CITATION: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2012 ONSC 1924
COURT FILE NO. 11-CV-431153CP
DATE: 20120326

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjuunde Ap-Fonden, David Grant and Robert Wong

Plaintiffs

- and -

Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (formerly known as BDO McCabe Lo Limited), Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Pöyry (Beijing) Consulting Company Limited, Credit Suisse Securities (Canada), Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada, Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Banc of America Securities LLC

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

- Kirk M. Baert and Michael Robb for the Plaintiffs
- Michael Eizenga for Sino-Forest Corporation, Simon Murray, Edmund Mak, W. Judson Martin, Kai Kit Poon and Peter Wang
- Emily Cole and Megan Mackey for Allan T.Y. Chan
- Peter Wardle and Simon Bieber for David J. Horsley
- Laura Fric and Geoffrey Grove for William E. Ardell, James P. Bowland, James M.E. Hyde and Garry J. West
- John Fabello and Andrew Gray for Credit Suisse Securities (Canada) Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Banc of America Securities LLC
- Peter H. Griffin and Shara Roy for Ernst & Young LLP
- Kenneth Dekker and Michelle Booth for BDO Limited

- John Pirie and David Gadsden for Pöyry (Beijing) Consulting Company Limited

HEARING DATES: March 22, 2012

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] A motion for an order requiring a defendant to deliver a statement of defence or for an order setting a timetable for a motion should not be a momentous matter. But scheduling is a very big deal in this very big case under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[2] The Defendants strenuously resist delivering a statement of defence before the certification motion, and they submit that it would both contrary to law and a denial of due process to require them to plead in the normal course of an action.

[3] The Defendants submit that having to plead their statement of defence is contrary to law because the Plaintiffs' statement of claim can be commenced only with leave pursuant to s. 138.8 of the *Securities Act*, R.S.O. 1990, c. S.5 and in *Sharma v. Timminco*, 2012 ONCA 107, the Court of Appeal ruled that the statement of claim does not exist until leave is granted. The Defendants submit that having to plead their statement of defence is a denial of due process because the Plaintiffs' statement of claim includes causes of action that might not survive a challenge under Rule 21 of the *Rules of Civil Procedure*. One of the Defendants, BDO Limited, also argues that claims against it are statute-barred, and, therefore, it should not be required to deliver a statement of defence but should be permitted to bring a Rule 21 motion before the certification hearing.

[4] The position of the Defendants is set out in paragraph 2 of the Defendant Sino-Forest Corporation's factum as follows:

> 2. The Responding Parties oppose the relief relating to the delivery of a statement of defence because, as a result of the Ontario Court of Appeal's decision in *Sharma v. Timminco*, the secondary market action has yet to be commenced and will not have been commenced unless and until leave has been granted by this Honourable Court. Accordingly, the Defendants cannot be required to deliver a statement of defence to a proceeding that has yet to be commenced. Moreover, the secondary market claims are intertwined with the balance of the allegations in the statement of claim, such that it would not be realistic to provide a partial or bifurcated defence. In addition, the Responding Parties expect to be bringing a motion to strike the Statement of claim, at least in respect of the portion of the claim that purports to be brought on behalf of Noteholders, who are prohibited from commencing such a claim by virtue of the no suits by holder clause.

[5] In response, the Plaintiffs submit that just as defendants are entitled to know the case they must meet, plaintiffs are entitled to know the defence they confront. The Plaintiffs submit that the law and the dictates of due process do not preclude ordering

the delivery of a statement of defence in accordance with the *Rules of Civil Procedure*, and the Plaintiffs' rely on the court's power under s. 12 of the *Class Proceedings Act, 1992* and on what I said in *Pennyfeather v. Timminco*, 2011 ONSC 4257 about the desirability of the pleadings being closed before the certification motion.

[6] In the immediate case, the Defendants also strenuously resist the Plaintiffs' request that the leave motion under s. 138.8 the *Securities Act* and the certification motion under the *Class Proceedings Act, 1992* be heard together. Instead of a combined leave and certification motion, the Defendants submit that a series of motions be scheduled, beginning with the leave motion, followed by Rule 21 motions, followed by the certification motion. Some Defendants would begin with the Rule 21 motions before the leave motion, but all wish a sequence of separate motions.

[7] The Defendants submit that a combined leave and certification motion would be both inappropriate and also unfair, and particularly so, if they are also required to plead their defences. The Defendants submit that fairness dictates that leave be determined in advance of certification, and that their right to attack all or part of whatever pleading emerges from the leave motion be preserved. They submit that it would be inefficient to deliver a statement of defence when the statement of claim is likely to be amended in a substantial manner depending on the outcome of the Plaintiffs' leave motion and the Rule 21 motions.

[8] The Plaintiffs regard the Defendants' proposal of a sequence of motions as something akin to having their action being sentenced to a life of imprisonment on Devil's Island.

[9] For the reasons that follow, I adjourn the motion as it concerns BDO Limited, and I order that there shall be a combined leave and certification motion on November 21-30, 2012 (10 days).

[10] I order that the "Proposed Fresh as Amended Statement of Claim" be the statement of claim for the purposes of the leave and certification motion and that this pleading shall not be amended without leave of the court. Further, I order that with the exception of the Plaintiffs' funding motion, there shall be no other motions before the leave and certification motion without leave of the court first being obtained.

[11] I do not agree that it would be contrary to law or a denial of due process to order the pre-certification delivery of a statement of defence; nevertheless, I shall not order all the Defendants to deliver their statements of defence before the combined leave and certification.

[12] Rather, I shall order that a statement of defence be delivered by any Defendant that delivers an affidavit pursuant to s. 138.8 (2) of the *Securities Act*. I order that any other Defendant may, if so advised, deliver a statement of defence. Further, I order that if a Defendant delivers a statement of defence, then the delivery of the statement of defence is not a fresh step and the Defendant is not precluded from bringing a Rule 21 motion at the leave and certification motion or from contesting that the Plaintiffs have shown a cause of action under s. 5 (1)(a) of the *Class Proceedings Act, 1992*.

