

Articles

Developments in Class Actions Law: The 2014-2015 Term — Securities Litigation Comes of Age at the Supreme Court of Canada

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I. INTRODUCTION

It has been over 35 years since Canadian investor advocates began working towards the creation of a statutory right of action to address inadequacies in the continuous disclosure of public issuers, and over 10 years since provincial and territorial legislatures began passing amendments to their Securities Acts to achieve that purpose. An important feature of the new legislation is the requirement that plaintiffs obtain leave of the court prior to commencing an action. This leave provision is central to the policy balance that the legislatures struck between the rights of short-term investors on the one hand, and issuers and their long-term shareholders on the other. It ensures that only good faith claims with a reasonable possibility of success proceed in court, thus saving issuers from the expense of spurious lawsuits and the inevitable settlement pressures that come with them, while at the same time leaving in place a sufficient opportunity for meaningful litigation to deter secondary market securities fraud.

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The Ontario leave to proceed provision, found in section 138.8 of Part XXIII.1 of the *Securities Act* (the “OSA”),¹ is typical:

138.8. (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

- (a) the action is being brought in good faith; and
- (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

Despite the undoubted importance of the leave provision, case law addressing this threshold — and particularly the second branch requiring a “reasonable possibility” of success — was slow to develop. By April 2015, only 10 contested leave decisions had been rendered by Canadian courts. Further, judicial opinion regarding the appropriate test was far from unanimous. It was with great interest, therefore, that the securities bar awaited the two Supreme Court of Canada decisions in 2015 which addressed the meaning and definition of the leave provision.

The first decision, *Theratechnologies Inc. v. 121851 Canada Inc.*,² arose on appeal from Quebec, and squarely considered the test for leave to proceed under the Quebec legislation. The second decision, *Canadian Imperial Bank of Commerce v. Green*,³ involved a trilogy of appeals from Ontario. Although the joint appeal was primarily focused upon the limitation period for secondary market claims under the OSA, the Court also considered the leave threshold in one of the three cases, and in the result, extended the *Theratechnologies* test to common law Canada.

At one level, the result of *Theratechnologies* and the *CIBC* Trilogy has provided much-needed certainty about the merits threshold required to obtain leave to proceed under provisions like section 138.8 of the OSA. The Supreme Court has clearly spoken on the issue, and has established a test that provides a fair balance between investors and issuers. Lower courts have had little difficulty in applying this test to subsequent litigation. One could therefore be forgiven for concluding that the matter is now settled.

¹ R.S.O. 1990, c. S.5 [hereinafter “OSA”].

² [2015] S.C.J. No. 18, [2015] 2 S.C.R. 106 (S.C.C.), revg [2013] J.Q. no 7925 (Que. C.A.) [hereinafter “*Theratechnologies*”].

³ [2015] S.C.J. No. 60, [2015] 3 S.C.R. 801 (S.C.C.), varg [2014] O.J. No. 419 (Ont. C.A.) [hereinafter “the *CIBC* Trilogy”]. The portion of the judgment referring to CIBC will be referred to as “*CIBC*”. The portion referring to Celestica will be referred to as “*Celestica*”. The portion referring to IMAX will be referred to as “*IMAX*”.

On another level, however, the *Theratechnologies* and the *CIBC* Trilogy decisions raise significant questions for the future. While the Court clarified the threshold for obtaining leave, it paid less attention to the powers that motion judges may exercise in deciding whether the threshold is met, and it did not address the standard of review on appeal from their decisions. Additionally, the Court affirmed that class actions can be brought for common law negligent misrepresentation securities claims without explaining how such a proceeding, in which the critical element of reliance must be proven individually by each class member, would be workable in practice. Finally, the Court did not explicitly address whether the leave test itself (as opposed to Part XXIII.1 generally) is informed by the primarily deterrent rather than compensatory nature of the statutory right of action. Philosophically, the lack of discussion on this last point is problematic because deterrence is an important organizing principle of the statutory liability model that will no doubt shape other aspects of the cause of action going forward.

The discussion that follows explores the backdrop of the legislative and judicial developments that culminated in *Theratechnologies* and the *CIBC* Trilogy and examines the issues for the future. We begin by reviewing the various policy proposals that, over a 25-year period, led to the enactment of the statutory cause of action. Thereafter, we consider the case law that developed under the leave provisions prior to the Supreme Court's decisions in 2015. We then explore *Theratechnologies* and the *CIBC* Trilogy with a view to explaining and critically analyzing these landmark judgments. Our conclusion is that *Theratechnologies* and the *CIBC* Trilogy, given the issues they decided, and the others left open, will have profound implications for the future of investor class actions in Canada.

II. THE LEGISLATIVE HISTORY

The basic structure of Part XXIII.1 of the OSA and its analogues in the other provinces and territories has been explained comprehensively elsewhere.⁴ In short, the legislation permits a plaintiff investor to bring

⁴ A.C. Pritchard & Janis P. Sarra, "Securities Class Actions Move North: A Doctrinal and Empirical Analysis of Securities Class Actions in Canada" (2010) 47 Alta. L. Rev. 881; Philip Anisman & Garry Watson, "Some Comparisons Between Class Actions in Canada and the U.S.: Securities Class Actions, Certification, and Costs" (2006) 3 Can. Class Action Rev. 467; Brandon Kain & Byron Shaw, "Mapping the Serbonian Bog: The Territorial Limits of Secondary

an action for a misrepresentation or lack of timely disclosure in a public issuer's continuous disclosure, provided the investor first obtains leave of the court by establishing the twin criteria of good faith and a reasonable possibility of success at trial. As the good-faith criterion has rarely been contested in the case law, and is unlikely to prove a meaningful hurdle to investors in the future,⁵ the focus of our review is on the second prong of the test: the need to demonstrate a reasonable possibility of success.

Broadly speaking, there were three phases in the development of Part XXIII.1 of the OSA, which since its enactment in 2005 has served as the legislative model followed by all other provinces and territories in Canada. Below, we review the various studies, reports and draft statutes from these three phases, spanning the late 1970s through to 2000, with a focus on the genesis of the leave requirement.

1. The 1979 Proposals and the OSC's 1984 Draft Legislation

The first phase encompassed two proposed revisions to securities legislation: (i) a 1979 report, followed with (ii) draft legislation released by the Ontario Securities Commission in 1984. Each initiative recommended the creation of a private right of action for misrepresentations in or omissions from the public documents filed by issuers after the primary distribution of their securities — in other words, their continuous disclosure in the secondary market.⁶

Market Securities Act Claims under the Canadian Constitution — Part 1” (2012) 53 Can. Bus. L.J. 63; Douglas Worndl, “Shareholder Class Action: A New Statutory Regime in Ontario — Part 1: Liability and Defences” (2003) 1 Comm. Lit. Rev. 2; Douglas Worndl, “Shareholder Class Actions: A New Statutory Regime in Ontario — Part 2: Damages, Liability Limits, Anti-Strike Suit Provisions” (2003) 1 Comm. Lit. Rev. 25 [hereinafter “Worndl, Part 2”]; Michael J. Duffy, “Investor Loss from Securities Non-Disclosure: A Statutory Presumption of Causation on the Canadian Model?” (2009) 32 U. New S. Wales L.J. 965.

⁵ Challenges by the defence under the good faith element were rejected in each of *Silver v. Imax Corp.*, [2009] O.J. No. 5573, at paras. 308, 309 (Ont. S.C.J.), leave to appeal refused [2011] O.J. No. 656 (Ont. Div. Ct.) [hereinafter “IMAX OSA motion”]; *Dobbie v. Arctic Glacier Income Fund*, [2011] O.J. No. 932, 2011 ONSC 25, at paras. 110-120 (Ont. S.C.J.), leave to appeal granted [2012] O.J. No. 456 (Ont. S.C.) [hereinafter “Arctic Glacier”]; and *Mask v. Silvercorp Metals Inc.*, [2015] O.J. No. 5471, 2015 ONSC 5348 (Ont. S.C.J.), affd [2016] O.J. No. 4436, 2016 ONCA 641 (Ont. C.A.) [hereinafter “Silvercorp SC”]. The generous standard for good faith is consistent with the expectations of commentators at the time Part XXIII.1 was enacted: see Philip Anisman & Garry Watson, *supra*, note 4, at 518.

⁶ Continuous disclosure refers to the documents a reporting issuer files publicly in the period after it offers its securities to the public through a primary distribution, typically by means of a prospectus. Continuous disclosure documents include, among other things, financial statements, proxy circulars, insider reports, material change reports and press releases. These publicly-released

First, in 1979, a committee commissioned by the federal government published *Proposals for a Securities Market Law for Canada* (the “Proposals”).⁷ The authors called for a comprehensive national securities regulatory regime by preparing a proposed draft statute.⁸ Although they addressed a wide range of issues, one clear lacuna in the existing statutory regime, in the view of the authors, was the absence of an enforcement mechanism in provincial legislation to compensate investors for issuer errors. Given that market participants were increasingly relying on continuous disclosure for their investment decisions, the Proposals recommended the creation of a private right of action to allow investors to seek compensation from market participants:⁹

Civil liability is central to the scheme of the Draft Act. Part 13 contains all the provisions creating civil liability and attempts to deal with it comprehensively, albeit not exhaustively, in order to ensure that any person who suffers harm as a result of improper conduct in the securities market or in connection with a transaction in securities may be compensated.¹⁰

The Proposals expressly anticipated that such secondary market actions would need to be pursued as class actions in order to achieve the desired compensation objective, even though no general class proceedings legislation had, in 1979, been enacted anywhere in Canada outside Quebec:

The liability in part 13 for improper market conduct cannot be fully enforced in all circumstances if class actions are not available in respect of impersonal transactions. (The power of the Commission in part 14 to bring such an action on behalf of investors will probably not be sufficient to provide a remedy for all violations.)¹¹

documents are intended “to ensure that all investors in the secondary market have equal access to material facts [about issuers] and that the securities market operates efficiently and fairly”: see *Abdula v. Canadian Solar Inc.*, [2012] O.J. No. 1381, 2012 ONCA 211, at paras. 13-17 (Ont. C.A.), affg [2011] O.J. No. 4067 (Ont. S.C.J.) [hereinafter “*Canadian Solar CA*”].

⁷ Philip Anisman, Warren M.H. Grover, John L. Howard & J. Peter Williamson, *Proposals for a Securities Market Law for Canada* (Ottawa: Minister of Supply and Services, Canada, 1979) [hereinafter “Proposals”].

⁸ For background on the development and reception of the Proposals, see Philip Anisman, “The Proposals for a Securities Market Law for Canada: Purpose and Process” (1981) 19 *Osgoode Hall L.J.* 329.

⁹ Proposals, vol. 1, *supra*, note 7, at 87-90 (ss. 13.07 and 13.09); *id.*, vol. 2, at 258-266.

¹⁰ Proposals, vol. 2, *supra*, note 7, at 235.

¹¹ *Id.*, at 236.

In the draft statute, the proposed statutory action was to be available to “any person” who traded in a security of the issuer prior to the correction of the misrepresentation or omission.¹² That investor would presumptively be entitled to compensation once it established the existence of a misrepresentation or omission; the issuer could avoid liability by proving the plaintiff “traded with knowledge of the misrepresentation or omission” or should have done so.¹³ Further, the rights of issuers were considered in that the cause of action did not extend to all public disclosure — although it did encompass more than what is known in the current Part XXIII.1 regime as “core” documents — and the proposed legislation included caps on damages.¹⁴

Notably, the authors disagreed on the application of the proposed new right of action: only two of the four authors believed that it should be available to investors broadly;¹⁵ the other two recommended limiting the right to a securities regulator.¹⁶ Indeed, in some circumstances, one of the authors opposed private actions entirely because of his concern about the potential for coercive settlements pursued by “unscrupulous plaintiffs” and “unscrupulous lawyers”.¹⁷

The next development — despite the division of opinions regarding investor access to the secondary market statutory right of action in the 1979 Proposals — came in 1984 when the Ontario Securities Commission (the “OSC”) published its own adaptation of the national draft legislation in the Proposals. The OSC stated that it wished to “promote investor confidence” by providing compensation to investors who suffered a loss based on a misrepresentation in secondary market disclosure. Its draft civil right of action, like the Proposals, dispensed with the need for investors to prove actual reliance, which would be presumed on the basis that all public information about an issuer is accounted for in the price of its securities.¹⁸ The OSC had no reservations about putting the cause of action in the hands of investors.

¹² Proposals vol. 1, *supra*, note 7, at 87-90 (ss. 13.07 and 13.09).

¹³ *Id.*, at 89 (ss. 13.07(2) and 13.09(5)). See also Proposals, vol. 2, *supra*, note 7, at 236.

¹⁴ *Id.*, at 87-90 (ss. 13.07(1), (5) and 13.09(1), (8)).

¹⁵ The two authors who supported the private right of action were Philip Anisman and J. Peter Williamson.

¹⁶ See Proposals, vol. 1, *supra*, note 7, at 87-90 (ss. 13.07 and 13.09); *id.*, vol. 2, at 258-266.

¹⁷ Proposals, vol. 2, *supra*, note 7, at 237 (and accompanying footnote).

¹⁸ Ontario Securities Commission, “Civil Liability for Continuous Disclosure Documents Filed under the *Securities Act* — Request for Comments” (1984) 7 O.S.C.B. 4910, at 6-130.

But the OSC went beyond the focus in the Proposals on compensation. It provided two other rationales for creating a right of action against public issuers for continuous disclosure documents: (1) the practical benefits of synchronizing the regulation of both primary and secondary market disclosure; and (2) the deterrent effect of private litigation on potential misconduct.¹⁹ The focus on deterrence is expressed in the OSC's view that a common law cause of action for misrepresentation would only be available in very limited circumstances and would therefore be "insufficient to exert a significant disciplinary effect on those responsible for informing the secondary market and to compel the preparation of public disclosure documents using an acceptable standard of care".²⁰

Despite approaching the need for statutory reform from a broader perspective than the authors of the Proposals, the OSC also recognized the fears of issuers that they could be exposed to "ruinous consequences" from large damage awards due to the proposed civil liability scheme.²¹ It therefore adopted the provisions from the Proposals to limit exposure to core documents and to impose caps on damages.²²

2. The Allen Committee Reports of 1995 and 1997

The second phase in the development of a secondary market statutory cause of action was the work of the Toronto Stock Exchange, first with the Dey Report in December 1994, which endorsed putting the issue of statutory liability for misrepresentations in continuous disclosure "back on the policy agenda",²³ and then with the creation of a committee headed by Thomas Allen to review the adequacy of continuous disclosure in Canada, including whether additional remedies were required to ensure compliance.

¹⁹ *Id.*, at 6-131 - 6-132.

²⁰ *Id.*, at 6-131.

²¹ *Id.*, at 6-133.

²² *Id.*, at 6-134. The Ontario Securities Commission did not include provisions for class actions, preferring instead to defer to the Ontario Law Reform Commission's recent work on the topic (released only two years earlier), but it implicitly acknowledged the potential for class proceedings by requesting comments on the issue: *Id.*, at 6-135.

²³ Toronto Stock Exchange Committee on Corporate Governance in Canada, *Where Were the Directors? Guidelines for Improved Corporate Governance in Canada* (Toronto: Toronto Stock Exchange, 1994), at para. 7.16 [hereinafter "Dey Report"]. The principal focus of the Dey Report was on the duties of directors and boards.

The Allen Committee produced an Interim Report in 1995 and a Final Report in 1997.

The Interim Report noted that one of the core issues it had to resolve was whether the primary reason for introducing a private right of action for secondary market misrepresentation should be compensation for investors, or deterring inaccurate disclosure. This dichotomy is reflected in the twin purposes of the OSA itself:

1.1 The purposes of the Act are,

- (a) to provide protection to investors from unfair, improper or fraudulent practices; and
- (b) to foster fair and efficient capital markets and confidence in capital markets.²⁴

Although the Interim Report recognized “an inexorable connection between compensation and deterrence [with] the need for the former varying inversely with the effectiveness of the latter”, it observed that it could “approach civil liability from either port of entry”.²⁵ The Committee contrasted the impact of the two objectives as follows (in a section entitled “Balance”):

A model that is primarily compensation driven would likely follow the United States model. One might say, quite simply — “If your disclosure is misleading, it’s very clear. Anyone who is injured in the market as a result of your conduct is entitled to compensation (subject to whatever defences are available).” This model would lead to the greatest number of potential plaintiffs, the greatest likelihood of injured persons being compensated and, arguably, the most effective deterrence due to the spectre of extensive liability. It would also, in our view, be more disruptive to Canada’s capital markets than a deterrence-driven model.

A model that is primarily deterrence driven would, in contrast, try to open the door of civil liability only to the extent that the consequences

²⁴ OSA, *supra*, note 1, s. 1.1.

