

CLASS ACTION DEFENCE QUARTERLY

**EDITOR-IN-CHIEF: KATHRYN CHALMERS
STIKEMAN ELLIOTT LLP**

Volume 5 Number 4

June 2011

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A SMOOTH LANDING — MANAGING MULTI-JURISDICTIONAL CLASS ACTIONS IN THE SAUER “MAD COW” LITIGATION



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After six years of floating the very real possibility of multiple trials, the BSE or “mad cow” national class action litigation¹ has finally landed, making its only home in Ontario. Most notably, although the last to arrive, the Québec class members have joined the Ontario action. To be sure, managing identical or overlapping multiple class actions has become a standard challenge for class action counsel, raising continuing discussion, in and out of the courtroom. It is a topic of interest at conferences, in legal publications and at lawyers’ preferred coffee and lunch venues.

Not surprisingly, litigators have attempted to tame the beast using a variety of strategies, many of which have been creative and successful. Often, the courts’ intervention is sought with approaches such as carriage motions, motions to stay proceedings in one or several provinces, challenges based on *forum non conveniens* arguments and constitutional challenges, to name a few. This has resulted in a growing body of jurisprudence addressing a variety of such legal issues.

The merger of the four BSE class actions² into the Ontario *Sauer* action illustrates what is perhaps a new, but likely expanding, approach.

[*Editor’s note:* This article is written solely on the author’s own behalf and any opinions expressed are those of the author only and do not reflect those of the Department of Justice or the Government of Canada.]

stage to all stakeholders — plaintiffs, defendants, intervenors and the court — in order to assist with the determination of whether a class action is a preferable procedure to resolve plaintiffs’ damages claims or not.

Galileo once said that the “authority of a thousand is not worth the humble reasoning of a single individual”. A proposed class is, in some ways, analogous to the “thousand” that Galileo speaks about. However, at the end of the day, what is important in deciding between aggregate damages and individual assessments, is the decisions (“reasonings”) of individual plaintiffs, the alternatives available to them, and the degree to which these are similar.

[*Editor’s note:* The author would like to acknowledge the assistance of Molly Yuan of Cohen Hamilton Steger & Co. Inc. for her help in researching this article.]

¹ Not all provinces have enacted statutes governing class action proceedings. The statutes of those that have are generally similar in their provisions. Refer to para. 5(1) of the *Class Proceedings Act, 1992* (Ontario), S.O. 1992, c. 6, and paras. 4(1) and (2) of the *Class Proceedings Act*, (British Columbia), RSBC 1996, CHAPTER 50, for example.

² Refer to para. 24(1) of the *Class Proceedings Act, 1992* (Ontario), and paras. 29(1) and (2) of the *Class Proceedings Act* (British Columbia), for example.

³ *Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684, 2007 ONCA 334.

⁴ *Cassano v. The Toronto-Dominion Bank*, [2007] O.J. No. 4406, [2007] ONCA 781.

⁵ *Healey v. Lakeridge Health Corporation*, [2011] O.J. No. 231, 2011 ONCA 55.

⁶ *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913, 27 C.P.C. (4th) 172 (Gen. Div.).

⁷ It is interesting to note, for example, that in *Fresco v. Canadian Imperial Bank of Commerce*, [2010] O.J. No. 3762, 2010 ONSC 4724, a case involving compensation for alleged unpaid overtime work, the Divisional Court did not certify the proceeding. The Divisional Court concluded, among other things, that damages *could not* be calculated in the aggregate in this case. Meanwhile, in another overtime class action, *Fulawka v. Bank of Nova Scotia*, [2010] O.J. No. 716, 2010 ONSC 1148, the certification court did certify the proceeding, concluding, among other things, that damages *could* be calculated in the aggregate in this case.

⁸ The terms “loss” and “damages” will be used interchangeably.

RECENT DECISIONS

LEAVE TO APPEAL DECLINED IN *IMAX*: DIVISIONAL COURT FINDS NO REASON TO DOUBT CORRECTNESS OF DECISION

By Gillian B. Dingle, Associate, Torys LLP

The first decision to grant leave under the Ontario *Securities Act*’s (R.S.O. 1990, c. S.5 [the *Securities Act*]) statutory secondary market misrepresentation regime — *Silver v. IMAX Corporation*, [2009] O.J. No. 5573 (S.C.J.) and [2009] O.J. No. 5585 (S.C.J.) — was rendered by Justice van Rensburg on December 14, 2009. On February 14, 2011, Justice Corbett released the Ontario Divisional Court’s decision ([2011] O.J. No. 656 (Div. Ct.)) declining to grant leave to appeal the motion judge’s decision on either the statutory or common law claims asserted in the action. He declined to disturb the relatively low threshold test that van Rensburg J. had applied to the statutory leave requirement, and found no reason to doubt the correctness of her decision permitting the certification of the common law negligent misrepresentation claims.