[13] In my reasons, I will explain why it may be advantageous to a defendant to deliver a statement of defence although it may not be obliged to do so.

[14] Finally, in my reasons, I will establish a timetable for the funding motion and for the leave and certification motion, which timetable may be adjusted, if necessary, by directions made at a case conference.

B. FACTUAL AND PROCEDURAL BACKGROUND

[15] Sino-Forest is a Canadian public company whose shares formerly traded on the Toronto Stock Exchange. At the moment, trading is suspended because on June 2, 2011, Muddy Waters Research released a research report alleging fraud by Sino-Forest. The release of the report had a catastrophic effect on Sino-Forest's share price.

[16] On June 20, 2011, The Trustees of the Labourers' Pension Fund of Central and Eastern Canada ("Labourers") retained Koskie Minsky LLP to sue Sino-Forest. Koskie Minsky issued a notice of action in a proposed class action with Labourers as the proposed representative plaintiff.

[17] The June action, however, was not pursued, and in July 2011, Labourers and another pension fund, the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario ("Engineers") retained Koskie Minsky and Siskinds LLP to commence a new action, which followed on July 20, 2011, by notice of action. The statement of claim in *Labourers v. Sino-Forest*, which is the action now before the court, was served in August, 2011.

[18] On November 4, 2011, Labourers served the Defendants in *Labourers v. Sino-Forest* with the notice of motion for an order granting leave to assert the causes of action under Part XXIII.1 of the *Ontario Securities Act.*

[19] At this time, there were rival class actions. Douglas Smith had retained Rochon Genova, LLP. Rochon Genova issued a notice of action on June 8, 2011. The statement of claim in *Smith v. Sino-Forest* followed on July 8, 2011. Northwest & Ethical Investments L.P. and Comité Syndical National de Retraite Bâtirente Inc. retained Kim Orr Barristers P.C., and on September 26, 2011, Kim Orr commenced *Northwest v. Sino-Forest.*

[20] On December 20 and 21, 2011, there was a carriage motion, and on January 6, 2012, I released my judgment awarding carriage to Class Counsel in *Labourers v. Sino-Forest*. I granted leave to the Plaintiffs to deliver a Fresh as Amended Statement of Claim, which may include the joinder of the plaintiffs and the causes of action set out in *Grant v. Sino-Forest*, *Smith v. Sino-Forest*, and *Northwest v. Sino-Forest*, as the Plaintiffs may be advised.

[21] On January 26, 2012, the plaintiffs delivered an Amended Statement of Claim.

[22] On March 2, 2012, the Plaintiffs initiated a motion seeking leave to assert causes of action pursuant to ss. 138.3 and 138.8 under Part XXIII.1 of the *Securities Act*

[23] Plaintiffs' motion materials included a draft Fresh as Amended Statement of Claim for the eventuality that leave is granted ("Proposed Fresh as Amended Statement

of Claim"). The Proposed Fresh as Amended Statement of Claim substantially amends and extends the allegations contained in the pleading delivered in January 2012.

[24] In their various pleadings, the Plaintiffs allege that Sino-Forest and the other Defendants made misrepresentations in the primary and secondary markets. The Plaintiffs claims include: $0.8 billion for primary market claims; $1.8 billion (U.S.) for noteholders; and $6.5 billion for secondary market claims. There are also claims against some of the Defendants for a corporate oppression remedy, negligence, negligent misrepresentation, conspiracy, and unjust enrichment. The following chart describes the claims against each Defendant:

	S.A. s. 130 (prospectus)	S.A. s. 130.1 (offering memorandum)	S.A. s. 138.3 (secondary market)	Negligent misrepresentation (secondary market)	Negligent misrepresentation (prospectus / o-memo)	Negligence (prospectus, offering memorandum)	Unjust Enrichment	CBCA Oppression	Conspiracy
Sino Forest	X	X	X	X	X	X	X	X	X
Chan	X		X	X	X	X	X	X	X
Horsley	X		X	X	X	X	X	X	X
Poon	X		X	X	X	X	X	X	X
Wang	X		X	X	X	X		X	
Martin	X		X	X	X	X	X	X	
Mak	X		X		X	X	X	X	
Murray	X		X	X	X	X	X	X	
Hyde	X		X	X	X	X		X	
Ardell			X	X				X	
Bowland			X	X				X	
West			X	X				X	
Ernst & Young	X		X	X	X	X			
BDO Ltd.	X		X	X	X	X			
Böyry (Beijing)	X		X			X			
Credit Suisse	X				X	X	X		
TD Securities	X				X	X	X		
Dundee Securities	X				X	X	X		
RBC Dominion	X				X	X	X		
Scotia Capital	X				X	X	X		
CIBC World	X				X	X	X		
Merrill Lynch	X				X	X	X		
Canaccord	X				X	X	X		
Maison	X				X	X	X		
Credit Suisse (USA)						X	X		
Banc of America						X	X		

[25] On March 6, 2012, there was a case conference, and I scheduled 10 days of hearings from November 21 to November 30, 2012. Apart from deciding that the leave motion must be heard, I did not decide what would be the subject matter of those hearing dates.

[26] None of the Defendants has served a statement of defence. None has advised which, if any, statutory or common law defences they will advance in response to the Plaintiffs' claims. In this regard, it may be noted that the Plaintiffs advance claims under s. 130 of the *Securities Act* with respect to misrepresentations in the primary market.

