File No. 35807

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

CANADIAN IMPERIAL BANK OF COMMERCE, GERALD MCCAUGHEY, TOM WOODS, BRIAN G. SHAW and KEN KILGOUR

Appellants
(Respondents)

- and -

HOWARD GREEN and ANNE BELL

Respondents
(Appellants)

MEMORANDUM OF ARGUMENT

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(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW

1. Insurance Bureau of Canada ("**IBC**") submits this Memorandum of Argument, from the unique perspective of Canadian insurers, on the interpretation of the statutory regime for secondary market securities liability as set out in Part XXIII.1 of the *Securities Act*, RSO 1990, c S.5 (the "***Securities Act***" or the "***Act***"), and more specifically, on the appropriate judicial interpretation of the statutory test for leave to commence an action under section 138.8 of the *Act*.

2. IBC's member companies provide insurance coverage for Canadian public companies and their directors and officers ("**D's & O's**"), who are named as defendants in proposed secondary market securities class actions since the coming into force of Part XXIII.1 of the *Act* in 2006. IBC member companies that provide D&O insurance have a critical and unique interest in the leave requirement under Part XXIII.1 of the *Act*, as it affects the way in which D&O insurers defend potential secondary market actions.

3. IBC intervened in this case before the Ontario Court of Appeal, where it made written and oral submissions in support of the Court of Appeal's reasoning in *Sharma v. Timminco*, 2012 ONCA 107 (the "***Timminco* Decision**").

4. IBC's position in the within case is that the Court of Appeal erred both in modifying its reasoning on the limitation issue in the *Timminco* Decision and in its interpretation of the leave requirement under section 138.8 of the *Act*. As the *Timminco* limitation issue has been comprehensively briefed by the Appellants, IBC focuses these submissions solely on the test for leave to commence an action under Part XXIII.1.

5. Learned Judges across Canada, when deciding whether a proposed Part XXIII.1 action "has a reasonable possibility of success", have applied different tests and approaches. However, these Judges have undertaken a certain degree of scrutiny of the evidence and have consistently found that the leave threshold is greater than what is required for determining whether a pleading discloses a cause of action.

6. In contrast, the Court of Appeal appears to equate the leave threshold to the *Hunt v. Carey* test for determining if a claim should be struck for disclosing no cause of action. To the extent that the Court of Appeal intended to set out a test that provides little if any scrutiny

above the test applied at certification for assessing whether the pleading discloses a cause of action, the Court of Appeal has "watered down" the leave requirement in a manner inconsistent with the legislative intent of this critical gatekeeper provision and with previous jurisprudence on the leave test. Therefore, the decision of the five-judge panel of the Ontario Court of Appeal has, arguably, set the "low-water" mark for the leave requirement.

PART II – STATEMENT OF THE QUESTION IN ISSUE IN THE APPEAL

7. IBC's submissions address the test for leave to commence a Part XXIII.1 claim.

PART III – STATEMENT OF ARGUMENT

8. Before an action can be commenced under Part XXIII.1 of the *Securities Act*, section 138.8 requires the prospective plaintiff(s) to establish by affidavit and other evidence that (a) the proposed 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." IBC respectfully submits that a robust and meaningful review of the evidence on the leave motion was intended by the legislation and practically required as part of the overall intended legislative scheme.

A. The Legislative Intent of the Leave Requirement

9. The genesis of Part XXIII.1 of the *Securities Act* was the final report released in March 1997 (the "**Allen Report**") prepared by the Toronto Stock Exchange Committee on Corporate Disclosure,[1] which was chaired by Thomas Allen (the "**Allen Committee**"), and the subsequent reports and draft legislation prepared by the Canadian Securities Administrators (the "**CSA Report**").[2]

10. The Allen Report recommended a "deterrence model" to improve the quality of continuous disclosure in Canada, rather than a "compensation model" that would focus on the full compensation of aggrieved investors. The Allen Committee recognized that not all

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[1] Toronto Stock Exchange Committee on Corporate Disclosure, *Final Report: Responsible Corporate Disclosure: A Search for Balance*, March, 1997 ("**Allen Report**"), Book of Authorities of the Intervener, Insurance Bureau of Canada ("**IBC BOA**"), Tab 13.

