JUST WHAT THE DOCTOR ORDERED?: A LOOK AT THE SIDE EFFECTS OF *THERATECHNOLOGIES* ON SECONDARY MARKET LIABILITY IN CANADA

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The recent decision of the Supreme Court of Canada in Theratechnologies Inc. v 121851 Canada Inc. ("Thera") goes to the heart of the debate on the place of the public and private enforcement methods in the Canadian securities regulation regime. Fundamentally, the case concerns the application of the statutory civil liability regime for the secondary securities market enacted in the mid-2000s by provincial legislators across the country. The regime provides a remedy to investors who have suffered a loss because of the failure of an issuer to comply with the applicable disclosure requirements. In Thera, the Supreme Court was called upon to determine the threshold of the statutory leave test, which applies to the remedy in addition to any other requirements governing class actions. The objective of this paper is to offer a critical review of the interpretation of the leave test threshold proposed by the Supreme Court in Thera. The paper argues that the decision imposes a stringent threshold for the leave test because, on the one hand, the Court overestimated the risk of strike suits and, on the other hand, did not appreciate the role of the mitigating mechanisms built-in the statutory regime to address this risk. Following Thera, the effectiveness of the regime appears greatly hampered by the combined effect of the mitigating mechanisms and the leave threshold. Hence, this raises the question as to whether the overall effect will render the remedy ineffective for investors, and bring us back to the situation that prevailed under common law and civil law where recourses were largely illusory. This preoccupation is not merely speculative; it is reflected quite clearly in the post-Thera case law, as our analysis of said case law demonstrates. If the perceived trend were to persist, this would mean that Thera will have marginalized private enforcement in the secondary market, thereby requiring more vigorous public enforcement in order to ensure the quality of disclosure on the secondary market.

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La décision récente de la Cour suprême du Canada dans l'arrêt Theratechnologies inc c 121851 Canada inc. (« Thera ») plonge au cœur du débat sur la place des méthodes d'application publiques et privées de la loi dans le régime de réglementation des valeurs mobilières canadien. Cette affaire porte essentiellement sur l'application du régime légal de responsabilité civile au marché secondaire des valeurs mobilières adopté au milieu des années 2000 par les législatures provinciales dans l'ensemble du pays. Le régime offre un recours aux investisseurs qui ont subi une perte en raison de l'omission d'un émetteur de se conformer aux exigences de divulgation applicables. Dans l'arrêt Thera, on demandait à la Cour suprême d'établir le seuil du critère d'autorisation s'appliquant au recours en plus des autres exigences portant sur les recours collectifs. Le présent article vise à présenter un examen critique de l'interprétation du critère préliminaire d'autorisation proposé par la Cour suprême dans l'arrêt Thera. L'article affirme que la décision impose un critère d'autorisation plus exigeant d'une part parce que la Cour a surestimé le risque de recours opportunistes et, d'autre part, parce qu'elle n'a pas évalué le rôle des mécanismes d'atténuation déjà prévus à cette fin dans le régime législatif. À la suite de l'arrêt Thera, l'efficacité du régime semble fortement affectée par l'effet conjugué des mécanismes d'atténuation et du critère d'autorisation, ce qui soulève la question de savoir si l'effet global rendra le recours inefficace pour les investisseurs et nous ramène à la situation qui avait cours en common law et en droit civil, alors que les recours étaient plutôt illusoires. Cette préoccupation ne constitue pas que de la spéculation, puisqu'on la constate manifestement dans la jurisprudence rendue après l'arrêt Thera, comme le démontre l'analyse de cette jurisprudence. Si la tendance perçue se maintient, Thera aura marginalisé les mécanismes privés d'application de la loi sur le marché secondaire, exigeant ainsi une application publique de la loi plus rigoureuse pour assurer la qualité de la divulgation sur le marché secondaire.

Contents

1. Introduction

Law matters. Tritely stated, this is the key message of the pathbreaking research led by Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny ("LLSV") at the turn of the century. A key insight of the law and finance literature they contributed to inspire is that the quality of the regulatory and enforcement frameworks regarding investor protection is instrumental in determining the level of ownership concentration and the development of stock markets.[1] A controversial corollary of LLSV's work is that investor protection laws are less robust in civil law jurisdictions than in common law jurisdictions.[2] As some authors recently observed, the controversy remains as it is still unresolved by empirical evidence.[3]

In parallel, building on the work of LLSV, authors such as Simeon Djankov,[4] Andrei Shleifer[5] and John C Coffee[6] have emphasized the importance of enforcement in securities regulation for the development of capital markets.[7] As a G20 Working Group put it in 2009: "No matter how sound the rules are for regulating the conduct of market participants, if the system of enforcement is ineffective—or is perceived to be ineffective—the ability of the system to achieve the desired outcome is undermined."[8]

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1 The law and finance literature is vast. Thus, we refer only to the seminal piece Rafael La Porta et al,"Law and Finance" (1998) 106:6 J Political Economy 1113.

2 Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, "The Economic Consequences of Legal Origins" (2008) 46:2 J Economic Literature 285; Edward L Glaeser & Andrei Shleifer, "Legal Origins" (2002) 117:4 QJ Economics 1193.

3 See Simon Deakin, "The Evolution of Theory and Method in Law and Finance" in Niamh Moloney, Eilís Ferran & Jennifer Payne, eds, *The Oxford Handbook of Financial Regulation* (Oxford: Oxford University Press, 2015) 13; Hans B Christensen, Luzi Hail & Christian Leuz, "Capital-Market Effects of Securities Regulation: Prior Conditions, Implementation, and Enforcement" (2016) 29:11 Rev Financial Studies 2885.

4 Simeon Djankov et al, "The New Comparative Economics" (2003) 31:4 J Comparative Economics 565.

5 Andrei Shleifer, "Understanding Regulation" (2005) 11:4 European Financial Management 439.

6 John C Coffee Jr, "Law and the Market: The Impact of Enforcement" (2007) 156:2 U Pa L Rev 229.

7 See generally Iain MacNeil, "Enforcement and Sanctioning" in Niamh Moloney, Eilís Ferran & Jennifer Payne, eds, *The Oxford Handbook of Financial Regulation* (Oxford: Oxford University Press, 2015) 280 [MacNeil]; Howell Jackson & Jeffery Y Zhang, "Private and Public Enforcement of Securities Regulation" in Jeffrey Gordon & Wolf-Georg Ringe, eds, *The Oxford Handbook of Corporate Law and Governance* (Oxford: Oxford University Press, 2018) 928 [Jackson & Zhang].

8 Group of Twenty (G-20), "Recommendations for Working Group 1, Enhancing Sound Regulation and Strengthening Transparency Final Report" (28 March 2009), online

In Canada, the role and limits of enforcement have attracted the attention of academics[9] and policymakers,[10] including in the context of the debate regarding the creation of a national securities commission.

The enforcement matters literature distinguishes between public and private enforcement of securities laws.[11] Public enforcement refers to the role of regulators in investigating and prosecuting contravention to securities legislation in order to obtain criminal, quasi-criminal or administrative sanctions. Private enforcement comes from market participants—in particular, investors—who institute private actions to have regulatory infringements punished and obtain compensation for the resulting damages.

Public and private enforcement methods have advantages and disadvantages. The public method may rely on regulators with a good understanding of the role of enforcement and the motivation and resources necessary to achieve the broad objectives of regulation. On the other hand, its weaknesses come to light when regulators are either not sufficiently motivated, captured by market participants or do not have access to the information they need to perform their duties. Furthermore, the effectiveness of public enforcement depends on the means and resources that are affected to this regulatory function.[12] On the other

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(pdf): *International Federation of Accountants* <www.ifac.org/system/files/publications/files/IFAC_G20_Letter_Wkgp_1.pdf> at 45.

9 See e.g. Peter Cory & Marylin Pilkington, "Critical Issues in Enforcement" in *Canada Steps Up*, vol 6, (Toronto: Task Force to Modernize Securities Legislation in Canada, 2006) at 165 [Cory & Pilkington]; Christopher C Nicholls, "Civil Enforcement of Canadian Securities Law" (2009) 9:2 J Corp L Studies 367 [Nicholls]; Adam C Pritchard & Janis P Sarra, "Securities Class Actions Move North: A Doctrinal and Empirical Analysis of Securities Class Actions in Canada" (2010) 47:4 Alta L Rev 881 [Pritchard & Sarra]; Poonam Puri, "Securities Litigation and Enforcement: The Canadian Perspective" (2012) 37 Brook J Intl L 967 [Puri]; Anita A Anand et al, "An Empirical Comparison of Insider Trading Enforcement in Canada and the United States" (2019) 57 Intl Rev L & Econ 49 [Anand].

10 See e.g. Expert Panel on Securities Regulation, *Final Report—Creating an Advantage in Global Capital Markets*, (Ottawa: Department of Finance, 2009); *Canada: Financial System Stability Assessment – Update*, Country Report No 08/59 (Washington, DC: International Monetary Fund, 2008) at 7.

11 Howell E Jackson & Mark J Roe, "Public and Private Enforcement of Securities Laws: Resource-based Evidence" (2009) 93:2 J Financial Economics 207; MacNeil, *supra* note 7 at 292–94.

12 In Canada, the question of resources has been raised by those who favour the creation of a national securities regulator. However, empirical studies suggest that resources are only one amongst a host of factors influencing the effectiveness of public enforcement. See Anand, *supra* note 9. See also Howell Jackson, "Regulatory Intensity in the Regulation of Capital Markets: A Preliminary Comparison of Canadian and U.S.

hand, when investors decide to exercise private enforcement, they are more likely to possess relevant information as a result of their proximity to the issuers or transactions. However, private enforcement's effectiveness can be jeopardized by investors using the remedies opportunistically, a phenomenon that can lead to overenforcement. A look at the literature shows that it remains difficult to determine which of these enforcement methods is better.[13] In light of this, one concludes that a regulatory regime should make room for both these enforcement methods, which can be complementary and compensate for their respective weaknesses.[14]

The recent decision of the Supreme Court of Canada in *Theratechnologies Inc v 121851 Canada Inc* ("*Thera*") goes to the heart of the debate on the place of the public and private enforcement methods in the Canadian securities regulation regime. Fundamentally, the case concerns the application of the statutory civil liability regime for the secondary securities market enacted in the mid-2000s by provincial legislators across the country. The regime provides a remedy to investors who have suffered a loss because of the failure of an issuer to comply with the applicable disclosure requirements. In *Thera*, the Supreme Court was called upon to determine the threshold of the statutory leave test, which applies to the remedy in addition to any other requirements governing class actions.

The objective of this paper is to offer a critical review of the interpretation of the leave test threshold proposed by the Supreme Court in *Thera*. The paper argues that the decision imposes a stringent threshold for the leave test because, on the one hand, the Court overestimated the risk of strike suits and, on the other hand, did not appreciate the role of the mitigating mechanisms built into the statutory regime to address this risk. Following *Thera*, the effectiveness of the regime appears greatly hampered by the combined effect of the mitigating mechanisms and the leave threshold. Hence, this raises the question as to whether the overall effect will render the remedy ineffective for investors, bringing us back to the

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Approaches" in *Canada Steps Up*, vol 6 (Toronto: Task Force to Modernize Securities Legislation in Canada, 2006).

13 For a review of the literature, see Jackson & Zhang, *supra* note 7.

14 Zachary D Clopton, "Redundant Public-Private Enforcement" (2016) 69:2 Vand L Rev 285; MacNeil, *supra* note 7 at 280. See e.g. Douglas Cumming, April Knill & Nela Richardson, "Firm Size and the Impact of Securities Regulation" (2015) 43 J Comparative Economics 417 (public enforcement supports the development of capital markets); Andrei Filip, Réal Labelle & Stéphane Rousseau, "Legal Regime and Financial Reporting Quality" (2015) 32:1 Contemporary Accounting Research 280 (civil liability influences the quality of accounting data). For a different view, see Amanda M Rose, "Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10B-5" (2008) 108:6 Colum L Rev 1301 [Rose].

situation that prevailed under common law and civil law where recourses were largely illusory. This preoccupation is not merely speculative; it is reflected quite clearly in the post-*Thera* case law, as our analysis of said case law demonstrates. If the perceived trend were to persist, this would mean that *Thera* will have marginalized private enforcement in the secondary market, thereby requiring more vigorous public enforcement in order to ensure the quality of disclosure on the secondary market.

The paper is organized as follows: in Part 2, after providing background on the policy rationales, we present the statutory civil liability regime that applies to the secondary securities market in Canada. In Part 3, we critically analyse the *Thera* decision. In Part 4, we explore the potential implications of *Thera* through a review of the recent case law.

