CITATION: Dobbie v. Arctic Glacier Income Fund et al, 2011 ONSC 25
COURT FILE NO.: 59725
DATE: 2011/03/01

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceedings under the *Class Proceedings Act, 1992*

B E T W E E N:	
ALEXANDER DOBBIE and MICHAEL BENSON	A. Dimitri Lascaris, Michael G. Robb and Daniel E. H. Bach for the Plaintiffs
Plaintiffs	
- and -	
ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., RICHARD L. JOHNSON, KEITH W. MCMAHON, DOUGLAS A. BAILEY, AND, IN THEIR PERSONAL CAPACITIES AND AS TRUSTEES OF ARCTIC GLACIER INCOME FUND, JAMES E. CLARK, ROBERT J. NAGY, GARY A FILMON, AND DAVID R. SWAINE	R. Paul Steep and Dana M. Peebles for the Defendants Nigel Campbell and Andrew McLachlin for Gary Cooley, Proposed Defendant Jeffery S. Leon, Eric R. Hoaken and Jonathan G. Bell for Frank Larson, Proposed Defendant
Defendants	
	HEARD: October 4, 5, 6, 7 and 8, 2010

TAUSENDFREUND J.

Overview

[1] The plaintiffs have commenced a proposed class proceeding. They claim that the defendants published misrepresentations relating to the sale of publicly traded securities

in both the primary and secondary market. These securities experienced a substantial market value decline which the plaintiffs seek to recoup for the proposed class. This action is at the procedural infancy stage. To date, only the Statement of Claim has been filed. The parties have brought the following motions:

(a) The defendants seek an order that certain portions of the Amended Amended Statement of Claim dated September 3, 2010 ("Statement of Claim") advancing the plaintiffs' common law and statutory causes of action be struck, under Rule 21.01, and/or as improperly pleaded under Rule 25 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

(b) The plaintiffs seek:

(i) leave to pursue the alleged secondary market misrepresentations (the "Part XXIII.1 claim") under to s. 138.8(1) of Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "*OSA*").

(ii) certification of the proposed class action pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*").

Facts

[2] The plaintiffs are residents of Ontario. Each purchased units of the defendant, Arctic Glacier Income Fund ("Income Fund") over the Toronto Stock Exchange during the class period.

[3] The defendant, Arctic Glacier Inc. ("Arctic"), is a producer, marketer and distributor of packaged ice to consumers in Canada and the United States. Arctic is incorporated under the laws of Alberta and is headquartered in Winnipeg, Manitoba.

[4] The Income Fund is an unincorporated mutual fund trust and is a reporting issuer in ten provinces, including Ontario. The other defendants are certain Officers, Directors and/or Trustees of Arctic and/or the Income Fund ("the Individual Defendants").

[5] The Income Fund's purpose is to market Arctic as an Income Fund for public trading on the TSX.

[6] When it was created, the Income Fund's sole assets were all the shares of Arctic. As such, the trading value of the Income Fund's units is based entirely on the financial and business results of Arctic. Facts and changes that are material to Arctic's business are facts and changes material to the value of the Income Fund's units.

[7] Arctic Glacier International Inc. ("Arctic International"), a company incorporated in the State of Delaware in the United States, is a wholly-owned direct subsidiary of Arctic, and is the principal operating subsidiary of the Income Fund and Arctic in the United States.

[8] In 2007, approximately 82% of the Income Fund's sales were generated in the United States and the balance in Canada.

[9] Between 2002 and 2008, the Income Fund stated in public disclosures, including prospectuses, that the packaged ice industry was very competitive. The defendants also represented in these documents that the Income Fund and its subsidiaries were good corporate citizens operating lawfully in a very competitive market.

[10] In March 2008, the Income Fund announced that it had become aware that the United States Department of Justice ("the DoJ") was conducting an anti-trust investigation of the packaged ice industry and that it was cooperating fully with the DoJ in this regard. Arctic's news release of March 9, 2008 included the following:

> Arctic Glacier is a good corporate citizen with strong, institutionalized internal policies and controls. We have always followed best practices in corporate governance and public disclosure, and we will continue to do so.

[11] In September 2008, the Income Fund announced that it was suspending its income trust distributions, due, at least in part, to the cost of responding to the DoJ investigation.

[12] In 2009, Arctic International pleaded guilty to a charge of participating, during the proposed Class Period, in a criminal, anti-competitive conspiracy in the United States. Under the terms of the plea agreement, Arctic International agreed to pay a fine of US $9 million, payable in installments over five years. In the U.S. plea agreement, Arctic International admitted that:

> Beginning January 1, 2001 and continuing until at least July 17, 2007, the defendant (Arctic International) and co-conspirators entered into and engaged in a conspiracy to suppress and eliminate competition by allocating packaged-ice customers in Southeastern Michigan and the Detroit, Michigan Metropolitan area. The charged conspiracy unreasonably restrained inter-state trade and commerce, in violation of s. 1 of the Sherman Act…

[13] The trading price of the Income Fund units lost significant value during the March-September 2008 period.

[14] The plaintiffs plead a proposed class period from March 13, 2002 to September 16, 2008. They commenced this proposed class action on September 25, 2008.

[15] I will now address each of the three motions sequentially.

A. Defendants' Motion to Strike

[16] The defendants move under Rule 21.01(1) and Rule 25.11 of the *Rules of Civil Procedure* to strike certain parts of the Statement of Claim. The relevant parts of the rules are:

> **21.01(1)** A party may move before a judge,
>
> …
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.
>
> **25.11** The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (a) may prejudice or delay the fair trial of the action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the court.

[17] As one would expect, the defendants have yet to file a statement of defence. Accordingly, I must read the Statement of Claim generously and be guided by the test applicable to Rule 21.01(1)(b) that a pleading should not be struck unless it is "plain and obvious" that the existence of the cause of action could not be established at trial. However, the "plain and obvious" test does not absolve the plaintiffs from their obligation to observe the rules of pleadings and should not be seen as encouraging them to neglect such obligations: *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.) and *Williams v. Canada* (2005), 76 O.R. (3d) 763 at paras. 15 and 17 (S.C.J.).

[18] With respect to the application of Rule 25.11, I am guided by the principles summarized by Nordheimer J. in *Jama v. McDonald's Restaurants*, [2001] O.J. No. 1068 at para. 21 (S.C.J.):

> **21.** The defendants claim that the amended statement of claim is prolix, pleads evidence, will prejudice or delay the fair trial of the action and is scandalous, frivolous or vexatious. Various paragraphs of the amended statement of claim are challenged on this basis… it is worthwhile to set out the principles that should be applied to this aspect of the motion. Those principles include:

(a) motions under rule 25.11 should only be granted in the "clearest of cases";

(b) any fact which can effect [*sic*] the determination of the rights of the parties can be pleaded but the court will not allow facts to be alleged that are immaterial or irrelevant to the issues in the action;

(c) portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous;

(d) facts may be pleaded but not the evidence by which those facts are to be proved;

(e) similar facts may be pleaded as long as the added complexity arising from their pleading does not outweigh their potential probative value. [Citations omitted]

[19] It is now settled that pleadings in actions under the *CPA* not only have to follow the usual rules, but must demonstrate a proper cause of action against each defendant: *Shaw v. B.C.E. Inc.*, [2003] O.J. No. 2695 at para. 5 (S.C.J.); *Pearson v. Inco Ltd.* (2002), 33 C.P.C. (5th) 264 at para. 84 (Ont. S.C.J.).

The Pleadings at Issue

[20] Under Rules 21 and 25, the defendants challenge various causes of action and remedies sought in the Statement of Claim:

(i) the common law pleading against the Income Fund;

(ii) the pleading of an underlying Anti-Trust Conspiracy;

(iii) the pleading under s. 130 of the *Securities Act*;

(iv) the pleading of negligence; and

(v) the pleading of negligent misrepresentation.

The Common Law Pleading Against the Income Fund

[21] The plaintiffs assert both statutory and common law causes of action against the Income Fund. These will be discussed separately.

[22] The statutory causes of action against the Income Fund are asserted under ss. 130 and 138.3 of the *OSA*. The claim under s. 138.3 may only be pursued with leave. This will be discussed in more detail.

[23] In para. 13 of the Statement of Claim, the plaintiffs describe the Income Fund as an unincorporated, open-ended mutual trust fund. Rule 9.01 of the *Rules of Civil Procedure* provides:

> 9.01(1) a proceeding may be brought by or against an executor, administrator or trustee as representing an estate or trust and its beneficiaries without joining the beneficiaries as parties.

[24] In *Whiting v. Menu Foods Operating Limited Partnership* (2007), 53 C.P.C. (6th) 124 (Ont. S.C.J.), Lax J. relied on Rule 9.01(1) to determine that the proper parties in an action against a trust are the trustees (para. 25) and that a trust is an entity that is not capable of being sued in Ontario (para. 29).

[25] The defendants assert that the plaintiffs cannot name the Income Fund as a defendant to the common law causes of action, as it lacks legal personality. Strathy J. affirmed this principle in *Cannon v. Funds for Canada Foundation*, [2010] O.J. No. 3486 at paras. 64-66 (S.C.J.):

> **64.** The trust is, however, most correctly described as a relationship. Waters quotes at p. 3 from G.W. Jeeton and L.A. Sheridan, *The Law of Trusts*, 10th ed…:
>
> > A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of

> some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.
>
> **65.** It is well-established that a trust itself does not have legal personality – it operates through its trustees… It is also held accountable through its trustees.
>
> **66.** The trustee derives his, her or its powers from the trust instrument … Where a third party suffers an injury as a result of the use of the trust funds, or as a result of actions of the trustee ... then the third party is entitled … to look to the trustee for redress ... It is through the trustee that compensation is obtained.

[26] I find that there is no common law right of action against the Income Fund. The pleadings in the Statement of Claim alleging negligence, negligent misrepresentation and breach of trust are struck as against the Income Fund.

[27] The claim against the Income Fund under s. 130 of the *OSA* creates a statutory right of action for misrepresentations contained in a prospectus. Where a person has purchased securities in an offering made through the prospectus, that right of action is available against an "issuer." The *OSA* defines an "issuer" as a person or company who has outstanding, issues or proposes to issue, a security. The *OSA* defines a "person" to include "a trust."

[28] I find that the plaintiffs have a statutory claim against the Income Fund under s. 130 of the *OSA*. Pleadings with respect to it will stand. As stated, the claim under s. 138.3 of the *OSA* will be reviewed below.

Pleading of an Underlying Anti-Trust Conspiracy

[29] The plaintiffs have pleaded that Arctic was engaged in an anti-trust conspiracy. However, that allegation is not advanced as a cause of action. The Statement of Claim alleges a course of illegal conduct by the defendants, or some of them. In their pleadings,

the plaintiffs point to the defendants' alleged failure to disclose illegal activity and their allegedly false and materially misleading statements with respect to the nature and legality of their business activities as the foundation for the claims. The plaintiffs give that course of conduct the collective moniker of "Anti-Competitive Conspiracy."

[30] The defendants state that to plead this conspiracy as the factual foundation for the claims advanced, the plaintiffs must plead all the requisite elements of the tort of conspiracy. This, the plaintiffs have not done. These elements are summarized in *Apotex Inc. v. Plantey USA Inc.* (2005), 5 B.L.R. (4th) 116 at para. 56 (Ont. S.C.J.):

> The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreements between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceeded [*sic*] to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

[31] In support of their position that all of the requisite elements of the tort of conspiracy must be pleaded, the defendants rely on *Aristocrat Restaurants Ltd. v. Ontario*, [2004] O.J. No. 5164 (S.C.J.) and *Sudbury Downs v. Ontario Harness Horse Assn.*, [2002] O.J. No. 5505 (S.C.J.). In my view, both of these cases must be distinguished from the present case, as both pleaded conspiracy as a cause of action, which is not advanced here.

[32] I find that the pleading of the anti-trust conspiracy may stand. If the defendants should require further details, the appropriate recourse is a demand for particulars.

Pleading Under Section 130 of the *OSA*

[33] The plaintiffs plead that the prospectuses of the Income Fund issued during the class period contained misrepresentations which are actionable under s. 130 of the *OSA*.

[34] The defendants assert two deficiencies with the s. 130 *OSA* pleading:

(a) They state that neither plaintiff can advance this personal cause of action since neither purchased their units in the primary market; and

(b) This pleading must be limited to:

(i) persons who purchased in Ontario; and

(ii) reliance on those fund prospectuses should be within three years of the issuance of the Notice of Action in this matter on September 25, 2008, as contemplated by the limitation period set out in s. 138.14(b)(ii) of the *OSA*.

(a) Representative Plaintiffs

[35] The plaintiffs concede that neither of them was a prospectus purchaser on the primary market. The defendants state that this is fatal to the plaintiffs' claim under s. 130(1) of the *OSA*.

[36] It is well settled that for each defendant named in a class action there must be a representative plaintiff who has a valid cause of action against that defendant: See *Hughes v. Sunbeam Corp.*, [2002] O.J. No. 3457 at para. 15 (C.A.). Each of the plaintiffs in this case has pleaded at least one cause of action against each of the defendants.