[2] Canadian Securities Administrators Notice 53-302 Report of the Canadian Securities Administrators: *Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of "Material Fact" and "Material Change"* November 3, 2000, (2000) 23 OSCB 1 ("**CSA Notice 53-302**"), IBC BOA, Tab 11.

aggrieved investors would receive recovery under its proposed civil liability scheme, and placed specific limits on the damages faced by public issuers, their D's & O's, and other market participants.[3]

11. The Allen Committee recognized that in the U.S., the combination of secondary market civil liability and class actions legislation had combined to give rise to unmeritorious, extortionate litigation often referred to as "strike suits":

> There have been problems in the U.S. concerning class action litigation over alleged disclosure violations, where numerous "strike suits" are brought immediately upon a drop in price. They are hastily drafted, indicating a rush to the courthouse without consideration of the merits. Studies in the U.S. show that most of these suits that are not dismissed at an early stage are settled. The effect is that some recovery is obtained in many cases lacking in merit. These class actions are perceived by issuers as a form of settlement extortion rather than as corrective justice. Remedial legislation has been enacted to make these strike suits more difficult to pursue. (emphasis added)[4]

12. The CSA Report largely adopted the Allen Committee's recommendations in the proposal for a statutory civil remedy for secondary market misrepresentation. Like the Allen Committee, the CSA Report saw the purpose of this remedy as deterrence, with the aim of improving the quality of continuous disclosure in Canada.[5]

13. In response to concerns about the danger of abusive strike suits, the CSA amended its proposed draft legislation to add the leave requirement that is now enshrined in section 138.8 of the *Securities Act*.[6] As set out in the final CSA Report, the key event leading to the CSA's recommendation to adopt a judicial leave requirement was the release of *Epstein v. First Marathon*, a decision denying a motion to approve the settlement of a securities class action on the basis that the settlement provided no recovery for the plaintiffs and attempted to solely benefit plaintiffs' counsel. In *Epstein*, Cumming J. discussed the U.S. experience with class

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[3] Allen Report at Ch. 6, IBC BOA, Tab 13.
[4] Allen Report at p. 26, IBC BOA, Tab 13.
[5] CSA Notice 53-302 at pp. 2-3, IBC BOA, Tab 11.
[6] *Ainslie v. CV Technologies Inc.* (2008), 93 O.R. (3d) 200 at paras. 11-13 (S.C.J.) ("*Ainslie*"), IBC BOA, Tab 1, additional reasons [2008] O.J. No. 4927 (S.C.J.), leave to appeal allowed [2009] O.J. No. 730 (S.C.J.); CSA Notice 53-302 at pp. 6-7, IBC BOA, Tab 11.

actions, citing commentary that "securities class actions, particularly those alleging open market fraud, had taken on such an appearance of impropriety that they were especially vulnerable to attack" (emphasis added).[7]

14. The CSA described the leave requirement as a "screening mechanism intended to "**limit unmeritorious litigation** or strike suits" (emphasis added):[8]

> . . . to screen out, as early as possible in the litigation process, unmeritorious actions. . . This screening mechanism is designed not only to minimize the prospects of an adverse Court award in the absence of a meritorious claim but, more importantly, to try to ensure that unmeritorious litigation, and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process.[9]

15. In reports after the enactment of the legislation, but prior to its coming into force, the CSA and the Five Year Review Committee of the *Securities Act* appointed by the Minister of Finance both described the leave requirement as a measure designed "**to screen out unmeritorious actions**" (emphasis added).[10] The leave requirement was always intended to be a merits-based analysis on the evidence filed.

16. In one of the first decisions under Part XXIII.1, *Ainslie v. CV Technologies*, the late Justice Lax reiterated the public policy goal of the leave requirement, which was to limit unmeritorious litigation and "strike suits", stating: "the CSA concluded that… a screening mechanism was necessary in order to prevent corporate defendants from being exposed to proceedings 'that cause real harm to long-term shareholders and resulting damage to our capital markets.'"[11]

17. From the perspective of the Canadian insurance industry, and in particular the D&O insurers, the correct application of the leave requirement merits test is a critical component of

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[7] *Epstein v. First Marathon Inc.* (2000), 2 B.L.R. (3d) 30 at para. 44, [2000] O.J. No. 452 (S.C.J.), quoting John Avery, "Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995" (1996) 51 Bus. Law. 335 at 337, IBC BOA, Tab 5.
[8] CSA Notice 53-302 at p. 2, IBC BOA, Tab 11.
[9] CSA Notice 53-302 at p. 6, IBC BOA, Tab 11; *Ainslie* at para. 12, IBC BOA, Tab 1.
[10] Five Year Review Committee, *Five Year Review Committee Final Report: Reviewing the Securities Act (Ontario)*, March, 2003 at p. 131, IBC BOA, Tab 12; CSA Notice 53-302 at pp. 6-7, IBC BOA, Tab 11.
[11] *Ainslie* at para. 12, IBC BOA, Tab 1.