²⁵ Toronto Stock Exchange Committee on Corporate Disclosure, *Toward Improved Disclosure: A Search for Balance in Corporate Disclosure* (Toronto: Toronto Stock Exchange, 1995), at 58 [hereinafter “Allen Committee Interim Report”]. See also the Dey Report, *supra*, note 23, at 50. In fact, the Allen Committee stated that “perhaps the most contentious and difficult issue” was whether, and to what extent, the issuer should be liable at all, rather than only responsible individuals. The Committee accepted issuer liability as essential to ensure “significant monetary recovery” without which the private action would be ineffectual: see Allen Committee Interim Report, *id.*, at 59.

*of misleading disclosure are large enough to provide effective deterrence without exposing companies to crippling damage awards. The degree to which a system of civil liability would be broadened, if at all, will be determined by the extent to which legislators believe compensation should be available at the expense of other balancing factors.*²⁶

Ultimately, in both the Interim Report and then in the Final Report — with the meaningful title “*Responsible Corporate Disclosure: A Search for Balance*”²⁷ — the Allen Committee agreed with the Proposals and with the OSC recommendation to create a statutory right of action for any person who traded securities prior to correction of a misrepresentation or omission,²⁸ in order to address deficiencies in the required public disclosure of Canadian issuers.²⁹ But the Committee’s core justification for this statutory mechanism, in both Reports, differed from the Proposals’ emphasis on compensation, and from the OSC’s three purposes, including compensation. The principal focus for the Allen Committee was instead deterrence (*i.e.*, ensuring correct disclosure):

In designing a civil liability model, the Committee sought to achieve a balance between competing goals and interests. A statutory civil liability model based on deterrence would try to open the door of civil liability only to the extent that the consequences of misleading disclosure would provide effective deterrence without exposing issuers to crippling damage awards, while the model based on compensation would try to compensate anyone who was injured by misleading disclosure. *The majority of the Committee favoured a deterrence model.*³⁰

As in the OSC draft legislation, the Allen Committee would not require that an investor prove reliance,³¹ and it recommended extending liability to “non-core” documents and statements (although with a stricter

²⁶ Allen Committee Interim Report, *id.*, at 58 (emphasis added).

²⁷ Toronto Stock Exchange Committee on Corporate Disclosure, *Responsible Corporate Disclosure: A Search for Balance* (Toronto: Toronto Stock Exchange, 1997) [hereinafter the “Allen Committee Report”].

²⁸ *Id.*, at 63-71.

²⁹ *Id.*, at 3, 15. The Allen Committee recommended other changes to securities regulation to attempt to improve issuers’ disclosure.

³⁰ *Id.*, at 41 (emphasis added). See also the Allen Committee Interim Report, *supra*, note 25, at 58.

³¹ Allen Committee Report, *supra*, note 27.

standard of liability for that category of disclosure).³² In addition, as with the earlier proposed reforms, the Allen Committee recognized the need to facilitate class proceedings by investors, although its focus was on the potential for aggregation of claims to better achieve the deterrence objective of the civil secondary market liability regime:

The loss incurred by each victim of a misrepresentation is not likely to be enough to warrant the financial and time commitments involved in pursuing a civil action, whereas the combined losses of all victims of a misrepresentation would likely provide the critical mass for a class action. *Without the spectre of class actions, issuers may perceive that no one investor would bother to commence an action based on a misrepresentation or delay in disclosure and may not devote adequate resources to ensuring that their continuous disclosure complies with the requirements.* The Committee concluded that a statutory provision for civil liability for a misrepresentation in a continuous disclosure system would have more deterrent effect in the context of class actions.³³

The Allen Committee did, however, emphasize the rights of public issuers as well. In particular, it highlighted the interests of their long-term shareholders when short-term investors brought litigation:

The Committee sought to achieve a balance between the competing interests of traders in securities and shareholders whose investment would be diminished by the payment of damages. *Logically, issuers and their management must be held responsible for the injury they cause through misleading disclosure, regardless [of] whether the disclosure was made in a prospectus or in continuous disclosure. However, it is the innocent shareholder who ultimately pays the damages.* In a primary offering, the source of compensation payable is the proceeds of the offering. Both the injured investors and the shareholders are essentially left whole as there is no net loss to the issuer's treasury if the monies must be returned to the investors. *In a secondary market trade, the source of compensation payable would be the issuer's treasury, despite its not having been enriched by the proceeds of an offering. Injured investors could be made whole, but the shareholders who do not buy or sell during the misrepresentation period would indirectly pay the damages because the value of the issuer would be reduced.*

Because the Committee believes that a deterrent is needed, the Committee concluded that the issuer should be liable for misleading disclosure.

³² *Id.*

³³ *Id.*, at 25 (emphasis added). See also the Allen Committee Interim Report, *supra*, note 25, at 44-45.

*Because the Committee also believes that the potential liability of those issuers should be limited to protect innocent shareholders from crippling economic consequences, the Committee concluded that civil liability should be subject to reasonable limitations.*³⁴

Those “limitations” included, among other things: (i) damages caps,³⁵ and (ii) a loser-pays costs rule, which it would have extended even to jurisdictions such as British Columbia to override the no-costs rule applicable there to other class proceedings.³⁶

Finally, the Committee considered whether the proposed new regime would “open the floodgates to U.S.-type securities litigation”, and if so, whether issuers needed to be protected by either: (i) permitting only a securities regulatory authority to commence an action on behalf of investors; or (ii) requiring investors to obtain the approval of a securities regulatory authority to commence a claim.³⁷ After acknowledging that such requirements “would represent an answer to those who are concerned that statutory civil liability opens a door to irresponsible plaintiffs (for which door there should be a gatekeeper)”, the Committee rejected the idea, for two reasons. First, unlike the two dissenting authors of the Proposals, the Committee did not believe that the coercive strikes suits which were perceived to exist in the United States would be common in Canada.³⁸ Second:

Creation of a gatekeeper role would clearly require identifying the test the gatekeeper would apply to legitimize a plaintiff. Such a role would also introduce into the system the risk of a duplication of process.³⁹

The Allen Committee’s concern that a gatekeeper provision would be difficult to define foreshadowed the judicial debate that lay ahead.

3. The CSA’s Draft Legislation of 1998 and 2000

The third and final phase in the development of the secondary market liability regime was the publication in 1998 by the Canadian Securities

³⁴ Allen Committee Report, *supra*, note 27, at 41-42 (emphasis added).

³⁵ *Id.*, at 32.

³⁶ *Id.*, at 32.

³⁷ Allen Committee Interim Report, *supra*, note 25, at 72.

³⁸ *Id.*, at 29-33.

³⁹ Allen Committee Report, *supra*, note 27, at 61. The Committee’s alternative was to permit securities regulatory authorities to intervene in civil actions either on their own initiative or at the request of a party.

Administrators (“CSA”) of its Draft Legislation and Request for Comments, followed by its final Draft Legislation in 2000.

The CSA expressly modelled its 1998 Draft Legislation⁴⁰ on the Allen Committee’s draft provisions. It created a civil right of action for secondary market misrepresentation with no need to prove reliance and included damage caps. In terms of its goals, the CSA reiterated that it had adopted the Allen Committee’s “deterrent model” of the private right of action, which it contrasted with a compensatory model;⁴¹ nevertheless, it connected the two objectives, observing that “deterrence should outweigh compensation but, at the same time, any deterrent effect requires a plausible element of compensation”.⁴²

However, the CSA made one significant departure from the prior legislative proposals, arising from a different objective than compensation of investors or deterrence to protect the integrity of capital markets. Although the CSA, like the Allen Committee, had not recommended (or even discussed) any form of gatekeeping function in its 1998 draft legislation,⁴³ its 2000 Proposal included, for the first time, a two-part leave test, which would require a prospective plaintiff seeking to pursue a claim for secondary market misrepresentation to demonstrate that the action was brought in good faith and has a reasonable prospect of success at trial.⁴⁴ It proposed, in other words, essentially the current section 138.8(1) of the OSA.

The CSA acknowledged that the two-pronged leave requirement was “a new provision”⁴⁵ that it had specifically included to protect issuers from unmeritorious litigation:

This screening mechanism is designed not only to minimize the prospects of an adverse court award in the absence of a meritorious

⁴⁰ Canadian Securities Administrators, “Proposal for a Statutory Civil Remedy for Investors in the Secondary Market: Notice and Request for Comment” (1998) 21 O.S.C.B. 3335 [hereinafter “OSC 1998 Request for Comments”]; Canadian Securities Administrators, “Request for Comments: Civil Liability for Continuous Disclosure” (1998) 21 O.S.C.B. 3367 [hereinafter “OSC 1998 Draft Legislation”].

⁴¹ Canadian Securities Administrators, “CSA Notice 53-302-Proposals for a Statutory Civil Remedy for Investors in the Secondary Market and Responses to the Proposed Change to the Definitions of ‘Material Fact’ and ‘Material Change’” (2000) 23 O.S.C.B. 7383 at 7389 [hereinafter “CSA Notice 53-302”]. See also *id.*, at 7384, 7387, and 7391-7392, 7410 (for the CSA’s discussion distinguishing its proposed regime with the compensatory model in place in the United States).

⁴² *Id.*, at 7391.

⁴³ OSC 1998 Draft Legislation, *supra*, note 40.

⁴⁴ CSA Notice 53-302, *supra*, note 41.

⁴⁵ *Id.*, at 7390.

claim but, more importantly, to try to ensure that unmeritorious litigation, and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process. By offering defendants the reasonable expectation that an unmeritorious action will be denied the requisite leave to be commenced, the 2000 Draft Legislation should better enable defendants to fend off coercive efforts by plaintiffs to negotiate the cash settlement that is often the real objective behind a strike suit.

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This screening mechanism, coupled with the new provision described earlier that would require court approval of a settlement agreement are procedural protections that supplement the “loser pays” cost and proportionate liability provisions retained from the 1998 Draft Legislation. Taken together, these elements of the 2000 Draft Legislation should ensure that any exercise of the statutory right of action occurs in a litigation environment different from that in the United States and less conducive to strike suits.⁴⁶

In explaining its decision to include the leave test, the CSA cited the “depth of public concern on the part of the issuer community ... coupled with some recent examples of entrepreneurial litigation in Canada”.⁴⁷ As to the former factor, the CSA pointed to the judicial leave test in responding to comments from the Canadian Bankers Association and Davies, Ward & Beck which expressed concerns that the use of a pleading threshold alone would encourage strike suits.⁴⁸ As to the latter factor, an Ontario class action decision, *Epstein v. First Marathon Inc.*,⁴⁹ had been released a few months before the 2000 Draft Legislation was published. In *Epstein*, Cumming J. refused to approve a class action settlement on the basis that the proceeding was a “strike suit”.⁵⁰ The CSA cited *Epstein* in its recommendation that settlements require court approval, but commented more broadly that the decision “represents a strong denunciation of strike

⁴⁶ *Id.*

⁴⁷ *Id.*, at 7389.

⁴⁸ CSA Notice 53-302, *supra*, note 41. The Crawford Report in 2003 also indicated that the introduction of the leave test by the CSA, among other procedural mechanisms to screen out unmeritorious actions, was included in response to concerns raised in the public comments to the 1998 draft legislation, particularly from issuers and their advisors: Ontario, *Five Year Review Committee Final Report: Reviewing the Securities Act (Ontario)* (Toronto: Queen’s Printer, 2003), at 131 [hereinafter “*Crawford Report*”].

⁴⁹ [2000] O.J. No. 452 (Ont. S.C.J.).

⁵⁰ CSA Notice 53-302, *supra*, note 41, at 7389-7390.

suits and a clear indication that Canadian courts, if given statutory authority, will exercise that authority to discourage strike suits”.⁵¹

Despite the fact that the new gatekeeper concept was a significant difference from each of the 1979 Proposals, the OSC Draft Legislation and the Allen Committee reports, the CSA gave little direction as to its proposed application of the leave standard. It stated only that it had taken the test from the Ontario Law Reform Commission’s (the “OLRC”) 1982 *Report on Class Actions*:

The screening provision is based on a test that was recommended by the Ontario Law Reform Commission in its 1982 *Report on Class Actions*. In its report the OLRC paid particular attention to the certification of a class action. The OLRC identified the motion for certification as one of the most important parts of the proposed procedure. The OLRC recommended that a court should be able to certify an action as a class action only if it finds that five conditions are satisfied by the representative plaintiff *including proof of the substantive adequacy of the action*.⁵²

However, referring back to the OLRC Report itself did not add much substance. Although the OLRC had also been concerned about strike suits and coercive settlements, it provided little guidance on its proposed standard to screen out such litigation. It conceded that there was “no evidence to suggest” that class actions had been used to blackmail defendants into settlements, but it was concerned that mass litigation “ha[s] the potential to be used in this way”.⁵³ In addition, the OLRC was seeking to protect courts from being overburdened with complex, difficult-to-administer litigation by subjecting actions to scrutiny at an early stage.⁵⁴ In terms of the standard of proof “of the substantive adequacy of the [proposed] action”, the OLRC had considered a number of analogies:

- (1) the summary judgment test under the former rule 58 of the Supreme Court of Ontario Rules of Practice — which required a party to raise a “triable issue” to avoid summary judgment;⁵⁵

⁵¹ *Id.*, at 7390.

⁵² *Id.*, see fn. 20 (emphasis added). The import of the Ontario Law Reform Commission’s report for the OSA leave test has been recognized in the case law: see *IMAX OSA motion*, *supra*, note 5, at paras. 313-318.

⁵³ Ontario Law Reform Commission, *Report on Class Actions*, Volume II (Toronto: Ministry of the Attorney General, 1982), at 309-224 [hereinafter “OLRC Report”].

⁵⁴ *Id.*, at 313.

⁵⁵ *Id.*, at 316-317. This standard has been superseded by *Hryniak v. Mauldin*, [2014] S.C.J. No. 7, [2014] S.C.R. 87 (S.C.C.) [hereinafter “*Hryniak v. Mauldin*”].

- (2) the superficially analogous standard for leave to bring a derivative action under Ontario's *Business Corporations Act* — which requires a security holder to show it is acting in good faith and “it is *prima facie* in the interests of the corporation or its shareholders that the action be commenced”,⁵⁶
- (3) the “serious question to be tried” standard for an interlocutory injunction;⁵⁷
- (4) a series of class action legislation precedents from jurisdictions as diverse as Quebec, South Australia, the United States; and
- (5) draft Canadian federal competition legislation.⁵⁸

Ultimately, however, the OLRC had rejected all of those alternatives in its draft class actions legislation. It reasoned:

The test that we proposed is not aimed at those cases where it is clear that the action cannot succeed. These cases can be dealt with under Rule 126 [currently, Rule 21] of the present Supreme Court of Ontario Rules of Practice, and its equivalent in the proposed rules of civil procedure. At the same time, the Commission is concerned about imposing a standard that would be too high — in other words, one that would have the effect of disqualifying the vast majority of suits commenced as class actions. To ensure that our proposed class action procedure is truly useful, it must be available to a wide variety of circumstances. *The preliminary merits test that we propose would require a standard of proof that is not as strict as a prima facie case test, but more than simple proof that a triable issue exists. We are satisfied that our preliminary merits test strikes a reasonable balance.*⁵⁹

Accordingly, the OLRC's proposed standard was to fall somewhere *above* both the pleadings threshold (for which no evidence may be considered) and the former summary judgment test (which precluded a judge from evaluating credibility, weighing evidence and drawing factual

⁵⁶ OLRC Report, *supra*, note 53, at 317-18; *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 246; *Richardson Greenshields of Canada Ltd. v. Kalmacoff*, [1995] O.J. No. 941 (Ont. C.A.), revg [1994] O.J. No. 1447 (Ont. Gen. Div.), leave to appeal refused [1995] S.C.C.A. No. 260 (S.C.C.). See also Philip Anisman, “Comments on Class Proceedings, Securities Market Liability and the CSA Proposal” in *Selected Topics in Corporate Litigation: Papers Presented at the 7th Queen's Annual Business Law Symposium 2000* (Kingston: Queen's University Faculty of Law, 2000), at 124.

⁵⁷ OLRC Report, *supra*, note 53, at 318-319; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17, [1994] 1 S.C.R. 311 (S.C.C.).

⁵⁸ OLRC Report, *supra*, note 53, at 319-322.

⁵⁹ *Id.*, at 323-24 (emphasis added).

inferences),⁶⁰ and somewhere *below* the requirement of the investor to establish a *prima facie* case.⁶¹ However, the OLRC did not give a precise delineation of the applicable standard. And, importantly, the proposed preliminary merits test was never put in play. Although the 1982 OLRC Report is broadly accepted as the source of many of the principles in class proceedings legislation adopted in the common law provinces, legislatures rejected the preliminary merits test, opting instead for just a pleadings review.⁶² Accordingly, no jurisprudence developed around the OLRC's preliminary merits threshold test, apart from *obiter* statements which defined the test that the legislatures adopted instead.

