Certification of Reliance-Based Claims in Class Actions

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Introduction

After the enactment in Ontario of a statutory cause of action for misrepresentations in the secondary market, plaintiffs continue to advance common law misrepresentation claims in securities class actions. Common law claims remain an important feature of securities class actions in Ontario because of the pro-defendant barriers embedded in Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (the "*OSA*"). In particular, claims under Part XXIII.1 are subject to remarkably low liability limits. Unless directors and officers can be shown to have acted with fraudulent intent, their liability is capped at the greater of $25,000 or 50% of their annual compensation, hardly a powerful deterrent to deficient disclosure practices. In addition, in order to assert the statutory cause of action, plaintiffs must first demonstrate that they have a reasonable possibility of success. No other type of class action is subject to such a preliminary merits test. These barriers mean that shareholders harmed by misrepresentations made by issuers, insiders and other market participants must look beyond the statutory causes of action to obtain full relief and to achieve effective deterrence.

Where negligent or fraudulent misrepresentation[1] is pleaded, defendants traditionally have opposed certification by invoking the argument that reliance eventually will have to be proven, and that the class action will then disintegrate into a plethora of individual reliance trials that will overwhelm the economies otherwise achieved through resolution of the common issues. On this basis, so the standard defence argument goes, certification of common law misrepresentation claims is not appropriate.

This paper reviews some Ontario case law considering the certification of common law misrepresentation claims, and the treatment of the reliance requirement in particular, and argues that, when properly pleaded, these claims are entirely suitable for certification.

1 In *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at para. 33, the Supreme Court of Canada stated that the elements of a claim of negligent misrepresentation are as follows: "(1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted." In *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306, the Supreme Court of Canada approved a definition of "fraud" as a "false representation of fact, made with knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it."

Commonality and Preferability under the *CPA*

Before turning to consider the Ontario cases that have considered the certification of common law misrepresentation claims, it would be helpful to first set out some fundamental principles relating to the interrelated requirements of commonality and preferability under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*"). The key principles were enunciated in the Supreme Court of Canada's trilogy of seminal decisions in *Western Canadian Shopping Centres Inc. v. Dutton*,[2] *Hollick v. Toronto (City)*[3] and *Rumley v. British Columbia*.[4]

The commonality question should be approached purposively. The underlying question, according to the Supreme Court of Canada, is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis."[5] An issue is common "where its resolution is necessary to the resolution of each class member's claim" and constitutes a "substantial ingredient" of each class member's claim.[6] The bar for establishing a common issue is low. The resolution of the common issues need not be determinative of liability. As noted by the Ontario Court of Appeal in *Cloud v. Canada (Attorney General)*, "an issue can constitute a substantial ingredient of the claims … even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution."[7]

The preferability inquiry focuses on whether a class proceeding would be a fair, efficient and manageable method of advancing the claims, and whether a class proceeding would be preferable to other reasonably available means of resolving the dispute.[8] The preferability inquiry is conducted through the lens of the three principal purposes of class proceedings: judicial economy, access to justice and behaviour modification.[9] It requires an assessment of the importance of the common issues in relation to the claims as a whole. That there are substantial individual issues is no obstacle to certification, though the common issues cannot be "negligible in relation to the individual issues."[10] As the Court of Appeal noted in *Cloud*, the drafters of the *CPA* specifically rejected the requirement that the common issues predominate over the individual issues. The preferability requirement can thus be met even if there are substantial individual issues to be resolved after the common issues trial. The critical question is

2 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 [*Dutton*].

3 *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 [*Hollick*].

4 *Rumley v. British Columbia*, [2001] 3 S.C.R. 184.

5 *Dutton*, *supra* note 2 at para. 39.

6 *Ibid.*; *Hollick*, *supra* note 3 at para. 18.

7 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 53 [*Cloud*].

8 *Hollick*, *supra* note 3 at para. 28.

9 *Ibid.* at para. 27.

10 *Cloud*, *supra* note 7 at para. 76.

"whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action."[11]

A Survey of Ontario Cases Considering Common Law Misrepresentation Claims

A couple of early certification decisions under the *CPA* suggested that plaintiffs would have a hard time in having common law misrepresentation claims certified, at least where there was not a single misrepresentation that was common to all class members. In *Mouhteros v. DeVry Canada Inc.*,[12] Winkler J. (as he then was) refused to certify a class action brought on behalf of students of a post-secondary educational institution relating to alleged misrepresentations concerning the quality of the institution's programs and facilities and the marketability of its graduates. The plaintiff pleaded claims, *inter alia*, for negligent and fraudulent misrepresentation. In respect of those claims, Winkler J. held that there were no common issues, stating that:

> In the present case, the various representations were published by the defendant in 67 different television commercials and 30 different newspaper advertisements, or were made verbally by some 122 admissions officers over a six-year period. The nature of the representations made in DeVry's advertising and promotions, the question of whether the representations were false and misleading, and whether they were made negligently or fraudulently will vary according to the content of the advertisement or the statements made by the admissions officer, the time at which it was published or communicated, the program of study undertaken by each individual student, and the conditions then extant at each of the DeVry campuses.
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> Hence, in these circumstances, the statutory and common law misrepresentation issues set out in the statement of claim cannot constitute common issues.[13]

Winkler J. also held that, even if the misrepresentation claims raised common issues, a class proceeding was not the preferable procedure for their resolution:

> Assuming that the misrepresentation issues identified above were capable of a common resolution, such resolution would be but the beginning, and not the end of the litigation. With respect to the claim for misrepresentation in tort, the plaintiff must prove reasonable reliance on a misrepresentation negligently made. Reliance is an essential element of the tort. The question of reliance must be determined based on the experience of each individual student, and will involve such evidentiary issues as how the student heard about DeVry, whether the student saw any of the advertisements and if so, which ones, what written representations were made to the student prior to enrollment, whether the student met with an admissions officer, and whether the student relied on some or all of these in deciding to enroll in DeVry. The inquiry will not end there, however. If the class members are able to demonstrate reliance, they must show that they relied to their detriment. Damages will require individual assessment. In that regard, the court must

11 *Ibid.*

12 *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 [*Mouhteros*].

13 *Ibid.* at paras. 23–24.

> consider the program of study entered into, the student's performance in the program, the field in which employment was sought, the length of the job search, any assistance in the search provided by DeVry, the class member's prior education and employment history, and the nature of the employment, if any, obtained by the class member. These issues are in addition to the numerous questions surrounding the nature of the representations and whether they were negligently and fraudulently made, as enunciated above.
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> The presence of individual issues will not be fatal to certification. Indeed, virtually every class action contains individual issues to some extent. In the instant case, however, what common issues there may be are completely subsumed by the plethora of individual issues, which would necessitate individual trials for virtually each class member. Each student's experience is idiosyncratic, and liability would be subject to numerous variables for each class member. Such an class action would be completely unmanageable.[14]

Certification was also denied in *Controltech Engineering Inc. v. Ontario Hydro*.[15] In that case, Ontario Hydro issued a request for proposals to provide it with electricity from renewable energy technology. The representative plaintiff and other parties submitted bids for projects. Ontario Hydro subsequently terminated the program without awarding a contract. The plaintiff asserted claims, *inter alia*, for fraudulent and negligent misrepresentation. The plaintiff did not allege a single representation made to all class members. Different statements were made to different class members at various stages of the bidding process and in relation to various proposals. On this basis, Sharpe J. held that there was no common issue with respect to the misrepresentation claims. The court noted that the circumstances were akin to those in *Mouhteros*.[16] Sharpe J. further held that a class proceeding was not the preferable procedure, having regard to the variety and importance of the individual issues that would need to be resolved after determination of any common issue.

A key feature of *Mouhteros* and *Controltech* is that not only were there multiple misrepresentations, but some or all of the misrepresentations appeared to have been communicated individually to each class member. In other words, the content of the misrepresentations may have varied from on class member to another. Thus, whether the impugned statements were misrepresentations was an issue that could not be common to all or even some of the class members.

Following *Mouhteros* and *Controltech*, Winkler J. (as he then was) certified claims for fraudulent misrepresentation against Bre-X Minerals Ltd. and certain other defendants.[17] The court was satisfied that there were common issues arising out of the cause of action in fraudulent misrepresentation, and that a class proceeding was the preferable procedure. However, Winkler J. was not prepared to certify

14 *Ibid.* at paras. 30–31.

15 *Controltech Engineering Inc. v. Ontario Hydro*, [1998] O.J. No. 5350 [*Controltech*].