These claims raises at least eight possible statutory defences, which are set out in subsections 130(3), (4) and (5) of the *Securities Act*. If leave is granted, the Plaintiffs also advance claims under Part XXIII.1 of the *Securities Act*. As noted in Sino-Forest's factum for this motion, there are at least 11 defences to secondary market claims.

C. DISCUSSION

1. Introduction

[27] In this introductory section, I will address the one relatively easy issue; i.e., the problem of the "moving target" statement of claim.

[28] In the sections that follow, I will address the more difficult issues of: (a) whether the Defendants can and should be ordered to deliver statements of defence; (b) whether the leave motion should be combined with the certification motion or instead there should be a sequence of motions; (c) what other motions, if any, should be permitted before the certification motion; and (d) what should the timetable be for the motions.

[29] Beginning with the relatively easy problem, at the argument of this motion, the Defendants vociferously complained that the Plaintiffs keep changing their statement of claim. The Defendants pointed to substantial differences among the statement of claim delivered before the carriage motion, the statement of claim delivered after the carriage motion, and the Proposed Fresh as Amended Statement of Claim offered up for the purposes of the leave motion.

[30] This complaint about a "moving target" statement of claim was advanced as part of the Defendants' arguments that they cannot legally be ordered to deliver a statement of defence. I, however, do not see how this complaint supports that particular argument.

[31] I rather regard the "moving target" complaint as a proper objection that if the Defendants are to be ordered to deliver a statement of defence, the content of the statement of claim needs first to be finalized.

[32] I agree that for the purposes of a leave or a certification motion, the content of the statement of claim needs to be finalized, and thus the approach should be to order a pleading to be finalized and to order that this pleading not be amended without leave of the court. I so order.

[33] The problem then becomes one of selecting which pleading to finalize for the purposes of the leave and certification motion. It makes common sense to select the pleading for which leave is being sought under the *Securities Act*; i.e. the Proposed Fresh as Amended Statement of Claim, and that indeed is my selection.

2. The Delivery of the Statement of Defence in Class Actions

[34] I turn now to the difficult issues of whether the Defendants can be ordered to deliver statements of defence, and if they can be ordered to plead, whether they should be ordered to plead.

[35] As will be seen shortly, the Defendants submit that they cannot be ordered to plead to a secondary market claim that does not exist unless and until leave is granted under s. 138.8 of the *Securities Act*. For present purposes, I will accept the correctness of this submission, but it does not follow that the Defendants cannot plead to that portion of the Proposed Fresh as Amended Statement of Claim that is not exclusively referable to the secondary market claims. Assuming that the Defendants are correct that there is a portion of the Proposed Fresh as Amended Statement of Claim to which they cannot be obliged to plead does not negate that there are portions of the Proposed Fresh as Amended Statement of Claim that can and should be answered by a statement of defence.

[36] The Defendants' submission rather means that rule 25.07 of the *Rules of Civil Procedure*, which provides the rules of pleading applicable to defences, needs to be amended for the purpose of the leave and certification motion so that defendants do not have to plead to a pregnant action under Part XXIII.1 of the *Securities Act* that may never be born.

[37] Rule 25.07 states:

> Admissions
>
> 25.07 (1) In a defence, a party shall admit every allegation of fact in the opposite party's pleading that the party does not dispute.
>
> Denials
>
> (2) Subject to subrule (6), all allegations of fact that are not denied in a party's defence shall be deemed to be admitted unless the party pleads having no knowledge in respect of the fact.
>
> Different Version of Facts
>
> (3) Where a party intends to prove a version of the facts different from that pleaded by the opposite party, a denial of the version so pleaded is not sufficient, but the party shall plead the party's own version of the facts in the defence.
>
> Affirmative Defences
>
> (4) In a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading.
>
> Effect of Denial of Agreement
>
> (5) Where an agreement is alleged in a pleading, a denial of the agreement by the opposite party shall be construed only as a denial of the making of the agreement or of the facts from which the agreement may be implied by law, and not as a denial of the legality or sufficiency in law of the agreement.
>
> Damages
>
> (6) In an action for damages, the amount of damages shall be deemed to be in issue unless specifically admitted.

[38] To repeat, for the purposes of the leave motion where a party cannot be obliged to plead and for the combined certification motion, rule 25.07 needs to be revised to accommodate s. 138.8 of the *Securities Act*.

[39] Pursuant to the authority provided by s. 12 of the *Class Proceedings Act, 1992*, which authorizes the court to make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination, I have the jurisdiction to revise the procedure for a class proceeding to accommodate s. 138.8 of the *Securities Act*, and I do so by notionally adding a new subrule 25.07 (7) as follows:

> (7) In an action under the *Class Proceedings Act, 1992* for which leave is also being sought to commence an action under section 138.3 of the *Securities Act* (liability for secondary market disclosure), in a defence, a party who does not file an affidavit pursuant to rule 138.8 (2) and who delivers a statement of defence shall decline to either admit or deny the allegations of fact referable solely to his or her liability for secondary market disclosure and not referable to any other pleaded cause of action.

[40] Practically speaking, notional subrule 25.07 (7) divides the Defendants into three classes.

[41] First, there are those Defendants who deliver a s. 138.8 (2) affidavit under the *Securities Act*. These Defendants must deliver a statement of defence for the reasons expressed below.

[42] Second, there are those Defendants against whom there are no allegations of fact referable to liability for secondary market disclosure, who thus have no right or need to deliver a s. 138.8 (2) affidavit under the *Securities Act* and who choose to deliver a statement of defence. These plaintiffs may, if so advised, simply plead in the normal course.

[43] Third, there are those Defendants against whom there are allegations of fact referable to liability for secondary market disclosure and who do not deliver a s. 138.8 (2) affidavit but who deliver a statement of defence.

