

Plaintiffs Need Not Reply: Motion Striking Reply Expert Report as Violating the Rule Against Case-Splitting Granted

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A motion to strike a plaintiff's reply expert report on a motion for leave under Part XXIII.1 of the Securities Act (Ontario) has been granted on the basis that the rule against case-splitting prevents a party from offering new evidence outside of the matters already raised since it risks setting a "litigation trap."

Key Takeaways

- **Only proper reply is permitted.** Reply evidence is only permitted when a responding party has raised a new matter that could not reasonably be anticipated by the plaintiff or where it is in response to an existing issue expanded upon in a manner that could not have been reasonably foreseen.
- **Whether reply evidence amounts to case-splitting must be determined on a case-by-case basis.** Courts will look to the individual circumstances and exigencies of each case to determine whether it is appropriate to allow reply evidence, paying particular attention to whether each party has a fair opportunity to present its case and respond to the case put forward against them.

Summary and Background

In March 2016, plaintiff shareholders commenced a proposed securities class action against North American Palladium Ltd., its former directors and officers, and its auditor alleging misrepresentations in the company's corporate public disclosure documents. The plaintiffs asserted both a common law misrepresentation claim as well as a statutory misrepresentation claim for which leave was required under Part XXIII.1 of the *Securities Act*.

The parties agreed to a formal timetable for the exchange of affidavit evidence and cross-examinations. The plaintiffs then delivered a motion record in support of their motion for leave, which included an expert report from a chartered accountant. The defendants delivered their respective responding records, including two affidavits and an expert report.

The plaintiffs then indicated that they would deliver a reply affidavit from their expert and an additional report from a second expert, retained specifically to reply to the defendants' expert evidence on the issue of causation. However, only a small portion of that second expert's report addressed the matter of causation. The report also engaged in an extensive analysis of matters already considered by the plaintiffs' first expert

and further opined upon new particulars of alleged negligence not previously addressed.

In response, the defendants brought a motion to strike the reply expert report prepared by the second expert on the basis that the evidence contravened the case management timetable and violated the rule against case-splitting.

The plaintiffs countered by arguing that the rule against case-splitting in the context of an action that already requires leave is unfair since the plaintiff is not given an opportunity to gather evidence from any adverse party before leave to proceed is granted.

The Decision

On July 26, 2018, Justice Perell granted the motion to strike, holding that the plaintiffs were attempting to use the second expert's report to correct deficiencies in their case in-chief. This violated the rule against case-splitting and was "both technically and substantively unfair."

Justice Perell explained that the rationale underlying the rule against case-splitting is that a defendant or responding party is entitled to know and be given an opportunity to respond to the case being made against him or her. Allowing a plaintiff or moving party to add new evidence or argument after the defendant or responding party has completed his or her evidence and argument is "intrinsically unfair." Where a defendant has responded to the case that they thought they had to meet, to allow a plaintiff to then raise new evidence and argument on reply is to allow them to "spring a trap" on the defendant.

Justice Perell also found that there is nothing from a policy perspective preventing a court from applying the rule against case-splitting in a motion for leave under Part XXIII.1 of the *Securities Act*. To the contrary, a defendant who has chosen to join issue with a plaintiff by filing affidavit evidence and producing documents should not then be exposed to "unexpected adverse procedural and evidentiary consequences." On that basis, Justice Perell rejected the argument advanced by the plaintiffs.

The Upshot

This decision highlights the importance of addressing all anticipated issues in dispute in the first instance and serves as a reminder of the adverse consequences that can flow when reply materials are used to address deficiencies in the case in-chief. It also confirms that the rule against case-splitting applies to motions for leave under Part XXIII.1 of the *Securities Act*, and provides clarity with respect to how the propriety of reply evidence will be considered by the court.

The Superior Court of Justice's decision in *Johnson v. North American Palladium Ltd.* is available [here](#).

If you have any questions about this decision, its implications, or corporate and securities litigation more

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generally, please contact Lara Jackson, John M. Picone, or any other member of the Cassels Securities Litigation Group.

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