

07-cv-335257 R03

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**HILLEL BERKOVITS**

Plaintiff

-and-

**CANON CANADA INC., and CANON INC.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.


IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: June 22, 2007

Issued by:.....  
Local Registrar

Address of court office:

393 University Avenue  
10<sup>th</sup> Floor  
Toronto, Ontario  
M5G 1E6

**TO: Canon Canada Inc.**  
6390 Dixie Road  
Mississauga, Ontario  
L5T 1P7

**Canon Inc.**  
30-2 Shimoraku 3-chome, Ohta-ku  
Tokyo, 146-8501  
Japan

## CLAIM

### I. DEFINITIONS

1. The following definitions apply for the purposes of this statement of claim:
  - a) “**Act**” means the *Class Proceedings Act*, 1991 S.O. 1992, c. 6, as amended;
  - b) “**Cameras**” means one of the following Cameras:
    - i. Canon A60
    - ii. Canon A70
    - iii. Canon A75
    - iv. Canon A80
    - v. Canon A85
    - vi. Canon A95
    - vii. Canon 510
    - viii. Canon S30
    - ix. Canon S40
    - x. Canon S100
    - xi. Canon S110
    - xii. Canon SD200
    - xiii. Canon SD300
    - xiv. Canon S400
    - xv. Canon SD450
    - xvi. Canon S410
    - xvii. Canon SD500
    - xviii. Canon S2 IS

- c) “**Canon**” means the defendants, Canon Inc, and Canon Canada Inc.
- d) “**Class**” or “**Class Members**” means all individuals and entities in Canada who own or have owned for their own use and not for resale one of the Cameras.
- e) “**Courts of Justice Act**” means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- f) “**Defect**” means the defect described in paragraphs 8 to 11.
- g) “**Hillel**” means the plaintiff, Hillel Berkovits.

## II. RELIEF SOUGHT

- 2. The plaintiff, on his own behalf, and on behalf of the Class Members, claims:
  - a) an Order certifying this action as a class proceeding and appointing Hillel as representative plaintiff;
  - b) a declaration that Canon owed a duty of care to the plaintiff and other Class Members;
  - c) a declaration that Canon was negligent in developing, designing, testing, manufacturing, distributing, marketing, advertising and selling the Cameras within Canada;
  - d) general damages for negligence in the sum of \$50,000,000.00 or such other amount as may be proved in this Court;
  - e) in the alternative, an Order that the Defendants be required to disgorge all moneys received directly or indirectly from the sale of the Cameras;
  - f) an Order that Canon reimburse the plaintiff and the Class Members for their out of pocket expenses incurred as a result of the Camera failures described herein;
  - g) punitive damages of \$10,000,000.00;
  - h) an Order directing a reference or such other procedure as may be necessary to determine issues not determined at the trial of the common issues;
  - i) prejudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

- j) the costs of this action on a substantial indemnity basis and GST thereon; and,
- k) such further and other relief as to this Honourable Court seems just.

### III. NATURE OF THIS ACTION

- 3. This action concerns the development, design, testing, manufacturing, distribution, marketing and selling of the specified Cameras by Canon. Canon knew or ought to have known prior to placing the Cameras into the stream of Canadian commerce that the Cameras were of poor workmanship and quality and were not suitable for their intended purpose. The Cameras were and are prone to malfunctioning in a manner that caused the Cameras to display an error code of e18 and subsequently cease functioning as will be described more fully below. The e18 error message is so common and widespread there is an entire website dedicated to the issue [www.e18error.com](http://www.e18error.com).

### IV. THE PARTIES

#### **The Plaintiff**

- 4. The Plaintiff, Hillel Berkovits, resides in Toronto, Ontario. On or about June, 2005, he purchased a Canon A75, from Best Buy, a retailer in Toronto, which came with a standard manufacturers **one year** warranty. The purchase price was approximately \$250.00.

#### **The Defendants**

- 5. Canon Canada Inc. is a Canadian company, a wholly owned subsidiary of Canon USA Inc., and maintains its head office in Mississauga, Ontario. Canon Canada was founded in 1973 to sell and promote the Canon line of optical and camera products. The Canon group of companies is an integrated group that designs, manufactures and distributes Canon products worldwide. Canon Inc, was founded in 1937, and is a worldwide leader in the development, manufacture and distribution of electronic equipment, most notably, in the camera and digital camera marketplace.