[44] Under notional rule 25.07 (7), these Defendants shall decline to either admit or deny the allegations of fact referable solely to his or her liability for secondary market liability and not referable to any other pleaded cause of action. These defendants must state that they neither admit nor deny the allegations contained in those paragraphs *(identify paragraph numbers)* of the statement of claim referable solely to liability for secondary market liability and not referable to any other pleaded cause of action. As will become clearer after the discussion below, by being required to neither admit nor deny allegations referable solely to secondary market liability, these Defendants cannot circumvent the requirements of s.138.8 (2) of the *Securities Act* that they must file an affidavit in order to set forth the material facts upon which they intend to rely for the leave motion.

[45] This brings the discussion and the analysis to whether there might be other reasons not to order the Defendants to deliver a statement of defence. The convention in class actions, which existed from 1996 to 2011, was that a defendant not be required to deliver a statement of defence pre-certification because of the likelihood that the statement of claim would be reformulated as a result of the certification decision and

based on the view that the statement of defence had little utility before certification. See *Mangan v. Inco Ltd.* (1996), 30 O.R. (3d) 90 at pp. 94-95 (Gen. Div.); *Glover v. Toronto (City)* [2008] O.J. No. 604 at para. 8 (S.C.J.).

[46] In *Pennyfeather*, I suggested that the convention should be revisited and that it was desirable that the pleadings be closed before the certification motion. See also *Kang v. Sun Life Assurance Company of Canada*, 2011 ONSC 6335.

[47] In *Pennyfeather* at paras. 37-38, 84-92, I stated:

> 37. Class actions are subject to the *Rules of Civil Procedure*, and there is nothing in the *Class Proceedings Act, 1992* that precludes defendants from pleading before the certification motion. It is informative that the convention of not closing the pleadings is not a statutory rule, and if the Plaintiff insists on the delivery of a pleading, a defendant may need to seek the permission of the court to delay the delivery of the pleading.
>
> 38. Moreover, the provisions of the *Class Proceedings Act, 1992* indicate that it was the Legislature's intention that the general rule is that the statement of defence should be delivered before the certification motion. Section 2 (3) of the Act indicates that the timing of the certification motion is measured by the delivery of the statement of defence. ....
>
> 84. ... it would be advantageous for the immediate case and for other cases, if the current convention ended and defendants were required in the normal course to deliver a statement of defence before the certification motion. As I will illustrate, there would be several advantages to this approach, and as I mentioned above, the Legislature intended that the general rule should be that the pleadings should be completed before the certification motion.
>
> 85. Before I provide some examples of the advantages of closing the pleadings before certification, it is helpful to recall that under s. 5 (1) of the *Class Proceedings Act, 1992*, a plaintiff must satisfy five interdependent criteria for his or her action or application to be certified as a class proceeding. The Plaintiff must: (1) show a cause of action; (2) identify a class; (3) define common issues; (4) show that a class proceeding would be the preferable procedure; and (5) qualify as a representative plaintiff with a litigation plan and adequate Class Counsel.
>
> 86. A major advantage of closing the pleadings is that controversies about the first of the five criteria for certification might be resolved or at least narrowed or confined before the certification motion.
>
> 87. The delivery of a statement of defence could be a fresh step that could foreclose any subsequent attack by the defendant for any pleadings irregularities and, more to the point, typically defendants do not deliver a statement of defence if there is a substantive challenge to the statement of claim. Rather, they bundle all their challenges to the statement of claim and bring a motion to have the statement of claim or portions of it struck out on both technical and substantive grounds. ...
>
> 88. In other words, the requirement of delivering a statement of defence will call out the defendant to make its challenges to the statement of claim and, thus, the s. 5 (1)(a) criterion might be removed as an issue as would any challenge to the pleading for wanting in particulars or for breaching the technical rules for pleading. The s. 5 (1)(a) criterion for certification might be decided before the certification motion.
>
> 89. If the defendant brings a comprehensive pleadings challenge before the certification motion, then, the s. 5 (1)(a) criterion would be resolved before the certification hearing one

> way or the other. It would be particularly useful to resolve a s. 5 (1)(a) challenge before the certification motion when the challenge is based on the court not having subject-matter jurisdiction over the plaintiff's claim. If that challenge is upheld, then the class action would be dismissed or stayed and the enormous costs of a comprehensive certification motion is avoided.
>
> 90. Further, hearing an interlocutory motion about the sufficiency of the pleading might be preferable to having the challenge heard at the certification motion as an aspect of the s. 5 (1)(a) analysis because a common outcome of this analysis is to grant the plaintiff leave to amend his or her statement of claim, which outcome, at a minimum, exacerbates the complexities of determining the certification motion because of the interdependency of the certification criteria.
>
> 91. In many cases, the technical or substantive adequacy of a plaintiff's statement of claim is not an issue and, therefore, requiring the completion of the pleadings will involve no interlocutory steps and the analysis of the other four certification criteria would be facilitated by a completed set of pleadings.
>
> 92. For instance, having the Statement of defence before the certification motion would provide useful information for analyzing the preferable procedure criterion and the plaintiff's litigation plan. Moreover, it may emerge that there are issues worthy of certification in the defendant's statement of defence.

[48] For present purposes, I do not retreat from what I said in *Pennyfeather*, and I shall emphasize several points and add a few more. In this regard, I emphasize that it was the clear intention of the Legislature that the pleadings be closed before certification. I add that this makes sense because the certification criteria of class definition, common issues, preferable procedure, and litigation plan are best adjudicated in the context of the parameters of the action and it may emerge that the defendant has pleaded issues that may usefully be added to the list of common issues.