the overall legislative scheme. Without a robust and meaningful leave test, public companies, D's & O's, and in turn, their D&O insurers, would be left exposed to meritless proceedings including "strike suits" brought only to pressure potential defendants and their insurers into nuisance settlements. They would also be in the unanticipated position of incurring unnecessary defence costs early in the proceedings if the test was too low.

B. Decisions Interpreting the Leave Test

18. Prior to the release of the Ontario Court of Appeal's decision in this case, several experienced class action judges in Ontario and other provinces with identical or similar legislation had interpreted the leave threshold in section 138.8(b) of the *Act*. These courts have applied a more stringent test than appears to have been articulated by the Ontario Court of Appeal in the decision below, which equates the leave requirement to the "no cause of action" pleading test and the requirement at certification that a proposed class action disclose a cause of action under section 5(1)(a) of the *Class Proceedings Act, 1992*, SO 1992, C. 6 (the "**CPA**").

19. While there may be differences in the actual wording used by courts when assessing the leave threshold, judges have consistently found that (a) the burden on a plaintiff under section 138.8(b) is higher than the pleadings threshold applied for certification (section 5(1)(a) of the *CPA*); and (b) the motion judge must conduct a critical examination of the evidence put forward on the motion in determining whether to grant leave.

20. In the first decision under section 138.8 of the *Act*, *Silver v. IMAX*, van Rensburg J. (as she then was) held that it sets a "relatively low threshold" but one that nonetheless required the plaintiffs to put forward evidence with respect both to the alleged misrepresentation and the conduct of the issuer's directors and officers in relation to it:

> The leave provision, working with the definition of the statutory cause of action and defences, requires plaintiffs to put forward the evidence they rely on as to the misrepresentation, and the extent of knowledge or participation required for non-core documents and liability for officers, and permits each proposed defendant to offer an account that may contradict the plaintiffs' allegations, or would fall within the terms of one or more of the defences afforded by the statute.

> The evidence must be considered at the leave stage to determine whether the plaintiffs' action, after the respondents have had the opportunity to put forward evidence to support their defences and the positions of the parties have been explored in cross-examination, has a reasonable possibility of success. (emphasis added)[12]

21. Subsequently, several judges have articulated tests under section 138.8 of the *Act* and comparable legislation that provide for a robust and meaningful leave threshold that includes extensive and critical examination of the evidence, including expert evidence, on which the parties rely.

22. For example, in the Supreme Court of British Columbia, Harris J. stated that the leave test is a merits-based analysis "intended to do more than screen out clearly frivolous, scandalous or vexatious actions", and requires the court to "weigh evidence in order to assess the likelihood of success at trial" (emphasis added).[13]

23. The Quebec Court of Appeal, in the *Theratechnologies Inc.* decision appealed to this Court and presently under reserve, similarly held that the leave requirement "is not aimed solely at preventing recourse that appears frivolous or unmeritorious."[14] The Court held that the criterion of a reasonable possibility that the action will be resolved in favour of the plaintiff is "less stringent than the criterion of the preponderance of the evidence," but "more stringent than the criterion of the colour of right" that forms part of the certification test under art. 1003 *C.p.c*. This more stringent criterion is

> in keeping with the legislator's intention to make the provision a serious screening mechanism, from the perspective of a compromise between, on the one hand, the objective of facilitating recourse for liability on the secondary market and, on the other, the need to prevent strike suits motivated by the objective of prying unjustified settlements out of reporting issuers that want to avoid long and costly legal debates.[15]

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[12] *Silver v. IMAX Corp.* (2009), 66 B.L.R. (4th) 222, [2009] O.J. No. 5573 at paras. 25, 324, 331-32 (S.C.J.), IBC BOA, Tab 9.
[13] *Round v. MacDonald, Dettwiler & Associates Ltd.*, 2011 BCSC 1416 at paras. 74-76, IBC BOA, Tab 8, aff'd 2012 BCCA 456.
[14] *Theratechnologies Inc. v. 121851 Canada Inc.,* 2013 QCCA 1256 at para. 118 ("*Theratechnologies*"), IBC BOA, Tab 10.
[15] *Theratechnologies* at para. 109, IBC BOA, Tab 10.