2. Background on the Secondary Market Civil Liability Regime

A) Policy Considerations

1) The Deficiencies of Private Enforcement

Prior to the enactment of the statutory civil liability regime, civil remedies for breach of continuous disclosure obligations involving the secondary market were "not very appealing", as stated by the Court of Appeal of Quebec.[15] Theoretically, investors could sue in tort, or in extracontractual liability in Quebec, upon injury caused by misrepresentations made by an issuer on the secondary market. However, these remedies proved ill-suited for injured investors seeking redress.[16] The most problematic element was the requirement for investors to prove reliance on misrepresentations, as well as causal link in Quebec. This burden proved especially onerous in the context of the secondary market, as investors are further removed from issuers.[17] Moreover, given the fact that these remedies were most likely to be exercised through class action proceedings, the requirement and burden to prove *individual* reliance and causal link proved even

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15 *Theratechnologies Inc v 121851 Canada Inc.*, 2013 QCCA 1256, [2013] RJQ 1128 at para 57 [*Thera*, CA]; see also *Theratechnologies Inc. v 121851 Canada Inc.*, 2015 SCC 18, 382 DLR (4th) 600 at para 27 [*Thera*, SCC].

16 *Thera*, SCC, *supra* note 15 at paras 27–29. See also David Johnston, Kathleen Rockwell & Cristie Ford, *Canadian Securities Regulation*, 5th ed (Markham: LexisNexis, 2014) at para 12.65 [*Canadian Securities Regulation*]; Stéphane Rousseau & Raymonde Crête, "L'environnement législatif québécois au regard du projet d'adoption d'un régime statutaire de responsabilité civile dans le contexte du marché secondaire des valeurs mobilières" (1999) 59:2 R du B 627; Christopher Donald, "Civil Remedies for Breach of Continuous Disclosure Obligations under Ontario's Securities Act" (2000) 45:3 McGill LJ 609 [Donald].

17 *Canadian Securities Regulation*, *supra* note 16 at para 12.65.

more challenging.[18] In other words, enforcement against breaches of continuous disclosure obligations made by reporting issuers were left to public enforcement.

These impediments were well-known, having first been discussed in 1979 in: *Proposals for a Securities Market Law of Canada*.[19] The authors of the report were divided as to the need for a statutory liability regime, as some feared that such a regime would open the door to strike suits, which were occurring in the United States; consequently, no specific proposal was put forward. While the Ontario Securities Commission ("OSC") raised the issue again in 1984,[20] it is only in 1994 that the "Dey Report" recommended that the enactment of a statutory liability regime be studied.[21]

A few years later, the Toronto Stock Exchange finally formed a committee (the Allen Committee) to study the adequacy of continuous disclosure compliance in the Canadian secondary market and the potential benefits of additional remedies for injured investors.[22] In its final report, published in 1997, the Allen Committee expressed serious concerns about investor confidence in Canadian capital markets, the degree of non-compliance with disclosure obligations and the risk that Canadian markets would thus be 'cast into disrepute'.[23] Moreover, given that most

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18 Nicholls, *supra* note 9; *Canadian Securities Regulation*, *supra* note 16 at paras 12.12, 12.15–12.16.

19 Phillip Anisman, *Proposals for a Securities Market Law for Canada* (Ottawa: Minister of Supply and Services, 1979).

20 "Civil Liability for Continuous Disclosure Documents Filed under the Securities Act: Request for Comments" (1984) 7 OSCB 4910. See also "Rapport du comité de réforme du régime d'information continue" (1986) 27:14 Bull CVMQ C-1; *Rapport quinquennal sur la mise en œuvre de la Loi sur les valeurs mobilières* (Québec: Ministère des finances, 1993) at 53–57.

21 Toronto Stock Exchange Committee on Corporate Governance in Canada, *Where Were the Directors? Guidelines for Improved Corporate Governance in Canada* (Toronto: Toronto Stock Exchange, 1994) at 49–51 [Dey Report]. See also Five Year Review Committee, Final Report, *Reviewing the Securities Act (Ontario)* (Toronto, Queen's Printer for Ontario, 2003) at 129 [Five Year Review]; Nicholls, *supra* note 9 at 390–91.

22 Toronto Stock Exchange Committee on Corporate Disclosure, *Responsible Corporate Disclosure: A Search for Balance, Final Report* (Toronto: Toronto Stock Exchange, 1997) at vi [*Allen Report*].

23 *Ibid* at vi–vii. See also "53-302, 'Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of 'Material Fact' and 'Material Change'"(2000) 23 OSCB 7383 [CSA Notice 53-302]; Five Year Review, *supra* note 21 at 130.

Canadian trading took place on the secondary market,[24] safe reliance on disclosed information became increasingly important for investors.[25]

Consequently, the *Responsible Corporate Disclosure: A Search for Balance, Final Report* (the "Allen Report") recommended the creation of a statutory civil liability regime for breach of continuous disclosure obligations. The purpose of the new regime was to improve the quality of disclosure through deterrence.[26] The rationale was that, if injured investors had an effective tool to seek redress upon breach of disclosure obligations, it would inevitably lead to the improvement of disclosure.[27] Accordingly, the provisions recommended by the Allen Report appeared to establish a powerful private enforcement regime for investors, by primarily: i) alleviating the burden of proof for investors[28] and ii) broadening the scope of liability, notably by extending liability to 'responsible issuers', directors and officers.[29]

The Allen Report also criticized the effectiveness of the existing mechanisms, in particular public enforcement, in protecting investors.[30] It recognized that public enforcement could be strengthened with a robust statutory liability regime[31]—private enforcement. From a policy standpoint, the regime was meant to restore investors' confidence in the

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24 In 2000, the CSA reported that more than 94% of trading on the Canadian capital markets took place on the secondary market, see CSA Notice 53-302, *supra* note 23 at 1.

25 *Canadian Securities Regulation*, *supra* note 16 at para 12.66 [Doyle].

26 *Allen Report*, *supra* note 22 at vi; see also CSA Notice 53-302, *supra* note 23 at 4.

27 *Ibid.*

28 See "Notice/News Release – Proposal for a Statutory Civil Remedy for Investors in the Secondary Market" (1998) 21 OSCB 3335 [Proposal for a Statutory Civil Remedy, 1998].

29 Nicholls, *supra* note 9 at 393–94; See e.g. *Securities Act*, RSO 1990, c S.5, s 138.1 [*OSA*]. The Quebec Securities Act, *Securities Act*, CQLR c V-1.1 [*QSA*], also incorporates this notion, without using the precise term 'responsible issuers'. Rather, it states, at section 225.2, al. 1 ('scope and interpretation'), that Division II of the Act, i.e. with respect to civil actions for misrepresentation in the secondary market, applies to "any person who acquires or disposes of a security of a reporting issuer or of any issuer closely connected to Québec whose securities are publicly traded".

30 *Allen Report*, *supra* note 22 at vii. The effectiveness of public enforcement has been debated in Canada over the last two decades. See Cory & Pilkington, *supra* note 9; Puri, *supra* note 9 at 976–86; Anand, *supra* note 9.

31 *Allen Report*, *supra* note 22 at paras 5.9–5.16; see also *Canadian Securities Regulation*, *supra* note 16 at para 12.66.

Canadian secondary market[32] after scandals in the 1990s, all of which involved questionable disclosure practices[33] of issuers.[34]

Subsequently, a committee of the Canadian Securities Administrators ("CSA"), composed of members of the securities commissions of Alberta, British Columbia, Ontario and Quebec, was formed to review the principal recommendations of the Allen Report. The CSA Committee's work led to the release of the *Proposal for a Statutory Civil Remedy for Investors in the Secondary Market* in 1998.[35] As discussed in more detail below, almost a decade will pass before securities legislation is amended to enact such a statutory liability regime. Indeed, Ontario adopted legislative amendments in 2006, while Quebec and the other provinces followed thereafter. The regimes enacted across the country were closely modelled on the proposal drafted by the CSA, which led to a harmonized liability regime in both common law and civil law jurisdictions in Canada.[36]

2) The Goal of Deterrence

The underlying philosophy and goal of the statutory regime is to deter violations of continuous disclosure obligations. Although this is widely accepted in Canadian jurisprudence,[37] and largely emphasised in legal commentary,[38] the Supreme Court did not fully grasp the significance of the deterrence component in its analysis in *Thera*, as discussed below.[39]

To understand the rationale for deterrence, one must recall that, at the time, the Allen Committee was under pressure from the market participants to recommend a new regime that was very similar to the one in the United States under Rule 10b-5.[40] However, the provisions it came

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32 See Proposal for a Statutory Civil Remedy, 1998, *supra* note 28.

33 *Thera*, SCC, *supra* note 15 at para 29.

34 Dey Report, *supra* note 21 at 49–51. See e.g. *Re Standard Trustco Ltd*, 1992 CarswellOnt 140 (WL Can), 6 BLR (2d) 241.

35 Proposal for a Statutory Civil Remedy, 1998, *supra* note 28.

36 See Stéphane Rousseau, "Étude du recours statutaire en responsabilité civile pour le marché secondaire des valeurs mobilières" (2009) 43 RJT 709.

37 See e.g. *Silver v Imax Corp*, [2009] OJ No 5573 at para 238, 2009 CarswellOnt 7874 (Ont Sup Ct J) (leave to appeal to Ont Div Ct refused, 2011 ONSC 1035). Although the ruling regarding the leave test and threshold was overturned by the ratio of the SCC in *Thera*, SCC *supra* note 15, the other parts of van Rensburg J's reasoning in this decision remain, according to us, unaffected.

38 Donald, *supra* note 16 at 616; Nicholls, *supra* note 9 at 367, 371.

39 This is further discussed in subsections 2.2 and 2.3.

40 On the implied private right of action that provides the foundation for civil liability under Rule 10b-5, see Rose, *supra* note 14.

to propose rather modelled those of the Ontario *Securities Act* [41] ("*OSA*") regarding prospectus misrepresentation in the primary market. Indeed, the Allen Committee concluded that *deterrence* of wrongful conduct by issuers,[42] and not '*investor compensation*' as in the US,[43] should be the primary objective of the new regime for breach of disclosure obligations in the secondary market,[44] for reasons further discussed below. Accordingly, it recommended that investors' compensation should be of secondary importance within the legislative goals of the new regime.[45] From the outset, the underlying philosophy and core elements of the proposed statutory civil regime were thus based on very different goals than those of US securities legislation. Indeed, in the words of Professor Coffee Jr speaking about American securities class actions: "private securities class actions currently represent the principal means by which financial penalties are imposed in cases of securities fraud and manipulation. In the aggregate, they impose penalties that overshadow those imposed by federal and state authorities and by self-regulatory organizations."[46]

The choice in favour of deterrence was also meant to avoid the unintended consequences of a compensatory regime. As Professor Nicholls notes, "*a compensation-focused remedy could result in a pointless and inefficient transfer of wealth to one group of shareholders from another (equally innocent) group of shareholders.*"[47] The Allen Committee was therefore preoccupied with protecting the interest of shareholders who would ultimately bear the cost of litigation and damage awards of secondary market class actions.[48] Such an award differs from the payment of damage awards on the primary market, which generally requires the issuer to return the subscription money paid by the injured investors. Indeed, in the case of secondary market, the award is to be deducted directly from the issuers' assets to which investors seeking remedy have not contributed, as investors rather trade with other market investors.[49] In

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41 *OSA*, *supra* note 29.

42 *Allen Report*, *supra* note 22 at vii. The Committee also concluded that "effective deterrence [would] logically reduce the need for investor compensation" at vii (see also paras 6.2–6.4).

43 *Silver v Imax Corporation*, [2009] OJ No 5573 (QL) at para 238, 2009 CarswellOnt 7874 (WL Can) (Sup Ct J) [*Silver*, Sup Ct].

44 Nicholls, *supra* note 9 at 391; see also *Canadian Securities Regulation*, *supra* note 16 at para 12.77.

45 Nicholls, *supra* note 9 at 371.

46 John C Coffee Jr, "Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation" (2006) 106:7 Colurn L Rev 1534 at 1536 [Coffee, "Reforming"].

47 Nicholls, *supra* note 9 at 394 [emphasis added].

48 *Allen Report*, *supra* note 22 at para 6.3; see also CSA Notice 53-302, *supra* note 23 at 3.

