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real estate brokerage services market despite the fact that TREB does not itself compete in that market.

Specifically, the Commissioner alleged that a TREB rule restricting its members from posting certain historical data on virtual office websites substantially lessens or prevents competition in the market for residential real estate brokerage services.

Re-hearing by Tribunal

The Supreme Court of Canada denied TREB's application seeking leave to appeal in July 2014; the case was sent back to the Competition Tribunal (the "Tribunal") for reconsideration. In late 2015, the Tribunal re-heard the case. Its decision had not yet been issued but is expected to be released in early 2016.

This decision will be significant: it will be the first decision to consider the abuse of dominance provisions following the Federal Court of Appeal's decision, and it will set the stage for future enforcement in the abuse of dominance arena.

Dominant companies and trade associations would be well-advised to consider their conduct in light of this upcoming decision.

Contested mergers

In April 2015, the Commissioner filed an application challenging a proposed merger between two major gas retailers, Parkland Fuel Corp. and Pioneer Energy. The Commissioner sought remedies in 14 local markets (representing less than 10 percent of the overall transaction).

The Commissioner also brought an application under s. 104 of the Act seeking an injunction preventing the merging parties from implementing the transaction in those 14 markets pending the outcome of the case. This application marked the first time that the Tribunal considered a contested case under s. 104.

Hold separate order

In May 2015, the Tribunal issued its injunction decision — ordering Parkland and Pioneer to hold separate retail gas stations and supply agreements in six of the 14 markets — pending resolution of the case. Notably, the Tribunal clarified that the test for an interim injunction under s. 104 is based on the standard for injunctions used in court.

Specifically, the Commissioner must:

(a) demonstrate that there is a serious issue to be tried;
(b) provide "clear and non-speculative" evidence that irreparable harm will result if the injunction is not granted; and
(c) establish that the balance of convenience supports the granting of relief.

Economic evidence

The outcome of the full case is still pending. The injunction decision, including the legal test set by the Tribunal, illustrates the need for both the Bureau and merging parties to develop ample economic evidence during the course of merger planning and review.

Going forward, the Bureau may be expected to increase its efforts to obtain such evidence from merging parties during the course of its reviews of transactions that it is considering challenging. Further, it is likely that the Bureau will continue to use s. 104 applications as a tool in future contested merger proceedings.

DIRECTORS' AND OFFICERS' LIABILITY

Rahimi decision a welcome one for directors and officers

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A reasonable investigation defence successfully defeated a proposed secondary market securities class action at the preliminary leave stage.

The recent decision in *Rahimi v. SouthGobi Resources* is a welcome addition to the jurisprudence for directors and officers faced with personal exposure for alleged misrepresentations in a reporting issuer's public disclosure. The decision arose at the preliminary leave stage of a proposed secondary market securities class action against the defendant coal mining company (the "Company") and certain of its current and former officers and directors.

The motion judge held that the individual defendants had presented sufficient evidence to establish the statutory reasonable investigation defence at the leave stage of the proceedings, thereby bringing an end to the claim against the company's directors and officers. The decision provides directors and officers with a potential roadmap to defeating securities class actions against them in appropriate circumstances and at an early stage in the litigation.

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Misrepresentations

Section 138.3(1) of the Ontario *Securities Act* ("OSA") creates a statutory cause of action for secondary market misrepresentation. It is available to any person who acquires or disposes of an issuer's securities between the time when documents containing misrepresentations were publically released and the time when the misrepresentations were publically corrected.

The statute permits plaintiffs to bring an action against (amongst others) the company, its directors and any officers who "authorized, permitted or acquiesced" in the release of the document containing the misrepresentation.

Test for leave

To proceed with an action, a plaintiff must first obtain leave of the court. Leave is mandatory if the court is satisfied that the action is brought in good faith and "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff."

According to the Supreme Court of Canada's recent decision in *Green v. Canadian Imperial Bank of Commerce,* the reasonable possibility of success threshold test articulated by the Supreme Court in *Theratechnologies Inc. v. 121851 Canada Inc.* applies to a motion for leave under s. 138.8 of the OSA.

To have a "reasonable possibility" of success, there must be a "reasonable or realistic chance that it will succeed." Claimants must offer both a plausible analysis of the applicable legislative provisions and some credible evidence in support of the claim.

Defences

The various defences to secondary market misrepresentation claims under the OSA include what is known as the reasonable investigation defence. While there may have initially been some uncertainty about whether the defence could be relied on at the leave stage of the proceedings, the Court of Appeal for Ontario approved its application at the leave stage in 2014 and the Supreme Court of Canada recently upheld that approval.

Under the statute, a defendant is not liable if the defendant proves:

(i) that he or she conducted or caused to be conducted a reasonable investigation before the document containing the misrepresentation was released; and

(ii) that he or she had no reasonable grounds to believe, at the time of the document's release, that the document contained the misrepresentation.

"All relevant circumstances"

The OSA further requires the court to consider "all relevant circumstances" in deciding whether the investigation was reasonable, including:

(i) the knowledge, experience and function of the defendants;

(ii) the existence of any system designed to ensure that the issuer meets its continuous disclosure obligations;

(iii) the reasonableness of reliance by the defendants on such system; and

(iv) the role and responsibility of the defendants in the preparation and release of the documents containing the misrepresentation.