24. In *Theratechnologies*, the Quebec Court of Appeal noted the "particularly substantial analyses that certain decisions rendered in Ontario have conducted before authorizing or denying the recourse envisioned," citing to, among others, the leave decisions in *Green v. CIBC* and *Silver v. IMAX*, as well as the decision of Strathy J. (as he then was) in *Gould v. Western Coal*. The Quebec Court of Appeal noted that only one decision, *Zaniewicz* v. *Zungui Haixi Corporation*, "did not conduct as detailed an analysis."[16]

25. In *Western Coal*, the motions judge conducted an extensive scrutiny of the affidavit evidence and cross-examination testimony of the parties' fact witnesses and financial experts, and in particular, accepted the evidence of the defendants' expert while largely disregarding and giving no weight to the evidence of the plaintiff's expert on the basis that he was opining on matters beyond his expertise, his opinion lacked the requisite independence, and acted as an advocate.[17] The proposed plaintiff's motion for leave was denied in a 340-paragraph decision which concluded that there was no reasonable possibility of success on the basis of the evidence filed on the motion.

26. A "particularly substantial analysis" was similarly undertaken in the *Bayens v. Kinross* decision recently upheld by the Ontario Court of Appeal and discussed in more detail below. Perell J. held "the test is a genuine screening mechanism that requires the court to assess and weigh the evidence and to determine whether the plaintiff's chance of success is a reasonable possibility."[18] Perell J concluded:

> At this juncture of the jurisprudence it can only be confidently said that the burden of proof on the plaintiff is higher than the "some basis in fact" standard used for certification motions but lower than: (a) establishing proof on the balance of probabilities (the civil trial standard); (b) showing that there is no genuine issue requiring a trial (the summary judgment test); and (c) showing a *prima facie* case or showing a serious issue to be tried (tests used for interlocutory injunctions.) … (emphasis added)[19]

27. In *Dugal v. Manulife Financial*, Belobaba J. interpreted the leave test as a robust merits test requiring "not just a triable issue but a seriously arguable claim" (emphasis

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[16] *Theratechnologies* at para. 125, n. 41, IBC BOA, Tab 10.
[17] *Gould v. Western Coal Corp.*, 2012 ONSC 5184, IBC BOA, Tab 6.
[18] *Bayens v. Kinross Gold Corp.*, 2013 ONSC 6864 at para. 38 ("*Kinross*"), IBC BOA, Tab 2, aff'd 2014 ONCA 901 ("*Kinross Appeal*"), IBC BOA, Tab 3.
[19] *Kinross* at para. 40, IBC BOA, Tab 2.

added).[20] Belobaba J. took guidance from the "reasonable possibility of success" standard originally proposed by the Ontario Law Reform Commission in its *Report on Class Actions* released in 1982 (the "**OLRC Report**"). The OLRC Report contemplated a merits-based test as a requirement for the certification of a class action, using language substantially similar to the language in section 138.8 of the *Act*. As stated in *Dugal*:

> The OLRC was explicit that the "reasonable possibility of success" test was not intended merely to screen out impossible cases: "The test that we propose is not aimed at those cases where it is clear that the action cannot succeed". There are already provisions under the *Rules of Civil Procedure* that allow such cases to be summarily disposed of, either by a motion to strike or a motion for summary judgment. Therefore, the "reasonable possibility of success" standard in s. 138.8, if the standard is not to be redundant, requires that plaintiffs prove something more than a mere possibility of success at trial. Otherwise, the leave application in securities class actions is nothing more than a speed bump. (emphasis added)[21]

28. At paragraph 85 of their factum, the respondents Howard Green and Anne Bell disagree with the leave threshold set out in *Dugal* and argue that the interpretation of the term "reasonable possibility of success" in the OLRC Report, which sets out a robust merits-based test, should not be adopted for the leave threshold in section 138.8 of the *Act*. The respondents contend that the certification test contemplated in the OLRC Report, which was not adopted in the CPA, has no connection or application to the leave test in section 138.8 of the *Act* (despite using the same language). In any event, that proposed test would have required both plaintiffs and defendants to file evidence. However, as held in *Ainslie*, under section 138.8 of the *Act*, only the proposed plaintiff is required to file evidence (though defendants almost always deliver affidavits as well).[22]

29. The robust leave threshold articulated in *Dugal* on the basis of the interpretation of the term "reasonable possibility of success" in the OLRC Report reflects the legislative intent of section 138.8 of the *Act*; avoids the redundancy of the very low threshold that the Court of Appeal appears to have articulated in the decision below; and is consistent with the majority of decisions of Ontario and B.C. judges on leave motions.