49 *Ibid.*

other words, the Committee made sure that the regime would not favour the interest of short-term investors over that of long-term investors.[50]

However, strengthening investor confidence could not entail shifting the entire burden and risk onto issuers.[51] The objective was to encourage issuers and their officers to rigorously comply with their disclosure obligations without exposing them to unlimited or undeterminable liability.[52] The Committee also recognized that the disclosure obligations imposed on issuers in Canadian capital markets should not be "more stringent" than those imposed on the United States' capital markets, nor should the liability standards be "more onerous". This type of imbalance would constitute a "competitive disadvantage to U.S. capital markets", dissuading "issuers from raising capital in Canada."[53]

As for the CSA, they expressly stated that their proposed draft legislation mirrored the 'deterrence model' developed by the Allen Committee.[54] In addition to penalizing shareholders of the targeted issuers, the CSA were of the view that a regime based on compensation would unduly increase the cost of compliance with disclosure obligations.[55]

Likewise, during parliamentary debates in Quebec, Minister of Finance Monique Jérôme-Forget stressed that the regime was, first and foremost, a tool to improve compliance to continuous disclosure obligations.[56] Comments made in the Ontario parliamentary debates echoed those of Monique Jérôme-Forget, as it was said that the goal of the Bill[57] introducing the regime—at a policy level—was to strenghten the

50 CSA Notice 53-302, *supra* note 23 at 3.

51 Nicholls, *supra* note 9 at 391.

52 *Canadian Securities Regulation*, *supra* note 16 at para 12.70 and "[t]his statutory regime attempts to balance the need to protect investors with the continuing need for efficient capital markets" at para 12.70.

53 *Allen Report*, *supra* note 22 at iii.

54 CSA Notice 53-302 *supra* note 23 at 3.

55 *Ibid*.

56 Quebec, Legislative Assembly, "Étude détaillée du projet de loi n° 19—Loi modifiant la Loi sur les valeurs mobilières et d'autres dispositions legislatives", *Journal des débats de la Commission des finances publique*e, 38:1 Vol 40, No 10 (25 October 2007) (Monique Jérôme-Forget) ["Étude détaillée du projet de loi n° 19"].

57 Bill 198, An Act to implement Budget measures and other initiatives of the Government, 3rd Sess, 37th Leg, Ontario, 2002 (assented to 9 December 2002), SO 2002, c 22 was proclaimed into force on December 31, 2005, by proclamation of the Lieutenant Governor, as amended by Bill 149, An Act to implement 2004 Budget measures, enact the Northern Ontario Grow Bonds Corporation Act, 2004 and amend various Acts, 1st Sess, 38th Leg, Ontario, 2004 (assented to 16 December 2004). This bill was also proclaimed into force on December 31, 2005, by proclamation of the Lieutenant Governor. See also Canadian Securities Regulation, *supra* note 16 at para 12.70.

capital markets. In order to achieve that goal, investors needed to receive "sound information" to make an "informed investment decision".[58]

B) Overview of the Secondary Markets Statutory Liability Regime

1) Rights of Action

The liability regime creates a statutory right of action for investors in two different circumstances: 1) misrepresentations in documents or oral statements and 2) failure to make timely disclosure of a material change.

The regime creates a right of action for misrepresentations[59] by the issuer. Specifically, if an issuer made a written[60] or oral[61] misrepresentation, investors have a right of action if they purchased or disposed of the issuer's securities during the period following the misrepresentation up until the correction of the misrepresentation. A written misrepresentation is defined as a misrepresentation made in a document released by the issuer. An oral misrepresentation is a misrepresentation made by a mandatary or other representative of the issuer in a public oral statement related to the issuer's business or affairs.

The regime also provides investors with a right of action when they acquire or dispose of an issuer's securities following the release, by an influential person,[62] of a document containing a misrepresentation or a public oral statement made by a mandatary or other representative of the influential person.

Finally, the regime creates a right of action for investors who acquire or dispose of an issuer's securities during the period between when the issuer failed to make timely disclosure of a material change and when the material change was disclosed in the manner required.[63]

2) Potential Defendants

Depending on the right of action, the liability regime identifies a number of potential defendants. Generally, investors can sue the issuer

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58 Ontario, Legislative Assembly, *Debates*, 37-3, No 60A (21 November 2002) (Hon Ted Chudleigh) at 3154.

59 *QSA*, *supra* note 29, s 225.8; *OSA*, *supra* note 29, s 138.3.

60 *QSA*, *supra* note 29, ss 225.8, 225.10; *OSA*, *supra* note 29, s 138.3(1).

61 *QSA*, *supra* note 29, ss 225.9, 225.10; *OSA*, *supra* note 29, s 138.3(2).

62 *QSA*, *supra* note 29, s 225.10; *OSA*, *supra* note 29, s 138.3(3).

63 *QSA*, *supra* note 29, s 225.11; *OSA*, *supra* note 29, s 138.3(4).

in every situation covered by the regime,[64] except for situations where misrepresentation is the result of a written or oral statement by an influential person. In those situations, investors must show that a director or officer of the issuer authorized, permitted or acquiesced to the release of the document or the making of the public oral statement.

Subject to particular conditions, the issuer's directors and officers are also potential defendants. For misrepresentations in a document[65] released by the issuer and for failure to make timely disclosure,[66] investors can sue the issuer and each director, as well as each officer of the issuer who authorized, permitted or acquiesced to the release of the document or who failed to make timely disclosure.

The rule is slightly different when there are misrepresentations in a public oral statement made by an issuer's representative. The directors and officers of the issuer may become defendants if they authorized, permitted or acquiesced to the making of the public oral statement.[67] The same requirements apply when there are misrepresentations in a document released by or are in a public oral statement made by a representative of an influential person.

In addition, the regime allows investors to sue an influential person, as well as each director and officer of the influential person, who authorized, permitted or acquiesced to the release of the document or the making of the public oral statement that contained misrepresentations.[68] The list of potential defendants also includes the person who made the misleading public oral statement.

It is worth mentioning that *each* influential person, and director and officer of an influential person, is a potential defendant where the issuer made misrepresentations in documents or public oral statements.[69] This is similarly true where the issuer fails to make timely disclosure. Influential persons and their directors and officers may be sued if they purposefully influenced the issuer into breaching its disclosure obligations.

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64 *QSA*, *supra* note 29, ss 225.8–225.1(1).

65 *QSA*, *supra* note 29, s 225.8; *OSA*, *supra* note 29, ss 138.3(1)(b), 138.3(1)(c).

66 *QSA*, *supra* note 29, s 225.11; *OSA*, *supra* note 29, ss 138.3(4)(b), 138.3(4)(c).

67 *QSA*, *supra* note 29, s 225.9(1)(3); *OSA*, *supra* note 29, ss 138.3(2)(c), 138.3(2)(d).

68 *QSA*, *supra* note 29, s 225.9; *OSA*, *supra* note 29, s 138.3(2).

69 *QSA*, *supra* note 29, s 225.10; *OSA*, *supra* note 29, s 138.3(3).

Finally, experts may be potential defendants under the liability regime if three conditions are met.[70] First, the information on which the misrepresentation is based must come from the expert's report. Second, the expert's report must be included, summarized or quoted in the document or oral statement. Third, if a person other than the expert released the document, the expert must have consented in writing to the use of the report, statement or opinion as it is contained in the document.

3) Elements Required to Establish Liability

The liability regime imposes different burdens of proof for misrepresentations in core documents and non-core documents (including oral statements)[71] and the failure to make timely disclosure.

Core documents are documents that issuers must file according to securities legislation, i.e. continuous disclosure documents.[72] For such documents, defendants are presumptively liable, unless they can invoke statutory defence where provided for misrepresentation in core documents.[73]

For misrepresentations in non-core documents, investors must show that the defendants were grossly negligent in the release of the document or the making of a public oral statement.[74] Investors can alternatively show that the defendants knew, at the time of release or making, that the document or public oral statement contained a misrepresentation, or that the defendants deliberately avoided acquiring such knowledge at or before that time.

Where investors sue for a failure to make timely disclosure, the issuer is presumptively liable.[75] For the other defendants, the investors must show that, at the time when a material change report should have been filed, they were aware of the change and that such change was a material change, or that the defendants deliberately avoided acquiring such knowledge at or before that time.[76] Investors may also show that the defendants were guilty of gross negligence in connection with the failure to make timely disclosure.

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70 *QSA*, *supra* note 29, ss 225.8(3), 225.9(4), 225.10(5); *OSA*, *supra* note 29, ss 138.3(1)(e), 138.3(2)(e), 138.3(3)(f).

71 The burden of proof is similar for non-core documents and oral statements.

72 *QSA*, *supra* note 29, s 225.3; *OSA*, *supra* note 29, s 138.1.

73 *QSA*, *supra* note 29, ss 225.13, 225.17; *OSA*, *supra* note 29, s 138.4.

74 *QSA*, *supra* note 29, ss 225.13, 225.15; *OSA*, *supra* note 29, s 138.4(1).

75 *QSA*, *supra* note 29, s 225.14; *OSA*, *supra* note 29, ss 138.4(3), 138.4(4).

76 *QSA*, *supra* note 29, s 225.14; *OSA*, *supra* note 29, s 138.4(3).

a) Available Defences

The liability regime provides for a significant number of statutory defences.

i) Due Diligence Defence

Defendants can avoid liability for misrepresentation or failure to make timely disclosure by using the due diligence defence.[77] First, they must show that they conducted, or caused to be conducted, a reasonable investigation. Second, they must demonstrate that at that particular time, they had no reasonable grounds to believe that the document or public oral statement contained a misrepresentation or that the failure to make timely disclosure would occur.

To assess whether an investigation was reasonable or not, the court shall consider all relevant circumstances, including:

1. the nature of the responsible issuer;
2. the knowledge, experience and function of the person or company;
3. the office held, if the person was an officer;
4. the presence or absence of another relationship with the responsible issuer, if the person was a director;
5. the existence, if any, and the nature of any system designed to ensure that the responsible issuer meets its continuous disclosure obligations;
6. the reasonableness of reliance by the person or company on the responsible issuer's disclosure compliance system and on the responsible issuer's officers, employees and others whose duties would in the ordinary course have given them knowledge of the relevant facts;
7. the period within which disclosure was required to be made under the applicable law;
8. in respect of a report, statement or opinion of an expert, any professional standards applicable to the expert;

77 *QSA*, *supra* note 29, s 225.17; *OSA*, *supra* note 29, s 138.4(6).

9. the extent to which the person or company knew, or should reasonably have known, the content and medium of dissemination of the document or public oral statement;

10. in the case of a misrepresentation, the role and responsibility of the person or company in the preparation and release of the document or the making of the public oral statement containing the misrepresentation or the ascertaining of the facts contained in that document or public oral statement; and

11. in the case of a failure to make timely disclosure, the role and responsibility of the person or company involved in a decision not to disclose the material change.[78]

So far, case law has not provided meaningful guidance with respect to the influence of these factors on the due diligence defence.

ii) Confidential Disclosure

The issuer is not liable for a failure to make timely disclosure where the issuer has filed a report on a confidential basis with its principal regulator in accordance with applicable legislation. To claim this defence, the issuer must show that it had a reasonable basis for making the disclosure on a confidential basis.[79] Further, where the information contained in the report remained material, the issuer has to show that it promptly made a public disclosure of the material change when the basis for confidentiality ceased to exist. In any event, the defence does not stand if the defendant released a document or made a public oral statement that, due to the undisclosed material change, contained a misrepresentation. Finally, the issuer must promptly disclose the material change where it becomes publicly known.

iii) Safe-Harbour for Forward-Looking Information

Forward-looking information is important to the financial markets. At the same time, it raises particular liability risks for issuers. To avoid a chilling effect on the disclosure of such information, the liability regime provides a safe-harbour for forward-looking information that is akin to that under US law.[80] The safe-harbour is subject to two conditions.

The first condition is disclosure-based. It requires that the forward-looking information to include a disclaimer written in 'reasonable

78 *OSA*, *supra* note 29, s 138.4(7). See also *QSA*, *supra* note 29, ss 225.15, 225.18.

79 *QSA*, *supra* note 29, s 225.27; *OSA*, *supra* note 29, s 138.4(8).

80 *QSA*, *supra* note 29, s 225.22; *OSA*, *supra* note 29, ss 138.4(9), 138.4(9.1).

cautionary language.' Specifically, forward-looking information must be identified as such. The forward-looking information must contain a statement that points out material factors that could cause actual results to differ materially from a conclusion, forecast or projection. In addition, there must be a statement describing material factors and assumptions used to draw conclusions or make forecasts or projections as set out in the forward-looking information.

