at bar, the elements for an issue estoppel or the elements to invoke the abuse of process doctrine are satisfied and additionally no purpose would be served by re-arguing whether the common law misrepresentation claim could and should be certified as a class action.

[41] The Millwrights submit that there is an unanswered question that it is in the interests of justice to have answered. The unanswered question is: where there are no statutory claims and, therefore, no viable litigation alternative for claims already deemed to have a reasonable possibility of success, is a class proceeding now the preferable procedure for the Class Members' common law claims?

[42] There are three problems with the Millwrights' submission. First, the Millwrights' so called unasked question was in fact asked at the original certification motion because it was integral and fundamental to the question that was asked. In *Danyluk v. Ainsworth Technologies Inc.*, *supra*, Justice Binnie stated at para. 54 for the Court that issue estoppel applies "to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that issue in the prior proceeding." Upon analysis, the scope of an issue estoppel is a matter of determining what issue or question was argued. In other words, the scope of what was the question addressed in the first litigation is a semantic problem of determining the meaning of

the question that was being litigated. See *Pennyfeather v. Timminco Limited*, 2016 ONSC 3124 at paras. 60-78.

[43] In *Gough v. Newfoundland and Labrador*, 2006 NLCA 3, leave to appeal to the Supreme Court of Canada refused, [2006] S.C.C.A. No. 71, the Court of Appeal of Newfoundland and Labrador considered an adverse possession claim that was being litigated a second time and the Court resorted to the abuse of process doctrine and infused it with notions of the *Henderson v. Henderson* principle to bar the re-litigation. The Court adopted the analysis of Donald Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2002) at pages 348 and 361, where the author states:

> The policy supporting abuse of process by re-litigation is the same as the essential policy grounds of issue estoppel and cause of action estoppel. The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by re-litigation. Other policy grounds have also been cited namely, to preserve the courts' and litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.
>
> ....
>
> Abuse of process by re-litigation applies to proceedings which would normally be governed by cause of action estoppel and to proceedings which do not meet the technicalities of that doctrine. As with cause of action estoppel, abuse of process by relitigation has sometimes been described as a rule against litigation by instalment, or the rule in *Henderson* [(1843), 3 Hare 100]. To breach the rule in *Henderson*, even though the parties are not the same, is an abuse of process. In applying abuse of process by re-litigation, the courts have taken a stern view of raising in new proceedings issues that ought reasonably to have been raised in earlier proceedings. A party is not entitled to re-litigate a case because counsel failed to raise an argument which the party wanted to raise or re-litigate an issue indirectly by "a cleverly camouflaged effort".

[44] Not to put too fine a point of it, a litigant cannot avoid an issue estoppel by atomizing the legal question before the court to find some unexamined atom. If I was wrong in deciding that standing alone the common law misrepresentation did not satisfy the preferable procedure test, the route was to appeal my decision not re-litigation of whether the common law claim standing alone is certifiable.

[45] Second, as the emphasized portion of the Reasons for Decision reveal, the question posed by the Millwrights was, in fact, answered by me at the original certification motion, at least in the sense that I considered whether the common law claims standing alone satisfied the preferable procedure criterion.

[46] It is not the case that a common law misrepresentation claim gets a free pass to certification because there is no viable statutory claim under the *Securities Act*. The certification

of the common law misrepresentation claim may or may not be preferable if there is a statutory claim, but it does not follow that it becomes preferable because there is no statutory claim. Each claim must pass the scrutiny of the certification criterion.

[47] Third, it is not the case that there is no viable litigation alternative for claims already deemed to have a reasonable possibility of success. The Millwrights have a misrepresentation claim worth perhaps hundreds of thousands of dollars and there undoubtedly are some other Class Members who have significant claims that would make it worthwhile to invest "in a misrepresentation claim with a reasonable possibility of success."

[48] A class action is not the exclusive route for mass claims, and a statutory claim under Part XXIII.1 of the Ontario *Securities Act* is not the only route to access to justice. In this last regard, it is worth noting that the limitation period under the *Act* is an absolute limitation period without any discoverability component, and thus the circumstances in the case at bar where there is no statutory claim could arise in other ways. The point is that investors confronted with the problem of proving reliance and damages individually may be well-served by joining together without having the common issue of misrepresentation certified as a class action. The issue of misrepresentation can be the subject matter of a joinder of claims followed by individual issues. That appears to be a possible situation for the case at bar.

[49] There is one last point to consider about issue estoppel and abuse of process. In *Danyluk v. Ainsworth Technologies Inc.*, *supra,* and in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19; the Supreme Court added a discretionary element to *res judicata,* issue estoppel, and the flexible doctrine of abuse of process. The Supreme Court held that where a party establishes the pre-conditions for an issue estoppel, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied, and the court should stand back and, taking into account the entirety of the circumstances, the court should consider whether an estoppel in the particular case would work an injustice. See also: *Amtim Capital Inc. v. Appliance Recycling Centres of America*, 2014 ONCA 62 and *Hanna v. Abbott*, *supra* at paras. 29-32.

[50] I see no injustice in precluding the Millwrights from re-litigating whether their common law misrepresentation claim should be certified under the *Class Proceedings Act, 1992*. They have had their day in court and they can continue to advance their individual claim.

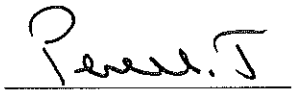
[51] Class Members with claims that they wish to litigate can join company in a common cause. Smaller claimants would not be excluded but they would need to understand that they would be exposed to costs and the expenditure of proving their individual claims.

[52] In my opinion, the next step in this proceeding should be a motion under sections 7, 10, 12, 19, and 20 of the *Class Proceedings Act, 1992.* Here, it should be recalled that section 7 provides that where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue and, for that purpose, the court may order the addition, deletion, or substitution of parties.

[53] For the above reasons, I grant the Defendants' motion but on terms that the Millwrights may, if so advised, bring a motion under s. 7, etc. of the *Class Proceedings Act, 1992.*

[54] If the parties cannot agree about the matter of costs, they may make submissions in

writing beginning with the Defendants' submissions within 20 days from the release of these Reasons for Decision followed by the Millwrights' submissions within a further 20 days.



Perell, J.

Released: May 24, 2016

**CITATION:** Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc., 2016 ONSC 3235
**COURT FILE NO.:** 11-CV-424069CP
**DATE:** 20160524

**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

Proceedings under the *Class Proceedings Act, 1992*

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**REASONS FOR DECISION**

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Perell, J.

Released: May 24, 2016