

-

SECURITIES LITIGATION UPDATE  
DIRECTOR AND OFFICER LIABILITY

-

**Monday, June 25, 2001**

**Joseph Groia**  
**Janice Wright**  
Alyssa Yufe

Groia & Company  
Lawyers  
Suite 1610, 145 King

Toronto, ON M5H

Phone: (416) 203-

Fax: (416) 203-

Street W.

1J8

2115

9231

-

---

---

“The easiest way to do anything is wrong”.

Bazooka Joe

## **Introduction**

The last year has seen many significant developments in securities litigation, class actions, and the liability of directors and officers for breaches of securities law. Many of these developments have exacerbated rather than clarified the present scope of director and officer liability in this area. This is in part because these changes are still developing. It is also in part because, like the law of negligence, the categories of liability for directors and officers are never closed.

The recent decision of the Ontario Court of Appeal in *Carom v. Bre-X*, seems to limit some of the traditional challenges to the certification of class actions for negligent misrepresentation. However, the impact of that decision may be restricted to certain contexts and the defendants in *Bre-X* are currently seeking leave to appeal to the Supreme Court of Canada. Similarly, although recent decisions of courts in Ontario have dealt harshly with the first signs of “strike suits” in Canada, this does not mean that American style litigation has been stopped from making an appearance in our justice system.

Canadian Securities Administrators (“CSA”) continue to work on a private right of action for continuous disclosure claims in the secondary market. A review of the proposed legislation suggests that the boundaries of the right of action have not been precisely or clearly defined. This may lead to significant increases in the potential liability of officers and directors in the secondary market and also possibly allow for a series of class actions that may in some instances be of dubious merit.

Finally, in May 2001, the CSA issued a new policy to compliment its proposal for the private right of action. Much like the Fair Disclosure policy recently adopted by the Securities and Exchange Commission (“SEC”) in the United States, this policy appears to be an attempt by the CSA to curb selective disclosure by issuers and their insiders. Critics of the American disclosure policy suggest that it has increased the fear of liability and reduced disclosure. The apparent failure of the CSA to learn from the American experience, coupled with its plan to adopt an ambitious ambit for the scope of its regulation, will likely further blur the scope of director and officer liability.

All in all these new developments add up to fertile ground for securities litigation. This paper briefly examines the effects of these proposed changes in securities regulation and considers some of the developing trends in class actions on the scope of director and officer liability in Canada.

## **Part I. Proposed Changes to Securities Law**

### **1. Secondary Market Liability**

In May 1998, the CSA published for comment proposed amendments to securities legislation, which would create a statutory civil liability regime for continuous disclosure. In November 2000, the CSA issued a further Notice of its proposed amendments, revising its original proposals to include some of the comments it received. This latest Notice, however, is not a request for comments and the CSA has expressly stated that it is not soliciting further comment on the proposed amendments but that, “certain members of the CSA will recommend the 2000 Draft Legislation to their respective governments and are hopeful that it will be tabled for legislative consideration at the first opportunity”. It appears that, for the most part, the CSA has now made up its mind and it is unlikely that we will see many more changes to the draft legislation.

### **The Allen Committee**

The CSA supports its proposal for the inclusion of a private right of action in the legislation on the basis that TSE initiatives such as the Allen Committee in 1995 argued that several high profile and well publicized incidents of alleged misrepresentations and questionable disclosure by public companies may have been related to the absence of statutory civil liability for continuous disclosure in Canada. Given the findings of the Allen Committee that secondary

market trading constituted 94% of capital markets trading, and the statutory right of action for prospectus disclosure, the absence of a right of action for continuous disclosure was considered an anomaly.

## **The Common Law**

The CSA also supports its proposal on the basis that there is no effective means of redress for secondary market misrepresentations available through private rights of action. Its argument is based on the reality that, without a statutory right of action for continuous disclosure, investor recourse for negligent or fraudulent misrepresentation is limited to cases where investors can afford to engage in expensive litigation and prove the necessary elements for these torts.

Canadian courts have consistently held that an investor claiming loss based on negligent or fraudulent misrepresentation must prove actual reliance as a key element of those torts.<sup>1</sup> A claim for negligent misrepresentation can only be asserted if the constituent elements and the material facts giving rise to each element are pleaded with particularity.<sup>2</sup> The tort of negligent misrepresentation has five constituent elements. There must be a duty of care arising from a special relationship between a representor and a representee. There must be a representation made that was untrue, inaccurate or misleading. The representor must have made the statement negligently. The representee must have reasonably relied upon the statement and further,

---

<sup>1</sup> *Carom v. Bre-X Minerals Ltd.* (1999) 44 O.R. (3d) 173, (“Bre-X”); *Menegon v. Philip Services Corporation* [not yet reported, March 6, 2001, Gans J.] (“Menegon”); and, *Collette v. Great Pacific Management Co.* (2001), 86 B.C.L.R. (3d) 92 (B.C.S.C.) (“Collette”).

<sup>2</sup> *Lana International Ltd. v. Menasco Aerospace Ltd.* (1996), 26 O.R. (3<sup>rd</sup>) 343 (Ont. Gen. Div.); Rule 25.06 (8) of the *Rules of Civil Procedure* and *Menegon*.

suffered damage as a result of the reliance.<sup>3</sup> Once a duty of care is found it must also override any policy limitations.<sup>4</sup>

The characteristics of this common law cause of action coupled with the expense of bringing an action has clearly discouraged individual law suits for misrepresentation. The introduction of the *Class Proceedings Act, 1992* (“CPA”), saw an opportunity for plaintiffs and their counsel to bring claims for mass misrepresentations to court. For the most part, however, certification has been refused in misrepresentation cases because the courts found that individual issues of reliance overwhelmed the common issues, given the need to inquire into multiple misrepresentations made in different circumstances and at different times.<sup>5</sup>

The Ontario Court of Appeal, however, has recently allowed the certification of a class action for negligent misrepresentation, fraudulent misrepresentation, conspiracy and breach of the *Competition Act* in *Carom v. Bre-X* (“Bre-X”),<sup>6</sup> a claim against former officers and directors of Bre-X. It held that the trial judge and the Divisional Court erred in principle by allowing the certification of all of the other causes of action against the issuer and its insiders except for the claim for negligent misrepresentation.