[37] On this issue, I am guided by *Boulanger v. Johnson and Johnson Corp.*, [2003] O.J. No. 1374 at para. 41 (Div. Ct.), which states that plaintiffs may assert causes of action which are not their personal causes of action but which are asserted by them on behalf of class members.

(b) Territorial Restrictions and Limitation Period

[38] The defendants assert that the class must be limited to those persons who purchased securities in Ontario, as each province has different securities legislation. In Ontario there appear to be two divergent lines of authority on this point. Both are 2010

decisions, released just two days apart. In *Coulson v. City Group*, 2010 ONSC 1596, Perell J. considered the objection of the defendants that the plaintiffs proposed a national class, yet pleaded only s. 130 of the *OSA*. The defendants in that case proposed that the class be limited to purchasers who acquired common shares pursuant to the prospectus as a result of a distribution in Ontario. Perell J. agreed with the position of the defendants and held:

> **146.** The fundamental point is that persons who cannot rely on s. 130 of the Ontario *Securities Act* must rely, if at all, on the securities legislation of other provinces, but this legislation has not been pleaded in the case at bar…
>
> **147.** …while the Defendants do not object to a national class, they do object to the class definition including persons who do not have a claim under s. 130 of the *OSA*. They argue that the class definition is too broad because it includes purchasers who would not have a claim against the underwriters pursuant to s. 130 of the Ontario *Securities Act*.
>
> **148**. I agree with the Defendants' argument…

[39] The plaintiffs rely on *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, the decision released two days before *Coulson*. Strathy J. in *Gammon Gold Inc.* followed *Silver v. Imax Corp.* (2009), 86 C.P.C. (6th) 273 (Ont. S.C.J.) ("Imax") and held:

> **117.** Like Van Rensburg J. in *Silver v. Imax – Certification*, I do not find it necessary at this stage to make a determination of the law applicable to the claims of non-resident members of the class who purchased their securities from underwriters in other provinces. Given the similarity between s. 130 of the *Securities Act* and the securities law of other provinces of Canada, this may not be an issue with respect to Class Members from other provinces.

[40] I am reminded that on a motion to strike, which is before me, I must afford the claim a generous interpretation. I prefer the more permissive and less technical approach taken by Strathy J. in *Gammon Gold*, *supra.* However, relying on *Boulanger v. Johnson and Johnson Corp.*, *supra* at paras. 54 and 55, to permit this claim for a national class to

stand, I will require the plaintiffs to amend the Statement of Claim to plead the relevant provisions of the securities acts of those other provinces which the plaintiffs propose to have included in this class proceeding. For that purpose, leave to further amend is granted.

[41] The defendant, Johnson, is not a trustee of the fund. Accordingly, the claim under s. 130 of the *OSA* as against the defendant, Johnson, is struck.

[42] The limitation period in s. 138.14(b)(ii) of the *OSA* limits the plaintiffs' cause of action under s. 130 of the *OSA* to the two fund prospectuses issued after September 26, 2005. Each Statement of Claim must be amended to that end.

Pleading of Negligence *Simpliciter*

[43] The plaintiffs advance a cause of action in negligence *simpliciter* based on Income Fund representations to the primary market during the class period through the four Fund prospectuses published prior to the s. 138.14 *OSA* limitation period and the two published afterwards. The Statement of Claim includes the following pleading:

> **92.** … each of the Defendants … ought to have known that the Income Fund's Class Period prospectuses were materially misleading as detailed above. Accordingly, the Defendants have violated their duties to the Class Members.
>
> **93.** The reasonable standard of care expected in the circumstances required the Defendants … to act fairly, reasonably, honestly, candidly and with due care in the course of compiling and disseminating the Income Fund's prospectuses.
>
> **94.** The Defendants … failed to meet the standard of care required by issuing prospectuses during the Class Period that were materially false and/or misleading as described above.
>
> **96.** The negligence of the Defendants … resulted in the damage to Class Members who purchased under a prospectus. Had the Defendants … complied with their duty of care … then the Units offered by such

> prospectuses either would not have been offered to and purchased by the Class Members or, alternatively, such Units would have been offered at prices that corresponded to their true value…
>
> **97.** As a result, those Class Members who purchased Units under a prospectus bought their Units at inflated prices, and suffered a corresponding loss…

[44] The defendants state that there is no common law duty of care owed by public issuers and their officers, directors and/or trustees through the publication of their prospectuses and seek to have those pleadings struck. The defendants state that the plaintiffs' duty of care analysis is flawed for three separate reasons:

(a) There is no such duty of care owed by the Income Fund at common law. It has been replaced by s. 130 of the *OSA*.

(b) The duty of care owed by the directors and trustees is to the Income Fund and not to the unitholders; and

(c) In any event, the claim of negligence is subsumed by the pleading of negligent misrepresentation and is therefore duplicative.

(a) Has section 130 of the OSA replaced the common law duty of care?

[45] Section 130 of the *OSA* states:

> **130(1)** Where a prospectus … contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against:
>
> (a) the issuer …
>
> (b) each underwriter …
>
> (c) every director of the issuer …

[46] Section 1 of the *OSA* defines a "misrepresentation" as:

> (a) an untrue statement of material fact, or

(b) an omission to state a material fact …

[47] In s. 1 of the *OSA*, a "material fact," when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

[48] The defendant relies on *Menegon v. Philip Services Corp.* (2001), 23 B.L.R. (3d) 151 (Ont. S.C.J.). This was a proposed class action regarding prospectus misrepresentations in which the plaintiffs intended to assert a common law duty of care said to be owed to a class of investors by the underwriters.

[49] On motion by the defendants, the Court in *Menegon* struck out that portion of the claim. I find that *Menegon* is to be distinguished from the present case, at least on the basis that in *Menegon* the proposed defendants were underwriters who do not stand in the same relationship of proximity to shareholders as do directors and officers of the corporation in which those shareholders have invested.

[50] In my view, s. 130 of the *OSA* does not create a duty, rather it provides a remedy. The statutory duty is found in s. 56 of the *OSA* which provides:

> **56(1)** A prospectus shall provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed and shall comply with the requirements of Ontario securities law.

[51] Rather than replacing the common law duty of care, s. 56(1) of the *OSA* informs of that duty. This concept was recognized in *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 and *Haskett v. Equifax Canada Inc.*, [2003] O.J. No. 771 (C.A.) at para. 25.

[52] I find that s. 130 of the *OSA* does not subsume common law claims, but preserves them. In that regard, I am also guided by s. 130(10) of the *OSA* which states:

> **(10)** The right of action for rescission or damages conferred by this section is in addition to and without derogation from any other right the purchaser may have at law.

(b) Do directors and trustees owe a duty of care to investors?

[53] The defendants state that the cause of action in negligence against the directors and trustees must be struck, as it creates an untenable conflict of interest for those individuals. The defendants rely on *Alvi v. Misir* (2004), 73 O.R. (3d) 566 (S.C.J.), in which a claim was brought by shareholders against directors of a corporation for their activities as directors. The Court in that case held at para. 57:

> **57.** In view of the fact that the statutory duties of good faith, loyalty and care are owed to the corporation, the directors cannot have separate duties of the same nature owing to the shareholders. Such parallel duties would create untenable and unrealistic conflicts…

[54] I distinguish *Alvi* from the facts before me. Here, the plaintiffs assert a cause of action on behalf of the proposed class at a time when they were not shareholders, but chose to purchase Income Fund units and thereby became "shareholders." Those decisions to purchase units resulted in damage to Class Members, as pleaded in paras. 96 & 97 of the Statement of Claim:

> **96.** The negligence of the Defendants resulted in the damage to Class Members who purchased under a prospectus. Had the Defendants complied with their duty of care by conducting reasonable due diligence into the Income Fund's business and affairs prior to the issuance of each of the Income Fund's Class Period prospectuses, then the Units offered by such prospectuses either would not have been offered to and purchased by the Class Members or, alternatively, such Units would have been offered at prices that corresponded to their true value. When the Anti-Competitive Conspiracy and the participation of Arctic and its affiliates therein were disclosed, the artificial inflation in the price of the Units was removed, and the trading price of the Units was corrected to reflect the true state of Arctic's business, affairs and financial position.

> **97.** As a result, those Class Members who purchased Units under a prospectus bought their Units at inflated prices, and suffered a corresponding loss upon the disclosure of the Anti-Competitive Conspiracy and the participation of Arctic and its affiliates therein.

[55] The plaintiffs assert that the duties of the named trustees are owed specifically to the beneficiaries of the trust, namely the unit-holding plaintiffs. An assertion that the trustees of the Income Fund do not owe fiduciary duties to those beneficiaries ignores the essential nature of a trust.

[56] In any event, I find that at this stage of the proposed class proceeding, it is not "plain and obvious" that the pleading of negligence against the directors of the company and the trustees of the Fund will fail.

(c) Are the claims in negligence and negligent misrepresentation duplicative?

[57] The defendants state that the pleadings in negligence and negligent misrepresentation rely on the same duty of care. In support of their position that the claim of negligence is subsumed by the pleading of negligent misrepresentation and should therefore be struck, the defendants rely on *Deep v. M.D. Management* (2007), 35 B.L.R. (4th) 86 (Ont. S.C.J.) and *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.).

[58] In *Deep* the Court struck the plaintiff's pleading in negligence in part because it failed to raise a cause of action separate from the cause of action for negligent misrepresentation. In like manner, the motions judge in *Imax* struck out the pleading of negligence, finding that the negligence pleading in that case was in substance a pleading of negligent misrepresentation. Justice van Rensburg stated at para. 88 in *Imax*:

> **88.** The negligence pleading in this case is in substance a pleading of negligent misrepresentation without the ingredient of reliance. There is also no pleading that the alleged negligence caused damage to the plaintiffs and no separate claim for a remedy based on negligence.

> Accordingly, the claims sounding in negligence *simpliciter* … will not be permitted to proceed and the claim shall be amended accordingly.

[59] A review of the pleadings in the case before me indicates that unlike *Deep* and *Imax*, the claims of negligence and negligent misrepresentation are pleaded quite differently and raise separate causes of action. The negligence *simpliciter* claim asserts that the securities issued pursuant to the prospectuses would not have been issued, or would have been issued at a substantially reduced offering price, but for the negligence of the defendants. The negligent misrepresentation pleading, on the other hand, points to a number of misrepresentations contained in various prospectuses and public disclosures.

[60] To further distinguish these pleadings of negligence *simpliciter* from those considered by Justice van Rensburg in *Imax* in para. 88 above, I note para. 97 of the Statement of Claim in this action which states, referring to the allegations of negligence:

> **97.** As a result, those Class Members who purchased Units under a prospectus bought their Units at inflated prices, and suffered a corresponding loss …

[61] Materially identical pleadings in negligence and negligent misrepresentation were sustained in *McCann v. C.P. Ships*, [2009] O.J. No. 5182 (S.C.J.), *Mondor v. Fisherman* (2001), 18 B.L.R. (3d) 260 (Ont. S.C.J.) and *Metzler Investment v. Gildan Metzler Investment v. Gildan Activewear Inc.*, [2009] O.J. No. 5695 (S.C.J.).

[62] In finding that the claim of negligence *simpliciter* advanced here focuses specifically on the theory that the prospectuses would not have been issued, or would have been issued showing a reduced offering price for the units, but for the negligence of the defendants, and that it therefore relies on a materially different theory than a negligent misrepresentation allegation, I also have regard to the B.C. Court of Appeal decision of *Collette v. Great Pacific Management Co.*, [2004] B.C.J. No. 381. In that case, the appellant sought damages for losses on units of two mortgages he purchased. The appellant alleged that the respondents breached due diligence obligations regrading the

mortgage investments before offering the units for sale. On the issue of whether individual reliance must be shown, the Court stated at paras. 33 & 34:

> **33.** The respondents submit that the investors cannot succeed without proof of reliance on the misrepresentation by each investor individually, particularly with respect to the claims for negligent misrepresentation. The chambers judge concluded that proof of reliance was required for the claims in tort but not in contract.
>
> **34.** The reason for insistence on reliance is to establish causation. If causation can be established otherwise, then reliance is not required: see *Henderson*, *supra*, per Lord Goff at 776, and *Yorkshire Trust Co. v. Empire Acceptance Corp. Ltd.* (1986), 24 D.L.R. (4th) 140 at 145-47, 69 B.C.L.R. 357 at 354-55, 22 E.T.R. 96 (S.C.) per McLachlin J. Here if the mortgage units had not passed the due diligence test they would not have been offered for sale by the respondents to any clients. Causation is therefore established between a breach of due diligence duty and the investors' loss, independently of proof of individual reliance. In my view, proof of reliance does not present an obstacle to the appellant's case as framed. The appellant's case adequately links a breach of duty causally to the investors' losses.

[63] I also note that the claim of negligence is limited to primary market purchasers while the negligent misrepresentation claim focuses on secondary market purchasers.

[64] For reasons noted, I decline to strike the plaintiffs' claim of negligence *simpliciter*.

The Pleading of Negligent Misrepresentation

[65] The plaintiffs advance a cause of action in negligent misrepresentation, based on the Income Fund's public disclosures in both the primary and the secondary markets. Relevant parts of these pleadings in the Statement of Claim are:

> **98.** On behalf of all Class Members, the Plaintiffs plead negligent misrepresentation.