In light of the potential significance of, but limited explanation for, its new gatekeeper provision, the fact that the CSA did not invite further public comment on its 2000 Draft Legislation elicited criticism at the time. For example, Philip Anisman, lead author of the 1979 Proposals and a member of the Allen Committee,⁶³ wrote in response to the CSA's 2000 Draft Legislation:

... the screening mechanism in the proposed legislation was introduced at the final stage of the CSA's efforts, without an opportunity for public comment. The CSA invited comment on its 1998 draft legislation in view of "the significance of the Proposal and the extent of the public interest generated by the TSE Final Report and the CSA Proposal." The recent innovations were not the subject of comment, but were added to the proposed legislation only when it was referred to governments for adoption. The proposed legislation would have benefited from an additional comment process.⁶⁴

⁶⁰ See *Aguonie v. Galion Solid Waste Materials Inc.*, [1998] O.J. No. 459, 38 O.R. (3d) 161 (Ont. C.A.), revg [1997] O.J. No. 1262 (Ont. Gen. Div.) for the older standard, which has been overtaken by *Hryniak v. Mauldin*, *supra*, note 55.

⁶¹ The OLRC's rationale for rejecting the latter, however, is puzzling. The OLRC offered that while "a '*prima facie* case' test seems to oblige the court to come to some conclusion concerning the likelihood of eventual success in the action, an 'appears to have merit' test imposes a somewhat lower standard" (OLRC Report, *supra*, note 53, at 322). However, in language similar to that ultimately enacted in s. 138.8(1), the OLRC's draft legislation seemed to contemplate just that sort of analysis: "a reasonable possibility that material issues ... *will be resolved at trial in favour of the class*", Ontario Law Reform Commission, Report on Class Actions, Volume III (Toronto: Ministry of the Attorney General, 1982), at 862 (emphasis added).

⁶² *Hollick v. Toronto (City)*, [2001] S.C.J. No. 67, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 15-16 (S.C.C.), affg [1999] O.J. No. 4747 (Ont. C.A.) [hereinafter "*Hollick v. Toronto (City)*"].

⁶³ Mr. Anisman dissented from the final Allen Committee Report primarily on the basis that the majority favoured deterrence objectives over compensatory ones in designing the secondary market liability regime: see Allen Committee Report, *supra*, note 27, at 85-87. He had dissented on the same basis from the Allen Committee Interim Report.

⁶⁴ Anisman, *supra*, note 56, at 127. See also Anisman & Watson, *supra*, note 4, at 514.

Anisman went on to express his own concerns. He believed that the CSA's changes to the Allen Committee's draft legislation, and in particular the leave mechanism,⁶⁵ "shift[ed] the balance in the proposed legislation against ... investors", and could "deter plaintiffs from bringing meritorious actions".⁶⁶ While the next section of this Article demonstrates that his concern about the reticence of investors to pursue the cause of action was unnecessary, two of Anisman's other criticisms of the screening mechanism were more prophetic:

- (1) he observed that the proposed legislation left the interpretation of the threshold standard "uncertain";⁶⁷ and
- (2) he was concerned that the CSA had "diverge[d]" from the OLRC model in several ways "hostile to investor class actions", including eliminating the balancing factor of a "no way" costs rule,⁶⁸ and weakening the ability of investors to obtain significant disclosure from defendants during the leave motion process.⁶⁹

4. Summary of the Legislative Proposals

Thus, a relatively linear narrative emerges from the three-decade process that led to the current private action for secondary market misrepresentation. The process began, in the 1979 Proposals, firmly rooted in the desire for compensation for investors who suffered losses due to misrepresentations. The OSC's 1984 draft legislation introduced deterrence as a complementary investor protection objective, but by the time of the Allen Committee's Interim and Final Reports in 1995 and 1997, and then in the CSA's 1998 Draft Legislation, deterrence had

⁶⁵ Together with the requirement that costs would follow the result in every case, and that settlements would require court approval: Anisman, *supra*, note 56, at 120-121.

⁶⁶ *Id.*, at 120, 121.

⁶⁷ *Id.*, at 125.

⁶⁸ OLRC Report, *supra*, note 53, at 313.

⁶⁹ Anisman, *supra*, note 56, at 125. The OLRC had recommended "procedure[s] that will guarantee the representative plaintiff will have access to the information in the possession of the defendant necessary to help [the investor] meet the preliminary merits test proposed": OLRC Report, *supra*, note 53, at 315. Although the CSA had adopted the provision which stated that both the plaintiff and the proposed defendants would "serve and file one or more affidavits setting forth the material facts on which each intends to rely" at the merits hearing, Anisman noted that the CSA had omitted the provision in the OLRC draft legislation which would also have required each party to swear in their affidavit "that he knows of no fact material to the application that has not been disclosed": see Anisman, *supra*, note 56, at 125 and fn. 94.

displaced compensation as the principal objective of the private right of action.

Then, in the final iteration of the Draft Legislation, the CSA brought the “balancing” principle of protecting issuers to the fore. It augmented the earlier costs and damage cap provisions with a settlement approval requirement and, most importantly, the leave to proceed test. The CSA, therefore, set the stage for the varying judicial treatments of the threshold process by lower courts which culminated in the Supreme Court decisions in 2015, as considered below.

III. THE ENACTMENT OF THE STATUTORY CAUSE OF ACTION

1. Part XXIII.1 is Passed: The Coming Avalanche?

In October 2002, Bill 198 was introduced in the Ontario legislature, setting out the statutory right of action for secondary market disclosure in substantially the form the CSA proposed in 2000, including the two-pronged leave requirement. Bill 198 was passed and received Royal Assent on December 9, 2002,⁷⁰ but the secondary market right of action provisions were not proclaimed in force until December 31, 2005.⁷¹

Between December 31, 2006 and October 26, 2008, all of the other provinces and territories of Canada adopted legislation imposing civil liability for secondary market disclosure.⁷² The Acts all contain a two-pronged requirement to obtain leave of the court to prosecute an action under the statute, with no apparent meaningful difference in wording.

After Part XXIII.1 was enacted, there was an expectation in the popular commentary in particular — but also in some academic literature — that courts and public issuers in Canada could expect a deluge of

⁷⁰ Bill 198, *Keeping the Promise for a Strong Economy Act (Budget Measures)*, Ontario, 2002 (consented to December 9, 2002), S.O. 2002, c. 22, s. 185.

⁷¹ In the intervening years, the Ontario government released the Crawford Report, which recommended proclamation of Bill 198 and observed that the leave requirement was introduced in response to issuer concerns about unmeritorious claims: Crawford Report, *supra*, note 48, at 131.

⁷² *Securities Act*, R.S.B.C. 1996, c. 418, Part 16.1; *Securities Act*, R.S.A. 2000, c. S-4, Part 17.01; *The Securities Act, 1988*, S.S. 1988-89, c. S-42.2, Part XVIII.1; *The Securities Act*, C.C.S.M. c. S.50, Part XVIII; *Securities Act*, C.Q.L.R. c. V-1.1, Part VIII, Chapter II, Division II; *Securities Act*, S.N.B. 2004, c. S-5.5, Part 11.1; *Securities Act*, R.S.N.S. 1989, c. 418, s. 46A-N; *Securities Act*, R.S.P.E.I. 1988, c. S-3.1, Part 14; *Securities Act*, R.S.N.L. 1990, c. S-13, Part XXII.1; *Securities Act*, S.Y. 2007, c. 16, Part 14; *Securities Act*, S.N.W.T. 2008, c. 10, Part 14; *Securities Act*, S.Nu. 2008, c. 12, Part 14.

securities class proceedings.⁷³ After all, the statutory amendment was intended to facilitate class actions.⁷⁴ However, in contrast to the United States, there have not been an overwhelming number of actions.⁷⁵ Between 2006 and the end of 2015, there were 68 proposed claims filed under the secondary market civil liability provisions in Canada,⁷⁶ the vast majority in Ontario. No case has come to trial.

Still, the driving forces behind the development of the statutory cause of action have been vindicated. As to the deterrence element, any company in Canada that suffers a sudden share loss precipitated by public knowledge of an adverse corporate development is surely now well aware of the risk of a securities class action. As to the compensation element, while almost half of the commenced actions are outstanding, more than \$463 million has been paid out to investors (and their counsel) in 30 settlements.⁷⁷

It is the balancing concept, weighing access to the courts for investors against protecting issuers from unmeritorious litigation, that has occupied judges at all levels since 2006. As explained below, although the “reasonable possibility of success” criterion in the leave provision was derived from the OLRC’s recommendation of a

⁷³ Stikeman Elliott’s “Litigation Unleashed” (2005) is the most notorious example of this sentiment. But see also Sandra Rubin, “Northern exposure set to explode” *National Post* (March 15, 2006); John J. Chapman, “Institutional Activism: Current Trends and Emerging Legal Issues” (2007) 44 *Can. Bus. L.J.* 327, at 342; Violetta Kokolus, “Mining for Legislative Gold after Bre-X: A General Commentary on the Use of Class Actions for Fraud in the Secondary Market” (2003) 9 *Appeal* 59; Ben Maiden, “Canadian lawyers take new look at due diligence” (June 2005) *IFLR* 37; Janet McFarland, “New law lets shareholders play hardball with firms” *The Globe and Mail* (January 2, 2006). Nonetheless, this optimism was not universally shared; see, e.g., Joseph Groia, *et al.* “The Future of Securities Class Actions in Canada: A Comment on the Article of Philip Anisman and Garry Watson” (2006) 3 *Can. Class Action Rev.* 527 [hereinafter “Groia”], which argued that the damages caps would discourage plaintiffs from pursuing litigation in Ontario other than as a means of obtaining evidence for use in U.S. litigation.

⁷⁴ See Proposals, vol. 2, *supra*, note 7, at 236; Allen Committee Report, *supra*, note 27; CSA Notice 53-302, *supra*, note 41; The *CIBC* Trilogy, *supra*, note 3, at paras. 71, 203 and 208.

⁷⁵ See Poonam Puri, “Securities Litigation and Enforcement: The Canadian Perspective” (2012) 37 *Brook. J. Int’l L.* 967.

⁷⁶ NERA Economic Consulting releases annual reports on the number of securities class actions initiated in Canada. Those reports are available on NERA’s website and indicate that the following number of actions have been initiated in the years since 2005: 2006 (one issued — IMAX); 2007 (three); 2008 (eight); 2009 (six); 2010 (eight); 2011 (nine); 2012 (eight); 2013 (ten); 2014 (ten); 2015 (four); Bradley A. Heys and Mark L. Berenblut, “Trends in Canadian Securities Class Actions: 2015 Update” (2016) NERA Economic Consulting. NERA treats similar class actions against the same public issuer in one or more provinces as a single case: see “note” on p. 3. We believe that only one, or perhaps two, of those cases were individual, not class, actions.

⁷⁷ *Id.*

preliminary merits test, judges considering the relative strength of the merits hurdle have been less interested in the two objectives which the OLRC sought to meet with that threshold (*i.e.*, preventing strike suits and lessening the burden on the courts).⁷⁸ Rather, they have been more interested in the practical risks and benefits of drawing inferences, weighing evidence and making findings of fact on a leave motion's limited record.

Before addressing that debate, another aspect of the leave to proceed case law deserves mention. As noted above, when the CSA adopted the leave provision from the OLRC Report, it did not pick up the two counterbalancing factors: (i) a no-costs rule,⁷⁹ and (ii) all of the recommended "procedure[s] that will guarantee the representative plaintiff will have access to the information in the possession of the defendant necessary to help him meet the preliminary merits test proposed".⁸⁰ The absence of those elements has been noteworthy in the leave process as it has developed.

As for access to evidence,⁸¹ motion judges have repeatedly limited attempts by proposed representative plaintiffs to obtain evidence from a defendant for a leave hearing: (i) defendants are not required to deliver an affidavit to contest leave;⁸² (ii) a plaintiff cannot issue a summons to a witness to examine a defendant who does not file an affidavit;⁸³ (iii) a plaintiff cannot obtain defendant documents using a broad Request to Inspect Documents;⁸⁴ (iv) a defendant who files an affidavit only in response

⁷⁸ OLRC Report, *supra*, note 53, at 312-313.

⁷⁹ *Id.*, at 313.

⁸⁰ *Id.*, at 315.

⁸¹ At the time the CSA draft legislation was proposed and Part XXIII.1 came into force, there was a general feeling that the plaintiff *would* have access to information from the defendant: see Anisman, *supra*, note 56, at 122; Worndl, Part 2, *supra*, note 4, at 28; Groia, *supra*, note 73, at 538, who, as noted above, posited that a leave motion in an Ontario proceeding might furnish evidence for use in parallel U.S. litigation. See also *Silver v. IMAX Corp.*, [2008] O.J. No. 1844 (Ont. S.C.J.), leave to appeal refused [2008] O.J. No. 2751 (Ont. S.C.J.).

⁸² *Ainslie v. CV Technologies Inc.*, [2008] O.J. No. 4891, 93 O.R. (3d) 200, at paras. 14-25 (Ont. S.C.J.), leave to appeal granted on this point [2009] O.J. No. 730 (Ont. S.C.J.), but the appeal was not heard [hereinafter "*CV Technologies*"]; *Abdula v. Canadian Solar Inc.*, [2013] O.J. No. 3517, 2013 ONSC 5035, at para. 5 (Ont. S.C.J.), leave to appeal refused [2013] O.J. No. 4312, 2013 ONSC 5993 (Ont. S.C.J.) [hereinafter "*Canadian Solar*"], and *Dugal v. Manulife Financial Corp.* (unreported, December 7, 2012), which stated that the issue had been "fully adjudicated", leave to appeal refused [2013] O.J. No. 219, 2013 ONSC 327 (Ont. S.C.J.) [hereinafter "*Dugal v. Manulife interlocutory*"].

⁸³ *CV Technologies, id.*, at para. 29, leave refused on this point at para. 3.

⁸⁴ *Mask v. Silvercorp Metals Inc.*, [2014] O.J. No. 3416, 2014 ONSC 4161 (Ont. S.C.J.), leave to appeal refused [2014] O.J. No. 3708, 2014 ONSC 4647 (Ont. Div. Ct.).

to certification cannot be cross-examined for purposes of the leave motion;⁸⁵ and (v) when a defendant does file a responding affidavit, cross-examination has been limited so that it does not approximate discovery.⁸⁶

As to costs, the usual loser-pays cost rules apply to leave to proceed motions,⁸⁷ and the courts have acted accordingly, with significant costs awards against unsuccessful investors,⁸⁸ but also in favour of proposed representative plaintiffs who have obtained leave to proceed.⁸⁹

2. The Leave Case Law Prior to the Supreme Court Decisions

In September 2006, investors issued the first case alleging common law misrepresentation and also stating an intention to pursue a statutory claim if granted leave to proceed against IMAX Corporation and its officers and directors, in Ontario. *IMAX* was also the first case to reach a leave to proceed hearing, in December 2008. By the time *Theratechnologies* was released in April 2015, contested hearings had been held in 10 cases, with a smaller number of appeal proceedings.⁹⁰ The plaintiffs obtained leave in more than half of the decisions.⁹¹

⁸⁵ *Canadian Solar*, *supra*, note 82, at para. 9; *Dugal v. Manulife* interlocutory, *supra*, note 82.

⁸⁶ *Labourers' Pension Fund of Central and Eastern Canada (Trustee of) v. Sino-Forest Corp.*, [2014] O.J. No. 5075, 2014 ONSC 6236, at para. 43 (Ont. S.C.J.).

⁸⁷ *OSA*, *supra*, note 1, at s. 138.11.

⁸⁸ See *Mask v. Silvercorp Metals Inc.*, [2015] O.J. No. 6619, 2015 ONSC 7780 (Ont. S.C.J.), where Belobaba J. concluded that costs of a leave motion are to be considered in a manner more consistent with conventional civil litigation than certification motions, because of the significant merits-based evidence. In that instance, the successful defendants were awarded \$500,000, affirmed on this point, with an additional costs award of \$75,000 on appeal, [2016] O.J. No. 4436, 2016 ONCA 641, at paras. 67-68 (Ont. C.A.) [hereinafter "*Silvercorp CA*"].

⁸⁹ See *Green v. Canadian Imperial Bank of Commerce*, [2016] O.J. No. 3039, 2016 ONSC 3829 (Ont. S.C.J.), where Strathy C.J.O. (the original leave motion judge prior to appeals to the Supreme Court) awarded costs of \$2,679,277.82 to the successful plaintiffs.

⁹⁰ Eight of those decisions were in Ontario cases, with one published case in British Columbia — *Round v. MacDonald, Dettwiler and Associates Ltd.*, [2011] B.C.J. No. 1980 (B.C.S.C.), affd [2012] B.C.J. No. 2545 (B.C.C.A.) [hereinafter "*Round*"] — and the Quebec motion decision in *Theratechnologies Inc. v. 121851 Canada Inc.*, [2012] J.Q. no 1529, 2012 QCCS 699 (Que. S.C.), affd [2013] J.Q. no 7925, 2013 QCCA 1256 (Que. C.A.), revd [2015] S.C.J. No. 18, 2015 SCC 18 (S.C.C.) [hereinafter "*Theratechnologies motion*"].