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[20] *Dugal v. Manulife Financial*, 2013 ONSC 4083 at para. 41 ("*Dugal*"), IBC BOA, Tab 4.
[21] *Dugal* at paras. 39, 41, IBC BOA, Tab 4.
[22] Respondents' Factum at para. 85; *Ainslie* at paras. 14-25, IBC BOA, Tab 1.

C. The Ontario Court of Appeal Erred in its Interpretation of the Leave Test

30. In the brief reference to the issue in the decision below, the Ontario Court of Appeal concluded that the leave threshold in section 138.8(b) of the *Act* is the same as the test for certification in section 5(1)(a) of the CPA:

> . . . in order to make that determination, the motion judge applies the same test that is used for determining whether the claim has a reasonable prospect of success for purposes of certification.[23]

31. In its December 2014 decision in *Kinross*, the Ontario Court of Appeal provided further guidance on the degree of scrutiny a motion judge should apply to the **evidence** on a leave motion.[24] The *Kinross* decision references *Green* by stating that the threshold at leave and certification are the "same tests", albeit "applied in entirely different contexts."[25] In addition, however, the *Kinross* decision correctly requires motion judges to apply "some critical evaluation of the merits of the action, based on all the evidence proffered by the parties on the leave motion" (emphasis added).[26] Indeed, the Court of Appeal upheld the decision of Perell J. dismissing a motion for leave based on his close scrutiny and rejection of the plaintiffs' expert evidence.

32. IBC submits that the threshold for granting leave cannot be the same as the threshold for determining that a pleading discloses a cause of action for the following reasons:

(a) The legislative history of section 138.8 of the *Act* clearly establishes a legislative intent to create a robust screening mechanism based on a preliminary merits assessment at an early stage of the action;

(b) The leave requirement was designed to operate separate from the certification test, and should not be interpreted in a manner that renders it redundant with the certification requirement that the pleadings disclose a cause of action (Part XXIII.1 claims may be brought on an individual basis as set out in the *Timminco* Decision);

(c) The statutory provisions requiring affidavit evidence from both plaintiffs and defendants and providing for cross-examination on that evidence underscore that the court on the leave motion **is expected to weigh conflicting evidence**,

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[23] *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90 at para. 88, IBC BOA, Tab 7.
[24] *Kinross Appeal*, IBC BOA, Tab 3.
[25] *Kinross Appeal* at para. 45, IBC BOA, Tab 3.
[26] *Kinross Appeal* at para. 49, IBC BOA, Tab 3.

draw reasonable inferences from that evidence, and evaluate the credibility of witnesses similar to the modern day concepts and rules for summary judgment motions;

(d) Experienced class actions judges in multiple jurisdictions have consistently interpreted the leave test as a low but nonetheless merits-based threshold that calls for a critical examination of the evidence, including expert evidence; and

(e) To read the leave test as nothing more than a pleadings test would undermine the statutory requirement of plaintiffs to file affidavit evidence.

33. IBC respectfully submits that Canadian public companies, D's & O's, and D&O insurers have invested significant resources in defending leave motions in the abundance of secondary market class actions that have been commenced following the coming into force of Part XXIII.1 of the *Act*. These litigants, and their insurers, did so in the legitimate expectation that the leave requirement, given its legislative history and context, was more than a pleadings test designed to "weed out hopeless claims" and duplicative of the certification requirements. The Court of Appeal's decision potentially strips these participants in securities litigation of an important protection, which was intended to be an integral component of the secondary market liability regime.