---

<sup>3</sup> *Queen v. Cognos Inc.*, [1993] 1 S.C.R. at p. 110, 99 D.L.R. (4<sup>th</sup>) 626.

<sup>4</sup> A review of the relevant cases suggests that a duty of care will exist in a negligent misrepresentation case where the following four elements are present: (a) the defendant ought reasonably to have foreseen that the plaintiff would rely on the representation; (b) reliance by the plaintiff in the circumstances was reasonable; (c) the defendant knew the identity of the plaintiff (or of a class of plaintiffs); (d) the defendant’s statements were used for the specific purpose or transaction for which they were made.

<sup>5</sup> *Abdool v. Anaheim Mgt. Ltd.*, supra; *Controltech Engineering Inc. v. Ontario hydro*, [1998] O.J. No. 5350 (Ont. Gen. Div.) at 5; *Mouteros v. Devry Canada Inc.* (1998), 41 O.R. (3d) 63 at 71-73 (Ont. Gen. Div.); *McKay v. CDI Career Development Institutes Ltd.* (1999), 64 B.C.L.R. (3d) 386 at 394-396 (S.C.); *Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 42 O.R. (3d) 776 at 787-7889 (Ont. Gen Div.)

<sup>6</sup> *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236; [2000] S.C.C.A. (“Bre-X”)

The Ontario Court of Appeal reviewed the standard set by the legislature and the judiciary for the determination of common issues and held that it was a low one.<sup>7</sup> The Court also held that common issues do not have to be issues which are determinative of liability and that they only need to be issues of law and fact, which move the litigation forward.

The Court allowed the certification of the claim on the basis that it found a substantial overlap of factual issues between the torts of negligent misrepresentation and fraudulent misrepresentation and its conclusion that there was no basis for treating them differently on the question of certification. This decision, however, only considers claims for negligent misrepresentation where there are also claims for fraudulent misrepresentation and other certified causes of action. As such, it does not appear to obviate the need for individual inquiries in all other cases<sup>8</sup>

### **Fraud on the Market Theory**

The CSA also finds support for its proposal on the basis that Ontario courts have been unwilling to import the American “fraud on the market theory” to claims for misrepresentations in the secondary market. The U.S fraud on the market theory essentially removes the necessity to establish reliance on any particular misrepresentation by the company, so long as the plaintiff can establish that the failure to generally disclose had an impact on the market price or value of its shares. Plaintiffs have attempted to use this theory in Ontario to establish deemed reliance and

---

<sup>7</sup> Macpherson J.A. reviewed the definition of common issues in section 8 (1) of the CPA and held: “The observation I would make about this definition is that it represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high.”

<sup>8</sup> Accordingly, the means of redress which have been employed by plaintiff counsel and which have yet to be tested for their effectiveness are the outstanding claims for negligent misrepresentation and breach of the Competition Act of the plaintiff class members in *Carom v. Bre-X*. See also the discussion of *Menegon*, *infra* Part II

a common issue in order to gain certification as a class proceeding in Ontario. In *Bre-X* and more recently in *Menegon*, Ontario Courts have been unwilling to recognize the theory holding that, “to import such a presumption would amount to a redefinition of the torts themselves.”<sup>9</sup>

### **The American Right of Action**

The CSA also suggests that a private right of action should be available in Canada because it is available in the United States. A meaningful comparison between American and Canadian law for private rights of actions for securities law breaches must consider the differences in the securities law framework in each jurisdiction. The civil right of action in the United States is not a statutory right but an implied right of Section 10(b) of the *Securities and Exchange Act*,<sup>10</sup> which is a general prohibition against market fraud. The deemed reliance aspect of fraud on the market is also a product of the American common law and was designed to fill in apparent gaps in U.S. securities legislation.<sup>11</sup>

Further, liability for misrepresentation for continuous disclosure in the United States is limited. American law only permits liability for primary violations of Section 10(b). The United States Court of Appeals for the Second Circuit in *Winkler v. Wigley*,<sup>12</sup> recently held that an outside

---

<sup>9</sup> *Bre-X*, *Supra* note 1, per Winkler J.

<sup>10</sup> Rule 10b-5 was promulgated under Section 10(b) of the Act.

<sup>11</sup> In the United States, the presumption of reliance does not flow automatically to the plaintiffs in a class action but rather there are certain thresholds that a plaintiff must meet. For example, in a Rule 10b-5 action, a plaintiff must prove that the defendant acted with “scienter”, which is defined by the U.S. Supreme Court as a “mental state embracing intent to deceive, manipulate or defraud.”

<sup>12</sup> *Winkler v. Wigley*, 242 F.3d 369 (unpublished opinion, full text available at 2000 U.S. App. LEXIS 31332 and 2000 WL 1786345) (2d Cir. Dec 6, 2000)

director and a public relations firm could not be held liable for misrepresentation in an annual report and a press release.<sup>13</sup>

In addition, for a class action to be certified in the United States, common issues must be found to “predominate”. This is to be contrasted with the test for common issues on a motion for certification in Ontario, where it is generally required that the plaintiff prove that there are common issues and that a class proceeding would be the preferable procedure for the resolution of the common issues.<sup>14</sup>

### **Outline of the CSA Proposals**

The proposed changes include the following:

1. Secondary market investors will have a civil right of action against issuers, directors, responsible senior officers, auditors, “influential persons”, and other experts for withholding information or for releasing misleading information that causes losses which could have been prevented, had complete information been made available.

Specifically, any person who is a director at the time a document was released or a public oral statement was made will be exposed to liability. Each officer of an issuer who

---

<sup>13</sup> The information concerned the purchase by NRD Mining, a small Canadian mining company, of a company that owned a Quartz mine in Madawaska Ontario. The Court relied on the dicta of the Supreme Court in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 128 L. Ed. 2d 119m 114 S. C.t. 1439 (1994), which held that there is no aiding and abetting liability under Section 10(b). The Court held: “We have rejected a test which holds a secondary actor liable for “substantial participation” in a misrepresentation and instead have adopted a bright line test, observing that if *Central Bank* was to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b)”.