⁹¹ The moving investors obtained leave to proceed, at least in part, in six of the 10 cases at first instance. Further, only two of the four losses were on the merits: the plaintiff in *Round* did not fall within the statute; and the plaintiff in *CIBC* would have been granted leave, but for the limitation period ruling. (Thereafter, on appeals, the plaintiff in *CIBC* prevailed at the Ontario Court of Appeal and then at the Supreme Court, overcoming the limitation bar; the plaintiff in *Theratechnologies* lost on appeal at the Supreme Court; and the plaintiff in *Celestica* had its action dismissed due to the statute bar at the Supreme Court.)

In reviewing those decisions, it should be remembered that setting the bar for leave to proceed as a “reasonable possibility” of success at trial did not have direct precedent in Canada.⁹² The parameters were clear — a “possibility” is more than a 0 per cent chance, but less than a “probability” of at least a 51 per cent chance of success — but motion judges faced with defining the meaning and application of the threshold were left with a great deal of room for interpretation.

The earliest interpretation on the meaning of the leave test was actually in an interlocutory motion (not a motion for leave to proceed) in *CV Technologies*.⁹³ In that case, Lax J. saw the provision as a meaningful substantive barrier:

In recommending that the Act include a screening mechanism, *the CSA concluded that*, irrespective of whether it was believed that the proposed legislation would result in strike suits, *a screening mechanism was necessary* in order to prevent corporate defendants from being exposed to proceedings “that cause real harm to long-term shareholders and resulting damage to our capital markets” ...

... [T]he legislative purpose of section 138.8 ...was not...to benefit plaintiffs or to level the playing field for them in prosecuting an action under Part XXIII.1 of the Act. Rather, it was enacted to protect defendants from coercive litigation and to reduce their exposure to costly proceedings ... Subsection 138.8(2) must be interpreted to reflect this underlying policy rationale and the legislature’s intention in imposing a gatekeeper mechanism.

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In my view, *the “gatekeeper provision” was intended to set a bar*.⁹⁴

That reading did not, however, carry over into the first leave to proceed decision. In *IMAX*, van Rensburg J. (as she then was) did not refer to Lax J.’s analysis of “the legislative purpose of section 138.8” itself.⁹⁵ Rather, Justice van Rensburg concluded that section 138.8 was

⁹² In *IMAX*, the motion judge stated that there were “no other statutory provisions in force in a Canadian jurisdiction, that adopt the same type of test”: *IMAX OSA motion*, *supra*, note 5, at para. 283.

⁹³ The issue in *CV Technologies* was whether each defendant was required to swear an affidavit on the leave motion on which the defendant could be cross-examined.

⁹⁴ *CV Technologies*, *supra*, note 82, at paras. 12, 15 and 24 (emphasis added).

⁹⁵ The Court in *IMAX* referred to *CV Technologies* in another part of the leave decision (*IMAX OSA motion*, *supra*, note 5, at fns. 116, 127), but did not advert to the clear (and, in the view of the authors, different) statement of the purpose of the leave test by Lax J. Also see footnotes 106 and 134 *infra*.

indivisible from Part XXIII.1 of the OSA as a whole, which was “remedial legislation”:

Similarly [to the derivative action], *the statutory cause of action was introduced as remedial legislation*; that is, in recognition of the obstacles to pursuing claims for secondary market misrepresentation under common law. *Accordingly, the leave test prescribed by the legislature should be interpreted so as to permit access to the courts by shareholders with legitimate claims.*⁹⁶

Justice van Rensburg also specifically rejected the defence argument that “a more onerous threshold is required ... because the overall purpose of these provisions is not to provide compensation, but to act as a deterrent to non-compliance with statutory disclosure requirements”, concluding that the “deterrent” objective of the statutory remedy does not inform the leave standard.⁹⁷

While Lax J. in *CV Technologies* had concluded that section 138.8 was not intended “to benefit plaintiffs”,⁹⁸ in the end, the motion judge in *IMAX* concluded that section 138.8 set a “relatively low threshold” — “something more than a *de minimis* possibility or chance”.⁹⁹ Indeed, in her view, the test was only meant to screen out cases based on “speculation or suspicion, rather than evidence”.¹⁰⁰ Leave to appeal that interpretation of the leave threshold was denied.¹⁰¹

In the next case, *Arctic Glacier*, the motion judge cited the above comments from both *IMAX* and *CV Technologies*, but failed to address their apparently disparate approaches to the leave test.¹⁰² He simply concluded that “[t]he applicable standard is more than a mere possibility

⁹⁶ *Id.* (emphasis added).

⁹⁷ *IMAX* OSA motion, *id.*, at paras. 328-329. The motion judge further observed that “[a] threshold that is too difficult to meet with have little deterrent value”, and that an “onerous” threshold might complicate the leave proceeding, “resulting in the very litigation costs that the drafters of the legislation were seeking to avoid” — *id.*, at para. 329.

⁹⁸ *CV Technologies*, *supra*, note 82, at para. 15.

⁹⁹ *Id.*, at paras. 25, 324. The motion judge referred to the OLRC Report, but stated that “[i]t appears that although the OLRC recommended some examination of the merits of a proposed class action, it was concerned about not setting the bar for certification too high.”: *id.*, at para. 318.

¹⁰⁰ *Id.*, at para. 330.

¹⁰¹ The leave to appeal judge in *IMAX* agreed with the defendants that Lax J. concluded, in *CV Technologies*, that the leave test “benefits defendants”, but ruled that it was not a “conflicting decision”, because van Rensburg J. “does not find that the leave provision ... ought to be constructed to benefit plaintiffs”: *Silver v. IMAX Corp.*, [2011] O.J. No. 656, 2011 ONSC 1035 (Ont. Div. Ct.), at fn. 10.

¹⁰² *Arctic Glacier*, *supra*, note 5, at paras. 106 (referencing *IMAX*) and 122 (referencing *CV Technologies*).

of success, but is a lower threshold than a probability”.¹⁰³ Leave to appeal that standard was also refused.¹⁰⁴

The next decision would define the statutory threshold until the Supreme Court released *Theratechnologies* in April 2015. In *CIBC* in July 2012, Strathy J. (as he then was) considered the studies by the OSC, the Allen Committee and the CSA, as well as the OLRC Report, and each of *CV Technologies*, *IMAX* and *Arctic Glacier* (as well as the intervening motion decisions from British Columbia in *Round v. MacDonald*, and from Quebec in *Theratechnologies*).¹⁰⁵ He summarized the defendant CIBC’s submission on the opposing possible interpretations of section 138.8 as follows:

[The defendant] submits that to accomplish [the] legislative purpose, the test must be a meaningful hurdle to the commencement of the action and not simply a “speed bump”. It suggests that the standard set in *Silver v. IMAX* and *Arctic Glacier* is too low, and that the more appropriate standard is to be followed in *Round v. MacDonald*.¹⁰⁶

In *Round*, Harris J. of the British Columbia Supreme Court had concluded that the moving investor did not have a valid cause of action on her facts, but addressed the leave test regardless. Without referring to either *IMAX* or *Arctic Glacier*, and having expressed the reservation that a leave motion was “an initial hurdle and not a substitute for the trial” given the limited evidentiary record, Harris J. nonetheless preferred a stricter test:

... it is clear, in my view, that the test is defined to do more than screen out clearly fraudulent, scandalous or vexatious actions. An action may have some merit, and not be fraudulent, scandalous or vexatious, without rising to the level of demonstrating that the plaintiff has a reasonable possibility of success.¹⁰⁷

¹⁰³ *Id.*, at para. 130.

¹⁰⁴ *Dobbie v. Arctic Glacier Income Fund*, [2012] O.J. No. 456, 2012 ONSC 773, at para. 53 (Ont. S.C.J.) [hereinafter “*Arctic Glacier* leave to appeal decision”].

¹⁰⁵ However, note that with respect to the decision in the *Theratechnologies* motion, *supra*, note 90, which had been released about four months earlier, the Ontario court lists the citation, but does not otherwise refer to the decision: *Green v. CIBC*, [2012] O.J. No. 3072, 2012 ONSC 3637 at para. 351 (Ont. S.C.J.), *var*d [2014] O.J. No. 419 (Ont. C.A.), *affd* [2015] S.C.J. No. 60, [2015] 3 S.C.R. 801 (S.C.C.) [hereinafter “*CIBC* (motion)”]. The motion decision in *Theratechnologies* was not referred to at all in the next leave decision: *Gould v. Western Coal Corp.*, [2012] O.J. No. 4291, 2012 ONSC 5184 (Ont. S.C.J.) [hereinafter “*Western Coal*”].

¹⁰⁶ *CIBC* (motion), *id.*, at para. 360.

¹⁰⁷ *Round*, *supra*, note 90 (appeal dismissed with no comment on the definition of the leave threshold).

In *CIBC*, Strathy J. observed that this analysis was “entirely *obiter*”,¹⁰⁸ and while he agreed that the test set a higher bar than “vexatious”, he opted for what he described as the “relatively low threshold” of the Ontario precedents (*IMAX* and *Arctic Glacier*).¹⁰⁹ Having earlier adopted the conclusion of the motion judge in *IMAX* that “the general interpretive principle to be applied to the statutory leave test ... [is] that the legislation is remedial and ... should be interpreted to facilitate access to the courts by shareholders with legitimate claims”,¹¹⁰ he explained his conclusion as follows:

... [The leave requirement] is meant to screen out cases that, even though possibly brought in good faith, are so weak that they cannot possibly succeed. It is not meant to deprive *bona fide* litigants, with a difficult but not impossible case, from having their day in court. This interpretation is also consistent with the philosophy of our legal system that contentious issues of fact and law are generally decided after a full hearing on the merits.

.....

... It seems to me that I should simply ask myself whether, having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs’ case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success.¹¹¹

On that test, Strathy J. would have granted leave to proceed but for a limitations bar.¹¹² Notably, the focus of his conclusion was not the set of principles — compensation, deterrence, public issuer rights — which had animated the pre-legislation debate, but rather the more practical issue of the appropriate exercise of the motion judge’s powers on a limited record.

Justice Strathy repeated that test — “so weak, or ... so successfully rebutted by the defendant, that it has no reasonable prospect of success” —

¹⁰⁸ *CIBC* (motion), *supra*, note 105, at para. 369.

¹⁰⁹ *Id.*, at para. 361.

¹¹⁰ *Id.*, at para. 352.

¹¹¹ *Id.*, at paras. 369, 373-374. Justice Strathy reached that conclusion having noted that his decision appeared to be the first one outside of Quebec in which “the rubber may really hit the road in the application of the leave test”, as the *IMAX* and *Arctic Glacier* defendants had made, in his view, relevant admissions, and the *Round* plaintiff “had no cause of action in any event”: *id.*, at para. 373.

¹¹² *Id.*, at paras. 472-473: “... I would have granted leave to pursue [certain allegations] ... [but] ... I have concluded, with considerable regret, that the plaintiffs’ claim is time-barred ...”.

in the next leave decision, *Gould v. Western Coal*.¹¹³ There, the investor's motion was dismissed, as Strathy J. found, on the record before him, that the proposed OSA case was "based purely on speculation or suspicion rather than evidence", in the words of *Silver v. IMAX*.¹¹⁴

In 2013, there were only two leave decisions in Ontario.¹¹⁵ In both cases, the court expressed reservations about the low bar set in the earlier decisions, but the motion judges addressed their concerns in a different manner. In *Dugal v. Manulife* (July 2013),¹¹⁶ Belobaba J. made clear that he preferred the *obiter dicta* in *Round*, which he felt properly reflected the "more demanding" OLRC standard,¹¹⁷ but concluded that he was constrained, in part, by the earlier decisions, including *CIBC*:¹¹⁸

Although I would very much prefer to treat the s. 138.8 hurdle as more than just a speed bump, I fear that the battle may be lost.¹¹⁹

He decided to grant leave, and carefully stated that he found that the moving investor met "both the relaxed Ontario approach and the more demanding B.C./OLRC approach".¹²⁰

In the next leave decision, *Kinross Gold* (November 2013),¹²¹ Perell J. surveyed the preceding "limbo dance of case law" regarding the leave test.

¹¹³ *Western Coal*, *supra*, note 105, at para. 106.

¹¹⁴ *Id.*, at para. 262.

¹¹⁵ The Quebec Court of Appeal released its decision in *Theratechnologies* (in French) on July 17, 2013, but neither of the two Ontario decisions released thereafter in 2013 refer to it — *Dugal v. Manulife* on July 25, 2013, and *Kinross Gold* on November 5, 2013 (the motion judge in *Kinross Gold* lists the citation for the 2012 motion decision [not the 2013 appeal decision] in *Theratechnologies*, but does not otherwise refer to it). The QCCA decision was also not referred to in any of the five leave to proceed decisions (two leave motions and three appeal decisions, all in Ontario) released in 2014. Similarly, in 2013, neither motion judge in *Dugal v. Manulife* or *Kinross Gold* referred to the then recent decision of the Ontario Court of Appeal in *1654776 Ontario Ltd. v. Stewart*, [2013] O.J. No. 1362, 2013 ONCA 184 (Ont. C.A.) in which Juriansz J.A. emphasized (although not in the context of a s. 138.8 motion) that the purpose of Part XXIII.1 was deterrence, not "solely the private interests of an aggrieved investor" (at para. 116), leave refused [2013] S.C.C.A. No. 225 (S.C.C.).

¹¹⁶ *Dugal v. Manulife Financial Corp.*, [2013] O.J. No. 3455, 2013 ONSC 4083 (Ont. S.C.J.), leave to appeal refused [2014] O.J. No. 981, 2014 ONSC 1347 (Ont. Div. Ct.) [hereinafter "*Dugal v. Manulife*"]. Leave to appeal was refused on March 3, 2014 on the question of the definition of the threshold (at paras. 10, 62) because the Court of Appeal had in the interim (February 3, 2014) affirmed the "relatively low threshold" concept, in *Green v. CIBC*, [2014] O.J. No. 419, 2014 ONCA 90, at para. 90 (Ont. C.A.) [hereinafter "*CIBC CA*"].

¹¹⁷ *Dugal v. Manulife*, *id.*, at paras. 40, 69.

¹¹⁸ *Supra*, note 116, at paras. 36-41.

¹¹⁹ *Id.*, at para. 41.

¹²⁰ *Id.*, at para. 41.

¹²¹ *Bayens v. Kinross Gold Corp.*, [2013] O.J. No. 5071, 2013 ONSC 6864 (Ont. S.C.J.), aff'd [2014] O.J. No. 6070, 2014 ONCA 901 (Ont. C.A.) [hereinafter "*Kinross Gold*"].

He assessed the judicial debate in light of the antecedent legislative policy studies, observing that “understanding the genesis of the policy behind the leave test is important to *interpreting* and *applying* the test”.¹²² (His distinction between these conceptions is discussed below.) Justice Perell’s focus in looking back was not particularly on the compensation/deterrence discussion in the earlier studies, but rather on the “need to protect defendants from coercive litigation”¹²³ and “the reality that it might be the long-term shareholders who would pay the price” in any award to a class of former shareholders.¹²⁴ In that light, it is perhaps not surprising that after surveying the same case law as Belobaba J. in *Manulife*, Perell J. concluded in *Kinross Gold* that “I do not think that the debate about the measure of the height for the bar for the test of leave is over”.¹²⁵

Justice Perell had to concede, with respect to “*interpreting*” the leave test, that the case law to that date had placed a “very low evidentiary burden on the moving party”.¹²⁶ However, when it came to “*applying*” the leave test, he did not feel that it needed to be “a mere road bump”. Rather, he was encouraged that Strathy J. had given “some teeth and bite” to, and had employed “some rigour” in applying, the leave test, in *CIBC* and in *Western Coal*, respectively.¹²⁷ Justice Perell held that despite the accepted definition of the test, it was, “nevertheless, a genuine screening mechanism” because the court had the power to “assess and weigh the evidence”, even though “there has been no discovery and ... the analysis [was] conducted on a paper record with all its attendant limitations”.¹²⁸ He concluded, using language from *CV Technologies*, that section 138.8:

... was enacted to protect defendants from coercive litigation and to reduce their exposure to costly proceedings, and, thus, it is necessary, fair, and just that the court have the ability to weigh the evidence of both parties within the constraints of a low bar evidentiary merits-based test.¹²⁹

¹²² *Id.*, at para. 19 (emphasis added).

¹²³ *Id.*, at paras. 26, 55.

¹²⁴ *Id.*, at para. 21.

¹²⁵ *Id.*, at paras. 38-39, 34.

