

Litigation - Canada

Ontario Court of Appeal deals blow to securities class actions

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Introduction

In *Musicians Pension Fund of Canada (Trustee of) v Kinross Gold Corporation*,⁽¹⁾ the Ontario Court of Appeal considered an appeal of the dismissal of a proposed securities class action based on common law and statutory misrepresentation claims. In Canada, securities legislation such as the Ontario Securities Act⁽²⁾ establishes that security holders have a right of action for misrepresentation in a reporting issuer's public disclosure or for a failure to make timely disclosure. However, the act also requires plaintiffs to seek leave from the court in order to pursue such a claim. Plaintiffs must establish that the claim has been brought in good faith and that there is a reasonable possibility that the claim will succeed at trial. The purpose of this leave requirement is to prevent 'strike suits' or unmeritorious claims from proceeding and to protect defendants from the expenses associated with defending such claims. While the jurisprudence has generally established that the leave requirement under the act is a relatively low threshold, certain claims have been struck for failing to meet this preliminary hurdle.

In addition, plaintiffs often combine statutory claims with common law negligent misrepresentation claims. However, there was a split in the jurisprudence at the lower-court level as to whether such claims could meet the test for certification as a class action and, in particular, the preferable procedure element of the test. This split looks to have been resolved by the appeal court in *Kinross* and in its earlier decision in *Green v Canadian Imperial Bank of Commerce*.⁽³⁾ In both decisions, the court held that common law negligent misrepresentation claims give rise to too many individual issues, with the result that they are not suitable for certification as class actions. In addition, notwithstanding the relatively low threshold for leave in respect of the statutory claim, the court in *Kinross* dismissed the appeal and upheld the motion judge's decision rejecting the plaintiff's motion for leave to proceed with the statutory claim. Thus, the court's decision represents good news for defendants in proposed securities class actions.

Facts

The appellant, the trustee of the Musicians' Pension Fund of Canada, purchased shares in Kinross Gold Corporation (KGC). In 2012 Musicians' Pension Fund commenced a class action against KGC and four corporate officers, seeking damages in the amount of C\$4 billion for alleged statutory and common law misrepresentations regarding two gold mines owned by KGC.

Musicians' Pension Fund alleged that KGC's public disclosure concerning the mines was misleading in two key respects:

- The value of the goodwill of the mines was overstated and KGC had failed to record a goodwill impairment charge on a timely basis (the goodwill impairment claim); and
- A planned expansion project for one mine had an unrealistic schedule that was not being adhered to (the expansion claim).

Lower-court decision

Musicians' Pension Fund brought a motion for leave to commence an action for misrepresentation under Section 138.3(1) of the act. As noted above, leave to commence the action is required by Section 138.8(1), which provides that the court will grant leave only where it is satisfied that:

- the action is being brought in good faith; and
- there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

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Musicians' Pension Fund also sought to certify its common law misrepresentation action as a class proceeding under Section 5 of the Class Proceedings Act 1992.⁽⁴⁾

The motion judge dismissed the leave motion on the basis that there was no possibility – let alone a reasonable possibility – that the goodwill impairment claim would succeed at trial because the expert accounting evidence relied on by Musicians' Pension Fund was fatally flawed. The motion judge therefore concluded that there was no factual basis for the claim. In addition, the expansion claim had not been pleaded by Musicians' Pension Fund and so was not considered by the motion judge.

The motion judge also refused to certify the common law claim as a class proceeding, reasoning that because leave to proceed with the statutory claims had been denied, it necessarily followed that the common law claim failed to satisfy the certification criteria.

Appeal decision

Musicians' Pension Fund appealed the leave and certification rulings, arguing that the motion judge had erred:

- in finding that there was no reasonable possibility that the goodwill impairment claim could succeed at trial;
- by refusing to consider the expansion claim; and
- by denying certification of the common law negligent misrepresentation claims solely on the basis of his refusal to grant leave to proceed with the statutory claims.

The Ontario Court of Appeal ultimately dismissed the appeal.

Leave requirement

The court agreed with the motion judge that there was no reasonable possibility that the goodwill impairment claim could succeed at trial. The court confirmed that the reasonable possibility requirement for leave under Section 138.8 of the act is a relatively low threshold; however, the court emphasised that it is a merits-based leave test that requires weighing the evidence adduced on the leave motion. The evidence is to be evaluated by the motion judge, which includes examining the factual underpinnings of the evidence and assessing its reliability. Further, the reasonableness inquiry is to be based on the evidentiary record as filed, without speculating on possible future, unknown evidence.