<sup>14</sup> *Bywater v. Toronto Transit Commission*, [1998] O.S. No. 4913 at para. 26.

authorized, permitted or acquiesced in the release of a document, or in the making of a public oral statement will also be exposed to liability. This liability is triggered any time a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement or releases a document that contains a “misrepresentation”. Liability will also flow to issuers for misrepresentations by “influential persons” where such persons make public oral statements and release documents that contain misrepresentations. Directors and officers of “influential persons” may be liable, where they authorize, permit or acquiesce in the making of the statement or the release of the document.

2. Reliance will be deemed so that secondary investors will not have to prove that they had relied on any specific information. The Court is also permitted to treat multiple misrepresentations as a single misrepresentation.
3. Causation: The 2000 Draft Legislation effectively creates a presumption of causation if the market price following the correction of the misrepresentation is different from the market price at the time the misrepresentation was made.
4. Defences: For some types of disclosure defendants will have a due diligence defence.

For other types, it will be necessary to show that the defendants were not reckless.<sup>15</sup>

---

<sup>15</sup> Directors will not be liable for misrepresentations in “non-core documents” (a document which is not a prospectus, take-over bid circular, issuer bid circular, a director’s circular, a right’s offering circular, MD&A, an annual information form, an informational circular, annual & interim financial statements, and a report required under subsection 75(2) of the proposed legislation) or public oral statements and a failure to make timely disclosure of a material change, unless the plaintiff can prove that the Director was reckless. This protection is not available to officers of issuers. (see section 3. (4)).

5. Damages limits: Damages against an issuer are limited to 5% of market capitalization or \$1 million, whichever is greater. For defendants other than the issuer, the limits will not apply if they knew of the representation. Liability limits in the case of a director or officer of a responsible issuer is limited to \$25,000 or 50% of the aggregate of the director's or officer's compensation from the responsible issuer and its affiliates, whichever is greater.
6. Joint and Several Liability: Liability will not be joint and several. Each person at fault will only be responsible to the extent that they were responsible for the misrepresentation, unless the misrepresentation is made knowingly.
7. Procedural issues: The CSA proposes that leave of the court be required to commence an action and approve any settlement.

The CSA defends its proposal against the criticisms it has received by arguing that it mirrors the existing liability or right of action for prospectus disclosure. In our view these contexts are very different and proposals for the liability of directors and officers should take into account these differences. Specifically, liability for continuous disclosure should take into account the reality that, unlike prospectuses which typically involve hours of professional advice and due diligence, continuous disclosure statements, although informed, are often made extemporaneously without the benefit of all of this homework. In addition, it is arguable that the proposed scope of liability

is unreasonable given the potential for liability for the oral statements of others who may otherwise be beyond the control of defendant directors and officers.

### **Strike Actions and Payment of Legal Costs**

The CSA has defended its proposal for a private right of action, despite the concern that it will change the class action climate and Americanize securities litigation in Canada. We are not sure that this would necessarily be a bad thing. We wonder, parenthetically, whether the more vigorous plaintiff's bar in the U.S. is one reason why there is a general perception that the U.S. has fairer and more efficient capital markets. Strike suits are not a uniquely American litigation class action phenomenon. The term "strike suits" or "strike actions" connotes the commencement and pursuit of a class proceeding where the merits of the claim are not readily apparent but the nature of the claim and targeted transaction is such that a sizeable settlement can be achieved with some degree of probability. The term suggests a class proceeding that is generally regarded as an abuse of process.<sup>16</sup>

The American strike suit experience is described by Steven Sharpe and James Reid<sup>17</sup>:

"In the United States, the availability of class action procedures combined with a contingency fee structure for plaintiffs' lawyers has led to the creation of an entrepreneurial sector of the legal profession known as the 'strike bar.' U.S. strike bar lawyers are motivated by sizeable contingency fees and relative freedom to direct litigation according to their own interests. Even defendants who have done nothing wrong face Hobson's choice: to pay for a very expensive battle in the courts and

---

<sup>16</sup> *Epstein v. First Marathon* (2000), 41 C.P.C. (4<sup>th</sup>) 159, ('Epstein'); Blacks law dictionary defines strike suits as follows: Shareholder derivative action begun with hope of winning large attorney fees or private settlement, and with no intention of benefiting [the] corporation on behalf of which [the] suit is theoretically brought."

<sup>17</sup> "Aspects of Class Action Securities Litigation in the United States" (1997), 28 Can. Bus. L.J. 348 at 353-4, cited by Mr. Justice Cumming in *Epstein*.

eventually risk a potentially exorbitant jury damage award, or settle. Most defendants eventually swallow their indignation and make the prudent economic choice and, as a result, settlement has become the typical outcome of class action securities litigation in the United States.”

The possibility for strike suits in Canada is a very real one. The CSA proposal extends liability to a fairly large class of potential plaintiffs. The deemed reliance provision eliminates the uncertainty and costs that would otherwise deter unmeritorious claims. When combined with the CPA, the private right of action will be available on a contingency fee basis. All of these factors would seem to foster the growth of strike suits in Ontario.

The effect of strike suits on the American civil justice system was so extreme that American legislators found it necessary to address perceived abuses to the class-action mechanism by adopting new legislation, the *Private Securities Litigation Reform Act of 1995* (“PSLRA”), which conferred a supervisory role on the court.<sup>18</sup>

Surprisingly, the introduction of this legislation has not resulted in a decrease in the number of class actions brought in the United States.<sup>19</sup> Congress has recently responded again by passing the *Securities Litigation Uniform Act of 1998*, which creates further restrictions by attempting to ensure that the U.S. Federal Court has the exclusive jurisdiction for these actions. Whether their efforts to stamp out strike actions will be successful remains to be seen.

---

<sup>18</sup> The PSLRA allows defendants a safe harbour from liability for forward looking statements provided that certain conditions are met, restricts the application of joint and several liability, creates a presumption that the representative plaintiff should have the largest financial interest in the case, and heightens the pleading requirement for fraud. Further, in requiring a mandatory inquiry by the court at the conclusion of each attempted class action, Rule 11 of the PSLRA allows for sanctions to be imposed on plaintiffs and lawyers who have brought forward frivolous suits.

<sup>19</sup> See the RAND Institute for Civil Justice’s study published last year: Hensler D.R. et al *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica: Rand Institute for Civil Justice, 2000).

