

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

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Appellant  
(Applicant)

- and -

HOWARD GREEN and ANNE BELL

Respondent  
(Respondents)

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**FACTUM OF THE APPELLANT  
(CANADIAN IMPERIAL BANK OF COMMERCE.)  
(Pursuant to Rules 35 and 42 of the *Rules of the Supreme Court of Canada*)**

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## PART I – OVERVIEW AND FACTS

### A. Overview

1. This appeal concerns the proper interpretation of the interaction between two intertwined statutory schemes that were intended to work together: Part XXIII.1 of the Ontario *Securities Act* (the “*OSA*”), which is the statutory regime created as a “specific and comprehensive code”<sup>1</sup> for secondary market misrepresentation class actions; and the Ontario *Class Proceedings Act* (the “*CPA*”).

2. Part XXIII.1 of the *OSA* was enacted after seven years of public policy research, analysis and consultation with market participants by Canada’s securities regulators. They recommended the enactment of a statutory civil liability regime for secondary market misrepresentations under which investors would be deemed to rely on material misrepresentations made to the market.

3. Securities regulators recommended the statutory regime because they believed that the common law remedy for misrepresentation provided insufficient deterrence for poor disclosure. This was because of the practical difficulties associated with investors pursuing the common law remedy by class action procedure due to the requirement to prove reliance on an individualized basis. By deeming reliance for the purpose of the statutory remedy, secondary market misrepresentation class actions would become possible within the framework of the statutory regime.

4. While securities regulators believed that the facilitation of secondary market misrepresentation class actions through deemed reliance was in the public interest, they also believed that there had to be carefully tailored limits on the availability and scope of such actions. This concern was based in part on the unique coercive power of such actions and the potential for abuse that had been demonstrated by the American experience with securities class actions. The need for limits was further based on the fact that any compensation for secondary market misrepresentations would come at the expense of innocent long term shareholders of the issuer who would not have benefitted from the wrong. To address these concerns, the statutory remedy therefore included a leave requirement intended to screen out clearly unmeritorious

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<sup>1</sup> CSA Notice 53-302, “Proposal for a Statutory Civil Remedy for Investors in the Secondary Market”, (2000) 23 OSCB (“CSA Report”) at 8, CIBC Auth., Tab 12.

cases, an absolute limitation period that required leave to be obtained with dispatch, and caps on liability.

5. The plaintiffs in this case used a procedural gambit not contemplated by the statutory regime: they commenced under the *CPA*, without leave, a common law misrepresentation claim and pleaded in that claim an intent to seek leave for a statutory claim. They then failed to bring their motion for leave for the statutory claim until after the expiry of the three year period prescribed by the statutory regime for obtaining leave and commencing a statutory claim.

6. The Court of Appeal for Ontario held (reversing its own recent prior decision) that by reason of the plaintiffs' procedural gambit, they were exempt from the statutory remedy's limitation period by operation of s. 28 of the *CPA*. It is submitted that this interpretation of the interaction between Part XXIII.1 of the *OSA* and s. 28 of the *CPA* is contrary to the statutory interpretation principle that requires intertwined statutes to be interpreted harmoniously. The Court of Appeal's interpretation negated the statutory remedy's limitation period, defeated legislative intent, and resulted in a perverse distinction between the position of a representative plaintiff (and class members) where the representative plaintiff has used the procedural gambit used in this case, versus their position where the representative plaintiff sues under the statutory remedy alone, as contemplated by the statutory regime.

7. The Court of Appeal justified its anomalous interpretation on the basis that the interpretation gave plaintiffs an avenue to gain control over whether they met the limitation period for the statutory claim, which otherwise would be uncertain. However, if this uncertainty was a design flaw in the statutory regime rather than a considered policy choice, it was for the Legislature to fix it, not the Court by the indirect and imperfect means chosen by the Court in this case. The Legislature has now addressed the uncertainty issue through an amendment to Part XXIII.1.

8. The Court of Appeal further held that the common law misrepresentation claim made in the class proceeding commenced by the plaintiffs without leave should be certified along with the statutory claim. This interpretation of the interaction between Part XXIII.1 of the *OSA* and the *CPA* again is discordant, contrary to the applicable principle of statutory interpretation.

9. Certification of common law claims, which are not subject to the limits that were incorporated into the statutory remedy, provides to the representative plaintiff the coercive power associated with securities class actions that the carefully calibrated statutory remedy was intended to mitigate; and it tilts against the interests of innocent continuing shareholders the balance intended by the Legislature with a view to their interests. Certification of the common law claim therefore defeats legislative intent and is contrary to the premise on which Part XXIII.1 was enacted: that common law misrepresentation claims are not a suitable framework for secondary market misrepresentation class actions.

10. Finally, there is an issue with respect to the merits-based test for granting leave to pursue a statutory claim. The motions judge, in his interpretation and application of the leave standard, according to which he would have granted leave in this case but for the expiry of the limitation period, read down the requirement that the plaintiff demonstrate a “reasonable possibility of success” to a requirement that the plaintiff merely show that the case is “not impossible”. This approach, the result (but not the articulation) of which was endorsed by the Court of Appeal, failed to give proper effect to the Legislature's intent that there be a meaningful assessment of the merits at the leave stage. Canadian Imperial Bank of Commerce (“CIBC”) relies on the submissions of the individual defendants on this issue.

#### **B. The Proposed Claim**

11. *The alleged misrepresentations.* The plaintiffs’ proposed claim alleges that the CIBC and the individual defendants made misrepresentations to the secondary securities market relating to CIBC’s exposure to the U.S. residential mortgage market (the “USRMM”). That exposure was through highly rated positions (asset backed securities and hedge positions arising from back-to-back swaps) the value of which was sensitive to the USRMM that were held in CIBC’s “Securities” and “Derivative Instruments” portfolios. The positions represented a small percentage of the assets held in those portfolios.

12. The carrying value of the positions was written down significantly by CIBC in late 2007 for accounting purposes (following earlier smaller write downs) as a result of the breaking of a third wave of what became an unprecedented credit crisis. The third wave was larger and more destructive than the two waves that had preceded it earlier that year, neither of which had

resulted in downgrades by rating agencies in their rating of the credit quality of senior positions sensitive to the USRMM of the kind held by CIBC.<sup>2</sup> However, with the breaking of the third wave, some financial institutions, led by CIBC, began to take significant write downs in the carrying value of such senior positions and to provide disclosure with respect to such positions fully disaggregated from the portfolios of which the positions were a part. Following that disclosure by CIBC in late 2007, there was a significant drop in CIBC's share price.

13. The plaintiffs are alleging that CIBC should have written down the carrying value of the positions sooner and by larger amounts, and should have provided disaggregated disclosure concerning the positions sooner, despite there being no peer institution with similar exposures that had taken larger write downs or provided disaggregated financial reporting earlier than did CIBC.<sup>3</sup> According to the plaintiffs, as a result of these alleged financial reporting deficiencies, CIBC's financial reporting in Q2, Q3 and at year-end 2007 misrepresented CIBC's financial position in that the reporting did not comply with GAAP. The plaintiffs are seeking damages for the alleged misrepresentations in the amount of the drop in the share price that followed the late 2007 disclosure, which the plaintiffs characterize as corrective disclosure of the prior alleged misrepresentations.

14. *The alleged misrepresentations all concern matters of judgment.* The valuation of the positions in question, the assessment of the degree of risk associated with the positions, and the determination of the appropriate financial reporting for the positions are all matters treated by GAAP as matters for the judgment of the reporting issuer.<sup>4</sup> Neither GAAP nor securities laws expect reporting issuers to be clairvoyant. Thus the fact that a financial reporting judgment is not supported by subsequent events does not make the judgment "wrong" or a "misrepresentation", or require, under accounting rules, a restatement of the past results. The question is whether the judgment was reasonable based on the information reasonably available at the time the judgment was made, applying industry standards at the time.

15. *CIBC's judgments were consistent with those of "all the players".* At the time CIBC was making the judgments in question, market participants had not recognized the risk for highly

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<sup>2</sup> Stephen G. Ryan, "Accounting in and for the Subprime Crisis" (2008) 83: 6 The Accounting Review 1605 at 1620, CIBC Auth., Tab 14 (referenced in the report of the plaintiffs' accounting expert, Professor Gordon Richardson).

<sup>3</sup> Strathy, J. Reasons, paras. 265, 270, CIBC Record, Tab 1b, pp. 53-54.

<sup>4</sup> Strathy, J. Reasons, paras. 250-258, 274-282, CIBC Record, Tab 1b, pp. 50-51, 54-56.

rated positions of the kind held by CIBC that ended up materializing in the context of the unprecedented global credit crisis to come. In the words of the plaintiffs' own economic expert, that risk was, *ex ante*, "completely missed by all the players – rating agencies, regulators, financial institutions and investors" – all of whom thought, prior to the breaking of the third wave of what became the credit crisis, that there was an "insignificant chance" of impairment of such highly rated assets.<sup>5</sup>

16. ***CIBC's judgments were the product of a reasonable investigation and have been endorsed by independent experts.*** The financial reporting in question was considered by CIBC's external auditors, Ernst & Young, in Ernst & Young's quarterly reviews and as part of its audit of the fiscal 2007 annual financial statements. Ernst & Young believed that CIBC's judgments were reasonable and gave an unqualified audit opinion on the fiscal 2007 annual financial statements. Ernst & Young, which is aware of all of the plaintiffs' allegations and of the opinion of the plaintiffs' accounting expert, has not indicated that any restatement of CIBC's past results is called for and has not withdrawn its audit opinion on CIBC's fiscal 2007 annual financial statements.

17. CIBC specifically requested, at the time of the financial reporting in question, that Ernst & Young observe and comment on CIBC's approach to the valuation of the positions in question (the matter at the heart of the plaintiffs' allegations) with a view to ensuring that CIBC's methodology met all applicable standards. Ernst & Young confirmed to CIBC at the time that CIBC's valuation process was "robust" and that CIBC was doing "about all that can be done" to value the positions in question.<sup>6</sup> The plaintiffs' own accounting expert has confirmed that it was reasonable for CIBC to rely on Ernst & Young.<sup>7</sup>

18. The appropriateness of CIBC's valuation approach and the reasonableness of its financial reporting judgments have subsequently been confirmed by an eminent independent accounting expert and by an independent economic expert, after a position-by-position review of the analyses performed by CIBC at the time, and two position-specific analyses to test the

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<sup>5</sup> Michel G. Crouhy, Robert A. Jarrow and Stuart M. Turnbull, "The Subprime Credit Crisis of 2008" (Fall 2008) *The Journal of Derivatives* 81 at 89, 104, CIBC Auth., Tab 13 (referenced in the report of the plaintiffs' experts, Robert A. Jarrow and Donald R. Van Deventer, in their Exhibit A2).

<sup>6</sup> Strathy, J. Reasons, paras. 211, 287, 299, CIBC Record, Tab 1b, pp. 43, 57, 58-59.

<sup>7</sup> Cross-Examination of Gordon Richardson, pp. 209-210, q. 804, CIBC Record, Tab 3a, pp. 274-276.

reasonableness of CIBC's valuation conclusions.<sup>8</sup>

19. The plaintiffs' accounting expert has criticized CIBC's accounting judgments as not being compliant with GAAP. However, he has done so based on his own valuation analysis, which he has conceded would not meet the requirements of GAAP, and without a position-by-position review of the kind done by CIBC's independent experts, despite the plaintiffs having had access to the information needed to do an analysis of the kind that was done by CIBC's experts.

20. The former Chair of the Ontario Securities Commission, David Brown (under whom Ontario's secondary market liability regime was implemented), has reviewed all of CIBC's processes around the disclosures in question. Mr. Brown concluded that CIBC's process was exemplary. Mr. Brown's opinion as to CIBC's disclosure process and the reasonableness of its investigation prior to making the statements in question is unchallenged by any contrary expert governance evidence from the plaintiffs, and was accepted by the motions judge.<sup>9</sup>

21. *The parallel U.S. claim has been summarily dismissed.* A parallel securities class action claim on behalf of U.S. investors in CIBC shares (which are listed on the NYSE as well as the TSX), relying on essentially the same alleged misrepresentations as in the Ontario case, was commenced against CIBC in the District Court of the Southern District of New York in July 2008, at the same time as the Ontario process was initiated on behalf of Canadian investors. The American claim was dismissed summarily in March 2010 under the American procedure designed to screen out dubious securities class action claims. In the Court's words, dismissing the American claim in its entirety:

The Complaint describes an unprecedented paralysis of the credit market and a global recession. Major financial institutions like Bear Stearns, Merrill Lynch and Lehman Brothers imploded as a consequence of the financial dislocation...CIBC, like so many other institutions, could not have been expected to anticipate the crisis with the accuracy the Plaintiff enjoys in hindsight.

...

The allegations regarding CIBC's write-downs amount to fundamental disagreements with Defendants' business judgments in a tumultuous economic downturn..."Securities laws do not guarantee sound business practices and do

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<sup>8</sup> Strathy, J. Reasons, paras. 268-271, 288, 299, CIBC Record, Tab 1b, pp. 53-54, 57, 58-59.

<sup>9</sup> Strathy, J. Reasons, paras. 456-457, 459, CIBC Record, Tab 1b, pp. 86-87.

not protect investors against reverses.”<sup>10</sup>

### C. Legislative Facts

22. ***The statutory regime is the product of an intensive public policy process.*** The statutory secondary market civil liability regime is the product of an intensive public policy process involving over seven years of research, analysis and consultation by securities regulators with market participants. The process was undertaken initially by the Toronto Stock Exchange Committee on Corporate Disclosure (the “TSX Committee”) and was continued by the Canadian Securities Administrators (the “CSA”) (the umbrella organization of Canada’s provincial securities regulators). This process led to a CSA proposal for a statutory civil remedy for investors in the secondary market. The CSA proposal was enacted in Ontario in 2002 (coming into force in 2005) as Part XXIII.1 of the *OSA*, and in substantially the same form in all other Canadian provinces.

23. ***The need for greater deterrence.*** In recommending a statutory remedy for secondary market misrepresentation, the starting point for the CSA was that there was a problem with the quality of the disclosure made to the secondary market in Canada, which investors viewed as inferior to the standard of disclosure in the United States. The CSA attributed this quality deficiency, at least in part, to the absence of effective redress for Canadian investors by way of private rights of action for secondary market misrepresentation, resulting in insufficient disincentives in Canada for poor disclosure.<sup>11</sup>

24. ***The impracticability of common law securities class action claims.*** In explaining the ineffectiveness of private rights of action for secondary market misrepresentation in Canada, the TSX Committee described common law remedies (the torts of negligent misrepresentation and deceit) as “so difficult to pursue and to establish that they are, as a practical matter, largely academic”.<sup>12</sup> The practical problem is the requirement at common law to prove reliance on an individualized basis. This makes common law misrepresentation claims, in the TSX Committee’s understanding, unsuitable for class action procedure: “If each class member were

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<sup>10</sup> *Plumbers & Steamfitters Local 773 Pension Fund v. Canadian Imperial Bank of Commerce*, 694 F. Supp. 2d 287 at 301, 303 (S.D.N.Y. 2010), CIBC Auth., Tab 6.

<sup>11</sup> CSA Report at 5, CIBC Auth., Tab 12.

<sup>12</sup> Toronto Stock Exchange Committee on Corporate Disclosure, *Responsible Corporate Disclosure: A Search for Balance* at iv (Toronto: Toronto Stock Exchange, 1997) (“TSX Report”), CIBC Auth., Tab 16.

required to prove reliance on a misrepresentation, the individual issues would overwhelm the common ones and there would be no benefit to a class proceeding”.<sup>13</sup> The CSA agreed with this premise: “In general, claims which require proof of individual reliance are unlikely to be certified as class actions”.<sup>14</sup>

25. The Canadian position was in contrast to the position in the United States where courts have implied a private right of action for secondary market misrepresentation from Section 10(b) of the *Securities Exchange Act of 1934*, and its implementing regulation, Rule 10b-5. Section 10(b) and Rule 10b-5 create liability for misleading statements relating to the purchase or sale of securities that are made with the requisite intent.