PART IV –COSTS

34. IBC does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

35. IBC requests permission to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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PART VI – TABLE OF AUTHORITIES

Tab	Authority	Paragraph Reference(s)
1	*Ainslie v. CV Technologies Inc.* (2008), 93 O.R. (3d) 200 (S.C.J.), additional reasons in [2008] O.J. No. 4927 (S.C.J.), leave to appeal allowed by [2009] O.J. No. 730 (S.C.J.)	13, 14, 16, 28
2	*Bayens v. Kinross Gold Corp.*, 2013 ONSC 6864	26
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4	*Dugal v. Manulife Financial*, 2013 ONSC 4083	27, 28, 29
5	*Epstein v. First Marathon Inc.* (2000), 2 B.L.R. (3d) 30, [2000] O.J. No. 452 (S.C.J.)	13
6	*Gould v. Western Coal Corp.*, 2012 ONSC 5184	24, 25
7	*Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90	24, 30, 31
8	*Round v. MacDonald, Dettwiler &Associates Ltd.*, 2011 BCSC 1416, aff'd 2012 BCCA 456	22
9	*Silver v. IMAX Corp*. (2009), 66 B.L.R. (4th) 222, [2009] O.J. No. 5733 (S.C.J.)	20, 24
10	*Theratechnologies Inc. v. 121851 Canada Inc.*, 2013 QCCA 1256	23, 24
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11	Canadian Securities Administrators Notice 53-302 Report of the Canadian Securities Administrators: *Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of "Material Fact" and "Material Change"* November 3, 2000, (2000) 23 OSCB 1	9, 12, 13, 14, 15
12	Five Year Review Committee, *Five Year Review Committee Final Report: Reviewing the Securities Act (Ontario)*, March, 2003	15
13	Toronto Stock Exchange Committee on Corporate Disclosure, *Final Report: Responsible Corporate Disclosure: A Search for Balance*, March, 1997	9, 10, 11, 12

PART VII – STATUTES AND RULES

***Class Proceedings Act, 1992*, SO 1992, C. 6**

Certification

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

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

* * *

***Loi de 1992 sur les recours collectifs*, LO 1992, chap. 6**

Recours collectif certifié par le tribunal

5 (1) Le tribunal saisi d'une motion visée à l'article 2, 3 ou 4 certifie qu'il s'agit d'un recours collectif si les conditions suivantes sont réunies:

a) les actes de procédure ou l'avis de requête révèlent une cause d'action;

* * *

***Securities Act*, RSO 1990, c S.5**

Liability for secondary market disclosure

Influential persons

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

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

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

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

(d) the influential person;

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

(f) each expert where,

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

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

(iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement.

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.

Copies to be sent to the Commission

(4) A copy of the application for leave to proceed and any affidavits and factums filed with the court shall be sent to the Commission when filed.

Requirement to provide notice

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

Same, appeal of leave decision

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

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

(b) the appellant shall provide the Commission with notice in writing of the date on which the appeal is scheduled to be heard, at the same time such notice is given to each respondent.

Limitation period

138.14 (1) No action shall be commenced under section 138.3,

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

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

(ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable

legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

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

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

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

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

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

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

Suspension of limitation period

(2) A limitation period established by subsection (1) in respect of an action is suspended on the date a notice of motion for leave under section 138.8 is filed with the court and resumes running on the date,

(a) the court grants leave or dismisses the motion and,

(i) all appeals have been exhausted, or

(ii) the time for an appeal has expired without an appeal being filed; or

(b) the motion is abandoned or discontinued.

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***Loi sur les valeurs mobilières*, LRO 1990, chap. S.5**

Responsabilité quant aux obligations d'information sur le marché secondaire

Personnes influents

138.3 (3) Lorsqu'une personne influente ou une personne ou compagnie qui a le pouvoir effectif, implicite ou apparent d'agir ou de parler au nom d'une telle personne publie un document ou fait une déclaration orale publique qui a trait à un émetteur responsable et qui contient une présentation inexacte des faits, la personne ou la compagnie qui acquiert ou aliène une valeur mobilière de l'émetteur pendant la période comprise entre le moment où a été publié le document ou celui où a été faite la déclaration et celui où a été publiquement rectifiée la présentation inexacte des faits que contient le document ou la déclaration a, que la personne ou la compagnie se soit ou non fiée à celle-ci, le droit d'intenter une action en dommages-intérêts contre les personnes suivantes :

a) l'émetteur responsable, si un de ses administrateurs ou dirigeants ou, dans le cas d'un fonds d'investissement, le gestionnaire du fonds d'investissement a autorisé ou permis que soit publié le document ou que soit faite la déclaration ou qu'il y a acquiescé;

b) l'auteur de la déclaration;

c) tout administrateur ou dirigeant de l'émetteur responsable qui a autorisé ou permis que soit publié le document ou que soit faite la déclaration ou qui y a acquiescé;

d) la personne influente;

e) tout administrateur ou dirigeant de la personne influente qui a autorisé ou permis que soit publié le document ou que soit faite la déclaration ou qui y a acquiescé;

f) tout expert, si les conditions suivantes sont réunies :