16 *Ibid.* at paras. 16–17.

17 *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173.

common issues relating to the negligent misrepresentation claims because the representations were made in around 160 statements over a four-year period. As the Divisional Court explained it:

> There are common issues in the fraud and conspiracy causes of action but no common issues in the negligent misrepresentation cause of action. As Winkler J. pointed out, the difference is that in the former as opposed to the latter it is contended that every representation, whenever made, is tainted by the fraud. One single overarching central fraud is alleged, as opposed to individual negligent misrepresentations. The allegation, that the single overall fraud permeates every statement, raises common issues regardless of whether individual issues may arise from the individual communications relied upon or not relied upon by the individual class members. If every representation was, as alleged, part of a single scam, it is not necessary to distinguish between the representations, as it would be in a case of negligent misrepresentation. Reliance and causation can easily be demonstrated on a common basis if it was a single lie from the beginning that there was gold in the ground in Busang. Reliance and damages cannot be demonstrated on a common basis when the details of each representation and the reliance of each investor have to be examined individually.
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> This was either a fraud from the beginning or it was not. If the former, there is a common issue. If the latter, each representation must be examined in terms of its individual effect on each individual investor.[18]

The Ontario Court of Appeal disagreed and held that the negligent misrepresentation claim, like the fraudulent misrepresentation claim, should be certified.[19] The common issues certified by Winkler J. in respect of the fraudulent misrepresentation claim focused on the knowledge and conduct of the defendants, leaving the conduct of the plaintiffs, especially reliance, "on the sidelines at this juncture in the litigation."[20] If the common issues were certified for the claim for fraudulent misrepresentation, they should also be certified in respect of the claim for negligent misrepresentation. The Court of Appeal stated:

> I think it is a mistake, at this early juncture of the litigation, to overemphasize the number and diversity of Bre-X's representations. One of the potential benefits of a class action with certified common issues relating to the knowledge and conduct of the defendants is that the resolution of those issues might narrow substantially the subsequent inquiries on the plaintiffs' side of the coin. As I understand the theory of the plaintiffs, the named defendants participated in a scheme to promote Bre-X shares by embarking on a program of issuing press releases they knew to be false, that portrayed the assay results from the Busang site as demonstrating the existence of a gold mine of staggering dimensions. If these facts can be established by the plaintiffs, the questions raised in para. 8(f) of the order declaring the common issues must be addressed. What did the individual defendants know about the promotional fraud? Here, if knowledge of the fraud cannot be attributed to a given defendant, the lesser degree of complicity respecting carelessness can be addressed. At this stage of the proceedings, the court does not know what this will entail by way of evidence. It is possible – I put it no higher – that fixing the knowledge

18 *Carom v. Bre-X Minerals Ltd.* (1999), 46 O.R. (3d) 315 at paras. 7–8.

19 *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 [*Bre-X*].

20 *Ibid.* at para. 51.

> and conduct of each Bre-X insider will present a much clearer picture. For example, if the moment when a Bre-X insider became careless about a representation or representations in which he participated could be isolated, the subsequent consideration, admittedly in individual trials, of such issues as duty of care and reliance might be rendered more focussed and manageable. This would 'move the litigation forward'. In short, the existence of 160 representations should not be used as a reason to refuse certification as a class action; rather, certification is, potentially, a way of reducing those 160 representations to a much smaller number of relevant ones.[21]

In respect of the preferability requirement, the Court of Appeal stated that:

> The fact that determination of some of the common issues relevant to the claim in negligent misrepresentation (or indeed the other three claims) will not resolve the entire litigation is not determinative. Certification can be the preferable procedure in situations far short of final resolution of the lawsuit.
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> On this point, the decision of this court in *Anderson v. Wilson*, supra, is instructive. In that case, the court certified claims in negligence and breach of contract by patients exposed to Hepatitis B through electroencephalogram tests administered by the defendant clinics. The court found that the class proceeding could not resolve the ultimate issues of liability and damages because it could not provide an answer to the pivotal question of causation. In those circumstances, Carthy J.A. framed the question in these terms, at p. 683:
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>> The question then becomes whether there are sufficient common issues left to justify certification. In my view, it seems sensible with this number of potential plaintiffs and the similarities that are evident in their claims, that any potential efficiency in advancement of their claims through the flexibility provided by the CPA should, where reasonable, be utilized.
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> In my view, this passage evinces a proper understanding of, and respect for, the objectives of the CPA. The CPA does provide a flexible procedure for dealing with multiple plaintiffs with similar claims, usually arising out of a single accident, catastrophe or other major event.[22]