[49] Further, I add that the Legislature also indicated by s. 35 of the *Class Proceedings Act, 1992,* that the *Rules of Civil Procedure* apply to class proceedings, reserving the courts' authority to make adjustments to that procedure under s. 12 of the *Act*. Generally speaking, it is desirable to normalize class actions with the procedure under the *Rules of Civil Procedure*. The *Rules* are the norm for a fair procedure, and the norm of civil procedure is that both sides must disclose the case that their opponent must meet. Defendants are not like an accused in a criminal proceeding with a right to remain silent. It is not regarded as unfair or abnormal to compel a defendant to plead a statement of defence in response to a statement of claim.

[50] Further still, I add that having a complete set of pleadings recognizes the maturity of the class action jurisprudence. There already have been many Rule 21 and s.5 (1)(a) challenges, and the viability of many causes of action or types of claim as being suitable for class actions has been informed by twenty years of cases. Recognition of the maturity of the case law in and of itself calls for a rethinking of the convention of not delivering a statement of defence, because assisted by precedents of what has been certified in the past, plaintiffs are better able to exit the certification hearing with their pleadings intact.

[51] In other words, in contemporary times the Defendants' concern that they will have wasted time and effort pleading to a statement of claim that may be different after certification will not be borne out. In any event, the complaint of a wasted effort is overblown. Unless pleadings are to be regarded as a work of fictional literature, claims and defences are based on the material facts that existed, and competent counsel will take instructions about all the possible claims and defences that emerge from those set of facts before the certification motion.

[52] I find it hard to believe that the accomplished lawyers in the case at bar are waiting for the outcome of the leave motion and the certification motion before investigating the material facts and researching the applicable law and advising the Defendants about what defences are available to them. The truth of the matter is that the Defendants and their lawyers are not concerned about wasted time and effort but rather they do not wish to plead because they believe it is tactically better to avoid the disclosure of their case that the *Rules of Civil Procedure* would normally mandate.

[53] I see no unfairness of denying defendants a tactical maneuver that may be inconsistent with general principle of rule 1.04 that the rules "shall be liberally construed to secure, the just, most expeditious and least expensive determination of every civil proceeding on its merits."

[54] I also see no unfairness in denying defendants the tactical maneuver of not delivering a statement of defence before certification when the exchange of pleadings may be tactically and substantively beneficial to defendants. The defendants arguments that class membership is over-inclusive or under-inclusive, that the proposed common issues want for commonality, that the action is not manageable as a class action, that a class proceeding is not the preferable procedure, and that the litigation plan is deficient are best made when the defendants shows the colour of his or her eyes by pleading a defence and these arguments will be stronger than the "is! – is not! – is too!" sandbox arguments of many a certification motion. For whatever it is worth, my own observation from recent certification motions where defendants have pleaded before certification is that both sides and the administration of justice are better for it.

[55] Finally, from a public relations point of view - and class actions are by their nature of considerable interest to the public - I would have thought that many defendants would like to seize the opportunity by pleading the material facts of their defence to take the sting out of the plaintiff's argument that the defendants need behaviour management and to level the playing field about the certification criteria.

[56] Thus, generally speaking, I persist in my view that the pleadings issues should be completed before the certification motion. The Defendants' argue, however, that whatever may be the situation for class actions generally, the Court of Appeal's decision in *Sharma v. Timminco, supra,* has overtaken *Pennyfeather*, and *Sharma* means that in a proposed secondary market class action, a statement of defence cannot be demanded or delivered before leave is granted under s. 138.3 of the *Securities Act.* A defendant cannot be asked to plead to a pregnant statement of claim.

[57] The Defendants take the *Sharma* decision to be authority that a class proceeding is not an action commenced under s. 138.3 until leave is granted and leave is required to

add the s. 138.3 cause of action to the class proceeding. The Defendants submit that without leave, a s. 138.3 action cannot be enforced. As Sino-Forest put it in its factum: "Until leave has been granted, the plaintiff has nothing: no limitation periods are tolled, and no steps in the proceeding – including the filing of a defence – can be taken."

[58] This hyperbolic submission by Sino-Forest and by the rest of the Defendants is not true. Whatever the effect of *Sharma*, it did not take away s. 138.8 of the *Securities Act*, under which subsection (2) requires for the leave motion that the plaintiff and each defendant swear under oath the "material facts upon which each intends to rely."

[59] Section 138.8 of the *Securities Act*, which provides the test for leave and which governs the procedure for the leave motion, states:

> 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.
>
> Same
>
> (2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.
>
> Same
>
> (3) The maker of such an affidavit may be examined on it in accordance with the rules of court. ....

[60] Subsection 138.8 (2) may be usefully compared and contrasted with rule 25.06 (1) of the *Rules of Civil Procedure*, which is the predominant rule about pleading in an action. Rule 25.06 (1) states:

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

Both the subsection and the rule require the party to disclose to their opponent the "material facts" on which the party "relies." The pleadings rule, however, does not require that the disclosure of material facts be under oath. Assuming that a defendant does file an affidavit under s. 138.8 (2), then the affidavit is, in effect, an under oath version of 25.06 (1)'s requirement that a defendant disclose the material facts upon which he or she relies.

[61] I concede that filing an affidavit under s. 138 (8) is not mandatory and that it cannot be assumed that a defendant will deliver an affidavit for a leave motion under the *Securities Act*, and that he or she cannot be compelled to do so. In *Ainslie v. CV*

Technologies Inc. 93 O.R. (3d) 200 at paras. 14-20, 24-25 (S.C.J.), Justice Lax interpreted s. 138.8 (2), and she stated:

> 14. Section 138.8(1) sets out a two-part test for obtaining leave to bring an action under Part XXIII.1 of the OSA and places the onus on the plaintiffs to demonstrate that (1) their proposed action is brought in good faith and (2) has a reasonable prospect for success at trial. As s. 138.8(1) requires an examination of the merits, the plaintiffs submit that the section is supplemented with s. 138.8(2) and (3). They rely on the mandatory language in s. 138.8(2) ("and each defendant shall") and submit that without the benefit of this requirement and the ability to cross-examine, a plaintiff would be deprived of the tools necessary to meet the standard the legislature created in s. 138.8(1).
>
> 15. This submission ignores the legislative purpose of s. 138.8. The section was not enacted to benefit plaintiffs or to level the playing field for them in prosecuting an action under Part XXIII.1 of the Act. Rather, it was enacted to protect defendants from coercive litigation and to reduce their exposure to costly proceedings. No onus is placed upon proposed defendants by s. 138.8. Nor are they required to assist plaintiffs in securing evidence upon which to base an action under Part XXIII.1. The essence of the leave motion is that putative plaintiffs are required to demonstrate the propriety of their proposed secondary market liability claim before a defendant is required to respond. Section 138.8(2) must be interpreted to reflect this underlying policy rationale and the legislature's intention in imposing a "gatekeeper mechanism".
>
> 16. The plaintiffs appear to be interpreting s. 138.8(2) as if it read: "Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits." But, the subsection continues: "setting forth the material facts upon which each intends to rely". If there are no material facts upon which a defendant intends to rely in responding to a leave motion, how can it be that a defendant is required to file an affidavit? Similarly, if a defendant files one or more affidavits, how can a plaintiff require that defendant to file other affidavits? By discounting this language, the plaintiffs are proposing an interpretation which relieves them of their obligation to demonstrate that their proposed action meets the pre-conditions for granting leave under the Act.
>
> 17. The plaintiffs' interpretation also fails to address the language used in subsections (3) and (4). Section 138.8(3) reads: "The maker of such an affidavit may be examined on it in accordance with the rules of court." Section 138.8(4) reads: "A copy of the application for leave to proceed and any affidavits filed with the court shall be sent to the Commission when filed" (emphasis added). Had it been the intention of the legislature to require the parties to file affidavits, irrespective of the onus placed upon the moving party, the legislature would have substituted the word "the" for "any" in s. 138.8(4) and the words "the plaintiff and each defendant" for "maker" in s. 138.8(3). I also note that the legislature attached no consequences to the failure of "each defendant" to file an affidavit.
>
> 18. In terms of onus, a useful analogy can be found in the summary judgment rule, Rule 20, of the Rules of Civil Procedure. Rule 20.04 provides:
>
> > 20.04(1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.
>
> 19. Similar to s. 138.8(2), rule 20.04 utilizes language suggesting that a responding party "must" or "shall" file affidavit material. Notwithstanding the use of such language, under Rule 20, a responding party retains the option to counter the motion by simply cross-examining the moving party, rather than by leading any direct evidence on the motion. In

> this regard, rule 20.04 has been interpreted as requiring the respondent to a summary judgment motion to "lead trump or risk losing". Notably, however, the onus to establish that there is no genuine issue for trial remains with the moving party. The onus does not shift to the respondent to show that a genuine issue for trial does in fact exist.8
>
> 20. Similarly, in a motion under s. 138.8 of the Act, the onus to demonstrate that the proposed claim meets the required threshold remains with the plaintiffs. The onus does not shift to the defendants. A defendant that does not "lead trump" by filing affidavit evidence in response to a motion under s. 138.8 may well take the risk that leave will be granted to the plaintiffs. It does not follow, however, that a defendant is obligated to file evidence or produce an affidavit from each named defendant. It is a well-established principle that, as a general proposition, it is counsel who decides on the witnesses whose evidence will be put forward. ....
>
> 24. In my view, the "gatekeeper provision" was intended to set a bar. That bar would be considerably lowered if the plaintiffs' view is correct. As I have already indicated, a defendant who does not file affidavit material accepts the risk that it may be impairing its ability to successfully defeat the motion for leave and is probably foregoing the right to assert the statutory defences under Part XXIII.1 of the Act. However, parties are entitled to present their case as they see fit and this includes the right to oppose the leave motion on the basis of the record put forward by the plaintiffs as GT intends, or on the basis of the affidavits of experts as CV intends. [page209]
>
> 25. To accept the plaintiffs' submissions would require each defendant to produce evidence that may not be necessary for the leave motion and would serve no purpose other than to expose those defendants to a time-consuming and costly discovery process. It would sanction "fishing expeditions" prior to the plaintiffs obtaining leave to proceed with their proposed action. This is an unreasonable interpretation of s. 138.8(2). It is inconsistent with the scheme and object of the Act. Properly interpreted, the ordinary meaning of s. 138.8(2) is that a proposed defendant must file an affidavit only where it intends to lead evidence of material facts in response to the motion for leave.

[62] In *Ainslie*, leave to appeal was granted [2009] O.J. No. 730 (Div. Ct.), but it appears that the appeal was never argued. In *Sharma v. Timminco Ltd.*, 2010 ONSC 790 at para. 32, I agreed with Justice Lax's interpretation of s. 138.8 (2).

[63] In the case at bar, I do not know whether any of the Defendants will deliver affidavits under s. 138.8 (2), but I do know that if a Defendant does deliver an affidavit, then its protest that it would be unfair to require a statement of defence loses its potency as does the urgency of the Plaintiffs' request that the Defendants be ordered to deliver their statements of defence. Delivering an affidavit under s. 138.8 is essentially the same as delivering a statement of claim or defence. As Justice Lax notes, a defendant who does not file affidavit material accepts the risk that it may be impairing its ability to successfully defeat the motion for leave. Justice Lax also notes that the defendant is probably foregoing the right to assert the statutory defences under Part XXIII.1 of the Act, but I would not necessarily go that far.

[64] Where this analysis takes me is that it while it would be inappropriate to order all the Defendants to deliver a statement of defence to a secondary market claim under the *Securities Act,* it would be proper to order that any Defendant who delivers an affidavit pursuant to s. 138.8 (2) of the *Act* shall also deliver a statement of defence. I so order.