> **99.** The Income Fund's disclosure documents referenced above were prepared, at least in part, for the purpose of attracting investments and with the intention that Class Members would rely upon the documents in making the decision to purchase Units. The Defendants … knew or ought to have known that the Plaintiffs and the Class Members would rely upon those disclosure documents in making their decision to purchase the Units, and the Defendants … intended that the Plaintiffs and the Class Members so rely.
>
> **100.** The Individual Defendants and Arctic made those omissions and the Misrepresentation and the related misrepresentations alleged herein by authorizing, permitting and/or acquiescing in the drafting and issuance of the disclosure documents referenced above, and/or by signing them.
>
> **101.** The Defendants … made the omissions, the Misrepresentation, and the related misrepresentations alleged herein negligently, intending that the Plaintiffs and the other Class Members would rely upon them, which the Class Members did to their detriment.
>
> **102.** The Plaintiffs and each other Class Member relied upon the Defendants' … omissions, the Misrepresentation, and the related misrepresentations alleged herein by reading and acting upon disclosure documents containing the omissions, the Misrepresentation, and the related misrepresentations alleged herein, or alternatively, by reading and acting upon documents that contained information derived from the omissions, the Misrepresentation, and the related misrepresentations.
>
> **103.** Further, given the relationship as pleaded below between the Income Fund's disclosures and the price of the Units, the Plaintiffs and each other Class Member relied upon the said omissions, the Misrepresentations and the related misrepresentations by the act of purchasing or acquiring Units in the open market.
>
> **104.** The Plaintiffs and each other Class Member suffered damages and loss, as particularized below, as a result of such reliance.

[66] To establish the tort of negligent misrepresentation, the plaintiffs must establish the required elements recited by the Supreme Court of Canada in *R. v. Cognos Inc.*, [1993] 1 S.C.R. 87 at p. 110:

1. There must be a duty of care based on a "special relationship" between the representor and the representee;

2. The representation in question must be untrue, inaccurate, or misleading;

3. The representor must have acted negligently in making said misrepresentation;

4. The representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

5. The reliance must have been detrimental to the representee in the sense that damages resulted.

[67] To identify the existence and scope of a duty of care in a claim of negligent misrepresentation, in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 20 the Supreme Court of Canada applied what has become known as the two-stage *Anns* test (see *Anns v. Merton London Bureau Council*, [1978] A.C. 728). The first stage of the *Anns* test requires that there be a relationship between the parties justifying the imposition of a duty of care. It calls for considerations of foreseeability, proximity and policy. At the second stage of the *Anns* test, the court should consider whether there are any residual policy considerations militating against the recognition of a duty of care.

[68] The defendants state that no duty of care can exist as pleaded by the plaintiffs. Accordingly, I must review in detail the application of the two-stage *Anns* test.

Relationship of Proximity

[69] The defendants assert that the plaintiffs failed to plead the material facts necessary to demonstrate a special relationship of proximity, as neither reasonable foreseeability nor reasonable reliance was pleaded. The plaintiffs have asserted that a duty of care was owed to class members. The defendants in response submit that this pleading lacks the necessary relational proximity. The defendants rely on *Attis v. Canada (Minister of Health)* (2008), 93 O.R. (3d) 35 (C.A.) at para. 68 for the assertion that a

duty of care cannot be owed only to the class members who purchased units, as opposed to the general public in this type of transaction. In my view, *Attis* does not assist the defendants. That decision focuses on the relationship between the government, policy decisions and members of the public. Further, the Court specifically states at para. 68 that relational proximity was not pleaded, contrary to the present case.

[70] The defendants state that there is no direct causal proximity between the defendants' release of the documents and the plaintiffs' loss. They state that the decline in the price of the units of the Income Fund on the open market is the result of numerous forces and events. They state that this type of indirect relationship between the defendants' conduct and the proposed class members' losses is insufficient to ground a finding of proximity. They rely on *Paxton v. Ramji*, 2008 ONCA 697 at para. 71 in support of that position. In *Paxton*, the Ontario Court of Appeal considered whether a physician treating a female for acne, simultaneously owed a duty to a child then neither planned nor conceived, but subsequently born to that female person. The "indirect relationship" reviewed in para. 71 of *Paxton* related specifically to that fact situation and, in my view, has no application to the present case.

[71] The defendants further rely on *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 at para. 27, stating that the proximity analysis must be grounded in the statutory scheme, where one exists. Yet, similarly to s. 130(10), s. 138.13 of the OSA provides,

> **138.13** The right of action for damages and the defences to an action under s. 138.3 are in addition to, and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part.

I am also guided by Justice van Rensburg's analysis of this issue in *Imax*, [2009] O.J. No. 5585:

> **40** While there are no reported cases in Ontario where a common law claim of misrepresentation in the secondary market has been considered at trial, such claims have been permitted to proceed under a Rule 21 or class

> proceeding certification motion in *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.); *Mondor v. Fisherman*, [2001] O.J. No. 4620 (S.C.), *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2006] O.J. No. 3748 (S.C.J.) and *McCann v. CP Ships Limited*, [2009] O.J. No. 5182…
>
> **47** The present case is similar to *Mondor* and can be distinguished from *Menegon*. The Claim concerns representations made as part of a reporting issuer's continuous disclosure obligations, and not, as in *Menegon*, representations intended for the primary market that were made in a prospectus. The continuous disclosure obligations of a reporting issuer are prescribed by and under the *OSA*, and the intended recipients of such disclosure are the investing public.
>
> **48** Section 138.3 of the *OSA* provides for liability of issuers, their directors and in certain circumstances their officers and intermediaries to persons who acquired or disposed of an issuer's securities between the time a material misrepresentation in secondary market disclosure was made and its correction. While there is a specific statutory remedy, s. 138.13 of the *OSA* provides that the statutory right of action for damages and the defences to an action "are in addition to and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part."
>
> **49** There is no inconsistency or conflict between the pursuit of a statutory remedy for secondary market misrepresentation that imposes liability without proof of reliance but subject to a damages cap and other limitations, and a claim alleging a common law duty of care for negligent misrepresentation arising out of the same circumstances, where reliance is an element of the tort. The public policy concern of conflict with an existing statutory regime or remedy does not arise in this case.

[72] In my view, the position advanced by the defendants that imposing a duty of care at common law could create requirements above and beyond those codified in the *OSA* should be left for trial and should not be resolved at this embryonic stage of the action. I find that the plaintiffs have made out a *prima facie* duty of care for pleading purposes. That takes me to the second stage of the *Anns* test.

Residual Policy Considerations

[73] The defendants assert that recognizing a *prima facie* duty of care to the entire secondary market would raise the spectre of indeterminate liability as the entire investing public is not a limited class. They rely on *Hercules*, *supra*, in which the Supreme Court addressed certain policy considerations to limit or constrain the scope of possible unlimited liability. These comments of the Court are of note:

> **41.** A *prima facie* duty of care will arise on the part of a defendant in a negligent misrepresentation action when it can be said (a) that the defendant ought reasonably to have foreseen that the plaintiff would rely on his representation and (b) that reliance by the plaintiff, in the circumstances, would be reasonable.

[74] The Supreme Court also noted at para. 46 that indeterminate liability would not inhere on the specific facts of those cases where:

> **46.** … the defendant knew the identity of the plaintiff **(or the class of plaintiffs)** who would rely on the statement at issue, but also because the statement itself was used by the plaintiff for precisely the purpose or transaction for which it was prepared. [Emphasis added.]

Did the defendants know the identity of the plaintiffs?

[75] The defendants rely on *Haig v. Bamford*, [1977] 1 S.C.R. 466 and *NPV Management Ltd. v. Anthony* (2003), 231 D.L.R. (4th) 681 (N.L. C.A.) for the proposition that the investing public is not a limited class.

[76] The plaintiffs in this case have pleaded:

> **99.** The Income Fund's disclosure documents … were prepared, at least in part, for the purpose of attracting investment and with the intention that Class Members would rely upon the documents in making the decision to purchase Units. The Defendants … knew or ought to have known that the Plaintiffs and the Class Members would rely upon those disclosure documents in making their decision to purchase the Units, and the Defendants … intended that the Plaintiffs and the Class Members so rely.

[77] I return to *Hercules*, *supra*, and note that the Court, in para. 46 of that decision, included "a class of plaintiffs" when it stated at para. 37:

> **37.** … in cases where the defendant knows the identity of the plaintiff **(or of a class of plaintiffs)** and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding **indeterminate liability will not be of any concern** since the scope of liability can readily be circumscribed. Consequently, such considerations will not override a positive finding on the first branch of the *Anns*/*Kamloops* test and a duty of care may quite properly be found to exist. [Emphasis added.]

[78] *Haig*, *supra* did not involve a public company. In that case, accountants prepared reports for a client with the knowledge that the documents were to be used to seek investments from a circumscribed class of investors. While the class of potential investors in this case is larger, the defendants here knew the class of persons who would rely on the continuous disclosure documents which the defendants prepared "for the purpose of attracting investments and with the intention that Class Members would rely upon the documents in making the decision to purchase Units."

[79] *NPV*, *supra* must be distinguished on the basis that the pleadings in the present case allege that the impugned statements were made to attract investments. In *NPV*, the statements at issue were made to satisfy reporting and disclosure requirements.

[80] I am also guided by the finding of Justice van Rensburg in *Imax, supra*. She held that the pleadings in *Imax*, which in this regard are materially similar to the pleadings in the present case, rendered *NPV* inapplicable.

[81] The defendants' claim that the continuous disclosures made by the Income Fund were primarily for the purpose of fulfilling statutory requirements is to suggest that a securities issuer exists for the purpose of fulfilling statutory obligations. That ignores the obvious focus of these disclosures which is to attract investors. The intended recipients

of such disclosure documents are members of the investing public, as pleaded in para. 97 of the Statement of Claim.

The Effect of Recognizing a Duty of Care

[82] The defendants raise a number of residual policy considerations which do not address the relationship between the parties, but the effect of recognizing a duty of care on other legal obligations: see *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at 554.

[83] First, they state that a *prima facie* duty of care may be negated when other causes of action provide remedies for the impugned conduct. They assert that the *OSA* provides such a remedy. As I stated above and as noted in *Imax*, *supra* at paras. 47 and 48, the specific statutory remedy of s. 138.13 of the *OSA* is "in addition to and without derogation from any other rights or defences…"

[84] The second concern raised by the defendants is that establishing the proposed common law duty of care would have a negative effect upon long-term unitholders by effectively creating an insurance scheme for short-term unitholders. In addition, the defendants say, it would have a negative chilling effect on the Canadian business sector. However, the plaintiffs assert that refusing to require corporate directors and officers to disclose the truth to the investing public would also have a negative effect on society. I am not persuaded at this early stage in the proceedings that it is plain and obvious that the claim of negligent misrepresentation will fail on this issue.

[85] Third, the defendants argue that Canadian common law duties should be harmonized on this issue with those determined by American courts. In my view, harmonization with the laws of a foreign jurisdiction cannot trump well-settled Canadian principles for evaluating the existence of a duty of care at common law. Canadian and American laws differ in many respects. It is not the role of this court to seek uniformity for its own sake with the laws of a foreign jurisdiction.

Actual Pleading of Detrimental Reliance

[86] Relying on *Lysko v. Braley* (2006), 79 O.R. (3d) 721 at para. 30 (C.A.), the defendants state that to plead reliance, the Statement of Claim must contain assertions that the plaintiffs altered their position by relying on the misrepresentation which resulted in a loss. The plaintiffs plead, although in a very general way:

> **102.** The Plaintiffs and each other Class Member relied upon the Defendants' … omissions, the Misrepresentation, and the related misrepresentations alleged herein by reading and acting upon disclosure documents containing the omissions, the misrepresentations…
>
> **103.** … the Plaintiffs and each other Class Member relied upon the said omissions, the Misrepresentation and the related misrepresentations by the act of purchasing or acquiring Units in the open market.
>
> **104.** … the Plaintiffs and each other Class Member suffered damages and loss, as particularized below, as a result of such reliance.

[87] In my view, the appropriate remedy here is that of a demand for particulars.

[88] The plaintiffs assert that reliance can be inferred from the act of purchasing units on the secondary market. The defendants state that reliance on such an inference is indistinguishable from the American doctrine of "fraud on the market." This theory was canvassed by Cumming J. in *Mondor*, *supra*:

> **59.** The "fraud on the market theory" is an implied statutory cause of action arising from Rule 10b-5 of the United States Securities and Exchange Commission. … The theory results in deemed reliance where an actionable misrepresentation is established on the part of a company and there has been the purchase of its shares by an investor in the secondary market. This statutory cause of action was described by the United States Supreme Court in *Basic Incorporated v. Max L. Levinson*, 485 U.S. 224 (1988) at 241 as follows:
>
> > [It] is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its

> business… Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements… The causal connection between the defendants' fraud and the plaintiffs' purchase of each stock in such a case is not less significant than in a case of direct reliance on misrepresentations.
>
> **60.** The theory negates the necessity of requiring proof of subjective reliance from each member of the proposed plaintiff class. The theory has been described as a legal fiction which has the effect of overcoming the need to prove reliance…
>
> **61.** The "fraud on the market theory" has been expressly rejected by Canadian courts because, *inter alia*, Canadian securities legislation does not include a similar concept, and that actual reliance is a necessary component under Canadian law concerning negligent and fraudulent misrepresentation.