¹²⁶ *Id.*, at para. 47.

¹²⁷ *Id.*, at paras. 32, 35.

¹²⁸ *Id.*, at paras. 27, 41, 46-51.

¹²⁹ *Id.*, at para. 55. Justice Perell refers to “Part XXIII.1” earlier in this sentence, but given that he is addressing the evidentiary test for the leave threshold, and that he uses the specific phrasing from the *CV Technologies* quotation cited at para. 26 of his decision, it seems clear that he was referencing section 138.8 itself in this passage.

He denied leave to proceed, concluding that “the action was launched with nothing more than speculation and suspicion that only a culpable explanation could rationalize the evaporation of billions of dollars of goodwill”.¹³⁰

In 2014, Ontario courts released two leave decisions and three appeal decisions, but the debate over the height of the bar (and also its application) did not advance. In *CIBC*, the Court of Appeal confirmed the “relatively low threshold” standard with little more comment (“... beyond that, it is not necessary, in my view, to try to further qualify the test”).¹³¹ The “low” or “very low” threshold merits test was thereafter employed in *Celestica* (leave to proceed granted, in part),¹³² in the leave to appeal decision in *Manulife*,¹³³ and in *Canadian Solar* (leave to proceed granted, in part).¹³⁴ Finally, in the last leave decision (on appeal) before the Supreme Court released *Theratechnologies*, in *Kinross Gold*, the Ontario Court of Appeal again affirmed the “relatively low threshold, merits-based test”. However, it combined that ruling with the procedural direction that motion judges were indeed empowered to undertake “some weighing of the evidence, the drawing of appropriate inferences, and the finding of facts established by the record”; otherwise, in the Court of Appeal’s view, “the leave requirement would be hollow indeed”.¹³⁵

There was almost exactly five years between the release of the first leave decision, in *IMAX* in December 2009, and the Court of Appeal’s decision in *Kinross Gold* in December 2014. It is apparent, in summarizing this body of law, that courts settled on the formulation of a “relatively low threshold” without taking up, in a vigorous fashion, the principled debate which preceded the creation of Part XXIII.1, and in particular section 138.8. Rather, the “gatekeeper” purpose of the leave

¹³⁰ *Id.*, at paras. 162-164, 180, 205.

¹³¹ *CIBC CA*, *supra*, note 116, at para. 90 (Feldman J.A., for the court). Interestingly, at paras. 35-41, the court did review the deterrence and compensation (access to justice) principles underlying the section 138.3 cause of action (and observed that the s. 138.8 threshold was enacted as a screening mechanism to ward off strike suits) during its consideration of the limitation period defence, but did not return to those underlying principles when the court considered the meaning of the leave test.

¹³² *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, [2014] O.J. No. 744, 2014 ONSC 1057 at paras. 121-122, 135-136, 145, 149 (Ont. S.C.J.).

¹³³ *Dugal v. Manulife Financial Corp.*, [2014] O.J. No. 981, 2014 ONSC 1347, at paras. 10-12, 27, 37 (Ont. Div. Ct.) (OSA motion).

¹³⁴ *Abdula v. Canadian Solar Inc.*, [2014] O.J. No. 4163, 2014 ONSC 5167, at paras. 37-38 (Ont. S.C.J.), leave to appeal refused [2015] O.J. No. 3568, 2015 ONSC 4322 (Ont. S.C.J.).

¹³⁵ *Musicians’ Pension Fund of Canada (Trustees of) v. Kinross Gold Corp.*, [2014] O.J. No. 6070, 2014 ONCA 901, at paras. 49-50, 54-56 (Ont. C.A.), affg [2013] O.J. No. 5071 (Ont. S.C.J.).

test was given some force and effect by motion judges' practical exercise of their power to subject the evidentiary record to close critical scrutiny. They thereby gave a measure of protection from "unmeritorious litigation" to public issuers and their long-term shareholders where warranted. In that way, the principle of deterrence through private enforcement was given precedence over a purely compensatory regime, and rights of public issuer defendants were recognized within the remedial Part XXIII.1.

When the issue finally reached the Supreme Court, both the interpretation of the threshold, and its application by the lower courts, would be reconsidered. Although the litigation results of the Supreme Court's decisions are consistent with the interpretation of the legislative history advanced in this article and in particular the primarily deterrent nature of Part XXIII.1, the reasoning the Court employed is not, and is anchored in the more superficial gatekeeper concept rather than the extensive and nuanced policy debate.

IV. THE SUPREME COURT DECISIONS IN 2015

1. *Theratechnologies*

The decision in *Theratechnologies* is primarily important in establishing the threshold for leave to proceed in Quebec securities class actions (which became the national threshold in the *CIBC* Trilogy), but the Supreme Court's ruling is also notable for its approach to the philosophy of the legislative amendments, and the standard of appellate review.

The facts were as follows. The issuer, *Theratechnologies*, applied to the United States Food and Drug Administration ("FDA") for approval of a new drug. While its FDA application was underway, *Theratechnologies* frequently updated its shareholders about new developments in the FDA approval process and in the ongoing clinical trials for the drug. As was standard practice, the FDA referred questions about the drug's safety to an expert Advisory Committee, and provided *Theratechnologies* with briefing materials it had prepared for this purpose. *Theratechnologies* did not issue a material change report upon receipt of these materials, since they contained no new information about the clinical trials which it had not already disclosed to its shareholders. Further, neither the briefing materials nor the FDA's questions for the Advisory Committee departed

in any way from the FDA's standard process for new drug approvals. Nevertheless, when the FDA published the briefing materials on its website two weeks later, Theratechnologies' share price dropped by 58 per cent.

Though the share price recovered within three days — when the Advisory Committee voted in favour of approving the drug — the plaintiff, a holding company, had sold its shares at a loss in the interim. It brought a putative class action against Theratechnologies and two of its directors and officers, alleging that they failed to make timely disclosure of the material change constituted by the FDA's briefing materials.

At first instance before the Quebec Superior Court,¹³⁶ the motion judge granted the plaintiff both authorization to proceed as a class action article 1003 of the old Quebec *Code of Civil Procedure* ("CCP")¹³⁷ (the equivalent of certification under the class proceedings legislation of the common law provinces), and authorization to bring a secondary market claim under section 225.4 of the Quebec *Securities Act* (the functional equivalent of leave to proceed under the common law securities legislation).¹³⁸

In granting authorization under section 225.4, the motion judge accepted that the leave to proceed test imposed a higher threshold than under article 1003 CCP, but found there was sufficient evidence in the record to conclude that the action had a reasonable possibility of success. The company appealed to the Quebec Court of Appeal.

¹³⁶ *Theratechnologies motion, supra*, note 90.

¹³⁷ Art. 1003 CCP provided:

1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

- (a) the recourses of the members raise identical, similar or related questions of law or fact;
- (b) the facts alleged seem to justify the conclusions sought;
- (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
- (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

This statute has since been replaced with the *Code of Civil Procedure*, CQLR c. C-25.01, which contains a similar authorization provision in art. 575.

¹³⁸ CQLR c. V-1.1, s. 225.4: "No action for damages may be brought under this division without authorization of the court. ... The court grants authorization if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff."

Because the CCP at the time precluded appeals from a decision to authorize a class action,¹³⁹ the sole issue for the Court of Appeal was whether the motion judge erred in granting authorization to bring a secondary market claim under section 225.4 of the Quebec *Securities Act*. In reasons written by Gascon J.A. before his elevation to the Supreme Court, the Quebec Court of Appeal affirmed that decision.¹⁴⁰ As with the motion judge, Gascon J.A. held the authorization test under section 225.4 is more stringent than under article 1003 CCP, but found there was sufficient evidence to provide a reasonable possibility of success at trial.

In doing so, Gascon J.A. appears to have set the test at the low level the Ontario courts established,¹⁴¹ or perhaps even lower: despite referring to the provision as a “serious screening mechanism”,¹⁴² he ultimately stated that a case should proceed unless it is “weak and tenuous to the point that it can be considered a strike suit, without apparent merit, and abusive to the point that it is futile and destined to fail”.¹⁴³ Further, Gascon J.A. describes the motion judge’s role in a manner that seems more restricted than in Ontario: “I disagree with the appellants’ assertion that, at this stage, the Court must conduct a complete and in-depth analysis of the evidence as adduced, including the proposed grounds of defence”, noting that the “particularly substantial analyses” undertaken in certain Ontario cases stemmed from the provisions in the OSA regarding the filing of affidavits and the cross-examination of affiants in contrast to the process for the authorization of class actions in Quebec.¹⁴⁴

¹³⁹ Pursuant to art. 1010 CCP. Under art. 578 of the new *Code of Civil Procedure*, CQLR c. C-25.01, a decision to authorize a class action may now be appealed with leave.

¹⁴⁰ *Theratechnologies motion*, *supra*, note 90. All quotations are from the reported English translation of the Court of Appeal’s decision.

¹⁴¹ Contrary to the discussion earlier in this paper of the apparent differences of opinion between the Ontario and British Columbia precedents, Gascon J.A. did not see any conflict in those cases. He cited the passage, *supra*, note 98, from *CV Technologies*, and found that the *IMAX* motion judge viewed “the existence of the screening mechanisms the same way” (at paras. 90-91), and after citing comments in *IMAX*, *Arctic Glacier* and *CIBC* (motion) as to the “tenor of the burden” required at the leave to proceed stage, he indicated the *Round* ruling was “to the same effect” (at paras. 111-116).

¹⁴² *121851 Canada inc. c. Theratechnologies inc.*, *supra*, note 90, at para. 109 [hereinafter “*Theratechnologies CA*”].

¹⁴³ *Id.*, at para. 173, and see para. 124. The language at para. 118 arguably places the threshold higher: “That screening mechanism therefore is not aimed solely at preventing recourse that appears frivolous or unmeritorious. It also tends to prevent recourse that, ultimately, has no reasonable chance of success.”

¹⁴⁴ *Id.*, at paras. 123, 125-126.

The Supreme Court of Canada reversed both lower court decisions.¹⁴⁵ The Court's unanimous reasons were written by Abella J., on behalf of a seven-member panel which included only one jurist from Quebec, Wagner J.¹⁴⁶ Delivered quickly, and written concisely, the Supreme Court's reasons reviewed little of the policy and legislative history described in this article.¹⁴⁷

Noticeably absent from the Court's decision is any discussion of the primarily deterrent rather than compensatory nature of the statutory civil liability regime discussed above. While Abella J. noted that the provisions had their genesis in the 1997 Final Report of the Allen Committee, she described the new legislation as the culmination of "Canada-wide efforts to develop a more meaningful and accessible form of recourse for investors".¹⁴⁸ For the *Theratechnologies* Court, the introduction of statutory liability for secondary market disclosure was a response to the inadequate remedies that existed for investors at common law and under the Quebec *Civil Code of Quebec*,¹⁴⁹ given the attendant difficulties of proving reliance, or a causal link between fault and prejudice.¹⁵⁰ There is no apparent recognition of the fact that the true goal of the new legislation was not to create a fully compensatory "reliance-free" right of action, analogous to that developed under the Securities and Exchange Commission's Rule 10b-5 in the United States, but rather to impose only a limited threat of civil liability, designed to act as incentive to good corporate disclosure practices. In the Supreme Court's words, the Allen Committee simply "recommended the creation of a statutory civil liability regime that would *help investors sue*".¹⁵¹

¹⁴⁵ *Theratechnologies*, *supra*, note 2.

¹⁴⁶ Justice Gascon, who joined the Supreme Court approximately six months before the *Theratechnologies* appeal date, was obviously precluded from sitting on the appeal given his participation in the Court of Appeal decision. As one other Justice needed to be excused, the choice of one of the other two Quebec jurists, Côté J., is presumably due to the fact that her first day at the Supreme Court coincided with the same day the *Theratechnologies* appeal was heard, December 1, 2014.

¹⁴⁷ Of interest is the fact that the Supreme Court refused leave to intervene on the *Theratechnologies* appeal to several parties that would have been expected to add depth to the discussion of the leave test: the Canadian Chamber of Commerce, United Senior Citizens of Ontario Inc., Canadian Foundation for Advancement of Investor Rights, Shareholders Association for Research and Education: Order of August 14, 2014. Only a provincial shareholders' group, Mouvement d'Éducation et de défense des Actionnaires, was granted leave to participate. In contrast, in the *CIBC* Trilogy, the Supreme Court granted leave to intervene to four parties.

¹⁴⁸ *Theratechnologies*, *supra*, note 2, at para. 27.

¹⁴⁹ C.C.L.R., c. CCQ-1991.

¹⁵⁰ *Theratechnologies*, *supra*, note 2, at paras. 27-28.

¹⁵¹ *Id.*, at para. 29 (emphasis added). While the Court also recognized that "[t]he Allen Committee concluded that the 'current sanctions and funding available to regulators ... are inadequate'",

Perhaps not surprisingly given this backdrop, Abella J. followed the Court of Appeal in characterizing the authorization/leave test as a barrier to “prevent[ing] unmeritorious litigation and strike suits”.¹⁵² With reference to the statements in the CSA’s 2000 Draft Legislation that the judicial screening mechanism was designed to avoid spurious claims,¹⁵³ Abella J. found that the authorization requirement in section 225.4 was enacted only “so that costly strike suits and unmeritorious claims would be prevented”.¹⁵⁴ The Court did not discuss the possibility that the leave test may also be seen to reflect the larger deterrent purpose of the legislation by ensuring that the compensatory potential of the civil liability right did not become so great as to displace the intended legislative balance.¹⁵⁵

Instead, Abella J. focused her discussion on the point that the leave to proceed test under section 255.4 created a higher standard than the class actions authorization requirement in article 1003 CCP.¹⁵⁶ Curiously, Abella J. made no comment here about the fact that the judicial screening mechanism proposed by the CSA — which ultimately became section 225.4 — was taken from the OLRC *Report on Class Actions*. As well, her discussion of whether the section 255.4 threshold was intended to be higher than that in article 1003 takes place without reference to the previous decision of the Supreme Court of Canada in *Hollick v. Toronto (City)*, where McLachlin C.J.C. (also a member of the *Theratechnologies* panel) addressed a similar issue:

In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a “preliminary merits test” as part of the certification requirements. *The proposed test would have required the putative class representative to show that “there is a reasonable possibility that material questions of fact and law common*

which suggests some aspect of deterrence, it then immediately returned to the compensatory theme of its legislative history exegesis, noting that the Allen Committee also concluded “the remedies available to investors in secondary trading markets who are injured by misleading disclosure are so difficult to pursue that they are, as a practical matter, largely hypothetical”, followed by the statement about “help[ing] investors sue” quoted above.

¹⁵² *Id.*, at para. 34.

¹⁵³ *Id.*, at para. 30.

¹⁵⁴ *Id.*, at para. 36.

¹⁵⁵ While Abella J. did speak of the leave to proceed test as the manifestation of a “legislative objective of a robust deterrent screening mechanism” (*id.*, at para. 38), the deterrence she envisions here is in relation to unmeritorious litigation by short-term investors, not inadequate continuous disclosure by issuers.

¹⁵⁶ *Id.*, at paras. 4 and 35.

to the class will be resolved at trial in favour of the class”: *Report on Class Actions, supra*, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, *Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim “disclos[e] a cause of action”*: see *Class Proceedings Act, 1992*, s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act, 1992*, s. 5(5).¹⁵⁷

It is unfortunate that the Court in *Theratechnologies* did not acknowledge the provenance of the authorization test in the recommendations of the OLCRC. As discussed previously, the OLCRC’s report contrasted the proposed merits test with several other preliminary motions, such as summary judgment, motions to strike and interlocutory injunctions. That Abella J. did not refer to any of this history — together with other possible analogies to the authorization test, like the statutory requirement for leave when bringing a derivative action — creates the impression that the Supreme Court did not consider the issue in as much depth as it could have. Indeed, the Court characterized the ongoing debate in the lower courts as to both the definition and the application of the test as “some discussion ... about what the threshold is”,¹⁵⁸ which, in our view, seems unduly dismissive.

In any event, the threshold the Court adopted for section 255.4 is perhaps surprising in light of the focus given to the purpose of the legislation by Abella J. (“a statutory civil liability regime that would help investors sue”),¹⁵⁹ and the reticence of the Court of Appeal regarding the scrutiny to be given the evidentiary record. Justice Abella affirmed that “[c]ourts are given an important gatekeeping role”,¹⁶⁰ and articulated the following test, and role, for motion judges:

In my view, as Belobaba J. suggested in *Ironworkers*, the threshold should be more than a “speed bump” ... and the courts must undertake a reasoned consideration of the evidence to ensure that the action has some merit. In other words, to promote the legislative objective of a robust deterrent screening mechanism so that cases without merit are prevented from proceeding, the threshold requires that there be a reasonable or realistic chance that the action will succeed.

