2016 ONSC 1629
Ontario Superior Court of Justice

LBP Holdings Ltd. v. Allied Nevada Gold Corp.

2016 CarswellOnt 6566, 2016 ONSC 1629, [2016] O.J. No. 2164, 130 O.R. (3d) 401, 266 A.C.W.S. (3d) 253

LBP Holdings Ltd., Plaintiff and Allied Nevada Gold Corp., Scott Caldwell and Robert M. Buchan, Defendants

Edward P. Belobaba J.

Heard: January 19, 2016; March 8, 2016
Judgment: April 27, 2016
Docket: CV-14-508513-CP

Counsel: Andrew Morganti, Matthew Stroh, for Plaintiff
John Fabello, Gillian Dingle, Eliot Che, for Proposed Defendants, Underwriters, Cormark Securities Inc. and Dundee Securities Limited
Lara Jackson, Jonathan Wansbrough, for Allied Nevada Defendants

***Edward P. Belobaba J.*:**

1 If a plaintiff brings a proposed securities class action against a defendant company alleging prospectus misrepresentations in a "bought deal" financing and the company later files for bankruptcy, can the plaintiff move to add the company's underwriters as party defendants? The answer, *prima facie*, is yes — unless there is non-compensable prejudice or the causes of action are untenable. The motions and cross-motions before me raise both of these issues.

Background

2 Allied Nevada is a gold mining company. Its primary asset is the Hycroft Mine in Nevada and its shares trade on the New York and Toronto stock exchanges. On May 17, 2013 Allied Nevada effected a cross-border US$150 million secondary public offering that was financed as a "bought deal" with Dundee Securities and Cormark Securities ("the Underwriters") acting as principals.

3 The plaintiff, LBP Holdings, a Nova Scotia company, purchased 20,000 shares. When the share price collapsed following several "corrective disclosures", the plaintiff commenced a proposed class action for damages. The notice of action was issued on July 16, 2014 and the statement of claim followed a month later.

4 The plaintiff says that Allied Nevada published core documents and made other statements containing material misrepresentations about its ability to process and leach ore at the Hycroft Mine, the feasibility of its 2013 gold production and cash cost guidance projections, and its ability to finance the expansion of the Hycroft Mine. The plaintiff pleads that these misrepresentations were incorporated by reference in a short form Prospectus for the secondary public offering ("SPO").

5 The plaintiff further pleads that the alleged misrepresentations were first corrected on July 22, 2013 when Allied Nevada published its second quarter operating results disclosing previous operating errors that prevented it from achieving its targets. They were corrected again on August 6 and 7, 2013 when Allied Nevada announced in a series of conference calls that, because it could not leach enough ore to generate sufficient cash flows, the expansion of the Hycroft Mine had to be deferred.

6 When the plaintiff issued the initial notice of action and statement of claim in July and August, 2014 it named Allied Nevada and two of its former executives as the defendants. On March 9, 2015 Allied Nevada filed for protection under U.S. bankruptcy law. Two months later, in May 2015, the plaintiff served the motion herein seeking to add the Underwriters as defendants.

The applicable law

7 The applicable law is not in dispute. A plaintiff will generally be granted leave to add a new defendant unless the proposed defendant can show non-compensable prejudice or that the claims being advanced are untenable at law. [1] The Underwriters say they succeed on both grounds and ask that the plaintiff's motion to add them as defendants be dismissed.

Analysis

8 There are actually three motions before me. Two are cross-motions to strike certain affidavits and expert reports. The third is the motion to add the Underwriters. Taken together, the motions raise the two key issues: whether the Underwriters can establish non-compensable prejudice or show that the claims being advanced against them are legally untenable.

(1) Non-compensable prejudice

9 The Underwriters say the plaintiff's attempt to add them as defendants only after Allied Nevada filed for bankruptcy protection has prejudiced the Underwriters. Their right to be indemnified by Allied Nevada for legal costs has been compromised irrevocably because of the bankruptcy proceeding. The Underwriters argue that this "missed opportunity" gave rise to the non-compensable prejudice and the plaintiff's motion must therefore be dismissed.