[89] In *Mondor* at paras. 65-67, Cumming J. held that actual reliance on a misrepresentation is a question of fact which may be inferred from all the circumstances. He then stated at para. 69:

> **69.** To foreclose the consideration of an arguable issue past the pleading stage, a moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected: *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463. Had the plaintiffs simply pleaded the "fraud on the market theory" I would have foreclosed that consideration. Given, however, that the case law recognizes that a person's reliance upon a representation may be inferred from all the circumstances, in my view it would be premature to foreclose the consideration of this issue in the case at hand beyond the pleading stage.

[90] This reasoning applies to the facts of this case. I am also guided on this issue by the comments of Rady J. in *McCann*, *supra* at para. 59:

> **59.** It seems to me that the case law is in a state of evolution and the court, in certain circumstances, is prepared to relax the otherwise strict requirement to establish individual reliance. I think it would be an error to conclude, at this stage of the proceedings, that the plaintiff cannot possibly succeed in a claim for negligent misrepresentation. I would adopt the language of Justice Rooke in the *Eaton* case at para. 91 that "it is simply too early to determine whether, and to what extent, individual reliance will need to be examined in this case. A trial on the common issues will determine this need..."

[91] For these reasons, the pleading of negligent misrepresentation may proceed to trial.

B. Plaintiffs' Motion for Leave Pursuant to Part XXIII.1 of the *OSA*

Overview

[92] Part XXIII.1 of the *OSA* became law on December 31, 2005. Prior to its promulgation, Canadian securities class actions were based essentially upon the common law, in particular, the tort of negligent/fraudulent misrepresentation. The intent of the legislation is described by Lax J. in *Ainslie v. C.V. Technologies Inc.* (2008), 93 O.R. (3d) 200 at para. 9 (S.C.J.):

> …to create a system of statutory liability that would contain enough checks and balances … so that issuers and their directors would be deterred from inadequate or untimely disclosure…

[93] The two seminal parts of this legislation are:

> **138.3(1)** Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during

> the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or the company relied on the misrepresentation, a right of action for damages against,
>
> (a) the responsible issuer;
>
> (b) each director of the responsible issuer at the time the document was released;
>
> (c) each officer of the responsible issuer…
>
> (d) each influential person, and each director and officer of an influential person, who knowingly influenced,
>
> (i) the responsible issuer … to release the document, or
>
> (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; …
>
> **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.
>
> (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.

[94] In attempting to interpret this legislation and to apply it to the facts of this motion, I am guided by the approach proposed by E.A. Driedger and adopted by the Supreme Court of Canada in numerous cases, including *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727 at para. 25:

> **25.** …the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[95] As already noted, the defendants on the above motion to strike and on this leave motion have chosen not to file any responding material. The plaintiffs suggest that this alone should be fatal to the defendants' opposition to the plaintiffs' motion to seek leave. The plaintiffs rely on s. 138.8(2) which states that each side "shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely." The plaintiffs also rely on the comments by van Rensburg J. in *Silver v. Imax Corp.*, [2008] O.J. No. 1844 (S.C.J.):

> **17.** The *Securities Act* provides its own procedure in respect of the statutory remedy, that specifically requires proposed defendants to put forward information … and that specifically authorizes examination on such information …
>
> **19.** 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 a right to cross-examine the deponents of such affidavits.

[96] However, these comments should be put into context by noting that they were made by van Rensburg J. on a motion to compel answers to questions refused during cross-examinations on a pending motion. Lax J. in *Ainslie*, *supra*, like Justice van Rensburg in *Imax Corp.*, *supra*, was one of the first to consider an action brought under Part XXIII.1 of the *OSA*. In *Ainslie*, Justice Lax considered a motion by the plaintiffs to compel the defendants to file and serve an affidavit under s 138.8(2) of the *OSA*. I particularly note paras. 23 and 25 of that decision:

> **23.** I respectfully suggest that these comments should be confined to the facts and circumstances at issue in *IMAX*. These comments were made in *obiter* in resolving a refusals motion in circumstances where the defendants had filed affidavit material. It is important to recognize

> that in *IMAX*, the court was not addressing the interpretation of s. 138.8(2).
>
> **25.** Properly interpreted, the ordinary meaning of s. 138.8(2) is that a proposed defendant must file an affidavit only where it intends to lead evidence of material facts in response to the motion for leave.

[97] I subscribe to this view advanced in *Ainslie* that the ruling in *IMAX* should be confined to the special facts of the refusals motion before the court. I find that the defendants, in opposing the plaintiffs' "leave" motion, may do so in the absence of filing any material.

Limitation Period

[98] As a further preliminary matter, I must address the limitation period, as it applies to a claim under Part XXIII.1 of the *OSA*. The class period proposed by the plaintiffs is March 13, 2002 to September 18, 2008. Part XXIII.1 of the *OSA* did not come into force until December 31, 2005. Section 138.14 of the *OSA* provides:

> **138.14** No action shall be commenced under s. 138.3,
>
> (a) in the case of a misrepresentation in a document, later than the earlier of,
>
> (i) three years after the date on which the document containing the misrepresentation was first released…

[99] It is common ground that a three-year limitation period applies. What is at issue is the retrospective effect, if any, of Part XXIII.1 of the *OSA*.

[100] The plaintiffs issued the Notice of Action on September 25, 2008. The defendants state that Part XXIII.1 is not retroactive and therefore the limitation period in s. 138.14 precludes the plaintiffs from relying on any core documents prior to September 26, 2005.

[101] The plaintiffs state that Part XXIII.1 should be applied prospectively to an ongoing factual matrix. They rely on *Dell Computer Corp. v. Union*, [2007] 2 S.C.R. 801 at paras. 113-15:

> **113.** Professor P.-A. Côté writes in *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 169, that "retroactive operation of a statute is highly exceptional, whereas prospective operation is the rule". He adds that: "[a] statute has immediate effect when it applies to a legal situation that is ongoing at the moment of its commencement: the new statute governs the future developments of this situation" (p. 152). A legal situation is ongoing if the facts or effects are occurring at the time the law is being modified (p. 153). A statute of immediate effect can therefore modify the future effects of a fact that occurred before the statute came into force without affecting the prior legal situation of that fact.
>
> **115.** Can the facts of the case at bar be characterized as those of an ongoing legal situation? If they can, the new legislation applies. If all the effects of the situation have occurred, the new legislation will not apply to the facts.

[102] The retrospective application of a statute to a series of events that occurred both before and after that legislation came into force was addressed by the Supreme Court in *Épiciers Unis Métro-Richelieu Inc. v. Collin*, [2004] 3 S.C.R. 257 at p. 280-81:

> **46.** The principles of retroactivity, immediate application and retrospectivity of new legislation must not be confused with each other. **New legislation does not operate retroactively when it is applied to a situation made up of a series of events that occurred before and after it came into force or with respect to legal effects straddling the date it came into force** (Côté, *supra*, at p. 175). If events are under way when it comes into force, the new legislation will apply in accordance with the principle of immediate application, that is, it governs the future development of the legal situation (Côté, *supra*, at pp. 152 *et seq.*). If the legal effects of the situation are already occurring when the new legislation comes into force, the principle of retrospective effect applies. **According to this principle, the new legislation governs the future consequences of events that happened before it came into force but does not modify effects that**

> **occurred before that date** (Côté, *supra*, at pp. 133 *et seq.* and pp. 194 *et seq.*). When new legislation modifies those prior effects, its effect is retroactive (Côté, *supra*, at pp. 133 *et seq.*). Professor Driedger gave a good explanation of this distinction between retroactive and retrospective effect:
>
> > A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. **A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted.** A retroactive statute changes the law from what it was; **a retrospective statute changes the law from what it otherwise would be with respect to a prior event.**
>
> (E.A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at pp. 268-69) [Emphasis added.]

[103] The Statement of Claim details a series of 53 documents disseminated by the Income Fund for public consumption between March 13, 2002 and June 30, 2008. In many of these documents, the Income Fund repeatedly asserts that it is a good corporate citizen operating lawfully in a competitive industry. The plaintiffs allege that this repeated assertion is a misrepresentation. Whether that is so is an issue to be left to the trial judge, assuming leave is granted. What I find at this stage of the proceedings is that this repeated misrepresentation is one continuing fact situation: *Attorney General of Canada v. Confederation Trust Company*, [2003] O.J. No. 2754 at paras. 26-28. As such, commencing with the Income Fund Prospectus of March 13, 2002, the plaintiffs may rely on the disclosure documents in support of their position that these documents contain misrepresentations.

[104] I also rely on s. 138.3(6) of the *OSA* to find that these representations made by the Income Fund, if found to be misrepresentations, may be treated and relied upon by the plaintiffs as a single misrepresentation.

The Statutory Leave Procedure

[105] Section 138.8(1) of the *OSA* requires that any action claiming secondary market misrepresentation must have leave of the court. The section provides as follows:

> **138.8(1)** No action may be commenced under s. 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.

[106] Regarding the purpose of the leave test, I adopt these comments of van Rensburg J. in *Imax*, 66 B.L.R. (4th) 222:

> **293.** The statutory cause of action for secondary market misrepresentation also serves a dual purpose, of permitting the recovery of damages by a shareholder, and as a deterrent to breach of a reporting issuer's continuous disclosure obligations under the *OSA.*
>
> **294.** Similarly, 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.

Leave Test – Part I: Is the action brought in good faith?

[107] The first test under s. 138.8 is whether the action is brought in good faith. This is not to be presumed and must be established by the plaintiffs on a balance of probabilities: see *Imax*, 66 B.L.R. (4th) 222 at para. 295.

[108] Each of the plaintiffs in their affidavits state:

> I have also commenced this action to ensure that the defendants are held accountable for their behaviour and to deter similar conduct by others. I

> have no ulterior motive, nor any improper or collateral purpose in commencing this action.

[109] The plaintiffs also note that the proposed defendants, Gary D. Cooley ("Cooley") and Frank Larson ("Larson") pleaded guilty in the U.S. to conspiracy of a commercial nature involving some of these corporate defendants. The plaintiffs rely on these guilty pleas as evidence of their belief that they have a chance of success against Larson and Cooley in this proposed class action. The plaintiffs have a financial interest in the action, as they acquired units during the Class Period. They also note that there is no evidence:

(a) that they have brought this motion for an improper purpose;

(b) of malice, bad faith or dishonesty;

(c) of a prior conflict between the parties; or

(d) an intention to seek an improper advantage.

[110] Neither the defendants nor the proposed defendant Larson dispute a finding that the plaintiffs are acting in good faith. That leaves the proposed defendant Cooley. He states that there is no evidence that he knowingly influenced the Income Fund with respect to the alleged misrepresentations and that accordingly there is no evidence from which the plaintiffs can establish good faith with regards to the claims they advance against Cooley.

[111] To determine whether the plaintiffs' claim against Cooley has been brought in good faith in the context of s. 138.8, I have regard to the definition of "good faith" in *Black's Law Dictionary*, 9th ed., B. Garner, Ed. (St. Paul: Thomson Reuters, 2009):

> A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards or fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.

[112] I am also guided by the analysis of van Rensburg J. in *Imax*, 66 B.L.R. (4th) 222:

> **308.** I interpret "good faith" in the context of s. 138.8, to require the plaintiffs to establish that they are bringing their action in the honest belief that they have an arguable claim, and for reasons that are consistent with the purpose of the statutory cause of action and not for an oblique or collateral purpose. "Good faith" involves a consideration of the subjective intentions of the plaintiffs in bringing their action, which is to be determined by considering the objective evidence.

[113] The good faith inquiry with regards to Cooley involves an analysis of the objective evidence within the context of the legislative scheme. For liability to accrue under s. 138.3, an individual must be a responsible issuer, a director or officer of a responsible issuer or an influential person at the time the impugned document was released. The plaintiffs allege that at the relevant time Cooley was either an officer or an influential person.

[114] Section 1(1) of the *OSA* defines "officer":

> with respect to an issuer or registrant, means,
>
> (a) a chair or vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager,
>
> (b) every individual who is designated as an officer under a by-law or similar authority of the registrant or issuer, and
>
> (c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a) or (b).

[115] It is admitted that Cooley was a vice-president of Sales and Marketing of Arctic and Arctic International, Inc. Although he was not a director or trustee of the Income Fund, it should be noted that Arctic International is wholly-owned by Arctic Glacier Inc. which, in turn, is wholly-owned by the Income Fund.

[116] As per s. 1(1)(a) of the above definition in the *OSA*, a vice-president of an issuer is an officer for purposes of s. 138.8. Having determined that Cooley was a vice-president, it is necessary to determine whether he was a vice-president of a responsible issuer. To answer this question at this stage of the analysis, I must only determine that there is enough objective evidence for the plaintiffs to support their good faith intentions in seeking leave to advance their s. 138.3 claims.

