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Rejection of Reasonable Investigation Defence in Securities Class Action Stands: Supreme Court Denies Leave to Appeal - Class Actions Group

John M. Picone

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The Ontario Court of Appeal has the final word in a securities class action in which it permitted a statutory secondary market misrepresentations claim to proceed under Part XXIII.1 of the Securities Act notwithstanding the assertion of the reasonable investigation defence.

Key Takeaways

- **Leave motion not a mini-trial.** Courts will be unlikely to entertain a reasonable investigation defence at the leave stage where there are serious issues of credibility or gaps in the evidence filed by the Company or individual defendants.
- **Conflicting evidence opens door for securities class actions to proceed.** Given the Supreme Court's denial of leave to appeal, it would appear that, going forward, where a plaintiff is able to establish a *prima facie* case in the misrepresentation claim and there is conflicting evidence on key issues for determination, including in respect of the reasonable investigation defence, the plaintiff will be granted leave to proceed with the claim.

Court of Appeal Decision Stands

On May 31, 2018, the Supreme Court of Canada denied the application by SouthGobi Resources Ltd. for leave to appeal a decision of the Court of Appeal which provided further guidance and clarification regarding the test for leave to proceed with a secondary market misrepresentation claim under section 138.8(1) and the defence of reasonable investigation under section 138.4(6)(a) of the *Securities Act*.[1]

The Court of Appeal held that on a motion for leave, the motion judge has an obligation to critically assess the evidence and where there are contentious issues of credibility or gaps that cannot be resolved on the evidentiary record, the motion for leave should be granted.

The Court of Appeal highlighted that leave motions are not to be treated as mini-trials, that the evidence before the court and the evidence ***not*** before the court must both be considered, and that the court's analysis and decision should be animated by the fundamental public policy principles underlying the regulation of the capital markets, and in particular disclosure.

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Our discussion regarding the Court of Appeal's decision in *Rahimi v. SouthGobi Resources Ltd.* is available here.

Find the full decision available here.

If you have any questions concerning this case or class actions generally, please contact Wendy Berman, John M. Picone, Danielle DiPardo or any other member of our Class Actions Group.

[1] R.S.O. 1990, c. S. 5.

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