10 To support the non-compensable prejudice argument, the Underwriters filed the affidavit of Ms. Hewitt, an experienced in-house legal counsel at Dundee. In response, the plaintiff first filed the expert report of Mr. Stemerman, an American bankruptcy specialist. When the Underwriters objected to this report because of an alleged conflict of interest, [2] the plaintiffs relented and filed the expert report of Mr. Gellert, another American bankruptcy specialist. The Underwriters, in turn, responded with the report of Ms. Edmonson, yet another American bankruptcy specialist. Mr. Gellert then filed a reply report.

11 The Hewitt and Edmonson affidavits concluded that the Underwriters were prejudiced by the bankruptcy proceeding. The Gellert opinion and reply found otherwise.

12 The plaintiff brought a motion to strike the Hewitt affidavit; the Underwriters moved to strike the Gellert opinions. My decision about their admissibility would obviously be helpful to counsel when they argued the motion to add the Underwriters so I advised the parties, soon after I heard the motions to strike, that all of the affidavits would be admitted. Here, briefly, are the reasons for this decision.

13 The Hewitt affidavit presents useful background information that assists with the overall narrative. It also provides some pertinent observations about an underwriter's interaction with an issuer, based on Ms. Hewitt's experience as an in-house legal counsel with a Canadian underwriter. Most of the Hewitt affidavit is thus helpful and admissible. But Ms. Hewitt is not an expert on American bankruptcy law. I will therefore give no weight to the paragraphs that purport to describe and opine on U.S. bankruptcy practice and the rights or remedies that flow therefrom. [3] The Hewitt affidavit is admissible subject to these comments.

14 I further find that the two Gellert opinions are admissible and should be given full weight. The Underwriters' submission that Mr. Gellert "plagiarized" the Stemerman report is reckless and completely unwarranted. It is true that Mr. Gellert used the Stemerman report as a template and repeated certain, non-controversial, background or narrative portions with little to no revision. But I reject the suggestion that Mr. Gellert simply copied Stemerman and passed off the latter's work as his own. I note that of the 45 paragraphs in the Stemerman report, about 30 of them provide non-contentious background that were tracked, even copied by Mr. Gellert with only minor revisions. But each of the remaining 15 paragraphs - which contain the core opinion component - was substantially rewritten by Mr. Gellert to reflect his own independent opinion on the points in question.

15 Nor is it fair to say that it was Stemerman who "framed the questions" and that Mr. Gellert simply followed along. In fact, on any fair reading of the affidavit chronology, one can see that Mr. Stemerman and Mr. Gellert were responding to Ms. Hewitt and it was Ms. Hewitt who framed the questions.

16 In short, there is no merit in the Underwriters' submission that the Gellert opinions should be struck. All the more so when one considers the recent decision of the Supreme Court in *White Burgess* [4] that makes clear that even if apparent bias can be shown (it was not shown here) this is irrelevant at the threshold admissibility inquiry and only goes to the overall weight of the expert's opinion. [5] There is no reason to strike the Gellert opinions. Both are admissible and will given full weight.

17 I can now turn to the content of the affidavits.

18 The Underwriters submit that as a result of the plaintiff's delay in adding them as parties, they have been prejudiced because of their inability to participate in and obtain benefits from the U.S. bankruptcy proceedings and recover the legal costs to which they are entitled.

19 As I have already noted, Ms. Edmonson's opinion supported the Underwriters' argument. Mr. Gellert disagreed and concluded that the Underwriters were not prejudiced by the timing of the Chapter 11 filing. In Mr. Gellert's opinion, 1) the Underwriters had "ample opportunity" to contribute to the plan of reorganization process and largely chose not to do so; 2) the Underwriters were not entitled to non-consensual releases by shareholders and creditors; 3) any hypothetical payments that may have been made by Allied Nevada to the Underwriters for legal fees would potentially have been subject to a 'claw-back'; and 4) any claims asserted by the Underwriters would likely be subordinated to the claims of general unsecured creditors.

20 I note as well that when Ms. Edmonson was asked on cross-examination whether the Underwriters' claim for the indemnification of defense costs was "extinguished" in the bankruptcy proceeding, she responded that they were not extinguished; that under U.S. bankruptcy law these claims are deemed allowed unless an objection has been filed (and none has been to date); and that the Underwriters may be still able to seek payment of their claims under Allied Nevada's insurance policies.

21 Given the competing expert opinions and the fact that Ms. Edmonson did not counter Mr. Gellert's reply opinion, I am unable to find that the Underwriters have established non-compensable prejudice. Based on the record before me, the plaintiff has cleared the first hurdle to add the Underwriters as defendant — non-compensable prejudice has not been established.

