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FROM: Justice H.A. Rady

PAGES: 48 (including cover page)

DATE: July 30, 2015

RE: **Rooney v. ArcelorMittal S.A.**
Court File No.: 3957-11CP

MESSAGE: Please see attached the Endorsement of Madam Justice H.A. Rady in the above-noted matter, released on July 30, 2015.

If you have any questions regarding this transmission, please call the Judges' secretaries at 519-660-3027.

CITATION: Rooney v. ArcelorMittal S.A., 2015 ONSC 3457
COURT FILE NO.: 3957-11CP
DATE: 2015/07/30

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Peter Rooney and Archie Leach (Plaintiffs)

AND:

ArcelorMittal S.A., Lakshmi N. Mittal, Aditya Mittal, 1843208 Ontario Inc., Philippus F. Du Toit, Nunavut Iron Ore Acquisition Inc., Iron Ore Holdings, LP, NGP Midstream & Resources, L.P., NGP M&R Offshore Holdings, L.P., Jowdat Waheed, Bruce Walter, John T. Raymond, John Calvert, Baffinland Iron Mines Corporation, Richard D. McCloskey, John Lydall and Daniella Dimitrov (Defendants)

BEFORE: Justice H. A. Rady

COUNSEL: Michael G. Robb, Douglas Worndl and Anthony O'Brien, for the plaintiffs

Steve Tenai, for the defendants ArcelorMittal S.A., Lakshmi N. Mittal, Aditya Mittal, 1843208 Ontario Inc., Philippus F. Du Toit and Baffinland Iron Mines Corporation

Andrea L. Burke, for the defendants Nunavut Iron Ore Acquisition Inc., Iron Ore Holdings, LP, NGP Midstream & Resources, L.P., NGP M&R Offshore Holdings, L.P., Jowdat Waheed, Bruce Walter, John T. Raymond and John Clavert

Alan L.W. D'Silva and Alexander Rose for the defendants, Richard D. McCloskey, John Lydall and Daniella Dimitrov

HEARD: December 15, 16, 17 and 18, 2014 and January 5, 2015.

ENDORSEMENT

Introduction

[1] For ease of reference, in these reasons I refer to the defendants as follows:

- ArcelorMittal S.A. – Arcelormittal
- 1843208 Ontario Inc. - 1843208

- Nunavut Iron Ore Acquisition Inc. - Nunavut
- Iron Ore Holdings, LP – Iron Ore Holdings
- NGP Midstream & Resources, L.P. – NGP Midstream
- NGP M&R Offshore Holdings, L.P. – NGP M&R
- Baffinland Iron Mines Corporation - Baffinland

[2] I sometimes refer to Arcelormittal and 1843208 and their directors as the Arcelormittal defendants and Nunavut and its directors as the Nunavut defendants.

[3] This is a proposed class action arising from a successful joint take-over bid for Baffinland by the corporate and limited partnership defendants. It engages the provisions of Parts XX and XXII of the Ontario *Securities Act*. The defendants have moved pursuant to Rules 21.01(1)(b), 25.06(8) and 25.11 to strike out all or substantially all of the plaintiffs' amended statement of claim. They allege that notwithstanding that the claim has been amended three times, it is fatally flawed for a variety of reasons including:

- it does not plead the essential element of a false or misleading material fact or undisclosed material fact for which disclosure was required;
- it pleads as undisclosed material facts, matters that disclosure rules either did not mandate disclosure or prohibited;
- it pleads as undisclosed material facts, matters that are disclosed in bid documents and news releases pleaded in the claim;
- it does not plead alleged undisclosed material facts with full particulars as required by Rule 25.06(8) but instead uses vague and non-exclusive language; and/or

- it pleads oppression claims for which the limitation period has expired.

[4] The defendants also allege that the plaintiffs were put to their election whether to sue the offerors under the joint bid or their respective directors. They have failed to do so and cannot proceed until they do. The defendants submit that vicarious liability has no application to s. 131(1) of the *Act*. Finally, they argue that the plaintiffs cannot pursue claims under s. 131(1) of the *Act* for sales of Baffinland shares on the secondary market.

[5] The plaintiffs resist the motion. Briefly put, they say it is not plain and obvious that the claim as pleaded cannot succeed. They submit that these motions are, in reality, motions for summary judgment without statements of defence having been filed, no affidavit evidence having been tendered nor cross-examinations conducted. They object to the defendants' use of certain documents to which extensive reference is made in support of the motion. They acknowledge their obligation to plead with particularity but submit that they have done so.

[6] The materials filed on this motion are voluminous. Leaving aside the multi-volume and tabbed motion records, the defendants' facta were 96 pages collectively. The plaintiffs' factum ran 126 pages and the reply factum another 45 pages. I am unaware of leave having been granted for the delivery of such lengthy facta. In addition, each side delivered four volumes of authorities. I also received a compendium, a pleadings brief and a chart setting out the relief sought, among other things.

[7] It will be apparent from the foregoing and the length of these reasons that this was an important but expensive motion for the parties and a time consuming one for the court.

The Facts

[8] The following summary of facts is derived from the allegations contained in the statement of claim.

[9] Baffinland is an iron mining company incorporated under the Ontario *Business Corporations Act*. Prior to the takeover that forms the subject of this action, Baffinland was a reporting issuer across Canada. Its common shares and securities were listed for trading on the Toronto Stock Exchange. Its sole business is the development of its Mary River Project located on northern Baffin Island, Nunavut.

[10] On March 5, 2008, Baffinland filed on SEDAR [the System for Electronic Document Analysis and Retrieval] a feasibility study based on transporting iron ore from the Mary River project by rail to a sea port for shipping (the 2008 Rail Feasibility Study) with production at 18,000,000 tonnes per annum. Baffinland further publicly reported in 2008, the existence of a study which considered possible expansion of production to 30,000,000 tonnes per annum (the 2008 Expansion Study).

[11] In June and July 2010, Baffinland announced that it was reviewing a road-haulage option for production and that it had commissioned a feasibility study to be prepared later in the year in respect of that option. The results of that feasibility study were publicly announced on January 13, 2011.

[12] ArcelorMittal and Baffinland engaged in negotiations in late 2009 and 2010 about a potential joint venture regarding the Mary River Project. However, prior to the completion of any joint venture transaction between ArcelorMittal and Baffinland, a hostile takeover bid was launched for Baffinland's common shares on September 22, 2010 by Nunavut Iron Ore Acquisition Inc. and Iron Ore Holdings LP. They offered $0.80 per common share.

[13] The plaintiffs allege that Jowdat Waheed headed the group that launched the hostile bid. Mr. Waheed had been a consultant to Baffinland until April 2010 and allegedly had access to confidential information respecting Baffinland both during his tenure and after the relationship ended.

[14] Baffinland's board of directors issued a directors' circular in response to the Nunavut bid and recommended Baffinland shareholders reject the bid. The circular was signed by the defendants Richard McCloskey, John Lydall and Daniella Dimitrov, who were Baffinland's directors at the time.

[15] On November 12, 2010, ArcelorMittal made a competing takeover bid for all of Baffinland's common shares and securities (in the form of warrants) for $1.10 and $0.10 respectively. Its circular was signed by the defendants Lakshmi Mittal and Aditya Mittal.

[16] Baffinland's board of directors issued a directors' circular recommending acceptance of the ArcelorMittal bid.

[17] There followed multiple rounds with increased offers and extensions to both the Nunavut and ArcelorMittal bids.

[18] The minimum tender conditions contained in both the Nunavut and ArcelorMittal bids were not met and on January 14, 2011, ArcelorMittal, Nunavut and Iron Ore Holdings made a joint bid for Baffinland through 1843208 Ontario Inc. The Mittals signed the related notice of variation and extension in respect of the joint bid. The joint bid offered $1.50 per common share and $0.10 per warrant.

[19] Baffinland's board of directors issued a notice of change to directors' circular on January 17, 2011 in which they recommended acceptance of the joint bid.

[20] The joint bid was extended on January 25 and February 7, 2011. It expired on February 17, 2011 with 93% of Baffinland's shareholders and 76% of warrant

holders tendering into the joint bid. The balance of shares was acquired by 1843208 pursuant to a court approved plan of arrangement pursuant to the *OBCA*.

[21] Phillipus Du Toit signed the February 7, 2011 notice of extension in respect of the joint bid. He did not sign any other bid documents.

[22] The plaintiff, Peter Rooney tendered common shares to the joint bid. He also sold Baffinland shares on the secondary market after the joint bid. The plaintiff, Archie Leach sold Baffinland common shares on the secondary market after the joint bid. He did not tender any shares to the joint bid.