26. For the purpose of a Rule 10b-5 action, reliance by investors on a misrepresentation made with respect to shares traded in an efficient market is presumed, based on the “fraud-on-the-market” theory.<sup>15</sup> According to that theory, the market price in an efficient market reflects all publicly available information, including any material misrepresentations; and thus a trade at the market price is *ipso facto* made in reliance on the misrepresentation, even if the investor was not aware of the misrepresentation when making the trade.

27. The presumption of reliance based on the “fraud-on-the-market” theory facilitates the certification of Rule 10b-5 secondary market securities class actions in the United States. However, U.S. state courts have consistently rejected attempts to extend the “fraud-on-the-market” theory from federal statutory claims under Rule 10b-5 to state common law negligent misrepresentation claims, thus effectively precluding class action procedure for such claims and limiting investors to the Rule 10b-5 cause of action for secondary market class actions.<sup>16</sup> State courts have reasoned that to permit the “fraud-on-the-market” concept applicable to federal statutory Rule 10b-5 claims to be applied to common law misrepresentation claims would enable plaintiffs to take the benefit of an incident of the federal statutory regime while evading the burdens of that regime.<sup>17</sup>

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<sup>13</sup> TSX Report at 46, para. 4.11, CIBC Auth., Tab 16.

<sup>14</sup> CSA Report at 9, CIBC Auth., Tab 12.

<sup>15</sup> *Basic Incorporated v. Levinson*, 485 U.S. 224, 108 S.Ct. 978, CIBC Auth., Tab 2.

<sup>16</sup> *Kaufman v. I-Stat Corporation*, 754 A. 2d 1188 at 1193-1194 (S.C.N.J. 2000), CIBC Auth., Tab 4.

<sup>17</sup> *Ibid.*

28. The CSA noted in its proposal for a statutory remedy that a then-recent Ontario court decision had (like U.S. state courts) rejected the use of the “fraud-on-the-market” theory for common law claims based on negligent or fraudulent misrepresentation. The CSA understood the effect of this decision to be effectively to rule out securities class actions in Canada based on common law misrepresentation: “The CSA view the decision as being significant because it illustrates the limitations inherent in class actions in the context of securities litigation based on the common law.”<sup>18</sup>

29. ***The solution: a statutory remedy that deems reliance.*** Accordingly, the CSA (like the TSX Committee) proposed that reliance be deemed for the purpose of the proposed statutory remedy for secondary market misrepresentation, in order to make the statutory cause of action, unlike common law causes of action, suitable for class action procedure. In the TSX Committee’s words: “...it would not be practical to pursue a class action under statutory civil liability for a misrepresentation absent a provision in the legislation...which deems the plaintiffs to have relied on the misrepresentation”.<sup>19</sup>

30. Furthermore, in contrast to the Rule 10b-5 liability standard, which requires proof by the plaintiff that the misrepresentation in question was made with intent or recklessness, the CSA, in its proposed statutory regime, provided for issuer liability for any misrepresentation unless the issuer can establish a due diligence defence based on having made a “reasonable investigation” before making the misrepresentation.<sup>20</sup>

31. ***The need for limits on the availability and scope of securities class actions: the strike suit concern.*** While the CSA concluded that a statutory remedy for misrepresentation that deemed reliance and required the issuer, in effect, to rebut negligence was necessary in the public interest in order to make securities class actions possible in Canada and thereby deter misrepresentations, the CSA also recognized that securities class actions are a potentially mixed blessing that carry with them significant risks and costs. The CSA concern – what the TSX Committee described as a “dilemma” – was that the civil remedy “cure” for inadequate compliance with continuous disclosure rules, unless properly designed and appropriately limited,

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<sup>18</sup> CSA Report at 9, CIBC Auth., Tab 12.

<sup>19</sup> TSX Report at 46, para. 4.11, CIBC Auth., Tab 16.

<sup>20</sup> CSA Report at 53, CIBC Auth., Tab 12.

could prove “worse than the disease”.<sup>21</sup>

32. This concern about the systemic risks and costs of securities class actions was derived from the American experience. Securities class actions in the United States, as noted by the CSA, had led to what Congress perceived as “burgeoning abuse of the litigation process by securities plaintiff’s lawyers” exploiting the coercive power of securities class actions.<sup>22</sup> The United States Supreme Court has explained that the coercion associated with securities class actions is unique in its degree, and arises from the mere pendency of the case and is not dependent on the merits:

There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general...[E]ven a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial...The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.<sup>23</sup>

33. This unique coercive power led to the phenomenon in the United States of “strike suits”, resulting in what an Ontario court described (in words quoted by the CSA) as the transformation of the securities class action mechanism in the United States by “profit-motivated lawyers and shareholder plaintiffs posing as class representatives” into “a means of harassing corporate defendants”.<sup>24</sup>

34. As a result of the “burgeoning abuse” of securities class actions in the United States, Congress passed the *Private Securities Litigation Reform Act* (the “PSLRA”) in December 1995, with a view, as noted by the CSA, to making it more difficult to bring securities class action claims.<sup>25</sup> The PSLRA was followed in 1998 by the *Securities Litigation Uniform Standards Act* (“SLUSA”), an anti-avoidance measure which prevented plaintiffs from trying to evade the PSLRA limitations on securities class actions by the expedient of bringing the cases in state courts relying on state statutory or common law causes of action rather than federal statutory law.

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<sup>21</sup> TSX Report at 6, para. 1.31, CIBC Auth., Tab 16.

<sup>22</sup> CSA Report at 8, footnote 27, CIBC Auth., Tab 12.

<sup>23</sup> *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917 at 739-740, CIBC Auth., Tab 3.

<sup>24</sup> CSA Report at 5, CIBC Auth., Tab 12.

<sup>25</sup> CSA Report at 8, footnote 27, CIBC Auth., Tab 12.

35. In light of the American experience with securities class actions, the CSA explained that it was concerned to ensure that “any exercise of the statutory right of action occurs in a litigation environment different from that in the United States and less conducive to coercive strike suits”.<sup>26</sup> Accordingly, the CSA concluded that, “The concern about strike suits must be addressed” given the risk otherwise of “real harm to long-term shareholders and resulting damage to our capital markets”.<sup>27</sup>

36. ***The need for limits: protection of innocent continuing shareholders.*** The other key concern of the CSA that had to be addressed in its design of the statutory regime was the interests of the innocent shareholders of the culpable issuer who will have derived no benefit from the conduct in question, but who bear the economic burden of providing compensation. The interests of the innocent continuing shareholders had to be balanced against the interests of injured investors. As the CSA explained:

[C]ompensation of aggrieved secondary market investors (who trade with other investors, not the issuer) would generally involve payment by a culpable issuer that did not in fact receive money from the secondary market investors; by diminishing the issuer’s assets, the compensation would in effect come at the expense of other innocent investors, in particular, the issuer’s continuing shareholders. (emphasis added)<sup>28</sup>

37. ***The limits imposed on securities class actions under the statutory regime.*** In order to address its concerns about strike suits and the interests of innocent continuing shareholders, the CSA balanced its facilitation of securities class actions (deemed reliance and a less rigorous liability standard than the fraud-based standard under Rule 10b-5) with limitations on their availability and scope. The key limitations in the CSA proposal, which were reflected in Part XXIII.1, included:

- *screening mechanism* (s.138.8): the requirement that a proposed plaintiff obtain leave to make a claim under the statutory remedy based on a showing of good faith and a reasonable possibility of success at trial. The CSA explained that this requirement was intended “to try to ensure that unmeritorious litigation, and the time and expense it

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<sup>26</sup> CSA Report at 7, CIBC Auth., Tab 12.

<sup>27</sup> CSA Report at 5, CIBC Auth., Tab 12.

<sup>28</sup> CSA Report at 3, footnote 10, CIBC Auth., Tab 12.

imposes on defendants, is avoided or brought to an end early in the litigation process”<sup>29</sup>, thereby assisting defendants “to fend off coercive efforts by plaintiffs to negotiate the cash settlement that is often the real objective behind a strike suit”<sup>30</sup>

- *absolute limitation period* (s.138.14): leave had to be obtained and a statutory claim commenced thereafter within the earlier of (i) three years of the misrepresentation in question, and (ii) six months from the issuance by the reporting issuer of a news release announcing that leave has been granted – an absolute limitation period that applied irrespective of discoverability or any other exception;
- *caps on liability* (s.138.7(1) and (2)): limits on damages that vary between different categories of defendant and that do not apply where the misrepresentation was intentional. The CSA explained the damages caps as a key element in achieving the objective of an appropriately balanced secondary market liability regime: “so that issuers and their directors and officers would be deterred from inadequate or untimely disclosure without, at the same time, creating a regime that would favour short term over long term investor interests”<sup>31</sup>;
- *proportionate liability* (s.138.6(1) and (2)): as between defendants found liable, damages are proportionate for issuers in all circumstances rather than joint and several, and likewise for other defendants unless they had knowledge of the misrepresentation;
- *no discretion to deny costs to a successful defendant* (s.138.11): the discretion under the *CPA* to deny costs to a successful defendant is expressly removed.

38. The result was the carefully calibrated statutory code enacted as Part XXIII.1 of the *OSA*, intended to be a “specific and comprehensive code” for secondary market securities class action claims,<sup>32</sup> and a code that “attempts to strike a fair balance between the interests of responsible issuers and plaintiffs”.<sup>33</sup>

#### **D. Procedural History**

39. *The plaintiffs’ procedural gambit.* The plaintiffs initiated their proposed claim on July

<sup>29</sup> CSA Report at 6, CIBC Auth., Tab 12.

<sup>30</sup> CSA Report at 6, CIBC Auth., Tab 12.

<sup>31</sup> CSA Report at 3, CIBC Auth., Tab 12.

<sup>32</sup> CSA Report at 8, CIBC Auth., Tab 12.

<sup>33</sup> CSA Report at 9, CIBC Auth., Tab 12.

22, 2008. They did so by a procedural gambit not contemplated by the CSA: they commenced a common law misrepresentation action by statement of claim under the *CPA*, for which no leave was required; and in that statement of claim, they also pleaded an intention to seek leave under s. 138.8 of the *OSA* to make a parallel claim under the statutory cause of action, s. 138.3.<sup>34</sup>

40. ***The plaintiffs assumed that the limitation period continued to run.*** The statement of claim for the common law claim stated, with respect to the intended motion for leave for the statutory claim, that the plaintiffs would be asking for the grant of leave “*nunc pro tunc*”.<sup>35</sup> Thus the plaintiffs were clearly assuming that the limitation period on the statutory claim continued to run until leave was granted and a statutory claim commenced, and was not suspended by operation of s. 28 of the *CPA*. The plaintiffs were asking in the prayer for relief for leave to be granted *nunc pro tunc* because they anticipated the possibility of leave not being obtained until after expiry of the three year limitation period on the statutory claim.

41. ***The plaintiffs did not perfect their motion for leave until after expiry of the limitation period.*** The three year limitation period for the statutory claim in respect of the alleged misrepresentations expired, depending on the misrepresentation in question, beginning on May 31, 2010, with the last of the alleged misrepresentations time-barred as of December 6, 2010.

42. The plaintiffs delivered a notice of motion for leave and an initial tranche of supporting affidavit material on January 21, 2010, more than one and a half years after their statement of claim and four months prior to when the limitation period for the statutory claim on the misrepresentations in question began to expire.<sup>36</sup> However, they did not deliver their final tranche of supporting affidavit material and complete their leave motion record-in-chief until a year later (January 15, 2011), after the expiry on December 6, 2010 of the three year period from the last of the alleged misrepresentations.<sup>37</sup>

43. ***The plaintiffs’ delay was not induced by the defendants.*** The plaintiffs’ dilatoriness was not caused or contributed to by anything said or done by the defendants. The topic of the limitation period was never raised by the plaintiffs, either with the defendants or with the court,

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<sup>34</sup> Strathy, J. Reasons, para. 494, CIBC Record, Tab 1b, pp. 93-94.

<sup>35</sup> Strathy, J. Reasons, para. 494, CIBC Record, Tab 1b, pp. 93-94.

<sup>36</sup> Strathy, J. Reasons, para. 494, CIBC Record, Tab 1b, pp. 93-94.

<sup>37</sup> Strathy, J. Reasons, para. 494, CIBC Record, Tab 1b, pp. 93-94.

and was not the subject of any discussion.<sup>38</sup> As the motions judge summed up: “There is nothing in the conduct of the defendants that would preclude them from taking the position they now take – that the limitation period has expired.”<sup>39</sup>

44. *The plaintiffs’ delay was not in reliance on the state of the law.* Nor is this a case where the plaintiffs could be said to have been lulled into a false sense of security by the state of the law. There was no precedent for using the expedient of a *nunc pro tunc* order to override the s. 138.14 limitation period. And there was no decided case, until after the expiry of the three year period on the last of the misrepresentations in this case, that held that s. 28 of the *CPA* could suspend the running of the limitation period on the statutory claim prior to the grant of leave.<sup>40</sup>

#### **E. Decision of the Motions Judge**

45. *Dismissal of the motion for leave for the statutory claim.* The motions judge held that the plaintiffs had met the test for leave to pursue the statutory claim, but for the expiry of the limitation period. However, he concluded he had no jurisdiction to grant relief from the expiry of the limitation period by ordering leave *nunc pro tunc* or otherwise, and he therefore dismissed the motion for leave.

46. With respect to his conclusion that the case met the test for leave, the motions judge interpreted the leave standard as being extremely low, requiring proof of no more than that the case was not impossible: “[The test for leave] is meant to screen out cases that, even though possibly brought in good faith are so weak they cannot possibly succeed... It is not meant to deprive bona fide litigants, with a difficult but not impossible case, from having their day in court.”<sup>41</sup>

47. As to his conclusion that he could not relieve against the expiry of the limitation period, at the time of the motions judge’s decision, the Court of Appeal for Ontario had just allowed the appeal in *Sharma v. Timminco* and held that s. 28 of the *CPA* does not suspend the running of the limitation period on the statutory claim prior to the grant of leave and commencement of the

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<sup>38</sup> Strathy, J. Reasons, para. 497, CIBC Record, Tab 1b, p. 95.

<sup>39</sup> Strathy, J. Reasons, para. 494, CIBC Record, Tab 1b, pp. 93-94.

<sup>40</sup> The first instance decision in *Sharma v. Timminco Ltd.*, 2011 ONSC 8024, CIBC Auth., Tab 9, which held that s. 28 did suspend the running of the s. 138.14 limitation period, was decided on March 31, 2011.

<sup>41</sup> Strathy, J. Reasons, para. 373, CIBC Record, Tab 1b, p. 73.

statutory claim.<sup>42</sup> The motions judge concluded that it would be inconsistent with the Court of Appeal's decision dismissing *Timminco* based on the expiry of the limitation period for the court to grant relief from the limitation period in this case, relying on inherent jurisdiction.<sup>43</sup>

48. ***Dismissal of the motion to certify the common law claim.*** With respect to the certification motion as it related to the common law claim, the motions judge declined to certify common issues relating to the common law claim. He did so having regard to the need for each class member to prove reliance on an individualized basis before there could be liability at common law to the class member; and the fact that certification of the common law claim would allow plaintiffs "to circumvent the elaborate procedural and liability structure of Part XXIII.1 of the *Securities Act*, which is designed for the protection of the public".<sup>44</sup>

#### **F. Decision of the Court of Appeal**

49. The Court of Appeal allowed the plaintiffs' appeal, granting leave to the plaintiffs to pursue their statutory claim and certifying the common issues relating to their common law claim, save for the issue of reliance.

50. ***Leave for the statutory claim.*** With respect to the appeal of the denial of leave, the Court of Appeal overruled its own recent prior decision in *Timminco* and ruled that because of the operation of s. 28 of the *CPA*, the statutory claim in this case was not statute-barred. According to the Court of Appeal:

...when a representative plaintiff in a class action [making a common law misrepresentations claim] brought within the *Securities Act* s. 138.14 limitation period, also pleads a cause of action based on s. 138.3 of the *Securities Act*, together with the facts that found that claim, and further pleads the intent to seek leave to commence an action under the *Securities Act*, then that claim has been "asserted" for the purpose of s. 28 of the *CPA*, and the limitation period is thereby suspended for all class members.<sup>45</sup>

51. In other words, a representative plaintiff could evade the requirement to obtain leave and commence a statutory claim within three years of the misrepresentation and within six months of

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<sup>42</sup> *Sharma v. Timminco*, 2012 ONCA 107, CIBC Auth., Tab 10.