Defendants often seek to minimize the significance of the Court of Appeal's decision in *Bre-X* by arguing that the case was decided on the narrow ground that, if certification of the fraudulent misrepresentation claim was appropriate, then so too was certification of the negligent misrepresentation claim. But this interpretation of *Bre-X* disregards the passages cited above, where the Court opines that the need to prove individual reliance is no bar to certification of a misrepresentation claim.

Similarly, defendants often seek to distinguish *Bre-X* on the basis that there was in essence a single misrepresentation alleged in *Bre-X* – namely, that there was "gold in the Busang" – but this too is an overly restrictive interpretation. As noted by the Court of Appeal, the plaintiffs alleged no less than 160 misrepresentations made over a period of several years, and while there may have been a common

21 *Ibid.* at para. 49.

22 *Ibid.* at paras. 58–60.

theme to those misrepresentations, it is scarcely credible that each statement communicated only that there was "gold in the Busang", and that there were no material differences between those 160 statements.

Following *Bre-X*, in *Canadian Imperial Bank of Commerce v. Deloitte & Touche*,[23] the Divisional Court certified a class action brought in connection with audits performed by Deloitte & Touche of the financial statements of Philip Services Inc. The plaintiffs asserted, *inter alia*, negligent misrepresentation and reckless misrepresentation, alleging that Deloitte & Touche inaccurately represented to the plaintiffs that it had conducted proper audits and that the financial statements fairly represented the company's financial position. In relation to the preferability criterion, the court stated:

> Even though reliance and causation are significant individual issues, that does not preclude the certification of a class proceeding … While the reliance of each Original Lender on those representations will have to be determined at some point, it will only be after a determination of significant common issues with respect to liability – particularly the existence of a duty of care to the Original Lenders, the standard of care for auditors, the determination whether there were *material misstatements* in the financial statements, and whether the misstatements were made negligently or recklessly. All of these are significant common issues, requiring extensive documentary and oral evidence and, with respect to the standard of care issues, expert evidence. There are other common issues as well, including elements of damages and champerty and maintenance. Resolution of these issues is very important to the course of the litigation, as success in respect of the common issues will significantly advance the litigation for the proposed class members, while if those issues are decided in favour of the defendants, the litigation will come to an end. [Emphasis added.][24]

As is apparent from the italicized language above, the Court contemplated that the impugned disclosure documents might be proven to have contained more than one misstatement, and yet the Court certified the action.

Certification of a misrepresentation claim was also granted in *Hickey-Button v. Loyalist College of Applied Arts & Technology*.[25] In this case, the plaintiff sued on behalf of students who entered the nursing program at Loyalist. The plaintiff claimed that Loyalist misrepresented that Loyalist offered the option to obtain a degree in nursing from Queen's University. The plaintiff alleged, *inter alia*, negligent misrepresentation. In respect of that claim, the Ontario Court of Appeal identified a number of common issues: the existence of a duty of care, whether representations were made, whether those representations were untrue, inaccurate or misleading, and whether Loyalist was negligent in making those representations. According to the court, the number of common issues and their significance to the

23 *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069.

24 *Ibid.* at para. 35.

25 *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [2006] 267 D.L.R. (4th) 601 [*Hickey-Button*].

litigation made this a case where a class proceeding was the preferable procedure. The interests of judicial economy would be served by addressing the common issues in a single class proceeding.[26]

There have also been a number of more recent certification decisions in the securities class action context that have examined common law misrepresentations claims and the reliance requirement. In *McCann v. CP Ships Ltd.*,[27] in which it was alleged that financial statements and related disclosures of CP Ships materially overstated net income, Rady J. certified, *inter alia*, claims for fraudulent/reckless misrepresentation and negligent misrepresentation. In that case, the plaintiff advanced the argument that reliance is not always an essential element of a misrepresentation claim and that if a plaintiff can prove, by some means other than reliance, that the acts or omissions of the defendants caused the plaintiff damages, a valid cause of action can be made out. After reviewing the relevant authorities, Rady J. stated:

> It seems to me that the case law is in a state of evolution and the court, in certain circumstances, is prepared to relax the otherwise strict requirement to establish individual reliance. I think it would be an error to conclude, at this stage of the proceedings, that the plaintiff cannot possibly succeed in a claim for negligent misrepresentation. I would adopt the language of Justice Rooke in the Eaton case at para. 91 that 'it is simply too early to determine whether, and to what extent, individual reliance will need to be examined in this case. A trial on the common issues will determine this need ...'
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> Accordingly, I would reject the defendants' arguments regarding negligent misrepresentation for two reasons. First, the plaintiff should be permitted an opportunity to demonstrate at trial why individual reliance is not necessary. There is at least one decision of an appellate court in Canada that is prepared to endorse Chief Justice McLachlin's reasoning in the Yorkshire Trust case, namely Collette, supra.
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> Second, if reliance is a necessary prerequisite to recovery, then class members should have an opportunity to prove it as an individual issue (see Hickey-Button, supra). I do not consider that the pleading is flawed because the plaintiff has not identified upon which documents he relied. That is a matter that can await the outcome of the common issues trial.[28]

Importantly, Rady J. did not decide whether reliance would ultimately have to be proven, but only determined that it was premature to say that a demonstration of reliance would be necessary. It is thus implicit in Rady J.'s decision that class members might ultimately have to prove reliance. Nonetheless, Rady J. certified the common law misrepresentation claims, holding that the plaintiff's proposed common issues – which included common issues relating to whether the disclosure documents contained a misrepresentation as alleged, whether a duty of care was owed and whether the misrepresentations were made knowingly, recklessly or negligently – were fundamental to the resolution of the proposed claims

26 *Ibid.* at paras. 55–56.

27 *McCann v. CP Ships Ltd.*, [2009] O.J. No. 5182.

28 *Ibid.* at paras. 59–61.

and would advance the proceeding. Her Honour further held that a determination of these issues would avoid duplication of fact finding, conserve legal resources and prevent conflicting decisions.[29]

A similar approach was taken by van Rensburg J. in the secondary market case of *Silver v. Imax Corp.*[30] The litigation arose out of misrepresentations allegedly made in IMAX's disclosure relating to IMAX's compliance with GAAP and that its revenues for 2005 met or exceeded IMAX's previously issued earnings guidance. Van Rensburg J. certified, *inter alia*, claims for fraudulent/reckless misrepresentation and negligent misrepresentation. The court held that the plaintiffs' pleading disclosed a cause of action in negligent misrepresentation notwithstanding the absence of a pleading of direct individual reliance by each class member. On that issue, van Rensburg J. stated that:

> While I do not find the cases relied on by the plaintiffs persuasive as to the ability of a court to find liability for negligent misrepresentation without proof of reliance in light of the repeated statements by our courts (including the Supreme Court of Canada in *Queen v. Cognos Inc.*) that reliance is an essential element of negligent misrepresentation, it is unnecessary to specifically rule on this issue at this stage in the proceedings. For the purpose of certification, the question is whether the Claim discloses a cause of action in negligent misrepresentation. I have concluded that it does disclose such a cause of action, notwithstanding the absence of a pleading of direct individual reliance by each class member. In the event that the plaintiffs are unable to prove reliance, it will remain open for them to argue at trial that reliance is not required.[31]

In *Imax*, the plaintiffs' common law claims centered on a single defined representation that was communicated to the public in different ways, but other, related misrepresentations were alleged. Van Rensburg J. stated that the fact that class members may have received the misrepresentations in different ways, or may not have relied on the misrepresentation, is not determinative of whether there are common issues, such as whether the misrepresentation was made negligently or recklessly, or whether the defendant made the misrepresentation intending that the class members rely upon it.[32] Van Rensburg J. stated that:

> Common issues 1 through 4 deal with the circumstances in which the alleged misrepresentations were made and the knowledge and participation of the various defendants. An evaluation of the conduct of the defendants is common to the class members, whether they are able to rely on the statutory cause of action (which is pleaded as applying to all members) or whether the common law causes of action are available to them. These issues will accordingly be included in the list of issues certified for the common issues trial.[33]

29 *Ibid.* at para. 97.

30 *Silver v. Imax Corp.*, [2009] O.J. No. 5585 [*Imax*].

31 *Ibid.* at para. 75.