The Class Action

[23] The plaintiffs commenced this proceeding on April 19, 2011 with the issuance of a notice of action. The notice of action was amended on April 21, 2011 and May 6, 2011. The statement of claim was filed on May 18, 2011. It has been amended three times. The latest is a fresh as amended statement of claim dated October 31, 2013. The claim is 66 pages long, comprised of 123 paragraphs followed by two schedules. The first schedule lists the relevant bid documents. The second summarizes the alleged undisclosed material facts referred to in the statement of claim. The claims asserted against the defendants may be summarized as follows:

- as against ArcelorMittal, 1843208, Nunavut, Iron Ore Holdings, NGP Midstream and NGP M&R (the offerors), the plaintiffs assert a claim for damages pursuant to s. 131(1) of the *OSA* and the analogous provisions of securities legislation of other Canadian provinces and territories for misrepresentations said to be contained in the disclosure documents issued by the offerors in connection with the takeover bid or in the alternative to damages, rescission of the transfer of Baffinland securities;

- as against Lakshmi N. Mittal, Aditya Mittal, Phillipus F. Du Toit, Jowdat Waheed, Bruce Walter, John T. Raymond, and John Calvert, the plaintiffs assert a claim for damages pursuant to s. 131(1) of the *OSA* and analogous statutory provisions for misrepresentations contained in the disclosure documents issued by the offerors in connection with the takeover bid;

- as against Richard D. McCloskey, John Lydall and Daniella Dimitrov, the plaintiffs assert a claim for damages pursuant to s. 131(2) of the *OSA* and analogous statutory provisions arising from misrepresentations said to be contained in the disclosure documents issued by the Baffinland directors in connection with the takeover bid;

- as against Baffinland, Mr. McCloskey, Mr. Lydall and Ms. Dimitrov, the plaintiffs claim relief from oppression pursuant to s. 248 of the *OBCA* including compensation pursuant to s. 248(3)(j) of the *OBCA*;

- as against the offerors, the plaintiffs assert a claim for damages for insider trading and tipping pursuant to s. 134 of the *OSA* and analogous statutory provisions; and

- as against the offerors, the plaintiffs assert a claim for unjust enrichment.

[24] The plaintiffs allege that the defendants were aware of the details of the proposed joint venture deal (which was close to being concluded) and its financial implications, as well as critical financial and strategic planning information. The shareholders were not accorded the same advantage.

[25] The plaintiffs have alleged that as holders of Baffinland's shares and securities, they were entitled to full, true and plain disclosure about the business and affairs of Baffinland in order that they could make an informed decision about whether to tender their securities to the joint bid. They allege that they did not receive such disclosure. The essence of the plaintiffs' case is that the offerors enjoyed preferred access to important and material internal information related to Baffinland's business that was not disclosed to Baffinland's other security holders.

[26] The plaintiffs allege that contrary to their obligations under Canadian securities law, the defendants provided the plaintiffs and class members with materially misleading disclosure, containing misrepresentations about the business and affairs of Baffinland. They allege that as a result of the defendants' wrongful conduct, they received less for their Baffinland securities than they otherwise would have. They allege that the takeover price was artificially low, having been suppressed by the alleged misrepresentations and other misconduct.

The Law Respecting Pleadings Generally

[27] Rule 21.01(1)(b) provides the court with jurisdiction to strike out a pleading "on the ground that it discloses no reasonable cause of action". The test on a Rule 21 motion is well settled by virtue of *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 and the legion of cases that have followed. No evidence is admissible on a motion pursuant to Rule 21.01(1)(b).

[28] The Court of Appeal has summarized the principles that apply to a Rule 21 motion to strike a pleading. They are as follows:

- the material facts pleaded must be deemed to be proven or true, except to the extent that the alleged facts are patently ridiculous or incapable of proof;

- if the claim incorporates by reference any document pleaded, the court is entitled to read and rely on the terms of such documents as if they were fully quoted in the pleadings;

- the novelty of the cause of action is no impediment to the proceeding;

- the statement of claim must be read with a forgiving eye to allow for drafting deficiencies; and

- if the claim has some chance of success, it must be permitted to proceed.

[29] See *MacKinnon v. Ontario Municipal Employees Retirement Board*, [2007] O.J. No. 4860 (C.A.). In that case, the court also commented that "[i]t is well settled law that the threshold for sustaining a pleading on a Rule 21 motion is not high".

[30] Those principles have been reiterated in *McCreight v. Ontario (Attorney General)* (2013), 116 O.R. (3d) 42 (C.A.). In that decision, the court also noted that a court can consider a document if it has been incorporated by reference in the pleading and it forms an integral part of the claim.

[31] In *Leadbeater v. Ontario*, [2001] O.J. No. 3472 (S.C.J.), Justice Nordheimer had occasion to consider the limits on how documents may be used on a Rule 21 motion. He commented as follows:

> The defendants assert that, based on this authority, they can refer to considerable material from the criminal proceedings against the plaintiff including the actual charges laid, the transcripts of the proceedings and the rulings made by various judges in the course of those proceedings. I have difficulty with the scope of that submission. I note that Mr. Justice Borins was very careful to draw a line between facts on the one hand and evidence on the other. I believe that the defendants are attempting to take the conclusion in the *Montreal Trust* case farther then it was intended by Borins J. to go.

> I accept the basic proposition that the court can review documents that are referred to in the statement of claim. I would also be prepared to accept, in the circumstances of this case where the criminal proceedings are referred to numerous times in the statement of claim, that the defendants would be entitled to refer to material from those proceedings for certain basic facts, such as the date the charges were laid, the exact wording of the charges, the time when the trial occurred, the result of the trial, when the appeal took place, the result of the appeal and so on. Where the matter becomes problematic is at the stage where the defendants say, for example, that I can have reference to findings made by a judge in the criminal proceeding to conclude that any given cause of action cannot possibly succeed. For example, it was urged upon me by Mr. Bell that if I reviewed the ruling made by Mr. Justice MacDougall that lead to the stay of the charges, I would be able to determine from that ruling that the prosecution was commenced and continued with reasonable and probable cause because it was based, among other things, on the statements of the complainant and her mother that were never recanted. Mr. Bell proceeds from this assertion to then submit that the plaintiff cannot meet the four part test for malicious prosecution set out in *Nelles v. Ontario*, [1982] 2 S.C.R. 170 (specifically the third and fourth components of the test) and therefore no reasonable cause of action for malicious prosecution is made out.
>
> It is at this point that I fear the matter transgresses from a motion to strike the pleading into a summary judgment motion. I am of the view that, with the exception of basic factual matters of the type to which I have referred, it is not proper to have reference to other evidence on a motion such as this for the purpose of trying to establish that the plaintiff's claim has no chance of success. On the contrary, I must look solely at the pleading and determine whether the necessary facts are pleaded to support any or all of the causes of action alleged. The issue of whether those facts can successfully prove the claims alleged when confronted with other facts is a matter that must be dealt with at a later date. To do otherwise is to muddy what is otherwise a clear line between motions such as this and summary judgment motions to the obvious detriment of the plaintiff.

[32] Where claims are made against officers and directors in their personal capacities, the court should take hard look at the pleading to ensure its sufficiency and

substance. The rationale is because of "the tendency for the plaintiffs to advance claims against officers and directors for tactical or leverage purposes": *Abdi Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd.*, [2001] O.T.C. 203 (S.C.J.). This increases the "risk that corporate officers and directors could be driven away from involvement in any respect of corporate business by the potential exposure to ill-founded litigation": *Adga Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101, leave to appeal refused [1999] S.C.C.A. No. 124. See also *Scheel v. Keltic Petrochemicals Inc.*, [2008] O.J. No. 864 (S.C.J.); and *Piedra v. Copper Mesa Mining Corp.*, 2011 ONCA 191.

[33] Rule 25.06(8) requires a plaintiff who claims misrepresentation to plead full particulars. The rule provides as follows:

> Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

[34] The importance of a properly particularized pleading was discussed by Justice Strathy (as he then was) in *Dougal v. Manulife Financial Corporation*, 2011 ONSC 387 (albeit in the context of Part XXIII.1 of the *OSA*). In his endorsement, His Honour made the following observation:

> In my endorsement of January 19, 2011, I set out at some length at paragraphs 13-24, the principles applicable to the pleadings of misrepresentation, including the need for "careful particularity" in pleading the components of the cause of action, including a description of the words spoken or written and when, how and by whom that representation was made. The same applies to pleadings of non-disclosure. At the risk of repetition, this proposed class action claims astronomical damages from a major Canadian financial institution and four officers and/or directors. People who are sued are entitled to know what they are said to have done wrong - people who are being sued for $3.5 billion dollars are entitled to know, with exacting particularity, what they allegedly did wrong.