<sup>43</sup> Strathy, J. Reasons, paras. 521-526, CIBC Record, Tab 1b, p. 99.

<sup>44</sup> Strathy, J. Reasons, paras. 595-597, 600 CIBC Record, Tab 1b, pp. 110, 112.

<sup>45</sup> Appeal Reasons, headnote, CIBC Record, Tab 1d, p. 127.

the grant of leave by the procedural gambit of commencing without leave a class proceeding making a common law misrepresentation claim and pleading an intent to seek leave for a statutory claim in respect of the same alleged wrong.

52. ***Certification of the common law claim.*** With respect to the appeal of the denial of certification of common issues relating to the common law misrepresentation claim, the Court of Appeal allowed the appeal and granted certification of those issues (save for the issue of reliance), holding that it could “see no reason why those issues cannot and should not be certified in order to advance the litigation”.<sup>46</sup>

53. In other words, a representative plaintiff can obtain all of the coercive power associated with certification of a secondary market class action with none of the carefully calibrated safeguards for the public interest that were built into Part XXIII.1, again, by the simple expedient of pursuing a common law misrepresentation claim along with the statutory claim.

## PART II – QUESTIONS IN ISSUE

54. This appeal raises the following three questions:

- (a) *Whether the s. 138.14 limitation period, which was expressed to run until leave has been granted and a claim under s. 138.3 of the OSA has been commenced, was suspended by s. 28 of the CPA prior to the grant of leave, by reason of the pleading in a class proceeding based on the common law cause of action of an intent to seek leave for a s. 138.3 claim. It is submitted that s. 28 does not suspend the limitation period on the s. 138.3 claim until after leave has been granted and the statutory claim has been commenced by the representative plaintiff, consistent with the Court of Appeal’s decision in *Timminco* and contrary to the Court of Appeal’s decision in this case.*
- (b) *Whether a class proceeding based on the common law cause of action can be the preferable procedure for resolving a secondary market misrepresentation claim, given the carefully calibrated statutory cause of action that was enacted to provide an appropriate framework for secondary market misrepresentation class*

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<sup>46</sup> Appeal Reasons, para. 104, CIBC Record, Tab 1d, p. 148.

*action claims.* It is submitted that the statutory regime is necessarily the preferable procedure for resolution of secondary market misrepresentation claims, the statutory regime having been expressly designed to overcome the inherent practical difficulties and threats to the public interest associated with securities class actions based on the common law cause of action.

- (c) *Whether the test for granting leave under s. 138.8 was properly interpreted and applied.* It is submitted that the motions judge, in his interpretation and application of the leave standard, and the Court of Appeal, in its endorsement of the motion judge's approach to the leave standard, failed to give proper effect to the Legislature's intent that there be a meaningful assessment of the merits at the leave stage.

### PART III – ARGUMENT

#### A. **Whether the s. 138.14 OSA Limitation Period Was Suspended by s. 28 of the CPA Prior to the Grant of Leave**

55. This statutory interpretation question concerns the interaction between ss. 138.8 and 138.14 of the *OSA* (as it read prior to its recent amendment) and s. 28 of the *CPA*, in circumstances where a representative plaintiff has used the procedural gambit used in this case: commencing under the *CPA*, without leave, a claim for common law misrepresentation, and pleading in that claim an intention to seek leave to make a claim under s. 138.3 of the *OSA*.

56. The question turns on whether the pleading in the common law claim of an intention to seek leave for a s. 138.3 claim is the "assertion" in a class proceeding of the s. 138.3 "cause of action" for the purpose of s. 28 of the *CPA*. In *Timminco*, where (as in this case) an intent to seek leave for a s. 138.3 claim was pleaded in a common law claim commenced as a class proceeding, the Court of Appeal held that the s. 138.3 cause of action was not "asserted" for the purpose of s. 28 until leave had been obtained and the s. 138.3 claim commenced. The Court of Appeal in this case reversed itself and decided the opposite.

57. It is submitted that the decision in *Timminco* was correct and the contrary decision in this case was wrong. The Court of Appeal's interpretation in this case of the interaction of s. 28 of

the *CPA* with ss. 138.8 and 138.14 of the *OSA* negated the latter sections, defeated legislative intent, and resulted in a perverse distinction between the operation of the s. 138.14 limitation period in circumstances where the representative plaintiff sued under s. 138.3 alone, versus where the representative plaintiff did as was done in this case, tacking the statutory claim onto a common law claim.

58. **Sections 138.8 and 138.14 of the OSA.** Section 138.8 provides that, “No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to the defendant.”

59. Section 138.14 (as it read prior to a recent amendment), provided that:

**138.14 Limitation period** – No action shall be commenced under section 138.3...later than the earlier of,

(i) three years after the date on which [the document containing the misrepresentation was first released/the public oral statement containing the misrepresentation was made/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 s. 138.3...[which news release is required by s. 138.9(1)(a) to be issued “promptly” after the grant of leave].

60. Thus reading ss. 138.8 and 138.14 together, unless leave was sought and obtained, and an action under s. 138.3 thereafter commenced, all within the earlier of three years from the misrepresentation and six months of the grant of leave, the s. 138.3 claim was time-barred.

61. The requirement for leave to commence the statutory claim coupled with the absolute limitation period for the commencement of the claim advanced the statutory objective identified by the CSA of limiting the coercive power associated with unmeritorious securities claims. It forced plaintiffs to bring on proposed claims with dispatch for a merits assessment, limiting the damage that is caused to defendants by the pendency of the claim, and the leverage this gives plaintiffs to extract settlements out of proportion to the merits.

62. **Section 28 of the CPA.** Section 28 of the *CPA* provides for the suspension in favour of class members of limitation periods on causes of action asserted in a class proceeding commenced by a representative plaintiff, and for the resumption of the running of the limitation

period if the class proceeding does not proceed:

**28 Limitations** – (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

- (a) the member opts out of the class proceeding;
- (b) an amendment that has the effect of excluding the member from the class is made to the certification order;
- (c) a decertification order is made under section 10;
- (d) the class proceeding is dismissed without an adjudication on the merits;
- (e) the class proceeding is abandoned or discontinued with the approval of the court; or
- (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise. (emphasis added)

63. The purpose of s. 28 is to avoid redundant actions by class members once the representative plaintiff has commenced a class proceeding on their behalf.

64. The suspensive effect of s. 28 on the running of the limitation period for a cause of action depends on the cause of action having been “asserted” in a class proceeding commenced by the representative plaintiff within the applicable limitation period. It is not the purpose of s. 28 to negate the limitation period altogether for the representative plaintiff as well as potential class members, prior to the timely commencement of the class proceeding by the representative plaintiff. This was acknowledged by the Court of Appeal in its decision below:

The role of the representative plaintiff in a class action from a limitation point of view is to properly commence the action within the limitation period. Where a proceeding is commenced by the representative plaintiff within the limitation period, the other class members are, in effect, sheltered by the timeliness of the representative plaintiff’s action. The contrary is also true: the other class members get no protection from an untimely proceeding. That is, unless the representative plaintiff commences the action effectively within the limitation period, then time does not cease to run for the other class members.<sup>47</sup>

65. Accordingly, s. 28 is not intended to put a representative plaintiff into a better position relative to limitation periods than he would have been in had he proceeded by way of individual

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<sup>47</sup> Appeal Reasons, para. 32, CIBC Record, Tab 1d, p. 135.

action rather than class action: in either event, the representative plaintiff must comply with limitation periods, failing which he is time-barred.

66. The question raised by this case is whether the commencement of a common law claim by the representative plaintiff within the three year limitation period for a s. 138.3 claim, coupled with the pleading of an intent to seek leave for a s. 138.3 claim, is the “assertion” of the s. 138.3 “cause of action” for the purpose of s. 28 of the *CPA*, thereby exempting not only absent class members, but also the representative plaintiff, from the requirement to obtain leave and commence the s. 138.3 claim within the s. 138.14 limitation period.

67. ***The applicable principles of interpretation.*** The resolution of this interpretation question turns on the interaction of s. 28 of the *CPA* and ss. 138.8 and 138.14 of the *OSA*. Section 28 was drafted with a view to it interacting with every statute that provides for a limitation period. Part XXIII.1 of the *OSA* was correspondingly drafted with a view to it interacting with the *CPA*: it was intended to operate in the context of class proceedings since the whole point of Part XXIII.1 was to facilitate certification through deemed reliance (subject to the limiting features discussed above).

68. Where two statutes are intertwined in this way and were intended to operate together, the applicable principle of interpretation is that the statutes are presumed to offer a coherent and harmonious scheme as if the provisions were part of a single Act. Thus an interpretation of one intertwined statute is to be avoided if it would negate provisions of the other.<sup>48</sup>

69. To the extent that there is a conflict between the statutes that cannot be resolved by a reasonable interpretation that avoids the inconsistency, then in determining which law should prevail, there are two applicable presumptions with respect to legislative intent: the more recent law prevails over the earlier law; and the special law prevails over the general. The Supreme Court of Canada has explained the two presumptions as follows:

The first presumes that the legislature was fully cognizant of the existing laws when a new law was enacted. If a new law conflicts with an existing law, it can only be presumed that the new one is to take

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<sup>48</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: LexisNexis Canada, 2008) at 325, 411-412, CIBC Auth., Tab 15; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591 at para. 47, CIBC Auth., Tab 5; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867 at paras. 30, 51-51, CIBC Auth., Tab 8.

precedence. The second presumes that the legislature intended a special law to apply over a general one since to hold otherwise would in effect render the special law obsolete.<sup>49</sup>

70. ***The harmonious interpretation of s. 28 CPA and ss. 138.8 and 138.14 OSA.*** The harmonious interpretation – the one that gives effect to all of the provisions in question and that does not negate any of them – is the interpretation in *Timminco* according to which, where an intention to seek leave for a s. 138.3 claim is pleaded in a common law claim commenced as a class proceeding, the s. 138.3 cause of action is not “asserted” for the purpose of s. 28 until leave has been granted and the s. 138.3 claim has been commenced. This interpretation requires a representative plaintiff to obtain leave and commence the s. 138.3 claim within the three year period stipulated by s. 138.14, thereby preserving the incentive for dispatch that the Court of Appeal in *Timminco* recognized as fundamental to the statutory purpose: “Section 138.14 was clearly designed to ensure that secondary market claims be proceeded with dispatch. That requires the necessary leave motion to be brought expeditiously”.<sup>50</sup>

71. This interpretation is equally consistent with the purpose of s. 28 of the *CPA*: once the representative plaintiff has commenced a s. 138.3 claim following the grant of leave, but not before, all potential class members get the benefit of the suspensive effect of s. 28 on the running of the s. 138.14 limitation period.

72. ***The Court of Appeal’s interpretation is unharmonious and has anomalous effects.*** The contrary interpretation by the Court of Appeal in this case is unharmonious. It means that where the representative plaintiff has adopted the procedural gambit used in this case, the s. 138.14 limitation period is suspended for everyone including the representative plaintiff, prior to the grant of leave, thereby completely negating for everyone the requirement to meet the merits-based leave test and commence the s. 138.3 claim within the absolute time period prescribed by s. 138.14. This interpretation therefore eliminates the incentive for dispatch, exposing defendants to the damage that is caused by the pendency of securities class action claims without the discipline on plaintiffs of the requirement to establish merits within a set time period.

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<sup>49</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: LexisNexis Canada, 2008) at 335-338, CIBC Auth., Tab 15; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591 at paras. 58-62, CIBC Auth., Tab 5.

<sup>50</sup> *Sharma v. Timminco*, 2012 ONCA 107 at para. 26, CIBC Auth., Tab 10.

73. Indeed, based on the Court of Appeal's interpretation, the suspension of the s. 138.14 limitation period for both the representative plaintiff and all potential class members is completely indeterminate and continues even if the representative plaintiff does not proceed with a motion to seek leave to make the s. 138.3 claim, or if the motion is dismissed. That is because, under s. 28, the failure to seek leave and the dismissal of the motion are not events that trigger the resumption of the running of a limitation period suspended by s. 28.

74. The Court of Appeal's interpretation therefore has the anomalous effect of putting the representative plaintiff into a better position relative to s. 138.14 than he would be in as an individual plaintiff, which the Court of Appeal concedes "is not the purpose of s. 28" and was an "anomalous effect" of its interpretation.<sup>51</sup>

75. The Court of Appeal's interpretation has the further anomalous effect (not recognized by the Court of Appeal) of creating a perverse distinction between the operation of the s. 138.14 limitation period where the representative plaintiff seeks to make a claim only under s. 138.3 (as contemplated by the CSA and the statutory regime) versus where the representative plaintiff instead adopts the procedural gambit used in this case and tacks the statutory cause of action onto a common law claim. A representative plaintiff who does the former is in a different and less favourable position (along with other class members) than one who does the latter. For the former (one who sues only under s. 138.3), s. 28 does not suspend the limitation period until after the grant of leave and commencement of the s. 138.3 claim. For the latter (one who tacks the s. 138.3 claim onto a common law claim), the s. 138.14 limitation period is suspended by s. 28 prior to the grant of leave, both for himself and for other class members.

76. This distinction is particularly perverse in that it incentivizes representative plaintiffs to commence common law secondary market claims by way of class action – the very mode of proceeding that the CSA had concluded was unsuitable for common law securities claims, leading the CSA to its proposal for a carefully calibrated statutory remedy that would provide an appropriate framework for secondary market securities class actions.

77. ***The Court of Appeal's interpretation is not supported by a semantic approach to interpretation.*** The Court of Appeal, in an attempt to support its anomalous interpretation,

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<sup>51</sup> Appeal Reasons, paras. 50-51, CIBC Record, Tab 1d, p. 139.

referenced the dictionary definition of “assert” used in *Timminco* according to which “to assert a claim” includes “to make a claim or to invoke a legal right”. The Court of Appeal in this case ruled that “by pleading the facts [in the common law claim] necessary to found the [s. 138.3] claim, the representative plaintiff is ‘making the claim’ and ‘invoking the legal rights’ given by the statute.”<sup>52</sup>

78. However, this semantic approach to interpretation does not support the Court of Appeal’s conclusion. The plaintiffs in this case did not plead all of the facts necessary to found their s. 138.3 claim. One of the essential elements of such a claim is that leave has been granted; the plaintiffs did not and could not plead that fact. Nor did the plaintiffs, in the statement of claim for the common law claim, “make” the s. 138.3 claim or “invoke” the s. 138.3 legal right. Rather, they merely pleaded an intention to seek leave to make that claim and to invoke that right should leave be granted. Their pleading did not itself make the claim or invoke the right, neither of which is permitted under s. 138.8 unless and until leave has been granted.

79. ***The Court of Appeal’s interpretation cannot be rationalized based on legislative intent.*** The Court of Appeal justifies the anomalous results of its decision and the negation of s. 138.14 on the basis that the contrary approach taken in *Timminco* rendered a secondary market securities class action “an uncertain endeavour”. According to the Court of Appeal in this case, the *Timminco* approach “undercuts the ability of investors to bring a class action within the limitation period because they do not have control of whether they can meet or toll the limitation period...[T]here is no guarantee that the motion will be completed, an order made, and all appeals exhausted within time.”<sup>53</sup> Absent class members, if not sheltered by the representative plaintiff’s common law claim pending the motion for leave for the statutory claim, would have to seek to pursue their own individual statutory claims to ensure that their statutory claims were timely, thereby undermining the purpose of s. 28.<sup>54</sup>

80. The Court of Appeal therefore reasoned that since the Legislature intended the statutory cause of action to be pursued by way of class action, “it is not inappropriate to give the term ‘asserted’ [in s. 28 of the *CPA*] the purposive and effective interpretation which makes the

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<sup>52</sup> Appeal Reasons, para. 46, CIBC Record, Tab 1d, p. 138.

<sup>53</sup> Appeal Reasons, para. 66, CIBC Record, Tab 1d, pp. 141-142.