(2) Tenable causes of action

22 I now turn to the second hurdle — whether the claims that are sought to be advanced against the Underwriters are legally tenable.

23 Here again, the applicable law is not in dispute. The test for determining whether a pleading is legally sufficient on a motion for leave to amend under Rule 26.01 is identical to the test on a motion to strike under Rule 21.01(1)(b) [6] , and therefore identical to that under s. 5(1)(a) of the *Class Proceedings Act*. [7] It must be "plain and obvious" that the claim discloses no reasonable cause of action. The court must accept the pleaded facts as proven unless they are patently ridiculous or incapable of proof. Novel causes of action are no bar to proceeding to trial; nor should a court dispose of questions of law that are unsettled in the jurisprudence. The pleading is to be read generously to accommodate drafting deficiencies and if the claim has a reasonable prospect of success it should be allowed to proceed to trial. [8]

24 The plaintiff asserts five causes of action against the Underwriters in the proposed as further amended statement of claim:

a. A primary market statutory claim under Part XXIII of the OSA;

b. A secondary market statutory claim under Part XXIII.1 of the OSA;

c. A primary market common law claim in negligence *simpliciter*;

d. A primary market common law claim in negligent misrepresentation; and

e. A claim in unjust enrichment seeking disgorgement of the underwriting fees received on the SPO.

25 The Underwriters do not oppose the two common law claims. But they are adamant that the two statutory claims and the claim for unjust enrichment are untenable and cannot be pursued. The case law is clear that it is necessary to consider whether each of the impugned causes of action is legally tenable on the facts as pleaded. [9]

26 I will now do so.

(1) The primary market statutory claim

27 Part XXIII of the OSA deals with civil liability for primary market disclosure. Where a prospectus contains a misrepresentation, underwriters can be sued for damages by a purchaser of the securities. Section 130(1)(b) of the *Securities Act* [10] explicitly includes underwriters in its listing of possible defendants. "Each underwriter" that was required to certify the prospectus under s. 59 of the Act [11] is exposed to primary market statutory liability under Part XXIII.

28 The Underwriters say the s. 130(1) primary market claim fails to disclose a reasonable cause of action and is not legally tenable because it is time-barred. The limitation period that applies to primary market claims is set out in s. 138(b) of the OSA. The aggrieved shareholder must bring the claims within 180 days after she first had knowledge of the facts giving rise to the cause of action, and no later than three years after the transaction that gave rise to the complaint.

29 The law is clear that a statement of claim fails to disclose a reasonable cause of action if the claim is *prima facie* barred by a limitation period. [12] A limitation period can be determined from the pleadings if no additional facts could be asserted to show that a limitation period has not expired. [13] And, as Justice Strathy confirmed in *Gammon Gold*, [14] "[t]here is no doubt that a putative class action can be dismissed, even prior to certification, where the claim of the proposed representative plaintiff is time-barred on the face of the pleading." [15]

30 The plaintiff pleaded in its July 16, 2014 notice of action that Allied Nevada disclosed certain facts "for the first time" on July 22, 2013, and provided further "corrective disclosure" on August 6 and 7, 2013. Even if the plaintiff did not know of these "corrections" at the time they were made, he knew about them when he filed his notice of action on July 16, 2014 and there is no suggestion to the contrary. Therefore, the limitation period started to run at the latest from July 16, 2014 and expired 180 days later on January 14, 2015. The motion for leave to add the Underwriters, brought in May, 2015, is therefore out of time.

31 Notwithstanding the above, the plaintiff attempts a final and somewhat novel argument. The plaintiff submits that it was not until Allied Nevada filed for Chapter 11 protection on March 9, 2015 that the "real truth" about Allied Nevada's cash flow and solvency was "revealed." The motion for leave to add the Underwriters, which was brought two months later, is thus well within the 180 day limitation period.

32 I do not accept this submission.

33 When Allied Nevada petitioned for Chapter 11 protection, it made no corrections to any statements that had been made in the Prospectus. The bankruptcy filing shows that Allied Nevada had estimated assets well in excess of its estimated liabilities and that it was solvent. The plaintiff's submission that the Chapter 11 filing somehow made Allied Nevada's statements in the Prospectus about the intended use of funds untrue cannot succeed.

