

Torys on Litigation and Dispute Resolution

L&DR 2010-3
March 22, 2010

Ontario Court Decision Creates Conflict Regarding Class Actions for Common Law Misrepresentation Claims

By [Andrew Gray](#)

In *McKenna v. Gammon Gold Inc.*, the Court refused to certify common law claims of alleged misrepresentations in a prospectus and in Gammon Gold's continuous disclosure because the need for proof of individualized reliance on the alleged misrepresentations made the claims unsuitable for the class action procedure. The *Gammon Gold* decision is consistent with the way that Ontario courts traditionally dealt with common law misrepresentation claims in class actions, and is also consistent with the theory underlying the statutory regime for securities misrepresentation claims; but the decision departs from the approach taken in the recent *Silver v. IMAX Corporation* decision.

In *IMAX*, the Court certified both statutory misrepresentation and common law misrepresentation claims relating to alleged misrepresentations made in IMAX's continuous disclosure. The statutory claims were brought under the secondary market liability regime in the *Securities Act*, which includes a provision deeming reliance on alleged misrepresentations. The inclusion of deemed reliance in the statutory regime for continuous disclosure misrepresentations was intended to overcome the need for proof of individual reliance and to make misrepresentation claims suitable for certification as securities class actions. In *IMAX*, in addition to certifying the statutory claim, the Court also certified common law misrepresentation claims made parallel to the statutory claim. In doing so, the Court accepted the plaintiffs' argument that individual reliance can be inferred on a "group" basis from the fact that members of the class purchased IMAX shares in an efficient market in which, according to the efficient market theory, the price of a security reflects information about the security, including the issuer's disclosure.

The Court in *Gammon Gold* rejected the inferred reliance argument as a basis for certifying common law misrepresentation claims. The Court reaffirmed the traditional view that common law misrepresentation claims are not suitable for certification because of the need for each class member to prove reliance on the alleged misrepresentations. In so ruling, the Court noted that the statutory regime provides for deemed reliance in prospectus and in secondary market misrepresentation claims in order to relieve shareholders of the common law requirement to prove reliance and thereby make misrepresentation claims appropriate for certification as class actions. On that basis, the Court certified the statutory prospectus misrepresentation claim – but not the common law misrepresentation claims – against Gammon Gold.

There is now a conflict in the law in Ontario on the certifiability of common law misrepresentation claims in securities class actions, although *Gammon Gold* is consistent with the weight of authority and the theory of the statutory regime. **1**

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