[35] I note that the plaintiffs seek very significant damages of $1 billion dollars in this case. Accordingly, Justice Strathy's comments apply with equal force to this case, bearing in mind that the point of particularity in pleadings is to permit the party opposite to understand the case it must meet.

[36] Finally, there is a real interest and benefit in weeding out hopeless claims. The salutary effects of a motion to strike were discussed by the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45 as follows:

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> This promotes two goods – efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to those claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be – on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

[37] With those general principles in mind, I turn to the defendants' many complaints about the adequacy of the pleading and the tenability of the claims advanced. I preface my remarks below by observing that it is difficult to accept that a claim that is as long and factually dense as this one is so devoid of particularity or substance that it should be struck in its entirety without leave to amend. Having said that, for reasons elaborated below, I am satisfied that there is merit to some of the defendants' submissions.

Is a cause of action for misrepresentation disclosed?

[38] The *OSA* sets out a special disclosure regime that imposes certain and particular disclosure obligations on offerors and their officers and directors and once a takeover bid is underway, on the directors of the target.

[39] The relevant sections of the *OSA* respecting misrepresentation are reproduced below:

> **Definitions**
>
> 1. (1) In this *Act*,
> ...
>
> "material fact", when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities;
> ...
>
> "misrepresentation" means,
>
> (a) an untrue statement of material fact, or
>
> (b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made;
>
> **Liability for misrepresentation in circular**
>
> 131. (1) Where a take-over bid circular sent to the security holders of an offeree issuer as required by Part XX, or any notice of change or variation in respect of the circular, contains a misrepresentation, a security holder may, without regard to whether the security holder relied on the misrepresentation, elect to exercise a right of action for rescission or damages against the offeror or a right of action for damages against,
>
> (a) every person who at the time of the circular or notice, as the case may be, was signed was a director of the offeror;
>
> (b) every person or company whose consent in respect of the circular or notice, as the case may be, has been filed

> pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by the person or company; and
>
> (c) each person who signed a certificate in the circular or notice, as the case may be, other than the persons included in clause (a).
>
> 131. (2) Where a directors' circular or a director's or officer's circular delivered to the security holders of an offeree issuer as required by Part XX, or any notice of change or variation in respect of the circular, contains a misrepresentation, a security holder has, without regard to whether the security holder relied on the misrepresentation, a right of action for damages against every director or officer who signed the circular or notice that contained the misrepresentation.

[40] Justice Strathy commented on the rationale for the regulatory scheme in *Allen v. Aspen Group Resources Corp.*, [2009] O.J. No. 5213 (S.C.J.):

> The take-over bid rules in the *Securities Act* were introduced in Ontario as a result of the recommendations in the "Kimber Committee" report in 1965 (*The Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, 1965)). The rules are designed to protect shareholders of the "target" company by ensuring that they are provided with full and timely disclosure of information to permit them to make an informed decision about the bid to purchase their securities.
>
> Under the *Securities Act*, a bidder (other than a bidder or transaction exempt from the statute) making a "take-over bid" (which includes various transactions in which an offeror proposes to obtain legal or *de facto* control of the target corporation) is required to follow a detailed set of rules to ensure that the shareholders of the target company receive equal treatment and sufficient time and information to assess the bid for their shares: see MacIntosh, Jeffrey G. and Nicholls, Christopher C., *Securities Law*, (Toronto: Irwin Law, 2002), p. 313...

[41] As the language of the definitions section makes clear, materiality is an essential element of the analysis of what merits disclosure. In *Sharbern Holding Inc. v. Vancouver Airport Centre*, 2011 S.C.C. 23, the Court made this observation:

> Securities legislation imposes on issuers a statutory duty of disclosure. That duty may vary in detail from one Act to another or from one jurisdiction to another. However, the common theme is that issuers must disclose to potential investors information affecting their investment decision. Even so, issuers are not subject to an indeterminate obligation, such that an unhappy investor may seize on any trivial or unimportant fact that was not disclosed to render an issuer liable for the investor's losses. Rather than issuers being required to provide unlimited disclosure, disclosure obligations have been enacted to provide a balance between too much and too little disclosure.

[42] Accordingly, the statute attempts to strike a balance between too much and too little information, bearing in mind the burden placed on issuers, as the court commented in *Kerr v. Danier Leather*, 2007 S.C.C. 44. On the same point, the court noted in *Sharbern (supra)*:

> Potential investors are indeed vulnerable to the superior knowledge of an issuer as to what need and need not be disclosed. That is the reason for legislated disclosure obligations in a securities context. However, the jurisprudence has recognized that it is not in the interests of investors to be buried "in an avalanche of trivial information" that will impair decision making (*TSC Industries*, at p. 448). As I will explain, the materiality standard calls for the disclosure of information that a reasonable investor would consider important in making an investment decision.

[43] The reference to the *TSC* case is *TSC Industries Inc. v. Northway Inc.*, 426 U.S. 438 (1976), which is a leading American authority and it is worth repeating what the court said:

> ...if the standard of materiality is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omission or misstatements, but also management's fear of exposing itself to substantial liability may

> cause it simply to bury the shareholders in an avalanche of trivial information – a result that is hardly conducive to informed decision making.

[44] Another important reality informing the analysis is captured in the following language at paragraphs 251, 252 and 253 of the plaintiff's factum:

- the target issuer, as an entity, has little stake in the outcome of a take-over bid;
- the stakes are high, however, for the target's shareholders who must assess whether the consideration being offered is sufficient to induce them to give up their interest in the future of the company; and
- the stakes are also high for offerors, who are incentivized to minimize [the] value of the target company's securities, so that their acquisition price is as low as possible.

[45] Bearing all of this in mind, I remind myself that it is not my task on a Rule 21 motion to make a determination of materiality.

Analysis

[46] I propose to break down the various allegations of the s. 131(1) and (2) misrepresentations in the statement of claim and examine each discretely. First, however, there are more generalized allegations of misrepresentation at paragraphs 3(b), 3(c), 3(d), 21, 22, 23A, 24, 25(c), 25(d), 25(e), 62, 89-90, 91-94 and 101. For example, paragraph 21 merely recites the following:

> The Plaintiffs and the Class Members, as holders of BIM [i.e. Baffinland] Securities, were entitled to full, true, and plain disclosure about the business and affairs of BIM in order that they might make informed decisions as to whether to tender their securities to the Joint Bid. They did not get it.

Paragraph 22 goes on to say:

> Instead, and contrary to their obligations under Canadian securities law, the Defendants provided the Plaintiffs and the Class Members with materially misleading disclosure, replete with misrepresentations about the business and affairs of BIM.

[47] I see nothing deficient or objectionable about paragraphs 3(b)(c)(d), 21, 22, 23A, 25(c), 62 (subject to a comment below about vague or non-exclusive language). They merely introduce in a general way the pleadings that follow. Of course, if the pleadings that follow are deficient, they would add nothing to the claim and they would necessarily fall.

[48] As a result, it is necessary to examine the ensuing allegations in some detail.

The 2008 Expansion Study (paragraphs 30, 31, 32A (f), 34, 44, 63 and 74 (a), 76 and Schedule B, paragraph 1)

[49] Paragraph 63 states that "[t]he Bid Documents failed to disclose the contents of the 2008 Expansion Study and the fact that the offerors had knowledge of the contents of the 2008 Expansion Study."

[50] The defendants submit that the fact that the 2008 study was not entirely disclosed cannot form the basis for an action for misrepresentation for three reasons. First, they say that only the non-disclosure of a material fact can form the basis for misrepresentation. Second, they submit that ss. 2.3(1)(b) of National Instrument 43-101-Standards for Disclosure of Mineral Projects (NI 43-101) precludes the disclosure of results of an economic analysis that included inferred mineral resources. They say that the 2008 Expansion Study was based predominately on inferred mineral resources and therefore disclosure was precluded. Third, they submit that the facts pleaded at paragraph 30 were publicly disclosed in a news release dated June 19, 2008 and the Nunavut Directors Circular of October 7, 2010.

[51] The plaintiffs respond that NI 43-101 did not prohibit offerors from disclosing information that they allege should have been disclosed in the context of a take-over bid. The language of NI 43-101 refers only to issuers.

[52] They point out that the prescribed forms for take-over bid circulars and directors' circulars provide for offerors and directors of targets to disclose any material facts about the target company which have not been generally disclosed. The circulars were filed in the prescribed form but the plaintiffs claim that they failed to include material facts about Baffinland that were not generally disclosed. They submit that the interpretation favoured by the defendants would in effect authorize insider trading.

