CITATION: Rooney v. ArcelorMittal et al, 2018 ONSC 1878
COURT FILE NO.: 3957-11CP
DATE: 20180518

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Peter Rooney and Archie Leach Plaintiffs	Michael G. Robb, Nicholas Baker, Garett Hunter, for the 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	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 Calvert Alexander Rose for the defendants, Richard D. McCloskey, John Lydall and Daniella Dimitrov Megan Keenberg for dissenting shareholders in Court File No. CV-11-9222-00CL (Toronto) **HEARD:** January 22, 23 and 24, 2018

JUSTICE H.A. RADY

Introduction

[1] The plaintiffs ask that this proposed shareholder class action be certified pursuant to s. 5 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 and for related relief that is elaborated below.

[2] This action arises from the successful joint take-over bid for Baffinland Iron Mines Corporation by the corporate and limited partnership defendants. It asserts a statutory cause of action under s. 131 of the Ontario *Securities Act*, R.S.O. 1990, c. S. 5 for circular misrepresentation and for insider trading damages pursuant to s. 134. The plaintiffs also ask for relief from oppression under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 and finally, make a claim for unjust enrichment.

[3] The litigation has been exceptionally hard fought. In 2012, a change of venue and a stay motion was heard by Justice Leitch. The stay motion arose from an outstanding related dissent and appraisal proceeding pursuant to s. 185 of the *OBCA*. The defendant 1843208 has asked the court to fix the fair value for Baffinland common shares held by a group of former Baffinland shareholders who refused to tender their shares to the takeover bid. The motion for the stay had been brought by the plaintiffs and was supported by the dissenting shareholders. Justice Leitch agreed that the dissent action should be stayed until the motion for certification had been adjudicated. She dismissed the change of venue motion. In the course of her reasons, she made the following findings:

> [59] The takeover of Baffinland is the subject of both the class action and the valuation proceeding, and more specifically the fair value of the shares in Baffinland is at issue in both proceedings. There is no question that expert evidence on that common issue will be required in both proceedings…
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> [77] I am satisfied that there is a substantial overlap of issues in the two proceedings, namely the value of the Baffinland securities. The fact that the valuation date will be different does not detract from that conclusion. It is also clear that the two proceedings share the same factual background. In my view, issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources…
>
> [78] Furthermore, I see no benefit in having the valuation proceeding finalized while an overlapping issue remains to be dealt with in the class action. Indeed, that process would be unfair to the Dissent Group to the point where it could deny them access to justice.

[4] Leave to appeal her decision was sought and refused.

[5] The plaintiffs in this action now ask that the valuation application be heard with or immediately after the common issues trial. The dissenting shareholders agree with this plan of action. However, the defendants want that action to proceed to hearing as soon as possible in Toronto on the commercial list. They say a date could be secured for much earlier than any trial date in this matter.

[6] The defendants also moved to strike all or substantially all of the claim pursuant to Rule 21. The motion was heard over five days in December 2014 and January 2015. The plaintiffs' appeal of my decision was heard by the Court of Appeal and its decision was released August 17, 2016. The Court of Appeal granted a portion of the appeal and dismissed another.

[7] The important takeaways from the Court of Appeal decision are twofold. First, it held that secondary market sellers do not have a cause of action pursuant to s. 131 of the *OSA*. Second, a plaintiff can sue both corporations and their directors pursuant to s. 131. It is not obliged to make an election between the two.

The Facts

[8] The following recitation of the facts is derived from my reasons respecting the defendants' pleadings motion as well as the material filed on this motion.

[9] Baffinland is an iron mining company incorporated under the *OBCA*. 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 was and remains the development of its Mary River Project located on northern Baffin Island, Nunavut involving the exploration and extraction of iron ore deposits said to be of particularly excellent quality.

[10] On March 5, 2008, Baffinland filed on SEDAR 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. The closing price for a Baffinland share on the TSX as of September 21, 2010 was $0.56 per share. The TSX closing price on the date of the bid was $0.94 per share, some 67 million shares having traded that day.

[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 and it recommended acceptance of the bid. Over 101 million shares traded that day and continued to trade between $1.11 and $1.20 until December 15, 2010.

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

[17] 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.

[18] 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. By January 24, 2011, the TSX closing price for Baffinland shares was $1.49.