## **Proposed Protections**

The CSA argues that it has ensured that there are sufficient preventative measures in the proposed legislation to off-set any concerns. First, it relies upon the standard “loser pays” costs rules to deter such actions. Second, the CSA suggests that the requirement of court approval before any action can be stayed, discontinued, settled or dismissed will prevent abuses of process and will ensure that only meritorious claims are brought forward. The CSA notes the recent Ontario decisions for its confidence that the judiciary will sufficiently patrol the civil justice system to remove frivolous claims:

“Much of the concern about strike suits stems from uncertainty about the likely response of Canadian courts to strike suit litigation and the coerced settlements that may be the real objective of strike suit litigation. The recent decision of the Ontario Superior Court of Justice in *Epstein v. First Marathon Inc.* provides a strong indication of judicial disapproval of any effort to import strike suit litigation on the American pattern...The *Epstein* decision represents a strong denunciation of strike suits and a clear indication that Canadian courts, if given statutory authority, will exercise that authority to discourage strike suits.”

## **Costs and Court Approval**

While there are a few recent settlements with at least some similarity to strike suits in Ontario,<sup>20</sup> the strike suit character of the settlement agreement in *Epstein* was transparent. In *Epstein*, Mr. Justice Cumming was asked to approve a settlement agreement of a class action brought by a shareholder who alleged that First Marathon, in negotiating a merger agreement with National Bank of Canada, agreed to a price that was insufficient. The proposed merger was structured as an arrangement under section 182 of the *Ontario Business Corporations Act* (“OBCA”). The

---

<sup>20</sup> J. Melnitzer, “Class Action Wars: Part 3 Securities Litigation,” (March 2001) LEXPERT vol 2. at 86.

plaintiff argued that the information circular was deficient and he brought an application to vary the Interim Order issued under section 182. He also attempted to have his lawyer, David Klein of Klein Lyons in Vancouver, appointed to represent the shareholders.

His application was dismissed on the basis that there was no evidence to suggest that disclosure was inadequate. Shortly before the scheduled hearing to approve the Plan of Arrangement, Mr. Klein threatened to raise his concerns about the Plan of Arrangement and to delay the court approval. The day before the hearing and shortly after the shareholders had overwhelmingly approved the arrangement, Mr. Klein signed a settlement agreement entitling him to \$190,000 in fees and disbursements.

Mr. Justice Cumming placed considerable emphasis on the fact that the settlement involved the payment of legal fees and disbursements to Mr. Klein with no benefit conferred on any shareholders of the corporation. The settlement agreement did not bind any person except the parties to the agreement. The \$190,000 came from the principals of First Marathon rather than First Marathon or the National Bank. The Court also noted that the confidential agreement was inimical to the fair representation of the class members and shareholder democracy. Mr. Justice Cumming stated that if there was any value in the settlement because of the merits of the class proceeding, then putative class members would have a right to disclosure of the settlement. Mr. Justice Cumming also pointed to the large media coverage and the pressure tactics employed by Mr. Klein who confirmed that he was receiving legal advice from Millberg Weiss, an American law firm specializing in securities' class actions brought on behalf of plaintiffs.

The Court stated:

“[S]trike suits which are lawyer rather than client driven, are disconcerting for two reasons. First, they often severely and unacceptably interfere with standard corporate governance practices, creating unnecessary inefficiencies and bypassing existing regulatory devices. Second, strike suits may effectively transform the class-action mechanism from a shield into a sword. When fashioned into a sword by profit motivated lawyers and shareholder-plaintiffs posing as class representatives, the class proceedings becomes a means of harassing corporate defendants.”

The Court not only declined to approve the proposed settlement but went on to exercise its discretion under the CPA to dismiss the action without costs and specifically prohibited any payment to the plaintiff’s counsel under the settlement agreement or otherwise.<sup>21</sup>

While there is no question that courts in Canada are opposed to the importation of strike suits into Canada, it does not follow that the burden of policing the system should rest entirely with judges in the certification process. In our view the CSA, should not introduce a statutory right of action into securities legislation without ensuring that there will be adequate resources in place to prevent the flooding of the court system.

## **Screening**

The third safeguard proposed by the CSA is the so called “screening mechanism” found in section 7 of the Draft Legislation. In the words of the CSA, this screening mechanism is “designed to screen out, as early as possible in the litigation process, unmeritorious actions”.

The section provides:

---

<sup>21</sup> Mr. Justice Cumming stated that Mr. Epstein’s purpose in using the class proceeding was certainly raised as an issue and he queried, “whether one minor shareholder, with only a few shares, apparently motivated by an entrepreneurial lawyer, may attempt to interfere with corporate restructuring that is not objected to by any of the corporation’s other shareholders.”

## Leave to Proceed

- (1) No action may be commenced under section 2 without leave of the court granted upon motion with notice to each defendant. The court shall only grant leave 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 7 the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.
- (3) The maker of such an affidavit may be examined thereon in accordance with the rules of court as to discovery.
- (4) A copy of the application for leave to proceed and any affidavits filed in connection therewith shall be sent to the Commission when filed.

In our opinion, this screening mechanism fails to create any real balance in the proposed legislation. First, the screening function of the mechanism is left to the judiciary. The court is given the responsibility of determining the merits of the action and the plaintiff's motivation for bringing the action at the very first stage of the litigation. Second, the CSA does not set out what factors are indicative of a meritorious claim, the state of mind of the plaintiff, or the likelihood for success at trial.<sup>22</sup>

---

<sup>22</sup> By way of contrast, the legislation adopted in the United States provides at least one example of an objective measure used to screen out claims which are brought in bad faith. The 1995 legislation requires a plaintiff seeking to serve as a representative party in the United States to file a sworn certification that: (1) the plaintiff did not purchase the shares at the direction of counsel or in order to participate in a lawsuit; (2) identifies any other action filed during the preceding three year period in which the plaintiff sought to serve as a representative plaintiff; and (3) the plaintiff will not accept payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as approved by the court.

In this sense, the CSA is asking the judiciary to determine the basis for a meritorious claim under the proposed legislation. One would think that by drafting the legislation, the CSA would be in the best position to make these determinations and would provide more guidance to the judiciary.