[53] The defendants reply that N1 43-101 is of general application and is not restricted to take-over bids. An issuer is defined under the *OSA* as "a person or company who has outstanding issues or proposes to issue a security". Accordingly, they submit that ArcelorMittal and Nunavut were corporations that had outstanding securities and were therefore issuers under the *OSA*.

[54] In my respectful view, the plaintiffs' submission is to be preferred for several reasons. First, it seems to me that the defendants are referring to evidence which they point to and rely on in NI 43-101 and the June 19, 2008 news release. These documents cannot be considered to be an integral part of the statement of claim. NI 43-101 is not referenced at all in the claim and while paragraphs 30-31 plead the contents of the press release, I see no explicit reference to it. To my mind, the defendants are attempting to do precisely what Nordheimer J. cautioned against in the *Leadbeater* decision. This will be a recurrent theme in some of the reasons that follow.

[55] The pleading alleges that the offerors and Baffinland directors were obliged to disclose the contents if the 2008 Expansion Study and the material facts that required disclosure are particularized in Schedule B to the Claim.

[56] It must be remembered that the pleadings are taken to be true. Can it be said to be plain and obvious and beyond doubt that the information would not be material to an investor? I think not. And importantly for the purposes of a Rule 21 motion, as I have already noted, the court does not determine materiality. That is an issue for trial.

[57] For these reasons, these paragraphs are adequately pleaded.

The 2010 Conceptual Study (paragraphs 32A (g), 32H, 33, 34, 35, 36D, 36E, 36F (a), 39A, 44, 64, 74(b), 76 and Schedule B, paragraph 2)

[58] The defendants submit that the allegation respecting the failure to disclose the contents of the 2010 Conceptual Study suffers from the same deficiencies outlined in respect of the 2008 Expansion Study. They say that security holders were made aware of the Conceptual Study by the Nunavut Directors' Circular and Baffinland news release of June 10, 2010 and July 12, 2010. They also argue that by the time of the joint bid of January 2010, the 2010 study was outdated and overtaken by a 2011 Road Feasibility Study that was publicly announced. Finally, they submit that the particulars at Schedule B do not disclose facts that were not publicly disclosed or facts that required disclosure.

[59] The plaintiffs respond in two ways. First, they say that the January 13, 2011 press release did not provide adequate disclosure of the 2011 study. Moreover, the 2011 study was not released until after the expiry of the joint bid. Second, they submit that even if the 2010 Conceptual Study were superseded, the bid documents that preceded the press release did not disclose any material facts that the defendants say were superseded.

[60] The adequacy of the disclosure is not something to be resolved on a pleadings motion.

[61] Moreover, the fact that the 2011 Road Feasibility Study was not released until after the bid closed may tend to support the allegation that the earlier study ought to have been disclosed. As already noted in connection with the 2008 Expansion Study, the materiality of the information contained therein is a triable issue. As a result, these paragraphs are sufficiently pleaded.

January 2011 Draft Environmental Impact Statement (paragraphs 74 (c), 78, 79, 80 and Schedule B, paragraph 3)

[62] The defendants submit that the particulars pleaded at paragraph 3 of Schedule B do not include matters that were not publicly disclosed. In particular, they point out that an undisclosed material fact as pleaded was that Baffinland "proposed to operate the Mary River Project at a production rate of 21 MTA and that approval of the project was being sought on that basis". This pleading is compared to paragraph 78 of the claim that pleads that Baffinland issued a press release on January 21, 2011, which announced that the draft environmental impact statement proposed a 21 MTA operation. They make a similar point respecting paragraph 3(b) of Schedule B.

[63] The plaintiffs respond that the press release announcing the filing of the January 2011 draft environmental impact statement was released on January 21, 2011. This was approximately one week after the release of the January 13, 2011 press release respecting the 2011 Road Feasibility Study. The plaintiffs say that the contents of the environmental press release must be reviewed in light of the earlier press release. They say there is a contradiction between the two vis-à-vis the haul options being contemplated by Baffinland and the offerors.

[64] I accept the plaintiffs' contention for the purposes of this motion.

2011 Road Feasibility Study (paragraphs 65, 74 (d) and 77)

[65] The defendants submit that the material undisclosed facts in the 2011 Road Feasibility Study are not pleaded.

[66] The plaintiffs respond that they have pleaded the relevant facts at paragraph 83 of the claim.

[67] I have reviewed the pleading and note that the plaintiffs allege that there was a discrepancy between what the 2011 Road Feasibility Study projected as an average long term price forecast for iron ore and what was said during the fourth quarter earnings conference call. They also allege that the ongoing negotiations between ArcelorMittal and Baffinland for the joint venture agreement was an undisclosed material fact. Consequently, the material undisclosed facts are pleaded.

Budgets and Financial Forecasts, Exploration Plans and Materials of the Baffinland Board (paragraphs 32A (a)(b)(e), 74 (e)(f)(i) and Schedule B paragraphs 4 (a)(b))

[68] The defendants make three submissions. First, they say the language used (i.e. "including") is vague and non-exclusive contrary to rule 25.06 (8). Second, no facts are pleaded to demonstrate why a budget from the previous year would or could be material. Finally, they submit that Baffinland made extensive disclosure of the 2010 exploration and drilling plans in the Nunavut Directors' Circular and January 13, 2011 news release.

[69] The plaintiffs reply that the defendants' disclosure obligations must be viewed in context and in particular, the defendants' preferred access to Baffinland's business prior to the bids having been made. They also point to the purpose of the legislation – to level the playing field for investors.

[70] I tend to agree that the use of non-exclusive language is objectionable. However, the plaintiffs should have leave to amend the pleading to eliminate the use of such words or phrases as "including" or "including but not limited to". The balance of the pleading at these paragraphs is adequate when one keeps in mind that context is important. I am not prepared to hold on a Rule 21 motion (nor is it open to me) and in the circumstances of the case, that an earlier budget could not be material to an investor trying to weigh his/her options.

Business Plans and Strategies (paragraph 74 (g))

[71] Simply put, the defendants say that the pleading is a bald allegation because it fails to plead the material facts that required disclosure in the unspecified plans and strategies.

[72] The plaintiffs' submission is the same as with respect to the budgets above.

[73] I agree with the defendant that the pleading is defective because it does not adequately identify to what business plans and strategies the plaintiffs are pointing. Leave to amend is granted.

Baffinland's negotiations related to permitting (paragraphs 32A (d) and 74 (h))

[74] According to the defendants, this should be struck as a bald pleading. The plaintiffs reply that Baffinland's interactions with the Nunavut Impact Review Board in respect of permits had been ongoing for five years by the time the bids started. The permits were necessary to the development of the Mary River project and as a result, the plaintiffs say information respecting those negotiations was a material fact requiring disclosure.

[75] In my view, this pleading is inadequate for the purpose of informing the defendants of the case they must meet. I agree that the pleading is bare – it merely pleads that "the details about [Baffinland's] negotiations relating to

permitting" were not disclosed. There is none of the factual detail elaborated in the plaintiffs' factum. The pleading is struck. Leave to amend is granted.

Baffindland's search for a strategic partner (paragraphs 32A (i) and 74 (j))

[76] The defence submits that the pleading is also a bald allegation that is contradicted by disclosures made in the Nunavut Directors' Circular and the ArcelorMittal Directors' Circular.

[77] The plaintiffs submit that the details of Baffinland's search for a strategic partner were available to Mr. Waheed (and therefore the Waheed group of defendants) by virtue of his relationship with Baffinland. Accordingly, this information - who was approached, what information was provided and what response was generated – was material undisclosed information. They also say paragraph 66(a.2) of the claim provides particulars of the allegations. I agree.

Baffinland's negotiations with ArcelorMittal (paragraphs 32A (j), 34, 36I, 74 (k), 82A and Schedule B, paragraphs 5 (a)(b) and (c))

[78] The defendants take issue with the use of non-exclusive, vague language. They also say that the allegations are contradicted by disclosures made in the Nunavut Directors' Circular, the initial ArcelorMittal offer and its directors' circular.

[79] The plaintiffs respond that they have properly pleaded the allegations. Their position is articulated in paragraphs 363-380 of their Factum. In summary, they say that the financial details of the joint venture had been reached as demonstrated by a commercial term sheet dated August 10, 2010 and was to be formalized by September 30, 2010. The hostile Nunavut bid intervened. It was these details that were material facts requiring disclosure.