[117] The definition of a "responsible issuer" is found in s. 138.1:

> "responsible issuer" means,
>
> (a) a reporting issuer, or
>
> (b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded;

A "reporting issuer" is defined in s. 1(1) of the *OSA*. Of particular note is subsection (e):

> "reporting issuer" means an issuer …
>
> (e) that is the company whose existence continues following the exchange of securities of a company by or for the account of such company with another company or the holders of the securities of that other company in connection with,
>
> (i) A statutory amalgamation or arrangement …
>
> where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least twelve months

[118] When the Income Fund was created, securities were exchanged so that the Income Fund became the holder of all the issued common shares of Arctic. At that time, Arctic Group, the predecessor of Arctic, had been in existence for more than 12 months.

[119] I find that there is sufficient objective evidence for the purposes of the good faith determination to find that Cooley was an officer of a responsible issuer and might be

liable under s. 138.3 through his acquiescence to the release of the misrepresentational documents.

[120] As stated, the remaining defendants and the proposed defendant Larson do not challenge the assertion that the plaintiffs have brought this action in good faith. With respect to them and the proposed defendant Cooley, I note that the plaintiffs have a personal financial interest in the action as well as a stated intent in starting this action to hold the defendants accountable for their behaviour and to deter similar conduct by others. There is no evidence of ulterior motive or conflict of interest. Accordingly, I find that the plaintiffs have met the "good faith" test under s. 138.8(1)(a) of the *OSA*.

Part II of the Statutory Leave Test: Is there a reasonable possibility that the plaintiffs will succeed at trial?

[121] To be granted leave on this motion, the plaintiffs must demonstrate at least a reasonable possibility of success at trial, assuming a finding that the action has been brought in good faith: see s. 138.8(1)(a) and (b) of the *OSA*. As stated in *Imax*, 66 B.L.R. (4th) 222 at para. 330:

> **330.** The statutory leave provision is designed to prevent an abuse of the court's process through the commencement of actions that have no real foundation, actions that are based on speculation or suspicion rather than evidence.

[122] The legislative history of Part XXIII.1 of the *OSA* was extensively reviewed by van Rensburg J. in *Imax*, 66 B.L.R. (4th) 222 and by Lax J. in *Ainslie*, *supra*. Drawing on these reviews, I am satisfied that Part XXIII.1 is on the one hand remedial, while on the other, it seeks "to protect defendants from coercive litigation and to reduce their exposure to costly proceedings." (*Ainslie*, *supra* at para. 15). It is this latter aim that the test in s. 138.8(1)(b) seeks to address. Having found that the plaintiffs brought this action in good faith, I must now decide whether "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff[s]."

[123] The task here is to attempt to bring clarity to the meaning of "reasonable possibility," as that phrase relates to these facts.

[124] In the context of a dangerous offender application brought by the Crown in *R. v. E.E.*, [2003] O.J. No. 1518 (S.C.J.), the defence sought to show that there was a reasonable possibility of eventual control of the accused in the community. In attempting to bring meaning to those words, the court stated:

> **41.** … it is important to underline the word reasonable. It is not a mere possibility, or any possibility, but one that is reasonable. Clearly, that means a possibility that has a reasonable possibility of success, in the mind of the Court.
>
> **42.** The "possibility" must have an air of reality, and have more substance than simply faith or hope.

[125] As already noted, statutory language should be read in its grammatical and ordinary sense. A review of dictionary meanings of these words indicates the following: *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998) defines "reasonable" as:

1. Having sound judgment; moderate; ready to listen to reason.
2. In accordance with reason; not absurd.
3. Within the limits of reason; fair, moderate …

[126] *Black's Law Dictionary*, *supra*, defines "reasonable" as:

1. Fair, proper, or moderate under the circumstances.
2. According to reason.

[127] The *Canadian Oxford Dictionary*, *supra*, defines "possibility" as:

1. The state or fact of being possible, or an occurrence of this.
2. A thing that may exist or happen **…**

[128] *Black's Law Dictionary*, *supra*, defines "possibility" as:

> 1. An event that may or may not happen **…**

[129] Van Rensburg J. in *Imax*, 66 B.L.R. (4th) 222 at paras. 313-346, considered the language of s. 138.8(1)(b). I find no reason to depart from her analysis. In particular, I note the following paras:

> **324.** "Reasonable" is used instead of "mere" to denote that there must be something more than a *de minimis* possibility or chance that the plaintiff will succeed at trial. The adjective "reasonable" also reminds the court that the conclusion that a plaintiff has a reasonable possibility of success at trial must be based on a reasoned consideration of the evidence.
>
> **326.** In undertaking this evaluation the court must keep in mind that there are limitations on the ability of the parties to fully address the merits because of the motion procedure. There is no exchange of affidavits of documents, no discovery (although affiants may be cross-examined) and witnesses cannot be summoned. The credibility of a witness' evidence given by affidavit in a motion, irrespective of how searching an out-of-court cross-examination may be, can only be fully determined when it is tested in open court.
>
> **330.** The statutory leave provision is designed to prevent an abuse of the court's process through the commencement of actions that have no real foundation, actions that are based on speculation or suspicion rather than evidence.

[130] In my view, in assessing the existence of a reasonable possibility of success at trial, I must consider the relevant evidence, within the context of this motion. The applicable standard is more than a mere possibility of success, but is a lower threshold than a probability.

Section 138.3 – Elements to be Proven

[131] The plaintiffs have limited their claim to rely only on core documents. For the purposes of this motion, the defendants do not oppose the following aspects of the pleaded s. 138.3 offences regarding the core documents, namely that:

- the Fund is a "responsible issuer";
- the Fund documents are "documents" that were released by the Fund;
- the Fund documents contain a "misrepresentation";
- the Plaintiffs acquired the Fund's securities during the Class period;
- the Trustees of the Fund, namely Clark, Nagy, Filmon and Swaine, are "directors" of the Fund;
- McMahon was a *de facto* "officer" of the Fund in his roles as CEO and CFO of Arctic Glacier Inc.;
- Bailey became *de facto* "officer" of the Fund as of December 29, 2006 … when he became CFO of Arctic Glacier Inc.; and
- Johnson, as a director, and McMahon and Bailey as officers of Arctic Glacier Inc., are "influential persons" of the Fund because they are "directors" and "officers" of a subsidiary of the Fund.

[132] To demonstrate that they have a reasonable possibility of success at trial, the plaintiffs must do so with each element of s. 138.3 and with each defendant: *Imax, supra*, at paras. 334-336.

[133] Based on the admissions by the defendants, I find that the elements of the cause of action in s. 138.3 have been met for the purposes of this motion as against the Income Fund. Accordingly, leave under s. 138.8 is granted as against the Fund.

[134] The defendants dispute, however, that there is a reasonable possibility of success at trial with respect to Arctic as a responsible issuer or an influential person. The defendants assert that Arctic is not an "influential person" because it is not a "promoter"

or an "insider" of the Fund. Consequently, the defendants argue that Arctic's directors and officers are not directors and officers of a "responsible issuer" or an "influential person."

[135] The defendants also dispute that the trustees of the Fund can be characterized as "influential persons" of the Fund, because they are not "promoters." Finally, the defendants allege that Bailey was not an "officer" of Arctic before December 29, 2006 and that he was not an "expert" of the Fund.

The Trustees

[136] The defendants admit that the defendants Clark, Nagy, Filmon and Swaine, as trustees of the Income Fund, are "directors" of the Income Fund, under s. 138.3(1)(b) of the *OSA*. As directors of a responsible issuer, namely the Income Fund, liability accrues to the trustees under s. 138.3(1)(b), subject to any statutory defences.

[137] The plaintiffs also state that these defendants Clark, Nagy, Filmon and Swaine are liable under s. 138.3(1)(b) of the *OSA* as "influential persons" within the meaning of 138.3(1)(d) of the *OSA*. An "influential person" is defined in s. 138.1 of the *OSA*:

> "influential person" means, in respect of a responsible issuer…
>
> (a) a promoter…

"Promoter" is defined in s. 1(1) of the *OSA*:

> "promoter" means,
>
> (a) a person or company who, acting alone or in conjunction with one or more other persons, companies or a combination thereof, directly or indirectly, takes the initiative in founding, organizing or substantially reorganizing the business of an issuer …

These defendants, as trustees of the Income Fund, were directly involved in the formation of the Income Fund, which the defendants have conceded is "an issuer." Each trustee, as an "influential person" acting as the controlling mind of the Income Fund, would knowingly have influenced the Income Fund as the responsible issuer to release the core documents in question. Accordingly, I find that there is a reasonable chance of success at trial against the defendants Clark, Nagy, Filmon and Swaine under s. 138.3 as "directors" and as "influential persons."

Arctic Glacier Inc.

[138] The plaintiffs assert that Arctic is liable under s. 138.3 as an "influential person" of the Income Fund. "Influential person" is defined in s. 138.1 of the *OSA*:

> "influential person" means, in respect of a responsible issuer…
>
> (a) a promoter…

[139] The defendants have conceded that the Fund is a "responsible issuer" under the *OSA*. The plaintiffs assert that Arctic is a "promoter" of the Income Fund. "Promoter" is defined in s. 1(1) of the *OSA*:

> "promoter" means,
>
> (a) a person or company who … takes the initiative in founding, organizing … the business of an issuer, or …

The plaintiffs submit that Arctic is a promoter, as it was involved in the formation of the Fund. The defendants dispute this characterization, stating that there is no evidence to support the finding that Arctic took the "initiative in founding or organizing" the business of the Income Fund. In support of their position, the plaintiffs point to the 2003 Renewal Annual Information Form issued by Arctic which states in part:

Recent Developments

The Arctic Group Inc. ("Arctic Group"), the predecessor corporation to Arctic Glacier Inc. was incorporated in 1996. In November 2001, the board of directors and management of Arctic Group considered several alternatives to enhance shareholder value … The board of directors of Arctic Group concluded that the best alternative to accomplish these goals would be to convert Arctic Group into an income trust fund.

Arrangement Agreement

On January 31, 2002, Arctic Glacier, Arctic Group and the Fund entered into the Arrangement Agreement which provided for implementation of the Arrangement pursuant to Section 193 of the ABCA. … The Arrangement became effective on March 22, 2002. On the Effective Date, each of the events below occurred in the following sequence:

(a) all of the right, title and interest of Arctic Group securityholders in the Arctic Group securities was transferred to Arctic Glacier in exchange for Subordinated Notes …

(d) Arctic Glacier and Arctic Group were amalgamated and continued as one corporation and:

(i) all of the issued and outstanding Arctic Group securities, all of which were then held by Arctic Glacier, were cancelled without any repayment of capital; and

(ii) the name of the amalgamated corporation became "Arctic Glacier Inc." …

Upon completion of the Arrangement, the Fund became the holder of all of the issued and outstanding Common Shares and Subordinated Notes.

[140] I find that Arctic and its predecessor, Arctic Group Inc., were "at the very heart of the … reorganization of the company" and that Arctic is thus a "promoter": see *Gordian Financial Group Inc. (Re)* (1995), 4 ASCS 1690 at para. 34.

[141] As a "promoter," Arctic is an "influential person." For liability to accrue to Arctic as an "influential person" under s. 138.3(1)(d), the plaintiffs must show that Arctic as an influential person, knowingly influenced,

> (i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or
>
> (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document …

The Income Fund has no separate business and is entirely dependent upon the operations of Arctic. The documents at issue are reports of the business of Arctic. Additionally, these reports were signed by Arctic's officers. It follows that Arctic must have influenced the release of the impugned documents.

[142] I find that Arctic, as an "influential person," knowingly influenced the release of the impugned documents. Accordingly, I find that the plaintiffs have a reasonable possibility of success at trial against Arctic as "an influential person."

[143] The plaintiffs submit that Arctic can also be characterized as a "responsible issuer" as it is a "reporting issuer." A responsible issuer is defined in s. 138.1 as a "reporting issuer." This term is defined in s. 1(1) of the *OSA*:

> "reporting issuer" means an issuer…
>
> (e) that is the company whose existence continues following the exchange of securities of a company by or for the account of such company with another company or the holders of the securities of that other company in connection with,
>
> (i) a statutory amalgamation or arrangement…
>
> where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least twelve months…

Referencing the 2003 Renewal Annual Information Form, the plaintiffs assert that as Arctic Group completed its initial public offering on March 25, 1997, it was in existence for at least 12 months prior to the amalgamation and was thus a "reporting issuer."

[144] The defendants assert that Arctic is not a "reporting issuer." They state that on March 22, 2002, after Arctic Group was amalgamated into the new Income Fund, the common shares of Arctic were de-listed from the TSX when units of the Fund commenced trading. The Alberta Securities Commission followed with a decision on September 30, 2002 deeming Arctic to no longer be a reporting issuer under the securities legislation of Alberta, Saskatchewan, Manitoba, Ontario and Quebec. Accordingly, the defendants state Arctic has not been a "reporting issuer" as of March 22, 2002. I agree.

[145] I find that Arctic is not a "responsible issuer."

Defendant McMahon

[146] McMahon was the Executive Vice President of Arctic from April 2003 until December 2006, and Chief Financial Officer from April 2001 until December 2006. He became a director of Arctic September 21, 2007 and was the Chief Executive Officer of the Income Fund from December 2006 onwards. The defendants have admitted that McMahon, as CFO and CEO of Arctic was a *de facto* "officer" of the Income Fund for the entire Class Period.