¹⁵⁷ *Hollick v. Toronto (City)*, *supra*, note 62, at para. 16 (emphasis added).

¹⁵⁸ *Theratechnologies*, *supra*, note 2, at para. 37.

¹⁵⁹ *Id.*, at para. 29.

¹⁶⁰ *Id.*, at para. 36.

A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success — and the time and expense they impose — are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What *is* required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour.¹⁶¹

Requiring plaintiffs to show “both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim” strikes an appropriate balance between the compensatory interests of short-term investors, and the concern that issuers and their long-term shareholders not be exposed to ill-conceived, expensive and time-consuming litigation.¹⁶² The passage also addresses the evidentiary burden on the investor, and the analytical role of the court. The threshold on which the *Theratechnologies* Court settled thus facilitates the larger statutory purpose. It ensures that the civil liability regime will function as a regulatory deterrent rather than as a full compensatory model as in the United States. And it does so despite the fact that the *sole* purpose put forward by the Court for the judicial screening mechanism (“to prevent costly strike suits and litigation with little chance of success”) does not fully reflect the overall deterrence objective.

The final point of interest is the lack of deference the Supreme Court showed to both levels of court below when applying this test to the facts. Justice Abella ultimately concluded that “the evidence does not credibly point to a material change that could have triggered timely disclosure obligations”,¹⁶³ because the FDA briefing materials did not contain any

¹⁶¹ *Id.*, at paras. 38-39 (emphasis in original).

¹⁶² On this point, the Court is clear that not only “costly strike suits”, but also any other “litigation with little chance of success” should be barred.

¹⁶³ *Id.*, at para. 56.

new information about the drug's clinical trials that Theratechnologies had not already disclosed, nor reveal any special departure from the FDA's ordinary processes.¹⁶⁴ It is remarkable that the Supreme Court overturned concurrent findings of mixed fact and law by two lower courts without any analysis of the appropriate standard of review. As Gonthier J. stated in *St-Jean v. Mercier*:

... [W]here there are *concurrent* findings of fact at the lower courts, this Court will be hesitant to intervene and disturb findings of fact. This Court has already said in *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, at p. 574, that the principle of non-intervention "is all the stronger in the face of *concurrent* findings of both courts below" ...¹⁶⁵

Both the Court of Appeal and motion judge in *Theratechnologies* found that there was sufficient evidence to disclose a reasonable possibility of success at trial. This of course does not preclude the Supreme Court from reaching a different conclusion, but it at least suggests the Court should be cautious before doing so. Nevertheless, Abella J. does not explain whether the standard of review was correctness or, if not, how the courts below made a palpable and overriding error of fact. There was certainly no extricable legal error identified.¹⁶⁶

The Court's approach here stands in sharp contrast to the one it had taken only one year earlier in *Hryniak v. Mauldin*, where in the comparable context of an appeal from a summary judgment motion, Karakatsanis J. stated:

In my view, absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. *When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error*

¹⁶⁴ *Id.*, at paras. 41-54.

¹⁶⁵ [2002] S.C.J. No. 17, [2002] 1 S.C.R. 491, at para. 45 (S.C.C.), affg [1999] J.Q. no 2584 (Que. C.A.) (emphasis in original). The principle of enhanced deference to concurrent findings of fact has a venerable history at the Court: beginning with (at least) *D'Avignon v. Jones*, [1902] S.C.J. No. 60, 32 S.C.R. 650 (S.C.C.), affg [1902] Y.J. No. 6 (B.C.S.C.), and continuing to recent decades: *Ontario (Attorney General) v. Bear Island Foundation*, [1991] S.C.J. No. 61, [1991] 2 S.C.R. 570 (S.C.C.), affg [1989] O.J. No. 267 (Ont. C.A.); *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] S.C.J. No. 111, [1996] 3 S.C.R. 727 (S.C.C.), revg [1994] B.C.J. No. 2581 (B.C.C.A.).

¹⁶⁶ *Theratechnologies*, *supra*, note 2, at paras. 4, 34-35 and 39.

in principle, findings of mixed fact and law should not be overturned absent palpable and overriding error: Housen v. Nikolaisen, [2002] 2 S.C.R. 235, at para. 36.¹⁶⁷

Similarly, in the context of appeals from certification decisions, the Court two years previously held in *AIC Ltd. v. Fischer* that “a decision by a certification judge is entitled to substantial deference”.¹⁶⁸ Why there should be a different approach in the context of the section 255.4 authorization process — which surpasses certification and comes much closer to summary judgment in its intensity of factual review — is not apparent. Indeed, it is even more curious that the Court in *Theratechnologies* did not explain its approach to the standard of review, given the deferential treatment it gave to the findings of fact made by the motion judge on the leave test in *CIBC*, discussed below.¹⁶⁹

2. The *CIBC* Trilogy

On February 9, 2015, with the *Theratechnologies* decision under reserve, the Supreme Court heard argument in the three appeals which had been decided together at the Court of Appeal: *IMAX*, *Celestica*, and *CIBC* (collectively, the *CIBC* Trilogy). Unlike *Theratechnologies*, the Court kept its decision in the *CIBC* Trilogy on reserve for nearly a full year. The result is a much deeper, but more sharply divided, examination of the policy goals which animated the new legislation.

The decision is difficult to read, in part because of the complicated set of issues it tackles. All three cases raised the issue of the limitation period in Part XXIII.1 of the OSA, while the *CIBC* case alone also required decisions from the Supreme Court on the meaning of the leave

¹⁶⁷ *Hryniak v. Mauldin*, *supra*, note 55, at para. 81 (emphasis added).

¹⁶⁸ [2013] S.C.J. No. 69, [2013] 3 S.C.R. 949, at para. 65 (S.C.C.) (emphasis added) [hereinafter “*AIC v. Fischer*”]. See also: *ProSys Consultants Ltd. v. Microsoft Corp.*, [2013] S.C.J. No. 57, [2013] 3 S.C.R. 477, at paras. 111 and 126 (S.C.C.), revg [2011] B.C.J. No. 688 (B.C.C.A.) [hereinafter “*Microsoft*”]; *Vivendi Canada Inc. v. Dell’Aniello*, [2014] S.C.J. No. 1, [2014] 1 S.C.R. 3, at para. 34 (S.C.C.), affg [2012] J.Q. no 1611 (Que. C.A.) [hereinafter “*Vivendi*”]; Cf. *Infineon Technologies AG v. Option consommateurs*, [2013] S.C.J. No. 59, [2013] 3 S.C.R. 600, at para. 40 [hereinafter “*Infineon*”].

¹⁶⁹ One may speculate that this had something to do with the fact that the share price in *Theratechnologies* rebounded so shortly after the FDA’s public disclosure — as in the Court’s earlier material change decision in *Kerr v. Danier Leather Inc.*, [2007] S.C.J. No. 44, [2007] 3 S.C.R. 331 (S.C.C.), affg [2005] O.J. No. 5388 (Ont. C.A.). Courts seem unlikely to strain to facilitate opportunistic claims by short-term investors where there is no harm to long-term shareholders from the alleged failure in disclosure.

test, its application to the facts of that case, and the question of whether to certify the pleaded common law misrepresentation cause of action alongside the proposed statutory claim.

By way of background as to the limitation period, section 138.8(1) of the OSA provides that “[n]o action may be commenced” under Part XXIII.1 until a court has granted leave. At the time the three claims were issued, section 138.14 provided that “[n]o action shall be commenced” under Part XXIII.1 if either three years had elapsed since the release or making of the impugned document or public oral statement or the failure to make timely disclosure.¹⁷⁰

This created an obvious difficulty for investors. If the statutory action could not be “commenced” until leave was granted under section 138.8, then it appeared that a plaintiff would be statute-barred by section 138.14 unless the proposed representative plaintiff brought, and won, their leave to proceed motion within three years after the misrepresentation occurred.¹⁷¹ The Ontario Court of Appeal confirmed this interpretation in *Sharma v. Timminco Ltd.*,¹⁷² where it held that the limitation period in section 138.14 was not suspended (by section 28 of the *Ontario Class Proceedings Act, 1992*)¹⁷³ simply because the plaintiff issued a common law proposed class action, and pleaded *an intention to* commence an action under section 138.8 upon the granting of leave.¹⁷⁴

(a) *The Motion Decisions*

Immediately following the decision in *Timminco*, the limitation period was considered by Ontario motion judges in 2012 in each of *IMAX*,

¹⁷⁰ The limitation period also expired, although it was not relevant in any of the three cases, under sections 138.14(1)(a)(ii), (b)(ii) and (c)(ii) if six months had elapsed since the issuance of a news release disclosing that leave had been granted under section 138.8, or its equivalent in other provinces.

¹⁷¹ OSA, *supra*, note 3, s. 138.14(1)(a)(i), (b)(i) and (c)(i).

¹⁷² [2012] O.J. No. 719, 2012 ONCA 107 (Ont. C.A.), leave to appeal refused [2012] S.C.C.A. No. 157 [hereinafter “*Sharma v. Timminco*”].

¹⁷³ Section 28 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [hereinafter “CPA”], provides that, on certain terms, “any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding”.

¹⁷⁴ *Sharma v. Timminco*, *supra*, note 172, at para. 18:

Without leave having been granted, a s. 138.3 cause of action cannot be enforced. It cannot be invoked as a legal right. Section 138.14 says as much. Thus, giving the suspension provision in s. 28(1) of the CPA its ordinary meaning, the s. 138.3 cause of action cannot be said to be asserted in the respondent’s class proceeding since no leave has been granted.

Celestica and *CIBC*. In each case, leave had not yet been granted by the date the limitation period expired. In each case, the Justices were very concerned about the perceived unfairness of the *Timminco* ruling to plaintiffs:

- (1) In the first action — *CIBC*¹⁷⁵ — Strathy J. heard the leave and certification motion, which was filed before but argued after, the expiry of the limitation period. He concluded that the plaintiff had justified leave under section 138.8 and certification of the statutory (but not the common law) cause of action as a class action. However, in light of *Timminco*, and because he found that he had no jurisdiction to grant leave *nunc pro tunc*, he dismissed the plaintiff's motion.
- (2) In the second action — *IMAX*¹⁷⁶ — van Rensburg J. had previously granted leave to that plaintiff, on a motion filed and heard before, but not decided until after, the expiry of the limitation period. She exercised the *nunc pro tunc* power to dismiss the statute bar motion of the defendants.¹⁷⁷
- (3) Similarly, in the third action — *Celestica*¹⁷⁸ — Perell J. dismissed the statute bar motion of the defendants, which was brought before the leave motion was heard, and after the limitation period had expired. He found that the doctrine of special circumstances could be applied to later grant leave to proceed *nunc pro tunc* if such a motion were otherwise successful.

(b) *The Court of Appeal Decision*

All three decisions were appealed, and heard together by the Ontario Court of Appeal, which, cognizant of its earlier decision in *Timminco*, convened a five-judge panel to decide an appropriate response. In a unanimous decision written by Feldman J.A., the court concluded that *Timminco* should not be followed on the limitations issue, and that

¹⁷⁵ *CIBC* motion, *supra*, note 105.

¹⁷⁶ [2012] O.J. No. 4002, 2012 ONSC 4881 (Ont. S.C.J.), affd [2014] O.J. No. 419, 2014 ONCA 90 (Ont. C.A.), affd [2015] S.C.J. No. 60, [2015] 3 S.C.R. 801 (S.C.C.).

¹⁷⁷ More precisely, in *IMAX*, after leave had been granted, the defendants sought summary judgment on the limitation period based on the intervening decision in *Timminco*, and the plaintiffs brought a cross-motion to amend their statement of claim to plead the statutory action *nunc pro tunc*.

¹⁷⁸ [2012] O.J. No. 5083, 2012 ONSC 6083 (Ont. S.C.J.), affd [2014] O.J. No. 419, 2014 ONCA 90 (Ont. C.A.), revd [2015] S.C.J. No. 60, [2015] 3 S.C.R. 801 (S.C.C.).

section 28 of the Ontario CPA did operate to suspend the limitation period in section 138.14 of the OSA once the plaintiff filed a statement of claim pleading a common law claim and an intention to seek leave to proceed with a statutory claim.¹⁷⁹ The court believed that this reading of the legislation accorded with the “twin goals of the new statutory cause of action ... to facilitate access to justice for investors and to deter corporate misconduct”,¹⁸⁰ thus apparently inverting the deterrence-compensation paradigm the Allen Committee and CSA had adopted.

As to the issues central to this article, the Court of Appeal upheld Strathy J.’s conclusion in *CIBC* that the leave test was satisfied, and briefly (as noted earlier) endorsed the threshold he had articulated: “whether, having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs’ case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success”.¹⁸¹

However, Feldman J.A. rejected Strathy J.’s further conclusion that the common law claim for negligent misrepresentation could not be certified, because reliance could not be a common issue. In her view, several of the other elements of the common law claim *could* still be certified as common issues, and they would significantly advance the claim to the point that a class action was the preferable procedure for a negligent misrepresentation cause of action, the individual reliance issue notwithstanding.¹⁸²

(c) *The Supreme Court Decision*

At the Supreme Court, the seven-judge panel delivered three sets of reasons that formed a shifting majority on the limitation period issue,

¹⁷⁹ Essentially, Feldman J.A. held that an investor who filed a pleading which stated an intention to seek leave under the OSA was “asserting” a claim pursuant to s. 28 of the *CPA* in the sense of “invok[ing] a legal right”, and so could shelter under that provision. As for the “unusual, if not anomalous effect” that the limitation period would be suspended for a plaintiff asserting a class action under s. 138.3, but not in an individual action, “Feldman J.A. reasoned that ... this effect followed from a statutory scheme that was optimized for class proceedings”. Additionally, “Feldman J.A. also expressed concern for judicial economy, worrying that all members of a class would be required to start their own actions while waiting to see if leave would be granted in the class proceeding”: all as described in the *CIBC* Trilogy, *supra*, note 3, at para. 41.

¹⁸⁰ *Id.*, at para. 64.

¹⁸¹ *CIBC CA*, *supra*, note 121, at para. 93, revd [2015] S.C.J. No. 60, [2015] 3 S.C.R. 801 (S.C.C.).

¹⁸² *Id.*, at paras. 98-105.

which dominated the decision: (i) Côté J. wrote for herself, McLachlin C.J.C. and Rothstein J.; (ii) Karakatsanis J. wrote opposing reasons on the statute bar for herself, Moldaver and Gascon JJ.; and (iii) Cromwell J. wrote separate reasons aligned with one group or the other, depending on the case. However, the Court was unanimous on the securities class action issues.

As to the limitation period, a majority of four Justices (*per* Côté J.,¹⁸³ with Cromwell J.¹⁸⁴), ruled that the Court of Appeal was wrong to overrule *Timminco*, finding that section 28 of the CPA did not operate to suspend the section 138.14 limitation period.¹⁸⁵ In the results, in *Celestica* the appeal was allowed and the action dismissed,¹⁸⁶ while in *IMAX* and *CIBC* the appeals were dismissed and the actions allowed to continue because of the time at which the motion for leave to proceed was filed in each action.¹⁸⁷ (To close off this issue, as the Court noted in *CIBC*, the Ontario legislature amended section 138.14 shortly after the Court of Appeal decision to make clear that the limitation period is suspended on the date a notice of motion for leave under s. 138.8 is filed

¹⁸³ The *CIBC* Trilogy, *supra*, note 3, at paras. 8 and 46-83.

¹⁸⁴ *Id.*, at para. 130.

¹⁸⁵ The majority reasoned that a statutory securities class proceeding cannot be “commenced” until the s. 138.3 cause of action is “asserted”, which cannot take place until leave to proceed has been granted under s. 138.8. The other three Justices dissented and would have upheld the Court of Appeal decision: see *id.*, at paras. 160-163, 171-211 and 213.

¹⁸⁶ *Celestica*, *supra*, note 3. In *Celestica*, Côté J. and Cromwell J. agreed that the defendants’ appeal on the statute bar should be allowed, and the case dismissed: *id.*, at paras. 111-117 and 129-130. Because the leave motion had not even been filed when the limitation period had expired, there could be no suspension of the limitation period under s. 28, and there was no basis for a *nunc pro tunc* order. The other three Justices, *per* Karakatsanis J., dissented on the basis that the limitation period was suspended under s. 28: *id.*, at paras. 160-163, 171-211 and 213.