[80] The plaintiffs acknowledge that there was some disclosure of negotiations with an unnamed third party in the first directors' circular but the information provided

was vague, incomplete and lacking in meaningful detail. The plaintiffs make this point:

> Nothing could have been more material in the context of the proposed take-over of Baffinland, whose share price had been stagnant because of the inability to raise financing for the Mary River Project, than information that the world's largest steel maker was prepared to enter a comprehensive joint venture agreement which involved the long sought-after financing of this world class iron ore deposit such that the shareholders could remain part of the company and reap the anticipated value growth over time, or wait to see how the market would react to this monumental news and cash out early.

[81] Again, the plaintiff's position is to be preferred for the purposes of this motion, although the use of non-exclusive language is to be eliminated here as elsewhere.

Baffindland's Negotations with the Qikiqtani Inuit Association (paragraphs 32A (k), 32I, 74 (i) and Schedule B, paragraph 16)

[82] The defendants repeat their objection to the use of non-exclusive words and that the term "including" should be struck limiting the particulars to those at subparagraphs 6 (a) and (b).

[83] The plaintiffs say they have properly pleaded the allegations.

[84] I agree with the defendants that the word "including" is objectionable and should be struck.

Financial model developed by Baffinland (paragraphs 32A (h), 32G, 32H, 74(m))

[85] The defendants argue that the financial model is part of the June 2010 conceptual study and therefore, suffers from the same flaws associated with it.

[86] The plaintiffs' position is that the pleading is properly drafted. They note that Mr. Waheed developed a financial model that was incorporated into the June 2010 conceptual study but other information was contained in early iterations of the

model. The model was derived from Baffinland's confidential information available to the bid group led by Mr. Waheed.

[87] Can it be said plain and obvious that these materials ought not to have been disclosed? I have concluded that it cannot, largely for the reasons already articulated.

Capital Summary, Operating Costs Summary and Internal Rates of Return (paragraphs 36F (b), (c), (d), 74 (n)(o) and (p))

[88] The defendants argue that in fact, this information, which the plaintiffs allege contained undisclosed material facts, was disclosed by Baffinland in the 2008 Rail Feasibility Study, the Nunavut Directors' Circular and Baffinland's January 13, 2011 news release.

[89] The plaintiffs reiterate that the 2008 Expansion Study and June 2010 Conceptual Study themselves had to be disclosed. It is further alleged that Ms. Dimitrov provided material information to Mr. Waheed including this and other information but it was not disclosed to shareholders.

[90] The pleading is adequate, again bearing in mind the context and the theory of the plaintiffs' case that Mr. Waheed was privy to confidential internal information respecting Baffinland that was not disclosed to investors.

Press Release January 13, 2011 and January 17, 2011 Notice of Change (paragraphs 67-73 and 89)

[91] The defendants repeat their position that the plaintiff's allegations are belied by these two documents, other public disclosures and the requirements of NI 43-101.

[92] The essence of the plaintiffs' position is that a resolution of these issues is not appropriate on a pleadings motion. I agree, for the reasons already articulated in respect to the 2008 Expansion Study.

Allegations do not apply to ArcelorMittal/184 defendants or Nunavut defendants (paragraphs 80 and 88)

[93] The defendants state that the allegations respecting a misrepresentation in the January 13, 2011 press release disclose no cause of action against them because none of the impugned statements were included in the defendants' bid documents or certified by them.

[94] The plaintiffs respond that the original takeover bid circulars issued by each of the offerors provided as follows:

> The Offeror has no knowledge of any material fact concerning the securities of Baffinland that has not been generally disclosed by Baffinland, or any other matter that is not disclosed in the Circular and that has not previously been generally disclosed, and that would reasonably be expected to affect the decision of the shareholders to accept or reject the offer.

[95] The plaintiffs say that the effect is that the offerors agreed that unless otherwise specified, Baffinland's public disclosure was correct and they had nothing additional to say. A subsequent Notice of Variation and Extension was issued the day following the January 13, 2011 Press Release by the terms of which the plaintiffs say the offerors adopted and brought up to date their earlier adoption of Baffinland's disclosures.

[96] The difficulty that I have is that none of this is pleaded in the claim. If it were, it seems to me impossible to conclude it is plain and obvious that the offerors might not face liability. Leave to amend granted.

Additional allegations of circular misrepresentations against Baffinland's former directors (paragraph 66)

[97] The plaintiffs allege that on November 12, 2010, the Baffinland board recommended unanimously to security holders that the initial ArcelorMittal offer be accepted. The claim goes on to plead that the directors' circular containing the recommendation was misleading and sets out six lengthy sub-paragraphs detailing why.

[98] I turn to each of the impugned sub-paragraphs.

[99] Paragraph 66(a) alleges that the ArcelorMittal Directors' Circular should have disclosed that one of Baffinland directors, Gordon McCreary, resigned shortly before the ArcelorMittal Directors' Circular was released because he would not recommend acceptance of the ArcelorMittal bid because the bid price was too low, and Mr. McCreary believed that a better price could be obtained from another bidder.

[100] The Baffinland Director defendants submit that there is no explicit allegation that Mr. McCreary communicated his reasons for resignation to the Board, which would have triggered an obligation to disclose.

[101] In my view, it is implicit from the allegation of non-disclosure that the Baffinland Board was aware of Mr. McCreary's reasons for resignation. While it may be true that Mr. McCreary could have disclosed to shareholders his reasons for resigning, it may also be true that the Baffinland Board had a responsibility to disclose all material information in the ArcelorMittal Directors' Circular, including the fact of the resignation and his reasons.

[102] At paragraph 66(a.1), the plaintiffs allege that the Special Committee was not independent by virtue of Ms. Dimitrov's involvement. They say that she was not

an independent director, and that the lack of independence should have been disclosed in the ArcelorMittal Directors' Circular. They allege that Ms. Dimitrov was a regular and active participant in the meetings and deliberations of the Special Committee, and in fact advised and influenced the Special Committee throughout the bid process.

[103] It is not plain and obvious that the plaintiffs cannot succeed on the allegation that the statement in the ArcelorMittal Directors' Circular that the Board had formed a Special Committee of independent directors comprised of three individuals was misleading, when Ms. Dimitrov was a *de facto* member of the Special Committee and she was not independent. It is arguable that those facts (if true) should have been disclosed because they were necessary to make the statement with respect to the independence of the Special Committee not misleading.

[104] Paragraphs 66(b) and (c) relate to the Board's assessment of the Nunavut and ArcelorMittal bid. It is not plain and obvious that the plaintiffs cannot succeed on the allegation that recommendation by the Baffinland Board of the ArcelorMittal bid in the ArcelorMittal Directors' Circular was misleading, when the ArcelorMittal Directors' Circular failed to disclose that different assessment criteria were used to evaluate the Nunavut bid and the ArcelorMittal bid. The plaintiffs say that the change in assessment criteria should have been disclosed, along with the reasons for the change and an explanation of how that change affected the Baffinland Board's assessment of the bids. These facts are adequately pleaded in the statement of claim.

No obligation to disclose Forecasts (paragraphs 81, 82 and 88(e))

[105] The defendants submit that the plaintiffs are alleging a failure to disclose an opinion about future events – in another word, forecasts. They rely on *Hembruff v. Ontario Municipal Employee Board* (2005), 78 O.R. (3d) 561 (C.A.) which

stands for the proposition that an omission to include forecasts cannot ground an action for misrepresentation.

[106] The plaintiffs reply that they do not allege a misrepresentation respecting forecasts. Rather, they are allegations that the defendants admitted that contrary to the representations in the bid documents, the offerors continued to plan to develop the Mary River Project using the rail model and the 2008 Rail Feasibility Study content remained valid.

[107] While the pleading in the impugned paragraphs may not fully capture what the plaintiffs argue, in my view, when the entire pleading is fairly read, the thrust of the plaintiffs' claim is apparent. I would not give effect to the defendants' argument.

The Election Issue

[108] The Nunavut and ArcelorMittal defendants submit that the plaintiffs must elect whether to exercise a right of action against the offerors under the joint bid or against the offerors' directors.

[109] The essence of the defendants' contention is that s. 131(1) of the *OSA* does not permit the plaintiffs to plead concurrent statutory rights of action against both an offeror and its corresponding directors/signatories. They say the *OSA* creates mutually exclusive rights of action and the plaintiffs must elect which of those two they wish to pursue. Having failed to do so, the defendants ask that the claim be struck or amended to reflect the election.

[110] They submit that a plain and grammatical reading of the operative words of the relevant provision supports their interpretation.