[19] The joint bid was extended on January 25 and again on February 7, 2011. Philippus Du Toit signed the February 7, 2011 notice of extension in respect of the joint bid. He did not sign any other bid documents. The bid expired on February 17, 2011 with 93 percent of Baffinland's shareholders and 76 percent of warrant holders tendering into the joint bid.

[20] The balance of shares was acquired by 1843208 through a plan of arrangement pursuant to the *OBCA* that was approved on March 25, 2011 by the Superior Court, Commercial List in Toronto. The plan provided:

- each Baffinland common share not tendered and taken up pursuant to the Joint Offer, and not held by a shareholder who exercised dissent rights, was automatically transferred by the holder to 1843208 Ontario Inc. and paid $1.50 in cash; and

- each Baffinland common share held by a shareholder who exercised dissent rights was automatically transferred to 1843208 Ontario Inc. but each dissenting shareholder was conferred the right to be paid the fair value for such shares.

[21] Baffinland shares traded until March 31, 2011 after which it ceased to be a reporting issuer.

[22] The plaintiff, Peter Rooney tendered 98,000 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 3,768,100 common shares on the secondary market after the joint bid. He did not tender any shares to the joint bid.

[23] Some 15 months after the initial Nunavut bid, enforcement staff of the Ontario Securities Commission raised concerns respecting the conduct of the defendants, Jowdat Waheed and Bruce Walter. There were allegations of insider trading, tipping and conduct contrary to the public interest in connection with Nunavut's bid for Baffinland. The claim was dismissed, however, following a lengthy hearing.

The Class Action

[24] The plaintiffs commenced this proceeding on April 19, 2011 by notice of action. It was amended on April 21, 2011 and May 6, 2011. The statement of claim was filed on May 18, 2011 and has been amended three times. The claim survived the pleadings motion and appeal largely intact.

[25] However, the plaintiffs have delivered a second fresh as amended statement of claim to conform with the refinements ordered following the pleadings motion and for which they request approval. 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, for damages or rescission of the transfer of Baffinland securities;

- as against Lakshmi N. Mittal, Aditya Mittal, Philippus 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.

[26] The plaintiffs allege that the defendants were aware of the details of the proposed joint venture deal that 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, it is said.

[27] 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.

[28] 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.

[29] They seek declarations that various enumerated documents contained misrepresentations and that certain defendants breached s. 76 of the *OSA*. In respect of the oppression claim, they seek:

> A declaration that the acts or omissions of BIM have effected a result, the business or affairs of BIM have been carried on or conducted in a manner, or the powers of the directors of BIM have been exercised in a manner, that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the Plaintiffs and the Class Members, within the meaning of section 248(2) of the *OBCA* ... [para. 3(f)].

[30] They ask for various declarations that certain defendants are vicariously liable for the acts of other defendants. Finally, they seek damages of $1,000,000,000 or, in the alternative, rescission of the transfer of shares pursuant to the joint bid or plan of arrangement.

The Material Filed

[31] As with the earlier pleadings motion, the material filed on this certification motion is voluminous, including facta that are far in excess of the customary length and a reply factum. One has to wonder why it is necessary to file this volume of material and also occupy three days of court time for oral submissions – all for a motion that is supposed to be about the suitability of a class action from a procedural standpoint rather than a merits evaluation.

The Issues on Certification Motion

[32] From the plaintiffs' perspective, the certification criteria have been met. They say the common issues trial and the valuation application should be tried at the same time or sequentially. Further, the proposed second fresh as amended claim is compliant with the pleadings and the subsequent appeal decisions.

[33] The defendants do not oppose certification of the *OSA* s. 131 circular misrepresentation claim. That section confers on security holders a right of action for damages (or rescission) for circular misrepresentation "without regard to whether the security holder relied on the misrepresentation".

[34] The defendants characterize the issues that are in dispute as follows:

(1) Class Definition
   (i) should compulsory acquisition holders be included within the certified class?
   (ii) should secondary market sellers be included within the certified class?
   (iii) is the class otherwise properly defined?

(2) Common Issues
   (i) do the oppression claims raise common issues?
   (ii) are the unjust enrichment and insider trading claims different than the circular misrepresentation claim so as to raise any separate common issues?
   (iii) are the proposed common issues otherwise properly framed?

(3) Litigation Plan
   (i) should the valuation application be heard concurrently with, or immediately after, the common issues trial as proposed in the litigation plan?
   (ii) who should pay for the costs of the notice program under the litigation plan?