### V. MATERIAL FACTS

#### **Background**

- 6. Canon has been engaged in the business of developing, designing, testing, manufacturing, distributing, marketing and selling of Cameras and related products in Canada since 1973.

7. At all material times, Canon developed, designed, tested, manufactured, distributed, marketed and sold the Cameras in Ontario and elsewhere in Canada.
8. The Cameras share the following common material defect (“Defect”) that cause them to unexpectedly display the same error message, and ultimately results in an inability for the consumer to use the product in a manner consistent with its intended purpose:
  - a) During normal use the lens of the Cameras tends to get stuck in an extended position and not retract; then
  - b) the Camera beeps a number of times and displays an “E18” in the lower left corner of the LCD screen; then
  - c) the lens remains in the extended position and refuses to move either to focus the lens or to retract when powered off.
  - d) Alternatively, the Camera lens does not extend when the Camera is powered on.
9. This defect is caused by a malfunction in the algorithm used by the Camera’s internal processor that is intended to prevent the camera from breaking when the lens comes into contact with a foreign object while being extended.
10. When the Camera operates properly the “e18” error can be cleared by ”powering the camera off” and rebooting it.
11. Cameras that suffer from the “e18” malfunction cannot be rebooted, or do not “power up”, and cease to function.
12. Due the widespread nature of the Defect, it is clear that Canon knew of the Defect at the time it sold or distributed the Cameras to the unsuspecting public, and notwithstanding the same, Canon sold and continues to sell the defective Camera models to Class Members.
13. Furthermore, Canon knew or ought to have known that the Defect could and would sometimes occur outside of the “standard” one year warranty period, and despite knowing of the likelihood for the Cameras to suffer from the Defect outside of the warranty period at the time Canon sold the Cameras, Canon refuses to fix the Defect for consumers that bought the Cameras and whose warranties expired prior to the Camera suffering from the Defect.
14. Due to the inherent Defect in the Cameras, the Cameras were of poor workmanship, quality and not suitable for their intended purpose.
15. The plaintiff and the Class Members have incurred damages as a result of the Defect, and have also incurred out of pocket expenses to repair or replace defective components, in the Camera or the entire Camera when the errors or failures occur outside of the warranty period.

### **The Plaintiff's Camera**

16. On or about August, 2006, soon after the expiration of the warranty period, while the Camera was in the "Powered Off" state, Mr. Berkovits attempted to "turn the Camera on". Instead of powering on, as the Camera is supposed to do, the lens of the Camera did not extend, and the LCD screen in the rear of the Camera flashed "error e18". When Mr. Berkovits contacted Canon to inform them of the problem with his Camera, they informed him that since the Camera was out of the warranty period, Canon would not repair the Camera. Canon recommended that Hillel take the Camera to a third-party repair shop. The repair shop informed Hillel that it would cost approximately \$100 to inspect the Camera to determine if it could be repaired, and additional sums based on an hourly rate in respect of technician's time needed to repair the Camera, in the event that it could be fixed by the repair shop. Faced with paying the repair shop \$100 with no guarantee that the Camera could be fixed, Hillel opted not to repair the Camera.

## **VI. CAUSES OF ACTION**

### **Negligence**

17. The Defendants at all material times owed a duty of care to the plaintiff and Class Members to:
  - a) ensure that the Cameras were fit for their intended purpose;
  - b) conduct adequate testing prior to sale to ensure that the Cameras were of merchantable quality and free of defects; and
  - c) design, assemble and manufacture the Cameras in such a manner that they operate without defects.
18. The plaintiff states that Canon breached its duty of care to the plaintiff and the Class in that, inter alia:
  - a) Canon developed, designed, tested, manufactured, distributed, marketed and sold the Cameras in such a manner that they were prone to experiencing an error when used as intended;
  - b) Canon failed to ensure that the Cameras were fit for their intended purpose and of merchantable quality;
  - c) Canon failed to conduct appropriate testing to determine whether the Cameras functioned properly as marketed and warranted;