<sup>54</sup> Appeal Reasons, para. 57, CIBC Record, Tab 1d, p. 140.

statutory claim work successfully as a class proceeding.”<sup>55</sup>

81. However, the fact that the statutory cause of action was intended to be pursued by class action and was enacted after the *CPA* supports the opposite conclusion to the conclusion reached by the Court of Appeal. The implications for a proposed class action and for absent class members of s. 138.14 coupled with the leave requirement in s. 138.8 were obvious; and there is a presumption, as discussed above, that the Legislature was “fully cognizant” of the *CPA* when it enacted Part XXIII.1. Therefore, the absence of protection in the statutory regime against the “uncertainty of the endeavour” that concerned the Court of Appeal must be considered a deliberate choice by the Legislature.

82. Had the Legislature wanted to protect against the uncertainty and the implications for absent class members that concerned the Court of Appeal, the Legislature would have done so directly in the Part XXIII.1 statutory regime so that there would be protection where the claim was made under s. 138.3 alone. The Legislature would not have made the protection depend on the random factor of whether the representative plaintiff tacked the s. 138.3 claim onto a common law claim commenced without leave by class action, a procedural gambit not contemplated by the statutory regime.

83. *Any conflict should be resolved in favour of Part XXIII.1.* If one takes the Court of Appeal’s view that the *Timminco* interpretation “undermines the purpose of s. 28” of the *CPA*, then one is left with an irreconcilable conflict between the statutes in question: the Court’s contrary interpretation in this case equally undermines the purpose of ss. 138.8 and 138.14 of the *OSA*, which were intended to require plaintiffs to demonstrate the merits of a proposed claim (as well as commence the claim) within a fixed period of three years from the alleged misrepresentation.

84. In these circumstances, as discussed above and as explained by the Supreme Court of Canada, the question that must be answered is, which provision should prevail. Where, as in this case, there is no express indication of which law should prevail, there are two presumptions as to legislative intent that are to be applied: “that the more recent law prevails over the earlier law

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<sup>55</sup> Appeal Reasons, para. 53, CIBC Record, Tab 1d, p. 138.

and that the special law prevails over the general.”<sup>56</sup>

85. In this case, both presumptions point to the conclusion that the Part XXIII.1 provisions of the *OSA* should prevail over those of the *CPA*. Part XXIII.1 is the more recent enactment. And it was intended to be, in the *CSA*’s words, a “specific and comprehensive code” to provide a suitable framework for secondary market misrepresentation class action claims. The Court of Appeal erred in resolving in favour of the older and more general statute what, on the Court’s own analysis, was a conflict between the statutes in question.

86. *The Court of Appeal usurped the role of the Legislature.* It was not for the Court of Appeal to do indirectly and imperfectly, through an anomalous interpretation of the interaction of s. 28 of the *CPA* with ss. 138.8 and 138.14 of the *OSA*, what the Legislature could have done directly, but did not do. In doing so in this case, the Court of Appeal usurped the role of the Legislature and the elaborate public policy process that led to the enactment of the statutory regime. If ss. 138.8 and 138.14, as enacted, produced consequences that were, in fact, unintended, then it was for the Legislature, not the Court of Appeal, to evaluate those consequences and to make any changes that the Legislature deemed appropriate.

87. That is what the Legislature has now done. Since the Court of Appeal’s decision in this case, the Legislature has amended s. 138.14 by adding a subsection (2) to provide for the suspension of the running of the limitation period once the plaintiff files a notice of motion for leave to make a s. 138.3 claim, and for the resumption of the running of the limitation period once the motion is disposed of:

**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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<sup>56</sup> *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591 at para. 58, CIBC Auth., Tab 5.

88. Through this amendment to the *OSA* regime, the Legislature was attempting to address what the Court of Appeal had perceived were design flaws in the original design. The Legislature, in contrast to the Court of Appeal, was able to address the perceived problem directly rather than having to do so indirectly through an interpretive expedient that depended on representative plaintiffs using the procedural gambit used in this case, and that resulted in anomalies. Under the amended regime, provided the representative plaintiff files a notice of motion for leave within the s. 138.14 limitation period:

- there is no advantage for the representative plaintiff relative to the running of the limitation period in adopting the procedural gambit used in this case of commencing a common law claim by class action and tacking onto it the statutory claim;
- failure to proceed with the motion for leave, or dismissal of the motion, will now result in the resumption of the running of the s. 138.14 limitation period, rather than the limitation period being suspended indefinitely as was the case under the Court of Appeal's interpretation.

**B. Whether a Class Proceeding Based on the Common Law Cause of Action Can Be the Preferable Procedure for Resolving a Secondary Market Misrepresentation Claim**

89. This question, like the preceding question, concerns the interaction between Part XXIII.1 of the *OSA* and the *CPA*. The question arises in this case in circumstances where the representative plaintiff is seeking to certify a class proceeding that makes parallel class action claims in respect of the same secondary market misrepresentations: one based on the statutory cause of action under s. 138.3; the other based on the common law misrepresentation cause of action.

90. It is submitted that in view of the presumption of coherence between the legislative schemes in question, for the preferability analysis under s. 5(1)(d) of the *CPA*, the court must have regard to the fact that Part XXIII.1 was designed to be the preferable procedure for secondary market misrepresentation claims and that the pursuit of the common law cause of action by way of class action would have the effect of defeating the purpose of Part XXIII.1.

91. It is therefore submitted that secondary market misrepresentation claims based on the common law cause of action should not be certified because they fail to satisfy the preferability criterion under the *CPA*. Accordingly, the Court of Appeal erred in certifying the common issues relating to the common law claim in this case.

92. ***Section 5(1)(d) of the CPA: the preferability criterion.*** Under s. 5(1)(d) of the *CPA*, before a court can certify a class action, the court must be satisfied that “a class proceeding would be the preferable procedure for the resolution of the common issues.”

93. The preferability analysis involves a comparative analysis of costs and benefits between the proposed class action and other available means of redress.<sup>57</sup> In the usual context for the preferability analysis, the other available means of redress are either non-class action litigation alternatives, such as joinder, test cases and consolidation; or non-litigation means of redress, either alone or in conjunction with individual actions.

94. In this case, in contrast to the usual context for the preferability analysis, the question is not whether a class proceeding is preferable to some non-class action means of redress. Rather, there is a proposed class action making two claims in respect of the same alleged wrong. One of the claims is based on a cause of action specifically and carefully tailored by securities regulators and enacted by the Legislature for securities class action claims. The other is based on a cause of action deemed by securities regulators to be impracticable for such claims and lacking in the limits (e.g. a leave requirement and caps on liability) believed by securities regulators to be necessary to protect the public interest.

95. The question raised by this case is whether class procedure can be the preferable procedure for resolution of a common law claim given the statutory remedy that was intended to provide the appropriate framework for secondary market misrepresentation class actions.

96. ***The applicable principle of interpretation.*** The resolution of this interpretation question again turns on the interaction between Part XXIII.1 of the *OSA* and the *CPA*. As is submitted above, Part XXIII.1 was drafted with a view to it interacting with the *CPA*: the whole point of Part XXIII.1 was to facilitate certification of secondary market misrepresentation claims through

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<sup>57</sup> *AIC Limited v. Fischer*, 2013 SCC 69 at para. 23, CIBC Auth., Tab 1.

deemed reliance, making practicable the pursuit of such claims by class action procedure, but subject to limiting features to protect the public interest.

97. Also as explained above, there is a “presumption of coherence” in the body of legislation, particularly as between statutory enactments that were intended to work together. That presumption means that “interpretations favouring harmony among statutes should prevail over discordant ones.”<sup>58</sup> An interpretation of one statute that would have the effect of defeating the purpose of the other is a “discordant” interpretation.

98. ***The harmonious interpretation.*** Where certification of common issues relating to a common law claim is being considered, the interpretation of the *CPA* preferability criterion that is in harmony with Part XXIII.1 leads to the conclusion that class procedure is not the preferable procedure for the resolution of those issues. Rather, the preferable procedure is by way of Part XXIII.1. As Perell, J. noted in *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, “Part XXIII.1 of the *OSA* was designed to be the preferable procedure for misrepresentation claims in the marketplace for shares.”<sup>59</sup>

99. ***Preferability analysis.*** The conclusion that a class action is not the preferable procedure for resolving the common issues raised by a common law secondary market misrepresentation claim is easy to reach where (as in this case), leave has been granted for a statutory claim based on the same alleged wrong, and that claim has been certified. In those circumstances, the statutory claim, which was tailor-made for secondary market misrepresentation class actions, offers an alternative and superior means of effective redress considered through the lens of the goals of class proceedings (behaviour modification, judicial economy and access to justice).

100. With respect to the judicial economy consideration, the preferability of a class action based on the statutory cause of action rather than the common law cause of action is particularly striking. For the statutory cause of action, reliance by investors is deemed with the result that no individual issues trials are required. In contrast, resolving a secondary market misrepresentation

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<sup>58</sup> *Pointe Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015 at para. 61, CIBC Auth. Tab 7; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: LexisNexis Canada, 2008) at 325-326, CIBC Auth., Tab 15.

<sup>59</sup> *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2014 ONSC 1057 at para. 184, CIBC Auth., Tab 11.

claim by way of a class action based on the common law cause of action would face the court with the enormous practical difficulty of dealing with the uncertifiable issues of reliance and damages on an individualized basis.

101. The degree of that potential difficulty is well-illustrated by the circumstances of this case which involves:

- *a multiplicity of alleged misrepresentations*: twelve related but distinct misrepresentations;
- *made on a multiplicity of occasions over a lengthy period*: eight pleaded occasions over a six month period;
- *during which there was an extremely large volume of trading*: over the period in question, 385 million CIBC shares traded in nearly 1.15 million separate transactions.<sup>60</sup>

102. Thus, to determine liability at common law in this case, there would have to be an individualized assessment of reliance in respect of each purchaser, relative to each purchase (over a million transactions), and relative to each of the twelve alleged misrepresentations, having regard to the particular market context at the time of each of the purchases.

103. With respect to the access to justice consideration in the preferability analysis, this has both a process and a substance component.<sup>61</sup> A class proceeding based on the statutory cause of action provides superior access to justice from a process point of view. With the common law cause of action, as pointed out by Perell, J. in *Celestica*, there would normally be a question at the individual trial phase as to who would cover the costs associated with the individual trials, with the result that few small investors would be motivated, willing or able to perfect their common law claims at an individual issues trial.<sup>62</sup>

104. As to the substance component of the access to justice consideration – whether the complainants will receive a just and effective remedy for their claims, if established<sup>63</sup> – the statutory claim is subject to liability caps that do not apply to the common law claim. However,

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<sup>60</sup> Strathy, J. Reasons, para. 580, CIBC Record, Tab 1b, p. 107.

<sup>61</sup> *AIC Limited v. Fischer*, 2013 SCC 69 at para. 24, CIBC Auth., Tab 1.

<sup>62</sup> *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2014 ONSC 1057 at para. 187, CIBC Auth., Tab 11.

<sup>63</sup> *AIC Limited v. Fischer*, 2013 SCC 69 at para. 24, CIBC Auth., Tab 1.

this is not a factor that should weigh against the statutory remedy as a preferable alternative. Quite the contrary, since those caps were considered necessary in the public interest to avoid “a regime that would favour short term over long term investor interests”, the fact that the statutory remedy is subject to those caps should weigh in its favour in the preferability analysis.

105. *The Court of Appeal’s discordant interpretation.* The Court of Appeal, in its decision to certify the common law claim, did no comparative analysis as between the common law claim and the statutory claim of the relative costs and benefits of these alternative means of redress for secondary market investors in respect of the misrepresentations in question.

106. The Court of Appeal’s decision to certify the issues raised by the common law claim is discordant with Part XXIII.1. The effect of certifying those issues in addition to those related to the statutory claim is to negate the limits that the Legislature intended should apply to secondary market securities class action claims (the statutory remedy having been enacted on the premise that the statutory regime was the only framework that was practicable for such claims). It means plaintiffs retaining, through the parallel common law claim, the coercive power that was intended to be mitigated by the limits under the statutory remedy; and it means innocent continuing shareholders losing the benefit of the caps on liability that were intended to help achieve a balance between their interests and the interests of injured investors. These effects of its decision were completely ignored by the Court of Appeal in its analysis of the question of certification of the common law claim.

107. *The Court of Appeal’s interpretation cannot be justified based on s. 138.13 of the OSA.* The Court of Appeal justifies its certification of the common law claim along with the statutory claim based on s.138.13 of the *OSA*, which preserves rights of action the plaintiff has apart from s.138.3:

**138.13 No derogation from other rights** - The right of action for damages and the defences to an action under s. 138.3 are in addition to, and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part.

According to the Court of Appeal, a refusal to certify the common law claim would conflict with this provision.<sup>64</sup>

108. To the contrary, this preservation of rights provision merely preserves the right of investors to sue for misrepresentation at common law. It does not confer on them the right to pursue such claims by way of class action procedure despite such procedure not being the preferable procedure for the resolution of such claims. This provision should not be read more broadly, as did the Court of Appeal, so as to defeat the purpose of Part XXIII.1.

109. *A common law claim should not be certified even where – particularly where – leave has been denied for a statutory claim.* It is submitted that even where leave has been denied to pursue the statutory claim and thus that alternative to a common law claim is not available, class procedure should not be viewed as the preferable procedure for the common law claim, and the common law claim should not be certified, consistent with the motions judge's decision in this case which denied both leave for the statutory claim and certification of the common law claim.

110. Again, Part XXIII.1 was specifically designed to be the framework for secondary market misrepresentation class action claims on the premise that the common law cause of action was not an appropriate framework, and on the understanding that, in the public interest, there had to be limits on the availability and scope of secondary market misrepresentation class actions. To certify a common law claim where any of the prerequisites for the statutory claim have not been met would be contrary to that premise and would negate those limits. As the motions judge correctly held, it would allow plaintiffs "to circumvent the elaborate procedural and liability structure of Part XXIII.1 of the *Securities Act*, which is designed for the protection of the public" with the result that "this entire system becomes redundant."<sup>65</sup>

111. This would be a profoundly discordant interpretation of the interaction of the *CPA* with Part XXIII.1 of the *OSA*. It would turn the leave motion for the statutory claim into a game for plaintiffs of "Heads I win, tails you lose", with a common law class action available to the plaintiffs as an alternative in the event that leave for the statutory claim was denied. Plaintiffs would thereby retain the coercive power associated with securities class actions in the very type

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<sup>64</sup> Appeal Reasons, para. 103, CIBC Record, Tab 1d, p. 148.

<sup>65</sup> Strathy, J. Reasons, paras. 596-597, CIBC Record, Tab 1b, p. 110.

of case that the CSA was most concerned to strip of its coercive power: cases that do not meet the prerequisites for leave for a statutory claim.

**C. Whether the Test for Leave Under s. 138.8 Was Properly Interpreted and Applied**

112. It is submitted that the motions judge, in his interpretation and application of the leave standard, and the Court of Appeal, in its endorsement of the motions judge's approach, failed to give proper effect to the Legislature's intent that there be a meaningful assessment of the merits at the leave stage.

113. CIBC relies on the submissions of the individual defendants concerning the leave test. CIBC simply adds the following points specific to CIBC.

114. CIBC, like the individual defendants, is entitled to the due diligence defence under Part XXIII.1 based on having made a reasonable investigation before making the statements in question, and having no reasonable grounds for believing the statements to contain a misrepresentation.

115. The misrepresentations alleged against CIBC principally concern its financial reporting and whether the reporting complied with GAAP as to matters that GAAP characterizes as matters of judgment for the issuer.

116. It is undisputed in this case that all of the financial reporting judgments in question:

- were informed by input from CIBC's external auditors, Ernst & Young, that CIBC expressly requested at the time CIBC was making the judgments;
- were endorsed by Ernst & Young at the time;
- have subsequently been endorsed by Ernst and Young with knowledge of the plaintiffs' allegations, in that Ernst & Young has not withdrawn its audit opinion on the reporting in question, nor required a restatement of the reporting;
- have been endorsed, after the fact, in connection with this case, by an eminent independent accounting expert;
- have been endorsed, again in connection with this case, by an independent economic expert based on a position-by-position review of the valuation judgments in question.