The second condition relates to the reasonableness of the forward-looking information. To meet this condition, the person or company that made the forward-looking statement had to have a reasonable basis for drawing the conclusion or making the forecast or projection.

iv) Expert Report

Where an expert report is the source of the misrepresentation in a document or public oral statement, defendants are not liable if the expert consented to the use of the report and if two further conditions are met.[81] First, the defendant must prove that he did not know and had no reasonable grounds to believe that there had been a misrepresentation in the part of the document or public oral statement made on the authority of the expert. Second, the defendant must prove that the reproduced part of the document or oral public statement fairly represented the expert's report, statement or opinion.

v) Knowledge of the Plaintiff

A person or company is not liable for a misrepresentation or a failure to make timely disclosure if that person or company proves that the plaintiff acquired or disposed of the issuer's securities when he knew that the document or public oral statement contained a misrepresentation or "was aware of the material change that should have been disclosed."[82]

b) Causation

The need to prove reliance at civil law and common law created a significant barrier for investors seeking to initiate an action for misrepresentation or failure to make timely disclosure. Inspired by the fraud-on-the-market theory, the statutory liability regime enacted a presumption of reliance. Henceforth from the enactment, plaintiffs do not have to show that they relied on the misrepresentation or on the issuer's compliance with disclosure requirements.

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81 *QSA*, *supra* note 29, s 225.24; *OSA*, *supra* note 29, s 138.4(11).

82 *QSA*, *supra* note 29, s 225.17; See also *OSA*, *supra* note 29, s 138.4(5).

c) Damages

The risk of strike suits is a key concern of the civil liability regime. The statutory remedy addresses this concern in a number of ways.

The regime creates a loss causation presumption, while it provides a specific formula for calculating damages that is similar to the price decline approach recognized by the US Supreme Court in the *Dura Pharmaceuticals Inc. v Broudo* decision ("*Dura Pharmaceuticals*").[83] The legislation states that damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure.[84]

The statutory regime also limits the amount of damages recoverable, absent the defendant's knowledge of the misrepresentation or the failure to make timely disclosure.[85] These liability limits apply to all damages awarded, including settlements in actions brought under comparable legislation in Canada. However, these limits do not apply to a defendant person or company other than the issuer if the plaintiff proves that the person or company had knowledge of the misrepresentation or of the failure to make timely disclosure.

Finally, the statutory regime provides for proportionate (i.e. several) liability.[86] Thus, the court must determine the defendant's responsibility for the damages assessed in favour of all plaintiffs in the action. Save for a few exceptions, each defendant will therefore be liable only for his portion of the aggregate damage assessed, subject to the aforementioned liability limits.

d) Procedural and Extraterritorial Aspects

To curtail the risk of strike suits, the statutory regime imposes a set of strict procedural requirements on investors looking to rely on the regime to initiate an action. For example, a plaintiff must obtain the court's leave in order to commence an action.[87] The court will grant leave if it is satisfied that the plaintiff is bringing the action in good faith and that there is a reasonable possibility that the action will be resolved at trial in favour

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83 *Dura Pharmaceuticals Inc. v Broudo*, (2005) 544 US 336, 125 S Ct 1627 (Sup Ct).

84 *QSA*, *supra* note 29, s 225.30; *OSA*, *supra* note 29, s 138.5(3).

85 *QSA*, *supra* note 29, ss 225.28, 225.29, 225.33; *OSA*, *supra* note 29, ss 138.5, 138.7, 138.1.

86 *QSA*, *supra* note 29, s 225.31; *OSA*, *supra* note 29, s 138.6.

87 *QSA*, *supra* note 29, s 225.4; *OSA*, *supra* note 29, s 138.8.

of the plaintiff. In *Theratechnologies*, the Supreme Court of Canada held that "the threshold should be more than a 'speed bump' … and the courts must undertake a reasoned consideration of the evidence to ensure that the action has some merit."[88] Thus, "to promote the legislative objective of a robust deterrent screening mechanism so that cases without merit are prevented from proceeding, the threshold requires that there be a reasonable or realistic chance that the action will succeed."[89] Additionally, the regime is subject to a three-year limitation period that is suspended only when leave has been granted.[90]

With respect to the extraterritorial application of the statutory regime, Canadian courts accept jurisdiction over investor lawsuits if there is a "real and substantial connection" between the jurisdiction and the claim.[91] Therefore, it is not a requirement that the issuer be publicly-traded in Canada. An issuer whose shares trade exclusively on a foreign exchange may be defined as a 'responsible issuer' and therefore be subject to civil liability under the *OSA* if it has a 'real and substantial connection to Ontario.'[92]

For example, in a case where BP was accused of making misrepresentations in its operations and safety program, the Ontario Superior Court stated that 'there is nothing in the wording of the Act that restricts the cause of action to investors who purchased their shares on an Ontario exchange.'[93] The court rejected BP's 'exchange-based' approach to determine whether a tort had been committed in the province, concluding that this approach was too restrictive and would result in imposing a limitation in the law where none exists. The critical fact in this case was that the purported class consisted only of Canadian investors. Therefore, it seems unlikely that Canadian courts will accept jurisdiction in cases where a non-Canadian purchases shares outside of Canada.

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88 *Thera*, SCC, *supra* note 15 at para 38.

89 *Ibid.*

90 *QSA*, *supra* note 29, s 225.34; *OSA*, *supra* note 29, s 138.14. *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60, [2015] 3 SCR 801.

91 See *Yip v HSBC Holdings plc*, 2018 ONCA 626, 425 DLR (4th) 594 at para 51.

92 Bradley A Heys & Mark L Berenblut, "Trends in Canadian Securities Class Actions: 2012 Update Pace of Filings and Settlements Falls; Auditor Risk and Court Rulings Take Centre Stage" (13 February 2013) online (pdf): *Nera Economic* Consulting <www.nera.com/content/dam/nera/publications/archive2/PUB_Canada_Recent_Trends_0213.pdf> (citing *Abdula v Canadian Solar Inc.*, 2012 ONCA 211, 348 DLR (4th) 597) [Heys & Berenblut].

93 *Kaynes v BP, plc*, 2013 ONSC 5802, 117 OR (3d) 685.

Canadian courts have declined to follow the *Morrison v National Australia Bank*[94] decision in which the US Supreme Court held that US securities laws do not apply to share transactions that do not take place on US securities exchanges. As a result, in 2012, Ontario courts accepted jurisdiction over three cases involving public companies whose securities were not listed on a Canadian exchange, namely Facebook, AIG and Canadian Solar.[95]

3. The Theratechnologies Decision

A) Facts

Theratechnologies inc. is a pharmaceutical research and development company based in Montréal and listed on the Toronto Stock Exchange. At the time, it was developing a new drug (called "tesamorelin"), treating lipodystrophy in HIV patients and had filed a 'new drug approval application' with the US Food and Drugs Administration (FDA). During this process, the FDA raised questions regarding the results of certain clinical studies testing the new drug, notably, its potential side effects. These questions were published in the FDA's report on May 25th and thereby caught the eye of stock quotation enterprises, including Dow Jones. These enterprises published a press release expressing their concerns about the potential side effects of the new drug. Acting on this very information, 121852 Canada Inc. decided on that same day to sell its shares in Theratechnologies. Trading being unusually high that day, Theratechnologies' shares registered a 58% drop. Two days later, on May 27th, the advisory committee that was mandated by the FDA to conduct a study on the new drug, approved it. Theratechnologies' share value returned to normal the following day, and official FDA approval came a few days later.

In trial court, 121852 Canada Inc. was granted leave by the motion judge to institute a securities class action proceeding under section 225.4 of the Quebec *Securities Act* ("*QSA*"), against Theratechnologies.[96] The plaintiff was essentially claiming a breach by Theratechnologies of its timely disclosure obligation, which required it to publish forthwith any material change. Prior to dealing with the interpretation and application of the leave provision, the Court of Appeal determined that a right to appeal

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94 *Morrison v National Australia Bank Ltd.*, (2010) 561 US 247, 130 S Ct 2869 (Sup Ct).

95 Heys & Berenblut, *supra* note 92.

96 *121851 Canada inc. c Theratechnologies inc.*, 2012 QCCS 699, 2012 CarswellQue 1636 (WL Can).

effectively exists, and that it should be granted.[97] However, the Court of Appeal concluded that the motion judge had not made any palpable or overriding error and dismissed the appeal.

B) The Supreme Court of Canada's Decision

The Supreme Court sided with the motion judge and the Court of Appeal of Quebec and stated that the test set forth by section 225.4 *QSA*, which requires a reasonable chance of success, sets out a different and higher threshold than that set forth in the code of civil procedure for authorizations of regular class actions.[98] However, the SCC disagreed with the motion judge and the Court of Appeal on their application of that test, and found that the threshold was not met and consequently, leave should have been denied to 121852 Canada Inc.[99] The Court of Appeal decision was thereby reversed by the SCC, and leave was denied to 121852 Canada Inc.

In its reasons, the Supreme Court sought to provide background on section 225.4 *QSA* by referring to the work of the "Allen Committee" and of the CSA in the development of the civil liability regime. The Court remarked that the CSA had decided to include a screening procedure in the model liability regime because of their preoccupations with strike suits, which had become frequent in the US under a more investor-friendly regime.[100] Even though the Allen Committee had not recommended such a screening process, it was put in place to ensure that only claims with a "reasonable possibility of success" could proceed. According to the Supreme Court, the new regime thus creates a balance between preventing costly strike suits, which should be prevented by a more stringent authorization mechanism, and providing a meaningful remedy to injured investors.[101]

According to the Supreme Court, the screening process gives tribunals a gatekeeping role, which allows them to conduct a preliminary examination of the impugned action and assess whether it has a reasonable possibility of success.[102] Specifically, a claim "with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim."[103] While this is true, the authorization proceeding should

97 *Thera*, CA, *supra* note 15.
98 *Thera*, SCC, *supra* note 15 at para 35.
99 *Ibid* at para 56.
100 *Ibid* at para 30.
101 *Ibid* at para 34.
102 *Ibid* at para 36.
103 *Ibid* at para 39.

not be treated as a "mini-trial" the Supreme Court cautioned, as the evidentiary requirements should not be as onerous of those set for trials.[104] What is required is sufficient evidence to show a "reasonable possibility of success".[105] The court must "undertake a reasoned consideration of the evidence to ensure that the action has some merit." [106] This is necessary in order to promote the legislative objective of a "robust deterrent screening mechanism" to prevent unfounded claims.[107]

In the opinion of the Supreme Court, the evidence produced by 121852 Canada Inc. did not credibly point to a material change, i.e. a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer. Applying the framework established in the *Vancouver Airport* decision to determine whether there had been a material change,[108] the Supreme Court examined the total mix of information that was available to investors on May 10, i.e. at the time that Theratechnologies received the FDA briefing materials that contained questions regarding the side effects of tesamorelin. The Court found that Theratechnologies had disclosed the results of the clinical trials that did mention those side effects:

> Through these press releases, Thera disclosed to its shareholders that it was monitoring tesamorelin's side effects, including on patients' blood sugar levels. It provided both summaries and full studies detailing the results of its clinical trials. There is no allegation that any of these reports were either false or misleading. A reasonable investor who read Thera's news releases would have known that blood sugar issues and diabetes were potential side effects of the drug, and that Thera's clinical trials had found they were not clinically significant.[109]

Thus, the appointment by the FDA of an advisory committee and the publication of the questions did not significantly alter the total mix of information: "the potential side effects of tesamorelin had already been disclosed to shareholders well before the FDA published its questions and the rest of its briefing materials." Hence, "[t]here was no new information about the side effects of tesamorelin that required timely disclosure as of

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104 *Ibid* at para 39.

105 *Ibid* at para 39.

106 *Ibid* at para 38.

107 *Ibid* at para 38.

108 *Sharbern Holding Inc. v Vancouver Airport Centre Ltd.*, 2011 SCC 23 at paras 55, 61, [2011] 2 SCR 175 [*Vancouver Airport*]. Interestingly, the Supreme Court did not cite *Vancouver Airport* in *Thera*, although it does apply the analytical framework set forth in that decision.

109 *Thera*, SCC, *supra* note 15 at para 47.

May 11, 2010."[110] Therefore, the Supreme Court ruled that there was no evidence supporting the existence of a material change as defined by the *QSA*, and consequently the cause of action had no reasonable possibility to succeed at trial.

C) Comments

1) The Risk of Strike Suits

a) General Observations

In *Thera*, the Supreme Court arguably set a stringent threshold for the leave test. It justified this threshold by stating that the test had to be robust in order to prevent unmeritorious litigation, or strike suits.[111] However, the Court omitted to provide the justification as to why strike suits were to be feared in such a way, as strike suits have not emerged in Canada ten years after the enactment of the regime. [112] It also accorded little attention to the fact that both the Allen Committee and the CSA had thoroughly studied this risk during development of the regime.

Indeed, at the time of the Allen Committee Report, there existed a perception among issuers that a new statutory regime would necessarily lead to unmeritorious litigation, or more precisely 'strike suits'.[113] The general preoccupation with strike suits originated from the US securities

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110 *Ibid* at para 48.