(i) la présentation inexacte des faits figure également dans un rapport, une déclaration ou une opinion de l'expert,

(ii) le document ou la déclaration reproduit, résume ou cite des passages du rapport, de la déclaration ou de l'opinion de l'expert,

(iii) si le document a été publié ou que la déclaration a été faite par une personne autre que l'expert, celui-ci a consenti par écrit à l'utilisation du rapport, de la déclaration ou de l'opinion dans le document ou la déclaration.

Autorisation de poursuivre

138.8 (1) Une action ne peut être intentée en vertu de l'article 138.3 qu'avec l'autorisation du tribunal, accordée sur motion avec préavis à chaque défendeur, et que si le tribunal est convaincu de ce qui suit :

a) l'action est intentée de bonne foi;

b) il est raisonnablement possible que l'action soit réglée au moment du procès en faveur du demandeur.

Idem

(2) Sur requête présentée en vertu du présent article, le demandeur et chaque défendeur signifient et déposent un ou plusieurs affidavits énonçant les faits importants sur lesquels ils ont chacun l'intention de se fonder.

Idem

(3) L'auteur d'un tel affidavit peut être interrogé au sujet de celui-ci conformément aux règles de pratique.

Copies envoyées à la Commission

(4) Les copies de la requête en autorisation de poursuivre et des affidavits et mémoires déposés auprès du tribunal sont envoyées à la Commission au moment du dépôt.

Obligation de donner un préavis

(5) Le demandeur avise par écrit la Commission de la date prévue de l'audition de la requête en autorisation, en même temps qu'il en avise chaque défendeur.

Idem, appel de la décision quant à l'octroi de l'autorisation

(6) Si l'une des parties interjette appel de la décision du tribunal quant à l'octroi de l'autorisation d'intenter une action en vertu de l'article 138.3 :

a) d'une part, chaque partie à l'appel fournit un exemplaire de son mémoire à la Commission au moment de son dépôt;

b) d'autre part, l'appelant avise par écrit la Commission de la date prévue de l'audition de l'appel, en même temps qu'il en avise chaque intimé.

Prescription

138.14 (1) Aucune action ne doit être intentée en vertu de l'article 138.3 :

a) dans le cas de la présentation inexacte de faits dans un document, après le premier en date des jours suivants :

(i) trois ans après la date à laquelle le document contenant la présentation inexacte des faits a été publié pour la première fois,

(ii) six mois après la délivrance d'un communiqué portant qu'a été accordée une autorisation d'intenter une action en vertu de l'article 138.3 ou de

dispositions législatives comparables d'autres provinces ou territoires du Canada à l'égard de la même présentation inexacte des faits;

b) dans le cas de la présentation inexacte de faits dans une déclaration orale publique, après le premier en date des jours suivants :

(i) trois ans après la date à laquelle la déclaration contenant la présentation inexacte des faits a été faite,

(ii) six mois après la délivrance d'un communiqué portant qu'a été accordée une autorisation d'intenter une action en vertu de l'article 138.3 ou de dispositions législatives comparables d'autres provinces ou territoires du Canada à l'égard de la même présentation inexacte des faits;

c) dans le cas du non-respect des obligations d'information occasionnelle, après le premier en date des jours suivants :

(i) trois ans après la date à laquelle la divulgation obligatoire devait être faite,

(ii) six mois après la délivrance d'un communiqué portant qu'a été accordée une autorisation d'intenter une action en vertu de l'article 138.3 ou de dispositions législatives comparables d'autres provinces ou territoires du Canada à l'égard du même non-respect des obligations d'information occasionnelle.

Suspension du délai de prescription

(2) Le délai de prescription créé par le paragraphe (1) à l'égard d'une action est suspendu à la date où un avis de motion en autorisation visé à l'article 138.8 est déposé au tribunal et recommence à courir à la date où, selon le cas :

a) le tribunal accorde l'autorisation ou rejette la motion et l'une des conditions suivantes est remplie :

(i) toutes les voies d'appel ont été épuisées,

(ii) le délai d'appel a expiré sans qu'un appel ait été interjeté;

b) la motion fait l'objet d'un désistement.