34 Further, the plaintiff acknowledges in its reply factum that the (allegedly false) statements made by Allied Nevada about its ability to finance the expansion of the Hycroft Mine were made "following the end of the Class Period." Therefore, even

if these statements could provide the basis for a claim of misrepresentation, it could not be a misrepresentation made by the Underwriters.

35 Allied Nevada's bankruptcy did not render any prior statements misleading. It is also inconsistent with the plaintiff's claim. The class period is January 18, 2013 to August 5, 2013. If the loss to primary market purchasers was caused by public corrections in late July and early August 2013 causing the share price to drop by almost 40 per cent (as the plaintiff pleads), then on the plaintiff's own pleading the fact of Allied Nevada's bankruptcy, which occurred almost two years later, is wholly irrelevant.

36 One final point. The expiry of a limitation period results in a rebuttable presumption of non-compensable prejudice and is itself a ground for refusing to add party defendants. [16] The onus is on the plaintiff to justify the delay in adding the Underwriters and to show that no prejudice would result from the amendment. [17] The plaintiff has adduced no such evidence.

37 For all of these reasons, the primary market statutory claim against the Underwriters, although viable in principle, is time-barred and thus untenable.

(2) The secondary market statutory claim

38 Part XXIII.1 of the OSA deals with civil liability for secondary market disclosure.

39 The Underwriters says that unlike the primary market statutory claim against underwriters under Part XXIII of the OSA, the secondary market statutory claim under Part XXIII.1 is not viable in principle and is thus untenable. The Underwriters says that the Part XXIII.1 claim discloses no reasonable cause of action as against the Underwriters because it is plain and obvious that they are not "experts" for the purposes of Part XXIII.1.

40 I agree with this submission.

41 An underwriter can only be sued under Part XXIII.1 and s. 138.3(1) of the OSA if it falls within the prescribed list of potential defendants. The only category that arguably applies is that of "expert" under s. 138(1)(e). The aggrieved shareholder has a right of action for damages against:

> (e) each expert where,
>
> (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
>
> (ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and
>
> (iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

42 The plaintiff focuses on the fact that the Underwriters certified the Prospectus under s. 59 of the OSA and stated that "to the best of our knowledge, information and belief, this prospectus constitutes full, true and plain disclosure of all material facts relating to the securities offered by this prospectus." Consequently, says the plaintiff, the Underwriters are liable not only under the Part XXIII primary market provision where they are listed explicitly as possible defendants but also under the Part XXIII.1 secondary market provision where they are not so listed because they fall within the meaning of "expert" under s. 138(1)(e).

43 In my view, this submission fails for at least two reasons.

44 The first relates to the language in s. 138(1)(e)(i) and the requirement that the misrepresentation (that was contained in the document, here the Prospectus) is *also* contained in a report, statement or opinion made by the expert. Even if underwriters are experts for the purposes of Part XXIII.1, the s. 59 certification which provides a "best of our knowledge" reassurance from the underwriter that "this prospectus constitutes full, true and plain disclosure of all material facts relating to the securities offered in the prospectus" does not repeat any misrepresentation previously made. That is, no misrepresentation previously made in

the Prospectus (if indeed any misrepresentation was made in the Prospectus) is "also contained" is the s. 59 certificate within the meaning of s. 138(1)(e)(i) of the OSA.

45 This alone is probably enough for a finding that the secondary market statutory claim against the underwriters is untenable.

46 But there is second reason as well, one that is more principled and goes to the very design of the OSA. Underwriters are not "experts" for the purposes of Part XXIII.1.

47 In my view, it is plain and obvious that the term "expert" in section 138.3(1)(e) is not intended to include underwriters. I do not mean to say that underwriters are not professionals or that they do not possess significant expertise. Indeed, it is no doubt true that underwriters have a "professional expertise in the capital markets." [18] What I mean to say, and I know all underwriters would agree, is that underwriters are not intended to be caught by the secondary market liability provisions of Part XXIII.1. They are not "experts" for the purposes of Part XXIII.1.

48 The terms "underwriter" and "expert" are defined separately and differently in the OSA. Section 1(1) of the OSA defines "underwriter" as:

> [a] person or company who, as principal, agrees to purchase securities with a view to distribution or who, as agent, offers for sale or sells securities in connection with a distribution and includes a person or company who has a direct or indirect participation in any such distribution ..."

