

## Court grants certification to disgruntled movie renters

***Wilkins v. Rogers Communications Inc.*, [2008] O.J. 4381 (S.C.J.)**

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### INSIDE

Two Ontario decisions consider scope of pre-certification evidence in secondary market securities class actions

Defendants may get reprieve from multiple and overlapping national class actions over Vioxx

In a somewhat surprising decision, the Ontario Superior Court of Justice recently certified a class action against Rogers Cable in respect of two movie channels that were unavailable to subscribers for short periods in mid-2006 (according to the evidence, this occurred at off-peak hours for maintenance reasons). The proposed class was defined as “all persons (including their estates, executors or personal representatives) corporations and other entities who rented one or more digital cable terminal(s) and subscribed to Rogers digital cable services” at the relevant times and further specifically included those who had subscribed to one channel to which the proposed representative plaintiff had not subscribed.

Justice Shaughnessy found that all five certification requirements had been met, subject to modification of the litigation plan.

The Statement of Claim alleged breach of contract, negligence, unjust enrichment and breach of Ontario’s *Consumer Protection Act, 2002*. Rogers argued that the pleadings lacked particularity and that the Service Agreement excluded the consumer legislation’s deemed warranty. The court stated that because, on certification, the “plain and obvious” test is used to determine whether pleadings disclose a cause of action, factual allegations must be presumed true. In other words, there is no inquiry into the merits of the action: the issue is whether it is appropriately presented as a class action.

The court reiterated the purposes of class definition set out in *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.): (i) to identify those with a potential claim against the defendant, (ii) to identify those who should be bound by the result, and (iii) to determine who is entitled to notice of certification in accordance with the *Class Proceedings Act, 1992* (“CPA”). Likelihood of success is not a factor to be considered in determining whether there is an identifiable class, Justice Shaughnessy observed.

Rogers argued that there were no common issues, particularly as liability with respect to each claim would have to be determined individually. However, Justice Shaughnessy found that there was a common issue concerning both the interpretation of the Service Agreement and the alleged breach of contract arising from the service outages. He added that damages could be determined in accordance with s. 24 of the CPA, which permits the court to order all or part of a damages award to be divided among some or all of the class members on an average or proportional basis.

In determining that a class action would further the policy objectives of the CPA and would clearly be the preferable procedure, Justice Shaughnessy

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found that requiring each class member to pursue their claim individually would be unreasonable, infeasible (given the small size of the individual claims) and unduly burdensome to the judicial system.

While Justice Shaughnessy concluded that “access to justice” might be denied if the action were not certified, the decision does raise the question whether every claim, no matter how small or possibly unmeritorious, ought to receive the attention of scarce judicial resources. Rogers is seeking leave to appeal the decision.

The author wishes to thank Emma Parker, Stikeman Elliott articling student, for her assistance.

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## Two Ontario decisions consider scope of pre-certification evidence in secondary market securities class actions

***Silver v. IMAX Corporation*, [2008] O.J. No. 2751 (S.C.J.) and *Ainslie v. CV Technologies Inc.*, [2008] O.J. No. 4891 (S.C.J.)**

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The interpretation of several key provisions under Part XXIII.1 of the Ontario *Securities Act* (OSA) was recently considered by the Ontario Superior Court of Justice in the context of proposed secondary market securities class actions in *Silver v. IMAX Corporation* (*IMAX*) and *Ainslie v. CV Technologies Inc.* (*CV Technologies*). The first of these provisions, section 138.3 of the OSA, creates a statutory cause of action for secondary market liability claims in Ontario. However, a second key provision under Part XXIII.1 – section 138.8 – requires a plaintiff to obtain the court’s leave and sets out the threshold that must be reached before such leave is granted:

- (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.

The leave requirement and threshold essentially establish the courts as a “gatekeeper” for these types of potential cases. Section 138.8 further provides – in subsections that are central to the discussion that follows – that:

- (2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely; and
- (3) The maker of such an affidavit may be examined on it in accordance with the rules of court.

### ***IMAX***

In *IMAX*, the first proceeding to be brought under Part XXIII.1 since it came into force at the end of 2005, the plaintiffs alleged that IMAX and certain of its directors were liable for allegedly misrepresenting financial results in a press release, and in respect of certain revenue recognition policies.