(4) Suitability of the Plaintiffs to serve as representative plaintiffs
   (i) the defendants say that the plaintiffs demonstrate a disinterest or indifference to the lawsuit that makes them unsuitable to represent the class.

[35] The plaintiffs ask for approval of the proposed second fresh as amended statement of claim. The defendants raise concerns about two paragraphs that they say do not comply with my earlier decision.

[36] The defendants have also brought a motion for the advice and direction of the court about the form of a letter of credit that may be accepted as a result of an earlier order approving the terms of a third party funding agreement with the plaintiffs.

The Law Respecting Certification Generally

[37] Section 5 of the *CPA* provides:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) The pleadings or the notice of application discloses a cause of action;
(b) There is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
(c) The claims or defences of the class members raise common issues;
(d) A class proceeding would be the preferable procedure for the resolution of the common issues; and
(e) There is a representative plaintiff or defendant who,
  (i) Would fairly and adequately represent the interests of the class,
  (ii) Has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  (iii) Does not have, on the common issues for the class, an interest in conflict with the interests or other class members.

[38] The principles governing certification are very well settled and need not be reviewed extensively. A helpful summary is found in *Arora v. Whirlpool Canada LP,* 2012 ONSC 4642, aff'd 2013 ONCA 657, leave to appeal to S.C.C. refused 2013 CarswellOnt. 18667. Justice Perell wrote:

> 121 For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Minister of Agriculture)* at para. 14.
>
> 122 On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Metropolitan Toronto (Municipality)* at para. 16.
>
> 123 The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions – providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton* at paras. 26 to 29; *Hollick v. Metropolitan Toronto (Municipality)* at paras. 15 and 16.
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> 124 The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Metropolitan Toronto (Municipality)* at paras. 28 to 29. [citations omitted]

[39] What is therefore clear is that a certification motion is a procedural step only. It is not intended to be an assessment of the claim's merits but rather an evaluation of whether the litigation can be "appropriately prosecuted as a class proceeding". See also *Pro-Sys*

Consultants Ltd. v. Microsoft Corp., [2013] 3 S.C.R. 477 and a host of other authorities that repeatedly stress this admonition. To reiterate, the focus is supposed to be on the form of the action rather than its merits.

[40] With respect to the standard of proof, the court in *Pro-Sys* observed at para. 100 that the "*Hollick*" standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. In my experience, while the principle is easily stated, in practice the line seems to become blurred. Consequently, the court's subsequent commentary in *Pro-Sys* serves as a useful reminder:

> 103 Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.
>
> 104 In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

[41] With these principles in mind, I turn to a consideration of the requirements of s. 5.

[42] From an organizational perspective, I will deal with the issues largely in the order proposed by the defendants but bearing in mind that they significantly overlap. As Winkler R.S.J. observed in *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.):

> 25 Over-inclusive class definitions can be avoided without resort to merits-based identifiers by adherence to the concept that the core of a class proceeding is the element of commonality. It is implicit in that concept that the cause of action, the scope of the class and the common issues are inextricably inter-related. Indeed, the first three criteria for certification as a class proceeding under s. 5(1) of the *CPA* may be stated in a single sentence as follows: There must be a cause of action, shared by an identifiable class, from which common issues arise.

Is a cause of action disclosed?

[43] The short answer is yes. The defendants do not suggest otherwise. The claim seeks remedies under s. 131 and 134 of the *OSA*; s. 248 of the *OBCA*; and for unjust enrichment.

Is there an identifiable class?

[44] The proposed class definition is as follows:

> All persons, other than Excluded Persons*, who:
>
> (i) tendered for sale BIM Securities to take-over bids by ArcelorMittal, Nunavut, Iron Ore Holdings, NGP Midstream, NGP M&R and/or 1843208 (collectively, the "Offerors") and whose BIM Securities were taken up by the Offerors; or
>
> (ii) otherwise disposed of BIM Securities on or after January 14, 2011 [which is the date on which the joint bid was made].
>
> *Excluded Persons means (1) the Defendants, and their past and present subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns; (2) any member of the families of the Individual Defendants; (3) the following individuals or entities, each of which directly or indirectly entered into a lock-up agreement pursuant to which BIM Securities were tendered to the Joint Bid: Resource Capital Fund IV L.P.; Resource Capital Fund III L.P.; RCF Management LLC; John Lydall; Walmley Investments Ltd; Gordon Watts; Michael T. Zurowski; Richard Matthews; Richard D. McCloskey; Gregory G. Missal; Rondal S. Simkus; Daniella E. Dimitrov; Grant Edey; Wide Range Mining Projects Pty Ltd, as trustee for the G&K Fietz Family Trust; Gwen M. Gareau; and Russell L Cranswick; and (4) the dissenting shareholders ("Dissenting Shareholders") identified in Schedule "A" of the Notice of Application filed by 1843208 Ontario Inc. on May 17, 2011 in the dissent and appraisal proceeding, Superior Court of Justice, Toronto Region (Commercial List), Court File No. CV-11-9222-00CL ("Valuation Application"), however, such exclusion taking effect only to the extent of the Dissenting Shareholders' BIM Securities in respect of which dissent rights were exercised.

[45] Plaintiffs' counsel says that the proposed class is therefore comprised of those (i) whose Baffinland securities were taken up through the joint bid; (ii) whose securities were acquired through the plan of arrangement (but not the dissenting shareholders); and (iii) whose securities were sold on the secondary market.

[46] There is no question that the class as proposed is identifiable or as Strathy J. (as he then was) said, it is "simple and unremarkable": *Allen v. Aspen Group Resource Corp.*, [2009] O.J. No. 5213 (S.C.J.). It is objectively defined. Persons are able to determine whether they are members by reference to the definition alone. The definition identifies those who are bound by the result and who is entitled to notice. See *Berg v. Canadian Hockey League*, 2017 ONSC 2608. I see no merit in the defendants' assertion that the definition is vague because it refers to securities "otherwise disposed of", given the plaintiffs' position noted above.

[47] More substantively, however, the defendants say that neither the compulsory acquisition security holders nor the secondary market sellers should be included in the class definition. For the reasons that follow, I agree with their first submission and disagree with the second.

[48] The defendants submit that the circumstances of the compulsory acquisition security holders are different than those of the other proposed class members – and significantly so. In particular, they assert that there is no rational connection between the circumstances surrounding the acquisition of those persons' shares and the proposed common issues because their securities were not acquired pursuant to the joint offer. Rather, they were acquired pursuant to a plan of arrangement and subject to a shareholder vote and court approval, which occurred on March 22, 2011 and March 25, 2011 respectively, more than a month after the expiry of the joint offer and the last tendered shares taken up pursuant to the joint offer. The defendants stress the following points in their factum:

- security holders were provided information in relation to the plan of arrangement in the plan of arrangement circular, which is not one of the circulars alleged to have contained a misrepresentation. The proposed Second Fresh as Amended Statement of Claim does not allege any misrepresentation in the plan of arrangement circular. Further, s. 131 of the *OSA* relied on by the plaintiffs does not apply to that particular circular;

- prior to the shareholder vote and court approval, the Road Haulage Feasibility Study for the Mary River Project pleaded by the plaintiffs at para. 83 and following under the heading "The Truth is Revealed after the Joint Bid Closed" was publicly available. Therefore, the allegation that this study was undisclosed does not apply to the compulsory acquisition security holders;

- the compulsory acquisition security holders were granted dissent rights to have the fair value of their shares appraised as provided for under s. 185 of the *OBCA* and elected not to assert these dissent rights; and

- the compulsory acquisition security holders were entitled to make submissions to the Court as to the fairness and reasonableness of the compulsory acquisition of their shares pursuant to the plan of arrangement.

[49] Finally, the defendants argue that the court approval process conferred by the plan of arrangement, including dissent rights, provided a preferable procedure.

[50] The plaintiffs counter that the defendants' argument is obviously about the legal tenability of the claim and should have been raised on the earlier motion to strike when the defendants argued successfully that the secondary market sellers could not assert a s. 131 claim.

[51] I cannot agree. That argument was a legal one grounded in Rule 21. The consideration here on certification differs. My point is that neither the pleadings nor the evidentiary record support the relief these individuals seek.

[52] I have concluded that the compulsory acquisition security holders stand in a different position than other security holders *vis-à-vis* the proposed common issues. The compulsory acquisition plan was subject to a shareholder vote and court approval. No misrepresentation is pleaded in connection with the plan of arrangement circular. The

road haulage feasibility study was disclosed prior to the shareholder vote and court approval. There was a mechanism for these shareholders to make submissions to the court with respect to the reasonableness of the plan of arrangement and a process for the adjudication of dissent rights.