Rahimi decision

In *Rahimi*, the Company announced a restatement of its consolidated financial statements to correct revenue recognition errors. Over the next several days, the Company's share price dropped by approximately 18 percent. The plaintiff sought to bring a class action to recover damages for the losses sustained by the putative class members as a result of the alleged misrepresentation.

The Company, as well as the two former CFOs and three directors that were named as defendants (collectively, the "SouthGobi Defendants"), acknowledged the revenue restatement but maintained that the earlier financial representations were actually true when made and, therefore, did not constitute misrepresentations.

The SouthGobi Defendants further argued that the restatement was the result of a change of judgment on the part of the Company's auditors, and that they had conducted a reasonable investigation prior to the release of the documents containing the alleged misrepresentations.

Specifically, the SouthGobi Defendants filed evidence demonstrating that during the relevant period, the Company was obliged to apply International Financial Reporting Standards ("IFRS"). However, its parent company was a Securities and Exchange Commission ("SEC") registrant and was required to apply U.S. Generally Accepted Accounting Principles ("GAAP").

The financial statements of the Company and its parent were required to be consolidated, and a conflict between the IFRS and U.S. GAAP standards for revenue recognition arose. The Company changed its revenue recognition policy on a going-forward basis, as there was no reason to change the earlier financials; that change was approved by the Company's auditors.

Several months later, the SEC challenged the Company's and its parent's revenue recognition policies because those policies were not U.S. GAAP compliant. The SEC also refused to approve the parent company's quarterly financials unless the Company's revenues were restated.

In connection with the restatement, the Company's press releases stated that "the Restated Financials are no longer accurate and should not be relied upon." The Company's management also advised that they had identified a "material weakness in the Company's internal controls."

Reasonable investigation

When the reasonable investigation defence is presented at trial, the onus is on the defendant(s) to prove the

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defence on a balance of probabilities. However, if the defence is raised at the leave motion, as it was in *Rahimi,* then the test is "whether there is a reasonable possibility that the defendants will not be able to establish one or both branches of the reasonable investigation defence."

If there is a reasonable possibility that the defendants will not be able to establish both elements of this defence at trial, the motion for leave must be granted. In *Rahimi*, the motion judge was persuaded that the action as against the individual defendants had no reasonable probability of success at trial.

Evidence

With regard to the two former CFOs, the motion judge held that they had conducted (or caused to be conducted) reasonable investigations of the relevant public disclosure, and had no reasonable ground to believe that the various financial disclosures contained any of the alleged misrepresentations about revenue recognition.

Particular emphasis was placed on the individuals' knowledge, experience, and reasonable reliance on the Company's auditors, who had audited the revenue recognition decisions at the time. With respect to the three directors, the motion judge held that a press release reference relating to the restatement was drafted by the Company's management, and had not been put to the board.

Thus, there was no linkage between the three defendant directors and the reference to a "weakness" in internal controls. The defendant directors presented evidence to show that they did everything that could reasonably be expected of them as members of the board and audit committee and further, that they had no reasonable grounds to believe that the various financial disclosures that were released under their jurisdiction over the time periods in question contained any misrepresentations about the recognition of revenue.

Leave granted

The motion judge granted leave to commence the action against the Company, as it was not clear that the Company could satisfy the reasonable investigation defence. Specifically, the Company had used words such as "correction" and "errors" in the Restatement and had announced that there was a "material weakness" in its internal controls over financial reporting. Also, there was an absence of evidence from management in place at the time of the Restatement to explain the content of the press release.

Significance

Rahimi provides guidance for directors and officers who seek to eliminate their exposure to secondary market securities class actions by putting forth the reasonable investigation defence at the leave stage. Specifically, directors and officers should consider filing a detailed evidentiary record setting out the defendants' knowledge, experience, credentials, reliance on audit committees and external auditors, as well as the quality of internal corporate governance, to establish the defence at the leave stage of the proceedings.

It should be noted, however, that the decision in *Rahimi* may still be appealed and, thus, may not be the last word on the reasonable investigation defence.

REFERENCES: *Rahimi v. South-Gobi Resources Ltd.*, 2015 ONSC 5948, 2015 CarswellOnt 16810 (Ont. S.C.J.); Ontario *Securities Act,* R.S.O. 1990, c. S.5; *Green v. Canadian Imperial Bank of Commerce,* 2014 ONCA 90, 2014 CarswellOnt 1143, (*sub nom.* Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.) (Ont. C.A.), additional reasons 2014 ONCA 344, 2014 CarswellOnt 5625 (Ont. C.A.), affirmed 2015 SCC 60, 2015 CarswellOnt 18335, 2015 CarswellOnt 18336 (S.C.C.); *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, 2015 CarswellQue 2764, 2015 CarswellQue 2765 (S.C.C.).

MUNICIPAL LAW

Will regulation of Airbnb be an Uber air ball?

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Bill 131 would legalize short-term shared housing and parking, and prohibit municipalities from using licensing or zoning powers to restrict them.

It is no secret that Airbnb and Uber have fallen into the crosshairs of some provinces, municipalities and NIMBY's or NIMI's. (NIMBY is a derogatory acronym that stands for "Not in My Back Yard." It is primarily used to describe neighbourhood groups that oppose change in a neighbourhood because it is too close, even though those groups might agree with the change as long as it happens somewhere else. NIMI stands for "Not In My Industry.")

On the one hand, opposition to Airbnb comes from local area residents who perceive the use of residential housing for short-term accommodation as a threat to their own use or enjoyment of their property and to the hospitality industry. On the other hand, opposition to Uber comes from the taxi cab industry.

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