[111] At the risk of repetition, s. 131(1) of the *OSA* is set out again below with my emphasis added:

> 131. (1) Where a take-over bid circular sent to the security holders of an offeree issuer as required by Part XX, or any notice of change or variation in respect of the circular, contains a misrepresentation, a security holder may [...] **elect to exercise a right of action for rescission or damages against the offeror or a right of action for damages against**,
>
> (a) every person who at the time the circular or notice, as the case may be, was signed was a director of the offeror;
>
> (b) every person or company whose consent in respect of the circular or notice, as the case may be, has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by the person or company; and
>
> (c) each person who signed a certificate in the circular or notice, as the case may be, other than the persons included in clause (a).

[112] The defendants compare the wording of the provision to other provinces' securities legislation to demonstrate that the legislature intended that an election be made. They also point to the statutory context and legislative history as supporting their contention. They refer to the legislation in Alberta, Manitoba, Newfoundland and Saskatchewan, which all require an election. They set out the provisions of the Alberta statute (R.S.A. 2000, c.54) because of its use of very similar language to its Ontario counterpart, although it must be said that the Alberta provision is structured in a way that makes it obvious that an election is necessary. It provides:

> 205. (1) If a take-over bid circular or a notice of change or variation is sent to the holders of securities of an offeree issuer or to the holders of securities convertible into securities of an offeree issuer as required under the regulations and that document contains a misrepresentation, each of those holders may, without regard to whether the holders relied on the misrepresentation, **elect to exercise** a right of action
>
> (a) for rescission or damages against the offeror, **or**
>
> (b) for damages against

(i) every person who, at the time the circular or notice was signed, was a director of the offeror,

(ii) every person or company whose consent has been filed pursuant to a requirement of the regulations, but only with respect to reports; opinions or statements that have been made by them, and

(iii) each person, other than the ones referred to in subclause (i), who signed a certificate in the circular or notice.

[113] They cite the British Columbia statute (R.S.B.C. 1996, c.418) as an illustration of the language used when an election is not required. It provides:

> 132 (1) If a take over bid circular, issuer bid circular, notice of change or notice of variation is required to be sent under the regulations and that document contains a misrepresentation, a person to whom the circular or notice was sent is deemed to have relied on the misrepresentation, and has a right of action for
>
> (a) rescission against the offeror, **or**
>
> (b) damages against
>
> (i) each person who signed the certificate in the circular or notice,
>
> (ii) every director of the offeror at the time the circular or notice was signed,
>
> (iii) every person whose consent has been filed as prescribed, **and**
>
> (iv) the offeror.

[114] The plaintiffs counter that the *OSA* is remedial legislation, intended for investor protection, which must be given a broad and liberal interpretation to achieve that purpose. They say that properly interpreted, no election is necessary between whom to pursue. Rather, the election is with respect to the type of remedy: either for rescission or damages. They rely on two Ontario decisions of this court, which they submit support their interpretation.

Legislative History

[115] In order to analyze the issue, a discussion of the legislative history might be helpful.

[116] The takeover bid rules in the *OSA* were introduced in Ontario as a result of the recommendations in the "Kimber Committee" report in 1965 (*The Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, 1965)). The rules are designed to protect shareholders of the "target company" by ensuring that they are provided with full and timely disclosure of information to permit them to make an informed decision about the bid to purchase their securities: see *Allen v. Aspen Group Resources Corp.*, *supra*. The Kimber Committee's recommendations led in 1966 to the introduction into the *OSA* of rules governing takeover bids. The Committee stated as follows:

> The committee has concluded that the primary objective of any recommendations for legislation with respect to the takeover bid transaction should be the protection of the bona fide interests of the shareholders of the offeree company. Shareholders should have made available to them, as a matter of law, sufficient up-to-date relevant information to permit them to come to a reasoned decision as to the desirability of accepting a bid for their shares...

[117] A further report, referred to as the "Merger report" in 1970 recommended that shareholders be given a right of action for damages or rescission if a take-over bid circular or directors' circular contained misleading disclosure, similar to the civil remedies that were already available in respect of misleading prospectuses: *Report of the Committee of the Ontario Securities Commission on the Problems of Disclosure Raised for Investors by Business Combinations and Private Placements* (1970). The authors of the Merger report stated that the civil remedies available in the prospectus context..."have been developed to meet the inadequacies of the common law and to give the small investor an effective remedy. They establish on the one hand the need for responsibility for those whose names appear on this kind of filing, either approving or as signatories. On the

other hand, they act as a deterrent against misrepresentation by providing both rescission and damages".

[118] Section 131 was first drafted in 1978 as part of Bill 7 "An Act to revise The *Securities Act*". At that time, the provision was numbered as section 127. The relevant part of Bill 7 at the time of its first reading was as follows:

> 127. (1) Where a takeover bid circular sent to the offerees of an offeree company as required by part XIX contains a misrepresentation, every offeree shall subject to section 128, be deemed to have relied on such misrepresentation and has a right of action for rescission or damages against the offeror, **and** a right of action for damages against,
>
> (a) every person who at the time the circular was signed was a director of the offeror;
>
> (b) every person or company whose consent in respect of the circular has been filed pursuant to a requirement of the regulations but only with respect to statements or reports that have been made by them; and
>
> (c) each person who signed a certificate in the circular or notice, as the case may be, other than the persons included in clause a.

[119] After first reading, Bill 7 then proceeded to the Administration of Justice Committee. The committee reviewed and amended s. 127. The replacement section provided as follows:

> 127. (1) Where a takeover bid circular sent to the offerees of an offeree company as required by Part XIX contains a misrepresentation, every such offeree shall, subject to section 128, be deemed to have relied on such misrepresentation and may elect to exercise a right of action for rescission or damages against the offeror **or** a right of action for damages against,
>
> (a) every person who at the time the circular was signed was a director of the offeror;
>
> (b) every person or company whose consent in respect of the circular has been filed pursuant to a requirement of the

> regulations but only with respect to reports, opinion or statements that have been made by them; and
>
> (c) each person who signed a certificate in the circular or notice as the case may be, other than the persons included in clause a.

[120] The immediately above noted changes remained in the final version of the Bill and were adopted in the *OSA*.

[121] The plaintiffs urge the court to examine the parallel provisions for prospectus liability and their evolution, in interpreting the section for takeover bids.

[122] The first iteration of the prospectus liability provision provided as follows:

> 126. (1) ...a purchaser who purchases a security offered thereby ... has, subject to section 128, a right of action for damages against,
>
> (a) the issuer or selling security holder;
>
> (b) each underwriter of the securities who is required to sign the certificate required by section 58;
>
> ...
>
> and
>
> (e) every person or company who signed the prospectus ... other than the persons or companies included in clauses a to d,
>
> and where the purchaser purchased the security from a person or company referred to in clause a or b he also has a right of rescission against such person or company.

[123] Compare the foregoing to the first revision of the circular liability provision:

> 127. (1) Where a take-over bid circular sent to the offerees of an offeree company as required by Part XIX contains a misrepresentation, every such offeree shall, subject to section 128, be deemed to have relied on such misrepresentation and has a right of action for rescission or damages against the offeror, and a right of action for damages against,

(a) every person who ...

[124] The plaintiffs note that the problem with these versions was that they seemed to permit a claim for both rescission and damages, which as a matter of law are alternate rather than concurrent remedies.

[125] They say the apparent "problem" was addressed in 1979 when Bill 7 was referred to the Administration of Justice Committee following second reading. The new version of the prospectus misrepresentation liability section provided:

> S. 126. (1) ...a purchaser who purchases a security offered thereby ... has a right of action for damages against,
>
> > (a) the issuer or a selling security holder on whose behalf the distribution is made;
> >
> > (b) each underwriter of the securities who is required to sign the certificate required by section 58;
>
> ...
>
> and
>
> > (e) every person or company who signed the prospectus ... other than the persons or companies included in clauses a to d,
>
> or, where the purchaser purchased the security from a person or company referred to in clause a or b or from another underwriter of the securities, he may elect to exercise a right of rescission against such person, company or underwriter, in which case he shall have no right of action for damages against such person, company or underwriter.

[126] The re-drafted version of the take-over bid circular liability provision read as follows:

> 127. (1) Where a take-over bid circular sent to the offerees of an offeree company as required by Part XIX contains misrepresentation, every such offeree shall be deemed to have relied on such misrepresentation and may elect to exercise a right of action for rescission or damages against the offeror or a right of action for damages against,

> (a) every person who at the time the circular was signed was a director of the offeror; ...

[127] This, the plaintiffs say, demonstrates the inclusive use of the word "or". They submit that the current section is drafted to make clear that if rescission is chosen as a remedy, a shareholder cannot maintain a claim for damages against any party.

