

## LOW THRESHOLD FOR LEAVE TO PROCEED IN CLAIM FOR SECONDARY MARKET MISREPRESENTATION

On December 14, 2009, the Ontario Superior Court of Justice granted leave for the plaintiffs in *Silver et al. v. IMAX Corporation* to proceed with a claim under the secondary market disclosure civil liability provisions of the Ontario *Securities Act*. The court concurrently issued its decision certifying the action as a class proceeding.

### Leave to Proceed

This decision is the first to interpret the requirement under section 138.8 of the Ontario *Securities Act* for a plaintiff to obtain leave of the court before commencing an action for misrepresentations in a reporting issuer's public disclosure.

In order to grant leave, the court must be 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.

Justice van Rensberg reviewed the history of the leave requirement and determined that it was "designed to prevent an abuse of the court's process through the commencement of actions that have no real foundation, actions that are based on speculation or suspicion rather than evidence." Given the dual purpose of the statutory cause of action for secondary market misrepresentations of: (i) permitting recovery of damages by a shareholder; and (ii) as a deterrent to breach by a reporting issuer of its continuous disclosure obligations, she determined that it should be interpreted so as to permit access to the courts by shareholders with legitimate claims.

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## Good Faith

Justice van Rensberg interpreted the first element of the test to:

“require the plaintiffs to establish that they are bringing their action in the honest belief that they have an arguable claim, and for reasons that are consistent with the purposes of the statutory cause of action and not for an oblique or collateral purpose.”

The plaintiffs’ personal financial interests as shareholders of IMAX, as well as the altruistic reason of holding the defendants accountable for misrepresentations to the public, were found to be consistent with the purpose of the statutory remedy. In the absence of any evidence of an ulterior motive or conflict of interest, these reasons were sufficient to satisfy the good faith requirement.

## Reasonable Possibility of Success

The interpretation of the second branch of the leave requirement was the central issue of the decision. Justice van Rensberg concluded that a reasonable possibility of success “sets a relatively low threshold for a plaintiff seeking leave to proceed with an action” and requires that: (i) there must be more than a *de minimis* possibility of success; and, (ii) that conclusion must be based on a reasoned consideration of the evidence before the court.

The evaluation of the possibility of success was found to require not only the consideration of each cause of action claimed by the plaintiffs, but also the evidence in support of each defence advanced by the defendants in order to determine whether such evidence will foreclose the plaintiffs’ reasonable possibility of success at trial.

Justice van Rensberg also concluded that, since each defendant is required to deliver an affidavit, the test should be applied to the plaintiffs’ prospects for success against the defendants individually.

After considering the evidence in support of the claims and defences, Justice van Rensberg found that there was a reasonable possibility for that the plaintiffs will succeed against all of the defendants other than two of the outside directors of IMAX who were not members of the audit committee or involved in its deliberations.

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