In this case the court agreed with the motion judge that the expert evidence filed by Musicians' Pension Fund had three fatal flaws:

- It relied on irrelevant data;
- It ignored relevant data that did not support the expert's opinion; and
- It mischaracterised or misunderstood the import of existing data.

In this regard, the court rejected Musicians' Pension Fund's argument that the motion judge had overstepped his proper role in examining the factual underpinnings of the expert's opinion. The court noted that in the context of the test for leave, this type of scrutiny was required to determine the reliability of the expert evidence.

The court also held that the motion judge did not err by refusing to consider the expansion claim on the basis that it was not pleaded. The court stated that "it is central to the litigation process that issues in a civil action be decided within the boundaries of the pleadings", and this foundational principle applies with no less force to a leave motion in a class action involving statutory securities market claims.

Certification ruling

Musicians' Pension Fund also argued that the motion judge erred by declining to certify the common law misrepresentation claims under the Class Proceedings Act. The requirements for certification are found in Section 5(1) of the Class Proceedings Act and oblige plaintiffs to demonstrate that:

- the pleadings disclose a cause of action;
- there is an identifiable class;
- the claims raise common issues;
- a class action would be the preferable procedure for resolving the common issues; and
- there is a representative plaintiff who:
 - will fairly and adequately represent the class;
 - has proposed a litigation plan; and
 - does not have a conflict with the class.

The moving party must show some basis in fact for each of these requirements, except for the requirement that the pleadings disclose a reasonable cause of action.

In contrast to the motion judge, the appeal court held that the finding that the statutory claims had no reasonable possibility of success and that the evidence supporting the statutory and common law actions would essentially be the same did not mean that there was no basis in fact for the 'identifiable

class' requirement in Section 5(1)(b) or the 'common issues' requirement in Section 5(1)(c). The court held that the appellants satisfied the certification requirements for an identifiable class and a representative plaintiff. Further, the appellant's pleadings could be amended to disclose a reasonable cause of action and the common issue requirement was satisfied for the most part (with two issues being an exception).

However, the court found that the preferable procedure criterion was not met based on Musicians' Pension Fund's allegation of negligent misrepresentation because to establish proof of reliance, causation and damages, individualised inquiries and fact finding would be required. This would necessitate a vast number of individual trials on these issues if the action were certified. Consequently, two key goals of a class action – judicial economy and access to justice – would be undermined, and instead an unmanageable, inefficient and unfair process would be imposed on the parties and on the court. Further, the court held that it is appropriate to consider the outcome of the leave motion for the statutory claim in the preferable procedure inquiry regarding the common law claim in the unique circumstances where:

- statutory misrepresentation claims and common law misrepresentation claims, based on the same evidentiary foundation, are combined; and
- the statutory claim has been found to have no reasonable possibility of success under a statutory mechanism that is directed at access to justice.

Thus, as the preferable procedure requirement had not been met, certification of the common law negligent misrepresentation claims was denied.

Comment

The Supreme Court of Canada has granted leave to appeal the Ontario Court of Appeal's decision in *Green* referred to above. Thus, the Supreme Court may overturn, vary or otherwise comment on the appeal court's decisions in both *Green* and *Kinross*.

However, at least for now, the *Kinross* decision establishes that motion judges faced with a motion for leave to pursue a secondary market securities class action should take a hard look at the evidence, including expert evidence, on which the claim is based. Even though the threshold for leave is relatively low, the plaintiff's evidence may be attacked as failing to provide an adequate foundation for establishing a reasonable possibility of success at trial. The decision also establishes that common law negligent misrepresentation claims do not meet the preferable procedure element of the test for certification. Each of these determinations is discouraging news for plaintiffs and welcome news for defendants in securities class actions.

For further information on this topic please contact [Matthew Fleming](#) or [Holly Cunliffe](#) at Dentons Canada LLP by telephone (+1 416 863 4511), fax (+1 416 863 4592) or email (matthew.fleming@dentons.com or holly.cunliffe@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

- (1) 2014 ONCA 901.
- (2) RSO 1990, c. S.5.
- (3) 2014 ONCA 90.
- (4) SO 1992, c 6.

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