49 This is a functional definition that focuses primarily on the underwriter's role in the distribution of securities. There is nothing here about an underwriter being part of a distinct profession that can provide authoritative expertise to statements made in a professional capacity.

50 However, the definition of "expert" as set out in s. 138.1 for the purposes of Part XXIII.1 (and this is the only place where "expert" is defined) does speak to membership in a profession that can give authority to a statement made in a professional capacity:

> "expert" means a person or company whose profession gives authority to a statement made in a professional capacity by the person or company, including, without limitation, an accountant, actuary, appraiser, auditor, engineer, financial analyst, geologist or lawyer, but not including a designated credit rating organization.

51 Each of the eight listed professions are regulated or licensed or otherwise held to certain defined standards of conduct and skill. These are the distinguishing characteristics of professions. As this court noted in *Law Society of Upper Canada v. Barrie (City)*: [19]

> The professions may be distinguished from other spheres of commercial activity for a number of reasons. The professions are self-regulating and self-licensing, and members of professions must conform to standards of conduct and technical skill. [20]

52 An underwriter is not a "professional" in this sense. Underwriters are not self-regulating or self-licensing. Quite the contrary. It is the Director under the OSA that decides who can distribute securities as an underwriter. Section 27(2) of the OSA sets out the criteria — proficiency, solvency and integrity — that the Director must consider in approving an applicant's registration as underwriter.

53 The plaintiff argues that because the s. 138.1 definition of "expert" lists eight examples, but does so "without limitation," that underwriters can still be included in this listing.

54 I do not agree. As noted by the Supreme Court, there is only one guiding principle when interpreting legislation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." [21]

55 The legislature obviously and expressly exposed underwriters to primary market liability in Part XXIII. They had every opportunity to do the same in Part XXIII.1 but they chose not to do so. In my view, that this exclusion was intentional can be implied. As noted by the Divisional Court in *Chrysler Canada*, [22] legislative exclusion can be implied when an express reference is expected but absent. The doctrine of implied exclusion applies:

> [w]henever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. As Laskin J.A. succinctly put it, 'legislative exclusion can be implied when an express reference is expected but absent.' The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature. [23]

56 There is good reason for limiting underwriters' liability to the primary market context. Part XXIII deals with liability for misrepresentation in a prospectus. Section 130(1) provides a right of action for damages against five categories of possible defendants including issuers, directors and underwriters that have signed the s. 59 certificate.

57 The reason for exposing these defendants to civil liability for misrepresentations in the prospectus is "to induce care in assembling the prospectus on the part of the directors of the issuer and those who sign the certificates." [24] And the level of care expected of underwriters is simply a reasonable level of diligence.

58 This is made clear by ss. 130(3) and (5) of the OSA. Section 130(3)(c) provides that no person or company, other than the issuer or selling security holder, is liable for prospectus misrepresentations under subsection (1) if he, she or it proves:

> that, with respect to any part of the prospectus ... purporting to be made on the authority of an expert or purporting to be a copy of or an extract from a report, opinion or statement of an expert, he, she or it had no reasonable grounds to believe and did not believe that there had been a misrepresentation or that such part of the prospectus ... did not fairly represent the report, opinion or statement of the expert or was not a fair copy of or extract from the report, opinion or statement of the expert.

59 Under s. 130(5) the underwriter is liable for a misrepresentation in a prospectus only if it is shown that the underwriter:

> (a) failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; or
>
> (b) believed there had been a misrepresentation.

60 I agree with securities law commentators that "this due diligence standard applies in the case of non-expertised parts of the prospectus. Where an expert is reasonably relied upon and there is no belief of misrepresentation, the underwriter would not be liable." [25]

61 A combined reading of ss. 130(1)(3) and (5) of the OSA shows that "underwriter" and "expert" are separate and distinct categories for the purposes of Part XXIII of the Act. The distinction, in my view, is even more apparent in Part XXIII.1.

62 The underwriters' s.59 certificate can trigger statutory liability under Part XXIII but not under Part XXIII.1. Indeed, this court has noted that s. 130 of the OSA provides a "complete code" for underwriter liability. [26]

63 I therefore have no difficulty concluding that the Underwriters are not "experts" for the purposes of Part XXIII.1 and that a secondary market statutory claim under s. 138.3(1)(e) has no reasonable prospect of success and is thus not a tenable cause of action.