111 *Ibid* at paras 34, 36. See also, the comments made by the Quebec Court of Appeal in *Amaya inc. c Derome*, 2018 QCCA 120 at para 84, 2018 CarswellQue 458 (WL Can) [*Amaya*]: "The screening mechanism in section 225.4 is indeed designed, above all things, to protect public issuers against frivolous lawsuits brought by investors who have no meaningful evidence to show that they have been the victims of misconduct in the secondary market. It also serves to protect long-term shareholders of the issuer who, not party to the unmeritorious action, would bear the cost of any settlement paid to opportunistic plaintiffs. The screening mechanism thus contributes to protect the public confidence in the capital markets by ensuring that investors will not be held hostage to frivolous litigation".

112 *Canadian Securities Regulation*, *supra* note 16; see also Marc-André Landry, Andrea Laing & Ariane Bisaillon, "Recours collectif en matière de responsabilité sur les marchés secondaires—Les enjeux selon une perspective pancanadienne" in Service de la formation continue du Barreau du Québec, eds, *Développements récents en litige de valeurs mobilières* (Cowansville, Que: Éditions Yvon Blais, 2013) 3 at 4 [Landry, Laing & Bisaillon]. See also Bradlay A Heys & Robert Patton, "Trends in Canadian Securities Class Actions: 2017 Update—Trickle of New Cases Suggests a Slow Rate of Filings Is the New Norm" (20 February 2018): online (pdf) *NERA Economic Consulting* <www.nera.com/content/dam/nera/publications/2018/PUB_2017_Recent_Trends_Canada_0218.pdf> [Heys & Patton].

113 *Nicholls*, *supra* note 9 at 391.

class actions scene.[114] Strike suits occur when opportunistic class action counsels use statutory rights of action as a tool to extract coerced settlements from issuers whenever a price drop occurred on the secondary market, regardless of merit.[115] Both the Allen Committee and the CSA closely studied this issue as they developed the regime.[116]

In December 1995, the Allen Committee published its Interim Report and called for industry comments.[117] In light of the comments made by issuers regarding strike suits, the Committee re-evaluated its interim conclusions to ensure their soundness.[118] After a thorough comparison of the American and Canadian litigation environment, the Committee concluded that the two systems were "sufficiently different to make it unlikely that meritless class actions will be brought in Canada."[119] Notably, it stressed that the procedural safeguards or 'disincentives' in general Canadian class action law were different from those in the US, and would sufficiently discourage unfounded claims.[120] As for the proposed provisions, it concluded that "*there was little practical risk that they would, if implemented, open the door to strike suits.*"[121]

In 1998, the CSA released a first Draft Legislation to implement the main recommendation of the Allen Committee Report.[122] Issuers continued to vigorously oppose the regime, arguing that the procedural safeguards recommended by the Allen Committee and included in the Draft Legislation did not sufficiently prevent strike suits. According to issuers, the new regime would thereby expose them as well as other market participants to unfounded claims and to the extraction of coerced

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114 *Allen Report*, *supra* note 22 at para 3.1; see also CSA Notice 53-302, *supra* note 23 at 5. See Coffee, "Reforming", *supra* note 46.

115 See Stephen J Choi, "The Evidence on Securities Class Actions" (2004) 57:5 Vand L Rev 1465; Janet Cooper Alexander, "Do the Merits Matter? A Study of Settlements in Securities Class Actions" (1991) 43:3 Stan L Rev 497. It is worth pointing out that according to Professor Coffee, "[t]he true 'strike suit' nuisance action, filed only because it was too expensive to defend, is, in this author's judgment, a beast like the unicorn, more discussed than directly observed": Coffee, "Reforming", *supra* note 46 at 1536, n 5.

116 Nicholls, *supra* note 9 at 391.

117 Toronto Stock Exchange Committee on Corporate Disclosure, "Toward Improved Disclosure—Interim Report" (1996) 19 OSCB 8.

118 Nicholls, *supra* note 9 at 391. *Allen Report*, *supra* note 22 at ii.

119 As quoted in CSA Notice 53-302, *supra* note 23 at 7389.

120 *Allen Report*, *supra* note 22 at vii.

121 As quoted in CSA Notice 53-302, *supra* note 23 at 7389 [emphasis added].

122 See in "Notice/News Release—Proposal for a Statutory Civil Remedy for Investors in the Secondary Market" (1998) 21 OSCB 3335 (see full Draft Legislation in "Request for Comments—Civil Liability for Continuous Disclosure" (1998) 21 OSCB 3367).

settlements.[123] Although the CSA's Civil Remedy Committee had been largely convinced by the work of the Allen Committee and its conclusion that "the litigation environment in Canada differs sufficiently from that in the United States that strike suits are not likely to be a problem in Canada",[124] it ultimately sought to reassure issuers by introducing modifications to its first Draft Legislation.[125]

Thus, the CSA subsequently published a revised version on November 3rd 2000, where it integrated two additional procedural mechanisms into the regime to 'further' prevent strike suits: i) court approval of any settlement; ii) leave requirement serving as a screening mechanism.[126] To justify this choice, the CSA invoked the concerns of the issuer community, and some "recent decisions regarding entrepreneurial litigation in Canada"[127]—without referring to any specific decision.[128]

b) The Safeguards Preventing Strike Suits

In *Thera*, Abella J repeatedly wrote that the leave requirement was integrated in the regime in order to prevent strike suits, emphasizing that that this requirement has to provide sufficient safeguards against strike suits.[129] Yet, with respect to securities class actions, there had only been one documented *attempted* strike suit in Canada, in *Epstein v First Marathon*, in 2000, which took place before any of the provincial regimes were even enacted.[130] More importantly, it is important to stress that the leave requirement is not the only mechanism that is meant to prevent strike suits. Indeed, several procedural mechanisms were created and integrated in the regime to limit the scope of liability.[131] Stated differently, the regime as a *whole*—not only the leave requirement—sought to balance between opposing interests and prevent strike suits. In this respect, the Quebec Minister of Finance Monique Jérôme-Forget aptly explained that the new regime was meant to simplify the burden of proof of investors, while at

123 CSA Notice 53-302, *supra* note 23 at 5–6.

124 *Îbid* at 7389.

125 Canadian Securities Regulation, *supra* note 16 at para 12.82.

126 CSA Notice 53-302, *supra* note 23 at 7389–90.

127 *Ibid* at 7389.

128 The CSA was referring to *Epstein v First Marathon*, [2000] OJ No 452, 2 BLR (3d) 30, the only alleged strike suit reported in Canada.

129 *Thera*, SCC, *supra* note 15 at paras 34, 36.

130 In *Bradley v Eastern Platinum Ltd*., 2016 ONSC 1903 at para 5, 2016 CarswellOnt 4883 (WL Can) [*Bradley*], the respondent claimed that the proposed action was not brought in good faith. Rady J, at para 6, having concluded that there was no reasonable possibility of success at trial of the allegation of non-disclosure of material change, did not proceed to the analysis regarding the good/bad faith of the plaintiff .

131 Nicholls, *supra* note 9 at 394.

the same time *maintaining a balance* between the opposing interests of issuers, by *limiting the compensation* payable to investors. She added that the goal was to protect investors, but not to provide incentive for issuers to leave Quebec.[132]

More specifically, a number of procedural mechanisms guarding against the risk of strike suits were embedded in the liability regime, including: [133]

- Burden of proof: the alleviated burden of proof is not applicable for every alleged violation of disclosure obligations—if the alleged breach is not contained in a 'non-core document', the burden of proof is more onerous for plaintiffs;

- Statutory defences: the defences are available even at the leave stage, notably a 'due diligence defence' (or 'reasonable investigation');[134]

- Proportionate (i.e. several) liability, which strongly reflects the statutory goal of deterrence;[135]

- Scope of the regime: the right of action is restricted to investors who actually either bought or sold securities between the occurrence of the misrepresentation and the occurrence of the correction. According to the Allen Committee, restricting the potential plaintiff pool in such a way better served the main objective of deterrence sought by the regime.[136]

In addition, other mitigating mechanisms, such as the enhanced "loser pays costs rule", the liability limits, and the court settlement approval requirement, serve also to curb the risk of strike suits. It is argued here that in *Thera*, when analysing the leave requirement, the Supreme Court underestimated the effectiveness of these mechanisms in preventing unmeritorious litigation. These three mechanisms will now be examined in turn.

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132 "Étude détaillée du projet de loi n° 19", *supra* note 56; see also Landry, Laing & Bisaillon, *supra* note 112 at 43.

133 Nicholls, *supra* note 9 at 394–96.

134 In the Quebec parliamentary debates, it was acknowledged that it was important to protect all the shareholders of issuers, both the injured and the continuing. One of the ways to ensure that balance was the *statutory defence* available to different defendants, see contributions of Richard Boivin in "Étude détaillée du projet de loi n° 19", *supra* note 56.

135 *Canadian Securities Regulation*, *supra* note 16 at para 12.80.

136 Nicholls, *supra* note 9 at 395.

i) 'Loser Pays' Rule

In common law provinces, the loser pays rule under procedural law provides that the party who loses a litigation pays the costs, i.e. court costs and lawyer fees, as determined by the tribunal. In Quebec, the rule is somewhat different in that legal costs are limited to judicial fees and disbursements, and do not include lawyers fees,[137] in contrast with Ontario for example. A court may order a party to pay lawyer fees only upon "substantial breaches noted in the conduct of the proceeding"[138] or abuse of proceedings.[139] In any case, the CSA noted that the "Canadian 'loser pays' costs rules" act as a discipline on frivolous actions.[140]

Nonetheless, the statutory civil liability regime modified the loser pays cost rules in common law provinces by making it mandatory, thereby overriding other statutory rules regarding costs.[141] By doing so, the regime removed discretionary powers usually attributed to courts by civil procedure statutes[142], which allow them to alter the default costs rule. In other words, under the statutory regime, the unsuccessful party invariably pays for costs, regardless of the circumstances.[143] The certainty of paying costs if unsuccessful at trial is effectively a strong incentive not to file unfounded claims, as note Ritchie and Carson: "Loser-pays cost rules can provide the court with an important tool to strike a fair balance between access to justice for class action plaintiffs and some degree of protection for businesses and other market participants, including long-term investors, against frivolous and potentially deviating litigation."[144] Professor Nicholls was more sanguine when commenting on the enhanced loser pays costs rule enacted in the regime: "This provision was yet another attempt by the drafters to exorcise the spectre of American strike suits."[145]

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137 Denis Ferland & Benoît Emery, *Précis de procédure civile*, 5th ed, vol 1 (Cowansville, Que: Éditions Yvon Blais, 2015); *Code of Civil Procedure*, CQLR c C-25.01, arts 339ff [*Code of Civil Procedure*].

138 *Code of Civil Procedure*, *supra* note 137, art 342.

139 *Ibid*, art 54.

140 CSA Notice 53-302, *supra* note 23 at 7389, n 16.

141 *Silver*, Sup Ct, *supra* note 43 at para 233, 66 BLR (4th) 222. Note that this rule regarding costs only applies to an 'action' i.e. after leave has effectively been granted. Consequently, it doesn't apply to leave motions. See *Silver v Imax Corporation*, 2010 ONSC 4017 at paras 5–9, 2010 CarswellOnt 5663 (WL Can).

142 *Class Proceedings Act*, *1992*, SO 1992, c 6 [*CPA*]; *Courts of Justice Act*, RSO 1990, c C.43.

143 Nicholls, *supra* note 9 at 398. See also Lawrence Ritchie & Robert Carson, "Will American Courts Embrace 'Loser Pays'?" (6 November 2014) online: *Osler* <www.osler.com/en/blogs/risk/november-2014/will-american-courts-embrace-loser-pays> [Ritchie & Carson].

144 Ritchie & Carson, *supra* note 143.

145 Nicholls, *supra* note 9 at 398.

ii) Liability Limits

As Professor Poonam Puri states, "[t]he limit on secondary market statutory liability is a defining feature of Canada's securities regime".[146] The limits were specifically integrated in the statutory regime to ensure that plaintiffs engage in litigation that had some merit, and thus to prevent strike suits.[147] Indeed, the CSA specifically stated that its Draft Legislation imposed liability limits to address preoccupations regarding the multiplication of securities class actions in the U.S.[148] It emphasised that such limits would achieve balance between all the different interests at stake. To that regard, they remarked:

> Providing compensation for investor damages is a secondary objective, which should be balanced against the interests of long term security holders of the issuer, who effectively pay the cost of any damage awards. *In order to achieve this balance, the proposed legislation would limit the potential exposure of issuers and other potential defendants.* [149]

Likewise, Nicholls considers that the liability limits are the most powerful instrument against unmeritorious litigation:

> Given the costs and risks of pursuing a class action claim against a public corporation for misrepresentation in continuous disclosure documents, including Ontario's robust "loser pays" costs rules, the prospect of receiving no more than $1 million in damages would not appear to provide a significant incentive for prospective plaintiffs and their counsel to pursue litigation.[150]

Thus, liability limits in Canada constitute a highly significant difference with American securities legislation. In fact, liability under US law is potentially unlimited,[151] and has developed into a 'fully compensatory model'.[152] In Canada, absent clear proof of fraud, the limits make it likely that investors will not be fully compensated for their injury.[153] This alone constitutes a strong argument that strike suits are not as likely to occur in Canada as in the US. One mitigating factor would be

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146 Puri, *supra* note 9 at 1002.