[53] I raise as well the prospect of inconsistent results and whether the inclusion of compulsory acquisition security holders could be interpreted as an impermissible collateral attack on the court's decision approving the plan. I have not overlooked that the approval of the plan of arrangement occurred when 1843208 controlled about 94 percent of the outstanding Baffinland shares. Perhaps it is true the approval was a foregone conclusion. Surely the answer to that would have been for this group to have exercised dissent rights as others did.

[54] Consequently, the compulsory acquisition security holders should be excluded from the class definition.

[55] With respect to the secondary market sellers, the defendants say that they do not raise common issues and require individual inquiries. They also submit that the plaintiffs' theory with respect to those sellers is problematic from a damages perspective. Here, the underlying context is that it has already been determined that secondary market sellers do not have a circular misrepresentation claim. Consequently, the only claim they might have lies in oppression, insider trading and tipping. I propose to address these arguments under the common issues discussion below.

Do the oppression claims raise Common Issues?

[56] The particulars of the alleged oppressive conduct are found at paragraphs 101 and 101 A, B and C of the claim. They are as follows:

- the Baffinland director circulars and amending notices and the January 13, 2011 Press Release and Material Change report contained misleading or untrue statements (para. 101);

- Baffinland failed to ensure that the terms of Baffinland's exclusivity agreement with ArcelorMittal contained terms which prevented it from joining forces with a hostile takeover bidder, which it ultimately did, when such terms were in common use in circumstances similar to these (para. 101A(a));

- Baffinland failed to take appropriate or any action to prevent Waheed from violating the terms of his confidentiality agreement with Baffinland when such actions would or could have either (i) put a stop to the Nunavut bid, and thus preserved the more valuable joint venture agreement with ArcelorMittal; or (ii) provided time for competitive bidders to consider and commence bids for Baffinland's shares (para. 101A(b));

- the defendant Daniella Dimitrov engaged in unlawful tipping between June and August (para. 101B); and

- the Baffinland officer and director defendants put their own interests ahead of the interests of Baffinland, the Plaintiffs and the class Members, by approving and supporting the Joint Offer which resulted in the accelerated vesting of the stock options of the Baffinland officers and directors to their personal benefit (para. 101C).

[57] The proposed common issues in respect of the oppression claim are articulated at Q. 17-20:

> During the Class Period, did any act or omission of BIM effect a result, or were the business or affairs of BIM carried on or conducted in a manner, or were the powers of the directors of BIM exercised in a manner, that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of the Class Members, within the meaning of section 248 of the *OBCA*?
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> If the answer to (17) is yes, should the Court make an order that BIM and the BIM Officers and Directors, or any one of them, compensate the Class Members pursuant to section 248(3) of the *OBCA*?
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> If the answer to (18) is yes, on what basis should the amount of compensation payable to the Class Members be determined?
>
> If the answer to (17) is yes, are there other remedies that should be ordered by the Court pursuant to section 248 of the *OBCA* to rectify the harm caused by BIM and the BIM Officers and Directors, or any of them, to the Class Members as a result of the conduct of those Defendants, or any of them, which was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of the Class Members?

[58] Turning then to the principles relevant to evaluating whether common issues exist, in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, the court quoted with approval the certification judge's comment that "[i]t should be kept in mind, however, that in certifying a common issue the court is not concluding that it will be answered in a manner favourable to one party or the other. The requirement that there must be an evidentiary basis for the existence of a common issue is a far cry from proof of the issue on the balance of probabilities."

[59] The court continued at para. 79:

> To the same effect, see also the majority of the Divisional Court in *Fresco*, at para. 72, and *Grant v. Canada (Attorney General)*, 81 C.P.C. (6th) 68 (Ont. S.C.J.), at para. 21. While the evidentiary basis for establishing the existence of a common issue is not as high as proof on a balance of probabilities, there must nonetheless be some evidentiary basis indicating that a common issue exists beyond a bare assertion in the pleadings. To be clear, this is simply the *Hollick* standard of "some basis in fact".