(3) The unjust enrichment claim

64 The plaintiff claims that the Underwriters have been "unjustly enriched" by receiving underwriting fees. The Underwriters say this claim is legally untenable and even assuming the facts as pleaded has no reasonable prospect of success.

65 Here again, I agree with the Underwriters.

66 A claim for unjust enrichment requires that the plaintiff show an enrichment by the defendant, a corresponding deprivation of the plaintiff and the absence of any juristic reason for the enrichment. [27]

67 This claim cannot succeed for two reasons. First, the plaintiff has no reasonable prospect of showing that there is "no juristic reason" for the enrichment. Second, even if there were unjust enrichment, this would be a harm suffered by Allied Nevada, not the plaintiff.

68 Where the enrichment results from the performance of a valid contractual obligation, the general policy favouring the security of transactions weighs against the intervention of restitutionary claims, such as unjust enrichment. [28] As is evident from the Prospectus, the Underwriters entered into an underwriting agreement with Allied Nevada and were to be paid fees pursuant to that agreement. The plaintiff has not pleaded that the underwriting agreement is unenforceable or illegal. Because there is a juristic reason for the Underwriters' receipt of fees from Allied Nevada under the underwriting agreement, the plaintiff's claim for unjust enrichment has no reasonable chance of success.

69 Even if the fees received by the Underwriters were unjustly paid and received, the plaintiff is not the proper party to assert a claim for these fees. The law is clear that a shareholder does not have a cause of action for a wrong done to a corporation in whose shares it invested. [29] Only upon a wrong done by the Underwriters to Allied Nevada could the underwriting fees be in question. Absent a derivative action (which has not been brought by the plaintiff), only Allied Nevada could have a cause of action for repayment of the underwriting fees.

70 In short, I agree with the Underwriters that the unjust enrichment claim is legally untenable.

Conclusion

71 The primary market common law claims in negligence and negligent misrepresentation were not contested. Leave to amend the statement of claim to add the two common law claims as against the Underwriters is granted.

72 The primary and secondary market statutory claims and the claim for unjust enrichment are untenable. Leave to amend the statement of claim to add these three causes of action as against the Underwriters is denied.

Disposition

73 The plaintiff's and Underwriters' motions to strike, respectively, the Hewitt and Gellert affidavits and expert reports are dismissed.

74 The plaintiff's motion to add the Underwriters as defendants with respect to the primary and secondary market statutory claims and to the unjust enrichment claim is dismissed. The two common law claims in negligence and negligent misrepresentation remain alive for purposes of certification, although I assume that this is not a preferred alternative for the plaintiff.

75 A word about costs. Because overall success on these motions is almost equally divided, I am not awarding costs. Here is my reasoning. I rendered a split decision on the Hewitt motion. The Plaintiff prevailed on the Gellert motion and, based on earlier in-court discussions with counsel, would have been entitled to $8000 in costs.

76 Success on the plaintiff's motion to add the Underwriters was divided albeit in favour of the Underwriters: the plaintiff prevailed on the non-compensable prejudice argument but failed on the contested causes of action arguments. The latter commanded somewhat more time and attention than the former and will thus absorb the plaintiff's $8000 credit.

77 Hence my conclusion that because overall success on these motions was almost equally divided, there will be no costs award.

Motion to add proposed defendants granted in part, and motions to strike dismissed.

Footnotes

1 Rules 5.04(2) and 26.02(c) of the *Rules of Civil Procedure*. And see *Marks v. Ottawa (City)*, [2011] O.J. No. 1445 (Ont. C.A.) at para. 19 and *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, [2009] O.J. No. 2642 (Ont. C.A.) at para. 20.

2 The Underwriters objected to Mr. Stemerman's report because he appeared as counsel for LBP Holdings Ltd. in Allied Nevada's Chapter 11 proceeding. The plaintiff disagreed with the Underwriters' position but retained Mr. Gellert, who reviewed the Hewitt and Stemerman affidavits and filed his own opinion.

3 Paras. 41, 50, 52, 53, and 55-57.

4 *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182 (S.C.C.).