117. Furthermore, the evidence of David Brown, the former Chair of the Ontario Securities Commission, as to CIBC's disclosure controls in relation to the financial reporting in question is unchallenged. Mr. Brown concluded that:<sup>66</sup>

"...CIBC, its directors and officers, including the individual defendants, were fully committed to the development and constant refreshing of an accurate base of knowledge about CIBC's hedged and unhedged securities and credit derivatives positions with exposure to USRMM";

"...[T]his commitment was backed by very robust, sophisticated and reliable systems...; these systems were sufficiently agile to identify and assimilate in real time the new information and changing circumstances which arose during a rapidly changing market environment";

"...[T]his information-gathering and dissemination system constituted an effective system of disclosure controls and internal controls over financial reporting that was adequate to ensure that CIBC could meet its continuous disclosure obligations as defined in the Securities Act".

118. Based on the undisputed evidence, even if the financial reporting judgments in question could be said to have constituted misrepresentations – a conclusion it would be very difficult to reach given that "judgments", by their nature, are not matters of objective fact for which there is a single "right" answer – the judgments were made based on disclosure processes that met applicable standards.

119. Neither the motions judge nor the Court of Appeal explain how, under a meaningful approach to the threshold merits test, and based on the record at the leave motion, the court could conclude that CIBC could fail to establish at trial the reasonable investigation defence. It is therefore submitted that, in the event that this Court upholds the decision of the Court of Appeal that the statutory claim is not time-barred, the motion for leave should be returned to the Superior Court of Justice for reconsideration in accordance with the reasons of this Court.

#### **PART IV – COSTS**

120. CIBC respectfully requests its costs of this appeal and of the proceedings below.

#### **PART V – ORDER SOUGHT**

121. CIBC respectfully requests an order that the appeal be allowed and the decision of the motions judge be restored, with costs throughout to CIBC.

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<sup>66</sup> Strathy, J. Reasons, paras. 456-57, CIBC Record, Tab 1b, p. 86.

November 6, 2014

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**TORYS LLP**, counsel for Canadian Imperial Bank of  
Commerce

Per: \_\_\_\_\_

Sheila Block

James C. Tory

Andrew Gray

Crawford G. Smith

## PART VI – AUTHORITIES

<b>Case</b>	<i>Paragraph(s) in Part II and III</i>
<i>AIC Limited v. Fischer</i> , 2013 SCC 69	92, 102, 103
<i>Basic Incorporated v. Levinson</i> , 485 U.S. 224, 108 S.Ct. 978	25
<i>Blue Chip Stamps v. Manor Drug Stores</i> , 421 U.S. 723, 95 S.Ct. 1917	31
<i>Kaufman v. I-Stat Corporation</i> , 754 A. 2d 1188 (S.C.N.J. 2000)	26
<i>Lévis (City) v. Fraternité des policiers de Lévis Inc.</i> , [2007] 1 S.C.R. 591	67, 68, 83
<i>Plumbers &amp; Steamfitters Local 773 Pension Fund v. Canadian Imperial Bank of Commerce</i> , 694 F. Supp. 2d 287 (S.D.N.Y. 2010)	20
<i>Pointe Claire (City) v. Quebec (Labour Court)</i> , [1997] 1 S.C.R. 1015	96
<i>R. v. Ulybel Enterprises Ltd.</i> , [2001] 2 S.C.R. 867	67
<i>Sharma v. Timminco Ltd.</i> , 2011 ONSC 8024	43
<i>Sharma v. Timminco Ltd.</i> , 2012 ONCA 107	46, 69
<i>Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.</i> , 2014 ONSC 1057	97, 102
 <b>Secondary Sources</b>	
Canadian Securities Administrators Notice 53-302, “Proposal for a Statutory Civil Remedy for Investors in the Secondary Market”, (2000) 23 OSCB	1, 22, 23, 27, 29, 31, 32, 33, 34, 35, 36, 37
Michel G. Crouhy, Robert A. Jarrow and Stuart M. Turnbull, “The Subprime Credit Crisis of 2008” (Fall 2008) <i>The Journal of Derivatives</i> 81	14
Stephen G. Ryan, “Accounting in and for the Subprime Crisis” (2008) 83: 6 <i>The Accounting Review</i> 1605	11
Ruth Sullivan, <i>Sullivan on the Construction of Statutes</i> , 5th ed. (Toronto: LexisNexis Canada, 2008)	67, 68, 96
Toronto Stock Exchange Committee on Corporate Disclosure, <i>Responsible Corporate Disclosure: A Search for Balance</i> (Toronto: Toronto Stock Exchange, 1997)	23, 28, 30

**PART VII – STATUTES****Statutes and Regulations****Section  
Reference***Class Proceedings Act, 1992, S.O. 1992, c. 6*

s. 28

*Securities Act, R.S.O. 1990, c. S.5*

s. 138

*Class Proceedings Act, 1992, S.O. 1992, c. 6***Limitations**

**28. (1)** Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

- (a) the member opts out of the class proceeding;
- (b) an amendment that has the effect of excluding the member from the class is made to the certification order;
- (c) a decertification order is made under section 10;
- (d) the class proceeding is dismissed without an adjudication on the merits;
- (e) the class proceeding is abandoned or discontinued with the approval of the court; or
- (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

**28. (1)** Sous réserve du paragraphe (2), tout délai de prescription applicable à une cause d'action invoquée dans un recours collectif est suspendu en faveur d'un membre du groupe à l'introduction du recours collectif et reprend au détriment du membre au moment où, selon le cas:

- a) ce membre se retire du recours collectif;
- b) est apportée une modification de l'ordonnance certifiant le recours collectif qui a pour effet d'exclure du groupe le membre;
- c) une ordonnance annulant l'ordonnance certifiant le recours collectif est rendue en vertu de l'article 10;
- d) le recours collectif est rejeté sans décision sur le fond;
- e) il y a désistement du recours collectif avec l'approbation du tribunal;
- f) le recours collectif fait l'objet d'une transaction avec l'approbation du tribunal, à moins que la transaction ne prévoie autre chose.

**Securities Act, R.S.O. 1990, c. S.5**

## INTERPRETATION AND APPLICATION

**Definitions**

138.1 In this Part,

“compensation” means compensation received during the 12-month period immediately preceding the day on which the misrepresentation was made or on which the failure to make timely disclosure first occurred, together with the fair market value of all deferred compensation including, without limitation, options, pension benefits and stock appreciation rights, granted during the same period, valued as of the date that such compensation is awarded; (“rémunération”)

“core document” means,

- (a) a prospectus, a take-over bid circular, an issuer bid circular, a directors’ circular, a notice of change or variation in respect of a take-over bid circular, issuer bid circular or directors’ circular, a rights offering circular, management’s discussion and analysis, an annual information form, an information circular, annual financial statements and an interim financial report of the responsible issuer, where used in relation to,
  - (i) a director of a responsible issuer who is not also an officer of the responsible issuer,
  - (ii) an influential person, other than an officer of the responsible issuer or an investment fund manager where the responsible issuer is an investment fund, or
  - (iii) a director or officer of an influential person who is not also an officer of the responsible issuer, other than an officer of an investment fund manager,
- (b) a prospectus, a take-over bid circular, an issuer bid circular, a directors’ circular, a notice of change or

## DÉFINITIONS ET CHAMP D’APPLICATION

**Définitions**

138.1 Les définitions qui suivent s’appliquent à la présente partie.

«déclaration orale publique» Déclaration orale faite dans des circonstances dans lesquelles une personne raisonnable croirait que les renseignements qu’elle contient seront divulgués au public. («public oral statement»)

«document» Toute communication écrite, y compris une communication préparée et transmise uniquement sous forme électronique, qui, selon le cas :

- a) doit être déposée auprès de la Commission;
- b) n’est pas obligée d’être déposée auprès de la Commission, mais qui :
  - (i) soit est déposée auprès de la Commission,
  - (ii) soit est ou doit être déposée auprès d’un gouvernement ou d’un de ses organismes en application du droit des valeurs mobilières ou des sociétés pertinent ou auprès de toute bourse ou de tout système de cotation et de déclaration des opérations en application de ses règlements administratifs, de ses règles ou de ses règlements,
  - (iii) soit a un contenu dont il serait raisonnable de s’attendre à ce qu’il ait une incidence sur le cours ou la valeur d’une valeur mobilière de l’émetteur responsable. («document»)

«document essentiel» S’entend des documents suivants :

- a) un prospectus, une circulaire d’offre d’achat visant à la mainmise, une circulaire d’offre de l’émetteur, une circulaire des administrateurs, un avis

variation in respect of a take-over bid circular, issuer bid circular or directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements, an interim financial report and a material change report required by subsection 75 (2) or the regulations of the responsible issuer, where used in relation to,

- (i) a responsible issuer or an officer of the responsible issuer,
- (ii) an investment fund manager, where the responsible issuer is an investment fund, or
- (iii) an officer of an investment fund manager, where the responsible issuer is an investment fund, or

- (c) such other documents as may be prescribed by regulation for the purposes of this definition; ("document essentiel")

"document" means any written communication, including a communication prepared and transmitted only in electronic form,

- (a) that is required to be filed with the Commission, or
- (b) that is not required to be filed with the Commission and,
  - (i) that is filed with the Commission,
  - (ii) that is filed or required to be filed with a government or an agency of a government under applicable securities or corporate law or with any exchange or quotation and trade reporting system under its by-laws, rules or regulations, or
  - (iii) that is any other communication the content of which would reasonably be expected to affect the market price or value of a security of the responsible

de changement ou de modification à l'égard de l'une ou l'autre de ces circulaires, une circulaire d'émission de droits, un rapport de gestion, une notice annuelle, une circulaire d'information, ainsi que les états financiers annuels et un rapport financier intermédiaire de l'émetteur responsable, relativement à :

- (i) soit un administrateur d'un émetteur responsable qui n'est pas également un dirigeant de celui-ci,
- (ii) soit une personne influente, à l'exclusion d'un dirigeant de l'émetteur responsable ou encore d'un gestionnaire de fonds d'investissement, si l'émetteur responsable est un fonds d'investissement,
- (iii) soit un administrateur ou un dirigeant d'une personne influente qui n'est pas également un dirigeant de l'émetteur responsable, à l'exclusion d'un dirigeant d'un gestionnaire de fonds d'investissement;

- b) un prospectus, une circulaire d'offre d'achat visant à la mainmise, une circulaire d'offre de l'émetteur, une circulaire des administrateurs, un avis de changement ou de modification de l'une ou l'autre de ces circulaires, une circulaire d'émission de droits, un rapport de gestion, une notice annuelle, une circulaire d'information, les états financiers annuels et un rapport financier intermédiaire de l'émetteur responsable ainsi que les rapports sur des changements importants que l'obligent à déposer le paragraphe 75 (2) ou les règlements, relativement à :

- (i) soit un émetteur responsable ou un dirigeant de celui-ci,

- issuer; (“document”)
- (ii) soit un gestionnaire de fonds d’investissement, si l’émetteur responsable est un tel fonds,
  - (iii) soit un dirigeant d’un gestionnaire de fonds d’investissement, si l’émetteur responsable est un tel fonds;
- c) les autres documents que prescrivent les règlements pour l’application de la présente définition. («core document»)
- «émetteur responsable» S’entend :
- a) soit d’un émetteur assujetti;
  - b) soit de tout autre émetteur ayant des liens réels et importants avec l’Ontario et dont les valeurs mobilières sont cotées en bourse. («responsible issuer»)
- “expert” means a person or company whose profession gives authority to a statement made in a professional capacity by the person or company, including, without limitation, an accountant, actuary, appraiser, auditor, engineer, financial analyst, geologist or lawyer, but not including a designated credit rating organization; (“expert”)
- «expert» Personne ou compagnie dont la profession donne foi à une déclaration qu’elle fait à titre professionnel, notamment un comptable, un actuaire, un évaluateur, un vérificateur, un ingénieur, un analyste financier, un géologue ou un avocat, à l’exclusion toutefois d’un organisme de notation désigné. («expert»)
- “failure to make timely disclosure” means a failure to disclose a material change in the manner and at the time required under this Act or the regulations; (“non-respect des obligations d’information occasionnelle”)
- «jour de bourse» Jour où le marché principal, au sens des règlements, des valeurs mobilières est ouvert aux opérations. («trading day»)
- «limite de responsabilité» S’entend des limites suivantes :
- a) dans le cas d’un émetteur responsable, le plus élevé de ce qui suit :
    - (i) 5 pour cent de sa capitalisation boursière, au sens des règlements,
    - (ii) 1 000 000 \$;
  - b) dans le cas d’un administrateur ou d’un dirigeant d’un émetteur responsable, le plus élevé de ce qui suit :
    - (i) 25 000 \$,
    - (ii) 50 pour cent de la rémunération totale que lui verse l’émetteur responsable et les membres du
- “influential person” means, in respect of a responsible issuer,
- (a) a control person,
  - (b) a promoter,
  - (c) an insider who is not a director or officer of the responsible issuer, or
  - (d) an investment fund manager, if the responsible issuer is an investment fund; (“personne influente”)
- “issuer’s security” means a security of a responsible issuer and includes a security,
- (a) the market price or value of which, or

payment obligations under which, are derived from or based on a security of the responsible issuer, and

- (b) which is created by a person or company on behalf of the responsible issuer or is guaranteed by the responsible issuer; (“valeur mobilière d’un émetteur”)

“liability limit” means,

- (a) in the case of a responsible issuer, the greater of,
- (i) 5 per cent of its market capitalization (as such term is defined in the regulations), and
  - (ii) \$1 million,
- (b) in the case of a director or officer of a responsible issuer, the greater of,
- (i) \$25,000, and
  - (ii) 50 per cent of the aggregate of the director’s or officer’s compensation from the responsible issuer and its affiliates,
- (c) in the case of an influential person who is not an individual, the greater of,
- (i) 5 per cent of its market capitalization (as defined in the regulations), and
  - (ii) \$1 million,
- (d) in the case of an influential person who is an individual, the greater of,
- (i) \$25,000, and
  - (ii) 50 per cent of the aggregate of the influential person’s compensation from the responsible issuer and its affiliates,
- (e) in the case of a director or officer of an influential person, the greater of,
- (i) \$25,000, and
  - (ii) 50 per cent of the aggregate of

même groupe;

- c) dans le cas d’une personne influente qui n’est pas un particulier, le plus élevé de ce qui suit :
- (i) 5 pour cent de sa capitalisation boursière, au sens des règlements,
  - (ii) 1 000 000 \$;
- d) dans le cas d’une personne influente qui est un particulier, le plus élevé de ce qui suit :
- (i) 25 000 \$,
  - (ii) 50 pour cent de la rémunération totale que lui verse l’émetteur responsable et les membres du même groupe;
- e) dans le cas d’un administrateur ou dirigeant d’une personne influente, le plus élevé de ce qui suit :
- (i) 25 000 \$,
  - (ii) 50 pour cent de la rémunération totale que lui verse la personne influente et les membres du même groupe;
- f) dans le cas d’un expert, le plus élevé de ce qui suit :
- (i) 1 000 000 \$,
  - (ii) les sommes que lui-même et les membres du même groupe ont reçues à titre de recettes de l’émetteur responsable et des membres du même groupe que ce dernier pendant les 12 mois précédant la présentation inexacte des faits;
- g) dans le cas de chaque personne qui a fait une déclaration orale publique et qui n’est pas un particulier visé à l’alinéa d), e) ou f), le plus élevé de ce qui suit :
- (i) 25 000 \$,
  - (ii) 50 pour cent de la rémunération