[65] Although I am ordering only Defendants who deliver s. 138.8 (2) affidavits to deliver a statement of defence, I order that any other Defendant may, if so advised, deliver a statement of defence. I leave them to make the tactical decision whether or not to deliver a pleading. As I discussed above, there are advantages for a defendant to plead in a class action.

[66] For reasons that I will come to next, if a Defendant does deliver a statement of defence, the delivery is without prejudice to the Defendant's right to bring a Rule 21 motion or to challenge whether the Plaintiffs have shown a cause of action as required by s. 5 (1)(a) of the *Class Proceedings Act, 1992*.

[67] Here it should be note that the "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959, which is used for a Rule 21 motion, is used to determine whether the proposed class proceedings discloses a cause of action; thus, a claim will be satisfactory under s. 5 (1)(a) unless it has a radical defect or it is plain and obvious that it could not succeed: *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; 1176560 *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.); *Healey v. Lakeridge Health Corp.*, [2006] O.J. No. 4277 (S.C.J.) at para. 25.

[68] In this last regard, the Defendants submitted that a defendant has a right to challenge whether the plaintiff has pleaded a reasonable cause of action by bringing a Rule 21 motion and a defendant would lose this procedural right if he or she delivered a statement of defence. Pleading over is a fresh step that deprives a defendant of the right to subsequently challenge the substantive adequacy of a pleading: *Bell v. Booth Centennial Healthcare Linen Services,* [2006] O.J. No. 4646 at paras. 5-7 (S.C.J.); *Cetinalp v. Casino,* [2009] O.J. No. 5015 (S.C.J.). From this true premise, the Defendants submit that since some or all of them wish to bring a Rule 21 motion or some or all will be challenging the reasonableness of the plaintiffs' statement of claim as an aspect of the s. 5 (1)(a) criterion of the of test for certification, they should not be required to deliver a statement of defence before the certification motion.

[69] The court's typical but not inevitable response to a Defendant's request to bring a Rule 21 motion before certification is to direct the motion to be heard at the certification hearing because the test for granting a Rule 21 motion is the same test that is applied for the s. 5 (1)(a) criterion for certification. Typically, when this direction is made the defendant is not required to deliver a statement of defence.

[70] As already noted, in the case at bar, several defendants have indicated that they wish to bring Rule 21 motions on the basis that several of the Plaintiffs' claims do not disclose a reasonable cause of action or on the basis that the bonds contain a "no suits" clause, and BDO Limited wishes to bring a Rule 21motion based on the argument that it is plain and obvious that claims against it are statute-barred.

[71] I agree that the right of Defendants to challenge the reasonableness of the Plaintiffs' statement of claim should be preserved and protected and I also believe that

this objective can be accomplished while still permitting defendants to deliver a statement of defence.

[72] Once again, using the authority of s. 12 of the *Class Proceedings Act, 1992*, I order that if a Defendant delivers a statement of defence, then the delivery of the statement of defence is not a fresh step and the Defendant is not precluded from bringing a Rule 21 motion at the leave and certification motion or the Defendant is not precluded from disputing that the Plaintiffs have shown a cause of action under s. 5 (1)(a) of the *Class Proceedings Act, 1992*.

3. Leave and Certification

[73] The above discussion addresses the matter of the Plaintiffs' request that the Defendants be ordered to deliver statements of defence and the discussion also lays the foundation for the discussion of the Plaintiffs' request that the leave motion under s.138.8 the *Securities Act* and the certification motion under the *Class Proceedings Act, 1992* be heard together and the Defendants' counter-submission that the motions should be sequenced leave motion, Rule 21 motions, and certification motion.

[74] In the case at bar, there is a general consensus that the leave motion should go first, and, in any event, because of the Court of Appeal's ruling in *Sharma* that s. 28 of the *Class Proceedings Act, 1992* is useless in protecting claims under Part XXIII.1 of the *Securities Act* from limitation periods, the leave motion must go first, and I have scheduled ten days of hearing commencing November 21, 2012.

[75] The question then is whether the certification motion should be combined with the leave motion.

[76] The Plaintiffs submit that hearing the two matters together is consistent with the direction from the Ontario Court of Appeal and that Supreme Court of Canada that litigation by installments should be avoided wherever possible because it does little service to the parties or to the efficient administration of justice." *Garland v. Consumers' Gas Company Limited* (2001), 57 O.R. (3d) 127 at para. 76 (C.A.), aff'd [2004] 1 S.C.R. 629 at para. 90. The Plaintiffs note that leave and certification were dealt with together in *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.), leave to appeal refused [2011] O.J. No. 656 (Div. Ct.) and in *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25.

[77] An admonition is different from a prohibition, and while the Court of Appeal and the Supreme Court may frown on litigation in installments, they did not prohibit it. Whether to permit motions before the certification motion is a matter of discretion. In exercising its discretion whether to permit a motion before the certification motion, relevant factors include : (a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined; (b) the likelihood of delays and costs associated with the motion; (c) whether the outcome of the motion will promote settlement; (d) whether the motion could give rise to interlocutory appeals and delays that would affect certification; (e) the interests of economy and judicial efficiency; and (f) generally, whether scheduling the motion in advance of certification would promote

the fair and efficient determination of the proceeding: *Cannon v. Funds for Canada Foundation*, [2010] O.J. No. 314 (S.C.J.) at paras. 14-15

[78] Thus, in my opinion, the question to be decided in the immediate case is whether it is fair (the most important factor) and efficient to hear the certification motion and the leave motion together.