¹⁸⁷ In the *CIBC* and *IMAX* appeals, while Côté J. would have ruled for the defendants, and dismissed the *CIBC* case in full (*id.*, at paras. 84-104 and 129), and the *IMAX* case in part, Cromwell J. found otherwise. He concluded that the Court should defer to the motion judges’ decisions that it was appropriate to exercise their discretion to grant leave *nunc pro tunc* and so joined with Karakatsanis J., who had found that the s. 138.14 limitation period was suspended by s. 28 of the CPA. In the result, those two defendant appeals were dismissed. In *CIBC*, Côté J. would have allowed the appeal, as she concluded that Strathy J. committed an error in principle which deprived his *nunc pro tunc* decision of the right to deference, and that there was no reason to grant leave *nunc pro tunc*: *id.*, at paras. 105-110 and 129. In *IMAX*, Côté J. would have allowed the appeal in part, insofar as Strathy J. had permitted the plaintiffs to add several new individual defendants after the expiry of the leave period *nunc pro tunc* who were not part of the original statement of claim. (Côté J. agreed that leave should be granted *nunc pro tunc* against the parties to the original pleading, since the limitation period expired against them while the leave decision was on reserve): *id.*, at paras. 105-106, 110.

with the court.¹⁸⁸ Accordingly, the limitations issue in the *CIBC* Trilogy is unlikely to arise again, at least with respect to securities class actions brought in Ontario after the date of the amendment.¹⁸⁹)

The true legacy of the *CIBC* Trilogy arises from the other elements of the Court's decision. In the context of this article, it is notable that Côté J. (with whom Cromwell J. agreed on this point),¹⁹⁰ in explaining why section 28 of the CPA does not operate to suspend the limitation period in section 138.14, made reference to the academic and legislative history of Part XXIII.1 in recognizing that the primary goal of Part XXIII.1 of the OSA was deterrence rather than compensation. That is, looking beyond just the cause of action to the entire statutory mechanism, Côté J. found that the legislation reflects "a carefully calibrated purposive balance struck by the limits to the statutory action":¹⁹¹

... Part XXIII.1 was developed progressively through a series of reports and other documents which ultimately culminated in the adoption of the statutory liability scheme in 2002. ...

In its report, the Allen Committee identified the failure by public corporations to comply with continuous disclosure requirements as a problem from the perspective both of actual incidents and of public perception. It concluded that the regulatory sanctions available at the time were an "inadequate deterrent" (conclusion (ii)) and that the common law remedies available to aggrieved investors for misleading disclosure in secondary trading markets were so onerous that they were "as a practical matter largely academic" (conclusion (iii)): p. vii.

As a solution, the Allen Committee proposed a statutory scheme for secondary market misrepresentation liability in which it would not be necessary to prove reliance on the misrepresentation. *Its recommendations were informed by two goals — deterrence of corporate non-disclosure and*

¹⁸⁸ *Id.*, at paras. 43, 46, 168 and 185. See section 138.14(2) of the OSA. As Côté J observed, this amendment creates a different result from the Court of Appeal in *CIBC* (which suspended the limitation period when a claim was filed that pleaded the relevant facts and an intention to seek leave for a statutory cause of action under section 138.3 OSA), and also a different result from *Timminco* and the Supreme Court majority decision (which suspended the limitation period only when leave was granted under section 138.8 OSA): *id.*, at para. 46.

¹⁸⁹ As of November 15, 2016, Alberta, Manitoba, New Brunswick and Nova Scotia had passed analogous limitations amendments: *Securities Act*, R.S.A. 2000, c. S-4, s. 211.095(2); *The Securities Act*, C.C.S.M., c. S-50, s. 197, s. 197(2); *Securities Act*, S.N.B. 2004, c. S-5.5, s. 161.9(2); and *Securities Act*, R.S.N.S. 1989, c. 418, s. 146N(2).

¹⁹⁰ The *CIBC* Trilogy, *supra*, note 3, at para. 130.

¹⁹¹ *Id.*, at para. 55.

compensation for wronged investors — related to the identified problem, but it is important to recognize that the Committee knowingly struck a precise balance between these goals. Its report concluded as follows at p. vii:

(v) Faced with the task of designing recommendations from the perspective of strengthening deterrence (conclusion (ii)) or creating a route to meaningful compensation of injured investors (conclusion (iii)), the Committee has adopted improved deterrence as its goal in the belief that effective deterrence will logically reduce the need for investor compensation.

This understanding would later be reiterated in CSA Notice 53-302, which includes the following comment: “*The CSA accept that deterrence should outweigh compensation but, at the same time, any deterrent effect requires a plausible element of compensation*” (p. 7391, fn. 23). In order to achieve this balance, the Committee proposed the establishment of a series of limits on damages and liability, as well as the creation of express statutory defences. *To give priority to compensation would have led to a different set of recommendations and limits*, as can be seen from the dissenting statement of Philip Anisman in the Allen Committee Report: pp. 85-124.

.....

In sum, Part XXIII.1 OSA strikes a delicate balance between various market participants. *The interests of potential plaintiffs and defendants and of affected long-term shareholders have been weighed conscientiously and deliberately in light of a desired precise balance between deterrence and compensation.* The legislative history reveals a long, meticulous development of this balance, one that found expression in all the limits built into the scheme.¹⁹²

Thus, in contrast to the Court’s earlier decision in *Theratechnologies*, the Court in the *CIBC* Trilogy did not reduce the meaning of the statutory cause of action to a compensatory mechanism designed to “help investors sue”. Instead, the Court took a more nuanced view of the entire context of Part XXIII.1 that was informed by its full history. Justice Côté’s recognition of the primacy of deterrence will be of significance in future cases, particularly when courts must search for an organizing principle with which to examine novel interpretive questions as they arise under the legislation.

¹⁹² *Id.*, at paras. 63-65 and 69 (emphasis added).

With respect to the specific outcome in *CIBC*, the Justices were unanimous on both the definition and the application of the section 138.8 OSA threshold. However, three issues are not addressed, or not fully explained, in the Court's opinions: (i) the definition of the test for leave to proceed; (ii) the standard of appellate review concerning motion judges' application of the test; and (iii) the role of motion judges in assessing evidence.

First, as to the definition of the test, Côté J. affirmed that the *Theratechnologies* threshold also applies in the common law thereby over-ruling the motion judge and the Court of Appeal in *CIBC* on that point. She summarized the decision under appeal as follows:

Strathy J. interpreted this statutory language as establishing a relatively low threshold according to which leave will be denied only if, "having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs' case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success": para. 374. The Court of Appeal upheld this interpretation of s. 138.8(1)(b).

The defendants ... argued in this Court that the threshold articulated by Strathy J. is too low.¹⁹³

Earlier, Côté J. had foreshadowed her conclusion on this point:

[Strathy J.] ... found that the plaintiffs' statutory claim had a reasonable possibility of success, but as I will explain below, *this finding was based on the wrong threshold*.¹⁹⁴

She continued on to articulate the correct threshold:

I will address the point briefly, given the Court's recent decision in *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106.

In *Theratechnologies*, the Court was asked to interpret s. 225.4 of the *Securities Act*, CQLR, c. V-1.1 ("*QSA*"), the Quebec counterpart to s. 138.8 OSA. That section, which introduces a leave requirement for a statutory claim based on a secondary market misrepresentation in Quebec, provides that there must be a "reasonable possibility that [the action] will be resolved in favour of the plaintiff" for leave to be granted. *The Court stated that for an action to have a "reasonable*

¹⁹³ *Id.*, at paras. 118-119.

¹⁹⁴ *Id.*, at para. 103 (emphasis added).

possibility” of success under s. 225.4, there must be a “reasonable or realistic chance that [it] will succeed”: *Theratechnologies*, at para. 38. Claimants must “offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim”: *Theratechnologies*, at para. 39.

There is no difference between the language of s. 138.8 OSA and that of s. 225.4 QSA. Moreover, both provisions relate to leave applications for statutory claims based on secondary market misrepresentation, albeit in different jurisdictions. Accordingly, *the threshold test under s. 225.4 QSA articulated in Theratechnologies applies in the context of s. 138.8 OSA*.

Although there may be differences in the records that need to be produced in support of the leave applications in Quebec and Ontario (*Theratechnologies inc. v. 121851 Canada inc.*, 2013 QCCA 1256, at paras. 125-26 (CanLII)), this does not affect the threshold a plaintiff must meet.¹⁹⁵

This represents the sum total of the Court’s opinion on the “height” of the leave test. No analysis was added by Côté J. in adopting the *Theratechnologies* decision, and Cromwell J.,¹⁹⁶ and Karakatsanis J. for the remainder of the Court,¹⁹⁷ said only that they agreed on this issue. As in *Theratechnologies*, the Court did not consider whether the primarily deterrent nature of Part XXIII.1 should inform the leave test. Similar to Abella J., Côté J. appeared to view the sole purpose of the leave test as a mechanism for preventing unmeritorious claims.¹⁹⁸

However, it is clear, since the *CIBC* Court was unanimous that Strathy J. had used “the wrong threshold” for leave, that it overruled his stated definition (a “relatively low threshold” according to which leave will be denied only if, following the evidentiary review, “the plaintiffs’ case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success”). The effect of the Supreme Court’s rulings is clearly to move the bar higher, even if the wording it used was not particular — a “reasonable *or realistic*” chance of success.¹⁹⁹

¹⁹⁵ *Id.*, at paras. 118-123 (emphasis added).

¹⁹⁶ *Id.*, at para. 147.

¹⁹⁷ *Id.*, at para. 212.

¹⁹⁸ *Id.*, at paras. 67-68.

¹⁹⁹ *Id.*, at para. 121 (emphasis added); *Theratechnologies*, *supra*, note 2, at para. 38.

Second, the Court in *CIBC* failed to make any specific comment on the role of a motion judge in analyzing the evidence on the threshold test. As set out above, in *Theratechnologies*, Abella J. explained that a judge “must undertake a reasoned assessment of the evidence to ensure that the action has some merit”, but cautioned that it “should not be treated as a mini-trial” and that “[a] full analysis of the evidence is unnecessary” as the “evidentiary requirements [are not] so onerous as to essentially replicate the demands of a trial”.²⁰⁰ In *CIBC*, the motion judge and the Court of Appeal had agreed that the court should “consider all the evidence adduced by the parties ... having regard to the limitations of the motions process”.²⁰¹ The Supreme Court made no comment at all on the issue (a surprising omission, as set out below), and therefore seems simply to have accepted the approach from *Theratechnologies*.

Third, the Supreme Court also failed to address the standard of review. In *Theratechnologies*, the Court, after changing the threshold test, reconsidered the evidentiary record and took the extraordinary step of reversing the leave decision in the face of concurrent factual findings by both courts below, without explaining its principled rationale for doing so. In *CIBC*, while the Court also unanimously revised the definition of the statutory test used in the lower courts, none of the opinions then reviewed the evidence to determine if the investor met the higher threshold. Given that Strathy J. had written over 500 paragraphs on the evidence, it is unfortunate that the Supreme Court did not explain why the corrected (elevated) threshold, applied to the evidentiary record in *CIBC*, made no difference to the outcome. Both the parties and the profession would have benefitted.

The failure to explicitly address the standard of review from the leave decision in either case, coupled with the different outcomes, is puzzling, and gives no direction to practitioners or appellate courts. It is to be hoped that the Supreme Court will consider this issue again at a future date, particularly given the importance it has attributed to appellate deference in the analogous summary judgment and certification contexts.

The effect of the Court’s rulings in *Theratechnologies* and in *CIBC* has already been seen. The Ontario Court of Appeal has since ruled on two section 138.8 appeals, each from a dismissed leave to proceed motion, and addressed the role of the motion judge in each decision. In the first decision, *Goldsmith v. National Bank* (January 2016), the Court

²⁰⁰ *Theratechnologies*, *supra*, note 2, at paras. 38-39.

²⁰¹ *CIBC* (motion), *supra*, note 105, at para. 374, affirmed (“Strathy J.’s analysis was careful and detailed”...[he] applied the correct level of scrutiny”) at paras. 90, 93-96 (C.A.).

rejected the plaintiff's argument that the motion judge had too closely scrutinized the evidence on the leave motion. As Pardu J.A. explained:

... the motion judge did not err by scrutinizing the evidence proffered by the appellant. Applying that scrutiny is necessary to give effect to the purpose of the screening mechanism. Moreover, given that s. 138.8 provides for the filing of competing evidence and for cross-examination on that evidence, it clearly anticipates such scrutiny. As noted by Cronk J.A. in *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901, 61 C.P.C. (7th) 1, at para. 56, if motion judges were prevented from scrutinizing the evidence proffered by an applicant, "the leave requirement would be hollow indeed."²⁰²

Justice Pardu then turned to broader objectives of the legislation. The Court interpreted the plaintiff's theory of her case against the goals and objectives of Part XXIII.1 and linked the leave threshold to the larger theme of balance which Côté J. recognized in the *CIBC* Trilogy. As Pardu J.A. stated:

Part XXIII.1 was enacted after a long period of study and is a carefully calibrated enactment that "strikes a delicate balance between various market participants". That balance finds expression in the many limits built into the scheme itself, and is a central element of the legislative purpose animating Part XXIII.1.²⁰³

In the second decision, *Mask v. Silvercorp* (August 2016),²⁰⁴ Strathy C.J.O. had the opportunity to re-assess the case law on the issue of the role of the motion judge, because the appellant investor argued that the Court should only consider the evidence of the moving party and that it had been "inconsistent with the purpose and spirit of the legislation to screen out only plainly unmeritorious claims" for the motion judge in that case (Belobaba J.) to go on to also analyze the defendants' evidence and weigh it against the investor's evidence.²⁰⁵ The Chief Justice effectively summarized the Court's role as follows:

I do not accept the appellant's submission that scrutiny of the evidence on a leave application should be so limited. In my view, the "reasonable

²⁰² *Goldsmith v. National Bank of Canada*, [2016] O.J. No. 146, 2016 ONCA 22, at para. 33 (Ont. C.A.), affg [2015] O.J. No. 2543 (Ont. S.C.J.).

²⁰³ *Id.*, (C.A.), at para. 59.

²⁰⁴ *Silvercorp CA*, *supra*, note 88.

²⁰⁵ In doing so, Strathy C.J.O. did address the standard of review on appeal from leave decisions, which the Supreme Court had not done: *Silvercorp CA*, *supra*, note 88, at paras. 37-38 and 51.

possibility” requirement of the leave test requires scrutiny of the merits of the action based on all the evidence proffered by the parties. Far from undermining the objective of the legislation, such scrutiny of the body of evidence is necessary to give effect to the purpose of the screening mechanism.

... Abella J. noted in *Theratechnologies* ... [that] s. 138.8 was meant to create a “robust deterrent screening mechanism so that cases without merit are prevented from proceeding” and further, that the assessment requires a “reasoned consideration of the evidence to ensure that the action has some merit”.²⁰⁶

*It follows from these comments that a “reasoned consideration of the evidence” must include scrutiny of the evidence proffered by both sides, and some weighing of the defence evidence against that adduced by the plaintiff. ... Abella J.’s endorsement of Belobaba J.’s comments in *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*, 2013 ONSC 4083 (CanLII), that s. 138.8 should operate as more than just a “speed bump”, is a clear indicator that the motion judge must do more than simply ascertain whether the plaintiff has presented evidence of a triable issue. Instead, the motion judge must review all the evidence adduced by both parties to ascertain whether there is “a reasonable or realistic chance that the action will succeed”:* *Theratechnologies*, at paras. 38 and 39.

*Moreover, as this court noted in *Kinross*, at para. 56, and *Goldsmith*, at para. 33, the statute itself confirms that some weighing of the evidence is anticipated by the express provisions of the Securities Act. Subsection 138.8(2) contemplates that both parties “shall” file affidavit evidence setting out the material facts on which each intends to rely on the leave application. Further, s. 138.8(3) explicitly provides for the right to cross-examine the deponents of the affidavits filed. These mechanisms would be meaningless if, as the appellant suggests, leave must be granted where the plaintiff’s evidence, viewed in isolation, could satisfy the “reasonable possibility of success at trial” test. I agree with *Cronk J.A.’s* comments at para. 56 of *Kinross*, adopted by *Pardu J.A.* in *Goldsmith* at para. 33, that such a restrictive treatment of the evidence would render the leave requirement hollow.*

The judge was not limited to a consideration of the plaintiff’s evidence. He was required to consider the evidence of both parties, keeping in mind the relatively low merits-based threshold, and the limitations of the record before him. *He was entitled, indeed required, to undertake a*

²⁰⁶ Underline emphasis added by Strathy C.J.O.

*critical evaluation of all the evidence and this necessarily required some weighing of the evidence, drawing of appropriate inferences and the finding of facts established by the record: see Theratechnologies at paras. 38-39; Kinross at paras. 52, 54-55, 59.*²⁰⁷

There are two final aspects of the decision in the *CIBC* Trilogy that are noteworthy for the future. First, the Court's decision in *CIBC* to also certify the parallel common law misrepresentation cause of action will have significant ramifications for securities class actions in the future.

