

Judges may weigh evidence on leave motions in secondary market securities class actions

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In *Mask v Silvercorp Metals Inc*([1](#)) the Ontario Court of Appeal upheld a decision([2](#)) refusing leave to commence an action for secondary market misrepresentation under Section 138.8 of the Ontario Securities Act.([3](#)) The decision, released on August 24 2016, confirms that the test for leave in statutory secondary market claims must be viewed as a substantive hurdle to such claims and that judges considering a motion for leave must weigh and evaluate the evidence before them.

Facts

Between March 1 2010 and September 12 2011 Silvercorp Metals Inc issued public reports regarding its mining operations in China. In September 2011 anonymous internet postings questioned the veracity of Silvercorp's financial accounting and public disclosure. The posts alleged that Silvercorp had overstated its mineral resources and reserves in China. As a result of the posts, Silvercorp's share price dropped by approximately 30%.

In response to the anonymous posts and in an effort to demonstrate that its initially reported revenue and production numbers were correct, Silvercorp issued a press release which included a reconciliation of mineral production to the revenue reported in its financial statements. Silvercorp also retained AMC Mining Consultants to summarise its reported mineral production and to update its future production estimates. The AMC report was released in June 2012.

In May 2013 the plaintiff, a former Silvercorp shareholder, commenced proceedings against Silvercorp and its chief executive officer and former chief financial officer, alleging that a comparison of the AMC report and the press release demonstrated that Silvercorp had overstated its production.

Decision

The plaintiff advanced three types of claims in the certification motion heard by the motion judge:

- a statutory and common law claim for misrepresentation;
- a statutory claim for failure to make timely disclosure; and
- a common law claim in negligence alleging that Silvercorp had co-authored and published public reports regarding its mineral reserves and production that it knew or should have known had not been properly audited or prepared in accordance with industry standards.

With regard to the first claim, the motion judge found that the plaintiff's expert evidence, which posited that the AMC report revealed inaccuracies in Silvercorp's public reports, was undermined by evidence proffered by Silvercorp's expert. Silvercorp's expert had demonstrated that the figures in the press release and other public reports were substantially the same as the figures in the AMC report and that the plaintiff did not file expert evidence rebutting Silvercorp's evidence. The motion judge found that there was no support for the plaintiff's second claim based on any alleged failure to

AUTHORS

[Matthew Fleming](#)



[Thomas Wilson](#)



make timely disclosure, and held that the plaintiff's common law negligence claim was unlikely to succeed because it was essentially a pleading of negligent misrepresentation, and was therefore duplicative of the first claim.

Appeal

The plaintiff unsuccessfully argued on appeal that the motion judge had erred by misapprehending evidence and misapplying the leave test under Section 138.8 of the Ontario Securities Act.

Primary submission

The plaintiff's primary submission was that the motion judge erred by applying a higher leave standard than what was required by the Supreme Court of Canada pursuant to *Theratechnologies*⁽⁴⁾ and *Canadian Imperial Bank of Commerce v Green*.⁽⁵⁾ In *Theratechnologies* the Supreme Court interpreted Section 138.8 of the Ontario Securities Act, pursuant to which the court must be satisfied that a statutory misrepresentation claim is brought in good faith and has a reasonable chance of succeeding at trial, as requiring the plaintiff to show "a plausible analysis of the applicable legislative provisions, and *some credible evidence in support of the claim*".⁽⁶⁾ A court's assessment requires a "*reasoned consideration of the evidence* to ensure that the action has some merit".⁽⁷⁾ The plaintiff contended that by analysing and weighing Silvercorp's expert evidence against the plaintiff's expert evidence, the motion judge incorrectly elevated the *Theratechnologies* leave standard and consequently turned the motion for leave into a mini trial.⁽⁸⁾

The court of appeal agreed with the motion judge's approach, noting that "scrutiny of the merits of the action based on all evidence proffered by the parties" is a necessary component of the leave test.⁽⁹⁾ The method adopted by the motion judge was consistent with the underlying purpose of the leave test, which is to serve as a "robust deterrent screening mechanism".⁽¹⁰⁾

The court of appeal further disagreed with the plaintiff's submission that the motion judge had made erroneous findings of fact, and held that "it was open to the motion judge to examine the factual underpinnings" and in doing so, the motion judge reasonably "concluded that the foundation [of the plaintiff's claim] had been demolished by the defendant's evidence and had not been repaired by the plaintiff's".⁽¹¹⁾

Secondary submission

The plaintiff's second submission was that the motion judge had overlooked relevant evidence and misapprehended the nature of the negligent misrepresentation claim by construing it as a mere comparison of Silvercorp's public reports and the AMC report.

However, the court of appeal agreed with the motion judge's assessment of the claim: the focus of the plaintiff's negligent misrepresentation claim was the alleged discrepancies between the reports.⁽¹²⁾ The court held that the motion judge's reasons made express reference to the evidence that was allegedly overlooked.⁽¹³⁾ The court confirmed the motion judge's finding that Silvercorp's evidence had explained any discrepancies between the company's public disclosure and the AMC report, and that the plaintiff had not filed evidence rebutting this explanation or cross-examined Silvercorp's expert on it.

The court further rejected the plaintiff's argument that the motion judge improperly weighed evidence and conducted a mini trial, and affirmed that a judge hearing a motion is required to evaluate and weigh the merits of a proposed claim and the evidence filed by the parties.

Comment

The court of appeal's decision in *Mask* affirms the test for leave in secondary market class actions. The Supreme Court in *Theratechnologies* was of the view that leave applications should provide a robust screening mechanism to prospective misrepresentation claims;⁽¹⁴⁾ at the same time, the Supreme Court was wary of imposing evidentiary burdens that would "essentially replicate the demands of a trial".⁽¹⁵⁾ The court of appeal in *Mask* attempts to reconcile these opposing interests by confirming that the leave test requires the scrutiny and weighing of evidence proffered by all parties.⁽¹⁶⁾ A motion judge is not limited to examining only the plaintiff's evidence to determine whether its claims have a reasonable prospect of succeeding at trial.

For further information on this topic please contact [Matthew Fleming](#) or [Thomas Wilson](#) at Dentons by telephone (+1 416 863 4511) or email (matthew.fleming@dentons.com or thomas.wilson@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

- (1) 2016 ONCA 641.
- (2) *Mask v Silvercorp Metals Inc* 2015 ONSC 5348.
- (3) RSO 1990, c S 5.
- (4) *Theratechnologies Inc v 121851 Canada Inc*, 2015 SCC 18.
- (5) 2015 SCC 60.
- (6) *Theratechnologies*, *supra* at para 39 (emphasis added).
- (7) *Ibid* at para 38 (emphasis added).
- (8) *Mask*, *supra* at para 36.
- (9) *Ibid* at para 41.
- (10) *Ibid* at para 42, citing *Theratechnologies*, *supra* at para 38.
- (11) *Ibid* at paras 48-49.
- (12) *Ibid* at para 53.
- (13) *Ibid* at paras 54-56.
- (14) *Theratechnologies*, *supra* at para 38.
- (15) *Ibid*, at para 39.
- (16) *Mask*, *supra* at para 43.

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