5 *White Burgess* explains that once an expert attests to her independence and impartiality (which is done in Ontario by signing Form 53), the persuasive burden falls on the party opposing the admission of the expert's evidence to show that the expert is "unable or unwilling" to comply with her overriding duty to the Court (*White Burgess*, at para. 48.) The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfil its primary duty to the court (at para. 50). I cannot find on the record before me that Mr. Gellert was unable or unwilling to carry out his primary duty to the court to provide fair, non-partisan and objective assistance.

6 *Atlantic Steel Industries Inc. v. CIGNA Insurance Co. of Canada*, [1997] O.J. No. 1278 (Ont. Gen. Div.).

7 *Class Proceedings Act, 1992*, S.O. 1992, c. 6. And see *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 41. I should note that the plaintiff filed an eleventh-hour motion asking that I also decide the cause of action question under. 5(1)(a) of the CPA. I dismissed this request. In fairness to the Underwriters who should have a proper opportunity to respond, the cause of action requirement under the CPA will be formally decided on the certification motion. Obviously, my decision herein about tenable causes of action will be relevant.

8 *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) at para. 33 and *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (S.C.C.) at para. 17.

9 *Brown v. University of Windsor*, 2014 ONSC 4666 (Ont. S.C.J.), at para. 29; aff'd 2015 ONCA 311 (Ont. C.A.) at para. 2.

10 *Securities Act*, R.S.O. 1990, c.S.5 ("OSA"). The parties disagree as to which provincial securities law should apply, The Underwriters say the Nova Scotia *Securities Act*, R.S.N.S. 1989, c. 418, should apply because the plaintiff is a Nova Scotia company with its head office in Halifax. The plaintiff says the Ontario securities legislation should apply because this is pleaded in the statement of claim. In my view, the choice of law issue is premature, and in any event, both sides agree that the relevant statutory provisions - whether Nova Scotia or Ontario - are virtually identical. For the purposes of the motions before me, I will refer to the OSA.

11 Any underwriter in a contractual relationship with the issuing company must supply a certificate for inclusion in the prospectus. The underwriter's certificate must state that "to the best of our knowledge, information and belief, this prospectus constitutes full, true and plain disclosure of all material facts relating to the securities offered by this prospectus." See *National Instrument* 41-101F1 (Item 37).

12 *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.* (2012), 113 O.R. (3d) 264 (Ont. S.C.J.)

13 *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1764 (Ont. S.C.J.).

14 *McKenna v. Gammon Gold Inc.* [2009 CarswellOnt 7551 (Ont. S.C.J.)], 2009 CanLii 66994.

15 *Ibid.*, at para. 37.

16 *Ismail v. Nitty's Food Services Ltd.*, 2014 ONSC 4140 (Ont. S.C.J.) at para. 6.

17 *Plante v. Industrial Alliance Life Insurance Co.* (2003), 66 O.R. (3d) 74 (Ont. Master) at para. 21, citing *Mota v. Hamilton-Wentworth (Regional Municipality) Police Services Board* (2003), 63 O.R. (3d) 737, [2003] O.J. No. 1100 (Ont. C.A.) at p. 748.

18 *YBM Magnex International Inc., Re*, 2003 LNONOSC 337, (2003), 26 O.S.C.B. 5285 (Ont. Securities Comm.), at para. 188.

19 *Law Society of Upper Canada v. Barrie (City)*, [2000] O.J. No. 9 (Ont. S.C.J.).

20 *Ibid.*, at para. 16.

21 *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 (S.C.C.) at para 26.

22 *Irber Holdings Ltd. v. Municipal Property Assessment Corp., Region No. 09*, 2012 ONSC 2129 (Ont. Div. Ct.) [hereinafter Chrysler Canada].

23 *Ibid.*, at para 30.

24 MacIntosh and Nicholls, *Securities Law* (2005) at 156.

25 Borden Ladner Gervais, *Securities Law and Practice* (3rd ed.), section 15.8.1.

26 *Dugal*, *supra*, note 13, at para 9.

27 *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (S.C.C.) at para. 30; *Metzler Investment GmbH v. Gildan Activewear Inc.*, [2009] O.J. No. 5695 (Ont. S.C.J.) at paras. 14-39

28 Maddaugh & McCamus, *The Law of Restitution* (2004) vol. I, at 46.

29 *Foss v. Harbottle* (1843), 67 E.R. 189 (Eng. V.-C.), as cited in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para 59.