The defendants filed affidavits in response to the plaintiffs’ motion for leave to commence the proceeding. On a motion to compel answers to questions refused during cross-examination on the defendants’ affidavits, the scope of pre-certification examination under s. 138.8(3) emerged as a key issue. Justice van Rensburg held that:

... a question that is potentially relevant to the facts alleged in respect to the statutory claims set out in the proposed statement of claim and in the defences raised in the responding affidavits must be answered even if it might reveal some other potential issues of wrongdoing not currently contemplated by the statutory claim.

The defendants were therefore ordered to answer various questions they had refused to answer during the case.

In a more general observation respecting the statutory provisions in issue, Justice van Rensburg noted:

The challenge is that these are the first proceedings under Part XXIII.1 of the Act. The Act provides no guidance as to the interpretation of the threshold test and what type, quality and quantity of evidence a court is to consider in making a determination of the plaintiffs’ good faith and the reasonable possibility of the plaintiffs’ success at trial. We are left with what the statute prescribes – a mandatory requirement for each plaintiff and each proposed defendant to set out facts by affidavit,

with the right to cross-examine the deponents of such affidavits. There is no indication in the statute that evidence put forward or examined upon must be restricted to what is in the public record. Indeed, the facts to support a due diligence defence are generally in the possession and control of the party asserting such a defence. There is no requirement in the statutory procedure for an affiant to attach documentary exhibits, but it is not unusual for exhibits to be attached to affidavits, and the parties in this case have attached extensive exhibits to their affidavits.

IMAX's motion for leave to appeal the order was dismissed by Justice Langdon who was "unable to find good reason to doubt the correctness of the decision." IMAX's counsel submitted that Justice van Rensburg had failed to abide by the canon of statutory interpretation requiring that statutory ambiguities be resolved by examining the purpose of the legislation and considering the efficacy of all the possible interpretations. Justice Langdon dismissed the argument as he found no ambiguity in the relevant statutory language.

Counsel further submitted that a more restrictive test than "semblance of relevance" should be applied to examinations under s. 138.8. Justice Langdon found that Justice van Rensburg was aware of the lack of interpretive guidance available and of her obligation to further the express legislative intent that cross-examination be in accordance with the rules of court. He reiterated that the established test for cross-examination on motions is that questions having a "semblance of relevance" to the issues raised in the pleadings and affidavits must be answered. He also observed that the Court maintains the discretion not to require questions to be answered when they are overbroad.

### ***CV Technologies***

The Superior Court revisited this issue in *CV Technologies*. In that case, a group of shareholders commenced a putative class proceeding against CV Technologies (CV) and certain of its officers and directors (and its former auditor) alleging that certain continuous disclosure documents, including certain financial statements from fiscal years 2006 and 2007, contained a misrepresentation. Among the putative causes of action was OSA s. 138.3.

The plaintiffs filed a number of affidavits in support of their motion for leave. CV filed two expert affidavits in opposition to the leave motion while the auditors filed no affidavits at all. The plaintiffs then brought a motion seeking to (i) compel each of the defendants to swear an affidavit in their own name in opposition to the leave motion or (ii) examine each of the defendants as a witness on a pending motion under Rule 39.03 of the *Rules of Civil Procedure*. There remained a question of whether certain commentary in van Rensburg J.'s reasons in IMAX should be interpreted to mean that all potential parties to a secondary market liability case must file affidavits.

The plaintiffs in *CV Technologies* argued that OSA s. 138.8(2) was unambiguous in compelling each defendant to swear and file an affidavit in opposition to the leave motion. Alternatively, they submitted that each defendant possessed evidence relevant to the leave motion and that an examination under Rule 39.03 was thus appropriate.

In dismissing the plaintiffs' motion, Justice Lax held that, in relation to the leave motion, while a defendant could file affidavits if he or she intended to lead evidence in opposition to that motion, OSA s. 138.8(2) does not require this. Justice Lax relied on (i) the interim and final reports on the Toronto Stock Exchange Committee on Corporate Disclosure (the "Allen Report") and (ii) the Canadian Securities Administrators' (CSA) draft legislation. Justice Lax noted that the Allen Report emphasized that the purpose of the secondary market liability legislation should be deterrence rather than compensation and that any such legislation should be structured to prevent "strike suits". The CSA draft legislation incorporated those concerns and characterized the proposed "gatekeeper" leave motion as an attempt "to ensure that unmeritorious litigation...is avoided or brought to an end early in the litigation process." Thus Justice Lax concluded that a primary purpose of the leave motion is to "protect defendants from coercive litigation and to reduce their exposure to costly proceedings", adding that its essence is to require putative plaintiffs "to demonstrate the propriety of their...claim *before* a defendant is required to respond." She added that as the plaintiffs bear the onus of satisfying both branches of the test for leave under s. 138.8(1), defendants are free to elect to lead no evidence in opposition to the leave motion if they prefer not to do so.