The Oppression Remedy Generally

[60] It may be helpful to set out now in a summary way, the principles applicable to the oppression remedy. In general terms, a court may make an order "in the event that an act or omission of the corporation (or affiliate) effects a result, or the business and affairs of the corporation have been carried on or conducted in a manner, or the powers of the directors have been exercised in a manner that is (i) oppressive, or (ii) unfairly prejudicial to; or (iii) that unfairly disregards the interests of any stakeholder": John A. Campion, Stephanie A. Brown, and Alistair M. Crawley, "The Oppression Remedy: Reasonable Expectations of Shareholders" in *Law Society of Upper Canada Special Lectures 1995: Law of Remedies: Principles and Proofs* (Scarborough: Thomson Canada Ltd., 1995) 229 at 232–233. This is the language of s. 248 of the *OBCA*.

[61] The seminal case discussing the oppression remedy (in that case, pursuant to s. 241 of the *Canada Business Corporation Act*) is *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69. The court set out a two part analysis. The first step is to examine reasonable expectations. If they have been breached, it is necessary to then consider whether the conduct complained of amounts to oppression, unfair prejudice or unfair disregard.

[62] The court went on to discuss the concept of reasonable expectations:

> 62 As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.
>
> 63 Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J. [Commercial List]). These expectations are what the remedy of oppression seeks to uphold.
>
> 64 Determining whether a particular expectation is reasonable is complicated by the fact that the interests and expectations of different stakeholders may conflict. The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment – the central theme running through the oppression jurisprudence – is most fundamentally what stakeholders are entitled to "reasonably expect".

[63] There is "no all-purpose definition of oppression". In *Ford Motor Co. of Canada v. OMERS*, [2006] O.J. No. 27 (C.A.), the court noted:

92 Courts rather than attempting to find an exhaustive all-purpose definition of oppression have tended to look for badges or *indicia* of oppressive conduct. A helpful catalogue is found in the reasons of Austin J. in *Arthur v. Signum Communications Ltd.*, [1991] O.J. No. 86 (Ont. Gen. Div.) at para. 132, (affirmed [1993] O.J. No. 1928 (Ont. Div. Ct.)) considering the provisions of the *OBCA*:

> Amongst the *indicia* of conduct which runs afoul of s. 247 are the following:
>
> (i) lack of a valid corporate purpose for the transaction;
>
> (ii) failure on the part of the corporation and its controlling shareholders to take reasonable steps to simulate an arm's length transaction;
>
> (iii) lack of good faith on the part of the directors of the corporation;
>
> (iv) discrimination between shareholders with the effect of benefitting the majority shareholder to the exclusion or to the detriment of the minority shareholder;
>
> (v) lack of adequate and appropriate disclosure of material information to the minority shareholders ; and
>
> (vi) a plan or design to eliminate the minority shareholders.

Is there commonality?

[64] The defendants submit that it is insufficient to simply plead a common expectation among class members. There must be some evidence in order for the court to find commonality, which they say is absent here or contradicted on the evidentiary record provided.

[65] Accordingly, the defendants submit that the oppression claims require individual evaluations and cannot be determined on a class-wide basis. The defendants do recognize that in some circumstances, shareholders' expectations can be inferred and direct testimony is not required: See *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONSC 1366, aff'd 2017 ONCA 1014; and *Noble v. North Halton Golf & Country Club*, 2016 ONSC 2962. They rely, however, on *Lord v. Clearspring Spectrum Holdings, L.P.*, 2017 ONSC 2246. Justice Myers wrote:

> [52] The oppression remedy starts with a claimant who holds an unmet expectation. However, not every hope, wish, or expectation, no matter how strongly held, will be actionable. The oppression remedy will only protect a person's expectation if it is also reasonable. That is, a hypothetical reasonable person, viewing the matter objectively, must accept the reasonableness of the expectation held by the claimant.

[53] In *Ernst & Young Inc. v. Essar Global Fund Ltd.*, ... Newbould J. disagreed with a case in which I also provided this starting point for an oppression analysis. At footnote 5 of his Reasons, Newbould J. wrote:

> The Essar Defendants contend that a party must have a subjective expectation ... The authority that Myers J. referred to for this statement says no such thing, and I do agree with it. As stated in *BCE*, the expectation held must have been reasonably held and the evidence of that may take many forms. As stated in *Ford*, there is no requirement that there be testimony from claimants as to their expectations.

[54] As I read this, any apparent disagreement between Newbould J. and me is semantic rather than substantive. Newbould J. seems to equate the requirement for there to be a subjective or personally held expectation with the issue of how the expectation is to be proven. I have not weighed-in on that issue.