147 *Canadian Securities Regulation*, *supra* note 16 at para 12.81.

148 See "Notice/News Release—Proposal for a Statutory Civil Remedy for Investors in the Secondary Market" (1998) 21 OSCB 3335.

149 CSA Notice 53-302, *supra* note 23, Executive Summary at 1 [emphasis added].

150 Nicholls, *supra* note 9 at 399. See also *Silver*, Sup Ct, *supra* note 43 at paras 236–38.

151 Pritchard & Sarra, *supra* note 9 at 903.

152 CSA Notice 53-302, *supra* note 23 at 8.

153 Pritchard & Sarra, *supra* note 9 at 904; see also *Canadian Securities Regulation*, *supra* note 16 at para 12.77.

that American securities law does not provide for disclosure of material change.[154] Further, although plaintiffs in the US must technically show the element of 'scienter' for all documents, or actual knowledge of the falsity for forward-looking documents,[155] American jurisprudence has alleviated the burden of proof for investors. Courts have developed the 'fraud-on-the-market' theory,[156] which holds that an investor's reliance on public misrepresentations may be presumed because the majority of public information is actually reflected in the market price of the issuer's securities.[157] In Canada, such an alleviated burden of proof exists for 'core-documents,[158] for which there is a presumption of reliance—or causality—but not for 'non-core documents'.[159]

iii) Mandatory Court Approval of Settlements

The mandatory approval of any settlement constitutes a third mitigating mechanism built in the statutory regime. The CSA chose to incorporate a settlement approval rule in its second Draft Legislation,[160] making judicial approval mandatory for an action to be stayed, discontinued or settled. The CSA was of the view that the settlement approval mechanism was an efficient way to prevent unmeritorious litigation, as it gave courts a supervisory role over launched actions. The real goal of strike suits, from what we may infer of them from the US, is forced settlement.[161] The decision of the Ontario Superior Court in *Epstein v First Marathon*[162] demonstrated the little tolerance that Canadian courts have for American-like strike suits. The settlement approval mechanism had proven highly efficient to prevent a coerced settlement and to prevent payment of the

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154 Pritchard & Sarra, *supra* note 9 at 892–93.

155 *Ibid.*

156 CSA Notice 53-302, *supra* note 23 at 8.

157 Canadian courts had rejected the 'fraud-on-the-market' theory in *Carom v Bre-X Minerals Ltd.*, (1998) 41 OR (3d) 780, 1998 CarswellOnt 4285 (WL Can). CSA Notice 53-302, *supra* note 23 at 9 wrote that the aforementioned theory was "inextricably bound up with the statutory action under U.S. securities law" and thus could not apply to the common law tort of negligent or fraudulent misrepresentation. The CSA believed that this decision illustrated "the limitations inherent in class actions in the context of securities litigation based on the common law." See also *Canadian Securities Regulation*, *supra* note 16 at paras 12.15–12.16; Nicholls, *supra* note 9 at 389: "[c]ourts in most Canadian jurisdictions rejected the US "fraud on the market" concept as an expedient solution to the challenges of proving reliance".

158 E.g. *OSA*, *supra* note 29, s 138.4; *QSA*, *supra* note 29, s 225.13.

159 Puri, *supra* note 9 at 1000.

160 CSA Notice 53-302, *supra* note 23 at 7389.

161 Coffee, "Reforming", *supra* note 46 at 1536; CSA Notice 53-302, *supra* note 23 at 7389.

162 *Epstein v First Marathon*, [2000] OJ No 452 (QL), 2000 CarswellOnt 346 (WL Can) (Sup Ct J).

claimant's lawyer fees by defendants, as this was a strike suit brought about by 'entrepreneurial lawyers'. The CSA itself stated that the decision in *Epstein v First Marathon*[163] was a clear indication that Canadian courts would, without hesitation, denounce strike suits and use their authority to discourage them.[164] We add that it was also a clear indication that, at that time (i.e. before the enactment of the statutory regime), Canadian courts already had all the necessary procedural tools to do so.

iv) Overall Architecture

Finally, it is arguable that the Supreme Court did not give sufficient consideration to the overall architecture of the regime. Indeed, the regime's architecture was specifically conceived to ensure that the primary objective, and more importantly, the primary *effect* of the new provisions would be deterrence rather than compensation. As discussed above, the leave requirement was merely one of the many mitigating mechanisms put in place to avoid unmeritorious litigation[165]. By failing to consider the effect of the mitigating mechanisms in its analysis, the Supreme Court made the leave threshold unnecessarily burdensome for investors.

With the eagerness to create a Canadian statutory civil regime for the secondary market came unease and fear of opening the door to strike suits. Because of such apprehensions and the related lobby,[166] the statutory civil regime for investors created a right of action less powerful than was first intended. Before *Thera*, Professor Nicholls perceived the regime itself as setting forth a relatively restrictive right of action for investors,[167] going as far as qualifying it *"as something of a dead letter"*.[168] The Supreme Court in *Thera* failed to acknowledge this perspective. It made the leave test overly stringent and burdensome at a stage of litigation where not all evidentiary elements are readily known to investors. To summarize, the effectiveness of the regime appears greatly hampered by the combined effect of the mitigating mechanisms already integrated in the regime, and the leave threshold set in *Thera*. Hence, the question: Will the overall effect render remedy illusive for investors, and bring us back to the situation that prevailed under the common law, i.e. when recourses were 'largely illusory'?

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163 *Ibid.*

164 CSA Notice 53-302, *supra* note 23 at 7389.

165 *Silver*, Sup Ct, *supra* note 43 at para 233.

166 *Canadian Securities Regulation*, *supra* note 16 at para 12.67, n 131.

167 Nicholls, *supra* note 9 at 371.

168 *Ibid* at 400 [emphasis added].

v) The Interpretation of the Leave Test

While it is true that the CSA did include the leave test in its Draft Legislation, in *Thera,*[169] the Supreme Court did not pay close attention to the context in which it came to be part of the regime. Recall that when they released its first Draft Legislation—which did not include a leave test—for comments in 1998,[170] the CSA faced strong opposition on the part of issuers. The CSA nonetheless supported and recommended the enactment of its Draft Legislation by provincial legislators. The CSA did however acquiesce to certain demands.[171] As a result, it added what it called a 'screening mechanism'[172]—the leave requirement—to control the risk of unmeritorious litigation. The leave would empower defendants to 'fend off' unfounded claims without being forced into coerced settlements.[173] By *combining* the leave requirement with the other mitigating mechanisms discussed above, the CSA believed that the regime would be even less likely to foster strike suits.[174]

According to some authors,[175] the CSA's change of heart was also due to the Ontario Superior Court decision in *Epstein v First Marathon* in 2000,[176] in which the court found that the claim was effectively a strike suit.[177] This might have convinced legislators that strike suits were effectively possible in Canada. Therefore, these authors argue that it was this very court decision that ultimately prompted the CSA, and eventually provincial legislators, to integrate a leave requirement in the new regime.[178] Nevertheless, *Epstein v First Marathon* seems to have been an isolated case. Authors Dimitri Laskaris and Daniel Bach explain that the CSA, in its assessment of the potential significance of *Epstein v First Marathon*, failed to recognize that the settlement approval mechanism

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169 *Thera*, SCC, *supra* note 15 at para 30.

170 See "Request for Comments — Civil Liability for Continuous Disclosure" (1998) 21 OSCB 3367.

171 A Dimitri Lascaris & Daniel EH Bach, "Securities Class Actions after *Timminco*: Has the Court of Appeal Undone Part XXIII.1?" (2012) 52:3 Can Bus LJ 416 at 416 [Lascaris & Bach].

172 CSA Notice 53-302, *supra* note 23 at 6.

173 *Ibid.*

174 CSA Notice 53-302, *supra* note 23 at 6; see also comments in Five Year Review, *supra* note 21 at 131.

175 Lascaris & Bach, *supra* note 171 at 418–19; Nicholls, *supra* note 9 at 396-397.

176 *Epstein v First Marathon Inc.*, [2000] OJ No 452 (QL), 2000 CarswellOnt 346 (WL Can) (Sup Ct J).

177 Interestingly, the plaintiff's counsel had received advice from a well-known US class action firm. See Nicholls, *supra* note 9 at 396–97.

178 *Ibid.*

in the Ontario *Class Proceedings Act*[179] was in fact adequate and highly effective to defeat the attempted strike suit.[180]

Writing before any court decisions had been rendered on a leave motion, Nicholls thought that the leave requirement in the *OSA*[181] did not appear to be, on its face, "unduly onerous".[182] As for Quebec, one could argue that a leave test similar to that for regular class actions instituted under the *Code of Civil Procedure* (*CCP*)[183] would have been a sufficient tool to prevent strike suits, without unduly burdening investors wanting to initiate an action.[184] Under the *CCP* test, an investor could not have merely alleged general facts, but rather would have had to support its claim with the precise violations of disclosure obligations for which he was seeking remedy.[185] Moreover, to obtain authorisation, the alleged facts would have had to justify the orders sought.[186] This would have been sufficient, as it is for regular class actions, to determine if a claim presented a chance of success, or if on the contrary, it appeared vexatious or frivolous.

According to a line of cases in Ontario prior to *Thera*, the leave test had a relatively low threshold, as the one for regular class actions.[187] Courts had concluded so after conducting a detailed statutory interpretation of the phrase "reasonable possibility of success at trial".[188] It was nonetheless acknowledged that, in the case of securities class actions, this threshold however low, had to be met by putting forward sufficient evidence—actual

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179 *CPA*, *supra* note 142, s 29.

180 Lascaris & Bach, *supra* note 171 at 418–19; Nicholls, *supra* note 9 at 397.

181 *OSA*, *supra* note 29.

182 Nicholls, *supra* note 9 at 397.

183 *Civil Code of Procedure*, CQLR c C-25, abrogated and replaced by *Civil Code of Procedure*, CQLR c C-25.01.

184 *Option consommateurs v Infineon Technologies AG*, 2013 SCC 59, 364 DLR (4th) 668 at para 61 [*Option consommateurs*, SCC].See also Pierre-Claude Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (Montréal, Éditions Thémis, 1996) at 408–09.

185 *Option consommateurs*, SCC, *supra* note 184 at para 65.

186 *Ibid*; *Comité Regional des Usagers des Transports en Commun c Commission des Transports de la CUQ*, [1981] 1 SCR 424, 37 NR 608 at 429.

187 See e.g. *Green v Canadian Imperial Bank of Commerce*, 2014 ONCA 90 at paras 85–88, 90, 118 OR (3d) 641 [*Green*, CA] (rev'd in *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60, [2015] 3 SCR 801 [Green, SCC]); *Bayens v Kinross Gold Corporation*, 2014 ONCA 901 at paras 44–45, 2014 CarswellOnt 17766 (WL Can) (the ruling regarding the leave test and threshold was overturned by the ratio of the SCC in *Thera*); *Silver,* Sup Ct, *supra* note 43.

188 See e.g. *Silver*, Sup Ct, *supra* note 43 at paras 3124–25.

evidence—and *a contrario*, not by speculation.[189] This is because the leave motion, unlike the certification motion, is not based solely on the pleas, and therefore the allegations will not necessarily be taken at face value.[190]

The leave requirement essentially provides that, to obtain leave, a plaintiff has to demonstrate that its claim: "(i) is being brought in good faith and (ii) has a reasonable prospect of success at trial".[191] This test is based on the one recommended by the Ontario Law Reform Commission ("OLRC") in its *Report on Class Actions*, in 1982.[192] The OLRC had been mandated to study class actions in Ontario, and had the overall mission to make them more accessible.[193] It described the recommended test as a "substantive adequacy" test and a "prophylactic measure against potential abuse of the proposed class action procedure".[194] As pointed out in *Silver v Imax Corporation*, this does not translate into a "substantial burden" of proof.[195] The OLRC had also proposed requiring the moving party and the defendant to file affidavits containing the material facts upon which they relied for certification.[196]

Belobaba J of the Ontario Superior Court, instigator of the movement towards the higher threshold of the leave test, did discuss the OLRC *Report* in his decision *Ironworkers Ontario Pension Fund (Trustee of) v Manulife Financial Corp*. (*Ironworkers*) ,[197] in which he notoriously wrote that the test should be "more than just a speed bump".[198] He suggested that the

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189 See e.g. *Gould v Western Coal Corporation*, 2012 ONSC 5184 at para 262, 2012 CarswellOnt 11306 (WL Can). Although the ruling regarding the leave test and threshold was overturned by the ratio of the SCC in *Thera*, the other parts of Strathy J's reasoning in this decision remain, according to us, unaffected.