While arguably the unique facts of the *IMAX* decision drove its result, in making this decision, Corbett J. has reinforced a compensatory, rather than deterrent approach to the *Securities Act* continuous disclosure regime. Through declining to grant leave on the issue of the common law misrepresentation claims, this decision has heightened the risk that the new *Securities Act* regime could be rendered superfluous on its first real judicial examination. Appellate consideration of the statutory regime, and how it should interact with common law negligent misrepresentation claims, is required to clarify how courts should approach these issues.

The IMAX Case and the Motion Judge’s Decision

The plaintiffs allege that IMAX Corporation made misrepresentations in press releases and year-end financial statements about its earnings and compliance with accounting requirements, particularly as

they related to its installation of theatre systems in Q4 2005, and how that revenue was being recognized. IMAX was required to re-state its 2005 financials, and its clear audit opinion for the year 2005 was withdrawn by its auditor.

The plaintiffs sued IMAX and a number of its directors and officers in a proposed class action, alleging common law negligent misrepresentation, and seeking leave to make statutory misrepresentation claims under the *Securities Act*. The leave and certification motions were argued together, and van Rensburg J. granted leave to the plaintiffs to make their statutory claims, and certified a class action in respect of certain of the common law claims, including negligent misrepresentation.

The Leave to Appeal Decision

Leave to appeal was sought with respect to both of these decisions. In considering the leave motion, and perhaps recognizing the unique facts giving rise to the claims in *IMAX*, Corbett J. noted that the focus of a leave motion is on the decision, not the lower court's reasons: "[i]nteresting legal questions raised by reasons, but not by decisions, can await other cases."

In respect of the statutory leave test, Corbett J. found that the defendants could not satisfy the first branch of the leave to appeal test, namely that they could not establish good reason to doubt the correctness of van Rensburg J.'s decision. The heart of his decision on this point was his assessment that, on the facts as found by her Honour, "this was not a close call that turned on the precise test used to grant leave." Under the particular circumstances of the *IMAX* case, leave would arguably have been granted even applying a higher threshold.

With respect to the common law misrepresentation claims, the plaintiffs had successfully argued before the motion judge that class reliance could be proved as a matter of fact, using the "efficient market theory". Justice Corbett relied on the existence of coordinate authority for the motion judge's ap-

proach, and the lack of appellate authority taking the contrary position.

The defendants argued that the decision in *McKenna v. Gammon Gold*, [2010] O.J. No. 1057 (S.C.J.), ought to guide the Divisional Court to grant leave to appeal on the common law misrepresentation claims. In that case, Justice Strathy had refused to certify an action alleging common law misrepresentation, due to the inability to establish reliance as a common issue. Leave had also been sought to appeal this decision ([2010] O.J. No. 3183 (Div. Ct)) and Justice Sachs had seen no reason to conclude that Justice Strathy had erred in his decision not to certify the common law misrepresentation claim. However, in the *IMAX* case, Corbett J. concluded that the decision in *Gammon Gold* was distinguishable due to the number and varied nature of the misrepresentations at issue in that case. In his view, there was thus no reason to doubt the correctness of the motion judge's decision, which did no more than allow the plaintiffs to advance the claim at trial.

The motion judge's decision in *IMAX*, now as affirmed by the Divisional Court, has set a low bar for *Securities Act* statutory misrepresentation claims to proceed and has carved out the possibility that common law misrepresentation claims can proceed alongside claims under the statutory regime, the very framework designed to address the inability of plaintiffs to certify such claims in class proceedings. Subsequent decisions have followed the motion judge's reasoning, and *IMAX* is now not the only class proceeding in which statutory and common law claims have been certified as was the case in *Dobbie v. Arctic Glacier Income Fund et al.*, [2011] O.J. No. 932 (S.C.J.). Appellate review of both the statutory leave test, and the ability of plaintiffs to establish class reliance using an "efficient market theory", is required to ensure that the *Securities Act* regime remains relevant and fills the specific void intended for it by the legislature.