The screening mechanism may also complicate and frustrate the certification process. The exercise of certification involves careful analysis and typically requires a great deal of judicial resources. Judges specializing in this area of the law place considerable emphasis on the importance of structure. The legislation introduces considerations into the certification process, which are foreign to the current process and procedure achieved by the Ontario judiciary. Mr. Justice Winkler recently wrote<sup>23</sup>:

“The Class Proceedings Act is a purely procedural statute. Indeed, the Act specifically states that an order certifying a class is not a determination on the merits of the proceeding. The intent was to create a procedure which would, in the words of the Report of the Attorney General’s Advisory Committee on Class Action Reform, ‘treat plaintiffs and defendants in a fair and equitable manner and...*not impose any unnecessary burdens on the courts.*’ (emphasis added).

Also according to Mr. Justice Winkler, the screening process set out in section 5(1) of the Act, is to be conducted with regard to the goals of the Act, namely, judicial economy, access to justice, and behavioural modification of culpable wrongdoers. In creating a new cause of action with a host of additional considerations, including a determination of merit, without considerable guidance as to the appropriate factors to be applied, appears to us to be a proposal that has little regard for its effect on the values and principles of the civil justice system.<sup>24</sup>

---

<sup>23</sup> The Honourable Mr. Justice Winkler “Advocacy in Class Proceedings Litigation”(Summer 2000) 19 Advocates’ Soc. J. No. 1, 6-9.

<sup>24</sup> It is also interesting to note that the final proposal including the 2000 amendments is consistent with certain principles of organizational theory. In “regulation of Corporate Law by Securities Regulators: A Comparison of Ontario and the United States”, (1997) 55(1) U.T. Fac. L. Rev 43, Patrick Moyer writes: “The theory predicts that

## 2. Regulation FD comes to Canada

On May 25 2001, the CSA published Notice of *Proposed National Policy 51-201 on Disclosure Standards*, in an attempt to follow the recent policy of the SEC aimed at curbing selective disclosure. The CSA says that it has become increasingly concerned about the selective disclosure of material corporate information by issuers to analysts, institutional investors, and other market participants, which it defines as the disclosure of material non-public information to one or more individuals or corporations and not generally to the investing public. According to the CSA, the practice of selective disclosure poses a serious threat to investor confidence in the fairness and integrity of the capital markets.

Regulation FD was adopted by the SEC in August 2000 and became effective in the United States on October 23 2000. It requires reporting companies to disclose material information through broad non-exclusionary means and not selectively to securities analysts and other market professionals. Regulation FD essentially provides that whenever an issuer or any person acting on its behalf discloses material nonpublic information to specified persons, the issuer must simultaneously (for intentional disclosures) or promptly (for non-intentional disclosures) make public disclosure of that information.

In “Zeroing in on Selective Disclosure,” May 2001, vol 12, No. 5 Business & Securities Litigator, Professor Harvey Goldschmid, former general counsel to the SEC and special counsel at Weil, Gotshal & Manges LLP, provided his insights into the reasons for Regulation FD and its

---

agencies will be conservative and avoid bright-line rules notwithstanding the benefits that certainty provides by facilitating planning and reducing litigation.”

intended impact. According to Professor Goldschmid, before Regulation FD was introduced, liability for tipping was limited to situations where the tipper breached a fiduciary duty to shareholders in disclosing material non-public information and the tippee knew or should have known of the breach.<sup>25</sup> Thus, Regulation FD was introduced to fill a void in U.S. law.

There is no similar void in the law in Canada. Tippers and tippees are included in the broad insider trading prohibitions in securities legislation across the provinces.<sup>26</sup> These provisions in the legislation, however, tend to be broad and the language of the offences and defences are vaguely defined. For this reason, part of the CSA policy offers some limited, but still much needed, insight on the expectations of Canadian securities regulators with respect to standards of disclosure. In our view, the policy could have gone further in defining its terms<sup>27</sup> and could otherwise have been less strict in its approach.

Criticism of the American disclosure policy suggests that it has increased the fear of liability and decreased disclosure. In a recent article in the *National Post*,<sup>28</sup> columnist Derek DeCloet writes that Regulation FD has silenced directors and officers. He cites a survey of several hundred U.S. investment professionals, wherein 81% said the new rules have made it easier for companies to minimize the information they give to investors. 62% said company executives were not as

---

<sup>25</sup> *Dirks v. SEC*, 463 U.S. 646 (1983). According to the U.S. Supreme Court, a breach of fiduciary duty will be held to exist where the “insider” will benefit, directly or indirectly, from the disclosure such as a pecuniary gain or a reputational benefit that will translate into future earnings.

<sup>26</sup> Indeed this has been recognized by the CSA itself. At page 3 of the Notice it states: “We considered promulgating a rule similar to Regulation FD. We believe, however, that the existing Canadian insider trading and tipping regime sets out a specific and comprehensive code which, among other things, prohibits all selective disclosures other than those made in the “necessary course of business.”

<sup>27</sup> For example, with respect to the defence that the information has been “generally disclosed,” the CSA does not offer any objective standard for what it considers to be generally disclosed. The CSA suggests that liability will be determined by an examination of the issuer’s standard disclosure policy and whether the issuer departed from it.

<sup>28</sup> “Firms can hide behind new Rules” June 8 2001, *National Post*, Derek DeCloet.

candid as they used to be and 57% said the amount and quality of information companies were releasing had declined.

He also suggested that with so many Canadian companies listed on U.S. stock exchanges the “disclosure chill” was already growing here. In predicting the worst from the CSA policy he wrote:

“Scoundrels in corporate Canada have a new weapon...the risk is that less honest chief executives will use the fairness disclosure regime to hide from uncomfortable questions. An analyst calls to ask about the production problems at your factory in Toledo? Sorry, that’s material information. Buzz off until the next quarterly conference call”.