[147] The term "officer" is defined in s. 1(1) of the *OSA*:

> An officer, with respect to an issuer… means,
>
> (a) a chair or vice-chair of the board of directors, chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager…

> (c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a)

[148] The Income Fund performs its operations entirely through Arctic whose officers perform the role which officers of the Income Fund would, if the Income Fund had officers. It apparently does not. The various documents filed by the plaintiffs on this motion appear to indicate that the officers of Arctic held themselves out to be officers of the Income Fund, at least in the core documents.

[149] Under s. 138.3(1)(c) of the *OSA*, officers of responsible issuers are liable if they "authorized, permitted or acquiesced in the release of the document."

[150] Throughout the Class Period, McMahon signed Form 52-109FT2. Therein he certified that he reviewed the annual or interim filings of the fund and with respect to each such document that they "do not contain any untrue statement of material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made." Initially, McMahon signed some annual filings directly.

[151] I find that during the Class Period, McMahon was an officer of the Income Fund and that, as such, the plaintiffs have a reasonable chance of successfully proving his liability under s. 138.3(1)(c) of the *OSA* at trial.

Defendant Bailey

[152] Bailey was CFO of Arctic as of December 29, 2006 and continued to hold that position at least for the balance of the Class Period. Prior to that date, from October 6, 2003 to December 29, 2006, Bailey was the Vice President of Accounting and Corporate Comptroller of Arctic. The defendants have admitted for purposes of this motion that Bailey was a *de facto* officer of the Income Fund. As did McMahon, Bailey signed Form 52-109FT2 throughout the Class Period certifying that he reviewed the impugned

documents and that they did not contain any untrue statements. He also signed some of the impugned documents directly. As is the case with McMahon, I find that the plaintiffs have established at least a reasonable possibility of success at trial as against Bailey as an officer of the Income Fund for the class period starting December 29, 2006.

[153] For the period prior to December 29, 2006, when Bailey held the position of the VP of Accounting and Corporate Comptroller of Arctic, the plaintiffs characterize this position as an "officer" of the Income Fund. They rely on *Momentas Corp. (Re)*, 2006 LNONOSC 778 at para. 101 where the Ontario Securities Commission ("OSC") articulated the test for determining if a person is a *de facto* director or officer. The OSC found that if a person is "an integral part of the mind and management of the company," then that person is a *de facto* director or officer. The defendants dispute this characterization and the application of the *Momentas Corp*. test to these facts. They state that the only evidence with respect to Bailey's role in Arctic prior to December 29, 2006, is a reference to Bailey, as one of the officers of Arctic, as senior management of the Income Fund. The defendants state that this is insufficient. I agree.

[154] The plaintiffs plead that Bailey is liable as an "expert," as per s. 138.3(1)(e) of the *OSA* in his role as an officer of Arctic prior to December 29, 2006. "Expert" is defined in s. 138.1 of the *OSA*:

> "expert" means a person or company whose profession gives authority to a statement made in a professional capacity by the person or company including, without limitation, an accountant…

Prior to December 2006, Bailey was the VP of Accounting at Arctic. However, there is no evidence that statements, opinions or reports in the core documents made by Bailey prior to that date were made in his capacity as an "expert" (rather than as an officer of Arctic.) Further, there is no evidence that Bailey consented to being an "expert" as

required by section 138.3(1)(e)(iii). I find that there is no reasonable possibility of establishing at trial that Bailey is an "expert" of the Fund.

[155] The defendants have admitted that Bailey, as an officer of Arctic, is an "influential person" of the Fund from December 2006 onwards and I so find.

Defendant Johnson

[156] The defendants have admitted that during the Class Period, Johnson was a director of Arctic. I have found that Arctic is an "influential person" as defined in s. 138.1 of the *OSA.* For purposes only of this motion, the defendants admit that Johnson, as a director of Arctic is an "influential person" of the Income Fund, as a "director" of Arctic, a subsidiary of the Income Fund.

[157] I find that there is a reasonable possibility that the plaintiffs will succeed at trial against Johnson as an "influential person" of the Income Fund under s. 138.3(1)(d). In my view, a sufficiently strong inference can be drawn that Johnson as a director of a subsidiary of the Income Fund was in a position to knowingly influence the Income Fund to release the impugned documents.

Proposed Defendant Larson

[158] The parties agree that during the Class Period, Larson was a senior Vice President, and from 2003 onwards, the Executive Vice-President of Arctic, although a resident and citizen of the United States. Based on my finding above, as an officer of Arctic, he was a *de facto* officer of the Income Fund.

[159] As an officer of the Income Fund, liability would accrue against him if he authorized, permitted or acquiesced to the release of the impugned documents.

[160] That leads me to the interpretation of the "acquiescence" threshold. The plaintiffs state that "acquiescence" is a low threshold which is met by Larson's position as Executive Vice-President of Arctic. They rely on *Katsigiannis v. Kottick-Katsigiannis* (2001), 55 O.R. (3d) 456 (C.A.), in which the Court, at para. 47, stated that: "'[t]o acquiesce' is to agree tacitly, silently or passively to something … acquiescence implies unstated consent."

[161] Both Cooley and Larson have admitted their involvement in certain anti-competitive conduct by Arctic in the U.S. through its American subsidiary, Arctic International.

[162] The defendants rely on *JLL Patheon Holdings, LLC v. Patheon Inc*. (2009), 64 B.L.R. (4th) 98 (Ont. S.C.J.). In the context of a third-party proxy solicitation, the Court held at para. 49:

> … the ordinary meaning of "acquiescence" upon which JLL relies carries with it the correlative that the party has at least some element of control over the act in question in the sense of being able to oppose successfully the occurrence of the legal consequences that flow from "acquiescence." This is captured by the reference to "implied consent" in the definition of "acquiesce" in Black's Law Dictionary 7th ed., which reads as follows: "To accept tacitly or passively; to give implied consent to (an act)." That concept is also present in the definition in the *Katsigiannis* decision.

[163] As Larson (and as did Cooley), by virtue of his guilty plea, admitted his involvement in anti-competitive conduct in the United States, it is clear that he, as an officer of the Income Fund (which was a responsible issuer), was probably aware that at least certain of the core documents in question contained misrepresentations. That is sufficient, in my view, to find that there is a reasonable possibility that the plaintiffs will succeed at trial against Larson as a *de facto* officer of the Income Fund.

[164] The plaintiffs have also asserted that Larson was "an influential person" who would have liability if he "knowingly influenced the release of the impugned documents." Though I am satisfied that the plaintiffs have met the test with respect to "acquiesce," I am not satisfied that they have done so with respect to "knowingly influenced the release of the documents." Accordingly, I find that the plaintiffs do not have a reasonable possibility of proving at trial that Larson is an "influential person" under s. 138.3 of the *OSA.*

Proposed Defendant Cooley

[165] Cooley became Vice President, Sales and Marketing of Arctic prior to the filing of the third quarter 2005 Report. The plaintiffs claim no prior liability as against Cooley. Both Cooley and Larson are listed in the Income Fund's 2006 Annual Report as senior management.

[166] The same reasoning as applied to Larson also applies to this proposed defendant. I find that the plaintiffs have a reasonable possibility of success against Cooley as a *de facto* officer of the Income Fund, a responsible issuer, under s. 138.3(1)(c), but not as an "influential person."

Evidence of Anti-Competitive Conduct

[167] To be granted leave, the plaintiffs must show that the evidence would support a finding, at least of a "reasonable possibility" that the Income Fund knew of or acquiesced in certain anti-competitive behaviour by one or more of its subsidiaries. To that end, the plaintiffs rely on two time periods, namely March 2002 to December 2004 and December 2004 to September 2008.

March 2002 to December 2004

[168] During the period of 2002 - 2004, the plaintiffs allege that Arctic was engaged in unlawful, anti-competitive conduct in Alberta, as evidenced by an action filed by a competitor of Arctic, namely Polar Ice Express Inc. In this case, *Polar Ice Express Inc. v. Arctic*, 2007 ABQB 717, released December 3, 2007, Polar Ice contended that Arctic unlawfully interfered with Polar Ice's contractual relations and commercial interests in 2002. The plaintiffs in the present case point to the following findings made by the trial judge:

> (a) In 2002, Arctic's sales manager for the Edmonton Region offered a $10,000 bribe to an employee of a customer, to grant Arctic an exclusive contract to supply ice;
>
> (b) Arctic targeted stores approached by Polar and cut its price only to those stores;
>
> (c) Arctic made other offers to liquor outlets and to Sobeys to match or even undercut Polar's price as a direct and deliberate attempt to induce those businesses to breach their contracts with Polar;
>
> (d) The conduct of Arctic to that end was egregious which ordinarily would call for punitive damages;
>
> (e) The trial judge did not award punitive damages but awarded damages in the amount of $50,000.

[169] The plaintiffs state that this conduct was not disclosed during the class period, during which the defendants continued to represent themselves as "good corporate citizens."

[170] In response, the defendants state:

> (a) It is unclear when the impugned activity became known to Arctic. As the decision was not released until December 2007, Arctic could not have been aware of those findings prior to that date.
>
> (b) The trial judge did not make a finding of systemic corporate wrongdoing.

(c) This Alberta decision is not sufficient evidence to support a finding that the plaintiffs have a reasonable possibility of success at trial with regard to the 2002 - 2004 period.

[171] The question is whether the defendants had knowledge of the conduct or Polar's allegations in that action prior to the release of that decision in December 2007. In my view, it is at least reasonably possible that the defendants were aware of the conduct or allegations raised in that action. Accordingly, I find that the plaintiffs have a reasonable possibility of success at trial with regard to the 2002 - 2004 period.

December 2004 to September 2008

[172] In December 2004, Arctic International, a wholly-owned subsidiary of Arctic, and consequently the Income Fund, acquired the Party Time Ice group of companies ("Party Time") based in Michigan. Party Time was then the largest ice business in Michigan, serving a population base of ten million people.

[173] In 2009, Arctic International admitted to its participation in an anti-competitive conspiracy in Michigan during the period of January 1, 2001 to at least July 17, 2007. Arctic International pleaded guilty to a charge of participating in a criminal, anti-competitive conspiracy in the United States. Under the terms of the plea agreement, Arctic International agreed to pay a fine of $9 million U.S. Under the terms of the plea agreement, Arctic International admitted that:

> Beginning January 1st, 2001, and continuing until at least July 17th, 2007, the exact dates being unknown to the United States, the defendant and co-conspirators entered into and engaged in a conspiracy to suppress and eliminate competition by allocating packaged-ice customers in southeastern Michigan and the Detroit, Michigan, metropolitan area. The charged conspiracy unreasonably restrained interstate trade and commerce, in violation of Section 1 of the Sherman Act…

[174] Canadian counsel for the Income Fund and the Corporate Secretary testified under oath that Arctic International had participated in the conspiracy.

[175] The plaintiffs state that from the acquisition of Party Time in December 2004 until the end of the Class Period, there should be no doubt that the Income Fund's subsidiary, Arctic International, was not a "good corporate citizen operating lawfully in a very competitive market," contrary to the representations in the defendant company's core documents.

[176] The defendants state that the U.S. Department of Justice charges were not laid within the Class Period and there is no evidence that the defendants knew or ought to have known about the anti-competitive activities in Michigan.

[177] Although the evidentiary trail at this stage is not perfect, I nevertheless conclude that the plaintiffs have demonstrated at least a 'reasonable possibility" of success at trial with respect to the period of December 2004 to the end of the Class Period.

[178] In the context of this leave motion, the defendants, as they did in the motion to strike, raised the concern that the plaintiffs failed to adequately plead an "anti-competitive conspiracy." As I did in the strike motion and based on the same reasoning, I find that the pleading of an anti-competitive conspiracy may stand.

Conclusion

[179] For reasons noted, I find that the plaintiffs have met the "leave test" under s. 138.8 of the *OSA*. The plaintiffs may pursue a statutory claim for misrepresentation in the secondary market under s. 138.3(1) of the *OSA* against the defendants, and the proposed defendants Cooley and Larson, subject to my findings in these reasons. An order may go granting the plaintiffs' leave to plead the causes of action in Part XXIII.1 of

the *OSA*, and that the proposed defendants, Cooley and Larson may be added as party defendants.

C. Certification Motion

[180] The plaintiffs, by motion, seek an order certifying this action as a class proceeding.

[181] Section 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*") articulates the test for certification:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[182] Certification of a class proceeding is mandatory if all five of the s. 5(1) requirements are met.

[183] In considering the requirements detailed in s. 5(1) of the *CPA*, I remain mindful of these additional provisions in the *CPA*:

> 5(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.
>
> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
>
> 2. The relief claimed relates to separate contracts involving different class members.
>
> 3. Different remedies are sought for different class members.
>
> 4. The number of class members or the identity of each class member is not known.
>
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

[184] The test for certification is a procedural endeavour. It is not meant to be a test of the merits of the action. The question at a certification stage is not whether the plaintiffs' claims are likely to succeed on the merits, but whether the action can be appropriately prosecuted as a class proceeding: *Hollick v. Toronto,* [2001] 3 S.C.R. 158 at para. 16.