Justice Lax clarified Justice van Rensburg's statement in *IMAX* that OSA s. 138.8(2) contains a "mandatory requirement for each plaintiff and each proposed defendant to set out the facts by affidavit with the right to cross-examine", stating that the motion in *IMAX* concerned a different section of the OSA, that Justice van Rensburg's statements concerning s. 138.8(2) were *obiter dicta*, and that *IMAX* should be confined to the facts of that case, in which each of the defendants had elected to swear and file affidavits.

As to the proposed examinations under Rule 39, Justice Lax explained that the plaintiffs could not circumvent her interpretation of s. 138.8(2) by relying on Rule 39 and that the proposed examinations are “neither contemplated by the *Securities Act* nor by the principles governing examinations under this rule.” Accordingly, Justice Lax denied the plaintiffs’ request to examine each of the defendants under Rule 39.

The decision is important because it limits the ability of plaintiffs’ counsel to conduct fishing expeditions of defendants of their choosing to help build a case prior to establishing that their case has sufficient merit to be granted leave. This ruling means that the defendants avoid the expense and inconvenience of extensive documentary and oral discoveries at an early stage.

The plaintiffs have sought leave to appeal Justice Lax’s decision. Stikeman Elliott acts for the proposed defendants CV Technologies and the named officers and directors in the *CV Technologies* case.

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## Defendants may get reprieve from multiple and overlapping national class actions over Vioxx

***Mignacca v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 4731 (S.C.J.)**

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The issue of overlapping national class actions concerning the same causes of action will soon come before Ontario’s appellate courts, thanks to a recent order granting leave to appeal in *Mignacca v. Merck Frosst Canada*.

The history of the *Merck* case is complex. Two Ontario class proceedings relating to Merck’s drug “Vioxx” were commenced almost simultaneously in 2006. The first proceeding was brought by the Saskatchewan law firm Merchant Law Group. The second was commenced by an Ontario firm, who subsequently (and successfully) sought to have the Merchant Law Group action stayed. However, the Merchant firm continued with a class proceeding it had commenced in Saskatchewan, seeking identical relief and certification of a national class.

The Saskatchewan proceeding was certified in June 2008 ([2008] S.J. No. 324), just three weeks before the Ontario certification motion, at which Merck both opposed certification and sought a stay of the proceeding in light of the Saskatchewan court’s decision to certify. However, Justice Cullity of the Ontario Superior Court certified the proceeding as a class proceeding on July 28, 2008 and refused to stay the action in Ontario.

Merck sought leave to appeal both the certification decision and the ruling with respect to the proposed stay. On November 24, 2008, Justice Bellamy granted leave to appeal the refusal to stay, while denying leave to appeal the certification order. The plaintiffs had conceded that leave to appeal ought to be granted in respect of whether a stay was appropriate for non-resident plaintiffs (who would be caught by both proceedings) but not for Ontario plaintiffs. Justice Bellamy found this to be too narrow a position.

Justice Bellamy found that Justice Cullity’s decision not to stay the Ontario proceeding was:

...open to very serious debate, given the potential results of allowing two overlapping multi-jurisdictional class actions in different provinces to proceed *in tandem*. Generally, the real possibility that significant confusion may arise where plaintiffs are included in multiple actions addressing similar claims leads courts in one province to give “full faith and credit” to the judgments given by a court in another province or territory. It is seriously debatable whether, in refusing to stay this proceeding pending the Saskatchewan action’s ultimate conclusion, the learned motion judge gave “full faith and credit” to the judgment of the Saskatchewan Court of Queen’s Bench....

Justice Bellamy concluded that the question of overlapping class proceedings was one of national importance, given the increasing likelihood that such proceedings would be brought in multiple jurisdictions.

For further information regarding any article in this newsletter, please contact your Stikeman Elliott representative, the authors listed above, or the editor, Adrian C. Lang (alang@stikeman.com). You may also contact any other member of the Class Action Group listed at [www.stikeman.com](http://www.stikeman.com)