If Regulation FD has worsened disclosure in the United States, we predict that the new CSA policy will have the same effect in Canada, especially when one considers the significant distinctions between the CSA policy and Regulation FD:

1. The CSA excludes from the necessary course of business exception, one on one conversations with analysts. It suggests that such meetings are a high-risk practice and should not occur altogether.<sup>29</sup> This is to be contrasted with Professor Goldschmid’s advice about Regulation FD:

“Most of the techniques that have been in use by IR officers should continue—the one –on –ones, the conferences with analysts, the kicking of the tires, the visits to the factories, etc. The one thing that’s being prevented here is hard-core provision of material information...There

---

<sup>29</sup> In the Notice, the CSA provides at 5.8 “*Selective Disclosure Violations Can Occur in A Variety of Settings: Selective disclosure most often occurs in one-on-one discussions (like analyst meetings) and in industry conferences and other types of private meetings and break-out sessions.*” In the Notice, the CSA cites the Ontario Securities Commission decision *In The Matter of Gary George* ((1999), 22 OSCB 717), and states that it agrees with the principles expressed by the Commission in *obiter* concerning the issue of selective disclosure made by an issuer’s chief executive officer to an analyst and the subsequent disclosure by the analyst to other members of his firm. The Commission stated: “If the information was material enough to cause [the analyst] to change his projections, it should have been publicly disseminated. *In general, we view one on one discussions between an officer of a reporting issuer and an analyst as being fraught with difficulties.*” (emphasis added).

should not be new material information, but they certainly can explain what they've already stated publicly about their strategy. They certainly can give people an ability to see management up close."

2. There is no exception to the tipping provisions for disclosures made to an analyst under a confidentiality agreement. By comparison, Regulation FD allows an issuer to make disclosure of material non-public information to an analyst if the issuer receives an express confidentiality agreement from the analyst.
3. Regulation FD does not create any new duties under the antifraud or private litigation provisions of U.S. securities law. Regulation FD specifically states that there is no liability for an issuer under Rule 10b-5 and there is no creation of private liability for issuers solely for violations of Regulation FD. This is to be contrasted with the new policy which ties into the CSA's concurrent proposal for a statutory private right of action for continuous disclosure in the secondary market.
4. Under the CSA policy (the insider trading and tipping scheme in the Act or the proposed right of action), the respondent or defendant's state of mind will not absolve him of liability. By contrast, Regulation FD allows Officers and Directors to be wrong in certain cases.<sup>30</sup>

---

<sup>30</sup> Professor Goldschmid explained: "The paradigm is somebody walking into a room, knowing he's giving out material information and doing it in a selective way to favor some few, whether they're large institutions, large shareholders or another select group. Materiality can invoke difficult issues of judgment. A quick response may initiate an inaccurate conclusion that a matter is not material. Everyone understood that applying materiality standards, which come from the Supreme Court, would be difficult in some instances and good minds could differ... *The protection to the investor relations professional, CEO or CFO which was carefully crafted by the commission—is that being wrong is not a problem. That will not create liability. Being unreasonable will not create liability. You must be intentional or reckless. There is no liability as long as there's not an extreme departure from standards of ordinary care...*" (emphasis added).

Given the differences in the United States from the existing insider trading and tipping regime in our legislation, one might have expected Regulation FD to be more extensive than the CSA policy. This is not the case. The strict CSA disclosure policy coupled with a very broad statutory private right of action may put directors and officers in an unreasonable predicament. In our view both the policy and proposed right of action fail to provide adequate clarity of the terms they employ. In certain situations officers and directors will not understand what is expected of them and will be “damned if they do disclose and damned if they don’t”. Inevitably, we believe this will lead to a greater fear of liability, less disclosure, and less candid information available for investors.

In this regard we agree with Derek DeCleot’s concluding remarks:

“This is where the CSA, led by David Brown, chairman of the Ontario Securities Commission needs to step in—and soon. It’s fine to say all shareholders have an equal right to see and hear information released by companies. But Mr. Brown and co. also have an obligation to make sure that right isn’t meaningless... For starters, the CSA should state more clearly what it considers material information. In theory, the definition is easy: Any piece of information that could move the stock price is material and must be revealed publicly. In practice, that’s too vague. So executives are saying little... Securities regulators have the right idea by forcing companies not to play favourites. But they’ve only done half the job. The next step is to make sure those good intentions don’t get abused.”

## **Part II: Update on Class Actions**

Here are a few recent cases of note;

### **I - *Stern v. Imasco*: Directors, Fiduciary Duties and the Oppression Remedy**

In *Stern v. Imasco*,<sup>31</sup> the plaintiff brought an action against Imasco, British America Tobacco PLC (“BAT”) and the individual directors of Imasco alleging that a proposed transaction was oppressive and that it constituted a breach of the fiduciary duties owed by the individual defendant directors to Imasco’s shareholders.<sup>32</sup> The plaintiff, on behalf of himself and as a representative of a class, sought an injunction prohibiting the transaction, rescission of the contract that would give effect to the transaction, and damages in the amount of \$1.26 billion.

The defendants argued that Section 37(a) of the CPA, which provides that the Act does not apply to a proceeding that may be brought in a representative capacity under another act, prevented the oppression claim from being certified as a class. Mr. Justice Cumming held that the use of class proceedings legislation can be complimentary to the objectives of the oppression remedy under the *Canada Business Corporations Act*, and he rejected the defendants’ argument. The Court found that although an oppression proceeding can sometimes have the characteristics of a representative action in its impact, it is not “brought in a representative capacity.”

---

<sup>31</sup> *Stern v. Imasco Ltd.* (1999), 38 C.P.C (4<sup>th</sup>) 347.

<sup>32</sup> BAT and Imasco entered into a going private agreement which would see all the components of Imasco sold except for Imperial Tobacco which BAT would keep. The plaintiff alleged that BAT was the driving force in the sale of Imasco’s component parts and that the value of his Imasco shares were not being maximized because of the deference by Imasco.

However, the Court struck out all the alleged causes of action in the statement of claim in respect of all parties except Imasco on the basis of Rule 21.01 (1)(b), that they disclosed no reasonable cause of action. With respect to the claim against BAT, the Court held that although oppression claims may be brought against shareholders in certain circumstances, it was not appropriate to allow such a claim in this case.<sup>33</sup> With respect to the defendant directors' motion to strike out the plaintiff's statement of claim, the Court held that while the directors of Imasco owed both a fiduciary duty and a duty of care to their corporation, a duty of care is not owed to specific shareholders<sup>34</sup> absent special circumstances or characteristics of a particular relationship.<sup>35</sup> The Court found that there were no specific claims made against any of the directors acting in their personal capacity.