[79] Provided that any Defendants who deliver s. 138.8 (2) affidavits or any Defendants who deliver statements of defence may bring Rule 21 motions or otherwise challenge all of the certification criteria as they may be advised, I see no unfairness in having the certification motion heard along with the leave motion. Because of the orders that I shall make, already discussed above, a Defendant may challenge all of the certification criteria regardless of whether the Defendant has pleaded or not. Pursuant to notional rule 25.07 (7), Defendants who do not file a s. 138.8 (2) affidavit and who deliver a statement of defence "shall decline to admit or deny the allegations referable solely to liability for secondary market disclosure and not referable to any other pleaded cause of action." I see no unfairness to the Defendants who may resist both the certification motion and the leave motion as they may be advised.

[80] In contrast, the sequential approach being advocated by the Defendants is unfair to the Plaintiffs and to the proposed class and will impede fulfilling the purposes of the class proceedings legislation, which are first and foremost, access to justice, secondarily, judicial economy, and thirdly, behaviour modification, all the while providing due process and fairness to all parties. Unfortunately, the suffocating expense of motions in class actions along with the excruciating delays and the additional costs of the inevitable leave to appeal motions and appeals that follow class action orders is a serious barrier to achieving the purposes of the legislation for both plaintiffs and defendants and a substantial disincentive to class counsel employing the legislation for other than the huge cases that would justify the litigation risks.

[81] As night follows day, if I agreed to schedule sequentially, there would be a ten-day leave motion, followed by the unsuccessful party launching the appeal process which will take several years to resolve. Whatever the outcome of the appeal, the action will return to the Superior Court for the certification motion of the claims not referable solely to liability for secondary market disclosure.

[82] In the case at bar, if Rule 21 motions were permitted before the certification hearing although work that could be done at the certification hearing will be accomplished, this will come at the cost of another round of appeals that will take several years to resolve only for the action to return again to the Superior Court for the determination of whether the balance of the certification criteria have been satisfied. That determination will also be appealed.

[83] In contrast, if I combine the leave motion, the Rule 21 motions, and the certification motion into one hearing, as night follows day, the determination will be appealed but the superior court and the appellate courts including the Supreme Court of Canada will be denied the pleasure of three visits from one or two generations of Class and Defence Counsel.

[84] The Defendants argue that there will be no efficiencies in a sequential ordering of the motions because the criteria for leave differs from the certification criteria, as does the burden of proof for these motions. However, courts are obliged to have the perspicacity to be able to deal with different criteria and different onuses of proof, but, more to the point, the evidentiary footprint for the leave and certification motions are the same, and it makes for little efficiency for the parties and little judicial economy to have the evidence and argument for leave and for certification heard more than once.

[85] Putting aside the somewhat unique circumstances of BDO Limited, I conclude that the certification hearing should be combined with the leave motion and that with the exception of the Plaintiffs' funding motion, which has already been scheduled, there shall be no other motions before the leave and certification motion without leave of the court first being obtained.

4. BDO Limited's Request for a Rule 21 Motion

[86] As noted at the outset of these reasons, I am adjourning the motion as it concerns BDO Limited, whose circumstances may be unique.

[87] BDO was a party to the *Smith v. Sino-Forest* and the *Northwest v. Sino-Forest* rival class actions and it was added to the case at bar after the carriage motion. It submits that all of the statutory claims against it are statute-barred as in one of the main common law misrepresentation claims. It submits that it can diminish its involvement in this expensive litigation by a Rule 21 motion based on the pleadings and without evidence.

[88] The Plaintiffs' response was that if BDO wished to assert a limitation period defence it should be a pleaded defence to which the Plaintiffs would file a reply demonstrating that it was not plain and obvious that the claims were statute-barred or demonstrating that there were defences to the running of the limitation period, presumably based on fraudulent concealment or estoppel or waiver. The Plaintiffs also asserted that there were other common claims against BDO that were not statute-barred and thus there was no utility in permitting a Rule 21 motion that would see BDO only partially out of the action.

[89] BDO's response was that there were no defences that could withstand the ultimate limitation periods of the *Securities Act* and fairness dictated that it should be permitted to substantially reduce being embroiled in this litigation.

[90] My own assessment was that the Plaintiffs were correct in submitting that in the circumstances of this case, BDO should plead its limitation defence and the Plaintiffs should have an opportunity to deliver a reply.

[91] Once BDO has pleaded, I will be in a better position in determining whether to permit a Rule 21 motion or perhaps a Rule 20 partial summary judgment motion.

[92] Accordingly, I am adjourning the motion as it concerns BDO Limited to be brought on again, if at all, after BDO has pleaded its statement of defence and the Plaintiffs their Reply.

5. The Timetable

[93] In light of the discussion above, it is ordered that subject to adjustments, if necessary, made at a case conference, the timetable for the Plaintiff's Funding Approval Motion and for the Leave and Certification Motion is as follows:

Funding Approval Motion

March 9, 2012: Plaintiffs to deliver motion record (completed)

March 30, 2012: Defendants to deliver responding records, if any

April 6, 2012: Plaintiffs to deliver factum

April 13, 2012: Defendants to delivery factum

April, 17, 2012: Hearing of the motion

Leave and Certification Motion

April 10, 2012: Plaintiffs to deliver motion record

June 11, 2012: Defendants to deliver responding records

July 3, 2012: Plaintiffs to delivery reply records, if any

September 14, 2012: Cross-examinations to be completed

October 19, 2012: Plaintiffs to deliver factum

November 9, 2012: Defendants to deliver factum

November 21-30, 2012: Hearing of the motion

D. CONCLUSION

[94] An order shall issue in accordance with these Reasons with costs in the cause.

Perell, J.

Released: March 26, 2012

CITATION: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2012 ONSC 1924
COURT FILE NO. 11-CV-431153CP
DATE: 20120326

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, et al.

Plaintiffs

- and -

Sino-Forest Corporation et al.

Defendants

REASONS FOR DECISION

Perell, J.

Released: March 26, 2012.