



# Court of Appeal provides guidance for securities class actions

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In the proposed \$1 billion class action *Rooney v. ArcelorMittal S.A.*, the Ontario Court of Appeal has clarified that security holders who sell their securities in the secondary market in connection with a take-over bid have no right to pursue an action for misrepresentation under Section 131(1) of the *Securities Act* (Ontario). The question was one of first impression before the Court. Consistent with the overriding policy objectives of the *Securities Act*, the Court confirmed that security holders who sell their securities in the secondary market cannot bypass the strict leave requirements, liability caps, and other elements of Part XXIII.1 included by the Legislature as part of the balance struck in creating statutory secondary market liability for misrepresentations.

## Background to the Action

The plaintiffs were security holders of Baffinland Iron Mines Corporation (“Baffinland”). On September 22, 2010, Baffinland was the subject of an unsolicited take-over bid by Nunavut Iron Ore Acquisition Inc. (“Nunavut Iron Ore”). ArcelorMittal S.A. then made a friendly bid for Baffinland on its own behalf and ultimately made a joint take-over bid with Nunavut Iron Ore. That joint take-over bid expired in February 2011.

The appellants commenced a proposed class action, naming Baffinland, Nunavut Iron Ore and ArcelorMittal, along with a number of related entities and individuals. Amongst other things, the appellants alleged that the relevant take-over bid circular and related documents that were sent to Baffinland’s security holders and filed with the Ontario Securities Commission contained misrepresentations about the business and affairs of Baffinland. The appellants relied in part, on Section 131(1) of the *Securities Act*, which provides as follows:

131. (1) Where a take-over bid circular sent to the security holders of an offeree issuer as required by the regulations related to 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 ...

## The Decision of the Motions Judge

The defendants brought various motions to strike the plaintiffs’ statement of claim, including a motion to strike the claims of security holders who sold their shares in the secondary market and who sought to rely on Section 131(1) of the *Securities Act*. The relief requested in respect of secondary market sellers was

granted. The motions judge held that security holders who transacted in the secondary market could not rely on Section 131(1) to assert a claim.

## The Court of Appeal Decision

The plaintiffs appealed the decision of the motions judge. The appeal was dismissed. Hourigan J.A., writing for the Court, held that non-tendering security holders could not advance a Section 131(1) right of action for the following reasons:

- It would make no sense for security holders who sold their shares in the secondary market to be given a right of rescission. Therefore, Section 131(1), which gives a right of rescission, was clearly not meant to include such security holders;
- The Legislature is presumed to have created a coherent and consistent legislative scheme and Part XXIII.1 of the *Securities Act* already extends a remedy to secondary market sellers for misrepresentation in a take-over bid circular; and
- The aim of Section 131(1) is to assist sellers in making an informed choice about whether to tender an offer to a bid, not to make an informed decision about the sale of shares in the secondary market.

In drafting Part XXIII.1 of the *Securities Act*, the Legislature sought to include adequate protections to prevent unmeritorious claims and inordinate delays in the prosecution of statutory secondary market class actions. It was for this reason that the Legislature included a leave requirement in Part XXIII.1 and capped liability. By its decision, the Court of Appeal has made it clear that proposed representative plaintiffs cannot use Section 131(1) to bypass these restrictions.

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Stikeman Elliott is counsel to certain former directors and officers of Baffinland Iron Mines Corporation. The authors, Alan D'Silva and Alexander Rose were counsel of record on the appeal.

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