- d) Canon manufactured, marketed and sold Cameras that Canon knew or ought to have known were defective or prone to suffer the Defect to the plaintiff and Class Members;
- e) Canon failed to disclose the defective nature of the Cameras; and
- f) Canon failed to recall the Cameras from the Canadian market immediately upon learning of the design/manufacture defect(s);

19. As a result of the Defendants' conduct described above, the Plaintiff and the Class Members have suffered damages.

20. It was foreseeable that the plaintiff and Class Members would suffer damages as a result of the negligence of Canon.

### **Unjust Enrichment**

21. By its wrongful acts and omissions as set forth herein, Canon was unjustly enriched at the expense of the plaintiff and Class Members, as follows:

- a) Enrichment: Canon was enriched in the form of increased profits, resulting from the sale of the Cameras to the Class Members.
- b) Corresponding Deprivation: Class Members purchased Cameras that Canon knew or ought to have known were defective, or were prone to suffer the Defect, and as a result such Class Members suffered damages, arising either out of their applicable Cameras suffering the Defect, or as a result of the Cameras purchased by the Class Members being so purchased at a price which exceeds their true value as a result of the Cameras being prone to suffer the Defect.
- c) Absence of Juristic Reason for the Enrichment: There can be no juristic reason for Canon's enrichment and the Class Members' corresponding deprivations to be maintained.

22. It would be inequitable for Canon to retain any profits, or other compensation it obtained from its wrongful conduct related to the Cameras, accordingly, the Plaintiff demands restitution on behalf of himself and the Class Members of all profits derived by Canon as a result of the sale of the Cameras.

### **Waiver of Tort**

23. As a result of the Defendants' conduct described herein, the plaintiff and Class Members reserve to themselves the right to elect at the trial of the common issues to waive the tort of negligence and to have damages assessed in an amount equal to the gross revenues earned by the Defendants, or the net income received by the Defendants from the sale of the Cameras.

### **Breach of Section 52 of the Competition Act**

24. The plaintiff pleads and relies upon the facts and allegations referred to above.
25. By virtue of making representations to the public as to the quality, character, and effectiveness of the Cameras, the Defendants breached section 52 of the *Competition Act*, R.S.C. 1985, c. C-34, in that the representations:
- a) were made to the public;
  - b) were made for the purpose of promoting the business interests of the Defendants;
  - c) were false and misleading in a material respect; and
  - d) stated a level of performance of the Cameras which was not accurate.
26. The plaintiff pleads that the non-disclosure of the defects constituted material and misleading representations for the purposes of section 52 of the *Competition Act*.
27. The plaintiff pleads that he and other Class Members relied upon these representations in making decisions to purchase their Cameras. Alternatively, the plaintiff relies upon section 52(1.1) of the *Competition Act* and pleads that it is unnecessary for any Class Member to show actual reliance on the misleading statements of the Defendants for the purposes of establishing a breach of the *Competition Act*.
28. As a result of the breach of section 52 of the *Competition Act*, the plaintiff and Class Members have suffered damages and are entitled to a civil remedy pursuant to section 36(1) of the *Competition Act*.

**Legislation**

29. The plaintiff pleads and relies upon the *Class Proceedings Act*, 1992, S.O. 1992, c. 6; the *Negligence Act*, R.S.O. 1990, c. N-1, as amended, and the *Competition Act*, R.S.C. 1985, c. C-34, as amended.
30. The plaintiff proposes that this action be tried in Toronto.
31. The originating process may be served without court order outside Ontario in that the claim is:
- (a) in respect of a tort committed in Ontario (rule 17.02(g));
  - (b) in respect of damages sustained in Ontario arising from a tort or breach of contract however committed (rule 17.02(h));
  - (c) against a person outside Ontario who is a necessary and proper party to this proceeding brought against another person served in Ontario (rule 17.02(o)); and
  - (d) against a person carrying on business in Ontario (rule 17.02(p)).

Date of Issue: June 22, 2007

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**Hillel Berkovits v. Canon Canada Inc., and Canon Inc.**  
Plaintiff Defendants

Court File No: 07-cv-335257  
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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**STATEMENT OF CLAIM**

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