Cassels

BC's Top Court Weighs in on Requirements for Leave in Secondary Market Misrepresentation Claim: Tietz v. Affinor Growers Inc. et al.

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The BC Court of Appeal's decision in Tietz v. Affinor Growers Inc.[1] marks BC's first substantive appellate decision on the leave requirements to bring a secondary market misrepresentation claim under the BC *Securities Act*.

The Court of Appeal's decision has three key takeaways for parties who are subject to secondary market claims:

- Anytime your company is considering expenses, including hiring consultants, consider whether it reduces working capital available to the company to the point it needs to be disclosed.
- The Court was not receptive to submissions that a respondent could rely on past aggregated disclosure of its use of consultants to satisfy its obligation to disclose certain material facts regarding payments to consultants.
- Both new publicly traded companies and junior mining companies and their counsel should consider whether certain transactions have the effect of reducing working capital available to the company and should consult with their counsel regarding potential consequential disclosure requirements resulting from those transactions.

Underlying Claims in the Proposed Class Proceeding

In this case, the petitioners allege that certain respondents (the Consultants) participated in a scheme with other respondents (the Issuers) through which the Consultants agreed to buy shares by way of private placement at a publicly disclosed share price on the condition that the Issuers would contemporaneously enter into consulting agreements and pay them consulting fees on the closing of the private placements.

The petitioners claim that neither the Issuers nor the Consultants had any *bona fide* expectation that services of any real value would be provided, that no services were in fact provided, and therefore that the Issuers misrepresented the price at which the shares were acquired and the proceeds that were available to the Issuers as working capital. Further, the amounts paid to individual consultants were not specifically disclosed by the Issuers.

As a result, the petitioners asserted losses as a result of (i) the purchase of shares at a higher price than they would have paid but for the scheme and (ii) the erosion in the value of their shares after disclosure of the alleged scheme.

Statutory Liability and the Leave Requirement

Section 140.3 of the *Securities Act* establishes statutory liability for issuers of securities to persons who suffer certain losses in the secondary market. It provides that an individual who acquires or disposes of securities has a right of action against the issuer, its officers and directors, and certain experts and influential persons for a misrepresentation in a document or public oral statement, without regard to whether the person relied upon such misrepresentation.

Leave to bring an action under section 140.3 must be sought under section 140.8 of the *Securities Act*, and may only be granted where the court is satisfied that:

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

The Leave Decision

The Chambers Judge granted the petitioners' application to bring secondary market claims against several of the petition respondents but declined to grant leave as against others.

In the lead-up to the leave application, the Chambers Judge heard several evidentiary objections to additional affidavit evidence tendered by the petitioners in support of their leave application. The Chambers Judge largely denied admission of that additional evidence, relying on the grounds that the evidence was not necessary, it did not prove or disprove material elements of the petitioners' claims, and it was replete with hearsay.

The Appeal

On appeal, the unsuccessful petition respondents challenged the decision granting leave, and the petitioners challenged the Chambers Judge's decision denying leave to bring claims against other parties. In addition, the petitioners argued that the Chambers Judge erred in law by refusing to admit the petitioners' additional affidavit evidence in support of the leave application.

Ultimately, the Court of Appeal upheld the decisions granting leave, reversed the Chambers Judge's refusal

to grant leave in respect of the successful petition respondents, and allowed the petitioners' evidentiary appeals.

Analysis

The Court of Appeal clarified that the Chambers Judge's task was two-fold. First, to determine what evidence was admissible and material to the application for leave to bring the statutory misrepresentation claims described in the pleadings. Second, to determine, based on that evidence, whether there was a reasonable possibility that the claims identified would be resolved at trial in favour of the petitioners.

The Court held that the Chambers Judge erred in law in excluding the affidavit evidence on the basis that at least some of the impugned evidence was admissible and relevant to the questions before the Chambers Judge on the leave application. In admitting this affidavit evidence, the Court clarified that hearsay evidence tendered by a petitioner seeking leave is not presumptively inadmissible on an application for leave to bring a secondary market misrepresentation claim since the application would not result in a final order.

The Court restated that the task of a judge on a leave application is to determine whether there is a reasonable possibility that the action founded upon the secondary market claim would be resolved at trial in favour of the plaintiff. In support of an application for leave, a petitioner may adduce evidence to support its claim, and also show that there is probative evidence that it will be able to obtain if leave is granted.

In deciding the leave appeals, the Court applied the leave test set out in *Theratechnologies Inc. v. 121851 Canada Inc.,*[2] which requires the applicant to satisfy the court that there is a "reasonable or realistic chance" the action will succeed based on "both a plausible analysis of the applicable legislative provisions and some credible evidence in support of the claim." Applying this test, the Court concluded that the petitioners had discharged their onus by offering some credible evidence to support their claim against the respondents, and that the affidavit evidence initially excluded by the Chambers Judge filled in substantial gaps in the case such that it was appropriate to grant the petitioners leave to commence secondary market liability claims against all petition respondents.

A number of the Issuers have sought leave to appeal to the Supreme Court of Canada on a variety of grounds..

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[1] 2022 BCCA 307.

[2] 2015 SCC 18.

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