190 *Silver*, Sup Ct, *supra* note 43 at para 25, 2009 CarswellOnt 7874 (WL Can); see also *Bayens v Kinross Gold Corporation*, 2014 ONCA 901 at para 46, 2014 CarswellOnt 17766 (WL Can) (although the ruling regarding the leave test and threshold was overturned by the ratio of the SCC in *Thera*, the other parts of the ONCA's reasoning in this decision remain, according to us, unaffected); *Green*, CA, *supra* note 187 at para 89 (Although rev'd in *Green*, SCC, *supra* note 187, the ONCA's reasoning in this decision remain, according to us, unaffected).

191 CSA Notice 53-302, *supra* note 23 at 7; see e.g. *OSA*, *supra* note 29, s 138.8; *QSA*, *supra* note 29, s 225.4.

192 CSA Notice 53-302, *supra* note 23 at 7, n 20. This recommendation was ultimately not incorporated in the *CPA*, *supra* note 142.

193 *Silver*, Sup Ct, *supra* note 43 at para 318.

194 Ontario Law Reform Commission, *Report on Class Actions*, vol 2 (Ontario: Ministry of the Attorney General, 1982) at 313–15 [*Report on Class Actions*].

195 *Silver*, Sup Ct, *supra* note 43 at para 316.

196 *Report on Class Actions*, *supra* note 194 at 425, 436.

197 *Ironworkers Ontario Pension Fund (Trustee of) v Manulife Financial* Corp, 2013 ONSC 4083, 2013 CarswellOnt 11013 (WL Can) [*Ironworkers*].

198 *Ibid* at para 39.

test as recommended by the OLRC imposed a high threshold, writing the following and quoting part of the *Report*:

> The OLRC was explicit that the "reasonable possibility of success" test was not intended merely to screen out impossible cases: "The test that we propose is not aimed at those cases where it is clear that the action cannot succeed". There are already provisions under the *Rules of Civil Procedure* that allow such cases to be summarily disposed of, either by a motion to strike or a motion for summary judgment.[199]

However, his quote omitted the following sentences of the paragraph in the OLRC *Report*, which holds:

> At the same time, the Commission is concerned about imposing a standard that would be too high—in other words, one that would have the effect of disqualifying the vast majority of suits commenced as class actions. To ensure that our proposed class action procedure is truly useful, it must be available in a wide variety of circumstances. The preliminary merits test that we propose would require a standard of proof that is not as strict as a *prima facie* test, but more than simple proof that a triable issue exists. We are satisfied that our preliminary merits test strikes a reasonable balance.[200]

Indeed, the test recommended by the OLRC entails a certain examination of the merits of a proposed action. However, it appears that the OLRC was also concerned with not setting the threshold too high. As for the SCC in *Thera*, it did not acknowledge and interpret the legislative origin of the leave test.

Another argument referred to in previous Ontario case law[201] to support a low threshold that the SCC failed to consider was the analysis in its own decision, *R v Imperial Tobacco Canada Ltd*.[202] In this decision, then Chief Justice McLachlin—in the context of a motion to strike—described the phrase "reasonable prospect of success" as "weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial."[203] In *Thera*, the SCC did not refer to this interpretation, let alone refute or distinguish it. In *Ironworkers*,[204] Belobaba J admitted that he foresaw the battle for a higher threshold was lost in advance because of the decision *R v Imperial Tobacco Canada Ltd*.[205]

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199 *Ibid*.

200 *Report on Class Actions*, *supra* note 194 at 323–24.

201 See e.g. *Green*, CA, *supra* note 187 at paras 85–88.

202 *Knight v Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 SCR 45.

203 *Ibid* at para 19.

204 *Ironworkers*, *supra* note 197.

205 *Ibid*.

Finally, the SCC did not give sufficient consideration to the fact that the leave motion takes place at a very early state of the proceedings, i.e. before full pleadings, discovery and production of documents.[206] As explained in *Silver v Imax Corporation*, the limited access to evidence available at such an early stage limits the ability of the parties, especially the investors, to "fully address the merits".[207] Courts should keep these limitations in mind, and what may become available at trial. They should also assess evidence "realistically", with regards to *which* party has access to evidence at the motion stage.[208] On a motion for Request to inspect some documents, Belobaba J stated that restricted access to evidence in possession of the defendant was significant to conclude to a relatively low threshold.[209]

To conclude, in *Thera*, the Supreme Court stated that the threshold for the regime's test was a high and stringent one,[210] writing that the legislative intent for the leave provision was *meant* to create a *robust* screening mechanism.[211] There is no indication however, in the statutory interpretation of the provision that the threshold was meant to be so stringent, and meant to impose such a high evidentiary burden on investors seeking leave.

4. Implications of the Theratechnologies Decision: A Look at Recent Case Law

The *Thera* decision and subsequent decisions have raised numerous questions in regards to the leave test set out by section 138.8 *OSA*[212] and section 225.4 *QSA*[213]. Naturally, a number of implications arise from the interpretation that the Supreme Court of Canada has set out for the "reasonable possibility" criteria.

Our literature review was inconclusive in regards to the consequences of the heightened leave test following *Thera*. Some commentators are of the view that the *Thera* decision did not significantly raise the threshold for the leave test: "The result is arguably a modestly tighter screening mechanism than was previously endorsed by the Court of Appeal, which may make it more difficult for plaintiffs to bring secondary

206 See e.g. *Green*, CA, *supra* note 187 at para 89.

207 *Silver*, Sup Ct, *supra* note 43 at para 326.

208 *Ibid* at para 327.

209 *Mask v Silvercorp Metals Inc.*, 2014 ONSC 4161 at para 43, 121 OR (3d) 705 (leave to appeal to Ont Div Ct refused, 2014 ONSC 4647).

210 *Thera*, SCC, *supra* note 15 at para 35.

211 *Ibid* at paras 34, 38–39.

212 *OSA*, *supra* note 29, s 138.8.

213 *QSA*, *supra* note 29, s 225.4.

market disclosure actions."[214] Another commentator was more critical of the decision, writing that "there are problems with the interpretative approach … apparently endorsed by the Supreme Court that make the statutory cause of action less consistent, less effective, and less fair than it could and should be".[215] Finally, according to NERA Consulting, there has been a sharp drop in class action filings in Canada following *Thera*, a consequence that cannot be explained following our literature review.[216]

In order to uncover the implications of *Thera*, after a review of the case law and doctrinal work, we have developed two hypotheses. The first hypothesis is that there is a resemblance of a mini-trial when the amount of evidence becomes exhaustive as of the leave hearing. The second is that there is an appearance of a trial conclusion at the leave stage. In other words, it appears as though, if leave is granted, the plaintiff will win at trial. These hypotheses, developed below, remain hypotheses and not conclusions until further decisions are rendered.

A) Methodology

Specifically, to come to the hypotheses, we have conducted an analysis of nine court decisions, both in the Quebec and Ontario jurisdictions. Out of the nine decisions, six[217] are at the top ten of pertinence for citing *Theratechnologies* according to Westlaw.[218] The three remaining: the *Ironworkers*[219] decision, *Paniccia v MDC*[220] and *Catucci v Valeant*[221], were chosen for various reasons. *Ironworkers*, despite the fact that it was rendered before *Theratechnologies*, was cited by Justice Abella as

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214 David Di Paolo, "The Supreme Court on Screening Out Strike Suits in Secondary Market Disclosure Class Actions" (21 April 2015) online: *CanLii Connecte* <canliiconnects.org/fr/commentaries/37000>.

215 David M Feldman, "The Statutory Claim for Secondary Market Misrepresentations after Theratechnologies and Green", (2017) 59:1 Can Bus LJ 1 at 28.

216 Heys & Patton, *supra* note 112.

217 These six decisions are: *Rahimi v SouthGobi Resources Ltd.*, 2017 ONCA 719, 137 OR (3d) 241 [*Rahimi*]; *Mask v Silvercorp Metals Inc*, 2016 ONCA 641, 132 OR (3d) 161 [*Mask*]; *Bradley*, *supra* note 130; *Goldsmith v National Bank of Canada*, 2016 ONCA 22, 132 OR (3d) 161; *Swisscanto Fondsleitung AG v BlackBerry Ltd.*, 2015 ONSC 6434, 2015 CarswellOnt 17472 (WL Can); *Coffin v Atlantic Power Corp*, 2015 ONSC 3686, 127 OR (3d) 199 [*Atlantic Power*].

218 The online service *Westlaw Next* provides a categorization of decisions citing another—in this case, *Theratechnologies v 121851 Canada Inc*—and classes them by order of pertinence, grading them from 1/4 to 4/4. The decisions considered are of a grade of 2/4 or higher. No decision, according to *Westlaw Next* has a 4/4 grade.

219 *Ironworkers*, *supra* note 197.

220 *Paniccia v MDC Partners Inc.*, 2018 ONSC 3470, 142 OR (3d) 421.

221 *Catucci v Valeant Pharmaceutical Inc.*, 2017 QCCS 3870, 2017 CarswellQue 7255 (WL Can) [*Catucci*].

a decision to be followed. *Paniccia v MDC* was chosen for it is a recent decision and we wished to determine if a new test or guideline had been recently established. Finally, *Catucci v Valeant* was chosen simply for its pertinence and exhaustive analysis, as well as being rendered in Quebec, thus attempting balance the sources of decisions we analysed.[222]

As the initial intent was to find a pattern within the decisions in regards to the leave test, criteria had to be established. Six different criteria were put forward:

1) Expert Evidence

Whether contradicting credible expert evidence was enough to grant leave, as it was in *Swisscanto v Blackberry*. This would help establish the leave's evidentiary requirement.

2) Defence Level

We considered the defence level of the plaintiff versus the defence. We wished to see if plaintiffs needed to consistently provide more evidence than the defendants to win their case.

3) Evidence Level

We considered whether the total evidence was exhaustive or preliminary. As the leave stage is a preliminary setting for trial, we considered whether or not the parties themselves were treating this stage as a trial in itself.

4) Mini-trial

We considered if the court seemed to analyse the case as a trial as well. Although no judge will explicitly write that they are conducting a mini-trial, we made certain inferences from the text itself.

5) Reasonable possibility versus reasonable probability

We looked at the decision and considered whether, although the criteria is a "reasonable possibility", the decision seemed to have a threshold at a "reasonable probability" of winning or not.

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[222] There is an average of 17.5 pages per decision for the 8 other decisions considered, while *Catucci*, *supra* note 221 totals 65 pages.

6) Nature of the Debate

We looked into what aspect of the test was being debated, whether the applicable legislation or the reasonable possibility, to determine whether or not the "reasonable possibility" criteria was indeed the one proving more troublesome for parties and judges alike.

Before looking at the results of our analysis, one caveat is worth emphasising: the number of decisions available that are pertinent is limited (n=9). Thus, our hypotheses may very well be invalidated. We are likely to have a better understanding of the leave test and the validity of our hypotheses in the years to come, as the courts hone the application of the aforementioned legislation.

B) Results

1) General Discussion

Each decision was submitted to the aforementioned criteria to evaluate what may come out as a pattern. The answer that each decision got when submitted to each criteria is reproduced in Table 1.

The first criteria about opposing credible expert evidence was inconclusive as many of the decisions led to either unconvincing expert reports or simply an absence of any expert witness report.

The second criteria regarding the level of defence that each party had vis-à-vis the other was also inconclusive. Indeed, there was a well-balanced number of decisions where the defence had higher, lower or similar amounts of evidence submitted. Nonetheless, it must be noted that this criteria does not look into the extent of the overall evidence imbalance, if any.

The third criteria led to an interesting result. We considered exhaustive evidence as cases where there was more than a single expert report for each party and/or a significant amount of filed evidence. Six out of the nine decisions were of such a reality. In *Rahimi*, both sides filed expert reports, but as Justice Belobaba notes himself, a "large volume of evidence" was filed, including large amounts of corporate documents. This, as we discuss later, indicates the parties' will to adduce considerable amounts of evidence to "hit the ground running" as of the leave stage.