## **II - *Bre-X***

-

As we have discussed earlier, the Ontario Court of Appeal recently allowed the certification of a claim for negligent misrepresentation against an issuer and certain of its insiders in *Bre-X Minerals Ltd.*, where there were also claims for conspiracy, breach of the *Competition Act*, and fraudulent misrepresentation. For the moment, we do not believe that *Bre-X* says anything about the certification of stand alone claims for negligent misrepresentation. The decision also does

---

<sup>33</sup> Mr. Justice Cumming stated: “[I]n respect of a public corporation, such as Imasco, it is the board of directors that is the sole directing mind of the corporation...For this reason, in my view, the statement of claim does not allege oppressive conduct against BAT to which section 241 of the CBCA can apply.”

<sup>34</sup> Mr. Justice Cumming stated: “However, directors do not, simply because they are directors, owe any duty directly to the shareholders of the corporation. The existence of such duties would place directors in a potential conflict of interest. What is in the best interests of the corporation as a whole will not necessarily be in the best interests of particular shareholders.”

<sup>35</sup> The Court relied on *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (C.A.) at p.301; *Budd v. Genra Inc.* (1998), 111 O.A.C. 288 (C.A.) at p. 296; *ScotiaMcLeod Inc. v. Peoples Jewelers Ltd.* (1995), 26 O.R. (3d) 481 (Ont.C.A.) per Finlayson J.A.; leave to appeal to the Supreme Court of Canada refused on September 12, 1996; and, *Hodgkinson v. Simms* [1994] 3 S.C.R. 377.

not stand for the proposition that once a claim for negligent misrepresentation is certified, investors will be able to succeed on the claims for misrepresentation absent individual inquiries.

### **III – *Collette v. Great Pacific Management Co.***

-

In *Collette v. Great Pacific Management Co.*,<sup>36</sup> the British Columbia Supreme Court refused the plaintiff's application to certify an action for contract, negligence and negligent misrepresentation as a class proceeding.<sup>37</sup> It appears from the Court's reasons that the matter was heard prior to the decision of the Ontario Court of Appeal in *Bre-X*, but that the British Columbia Supreme Court then heard further submissions following the release of the Ontario Court of Appeal's decision.

In *Collette*, the plaintiff argued that the conduct of the defendants amounted to a type of systemic negligent misrepresentation appropriate for certification as a class proceeding. The plaintiff did not plead reliance but alleged instead that the mere offering of the investment constituted a negligent misrepresentation that the investment was prudent for all investors.

The Court, however, held that "it is now broadly accepted in Canada that a proximity test involving an objective consideration of reliance will always be required as a matter of law in cases of negligent misrepresentation."<sup>38</sup> The Court disagreed with the plaintiff's submission that

---

<sup>36</sup> *Collette v. Great Pacific Management Co.*, [2001] B.C.J. No. 253 ("Collette")

<sup>37</sup> The plaintiff purchased two investments on certain mortgages from a representative of the defendant who was authorized and licensed to see securities. The plaintiff and 1,000 to 1,500 investors purchased one or both investments and lost their money.

<sup>38</sup> The Court cited the British Columbia Court of Appeal's decision in *Cooper v. British Columbia (Registrar of Mortgage Brokers)* (2000), 75 B.C.L.R. (3d) 54; 2000 BCCA 151.

reliance could be presumed and distinguished the American authorities relying on the fraud on the market theory. The Court stated: “[C]ommonality is much more limited than the plaintiff suggested. This is not a case of a single offering made to a homogenous class. Different investors will have learned of the investment opportunity in different ways and at different times, whether through discussion with advisors or by reviewing promotional materials or both...”

Upon applying the Ontario Court of Appeal decision in *Bre-X*, Justice Macaulay stated:

“I observe that the common issues approved in *Bre-X* related specifically to the point in time at which the analysts knew or ought to have known of the alleged fraud and did not touch on reliance in any way. In all of the circumstances, I am not persuaded that the decision by the Court of Appeal in *Bre-X* assists me in determining the certification in the present case. I agree with counsel for Great Pacific that the dominant rationale for the decision appears to be the double tracking of the fraudulent and negligent misrepresentation claims. The court was understandably concerned with the need to achieve economy by dealing with related claims together whether or not it was a class proceeding. That factor does not arise in the case at bar.”

The Court was also not convinced that the policy goals behind the CPA militated in favour of certification in this case. It held: “The unfortunate reality is that a class proceeding would necessarily devolve into essentially individual actions such that the goals of accessibility and judicial economy would not be enhanced by certification. In my view, a class proceeding is not the preferable procedure for the fair and efficient resolution of the common issues.”

#### **IV - *Menegon v. Philip Services Corporation:* Liability for Continuous Disclosure in the Secondary Market**

In *Menegon v. Philip Services Corporation*, [not yet reported: March 6, 2001], the Ontario Superior Court of Justice dismissed a motion for certification of a class proceeding and for an order appointing the moving party as the plaintiff. The defendants brought cross motions pursuant to Rules 21 and 51 seeking orders to dismiss the action. The plaintiff also brought a

motion to amend the statement of claim to add a cause of action against the defendant Canadian Underwriters only, for negligent misrepresentation in connection with a 1997 prospectus. The plaintiff alleged that he and other members of the proposed class had a statutory right of action against the Canadian Underwriters for “errors or omissions” in the Prospectus, pursuant to section 130 (1) of the *Securities Act* or an action for negligent misrepresentation arising from matters contained in or omitted from the prospectus. Plaintiff’s counsel admitted, however, that the proposed representative plaintiff bought his shares in the secondary or open market.

Plaintiff’s counsel tried to persuade the Court to permit an action on behalf of purchasers of shares who did not buy pursuant to a prospectus, and bought in the secondary or open market.

Mr. Justice Gans held:

“Notwithstanding the urgings of plaintiff’s counsel, I was not prepared to fill the suggested legislative void for a variety of reasons. In the first place, it is my view that I lack the jurisdiction to do so. The creation of such a cause of action absent a special relationship is completely within the province of the legislature.

The Act in its present form has gone through three wholesale changes since 1966, as best as I can determine from my own limited research. The legislature, presumably in its desire to keep pace with the challenges of the day and, specifically, the expanding causes of action against issuers and their directors, did not see fit to provide secondary market securities purchasers with a section 130 –type cause of action...It is only now, I am led to believe, that the legislature is contemplating an expansion of the class of claimants to secondary market purchasers.

It therefore does not rest with me to promulgate an amendment to the current legislation by judicial [fist?] so as to, perhaps, pre-empt the legislature.”