After Part XXIII.1 was proclaimed, investors began to issue common law misrepresentation claims as proposed class proceedings, as a procedural framework within which to bring their leave to proceed motions under the OSA, an ironic development, given that the statutory cause of action had been created to address the perceived ineffectiveness of the common law cause of action for investors. When plaintiffs coupled their OSA motion with a certification motion, motion judges breathed new life into the common law remedy by certifying *both* causes of action. In this way, the creation of the statutory right, with its legislative elements intended to limit the litigation exposure of public issuers, had the unforeseen consequence of exposing them to the unfettered risks of the resurgent common law liability.²⁰⁸ It was perhaps this concern that motivated Strathy J. in *CIBC*, in considering the common law cause of action in negligent misrepresentation, to refuse to certify reliance and damages as common issues, and to deny certification at common law generally as the preferable procedure for a class of investors (Defendants had advanced that argument and lost in prior section 138.8 decisions.)²⁰⁹

²⁰⁷ *Silvercorp CA*, *supra*, note 88, at paras. 41-45 (emphasis added). Interestingly, although the motions judge had applied the wrong (lower) definition of the threshold in dismissed the investor's leave to proceed motion, that point was not specifically addressed by the Court of Appeal. (The decision of the motion judge in *Silvercorp* had been released after the Supreme Court's decision in *Theratechnologies*, but before its decision in the *CIBC* Trilogy. The motion judge had concluded that the threshold definition of Strathy J. in *CIBC* ("The plaintiff's case is so weak ..."), as adopted by the Court of Appeal in that case, was "in essence the same test" as set out by Abella J. in *Theratechnologies: Silvercorp SC*, *supra*, note 5, at paras. 37-38. That was an error given the subsequent ruling by Côté J. in *CIBC*, as explained above.)

²⁰⁸ This outcome was certainly not anticipated. Indeed, Phillip Anisman observed in 2000 that the introduction of the leave requirement and other barriers in the legislation might lead investors to ignore the statutory cause of action in favour of common law claims: see Anisman, *supra*, note 56, at 127. See also Andrea Laing & Helen Richards, "Common Law Securities Misrepresentation Claims — Still With Us in the Post-*Green* Era?" (2016) 11 *Can. Class Action Rev.* 373.

²⁰⁹ The motion judge in *IMAX* accepted the submission of the plaintiffs that their "efficient market" theory of inferred reliance might someday be validated by a trial judge, contrary to the submission of the defendants that it was simply the U.S. "fraud on the market" theory of deemed

The Court of Appeal reversed, and certified both the statutory and (in part) the common law causes of action. The Supreme Court summarized the treatment below and upheld the Court of Appeal's decision (*per* Côté J.,²¹⁰ with Cromwell J.²¹¹ and Karakatsanis J.²¹² concurring):

In *CIBC*, the plaintiffs sought certification for seven common issues relating to a common law misrepresentation claim. Strathy J. held that reliance, a necessary element of a common law misrepresentation claim, “is not an issue that is capable of resolution on a common basis”: para. 600. He added that “a class proceeding would not be the preferable procedure for resolving a reliance-based claim, as it would give rise to individual issues of causation and reliance that would be unmanageable”: para. 610. In the result, he *refused to certify all seven issues relating to the common law negligent misrepresentation claim*.

The Court of Appeal upheld the motion judge's decision not to certify the issues relating to reliance and damages. However, it held that five out of the seven issues proposed by the plaintiffs related to the intent and conduct of the defendant CIBC, and should be certified as against CIBC in order to advance the litigation against it. The Court of Appeal therefore allowed the appeal in part and certified those five issues.

In this Court, the defendants argued that none of the issues relating to the common law misrepresentation claim should be certified in this case. The defendants further argued that the common law misrepresentation claim fails the preferability analysis required under s. 5(1)(d) CPA, because the common law cause of action is not preferable to the statutory cause of action under Part XXIII.1 OSA. The defendants raised several arguments to the effect that the procedure created by Part XXIII.1 was specifically intended by the legislature to be the preferable procedure for class actions: CIBC's factum, at paras. 89-111.

CIBC's argument is premised in part on *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, in which this Court stated that the

reliance which had already been rejected in *Carom v. Bre-X Minerals Ltd.*, [1998] O.J. No. 4496, 41 O.R. (3d) 780 (Ont. Gen. Div.), see *Silver v. IMAX Corp.*, [2009] O.J. No. 5585, 86 C.P.C. (6th) 273, at paras. 58-63 (Ont. S.C.J.), leave to appeal refused [2011] O.J. No. 656 (Ont. S.C.J.) [hereinafter “*IMAX - Certification Reasons*”]. The motion judge certified all elements of the tort of negligent misrepresentation as common issues, including reliance and damages: *id.*, at paras. 186-190, 198-207. Leave to appeal was denied on the detrimental reliance point: *Silver v. IMAX Corp.*, *supra*, note 101, at paras. 47-55. The same argument by the plaintiff was accepted (against the same opposing position) in *Arctic Glacier*, *supra*, note 5, at paras. 225-227; although leave was granted on this point, *supra*, note 105, at paras. 33-40, the appeal was never heard.

²¹⁰ The *CIBC* Trilogy, *supra*, note 3, at paras. 124-129.

²¹¹ *Id.*, at para. 147.

²¹² *Id.*, at para. 212.

preferability analysis focuses not just on the alternative procedure, but also on the effect that the procedure may have on the achievement of substantive results: para. 34.

*I am unable to accept CIBC's arguments. First, they run counter to the language of s. 138.13 OSA, which provides that the statutory right of action under s. 138.3 OSA is meant to be "in addition to, and without derogation from, any other rights". Moreover, the preferability analysis under s. 5(1)(d) CPA requires a court to assess whether a class proceeding is the preferable procedure. The Court's dictum in Fischer does not stand for the proposition, essentially advanced by the defendants, that a cause of action must be the preferable one in order for a claim based on it to be certified as a class proceeding. It merely indicates that the effect of a procedure on substantive rights is relevant to its preferability for the pursuit of a given cause of action. In short, the defendants' argument confuses procedure with substantive causes of action.*²¹³

In the wake of *CIBC*, defendants may look to find new ways to resist investor class actions at common law. One argument that is ripe for determination (in all jurisdictions except Quebec) is the underlying question of whether issuers, directors and officers owe secondary market investors a common law duty of care in making continuous disclosure; if not, then negligent misrepresentation cannot be certified in a class action for secondary market investors. It appears that only two appellate courts addressed this issue prior to the enactment of Part XXIII.1 and its equivalents in other provinces,²¹⁴ and the decisions were divided.²¹⁵ The issue has been raised but not decided in three section 138.8 motions,²¹⁶

²¹³ *Id.*, at paras. 124-128 (emphasis added).

²¹⁴ The Allen Committee specifically referred to the difficulty of establishing a duty of care in stating that: "The practical difficulties in bringing an action for deceit or negligent misstatement means that there is no effective remedy for an investor who suffers losses resulting from misleading continuous disclosure": Allen Committee Interim Report, *supra*, note 27, at paras. 3.55 – 3.56. In its Final Report, the Committee could find only one prior judgment against a public issuer — *Dixon v. Easson*, [1993] B.C.J. No. 1095, 102 D.L.R. (4th) 1 (B.C.C.A.), revg [1990] B.C.J. No. 1142 (B.C.S.C.) [hereinafter "*Dixon v. Easson*"] — which confirmed its conclusion that common law actions for negligent misrepresentation in continuous disclosure "are rare and do not represent a meaningful remedy against the tortfeasors": Allen Committee Report, *supra*, note 25, at 12.

²¹⁵ *Dixon v. Easson, id.*, was released in 1993, prior to the seminal Supreme Court decision in *Hercules Managements Ltd. v. Ernst & Young*, [1997] S.C.J. No. 51, [1997] 2 S.C.R. 165 (S.C.C.), affg [1995] M.J. No. 196 (Man. C.A.). Compare to *NPV Management Ltd. v. Anthony*, [2003] N.J. No. 194, 2003 NLCA 41 (Nfld. C.A.), leave to appeal refused [2003] S.C.C.A. No. 436 (S.C.C.).

²¹⁶ The legal viability of this duty was debated in the OSA leave to proceed motions in *IMAX - Certification Reasons*, *supra*, note 209, at paras. 25-55 in 2009, and then in *Arctic Glacier*, *supra*, note 5, at paras. 48-56, 67-84 in 2011, but the issue was adjourned to trial both times. Leave to appeal was refused in *IMAX* (Corbett J. agreed that this issue was "important, complex and

and it has not been resolved in any summary judgment or trial decision by a Canadian court since 2006 either.

The argument that a common law duty of care for continuous disclosure does not, and should not, co-exist with the statutory right of action in Part XXIII.1, which was designed by the Legislature to balance the rights of investors and issuers, and to ensure that the main focus of the statute remains deterrence rather than compensation, is reflected in the very recent comments of the Ontario Court of Appeal in *Rooney v. ArcelorMittal S.A.* There, in holding that secondary market investors cannot sue under section 131 for misrepresentations in a take-over bid circular given the existing statutory right of action in Part XXIII.1, the court made the following comments which appear equally applicable to the issue of whether a common law duty of care may exist alongside Part XXIII.1:

Clearly there was a gap in the legislative scheme with respect to secondary market participants. The legislature filled that gap. They did so on the basis that there was no statutory right of action for secondary market participants. In providing that right of action, *the legislature heeded the advice of Cardozo J. in Ultramares Corporation v. Touche, 174 N.E. 441 (N.Y. App. Ct. 1931) that the law should not admit “to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.” It was for this reason that the legislature included a leave requirement and capped liability.* I agree with the submission of the respondents that *the appellants’ attempted reliance on s. 131(1) for secondary market participants is an impermissible attempt to avoid the restrictions placed on the operation of the statutory cause of action found in Part XXIII.1.*²¹⁷

Although not a securities case, the Supreme Court’s decision in the upcoming appeal from *Livent Inc. v. Deloitte & Touche* may shed

controversial”, but concluded that it should be left for trial: *supra*, note 102, at para. 46, but Leitch J. granted leave to appeal on this point in the *Arctic Glacier* leave to appeal decision, *supra*, note 109, at paras. 27-32, 40 in 2012, concluding that the “duty of care in negligent misrepresentation needs to be re-examined in light of *Imperial Tobacco*” (which had been released in the interim period: *R. v. Imperial Tobacco Canada Ltd.*, [2011] S.C.J. No. 42, [2011] 3 S.C.R. 45 (S.C.C.)): *id.*, at para. 44. That case settled, and the appeal was not heard. This issue appears to have been raised by the defence in only one of the subsequent contested s. 138.8 motions: *Dugal v. Manulife*, *supra*, note 116, at para. 83. There, the court referenced *IMAX* and adjourned the duty of care decision to trial. It is not clear whether either *Imperial Tobacco*, or Leitch J.’s leave to appeal decision in *Arctic Glacier*, were provided to that court.

²¹⁷ [2016] O.J. No. 4347, 2016 ONCA 630, at para. 77 (Ont. C.A.) (emphasis added). See also: *Menegon v. Philip Services Corp.*, [2001] O.J. No. 5547, 23 B.L.R. (3d) 151, at para. 158 (Ont. S.C.J.), affd [2003] O.J. No. 8, 167 O.A.C. 277 (Ont. C.A.).

further light on the parameters of the duty of care for negligent misrepresentation and its potential application to such claims.²¹⁸

The final aspect of the decision in the *CIBC* Trilogy which deserves comment for its potential impact in future cases is the Court's approach to the Ontario *CPA*. The decision hints at a potential shift in attitude at the Supreme Court towards class actions going forward. Only two years previously, in *ProSys Consultants Ltd. v. Microsoft Corp.*, the Supreme Court had taken a generous approach to class proceedings legislation, finding that the certification motion "does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; 'rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding'".²¹⁹ The Court immediately followed these comments with a series of decisions in which it affirmed class certification or authorization.²²⁰

However, in the *CIBC* Trilogy, Côté J. (Cromwell J. concurring on this point)²²¹ found that section 28 of the Ontario *CPA* was incapable of altering the substantive provisions of the *OSA*. That is, class actions "are merely procedural vehicles". They can *extend* the substantive rights of the representative plaintiff to the other class members, but they cannot be used by courts to "create substantive rights for the class which an individual plaintiff would not otherwise enjoy since they do not exist":

The only way s. 28 *CPA* can protect the other members is by affording them the substantive protection already enjoyed by the representative plaintiff. Before there is a right of action or a suspension of the limitation period flowing from the operation of the statutory scheme itself, the *CPA* cannot be interpreted in such a way as to create either one.

.....

The interpretation proposed by my colleague and by the Court of Appeal in the cases at bar gives priority to the objectives of the CPA at the price of contradicting the ordinary and grammatical meaning of the

²¹⁸ [2016] O.J. No. 51, 2016 ONCA 11 (Ont. C.A.), leave to appeal granted [2016] S.C.C.A. No. 84 (S.C.C.).

²¹⁹ *Microsoft*, *supra*, note 168, at para. 102.

²²⁰ *Infineon*, *supra*, note 168; *AIC v. Fischer*, *supra*, note 168; *Vivendi*, *supra*, note 168; *Cf. Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [2013] S.C.J. No. 58, [2013] 3 S.C.R. 545 (S.C.C.), varg [2011] B.C.J. No. 689 (B.C.C.A.).

²²¹ The *CIBC* Trilogy, *supra*, note 3, at para. 130.

words of the provisions and upsetting the specific balance struck in Part XXIII.1 OSA even though those objectives had already been taken into account in enacting the legislation providing for the statutory claim. Part XXIII.1 OSA is the more recent legislation; it creates a scheme that is intended to be comprehensive, and was crafted with the CPA in mind. The purposes associated with the CPA — judicial economy, access to the courts and behaviour modification — were each explicitly considered in developing the structure of Part XXIII.1 OSA. Policy concerns, as compelling as they are, do not override the plain meaning of the text and the intent of the Ontario legislature. This is not altered by the fact that both the CPA and Part XXIII.1 OSA are remedial in nature, and should thus be interpreted broadly and purposively.²²²

Therefore, in the final contest between class proceedings legislation and the OSA, the Court concluded that the provisions of the securities statute should prevail. Policy goals favouring investors (access to justice) and even the courts themselves (judicial economy), however important to the Ontario CPA itself, cannot justify a degradation of the defendant's substantive (and procedural) legal rights. The Supreme Court has thus accepted that the judicial enthusiasm for the objectives of class actions must be tempered in the face of legislation designed to create a balance between the rights of investors and issuers. Indeed, the closing remarks of Côté J. on this point are a fitting summation of the developments reviewed in this paper, dating back to the 1979 Proposals, and moving forward to the creation of the leave test in 2005 and its interpretation since:

The end result of the legislature's consideration was that [Part XXIII.1] includes a leave requirement that serves as a precondition to the commencement of an action, a limitation period and no requirement to prove reliance on the misrepresentation. *The combined effect of these features is to promote efficiency and fairness for both parties.*²²³

V. CONCLUSION

The Supreme Court's decisions in *Theratechnologies* and the *CIBC* Trilogy are a watershed moment in the history of secondary market securities litigation. They stand at the end of a decades-long narrative arc

²²² *Id.*, at paras. 73, 75.

²²³ *Id.*, at para. 75 (emphasis added).

in which first, law reform bodies, then the courts, grappled with the appropriate balance to be struck between the interests of investors and the rights and obligations of issuers (and their long-term shareholders). Now that the Supreme Court has spoken, the most fundamental aspect of the statutory claim — the definition and application of the leave to proceed threshold — has been clarified, and the viability of the common law cause of action as a parallel preferable procedure has been affirmed. Lower courts and litigants can move forward accordingly.

In those respects, the Supreme Court's decisions represent the coming of age of the statutory action for inadequate continuous disclosure. The Court opted for a balanced threshold that favours neither investors nor issuer defendants, and acknowledged that the primary purpose of the legislation (if not the leave test) is deterrence rather than compensation. Both outcomes are critical to the coherence of the legislative right of action, and will assist courts in addressing new issues of statutory interpretation in a principled manner.

However, in defining those aspects of the framework for securities class actions, the Court did not specifically address the boundaries of the practical application of the powers of judges on leave motions, or the standard of appellate review of such decisions, and it left open the possibility of an evolving attitude at the Supreme Court towards the policy limits of class actions. Further, with the certification of some elements of the common law cause of action, the issue of whether a duty of care can or should co-exist with Part XXIII.1, and the question of how a court can realistically manage a class action requiring individual reliance trials, come into focus.

Finally, the relationship between the leave test and the primarily deterrent purpose of Part XXIII.1 was not explored. If the main function of the statutory claim is not to compensate investors, but to create a sufficient liability threat to dissuade inadequate continuous disclosure, should not the leave threshold reflect this fact? In a close case, which is neither a strike suit nor wholly unmeritorious, but is weak, why should a plaintiff be permitted to proceed for a class of investors when compensation is not an end in itself, but only a secondary goal within the larger regulatory regime established by the Securities Acts? We expect that courts will continue to wrestle with all of these fundamental questions, and new ones as yet unforeseen, through the lens of the decisions in *Theratechnologies* and the *CIBC Trilogy*.