[128] The plaintiffs also submit that the interpretation advocated by the defendants is bad public policy because it would "absolve critical capital market actors of civil liability for their breaches of Ontario securities laws".

[129] Finally, they say that the case law supports their contention. They rely in particular on *Maxwell v. MLG Ventures Ltd.*, [1995] O.J. No. 1136 (S.C.J.) and *Allen v. Aspen Group Resources Corp., supra*, the latter another decision of Justice Strathy. In both cases, claims were certified against both the offerors and their directors. In the *Aspen* decision, the court noted as follows:

> The teeth of the take-over bid provisions are found in s. 131, which give the shareholders of the target company a civil remedy in damages, as well as a claim against the offeror for rescission, in the event of misrepresentation or non-disclosure in the take-over bid circular. The remedy can be exercised not only against the offeror corporation, but also against the directors or officers of the offeror who signed the circular.

[130] The defendants say that the plaintiffs' reliance on these decisions is misplaced because the issue was not explicitly raised or addressed.

[131] This latter contention is difficult to reconcile with the plain wording of the passage of the *Aspen* decision quoted above. Moreover, the plaintiffs make an interesting point that counsel of record for the defendant directors was a leading securities litigation and former director of enforcement for the Ontario Securities Commission. It seems unlikely he and the very experienced class action judge would have overlooked the issue.

[132] However, I have concluded that the defendants' position that an election is necessary must prevail, although it must be said that the legislation is not as clearly expressed as it could be. I have so concluded because:

- the plain and grammatical meaning of the operative words in s. 131(1) appear to require an election as between a right of action against an offeror or its directors/signatories (i.e. the persons listed in s. 131(1) (a)–(c));

- the combined use of the words "elect" and the word "or" in s. 131(1) seems to demonstrate that the rights of action against an offeror and the persons listed in s. 131(1) (a)–(c) are mutually exclusive;

- the statutory context of s. 131(1) supports the conclusion that the legislature intended to create mutually exclusive rights of action against an offeror on the one hand and the persons listed in the s. 131(1) (a)-(c) on the other; and

- the legislative history of s. 131(1) suggests that the legislature deliberately avoided creating concurrent statutory rights of action against an offeror and the persons listed in s. 131 (a)-(c).

[133] The language of the section speaks to an election, a requirement that is not found in s. 130(1), which creates liability for prospectus misrepresentation. The plaintiffs' submission that the amendment was necessary to correct a drafting problem is flawed because their interpretation would permit a claimant to sue an offeror for rescission and maintain an action for damages, which I would have thought mutually exclusive remedies, as the plaintiffs appear to concede.

[134] Moreover, it seems very unlikely that the word "or" be ready both exclusively and inclusively within the span of a few words.

[135] For these reasons, I have concluded that an election is necessary. I would grant the plaintiffs leave to amend to reflect their election.

Vicarious Liability (paragraphs 3(i), (j), (k), (l), 111-118)

[136] The plaintiffs seek relief in the following forms:

(a) ArcelorMittal is vicariously liable for the alleged breach of s. 131(1) of the *OSA* by Lakshmi Mittal and Aditya Mittal (paras. 3(g), 13, 25(d), 107, 108);

(b) 1843208 is vicariously liable for the alleged breach of s. 131(1) by Philippus du Toit (paras. 3(h), 14, 25(d), 109 and 110);

(c) Nunavut is vicariously liable for the alleged breach of s. 131(1) by Jowdat Waheed, Bruce Walter and John Raymond (paras. 3(i), 15, 16, 17, 25(d), 111, 112);

(d) Iron Ore Holdings is vicariously liable for the alleged breach of s. 131(1) by Jowdat Waheed, Bruce Walter and John Raymond (paras. 3(j), 15, 16, 17, 25(d), 113, 114);

(e) NGP Midstream is vicariously liable for the alleged breach of s. 131(1) by John Raymond and John Calvert (paras. 3(k), 17, 18, 25(d), 115, 116); and

(f) NGP M&R is vicariously liable for the alleged breach of s. 131(1) by John Raymond and John Calvert (paras. 3(l), 17, 18, 25(d), 117, 118).

[137] The defendants are prepared to assume for the purposes of this motion (but they do not concede) that vicarious liability can attach to a statutory cause of action. However, they submit that any such extension is subject to an express or implied contrary intention as found in the relevant statutory language.

[138] They rely on the House of Lords' decision in *Majrowski v. Guy's and St. Thomas' NHS Trust*, [2006] UKHL 34, which noted the following:

> The rationale [underlying the principle of vicarious liability for common law wrongs] holds good for a wrong comprising a breach of statutory duty or prohibition which gives rise to civil liability, provided always the statute does not expressly or implicitly indicate otherwise. A precondition of vicarious liability is that the wrong must be committed by an employee in the course of employment...If this prerequisite is satisfied the policy reasons underlying the common law principle are as much applicable to equitable wrongs and breaches of statutory obligations as they are to common law torts...
>
> Accordingly, on this point I agree with the Court of Appeal. Unless the statute expressly or implicitly indicates otherwise, the principle of vicarious liability is applicable where an employee commits a breach of statutory obligation sounding in damages while acting in the court of his employment.

[139] In the *Aspen* case, Justice Strathy had occasion to consider whether the statutory vicarious liability provision under s.11 of the *Partnerships Act* extends to statutory causes of action. He observed that "in the case of a statutory wrong, it will be necessary to examine the statute to determine whether vicarious liability is expressly or impliedly excluded". In the course of his analysis, he cited *Majrowski* with approval and reviewed other Canadian jurisprudence that supported the foregoing statement of principle.

[140] The defendants submit that because the *OSA* creates statutory liability for the offeror and the offeror's directors and signatories and an election must be exercised, the intention is clear to exclude vicarious liability. They also say that the plaintiffs have failed to plead the particulars of the relationship from which liability can be said to arise.

[141] The plaintiffs disagree. They reiterate their position on the election issue. They rely on s. 131(11) which provides as follows:

> The rights of action for rescission or damages conferred by this action is in addition to and without derogation from any other right the security holders of the offeree issuer may have at law.

[142] They submit that the concept of vicarious liability is broad and the categories of relationships that attract liability are not static. They argue that the individual Waheed defendants acted in a managing partner capacity of the limited partnerships. To the extent that the pleading may be defective with respect to Mr. Raymond, NGP Midstream and NGP M&R, they ask for leave to amend.

[143] Given my disposition with respect to the election issue, it follows that the claims for vicarious liability must fall. The statute requires security holders to elect whether to sue the offeror or its directors. As a result, the *Act* by necessary implication excludes liability arising vicariously. To conclude otherwise would make an election irrelevant and unnecessary.

Insider Trading/Unjust Enrichment (paras. 24, 103-106)

[144] The defendants say that the same deficiencies in pleading undisclosed material facts apply here as well.

[145] For the same reasons already identified in that regard, I am not prepared to strike those pleadings.

Oppression (paras. 101 (3(f), 25(f), 52-56, 90 A-D, 98 A, 100, 101, 101A and B, 102 and 120)).

[146] The essence of the defendants' position is that the oppression claims must necessarily fall to the extent that they correspond to any s. 131(2) claims, assuming they have successfully had them struck. They say the essential elements for the claim are not pleaded and certain claims are time barred.

[147] I quote from the factum of the former directors at paras. 37 and 38:

> 37. Stakeholders' reasonable expectations are the cornerstone of the oppression remedy. In a hostile bid situation where the corporation is "in play", shareholders may expect that directors will act in the best interests of the shareholders as a whole and take reasonable steps to maximize shareholder value. That said, a Court will not rule on the "commercial viability" of directors' decisions. The focus of the Court's scrutiny will be on the process by which such decisions were reached, although the Court will not enter into the *minutiae* of decision making processes.
>
> 38. As described in the circulars incorporated by reference into the Fresh as Amended Statement of Claim, it is clear that once Baffinland was "in play", reasonable steps were taken to maximize shareholder value. The Board formed a Special Committee to assess the Nunavut Offer; recommended its rejection with the benefit of professional advice; brought Mr. Waheed's involvement to light and alerted Staff of the OSC to the Board's concerns; kept two shareholder rights plans in place to afford more time for alternatives to emerge; worked to bring an alternative offer forward; and ensured that it could consider any superior proposals that might be made. Eight rounds of bidding followed with an ultimate offer of $1.50 made to shareholders in the Joint Bid (a 268% premium to the share price on September 21, 2011). In any event, if shareholders were not content with the Joint Bid they did not have to tender to it. [citations omitted]

[148] In my respectful view, the defendants are inviting the court to undertake a merits analysis, precisely the exercise that is not to be done on a Rule 21 motion. The defendants may well prevail in future but that is not the determination that I must make now on this motion.