[185] This point was further developed by the Ontario Court of Appeal in *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 50:

> **50.** *Hollick* also makes clear that this does not entail any assessment of the merits at the certification stage. Indeed, on a certification motion, the court is ill-equipped to resolve conflicts in the evidence or to engage in finely

> calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

[186] I also note this general observation on class proceedings by van Rensburg J. in *Silver v. Imax Corp.*, [2009] O.J. No. 5585 at para. 10:

> **10.** Class actions offer three important advantages. They serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. By allowing fixed litigation costs to be divided over a large number of plaintiffs, access to justice is improved by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public (this is the "behaviour modification" element) (*Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534, paras. 27-29). See also *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 14-16.

Section 5(1)(a) *CPA*: Do the pleadings disclose a cause of action?

[187] Section 5(1)(a) articulates the same test I addressed above in the defendants' motion to strike.

[188] The *CPA* is remedial and should be given a broad and liberal interpretation, as affirmed by McLachlin C.J.C. in *Hollick*, *supra* at paras. 14-16:

> **14.** The legislative history of the *Class Proceedings Act, 1992*, makes clear that the Act should be construed generously. Before Ontario enacted the *Class Proceedings Act, 1992*, class actions were prosecuted in Ontario under the authority of Rule 12.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. That rule provided that
>
> > [w]here there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.
>
> While that rule allowed courts to deal with relatively simple class actions, it became clear in the latter part of the 20th century that Rule 12.01 was not well-suited to the kinds of complicated cases that were beginning to come before the courts. These cases reflected "[t]he rise of mass production, the

diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs": *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 at para. 26. They often involved vast numbers of interested parties and complex, intertwined legal issues—some common to the class, some not. While it would have been possible for courts to accommodate moderately complicated class actions by reliance on their own inherent power over procedure, this would have required courts to devise *ad hoc* solutions to procedural complexities on a case-by-case basis: see *Western Canadian Shopping Centres*, at para. 51. The *Class Proceedings Act, 1992*, was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than *ad hoc* basis, with the increasingly complicated cases of the modern era.

15. The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class members would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario law Reform Commission, *Report on Class Actions* (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

16 It is particularly important to keep this principle in mind at the certification stage. 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 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) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally *Report of the Attorney General's Advisory Committee on Class Action Reform,* at pp. 30-33.

[189] I also note the principles applicable to a s. 5(1)(a) determination articulated by Cumming J. in *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 at para. 17:

> (a) no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion;
>
> (b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
>
> (c) the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;
>
> (d) the novelty of the cause of action will not militate against the plaintiff;
>
> (e) matters of law not fully settled in the jurisprudence must be permitted to proceed; and
>
> (f) the statement of claim must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, at pp. 990-91 S.C.R.; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673, [1999] O.J. No. 2494 (C.A.), at p. 679 O.R.; *Hollick, supra*, at para. 25*; M.C.C. v. Canada (Attorney General),* [2004] O.J. No. 4924, 247 D.L.R. (4th) 667 (C.A.), at para. 41.

[190] The plaintiffs assert that the pleadings disclose at least four valid causes of action:

(i) Section 130 of the OSA

[191] Within the three year limitation period from September 25, 2005 to September 25, 2008, the plaintiffs allege that their pleadings disclose a valid cause of action under s. 130 of the *OSA*. This section creates primary market remedies by assigning liability to issuers and associated persons when misrepresentations are published in prospectuses. As the plaintiffs' pleadings claim that the prospectuses issued May 17, 2006 and January 25, 2007 contained misrepresentations, the Statement of Claim discloses a valid cause of action under s. 130 of the *OSA.*

[192] The plaintiffs also advance a claim under s. 130 of the *OSA* as against the Income Fund and its trustees: Clark, Nagy, Filmon and Swaine. Section 130(1)(e) of the *OSA* assigns liability to those who signed the prospectuses. In addition to the trustees, the defendant McMahon signed both prospectuses and the defendant Bailey signed the prospectus issued January 25, 2007.

[193] On the defendants' motion to strike, I ruled that the plaintiffs' claim under s. 130 of the *OSA* may stand subject to proposed amendments to the Statement of Claim for which I granted leave to amend.

(ii) Negligence Simpliciter

[194] On the defendants' motion to strike, I ruled that the plaintiffs' claim of negligence simpliciter may stand.

(iii) Negligent Misrepresentation

[195] On this cause of action I have ruled, in response to the defendants' motion to strike, that this pleading may stand.

(iv) Breach of Trust

[196] The plaintiffs plead a breach of trust against the trustees of the Income Fund, namely Clark, Nagy, Filmon and Swaine. This claim is not contested by the defendants.

[197] Accordingly, I find that the pleadings disclose a cause of action as required by s. 5(1)(a).

Section 5(1)(b) *CPA*: Is there an identifiable class of two or more persons that would be represented by the representative plaintiffs?

[198] The plaintiffs have defined the proposed class as follows:

> All persons and entities, wherever they may reside or be domiciled, other than Excluded Persons, who acquired Units of [the Income Fund] during the period from March 13, 2002 to September 16, 2008.

[199] This portion of the certification test is meant to address three jurisprudential principles, noted in *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 at para. 10 and in *Hollick, supra* at para. 17:

> (a) Identifying those persons who have a potential claim for relief against the defendants;
>
> (b) Defining the parameters of the lawsuit so as to identify those persons who are bound by the result; and
>
> (c) Describing who is entitled to notice pursuant to the Act.

[200] McLachlin C.J.C. in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 ("*WCSC*"), an appeal arising from the Alberta class action legislation with a test for certification similar to the *CPA*, stated at para. 38:

> **38.** The [class] definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known.

[201] In analyzing this step of the certification test, I am also guided by these comments in *Hollick, supra* at para. 21:

> **21.** The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad—that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended…

[202] I note that the lack of territorial limitations to the proposed class is not a barrier to certification: *Imax*, [2009] O.J. No. 5585 at para. 129 and *Pysznyj v. Orsu Metals Corp.*, 2010 ONSC 1151 at paras. 13-19.

[203] The defendants state that the class as proposed is too large. They say that it is unworkable, as it includes all those who purchased units during the Class Period and not just those who still held units at the end of the Class Period in September 2008. These unitholders, the defendants state, were unaffected by the alleged misrepresentations, as they sold prior to the fall in the market price triggered by the DoJ investigation.

[204] It may well be that individual issues may arise and that certain subclasses in due course may need to be identified. That issue would appear to be addressed by s. 6 of the *CPA*. I am also guided by these comments in *Imax*, [2009] O.J. No. 5585 at paras. 106 and 107:

> **106.** In any event, a proposed class will not be overbroad simply because it may include persons who ultimately will not have a claim against the defendants…
>
> **107.** The submission by the defendants in this case that the class is overbroad because some of the class members may not have claims depends on their contention that there will be individual issues (such as reliance and damages) to be decided after the common issues have been determined. While the plaintiffs assert that reliance (based on the efficient market theory) and damages (contending that an aggregate assessment will be appropriate) will not be individual issues in this case, even if they are wrong and individual issues remain after the determination of the common issues, this is not an impediment to certification. As Cullity J. noted in *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (S.C.), at para. 69, "whenever, because of the existence of individual issues, a judgment on the common issues in favour of the plaintiffs will not determine a defendant's liability, it will always be possible—and invariably likely—that an acceptable class will include persons who will not have valid claims".

[205] Although "early sellers" may eventually be found not to have suffered a loss as a result of the alleged misrepresentations, it is arbitrary at this stage to so conclude and this issue should be left for trial: *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 at para. 122.

[206] I am also guided by these comments of the Supreme Court of Canada in *WCSC*, *supra* at para. 39:

> **39.** …there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action

> may require the court to examine the significance of the common issues in relation to individual issues.

[207] In my view, any possible individual issues which may arise pale in comparison to the issues of the proposed class. Any such individual issues can and should be addressed by the trial judge and should not stand in the way of certification.

[208] I find that the proposed class meets the requirements for an identifiable class under s. 5(1)(b).

Section 5(1)(c) *CPA*: Do the claims raise common issues?

[209] The term "common issue" is defined in the *CPA*:

> 1. "common issues" means,
>
> (a) common but not necessarily identical issues of fact, or
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[210] Cumming J. in *Ford*, *supra* at para. 33 summarized the law regarding this step of the certification test:

> **33.** The definition of "common issues" in s. 1 of the *CPA* "represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high". The common issues need only to "advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of a particular legal claim … is not required." This requirement has been described by the Court of Appeal "as a low bar". The Supreme Court of Canada has held that in framing the common issues, the guiding question should be "whether allowing the suit to proceed as a representative one would avoid duplication of fact finding or legal analysis". The common issues question should be approached purposively: *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (C.A.), at pp. 248-49 O.R.; *M.C.C. v. Canada*, *supra*, at para. 52; *Western Canadian Shopping Centres*, *supra*, at para. 39; *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, at para. 29.

[211] The underlying question, as held by the Supreme Court of Canada, is "whether allowing the suit to proceed as a representative one would avoid duplication of fact-finding or legal analysis": *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 at para. 29.

[212] The plaintiffs have proposed this list of common issues:

> [1] Did some or all of the following disclosure documents of the Income Fund contain a misrepresentation?
>
> (The plaintiffs provide a detailed list of core documents issued by the Income Fund between March 13, 2002 and September 2008.)
>
> [2] If the answer to [1] is yes, are the defendants or some of them liable to Class Members pursuant to Section 138.3 of the *Securities Act*?
>
> [3] If the answer to [2] is yes, what damages are payable by each defendant in respect of that liability?
>
> [4] If the answer to [1] regarding the prospectus of May 17, 2006 and of January 25, 2007 is yes, are the defendants or some of them liable to Class Members or some of them pursuant to s. 130 of the *Securities Act?*
>
> [5] If the answer to [4] is yes, what damages are payable by each defendant in respect of that liability?
>
> [6] Did the defendants, or any of them, owe the Class Members a duty of care? If so, which defendants owed what duty and to whom?
>
> [7] If the answer to [6] is yes, did any or all of the defendants breach their duty of care? If so, which defendants breached their duty and how?
>
> [8] If the answer to [7] is yes, did the defendants' breach of their duty of care cause damage to those Class Members? If so, what is the appropriate measure of that damage?
>
> [9] In respect of the Class Members' negligent misrepresentation claim, what is the procedure whereby class members must demonstrate their individual reliance upon the defendants' misrepresentations?
>
> [10] Did the trustees or some of them commit a breach of trust?

> [11] If so, what damages are payable by the Trustees to the Class Members in respect of their breach of trust?
>
> [12] Is the Income Fund vicariously liable or otherwise responsible for the acts of the other defendants?
>
> [13] Is Arctic Glacier Inc. vicariously liable or otherwise responsible for the acts of the other defendants?
>
> [14] Should one or more defendants pay punitive damages to the Class? If so, who, in what amount, and to whom?
>
> [15] Should the defendants pay the cost of administering and distributing the recovery? If so, which defendants should pay, and how much?

[213] The plaintiffs assert that these claims will substantially advance the case on behalf of the Class. They have characterized the misrepresentations throughout the class period as a single ongoing misrepresentation and assert that the unit prices reflected that misrepresentation. As such, the plaintiffs state, the effect of the misrepresentation on the unit prices over time is an issue common to every Class Member.

[214] The defendants concede all but five of the proposed common issues. The defendants challenge common issues 6, 7, 8, 9 and 14. The defendants raise these questions:

> ***[6] Did the defendants or any of them, owe the Class Members a duty of care?***

[215] On the defendants' motion to strike the claim of negligence simpliciter, I declined to strike that claim. I noted that the pleadings with respect to that claim assert that the securities issued pursuant to the prospectuses would not have been issued, or would have been issued at a substantially reduced offering price, but for the negligence of the defendants.

[216] Paragraph 97 of the Statement of Claim, referring to the allegations of negligence, reads:

> 97. As a result, those Class Members who purchased Units under a prospectus bought their Units at inflated prices and suffered a corresponding loss…

[217] I find that this is a common issue.

[7] If the answer to [6] is yes, did any or all of the defendants breach their duty of care?

[218] Although the alleged breach, namely the misrepresentations, took place over a period of about six years, these alleged misrepresentations repeated themselves and differed very little, if any, in substance from one to the other. In my view, these representations can be viewed as a single misrepresentation. Accordingly, I find that this purported breach would likely not require individual assessment and thus qualifies as a common issue.

[8] If the answer to [7] is yes, did the defendants' breach of their duty of care cause damage to those Class Members?

[219] The pleaded damage to the Class Members is either a loss of value of their securities or their purchase of them at inflated values. These, in my view, are common issues.

[220] In arriving at that view, I am guided, in part, by these comments of van Rensburg J. in *Imax*, [2009] O.J. No. 5585 at para. 182:

> **182.** Ultimately, the question when determining the common issues is to distinguish between issues that might be common to the class (or a subclass) and individual issues, and to ensure that issues that will require individual determinations are not included in the list of common issues. The fact that not all members of the class may be affected in the same way by the determination does not prevent the issue from being included as a common

> issue. Again, the cases emphasize that a common issue is not necessarily one where success for one member of the class necessarily results in success for all members.

[9] In respect of the Class Members' negligent misrepresentation claim, can class members' reliance be adequately demonstrated as a common issue?