<p>the director's or officer's compensation from the influential person and its affiliates,</p> <p>(f) in the case of an expert, the greater of,</p> <p style="padding-left: 20px;">(i) \$1 million, and</p> <p style="padding-left: 20px;">(ii) the revenue that the expert and the affiliates of the expert have earned from the responsible issuer and its affiliates during the 12 months preceding the misrepresentation, and</p> <p>(g) in the case of each person who made a public oral statement, other than an individual referred to in clause (d), (e) or (f), the greater of,</p> <p style="padding-left: 20px;">(i) \$25,000, and</p> <p style="padding-left: 20px;">(ii) 50 per cent of the aggregate of the person's compensation from the responsible issuer and its affiliates; ("limite de responsabilité")</p> <p>"management's discussion and analysis" means the section of an annual information form, annual report or other document that contains management's discussion and analysis of the financial condition and financial performance of a responsible issuer as required under Ontario securities law; ("rapport de gestion")</p> <p>"public oral statement" means an oral statement made in circumstances in which a reasonable person would believe that information contained in the statement will become generally disclosed; ("déclaration orale publique")</p> <p>"release" means, with respect to information or a document, to file with the Commission or any other securities regulatory authority in Canada or an exchange or to otherwise make available to the public; ("publication", "publier")</p> <p>"responsible issuer" means,</p>	<p>totale que lui verse l'émetteur responsable et les membres du même groupe. («liability limit»)</p> <p>«non-respect des obligations d'information occasionnelle» Omission de divulguer un changement important de la manière et aux moments qu'exigent la présente loi ou les règlements. («failure to make timely disclosure»)</p> <p>«personne influente» Relativement à un émetteur responsable, s'entend, selon le cas :</p> <p style="padding-left: 20px;">a) d'une personne qui a le contrôle;</p> <p style="padding-left: 20px;">b) d'un promoteur;</p> <p style="padding-left: 20px;">c) d'un initié qui n'est pas un administrateur ou un dirigeant de l'émetteur responsable;</p> <p style="padding-left: 20px;">d) d'un gestionnaire de fonds d'investissement, si l'émetteur responsable est un fonds d'investissement. («influential person»)</p> <p>«publication» Relativement à un renseignement ou à un document, s'entend de son dépôt auprès de la Commission, d'un autre organisme de réglementation des valeurs mobilières au Canada ou d'une bourse ou de sa mise à la disposition du public d'une autre façon. Le verbe «publier» a un sens correspondant. («release»)</p> <p>«rapport de gestion» La partie d'une notice annuelle, d'un rapport annuel ou d'un autre document qui contient une analyse par la direction de la situation financière et de la performance financière de l'émetteur responsable comme l'exige le droit ontarien des valeurs mobilières. («management's discussion and analysis»)</p> <p>«rémunération» Le total de la rémunération reçue pendant la période de 12 mois précédant immédiatement le jour où la présentation inexacte des faits a été faite ou celui où le non-respect des obligations d'information occasionnelle s'est produit pour la première fois, d'une part, et de la</p>
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- (a) a reporting issuer, or
- (b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded; (“émetteur responsable”)

“trading day” means a day during which the principal market (as defined in the regulations) for the security is open for trading. (“jour de Bourse”)

juste valeur marchande de toutes les rémunérations différées, notamment les options, les prestations de retraite et les droits à la plus-value des actions, accordées pendant la même période, évaluée à la date où une telle rémunération est versée, d’autre part. («compensation»)

«valeur mobilière d’un émetteur» Valeur mobilière d’un émetteur responsable, y compris une valeur mobilière :

- a) d’une part, dont le cours ou la valeur ou les obligations de paiement qui lui sont rattachées découlent d’une valeur mobilière de l’émetteur responsable ou sont fondés sur elle;
- b) d’autre part, que crée une personne ou une compagnie au nom de l’émetteur responsable ou que ce dernier garantit. («issuer’s security»)

#### Application

138.2 This Part does not apply to,

- (a) the purchase of a security offered by a prospectus during the period of distribution;
- (b) the acquisition of an issuer’s security pursuant to a distribution that is exempt from section 53 or 62, except as may be prescribed by regulation;
- (c) the acquisition or disposition of an issuer’s security in connection with or pursuant to a take-over bid or issuer bid, except as may be prescribed by regulation; or
- (d) such other transactions or class of transactions as may be prescribed by regulation.

#### Non-application

138.2 La présente partie ne s’applique pas à ce qui suit :

- a) l’achat de valeurs mobilières offertes par un prospectus au cours de la période de placement;
- b) l’acquisition de valeurs mobilières d’un émetteur conformément à un placement exempté de l’application de l’article 53 ou 62, sauf dans la mesure prescrite par les règlements;
- c) l’acquisition ou l’aliénation de valeurs mobilières d’un émetteur relativement ou conformément à une offre d’achat visant à la mainmise ou à une offre de l’émetteur, sauf dans la mesure prescrite par les règlements;
- d) les autres transactions ou catégories de transactions que prescrivent les règlements.

#### LIABILITY

#### Liability for secondary market disclosure

#### RESPONSABILITÉ

#### Responsabilité quant aux obligations

**Documents released by responsible issuer**

138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document 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 and the time when the misrepresentation contained in the document 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;
- (b) each director of the responsible issuer at the time the document was released;
- (c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;
- (d) each influential person, and each director and officer of an influential person, who knowingly influenced,
  - (i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or
  - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and
- (e) each expert where,
  - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
  - (ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and
  - (iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the

**d'information sur le marché secondaire****Documents publiés par l'émetteur responsable**

138.3 (1) Lorsqu'un émetteur responsable ou une personne ou compagnie qui a le pouvoir effectif, implicite ou apparent d'agir au nom d'un tel émetteur publie un document 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 et celui où a été publiquement rectifiée la présentation inexacte des faits qu'il contient 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;
- b) tout administrateur de l'émetteur responsable en poste au moment de la publication du document;
- c) tout dirigeant de l'émetteur responsable qui a autorisé ou permis la publication du document ou qui y a acquiescé;
- d) toute personne influente et tout administrateur ou dirigeant d'une telle personne qui ont sciemment incité :
  - (i) soit l'émetteur responsable ou toute personne ou compagnie agissant en son nom à publier le document,
  - (ii) soit un administrateur ou un dirigeant de l'émetteur responsable à autoriser ou à permettre la publication du document ou à y acquiescer;
- e) 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 reproduit, résume ou cite des passages du rapport, de la déclaration ou de l'opinion de l'expert,

report, statement or opinion in the document.

(iii) si le document a été publié par une personne ou une compagnie 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.

#### **Public oral statements by responsible issuer**

(2) Where a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the 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 public oral statement was made and the time when the misrepresentation contained in the 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;
- (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 making of the public oral statement;
- (d) each influential person, and each director and officer of the influential person, who knowingly influenced,
  - (i) the person who made the public oral statement to make the public oral statement, or
  - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and
- (e) each expert where,
  - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
  - (ii) the person making the public oral

#### **Déclarations orales publiques de l'émetteur responsable**

(2) Lorsqu'une personne qui a le pouvoir effectif, implicite ou apparent de parler au nom d'un émetteur responsable fait une déclaration orale publique qui a trait aux activités commerciales ou aux affaires de celui-ci 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 faite la déclaration et celui où a été publiquement rectifiée la présentation inexacte des faits qu'elle contient 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;
- b) l'auteur de la déclaration;
- c) tout administrateur ou dirigeant de l'émetteur responsable qui a autorisé ou permis que soit faite la déclaration ou qui y a acquiescé;
- d) toute personne influente et tout administrateur ou dirigeant d'une telle personne qui ont sciemment incité :
  - (i) soit l'auteur de la déclaration à faire celle-ci,
  - (ii) soit un administrateur ou un dirigeant de l'émetteur responsable à autoriser ou à permettre que soit faite la déclaration ou à y acquiescer;
- e) 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,

statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

- (iii) if 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 public oral statement.

### **Influential persons**

(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

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

- (iii) si 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 la déclaration orale publique.

### **Personnes influentes**

(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

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.

#### **Failure to make timely disclosure**

(4) Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act or the regulations and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against,

- (a) the responsible issuer;
- (b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and
- (c) each influential person, and each director and officer of an influential person, who knowingly influenced,
  - (i) the responsible issuer or any person or company acting on behalf of the responsible issuer in the failure to make timely

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.

#### **Non-respect des obligations d'information occasionnelle**

(4) Lorsqu'un émetteur responsable ne respecte pas les obligations d'information occasionnelle, la personne ou la compagnie qui acquiert ou aliène une valeur mobilière de l'émetteur pendant la période comprise entre le moment où devait être divulgué le changement important de la manière exigée en application de la présente loi ou des règlements et celui où il l'a été a, que la personne ou la compagnie se soit ou non fiée à ce que l'émetteur responsable ait respecté ses obligations d'information, le droit d'intenter une action en dommages-intérêts contre les personnes suivantes :

- a) l'émetteur responsable;
- b) tout administrateur ou dirigeant de l'émetteur responsable qui a autorisé ou permis le non-respect des obligations d'information occasionnelle ou qui y a acquiescé;
- c) toute personne influente et tout administrateur ou dirigeant d'une telle personne qui ont sciemment incité :
  - (i) soit l'émetteur responsable ou

disclosure, or

- (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

toute personne ou compagnie agissant en son nom à ne pas respecter les obligations d'information occasionnelle,

- (ii) soit un administrateur ou un dirigeant de l'émetteur responsable à autoriser ou à permettre le non-respect des obligations d'information occasionnelle ou à y acquiescer.

### **Multiple roles**

(5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer.

### **Rôles multiples**

(5) Dans une action intentée en vertu du présent article, la personne qui est administrateur ou dirigeant d'une personne influente n'encourt aucune responsabilité à ce titre si elle en encourt une à titre d'administrateur ou de dirigeant de l'émetteur responsable.

### **Multiple misrepresentations**

(6) In an action under this section,

- (a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and
- (b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure.

### **Multiples présentations inexactes des faits**

(6) Dans une action intentée en vertu du présent article :

- a) d'une part, de multiples présentations inexactes des faits dont le sujet ou le contenu est le même peuvent, à la discrétion du tribunal, être traitées comme une seule présentation inexacte des faits;
- b) d'autre part, de multiples cas de non-respect des obligations d'information occasionnelle relativement à un ou à plusieurs changements importants dont le sujet est le même peuvent, à la discrétion du tribunal, être traités comme un seul cas de non-respect.

### **No implied or actual authority**

(7) In an action under subsection (2) or (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation.

### **Absence d'un pouvoir implicite ou effectif**

(7) Dans une action intentée en vertu du paragraphe (2) ou (3), si l'auteur de la déclaration orale publique avait le pouvoir apparent, mais non le pouvoir implicite ou effectif, de parler au nom de l'émetteur responsable, aucune autre personne n'encourt une responsabilité à l'égard des valeurs mobilières de celui-ci qu'elle a acquises ou qu'elle a aliénées avant qu'elle ne prenne ou qu'elle ne devrait raisonnablement avoir pris connaissance de la présentation inexacte des faits.

**Burden of proof and defences****Non-core documents and public oral statements**

138.4 (1) In an action under section 138.3 in relation to a misrepresentation in a document that is not a core document, or a misrepresentation in a public oral statement, a person or company is not liable, subject to subsection (2), unless the plaintiff proves that the person or company,

- (a) knew, at the time that the document was released or public oral statement was made, that the document or public oral statement contained the misrepresentation;
- (b) at or before the time that the document was released or public oral statement was made, deliberately avoided acquiring knowledge that the document or public oral statement contained the misrepresentation; or
- (c) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document or the making of the public oral statement that contained the misrepresentation.

**Same**

(2) A plaintiff is not required to prove any of the matters set out in subsection (1) in an action under section 138.3 in relation to an expert.

**Failure to make timely disclosure**

(3) In an action under section 138.3 in relation to a failure to make timely disclosure, a person or company is not liable, subject to subsection (4), unless the plaintiff proves that the person or company,

- (a) knew, at the time that the failure to make timely disclosure first occurred, of the change and that the change was a material change;
- (b) at the time or before the failure to make timely disclosure first occurred, deliberately avoided acquiring

**Fardeau de la preuve et moyens de défense****Documents non essentiels et déclarations orales publiques**

138.4 (1) Dans une action intentée en vertu de l'article 138.3 à l'égard de la présentation inexacte de faits dans un document qui n'est pas un document essentiel ou dans une déclaration orale publique, une personne ou une compagnie n'encourt aucune responsabilité, sous réserve du paragraphe (2), à moins que le demandeur ne prouve que celle-ci :

- a) soit savait, lorsque le document a été publié ou que la déclaration a été faite, que le document ou la déclaration contenait la présentation inexacte des faits;
- b) soit a évité délibérément, lorsque le document a été publié ou que la déclaration a été faite ou avant ce moment, de prendre connaissance du fait que le document ou la déclaration contenait la présentation inexacte des faits;
- c) soit était coupable, par acte ou omission, d'inconduite grave relativement à la publication du document ou à la déclaration qui contenait la présentation inexacte des faits.

**Idem**

(2) Aucun demandeur n'est tenu de prouver une question énoncée au paragraphe (1) dans une action intentée en vertu de l'article 138.3 à l'égard d'un expert.

**Non-respect des obligations d'information occasionnelle**

(3) Dans une action intentée en vertu de l'article 138.3 à l'égard du non-respect d'obligations d'information occasionnelle, une personne ou une compagnie n'encourt aucune responsabilité, sous réserve du paragraphe (4), à moins que le demandeur ne prouve que celle-ci :

- a) soit savait, lorsque le non-respect s'est produit pour la première fois, qu'il y avait eu un changement et qu'il s'agissait d'un changement important;
- b) soit a évité délibérément, lorsque le non-

knowledge of the change or that the change was a material change; or

- (c) was, through action or failure to act, guilty of gross misconduct in connection with the failure to make timely disclosure.

#### Same

(4) A plaintiff is not required to prove any of the matters set out in subsection (3) in an action under section 138.3 in relation to,

- (a) a responsible issuer;
- (b) an officer of a responsible issuer;
- (c) an investment fund manager; or
- (d) an officer of an investment fund manager.

#### Knowledge of the misrepresentation or material change

(5) A person or company is not liable in an action under section 138.3 in relation to a misrepresentation or a failure to make timely disclosure if that person or company proves that the plaintiff acquired or disposed of the issuer's security,

- (a) with knowledge that the document or public oral statement contained a misrepresentation; or
- (b) with knowledge of the material change.

#### Reasonable investigation

(6) A person or company is not liable in an action under section 138.3 in relation to,

- (a) a misrepresentation if that person or company proves that,
  - (i) before the release of the document or the making of the public oral statement containing the misrepresentation, the person or

respect s'est produit pour la première fois ou avant ce moment, de prendre connaissance du changement ou du fait qu'il s'agissait d'un changement important;

- c) soit était coupable, par acte ou omission, d'inconduite grave relativement au non-respect.

#### Idem

(4) Aucun demandeur n'est tenu de prouver une question énoncée au paragraphe (3) dans une action intentée en vertu de l'article 138.3 à l'égard, selon le cas :

- a) d'un émetteur responsable;
- b) d'un dirigeant d'un émetteur responsable;
- c) d'un gestionnaire de fonds d'investissement;
- d) d'un dirigeant d'un gestionnaire de fonds d'investissement.

#### Connaissance de la présentation inexacte des faits ou du changement important

(5) Une personne ou une compagnie n'encourt aucune responsabilité dans une action intentée en vertu de l'article 138.3 à l'égard de la présentation inexacte de faits ou du non-respect d'obligations d'information occasionnelle, si elle prouve que le demandeur a acquis ou aliéné la valeur mobilière de l'émetteur :

- a) soit en sachant que le document ou la déclaration orale publique contenait une présentation inexacte des faits;
- b) soit en sachant qu'il existait un changement important.