[149] On the issue of the limitation period, the defendants submit that the plaintiffs amended their pleading in May 2013 to add new claims of oppression against Baffinland and its former directors. The defendants say that the claims are barred by the *Limitations Act*, 2002. They allege in particular:

- the plaintiffs knew of Mr. Waheed's involvement in the Nunavut offer when the Nunavut Directors' Circular was issued in October, 2010. It was only in May, 2013 that the plaintiffs amended their

pleadings to allege that Baffinland and the former directors acted oppressively by failing to take action to prevent Mr. Waheed from violating the terms of his confidentiality agreement, which they say could have put a stop to the Nunavut offer and preserved the ArcelorMittal joint venture. As noted above, until that time, there was no allegation against Baffinland or the former directors relating to Mr. Waheed's alleged receipt of information or the events that preceded the initial Nunavut offer;

- the plaintiffs knew of the joint bid when it was announced in January 2011. However, it was only in their May 2013 amendments that they first alleged that Baffinland and the former directors had acted oppressively by failing to ensure that the terms of Baffinland's exclusivity agreement with ArcelorMittal contained terms that would prevent it from ultimately making a joint bid with Nunavut. In the prior pleadings, there was no basis to assume that such a claim would be advanced, particularly given that the initial ArcelorMittal offer represented a significant premium to the initial Nunavut Offer. This too is a new cause of action based upon a separate set of facts and allegations, unrelated to their prior misrepresentation claims, and is out of time.

[150] The plaintiffs respond that no new causes of action are pleaded but rather additional relief is sought based on facts already pleaded. They rely as well on the principle of discoverability.

[151] The relevant limitation period is found at s. 138 of the *OSA*, which provides as follows:

> Unless otherwise provided in this *Act*, no action shall be commenced to enforce a right created by this Part more than,
>
> a) in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action; or
>
> b) in the case of any action, other than an action for rescission, the earlier of,
>
> (i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or
>
> (ii) three years after the date of the transaction that gave rise to the cause of action.

[152] The issue is whether the amendments setting out the allegations of oppression constitute "a fundamentally different claim": *Frohlick v. Pinkerton Canada Ltd.* (2008), 88 O.R. (3d) 401 (C.A.). If so, they would be out of time, subject to any argument respecting discoverability. Because of my conclusion below, I need not address discoverability.

[153] Lauwers J. (as he then was) had occasion to consider whether proposed amendments raised new causes of action after the expiry of a limitation period in *Ivan v. Financiere Telco Inc.*, [2011] O.J. No. 4162 (S.C.J.). He made the following comments:

> 29 The contrast between a "cause of action" seen as a factual matrix and a "cause of action" seen as the legal basis for relief often arises in motions under Rule 26 of the *Rules of Civil Procedure* to amend a Statement of Claim after the limitation period has expired. In these cases, the plaintiff's effort is typically to characterize the amendment as pleading an alternative claim for relief arising out of the same facts, or as stating different legal conclusions arising from the same facts, or as providing better particulars of the claims already made, or as correcting errors in the original pleading, or as asserting a new head of damage arising out of the same facts. See R. D. Gordon J. in *Timbers Estate v. Bank of Nova Scotia*, [2011] O.J. No. 2696 (S.C.), at para. 14. By contrast, the defendant's position is typically to argue that, seen properly, the amendments amount to a new cause of action: *Frohlick v. Pinkerton Canada Ltd., supra*, *Joseph v. Paramount Canada's Wonderland,* (2008), 90 O.R. (3d) 401 (C.A.).
>
> 30 When the defendant's claim is that the amendment raises a new cause of action after the limitation period has expired, then the court's usual analytical approach is to consider the constituent elements of the alleged new cause of action to see if the facts as originally pleaded, or as better particularized in the proposed new pleading, could sustain that cause of action. See Morden and Perell, *The Law of Civil Procedure in Ontario*, (Markham, Ont.: LexisNexis, 2010) at 307-308.
>
> 31 In my view, the trend of the cases favours the broader factually-oriented approach to the meaning of "cause of action"

> in interpreting and applying rule 26.01: *Fitzpatrick Estate v. Medtronic Inc.*, [1996] OJ. No. 2439 (C.J.), at para. 22, *Gladstone v. Canadian National Transportation Ltd.*, [2009] O.J. No. 3118 (Div. Ct.), at paras. 37-40, 44, *Rausch v. Pickering (City)*,]2010] O.J. No. 1889 (S.C.), at paras. 38-42.

[154] I agree with the plaintiffs that no new causes of action are pleaded. Rather, they simply seek an additional relief arising from allegations that have been made from the outset, with perhaps some refinement or elaboration of the underlying factual matrix. The essential facts that might give rise to an oppression remedy were pleaded within the limitation period.

Secondary Market Transactions

[155] In summary, the defendants submit that s. 131 does not apply to secondary market transactions because of:

- the rescission remedy;
- the nature of the transaction covered; and
- the structure of the *OSA*.

[156] The plaintiffs answer that there is no sound basis for treating security holders who sell in the secondary market during a take-over bid differently from those who tender to the bid.

[157] However, it seems to me that this is the effect of the legislation. In my view, the language of the section by necessary implication excludes secondary market transactions. The fact is that those shareholders who sell their shares on the secondary market can never elect to exercise a right to rescission. The remedy is simply not available to them.

[158] There is support for this interpretation in *Tucci v. Smart Technologies* (2013), 114 O.R. (3d) 294 (S.C.J.), which was a prospectus misrepresentation case rather than a takeover case and therefore my reasoning is by way of analogy.

[159] In *Tucci*, Justice Perell excluded secondary market purchasers from a proposed class in an action under s. 130(1). The plaintiffs had argued that "a purchaser who purchases a security offered by the prospectus during the period of distribution or during the distribution to the public included primary and some secondary market purchasers". Justice Perell disagreed noting that s. 130(1) of the *OSA* included rescission as a remedy, something that would be unavailable to purchasers on the secondary market.

[160] It is not the case that secondary market sellers would have no remedy. The *OSA* creates rights of action in respect of those transactions in s. 138.3. This section of the *Act* extended remedies to security holders not previously available.

[161] Finally, it is noteworthy that the disclosure requirements of s. 131 are designed to assist security holders to decide whether to accept or reject an offer. The aim of the section is to ensure that a security holder is equipped to make an informed decision whether to tender into the bid, rather than to sell its shares.

Frivolous and Vexatious Pleadings (para 45A and 82A)

[162] Paragraph 45A of the claim pleads that "(t)he Nunavut bid was intended to, and did, pre-empt the completion and announcement of the joint venture transaction between [Baffinland] and ArcelorMittal." The defendants say that the Nunavut defendants' intentions are irrelevant to the causes of action pleaded by the plaintiffs. They argue that the Nunavut bid only has tangential relevance to the plaintiffs' oppression claims, if at all, and in any event, the Nunavut defendants' intentions are wholly irrelevant to such claims.

[163] Paragraph 82A of the claim alleges inadequate disclosure by the Nunavut defendants in the initial Nunavut Offer when the Nunavut take-over bid was announced on September 22, 2010. The defendants submit that this is wholly irrelevant to the pleaded causes of action and is therefore frivolous and vexatious. They reason that no claims of action are advanced by the plaintiffs in connection with the initial Nunavut Offer or the Nunavut take-over bid, nor could they have done so, given that the Nunavut take-over bid did not proceed and no Baffinland shares were taken up under that bid.

[164] Finally, paragraph 82A pleads that "the fact of ongoing negotiations between ArcelorMittal and [Baffinland] of a joint venture agreement...was not disclosed...[after September 22, 2010]". The defendants submit that this is also demonstrably contradicted by the disclosure documents incorporated by reference in the pleading and is incapable of proof.

[165] In my view, the pleadings should stand. They form part of the factual narrative underpinning the claim. Put another way, they are part of the chronology of events culminating in the successful bid. They give context to the claim by adding to the narrative.

Disposition

[166] It is entirely possible that given the breadth and depth of the defendants' attack on the pleading, I may have overlooked some part of the relief being sought. If so, counsel may correspond with me.

[167] An order shall issue consistent with these reasons. It occurs to me that success is divided on this motion and accordingly, there should be no order respecting costs. However, if the parties wish to persuade me otherwise, I will receive brief (no more than five pages) of written submissions to be complete by September 30, 2015. Given counsel's summer vacation schedules, I will leave it to them to work out a timetable for the delivery of their submissions within that timeframe.

Justice H. A. Rady

Date: July 30, 2015