[221] The defendants assert that reliance is inherently individual and thus cannot be a common issue. They state that the individual nature of the reliance requirement is such that it would overwhelm the other common issues. The defendants rely in part on *Williams v. Mutual Life Assurance Company of Canada* (2000), 51 O.R. (3d) 54 (S.C.J.). In that case, Cumming J. refused to certify a negligent misrepresentation claim, as the outcome of such cases would depend on a "myriad of individual evidentiary factors." He stated at para. 39: "[a] common issue cannot be dependent upon findings of fact which have to be made with respect to each individual claimant."

[222] The plaintiffs suggest that reliance can be inferred using the efficient market theory which presumes that misrepresentations to the market are reflected in the unit price. Thus, any purchaser can be deemed or inferred to have relied on such statements through the act of purchasing units.

[223] It is generally accepted that a cause of action in negligent misrepresentation requires proof of reliance. For that reason, courts have concluded that negligent misrepresentation claims are unsuitable for certification: *McKenna v. Gammon Gold Inc.*, *supra* at para. 135.

[224] As found by Strathy J. in *Gammon Gold, ibid.* at paras. 136 and 137:

> **136.** Issues of reasonable reliance have usually been considered to be individual issues that are not capable of being resolved on a common basis: *Lacroix v. Canada Mortgage and Housing Corp.*, [2009] O.J. No. 316, 68 C.P.C. (6th) 111 (S.C.J.) at para. 97; *Lawrence v. Atlas Cold Storage Holding Inc.* (2006), 34 C.P.C. (6th) 41, [2006] O.J. No. 3748 (S.C.J.), at paras. 91-93;

> *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at para. 57; *Serhan (Estate Trustee) v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (S.C.J.) at paras. 57-60.
>
> **137.** Exceptions may be made where there is a single representation made to all members of the class or there are limited number of representations that have a common import: see, for example, *Hickey-Button v. Loyalist College of Applied Arts and Technology*, 211 O.A.C. 301, [2006] O.J. No. 2393.

[225] Proof of reliance in a case of negligent misrepresentation can be made by inference, as opposed to direct evidence: *Mondor v. Fisherman,* [2001] O.J. No. 4620 and *Lawrence v. Atlas Cold Storage Holding Inc.* (2006), 34 C.P.C. (6th) 41. Two recent actions were certified in the face of claims of negligent misrepresentation: see *McCann v. CP Ships*, *supra* and *Silver v. Imax*, [2009] O.J. No. 5585.

[226] Strathy J. in *Gammon Gold*, *supra* came to a different conclusion. He described the misrepresentations before him at paras. 160-161:

> **160.** In this case, multiple misrepresentations are alleged … in press releases, regulatory filings, conference calls, annual reports and a multitude of other written and oral forms. The alleged misrepresentations relate to a variety of complaints, not simply the level of gold production. The plaintiff complains of undisclosed equipment failures, contracts with insiders, stock option expenses, non-compliant financial statements and inadequate disclosure controls. Individual inquiries would have to be made into what alleged misrepresentations were made to each class member and whether he or she relied upon any of those representations…
>
> **161.** There is no basis on which reliance could be resolved as a common issue. The need to determine the issue individually would give rise to a multitude of questions in each case concerning the representations communicated to a particular investor, the experience and sophistication of the investor, other information or recommendations made to the investor and whether there was a causal connection between the misrepresentation(s) and the acquisition of the security…

[227] It appears, as stated by Rady J. in *McCann*, *supra* at para. 59 that the case law on this issue is "in a state of evolution." I recognize that depending on the type and number

of alleged misrepresentations in a particular case, these could in certain circumstances overwhelm the common issues and would, as such, not be suitable to be resolved as a class proceeding. I find that the alleged misrepresentations made in this case in core documents are consistent and repetitive and can essentially be treated as one. As such, I distinguish these misrepresentations factually from those detailed in para. 160 in *Gammon Gold*, *supra.*

[228] In my view, the alleged misrepresentations here can be readily managed as a common issue and may proceed as such.

[14] Should one or more defendants pay punitive damages to the Class? If so, who, in what amount, and to whom?

[229] I am guided by and accept the reasoning on this issue by Strathy J. in *Gammon Gold*, *supra.* He distinguished *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (S.C.J.) but accepted Perell J.'s reasoning on the question of whether a claim for punitive damages is appropriate for certification. Strathy J. held at para. 170:

> **170.** Applying Justice Perell's test to the case presently before me, I find that the requirements for the certification of punitive damages as a common issue have been met. The nature of the present securities class action, as opposed to the product liability action before Perell J., makes the degree of misconduct, causation, harm, and the quantification of compensatory damages determinable by the common issues judge. There is no need for individual proof of loss to enable a common issues judge to assess punitive damages.

[230] I agree. The claim for punitive damages may proceed as a common issue.

Section 5(1)(d) *CPA*: Would a class proceeding be the preferable procedure for resolution of the common issues?

[231] In assessing this question, one should start with *Hollick, supra* at paras. 27-31. The Ontario Court of Appeal in *Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684 summarized the principles set out in *Hollick* as follows (para. 69):

> 1. The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
>
> 2. "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
>
> 3. The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

[232] The plaintiffs state that in view of the large number of potential class members, certification of this action would enhance judicial economy, even if it would not resolve the claims of every class member. This was the finding in *Carom v. Bre-X* (2000), 51 O.R. (3d) 236 at para. 58 (C.A.): "[c]ertification can be the preferable procedure in situations far short of final resolution of the lawsuit."

[233] The plaintiffs also rely on *CIBC v. Deloitte & Touche*, [2003] O.J. No. 2069 at para. 38 (Div. Ct.):

> **38.** …[T]here is no reasonably available alternative procedure to a class proceeding which is preferable, since the decision in one action will not bind the defendants with respect to the common issues. Given these facts, a class proceeding will promote the objective of judicial economy.

[234] The defendants interpret "judicial economy" differently. They state that as the DoJ in the United States has already completed a full investigation and charged culpable individuals and entities, a further judicial inquiry would not serve the goal of judicial economy. They state that this proposed litigation would impose crippling investigation-

related costs on existing security-holders for a second time. However, the DoJ investigation was in relation to illegal acts in the United States and had no bearing on possible losses suffered by individual investors for whom compensation is sought in this proposed class action. In my view, in a judicial economy inquiry, the focus should be on the preferable procedure for hearing specific claims, not on whether litigating a specific issue would be economical for the defendant corporation.

[235] The defendants have not advanced any evidence to suggest an alternate procedure for redress for Class Members whose securities have lost value as a result of the alleged misrepresentation: see *1176560 Ontario Limited v. Great Atlantic & Pacific Co. of Canada Ltd.*, [2002] O.J. No. 4781 at para. 27 (S.C.J.):

> **27.** …it would be antithetical to permit the defendants to defeat certification by simple reliance on bald assertions that joinder, consolidation, test cases or similar proceedings are preferable to a class proceeding. This is a simple shopping list of procedures that may be available in all cases. Mere assertion that the procedures exist affords no support for the proposition that they are to be preferred. The defendant must support the contention that another procedure is to be preferred with an evidentiary foundation. As stated in *Hollick* [at para. 22]:
>
> > In my view, the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.

[236] The plaintiffs urge that certification will enhance access to justice for Class Members, as the cost of litigating the matter individually would be far greater than the particular loss at issue. In my view, certification here clearly advances the interests of access to justice. The claims of the Class Members have yet to be investigated by any Canadian judicial body and the American DoJ investigation into illegal activity is not an appropriate substitute.

[237] As noted in *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375 at para. 99, "the objective of behaviour modification is to ensure that actual and potential wrongdoers do not ignore their obligations to the public." The defendants submit that the fines imposed as a result of the guilty pleas in the United States have already achieved the objective of behaviour modification. However, as noted by the plaintiffs, this action is not brought to seek compensation for anti-competitive behaviour, but for the failure to disclose such anti-competitive behaviour, a wrong not addressed by those guilty pleas.

[238] In finding that the plaintiffs have met the s. 5(1)(d) requirement, I also rely on these comments by Leitch J. in *Metzler Investment GMBH v. Gildan Activewear Inc.* (24 September 2010), London 58574CP at para. 11 (S.C.J.):

> **11.** …the costs of pursuing this action on an individual basis would be prohibitive and uneconomical for any Class Member thereby reducing access to justice and insulating the defendants from these claims. In addition, a class proceeding allows a single determination of the significant legal issues in this case thus eliminating the prospect of a multiplicity of proceedings. Finally, as noted by the plaintiff, its ability to access the courts to prosecute claims against violators of securities law is an important means of enhancing investor protection and restoring investor confidence, while creating an incentive for public corporations to take precautions which will protect market integrity.

Section 5(1)(e): Is there a representative plaintiff who:

i. will fairly and adequately represent the interests of the class?

ii. has produced a workable litigation and notification plan?

iii. does not have conflicts of interest with other class members on the common issues?

[239] In assessing adequate and fair representation of class interests, the Supreme Court in *WCSC*, *supra* noted at para. 41:

> **41.** In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class…

[240] The plaintiffs note that both representative plaintiffs indicated their intention to prosecute the claims with the view to advancing the best interests of the Class Members. There is no evidence to suggest otherwise.

[241] The plaintiffs have prepared a litigation plan. As stated in *Fakhri v. Alfalfa's Canada, Inc.*, [2003] B.C.J. No. 2618 at para. 77 (S.C.):

> **77.** The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issue are demonstrated by the class members.

[242] The defendants have not refuted the sufficiency of the plaintiffs' litigation plan.

[243] Any conflicts of interest must be actual and current to disqualify the proposed representative plaintiffs: *Eaton v. HMS Financial Inc.*, [2008] A.J. No. 1127 at paras. 186-187. The defendants' suggestion that the representative plaintiffs may have a conflict of interest is but speculative. There is nothing before me to support a finding of an actual conflict.

[244] I find that the plaintiffs have met the s. 5(1)(e) requirement.

[245] I am satisfied that this action should be certified.

[246] For a summary of my findings on the three motions addressed above, see Schedule A, attached.

[247] If required, counsel may bring the matter of costs before me within 60 days.

"Justice Tausendfreund"
Justice Tausendfreund

Released: March 1, 2011

SCHEDULE A:
TABLE OF FINDINGS

Motion to Strike Pleadings	**Finding**
a. Common law claims against the Income Fund	Motion to strike granted
b. "Anti-Trust Conspiracy"	Motion to strike dismissed

c. Section 130 of the *OSA*	Motion to strike dismissed*
d. Common law claim in negligence	Motion to strike dismissed
e. Common law claim in negligent misrepresentation	Motion to strike dismissed

* = However, plaintiffs must amend Statement of Claim to plead all provincial securities acts upon which they wish to rely. In addition, the s. 130 claim is struck as against the defendant Johnson.

Motion for Leave	**Finding**
Is the failure to file evidence fatal to the defendants' case?	No
Does s. 138.3 apply prospectively?	Yes
The test for leave (s. 138.8)	
a. Is the action brought in good faith?	Yes
b. Is there a reasonable possibility of success at trial...	
i. Against the Income Fund?	Yes – leave granted
ii. Against Arctic as a "responsible issuer"?	No – leave denied
iii. Against Arctic as an "influential person"?	Yes – leave granted
iv. Against trustees as "directors"?	Yes – leave granted
v. Against trustees as influential persons"?	Yes – leave granted
vi. Against McMahon as an "officer"	Yes – leave granted
vii. Against Bailey as an "officer" from Dec. 29, 2006 onwards?	Yes – leave granted
viii. Against Bailey as an "officer" prior to Dec. 29, 2006?	No – leave denied
ix. Against Bailey as an "expert"?	No – leave denied
x. Against Bailey as an "influential person" from Dec. 29, 2006 onwards?	Yes – leave granted
xi. Against Johnson as a "director"?	Yes – leave granted

xii. Against Johnson as an “influential person”?	Yes – leave granted
xiii. Against Larson as an “officer”?	Yes – leave granted
xiv. Against Larson as an “influential person”?	No – leave denied
xv. Against Cooley as an “officer”?	Yes – leave granted
xvi. Against Cooley as an “influential person”?	No – leave denied
xvii. That the Income Fund knew or acquiesced to the anti-competitive conduct from 2002-2004?	Yes – leave granted
xviii. That the Income Fund knew or acquiesced to the anti-competitive conduct from 2004-2008?	Yes – leave granted

Motion for Cerification	**Finding**
Section 5(1)(a): Do the pleadings disclose a cause of action?	Yes
Section 5(1)(b): Is there an identifiable class of two or more persons that would be represented by the representative plaintiffs?	Yes
Section 5(1)(c): Do the claims raise common issues? The defendants concede all but the following proposed common issues:	
a. Common issues #6, #7 and #8?	Yes
b. Common issue #9?	Yes
c. Common issue #14 common?	Yes
Section 5(1)(d): Is a class proceeding the preferable procedure for resolution of the common issues?	Yes
Section 5(1)(e): Is there a representative plaintiff who...	
a. Will fairly and adequately represent the interests of	Yes

the class?	
b. Has produced a workable litigation and notification plan?	Yes
c. Does not have conflicts of interest with other class members on the common issues	Yes