#### Enquête raisonnable

(6) Une personne ou une compagnie n'encourt aucune responsabilité dans une action intentée en vertu de l'article 138.3 à l'égard, selon le cas :

- a) de la présentation inexacte de faits, si elle prouve que :
  - (i) d'une part, préalablement à la publication du document ou à la

- |  |   |
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| <p>company conducted or caused to be conducted a reasonable investigation, and</p> <p>(ii) at the time of the release of the document or the making of the public oral statement, the person or company had no reasonable grounds to believe that the document or public oral statement contained the misrepresentation; or</p> <p>(b) a failure to make timely disclosure if that person or company proves that,</p> <p>(i) before the failure to make timely disclosure first occurred, the person or company conducted or caused to be conducted a reasonable investigation, and</p> <p>(ii) the person or company had no reasonable grounds to believe that the failure to make timely disclosure would occur.</p> | <p>déclaration orale publique contenant la présentation inexacte des faits, elle a procédé ou fait procéder à une enquête raisonnable,</p> <p>(ii) d'autre part, lorsque le document a été publié ou que la déclaration orale publique a été faite, elle n'avait aucun motif raisonnable de croire que le document ou la déclaration contenait la présentation inexacte des faits;</p> <p>b) du non-respect d'obligations d'information occasionnelle, si elle prouve que :</p> <p>(i) d'une part, avant que le non-respect ne se produise pour la première fois, elle a procédé ou fait procéder à une enquête raisonnable,</p> <p>(ii) d'autre part, elle n'avait aucun motif raisonnable de croire que le non-respect se produirait.</p> |
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#### **Factors to be considered by court**

(7) In determining whether an investigation was reasonable under subsection (6), or whether any person or company is guilty of gross misconduct under subsection (1) or (3), the court shall consider all relevant circumstances, including,

- (a) the nature of the responsible issuer;
- (b) the knowledge, experience and function of the person or company;
- (c) the office held, if the person was an officer;
- (d) the presence or absence of another relationship with the responsible issuer, if the person was a director;
- (e) the existence, if any, and the nature of any system designed to ensure that the responsible issuer meets its continuous disclosure obligations;
- (f) the reasonableness of reliance by the person or company on the responsible

#### **Facteurs que le tribunal doit prendre en considération**

(7) Lorsqu'il décide si une enquête était raisonnable pour l'application du paragraphe (6) ou si une personne ou une compagnie est coupable d'inconduite grave pour l'application du paragraphe (1) ou (3), le tribunal prend en considération toutes les circonstances pertinentes, y compris les éléments suivants :

- a) la nature de l'émetteur responsable;
- b) les connaissances, l'expérience et le rôle de la personne ou de la compagnie;
- c) le poste occupé, dans le cas d'un dirigeant;
- d) la présence ou l'absence d'un autre lien avec l'émetteur responsable, dans le cas d'un administrateur;
- e) l'existence éventuelle et la nature de tout système visant à faire en sorte que l'émetteur responsable s'acquitte de

- issuer's disclosure compliance system and on the responsible issuer's officers, employees and others whose duties would in the ordinary course have given them knowledge of the relevant facts;
- (g) the period within which disclosure was required to be made under the applicable law;
  - (h) in respect of a report, statement or opinion of an expert, any professional standards applicable to the expert;
  - (i) the extent to which the person or company knew, or should reasonably have known, the content and medium of dissemination of the document or public oral statement;
  - (j) in the case of a misrepresentation, the role and responsibility of the person or company in the preparation and release of the document or the making of the public oral statement containing the misrepresentation or the ascertaining of the facts contained in that document or public oral statement; and
  - (k) in the case of a failure to make timely disclosure, the role and responsibility of the person or company involved in a decision not to disclose the material change.
- ses obligations d'information continue;
- f) la question de savoir s'il était raisonnable pour la personne ou la compagnie de se fier aux mécanismes de respect des obligations d'information de l'émetteur responsable et aux dirigeants et employés de celui-ci ainsi qu'aux autres personnes dont les fonctions lui auraient normalement permis de prendre connaissance des faits pertinents;
  - g) le délai imparti pour faire une divulgation requise en application du droit applicable;
  - h) à l'égard d'un rapport, d'une déclaration ou d'une opinion d'un expert, les normes professionnelles applicables à celui-ci;
  - i) la mesure dans laquelle la personne ou la compagnie connaissait ou aurait raisonnablement dû connaître le contenu et le mode de diffusion du document ou de la déclaration orale publique;
  - j) dans le cas de la présentation inexacte de faits, le rôle et la responsabilité de la personne ou de la compagnie dans la préparation et la publication du document qui la contient, dans la déclaration orale publique qui la contient, ou encore dans la vérification des faits qui figurent dans le document ou la déclaration;
  - k) dans le cas du non-respect d'obligations d'information occasionnelle, le rôle et la responsabilité de la personne ou de la compagnie qui a participé à la décision de ne pas divulguer le changement important.

#### **Confidential disclosure**

(8) A person or company is not liable in an action under section 138.3 in respect of a failure to make timely disclosure if,

- (a) the person or company proves that the material change was disclosed by the

#### **Divulgence confidentielle**

(8) Une personne ou une compagnie n'encourt aucune responsabilité dans une action intentée en vertu de l'article 138.3 à l'égard du non-respect d'obligations d'information occasionnelle si les conditions suivantes sont

- responsible issuer in a report filed on a confidential basis with the Commission under subsection 75 (3) or the regulations;
- (b) the responsible issuer had a reasonable basis for making the disclosure on a confidential basis;
- (c) where the information contained in the report filed on a confidential basis remains material, disclosure of the material change was made public promptly when the basis for confidentiality ceased to exist;
- (d) the person or company or responsible issuer did not release a document or make a public oral statement that, due to the undisclosed material change, contained a misrepresentation; and
- (e) where the material change became publicly known in a manner other than the manner required under this Act or the regulations, the responsible issuer promptly disclosed the material change in the manner required under this Act or the regulations.
- réunies :
- a) elle prouve que l'émetteur responsable a divulgué le changement important dans un rapport déposé sous le couvert de la confidentialité auprès de la Commission en application du paragraphe 75 (3) ou des règlements;
- b) l'émetteur responsable avait un motif raisonnable de faire la divulgation sous le couvert de la confidentialité;
- c) si les renseignements figurant dans le rapport déposés sous le couvert de la confidentialité demeurent importants, le changement important a été rendu public promptement dès que le besoin de confidentialité a cessé d'exister;
- d) ni elle ni l'émetteur responsable n'a publié un document ou fait une déclaration orale publique qui contenait une présentation inexacte des faits du fait de la non-divulgation du changement important;
- e) l'émetteur responsable a divulgué promptement le changement important de la manière exigée en application de la présente loi ou des règlements s'il a été porté à la connaissance du public d'une autre manière.

#### **Forward-looking information**

(9) A person or company is not liable in an action under section 138.3 for a misrepresentation in forward-looking information if the person or company proves all of the following things:

1. The document or public oral statement containing the forward-looking information contained, proximate to that information,
  - i. reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-

#### **Information prospective**

(9) Une personne ou une compagnie n'encourt aucune responsabilité dans une action intentée en vertu de l'article 138.3 à l'égard de la présentation inexacte de faits dans une information prospective si elle prouve ce qui suit :

1. Le document ou la déclaration orale publique contenant l'information prospective comportait, à proximité de celle-ci :
  - i. d'une part, une mise en garde raisonnable qualifiant l'information prospective de telle ainsi que les facteurs importants susceptibles d'entraîner un écart important entre les résultats réels et une

- looking information, and
- ii. a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.
2. The person or company had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information.

### Same

(9.1) The person or company shall be deemed to have satisfied the requirements of paragraph 1 of subsection (9) with respect to a public oral statement containing forward-looking information if the person who made the public oral statement,

- (a) made a cautionary statement that the oral statement contains forward-looking information;
- (b) stated that,
  - (i) the actual results could differ materially from a conclusion, forecast or projection in the forward-looking information, and
  - (ii) certain material factors or assumptions were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information; and
- (c) stated that additional information about,
  - (i) the material factors that could cause actual results to differ materially from the conclusion, forecast or projection in the forward-looking information, and

conclusion, une prévision ou une projection qui figure dans l'information prospective,

- ii. d'autre part, un énoncé des facteurs ou des hypothèses importants qui ont servi à tirer une conclusion ou à faire une prévision ou une projection qui figure dans l'information prospective.
2. La personne ou la compagnie avait un motif raisonnable de tirer les conclusions ou de faire les prévisions et les projections figurant dans l'information prospective.

### Idem

(9.1) La personne ou la compagnie est réputée avoir satisfait aux exigences de la disposition 1 du paragraphe (9) à l'égard d'une déclaration orale publique contenant une information prospective si l'auteur de la déclaration :

- a) a fait une mise en garde portant que la déclaration contenait une information prospective;
- b) a déclaré :
  - (i) d'une part, qu'il pourrait y avoir un écart important entre les résultats réels et une conclusion, une prévision ou une projection qui figure dans l'information prospective,
  - (ii) d'autre part, que certains facteurs ou hypothèses importants ont servi à tirer une conclusion ou à faire une prévision ou une projection qui figure dans l'information prospective;
- c) a déclaré que des renseignements supplémentaires concernant :
  - (i) d'une part, des facteurs importants susceptibles d'entraîner un écart important entre les résultats réels et la conclusion, la prévision ou la

- (ii) the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information,

is contained in a readily-available document or in a portion of such a document and has identified that document or that portion of the document.

#### **Same**

(9.2) For the purposes of clause (9.1) (c), a document filed with the Commission or otherwise generally disclosed shall be deemed to be readily available.

#### **Exception**

(10) Subsection (9) does not relieve a person or company of liability respecting forward-looking information in a financial statement required to be filed under this Act or the regulations or forward-looking information in a document released in connection with an initial public offering.

#### **Expert report, statement or opinion**

(11) A person or company, other than an expert, is not liable in an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert in respect of which the responsible issuer obtained the written consent of the expert to the use of the report, statement or opinion, if the consent had not been withdrawn in writing before the document was released or the public oral statement was made, if the person or company proves that,

- (a) the person or company did not know and had no reasonable grounds to believe that there had been a misrepresentation in the part of the document or public oral statement made on the authority of the expert; and
- (b) the part of the document or oral public

projection qui figure dans l'information prospective,

- (ii) d'autre part, des facteurs et des hypothèses importants qui ont servi à tirer une conclusion ou faire une prévision ou projection qui figure dans l'information prospective,

figurent dans un document facilement disponible ou dans une partie d'un tel document, et a précisé de quel document ou partie de celui-ci il s'agit.

#### **Idem**

(9.2) Pour l'application de l'alinéa (9.1) c), un document déposé auprès de la Commission ou divulgué au public autrement est réputé être facilement disponible.

#### **Exception**

(10) Le paragraphe (9) ne dégage pas une personne ou une compagnie de la responsabilité à l'égard de l'information prospective figurant dans un état financier qui doit être déposé en application de la présente loi ou des règlements ou de l'information prospective figurant dans un document publié dans le cadre d'un placement initial dans le public.

#### **Rapport, déclaration ou opinion de l'expert**

(11) Une personne ou une compagnie, sauf un expert, n'encourt aucune responsabilité dans une action intentée en vertu de l'article 138.3 à l'égard de toute partie d'un document ou d'une déclaration orale publique qui reproduit, résume ou cite des passages d'un rapport, d'une déclaration ou d'une opinion de l'expert à l'égard de l'utilisation desquels l'émetteur responsable a obtenu le consentement écrit de ce dernier, lequel consentement n'a pas été retiré par écrit préalablement à la publication du document ou à la déclaration, si elle prouve ce qui suit :

- a) elle ne savait pas et n'avait aucun motif raisonnable de croire que la partie du document ou de la déclaration qui s'appuie sur l'autorité de l'expert contenait une présentation inexacte des faits;
- b) la partie du document ou de la

statement fairly represented the report, statement or opinion made by the expert.

déclaration reflétait fidèlement le rapport, la déclaration ou l'opinion de l'expert.

### **Same**

(12) An expert is not liable in an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert, if the expert proves that the written consent previously provided was withdrawn in writing before the document was released or the public oral statement was made.

### **Idem**

(12) Un expert n'encourt aucune responsabilité dans une action intentée en vertu de l'article 138.3 à l'égard de toute partie d'un document ou d'une déclaration orale publique qui reproduit, résume ou cite des passages d'un de ses rapports ou d'une de ses déclarations ou opinions, s'il prouve qu'il a retiré par écrit, préalablement à la publication du document ou à la déclaration, le consentement écrit qu'il avait accordé antérieurement.

### **Release of documents**

(13) A person or company is not liable in an action under section 138.3 in respect of a misrepresentation in a document, other than a document required to be filed with the Commission, if the person or company proves that, at the time of release of the document, the person or company did not know and had no reasonable grounds to believe that the document would be released.

### **Publication de documents**

(13) Une personne ou une compagnie n'encourt aucune responsabilité dans une action intentée en vertu de l'article 138.3 à l'égard de la présentation inexacte de faits dans un document, sauf un document qui doit être déposé auprès de la Commission, si elle prouve qu'au moment de la publication du document, elle ne savait pas et n'avait aucun motif raisonnable de croire qu'il serait publié.

### **Derivative information**

(14) A person or company is not liable in an action under section 138.3 for a misrepresentation in a document or a public oral statement, if the person or company proves that,

### **Renseignements dérivés**

(14) Une personne ou une compagnie n'encourt aucune responsabilité dans une action intentée en vertu de l'article 138.3 à l'égard de la présentation inexacte de faits dans un document ou dans une déclaration orale publique, si elle prouve ce qui suit :

- (a) the misrepresentation was also contained in a document filed by or on behalf of another person or company, other than the responsible issuer, with the Commission or any other securities regulatory authority in Canada or an exchange and was not corrected in another document filed by or on behalf of that other person or company with the Commission or that other securities regulatory authority in Canada or exchange before the release of the document or the public oral statement made by or on behalf of the responsible issuer;
- (b) the document or public oral statement contained a reference identifying the document that was the source of the

- a) la présentation inexacte des faits figurait également dans un document déposé par une autre personne ou compagnie ou en son nom, sauf l'émetteur responsable, auprès de la Commission, d'un autre organisme de réglementation des valeurs mobilières au Canada ou d'une bourse et n'a pas été rectifiée dans un autre document déposé par cette autre personne ou compagnie ou en son nom auprès de la Commission, de cet organisme ou de cette bourse avant que ne soit publié le document ou que ne soit faite la déclaration par l'émetteur responsable ou en son nom;

misrepresentation; and

- (c) when the document was released or the public oral statement was made, the person or company did not know and had no reasonable grounds to believe that the document or public oral statement contained a misrepresentation.

#### **Where corrective action taken**

(15) A person or company, other than the responsible issuer, is not liable in an action under section 138.3 if the misrepresentation or failure to make timely disclosure was made without the knowledge or consent of the person or company and, if, after the person or company became aware of the misrepresentation before it was corrected, or the failure to make timely disclosure before it was disclosed in the manner required under this Act or the regulations,

- (a) the person or company promptly notified the board of directors of the responsible issuer or other persons acting in a similar capacity of the misrepresentation or the failure to make timely disclosure; and
- (b) if no correction of the misrepresentation or no subsequent disclosure of the material change in the manner required under this Act or the regulations was made by the responsible issuer within two business days after the notification under clause (a), the person or company, unless prohibited by law or by professional confidentiality rules, promptly and in writing notified the Commission of the misrepresentation or failure to make timely disclosure.

#### **DAMAGES**

##### **Assessment of damages**

138.5 (1) Damages shall be assessed in favour of a person or company that acquired an issuer's securities after the release of a document or the making of a public oral statement containing a

- b) le document ou la déclaration contenait un renvoi au document à l'origine de la présentation inexacte des faits;
- c) lorsque le document a été publié ou que la déclaration a été faite, elle ne savait pas et n'avait aucun motif raisonnable de croire que le document ou la déclaration contenait une présentation inexacte des faits.

#### **Prise de mesures de rectification**

(15) Une personne ou une compagnie, sauf l'émetteur responsable, n'encourt aucune responsabilité dans une action intentée en vertu de l'article 138.3 si la présentation inexacte des faits ou le non-respect des obligations d'information occasionnelle s'est produit à son insu ou sans son consentement et que, après avoir pris connaissance de la présentation inexacte des faits, mais avant qu'elle ne soit rectifiée, ou après avoir pris connaissance du non-respect, mais avant que la divulgation ne soit faite de la manière exigée en application de la présente loi ou des règlements :

- a) d'une part, elle a promptement avisé le conseil d'administration de l'émetteur responsable ou les autres personnes agissant à titre semblable de la présentation inexacte ou du non-respect;
- b) d'autre part, si l'émetteur responsable n'a pas rectifié la présentation inexacte des faits ou divulgué subséquemment le changement important de la manière exigée en application de la présente loi ou des règlements dans les deux jours ouvrables qui suivent la remise de l'avis prévu à l'alinéa a), elle a avisé promptement la Commission, par écrit, de la présentation inexacte ou du non-respect, à moins que le droit ou les règles du secret professionnel ne l'interdisent.