The fourth criteria led to a divided result whether or not decisions resembled a mini-trial. This goes beyond a consideration of the merits and is a subjective appreciation of whether or not the case resembles a trial in itself as of the leave stage. Nonetheless, the fact that four of the nine decisions led to a positive answer to the criteria is noteworthy.

The criteria regarding the resemblance of the probability of winning was a complex one, as the cases that do not grant leave are difficult to analyse.[223] Thus, the analysis is divided, but we nonetheless infer from the cases where leave is indeed granted below.

The last criteria, regarding which aspect of the leave test is debated before the courts led to an overwhelming conclusion: the "reasonable possibility" criteria is the one being most often debated, leading to an eight out of nine result.

2) Resemblance of a Mini-Trial

We first hypothesize that, as the amount of evidence rises for the leave hearing, the hearing itself resembles a mini-trial. The Supreme Court of Canada has noted that the leave hearing must not be treated as a mini-trial.[224] Yet, as the amount of evidence provided by both parties becomes exhaustive and, in some cases, titanic, the judges are pushed towards a deeper consideration of the material presented.

In *Rahimi v SouthGobi Resources Ltd et al*, the Court of Appeal wrote that the motion judge had treated the case as a mini-trial and had indeed erred in his consideration of the case before the court.[225] In *Mask v Silvercorp*, the plaintiff had made multiple requests for documents and multiple experts were presented at trial. Yet, the motion judge found that the plaintiff's expert report was "completely undermined" by the defence's expert report.[226] This suggests, in itself, a consideration of the merits of the case. Granted, the Supreme Court calls for such consideration, but this nonetheless coincides with the appreciation of evidence that would be made at trial, and thus, we find a paradox between a "no mini-trial" analysis, with a weighing of the merits and a "critical evaluation of all the evidence"[227]. Additionally, it was stated by Justice Strathy in *Green*: "the conflict in the expert evidence is a matter that should be resolved at

223 Due to the subjective nature of the evaluation, we preferred to leave the *Atlantic Power*, *supra* note 217 decision as undetermined, as there was no substantial evidence to support one answer or another.

224 *Thera*, SCC, *supra* note 15 at para 39.

225 *Rahimi*, *supra* note 217 at para 50.

226 *Mask*, *supra* note 217 at para 29.

227 *Ibid* at para 45.

trial."[228] In *Catucci v Valeant*, some 12,000 pages of material was filed, in addition to the numerous experts witnesses. The trial judge noted his need to maintain enough distance as to ensure it did not become a mini-trial. Nonetheless, in this particular decision, it is the parties that seem to treat the hearing as a trial in itself. Indeed, multiple arguments to discredit experts were presented, and what is meant to be a hearing to prevent strike suits led to a five day hearing, immobilizing vast judicial resources and costing vast sums to both parties. It is clear that when the stakes are high and vast amounts of evidence are presented, the resemblance to a mini-trial rises.

To ensure that our hypothesis was not purely true on one side of the coin, we verified the opposite effect, and indeed, the hypothesis holds. For the decisions with preliminary levels of evidence presented to the court, the resemblance of a mini-trial was nonexistent. In *Goldsmith v NBC*, very little evidence was presented as most of the debate held on the applicable legislation portion of the test and not the reasonable possibility portion. In *Swisscanto v BlackBerry*, only two expert opinions were filed and both relied solely on publicly available information.[229] The credibility of each expert was quickly demonstrated in the thirteen-page decision and any thought of mini-trial is completely extinguished. A similar feeling is conveyed in *Paniccia v MDC*.

Out of the nine decisions considered, only two are outliers. The *Ironworkers* and the *Atlantic Power* decisions both have exhaustive evidence adduced before the court, with 14,000 electronic records produced by the defendants alone for the latter decision. Yet, there is no resemblance of a mini-trial. Whether this is unique to Belobaba J is not something we have considered, as we sought a broader pattern.[230]

Acknowledging that we have a limited number of decisions, we nonetheless believe our hypothesis to have some merit as it holds in seven

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228 *Green v Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 at para 315, 2012 CarswellOnt 8382 (WL Can). Although Justice Strathy's decision was overruled, this aspect of the decision was not contested. The SCC limited its writing on the reasonable possibility criteria to a referral to the *Theratechnologies* decision and repeats the necessity to produce some credible evidence to support the claim. It appears paradoxical to have to produce "some" credible evidence when there is an analysis of all the evidence adduced and a thorough weighing of the merits. This additionally adds to the recent *Amaya*, *supra* note 111, which greatly limited early document disclosure at the leave stage.

229 *Swisscanto Fondsleitung AG v BlackBerry Ltd.*, 2015 ONSC 6434 at para 32, 2015 CarswellOnt 17472 (WL Can) [*Swisscanto*].

230 Additionally, Justice Belobaba rendered the decision in *Swisscanto*, *supra* note 229 and, as such, there was little motive to think that Justice Belobaba's decisions were different from others.

out of nine cases considered. Our hypothesis is furthermore supported by the single logical argument that it is in the best interest of the defending party to treat the leave hearing as a trial and ensure to the best of its ability that the trial not move forward. Naturally, to counter the presentation of massive amounts of evidence and provide the "reasonable possibility" of winning at trial, the plaintiff will increase the amount of evidence as to match, to some extent, the evidence that defence adduces.

3) The Impact of Leave on the Outcome of the Case

Our second hypothesis holds much importance for the future of the leave hearing. Indeed, we believe that if leave is granted, there is more than a possibility of winning at trial. We believe that if leave is granted, there is a probability of winning. Such a hypothesis is drawn from within the text of the decisions themselves. Granted, at this stage, it is too early to determine a correlation, as the number of decisions rendered is too low. The only decision that we looked into where leave was granted early enough for us to potentially have the trial decision is the *Ironworkers* decision. However, it led to a settlement that was accepted by the judge that had granted leave initially. One must note that this hypothesis has a double meaning: winning at the leave stage will, in our opinion, lead to a win at trial, but to win the leave, the judge must be convinced beyond the reasonable possibility prescribed by the legislation to allow the case to go forward.

In *Bradley v East Platinum Ltd*, the motion judge weighed the evidence before her. She concluded that suspicion alone was insufficient to allow the case to move forward. Yet, this is a consideration beyond the credibility of the expert witnesses. The report provided by JP Morgan notes the suspicion, and one could consider this suspicion by a credible expert as sufficient to have a reasonable possibility of winning at trial.[231] The appreciation of the content of expert reports and cross-examinations resemble a weighing of evidence similar to trial, and thus, one can suspect that, to win at the leave hearing, one must provide sufficient evidence to leave little doubt. In the words of Justice Belobaba:

> If the weather forecast says that the chance of rain tomorrow is no more than 1%, would you conclude that there is a reasonable possibility that it will rain tomorrow? Probably not. What if the chance of rain is 20%? Most people, I would think, would describe this as a reasonable possibility of rain. How about 10%? Or 5%? Does a one in twenty chance amount to a reasonable possibility?[232]

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231 *Bradley*, *supra* note 130 at para 92.

232 *Ironworkers*, *supra* note 197 at para 37.

There must be, according to Justice Belobaba, a reasoned consideration of the evidence, and the threshold, as the Supreme Court agrees, goes beyond the *de minimis* possibility of winning. Unfortunately, demonstrating that the issue is beyond simply triable, but under the reasonable *probability* of winning is a confusing and blurry area, in addition to the materiality criteria that requires exhaustive examination. Thus, it would appear as if the courts wish to observe a reasonable probability of winning at trial, as to ensure that the case is, indeed, not a strike-suit nor merely triable, as the legislator intended in his approach of deterrence.

In *Swisscanto v BlackBerry Ltd*, the motion judge clearly indicated a belief that the plaintiff would win his case. Indeed, the judge notes that the defence was, granted thoughtful, successfully rebutted by the plaintiff's expert. He even notes, regarding the additional submissions: "However, without exception, each of these additional submissions was rebutted by the plaintiff with plausible evidence and argument."[233] This is a clear consideration of the weight of the evidence adduced and clearly concludes to whom provided a preponderant argument. It seems that Belobaba, even if concluding that two opposing credible expert witnesses was enough to move forward to trial, is in favour of one side. One could almost think of submitting the decision as evidence before the trial judge.

In *Catucci v Valeant Pharmaceuticals*, the court, once again, stated that the plaintiff had met the reasonable possibility criteria and that the proper forum to decide fully on the matter was at trial. Like many securities class actions, an important question before the court is based on the materiality of any information that was disclosed or omitted. In this particular case, expert reports were adduced to support, or discredit, the materiality of Valeant's actions.[234] Materiality, as stated by the SCC is "a question of mixed law and fact".[235] There is no determined boundary to materiality and it relies on a subjective appreciation of facts. Thus, as it is a debate that has a great many facets, one would think that it should be left for trial. The judge wrote: "the battle of the experts is a matter better left to be decided at trial and not at this stage."[236] Yet, the court later concludes with:

> Accordingly, at this point, the Court believes that there is a reasonable possibility that the Applicants can successfully establish, on the merits of the action, that in failing to disclose its relationships with specialty pharmacies and the associated risks, Valeant misrepresented material facts which ought to have been disclosed.[237]

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233 *Swisscanto*, *supra* note 229 at para 46.

234 *Catucci*, *supra* note 221 at paras 104, 113, 118, 121.

235 *Sharbern Holding Inc. v Vancouver Airport Ltd.*, 2011 SCC 23 at para 61, [2011] 2 SCR 175.

236 *Catucci*, *supra* note 221 at para 186.

237 *Ibid* at para 203.

The court appears to conclude on the materiality of the information and leaves the trial courts to determine whether the failure to disclose certain relationships amounts to misrepresentation of material facts. Once again, the plaintiffs seem to stand at a vantage point vis-à-vis the defendants as a very big chunk of the litigation seems to have been concluded upon by the court. Where this leaves Valeant in its options to contest the materiality is rather unclear, as the materiality of the information is not an issue sought to be dealt with collectively in the judgement's conclusions.[238] Materiality was also concluded at the leave stage in *Paniccia v MDC*.[239]

5. Conclusion

Statutory secondary market class actions are on the fall. The average number of class actions in Canada has fallen from 8.9 cases per annum between 2008 and 2014, to 5.0 cases per annum between 2015 and 2018.[240] Considering this fact, it is conceivable that the ever-increasing height of the leave hurdle is a source for such a reduction in class actions. Additionally, the vast amount of uncertainty surrounding the "reasonable possibility" criteria may very well explain a portion of said reduction. It appears that parties and justices alike are uncertain of the applicability of a "reasonable possibility" criteria, especially following the interpretation given in *Thera*, and our two hypotheses certainly support that fact. It remains to be seen whether our hypotheses will be confirmed or not, and if the Supreme Court will see the upcoming class actions as a chance to reset the course on which we are heading. It remains nevertheless clear that the current reality is set for adamantly deterring stance, where the off-chance of a strike-suit is overwhelmed by the measures currently in place. Whether or not these measures undo their original intent of granting shareholders a viable recourse versus a reporting issuer is something to be closely followed.

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238 *Ibid* at para 352.

239 *Paniccia v MDC Partners Inc.*, 2018 ONSC 3470 at para 106, 142 OR (3d) 421.

240 Heys & Patton, *supra* note 112 at 2.

TABLE 1

	Superior Court	Number of decisions	9									
	Appellate Court											
	Decisions	**Most common answer**	**Number**	**Goldsmith v NBC**	**Mask v Silvercorp**	**Rahimi v SouthGobi**	**Bradley v EastPlat**	**SwissCanto v BlackBerry**	**Catucci v Valeant**	**Ironworkers v Manulife**	**Coffin v Atlantic Power**	**Paniccia v MDC**
Criteria	Is contradicting credible expert evidence enough?	Not applicable	4	Not applicable	No	Not applicable	No	Yes	Yes	No	Not applicable	Not applicable
	Defence at what level vis-à-vis plaintiffs?	Lower	4	Lower	Higher	Lower	Higher	Similar	Similar	Lower	Higher	Lower
	Exhaustive evidence or preliminary?	Exhaustive	6	Preliminary	Exhaustive	Exhaustive	Exhaustive	Preliminary	Exhaustive	Exhaustive	Exhaustive	Preliminary
	Resembles mini-trial/ in-depth analysis?	No	5	No	Yes	Yes	Yes	No	Yes	No	No	No
	Resemblance of *probability* of winning?	No	4	No	No	No	Yes	Yes	Yes	Not applicable—Pre Thera	Un-determined	No
	What was at stake: applicable legislation or reasonable possibility?	Reasonable possibility	8	Applicable legislation	Resonable possibility	Reasonable possibility	Reasonable possibility	Reasonable possibility	Reasonable possibility	Reasonable possibility	Reasonable possibility	Reasonable possibility