ON court: Class actions appropriate procedure for negligent misrepresentation claim

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Background and decision

In *LBP Holdings Ltd v Hycroft Gold Corporation*, the Ontario Divisional Court certified a class action alleging negligent misrepresentation against a syndicate of underwriters in relation to alleged misrepresentations made in a prospectus. The Court overturned Justice Perell's holding on the certification motion that a class proceeding was not the preferable procedure for adjudication of these claims, given that a number of issues, including whether any particular investor relied on the impugned representations, individual trials would be required. The Divisional Court held that a class action would nonetheless be a preferable procedure since other elements of the cause of action could be determined on a class-wide basis.

The claim arises from a May 2013 equity financing by Hycroft Gold Corporation made pursuant to a prospectus. Hycroft engaged Dundee Securities Inc. and Cormark Securities Inc. to underwrite the offering. Pursuant to the engagement, the underwriters certified to the best of their knowledge that the prospectus constituted full, true and plain disclosure of all material facts relating to the offered securities. In 2014, LBP Holdings commenced a proposed class action against Hycroft and the underwriters under s. 130 of the *Ontario Securities Act* for misrepresentation in a prospectus. LBP also claimed against the underwriters for negligent misrepresentation.

The Hycroft defendants consented to certification of the plaintiff's statutory claim. However, they resisted certification of the negligent misrepresentation claim and Justice Perell refused to certify that claim. The underwriters argued that a class proceeding was not the preferable procedure for resolving the common issues in accordance with s. 5(1)(d) of the *Class Proceedings Act* (CPA). Justice Perell agreed with the underwriters, holding that determining the issues of reliance, causation and damages for each plaintiff would require individual trials. The need for these trials created serious concerns about the manageability and productivity of a class proceeding. The plaintiff appealed this decision to the Divisional Court of Ontario.

Justice Backhouse, writing for the Divisional Court, allowed the appeal and certified the plaintiff's claim. She found that the certification judge had erred on matters central to the proper application of the CPA. Namely, s. 5 of the CPA is to be interpreted in a broad

and purposive manner. Whether a class proceeding is preferable must be viewed through the lens of achieving judicial economy, access to justice and behavior modification. The Divisional Court held that Justice Perell failed to engage in a comparative analysis of these factors and therefore erred in principle. Rather, the Divisional Court found that class certification would increase access to justice, judicial economy and behavior modification. As a claim had already been certified with the same class members, arising from the same factual matrix, with multiple common issues, it would not be unfair, inefficient or unmanageable to allow this class to simply add a claim against the underwriters.

Takeaway

In the past, Ontario courts have often refused to certify negligent misrepresentation claims precisely because of the need to provide reliance and causation on an individual basis, making this a notable decision (for example, the Court of Appeal's decision in *Bayens v. Kinross Gold Corporation*). It also re-introduces negligent misrepresentation as an additional claim that plaintiffs can bring in securities class actions. This is significant because tort claims are not subject to the caps on liability that apply to statutory claims under the *Securities Act*.

By

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