32 *Ibid.* at para. 177.

33 *Ibid.* at para. 183.

Van Rensburg J. also added common issues in relation to the misrepresentation claims of, *inter alia*, whether the alleged misrepresentation was false, and whether and when the alleged misrepresentation was corrected.

Strathy J. came to a different conclusion in another recent secondary market case, *McKenna v. Gammon Gold Inc.*[34] *Gammon Gold* involved alleged misrepresentations made to both primary and secondary market purchasers, the effect of which was to overestimate the actual and anticipated production rate at Gammon's Mexican mines and to misrepresent the state of Gammon's business. Strathy J. denied certification of claims for negligent misrepresentation. While accepting that reliance could be proved by inference, Strathy J. held that proof of reliance is a necessary element of a negligent misrepresentation claim:

> With deference to my colleagues who have come to a different conclusion, I accept the submission of counsel for the defendants that there is authority, binding on me, that makes proof of reliance a necessary requirement of a negligent misrepresentation claim. This is why the legislature has seen fit to relieve the investing public of this onerous requirement in the primary market through s. 130(1) and s. 131.1(1) [of the *OSA*], which contain 'deemed reliance provisions,' and in the secondary market by a similar provision in s. 138.3(1) of the Securities Act. The right to pursue the latter claim is subject to the plaintiff passing the initial hurdle in obtaining leave under s. 138.8 by showing that the action is brought in good faith and has a reasonable prospect of success.
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> I conclude that the need to prove reliance as a necessary element of negligent misrepresentation, and the inability to establish reliance as a common issue, makes the common law misrepresentation claims, in both the secondary and primary markets, fundamentally unsuitable for certification. In this case, multiple misrepresentations are alleged throughout the ten month Class Period, in press releases, regulatory filings, conference calls, annual reports and a multitude of other written and oral forms. The alleged misrepresentations relate to a variety of complaints, not simply the level of gold production. The plaintiff complains of undisclosed equipment failures, contracts with insiders, stock option expenses, non-compliant financial statements and inadequate disclosure controls. Individual inquiries would have to be made into what alleged misrepresentations were made to each class member and whether he or she relied upon any of those representations. …
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> There is no basis on which reliance could be resolved as a common issue. The need to determine the issue individually would give rise to a multitude of questions in each case concerning the representations communicated to a particular investor, the experience and sophistication of the investor, other information or recommendations made to the investor and whether there was a causal connection between the misrepresentation(s) and the acquisition of the security. The inability to determine the defendants' liability without individual inquiries as to reliance makes the proceeding unsuitable for certification in relation to the negligent misrepresentation claim.[35]

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34 *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591 [*Gammon Gold*].

35 *Ibid.* at paras. 159–161.

However, Strathy J. certified a negligent misrepresentation claim in a decision that quickly followed *Gammon Gold*. In *Ramdath v. George Brown College of Applied Arts & Technology*,[36] the class members were alleged to have relied on a single, written representation that was likely communicated to every member of the class. Even though each class member would have to establish reliance on the misrepresentation, Strathy J. held that "this case is at the positive end of the spectrum of misrepresentation cases that are appropriate for certification."[37]

The Propriety of Certifying Common Law Misrepresentation Claims

Regardless of whether courts in Ontario will insist upon proof of reliance in all cases where common law misrepresentation claims are advanced, these claims, when properly pleaded, should generally be accepted for certification.

In a negligent misrepresentation claim, there are significant common issues around whether the defendant owes a duty of care to the class members based on a "special relationship", whether the defendant made an untrue, inaccurate or misleading statement, whether the defendants intended that the class members rely upon the misrepresentation, and whether the defendants' conduct departed from the applicable standard of care. As recognized by the courts in *Bre-X* and *Imax* (among other cases), these issues are appropriate for resolution at the common issues trial because they can be resolved solely by reference to the conduct of the defendant, and without an individualized inquiry into each class member's circumstances. Moreover, the resolution of these issues will advance the litigation significantly. Certain of the decisions surveyed above suggest that the commonality criterion will be easier to satisfy if the plaintiff can distil a single misrepresentation common to all class members. However, even if multiple misrepresentations are alleged, there may still be common issues the resolution of which would advance the litigation significantly, thus rendering certification appropriate.

36 *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019.

37 *Ibid.* at para. 103.