Leave Test Enforced

Decision employs SCC's meaningful leave test for securities class action BY JULIUS MELNITZER

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> KEVIN O'BRIEN, OSLER, HOSKIN & HARCOURT LLP

IF A RECENT Ontario Superior Court decision is any indication, the test for leave to commence a secondary-market securities application as enunciated by the Supreme Court of Canada in December will have real teeth in its practical application.

"The decision of Justice [Helen] Rady [in *Bradley v. Eastern Platinum Ltd.*] makes it clear that the leave threshold is going to be a meaningful merits test, which is what the leave test was always intended to be," says Alan D'Silva of Stikeman Elliott LLP in Toronto, who represented Eastern.

The *Ontario Securities Act* requires the plaintiff to establish a "reasonable possibility that the action will be resolved at trial in the plaintiff's favour." But the parameters of the leave test only took real shape with the release of the high court's judgment in *CIBC v. Green*. In that decision, the court held that plaintiffs must demonstrate a "reasonable or realistic chance that the action will succeed." To this end, they had to "offer both a plausible analysis of the applicable legislative provisions and credible evidence in support of the claim."

The court provided little guidance on how the test should be applied, though, leaving doubt as to *Green's* practical application. Rady's ruling puts that doubt to rest, requiring courts to undertake "a robust, meaningful examination and critical evaluation of the evidence (or absence of evidence)" that the action had some merit. The leave test, then, has to be more "than a 'speed bump' in the litigation."

As Rady saw it, the test for leave was more akin to a motion for summary judgment, which required judges to weigh the evidence, than a motion to strike, which had to be decided on the pleadings. "The upshot is that motions for leave will result in a comprehensive analysis on the merits, forcing parties to lead with their best foot," says Kevin O'Brien of Osler, Hoskin & Harcourt LLP in Toronto. "That's not to say that the plaintiffs will have to prove their case, but they will have to show a realistic possibility that they will ultimately be successful."

Brian Bradley, the proposed representative plaintiff, alleged that Eastern had failed to disclose a complete or partial shutdown of its platinum mine in South Africa in 2011. The claim was then amended to allege that the introduction of certain support technologies at the mine had caused the decreased production.

ALAN D'SILVA
> STIKEMAN ELLIOTT LLP

Eastern responded with uncontradicted affidavit, documentary and transcript evidence from employees showing that there had been no mine shutdown or introduction of new technology at the relevant time. Instead, the evidence revealed that the decreased production had been caused by unforeseen rock falls.

Rady concluded that the plaintiff's interpretation of events was "simply not supported by the overwhelming weight of the evidence that points to the opposite conclusion." She was not prepared to "disregard what I view to be very compelling and persuasive evidence" that could be undermined only by conclusion that Eastern's witnesses gave or fabricated false evidence.

KEVIN O'BRIEN
> OSLER, HOSKIN & HARCOURT LLP

Daniel Bach of Siskinds LLP in London, who represented Bradley, acknowledges his client's disappointment in the result. "It's a case where the court decided to prefer one side's evidence over that of the other," Bach says. "We believe it will be some time before the courts have enough experience to come up with a definitive approach where there are competing evidentiary narratives."

Bach also points out that *Bradley* was not a typical secondary-markets case because the allegations were that Eastern had failed to make timely disclosure. "By contrast, most of these cases deal with allegations of misrepresentation against issuers."

However that may be, *Bradley* does show the importance of introducing evidence from defendants. "Defendants are going to have a hard time defeating leave applications if they fail to put forward rebuttals to the plaintiff's case," D'Silva says.

That doesn't mean the evidence must come from directors and officers. "A responding record can be effective if the relevant evidence comes from other witnesses," D'Silva says. Indeed, Rady found that testimony from Eastern's CEO, a co-defendant, was "simply not necessary" in view of the evidence adduced from employees with first-hand knowledge of the facts.