#### **DOMMAGES-INTÉRÊTS**

##### **Évaluation des dommages-intérêts**

138.5 (1) Des dommages-intérêts sont évalués de la manière suivante en faveur de la personne ou de la compagnie qui a acquis des valeurs mobilières d'un émetteur après qu'est

misrepresentation or after a failure to make timely disclosure as follows:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions.
2. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the lesser of,
  - i. an amount equal to the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions, and
  - ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average

publié un document ou qu'est faite une déclaration orale publique contenant une présentation inexacte des faits ou après le non-respect d'obligations d'information occasionnelle :

1. Dans le cas de valeurs mobilières de l'émetteur responsable que la personne ou la compagnie a aliénées subséquemment au plus tard le 10<sup>e</sup> jour de bourse qui suit la rectification publique de la présentation inexacte ou la divulgation du changement important de la manière exigée en application de la présente loi ou des règlements, les dommages-intérêts évalués correspondent à la différence existant entre leur prix d'acquisition moyen, y compris les commissions versées à leur égard, et leur prix d'aliénation, sans toutefois déduire les commissions versées à l'égard de l'aliénation, calculée en tenant compte du résultat des transactions d'arbitrage en couverture ou autres transactions visant à réduire les risques.
2. Dans le cas de valeurs mobilières de l'émetteur responsable que la personne ou la compagnie a aliénées subséquemment après le 10<sup>e</sup> jour de bourse qui suit la rectification publique de la présentation inexacte ou la divulgation du changement important de la manière exigée en application de la présente loi ou des règlements, les dommages-intérêts évalués correspondent au moins élevé des montants suivants :
  - i. un montant correspondant à la différence existant entre leur prix d'acquisition moyen, y compris les commissions versées à leur égard, et leur prix d'aliénation, sans toutefois déduire les commissions versées à l'égard de l'aliénation, calculée en tenant compte du résultat des transactions d'arbitrage en couverture ou autres transactions visant à

price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,

A. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or

B. if there is no published market, the amount that the court considers just.

3. In respect of any of the securities of the responsible issuer that the person or company has not disposed of, assessed damages shall equal the number of securities acquired, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,

i. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or

réduire les risques,

ii. un montant correspondant au nombre de valeurs mobilières que la personne a aliénées, multiplié par la différence existant entre leur prix d'acquisition unitaire moyen, y compris les commissions versées à leur égard, calculées sur une base unitaire, et :

A. si les valeurs mobilières de l'émetteur font l'objet d'opérations sur un marché organisé, leur cours sur le marché principal, au sens des règlements, pendant les 10 jours de bourse qui suivent la rectification publique de la présentation inexacte ou la divulgation du changement important de la manière exigée en application de la présente loi ou des règlements,

B. s'il n'existe aucun marché organisé, le montant que le tribunal estime juste.

3. Dans le cas de valeurs mobilières de l'émetteur responsable que la personne ou la compagnie n'a pas aliénées, les dommages-intérêts évalués correspondent au nombre de valeurs mobilières acquises, multiplié par la différence existant entre leur prix d'acquisition unitaire moyen, y compris les commissions versées à leur égard, calculées sur une base unitaire, et :

i. si les valeurs mobilières de l'émetteur font l'objet d'opérations sur un marché organisé, leur cours sur le marché principal, au sens des règlements, pendant les 10 jours de bourse qui suivent la

ii. if there is no published market, the amount that the court considers just. 2002, c. 22, s. 185; 2006, c. 33, Sched. Z.5, s. 17; 2007, c. 7, Sched. 38, s. 12 (1-4).

rectification publique de la présentation inexacte ou la divulgation du changement important de la manière exigée en application de la présente loi ou des règlements,

ii. s'il n'existe aucun marché organisé, le montant que le tribunal estime juste.

### Same

(2) Damages shall be assessed in favour of a person or company that disposed of securities after a document was released or a public oral statement made containing a misrepresentation or after a failure to make timely disclosure as follows:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the difference between the average price received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions.
2. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the lesser of,
  - i. an amount equal to the difference between the average price received upon the disposition of those securities (deducting any

### Idem

(2) Des dommages-intérêts sont évalués de la manière suivante en faveur de la personne ou de la compagnie qui a aliéné des valeurs mobilières après qu'est publié un document ou qu'est faite une déclaration orale publique contenant une présentation inexacte des faits ou après le non-respect d'obligations d'information occasionnelle :

1. Dans le cas de valeurs mobilières de l'émetteur responsable que la personne ou la compagnie acquiert subséquentement au plus tard le 10<sup>e</sup> jour de bourse qui suit la rectification publique de la présentation inexacte ou la divulgation du changement important de la manière exigée en application de la présente loi ou des règlements, les dommages-intérêts évalués correspondent à la différence existant entre leur prix d'acquisition moyen, déduction faite des commissions versées à l'égard de l'aliénation, et leur prix d'acquisition, sans toutefois inclure les commissions versées à leur égard, calculée en tenant compte du résultat des transactions d'arbitrage en couverture ou autres transactions visant à réduire les risques.
2. Dans le cas de valeurs mobilières de l'émetteur responsable que la personne ou la compagnie a subséquentement acquises après le 10<sup>e</sup> jour de bourse qui suit la rectification publique de la présentation inexacte ou la divulgation du changement important de la manière exigée en application de la présente loi ou des règlements, les

- commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions, and
- ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis) and,
    - A. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or
    - B. if there is no published market, the amount that the court considers just.
3. In respect of any of the securities of the responsible issuer that the person or company has not acquired, assessed damages shall equal the number of securities that the person or company disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in
- dommages-intérêts évalués correspondent au moins élevé des montants suivants :
- i. un montant correspondant à la différence existant entre leur prix d'aliénation moyen, déduction faite des commissions versées à l'égard de l'aliénation, et leur prix d'acquisition, sans toutefois inclure les commissions versées à leur égard, calculée en tenant compte du résultat des transactions d'arbitrage en couverture ou autres transactions visant à réduire les risques,
  - ii. un montant correspondant au nombre de valeurs mobilières que la personne a aliénées, multiplié par la différence existant entre leur prix d'aliénation unitaire moyen, déduction faite des commissions versées à l'égard de l'aliénation, calculées sur une base unitaire, et :
    - A. si les valeurs mobilières de l'émetteur font l'objet d'opérations sur un marché organisé, leur cours sur le marché principal, au sens des règlements, pendant les 10 jours de bourse qui suivent la rectification publique de la présentation inexacte ou la divulgation du changement important de la manière exigée en application de la présente loi ou des règlements,
    - B. s'il n'existe aucun marché organisé, le montant que le tribunal estime juste.
3. Dans le cas de valeurs mobilières de l'émetteur responsable que la personne

respect of the disposition determined on a per security basis) and,

- i. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as such terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or
- ii. if there is no published market, then the amount that the court considers just.

ou la compagnie n'a pas acquises, les dommages-intérêts évalués correspondent au nombre de valeurs mobilières qu'elle a aliénées, multiplié par la différence existant entre leur prix d'aliénation unitaire moyen, déduction faite des commissions versées à l'égard de l'aliénation, calculées sur une base unitaire, et :

- i. si les valeurs mobilières de l'émetteur font l'objet d'opérations sur un marché organisé, leur cours sur le marché principal, au sens des règlements, pendant les 10 jours de bourse qui suivent la rectification publique de la présentation inexacte ou la divulgation du changement important de la manière exigée en application de la présente loi ou des règlements,
- ii. s'il n'existe aucun marché organisé, le montant que le tribunal estime juste.

#### **Same**

(3) Despite subsections (1) and (2), assessed damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure.

#### **Proportionate liability**

138.6 (1) In an action under section 138.3, the court shall determine, in respect of each defendant found liable in the action, the defendant's responsibility for the damages assessed in favour of all plaintiffs in the action, and each such defendant shall be liable, subject to the limits set out in subsection 138.7 (1), to the plaintiffs for only that portion of the aggregate amount of damages assessed in favour of the plaintiffs that corresponds to that defendant's responsibility for the damages.

#### **Idem**

(3) Malgré les paragraphes (1) et (2), les dommages-intérêts évalués ne doivent comprendre aucun montant dont le défendeur prouve qu'il est attribuable à une fluctuation du cours des valeurs mobilières qui ne découle pas de la présentation inexacte des faits ni du non-respect des obligations d'information occasionnelle.

#### **Responsabilité proportionnelle**

138.6 (1) Dans une action intentée en vertu de l'article 138.3, le tribunal détermine la responsabilité qui incombe à chaque défendeur qui est tenu responsable dans l'action relativement aux dommages-intérêts évalués en faveur de tous les demandeurs qui y sont parties, sous réserve des restrictions énoncées au paragraphe 138.7 (1), chacun de ces défendeurs n'étant alors tenu responsable à l'égard des demandeurs que de la fraction du montant total des dommages-intérêts évalués en leur faveur qui correspond à sa part de responsabilité relativement à ceux-ci.

**Same**

(2) Despite subsection (1), where, in an action under section 138.3 in respect of a misrepresentation or a failure to make timely disclosure, a court determines that a particular defendant, other than the responsible issuer, authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing it to be a misrepresentation or a failure to make timely disclosure, the whole amount of the damages assessed in the action may be recovered from that defendant.

**Same**

(3) Each defendant in respect of whom the court has made a determination under subsection (2) is jointly and severally liable with each other defendant in respect of whom the court has made a determination under subsection (2).

**Same**

(4) Any defendant against whom recovery is obtained under subsection (2) is entitled to claim contribution from any other defendant who is found liable in the action.

**Limits on damages**

138.7 (1) Despite section 138.5, the damages payable by a person or company in an action under section 138.3 is the lesser of,

- (a) the aggregate damages assessed against the person or company in the action; and
- (b) the liability limit for the person or company less the aggregate of all damages assessed after appeals, if any, against the person or company in all other actions brought under section 138.3, and under comparable legislation in other provinces or territories in Canada in respect of that misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of any such actions.

**Idem**

(2) Malgré le paragraphe (1), si, dans une action intentée en vertu de l'article 138.3 à l'égard de la présentation inexacte de faits ou du non-respect d'obligations d'information occasionnelle, le tribunal décide qu'un défendeur donné, sauf l'émetteur responsable, a autorisé ou permis la présentation inexacte ou le non-respect ou qu'il y a acquiescé en toute connaissance de cause, le montant total des dommages-intérêts évalués dans l'action peut être recouvré auprès de ce défendeur.

**Idem**

(3) La responsabilité des défendeurs à l'égard desquels le tribunal a pris la décision prévue au paragraphe (2) est conjointe et individuelle.

**Idem**

(4) Tout défendeur duquel un montant est recouvré en application du paragraphe (2) a le droit de demander un redressement à tout autre défendeur qui est tenu responsable dans l'action.

**Plafond des dommages-intérêts**

138.7 (1) Malgré l'article 138.5, les dommages-intérêts auxquels une personne ou une compagnie est tenue dans une action intentée en vertu de l'article 138.3 correspondent au moins élevé des montants suivants :

- a) le total des dommages-intérêts évalués contre elle dans l'action;
- b) sa limite de responsabilité, déduction faite du total des dommages-intérêts évalués, après les appels éventuels, contre elle dans toutes les autres actions intentées en vertu de l'article 138.3 et de dispositions législatives comparables des autres provinces ou territoires du Canada à l'égard de cette présentation inexacte des faits ou de ce non-respect des obligations d'information occasionnelle, et déduction faite de tout montant versé en règlement de telles actions.

**Same**

(2) Subsection (1) does not apply to a person or company, other than the responsible issuer, if the plaintiff proves that the person or company authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure, or influenced the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure.

**Idem**

(2) Le paragraphe (1) ne s'applique pas à une personne ou une compagnie, sauf l'émetteur responsable, si le demandeur prouve qu'elle a autorisé ou permis la présentation inexacte des faits ou le non-respect des obligations d'information occasionnelle ou qu'elle y a acquiescé en toute connaissance de cause.

## PROCEDURAL MATTERS

**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

## QUESTIONS DE PROCÉDURE

**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 signifiant 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

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.

#### **Notice**

138.9 (1) A person or company that has been granted leave to commence an action under section 138.3 shall,

- (a) promptly issue a news release disclosing that leave has been granted to commence an action under section 138.3;
- (b) send a written notice to the Commission within seven days, together with a copy of the news release;
- (c) send a copy of the statement of claim or other originating document to the Commission when filed; and
- (d) provide the Commission with notice in writing of the date on which the trial of the action is scheduled to proceed, at the same time such notice is given to each defendant.

#### **Appeal**

(2) If any party to an action under section 138.3 appeals the decision of the court,

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

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.

#### **Préavis**

138.9 (1) La personne ou la compagnie à laquelle est accordée l'autorisation d'intenter une action en vertu de l'article 138.3 fait ce qui suit :

- a) elle délivre promptement un communiqué portant que lui a été accordée l'autorisation d'intenter une action en vertu de l'article 138.3;
- b) elle envoie à la Commission dans les sept jours qui suivent un préavis écrit et une copie du communiqué;
- c) elle envoie à la Commission, au moment du dépôt, une copie de la déclaration ou de l'acte introductif d'instance;
- d) elle avise par écrit la Commission de la date prévue du procès, en même temps qu'elle en avise chaque défendeur.

#### **Appel**

(2) Si une partie à une action intentée en vertu de l'article 138.3 interjette appel de la décision du tribunal :

- a) d'une part, chaque partie fournit un exemplaire de son mémoire à la

(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.

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.

**Restriction on discontinuation, etc., of action**

138.10 An action under section 138.3 shall not be discontinued, abandoned or settled without the approval of the court given on such terms as the court thinks fit including, without limitation, terms as to costs, and in determining whether to approve the settlement of the action, the court shall consider, among other things, whether there are any other actions outstanding under section 138.3 or under comparable legislation in other provinces or territories in Canada in respect of the same misrepresentation or failure to make timely disclosure.

**Restriction relative à l'abandon d'une action**

138.10 L'abandon ou le règlement d'une action intentée en vertu de l'article 138.3 est subordonné à l'approbation du tribunal selon les conditions qu'il estime opportunes, notamment en ce qui a trait aux dépens. Lorsqu'il décide s'il doit ou non approuver le règlement de l'action, le tribunal tient compte notamment des autres actions en cours, le cas échéant, qui ont été intentées en vertu du même article ou de dispositions législatives comparables d'autres provinces ou territoires du Canada à l'égard de la même présentation inexacte des faits ou du même non-respect des obligations d'information occasionnelle.

**Costs**

138.11 Despite the *Courts of Justice Act* and the *Class Proceedings Act, 1992*, the prevailing party in an action under section 138.3 is entitled to costs determined by a court in accordance with applicable rules of civil procedure.

**Dépens**

138.11 Malgré la *Loi sur les tribunaux judiciaires* et la *Loi de 1992 sur les recours collectifs*, la partie qui a gain de cause dans une action intentée en vertu de l'article 138.3 a droit aux dépens que fixe le tribunal conformément aux règles de procédure civile applicables.

**Power of the Commission**

138.12 The Commission may intervene in an action under section 138.3, in an application for leave to commence the action under section 138.8 and in any appeal from the decision of the court in the action or with respect to whether leave is granted to commence the action.

**Pouvoir de la Commission**

138.12 La Commission peut intervenir dans une action intentée en vertu de l'article 138.3, dans une requête en autorisation d'intenter une action visée à l'article 138.8 et dans tout appel de la décision du tribunal portant sur l'action ou l'autorisation de l'intenter.

**No derogation from other rights**

138.13 The right of action for damages and the defences to an action under section 138.3 are in addition to, and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this

**Maintien des autres droits**

138.13 Le droit d'intenter une action en dommages-intérêts en vertu de l'article 138.3 et les moyens de défense présentés dans une action intentée en vertu du même article ne portent pas atteinte aux autres droits ou moyens de défense du demandeur ou du défendeur dans une action

Part.

intentée en vertu d'autres dispositions que celles de la présente partie, mais s'y ajoutent.

**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

**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

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.

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 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.

#### **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.