With respect to the amendment for the cause of action against the Canadian Underwriters, the Court held that while purchasers of shares in a secondary market are unable to bring an action for

a faulty prospectus,<sup>39</sup> they may still have resort to the common law. Upon applying the common law test for a duty of care to determine whether the amendment was appropriate, the Court found that their retainer created a finite obligation defined by the number of shares sold in the distribution. The Court concluded that it was plain and obvious and beyond doubt that the claim for negligent misrepresentation in the secondary market could not succeed against the Canadian Underwriters and it therefore refused the amendment.

The Court also refused to allow the plaintiff to amend the claim and substitute another plaintiff who could assert a “clean claim” as a section 130 purchaser. The Court would not deny the defendants the protection of the limitation period and held that it was unreasonable for the plaintiffs to have requested this relief at such a late stage in the certification proceedings.

### **Part III: Defence Strategies**

#### **Claims against Directors and Officers**

While the 1999 Court of Appeal decision in *Agda Systems International Ltd. v. Valcom Ltd.*,<sup>40</sup> suggests that directors and officers who allegedly commit torts may not be protected from liability even where the torts are committed in pursuit of corporate goals, it is well established that they cannot be held civilly liable for the actions of the corporations they control and direct unless there is some conduct on their part that “is either tortious in itself or exhibits a separate

---

<sup>39</sup> *Peek v. Gurney et al* (1973), VI English and Irish Appeal I.R. 327 at 395; *Al Nakin Investments (Jersey) Ltd., et al v. Longeroft et al* (1990), All E.R. 321 at 327 (Chancery Div.); *Montreal Trust Co. of Canada v. Scotia McLeod Inc.* (1994), 15 B.L.R. 2<sup>d</sup> 160 at 177 (Ont. Gen. Div); and, John J. Chapman, “Class Proceedings for Prospectus Misrepresentation” (1994), 73 Canadian Bar Review 492. The Court also considered that extending the liability and right of action to investors in the secondary market would “play havoc with the scheme of the legislation.” In this regard, the Court considered the purposes of the monetary limitation, the statutory preconditions and the time limitation in sections 130 (4), (5), (7) and (8) of the Act.

<sup>40</sup> *Agda Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (“Agda”).

identity or interest from that of the corporations such as to make the acts or conduct complained of those of the directing minds”. Further, directors and officers will only be liable for such tortious conduct, if the tortious conduct is properly pleaded.<sup>41</sup>

### **Rule 21.01 (1)(b)**

Where the pleading does not sufficiently set out the special circumstances required for the personal liability of officers and directors, a Rule 21.01 (1)(b) motion can be brought. In most of the cases discussed in this paper, the defendants brought motions to strike the plaintiff’s statement of claim on the basis that it disclosed no cause of action. *Imasco* represents one example of the potential for a Rule 21.01 (1)(b) motion to dispose of actions against directors where pleadings are not sufficient and where the allegations do little, if anything, to establish a duty of care or special relationship.<sup>42</sup>

Furthermore, in class action litigation, section 5 (1)(a) of the CPA requires the court to determine, on a motion for certification, whether the pleadings or the notice of application disclose a cause of action. In this context, the court may choose to hear the motion under Rule

---

<sup>41</sup> The Ontario Superior Court of Justice in *United Canadian Malt Ltd. v. Outboard Marine Corporation of Canada Ltd.* (2000), 48 O.R. (3d) 352, recently allowed a claim to stand against directors for environmental liability, finding its pleadings to have been sufficient. Mr. Justice Ian V.B. Nordheimer stated: “The alleged misconduct was properly pleaded here, at least once the plaintiffs amended their statement of claim to make specific allegations against the individual defendants, namely that the individual defendants knew about the contamination, knew the risk it posed to the plaintiff’s property and did nothing to deal with the problem or advise the plaintiff of the risk.”

<sup>42</sup> There does appear to be a recent trend, however, to limit the use of Rule 21 motions in favour of Rule 20 summary judgment motions. The first class proceeding commenced in Ontario was disposed of on a Rule 20 motion for summary judgment, *Smith v. Canadian Tire Acceptance Ltd.* (1994), 19 O.R. (3d) 610 (Gen. Div.), 1995, 26 O.R. (3d) 95 (C.A.), leave to appeal to the Supreme Court of Canada denied, (October 3, 1996), Doc. 25080 (S.C.C.) and the first class proceeding to reach the Supreme Court of Canada was recently also dismissed on a motion for summary judgment *Garland v. Consumers’ Gas Co.*, [1998] 3 S.C.R. 112, [2000] O.J. No. 1534 (S.C.C.).

21.01 (1)(b) first and then apply its decision to the section 5 (1)(a) test for the purpose of certification. The Court proceeded this way in *Bre-X*.<sup>43</sup>

## **Conclusion**

Although the foregoing developments are significant, the scope of director and officer liability in this area of law is not yet known. While leave to appeal the Ontario Court of Appeal's decision in *Bre-X* is being sought, the CSA is continuing its efforts to establish a statutory right of action for continuous disclosure obligations in the secondary market. The CSA is also proposing to introduce a continuous disclosure policy in Canada which may have the same chilling effects as Regulation FD is having in the United States. The failure to provide efficient screening mechanisms in the proposed legislation for the statutory right of action and the broad nature of that right of action may permit an increase in strike suits in Canada. In not providing clear definitions for important terms, the proposals may prevent directors and officers from knowing what their duties and obligations are in some cases, while subjecting them to significantly greater liability. While the actual effects of these developments remain to be seen, we can say with some certainty that they add up to fertile ground for securities litigation.

---

<sup>43</sup> In *Bre-X*, Mr. Justice Winkler stated: "As the first element of the test for certification as a class proceeding contained in section 5(1)(a), the court must determine whether the pleadings disclose a cause of action. This question is to be determined by analogy to a motion to strike pursuant to Rule 21.01, and the principles to be applied are the same... Section 35 of the *Class Proceedings Act, 1992* provides that the rules of the court apply to class proceedings... Accordingly, I have advised counsel *ex proprio motu* that in the interest of judicial economy, one of the goals of the Act, I will determine whether the claims disclose a cause of action for the purpose of s. 5 (1)(a) in the context of the instant motions. Any dispositions in these pleadings motions will constitute dispositions for the purpose of the certification motions."