[55] It is perfectly clear from *BCE* that before a person can claim an oppression remedy, he or she must actually, subjectively, ie. personally, hold an expectation. ...

[56] That is, a stakeholder must personally (i.e. subjectively) have an expectation and actually rely on it before it even gets to the question of whether that expectation is also objectively reasonable.

[57] I do not read Justice Newbould's decision as disagreeing with the proposition that there must be a stakeholder who personally holds an unmet, reasonable expectation. ... I agree that the case law does not require expectations to be proven through an individual's direct testimony. I have no issue with a representative plaintiff proving the expectations of those whom it represents by leading evidence establishing an inference like any other fact. Ultimately, Newbould J. and I both read *BCE* as providing that there must be a stakeholder who holds an unmet, reasonable expectation. We agree as well that the stakeholder's expectation and its reasonableness can be proven by inference.

[66] A similar conclusion is expressed in *Shaw v. BCE Inc.*, [2003] O.J. No. 2695 (S.C.J.), in which Justice Farley observed that "a claim based on reasonable expectations is also highly individualized and depending on an assessment of what the individual's expectations were, on what they were based, and whether they were reasonable".

[67] In the circumstances of this case, the defendants argue that there is no basis to infer that all shareholders had the same expectation and point to some of the evidence in support of their contention. For example, a huge number of shares traded over the class period when the common expectation is said to have existed. The volume of trading, it is suggested, demonstrates that there was no commonality of expectations. In particular, they point to evidence that is available including:

- over 325 million Baffinland common shares were tendered into the joint offer;

- more than 754 million Baffinland common shares were traded on the secondary market during the bidding process;

- some of the new investors in Baffinland shares during the bidding process were hedge funds, asset managers focused on distressed credit opportunities and arbitrageurs. Their expectations could well have been focused on short term gains rather than a long term investment strategy; and

- some investors might have been speculating on whether there would be further increases in the bid price and were essentially not interested in the Mary River project itself. Consequently, they say the shareholders were not a homogenous group with the same similar objectives.

[68] The plaintiffs counter that the defendants' objection is misconceived. They say that if the defendants are correct, an oppression claim could never be advanced on behalf of a group of stakeholders against a public company because it would be "necessary to prove that the asserted expectations were subjectively held by each relevant stakeholder, that each stakeholder subjectively relied on the subjective expectations and that each stakeholder subjectively believed that their subjective expectations were violated and, further, where the alleged oppressive conduct is found in the making of a misrepresentation, that each stakeholder subjectively relied on the misrepresentation." [Plaintiffs' Reply Factum para. 34].

[69] I agree with the plaintiffs. First, it seems to me that shareholder expectations have both an objective and a subjective component. Regardless of subjective expectations, which deal with risk tolerance and profit seeking risk taking, the objective component deals with the integrity of the market and the information that is disseminated in it. The objective component is something every shareholder would reasonably expect. The issues raised in this claim arise in that context. Indeed, this is made clear in the pleading at para. 100 and following of the proposed Statement of Claim where the plaintiffs characterize their expectations as follows:

> 100. a) the business and affairs of BIM [Baffinland] would be conducted in accordance with the law and, in particular, in accordance with the disclosure requirements and insider trading prohibitions of Canadian securities laws;
>
> b) the directors and management would take all reasonable steps available to them to protect their interests as shareholders in the context of their endeavours to maximize shareholder value; and
>
> c) the directors and officers of BIM would not put their own interests ahead of the interests of BIM, the Plaintiffs and the Class Members, as shareholders of BIM.

101A. BIM and the BIM Officers and Directors further disregarded the reasonable expectations of the Plaintiffs and Class Members by:

a) failing to ensure that the terms of BIM's exclusivity agreements with ArcelorMittal contained terms which prevented it from joining forces with a hostile takeover bidder, which it ultimately did, when such terms were in common use in circumstances similar to these;

b) failing to take appropriate or any action to prevent Waheed from violating the terms of his confidentiality agreement with BIM when such actions would or could have either

(i) put a stop to the Nunavut bid, and thus preserved the more valuable joint venture agreement with ArcelorMittal; or

(ii) provided time for competitive bidders to consider and commence bids for BIM's shares.

101B. Dimitrov, as an officer and director of BIM, further disregarded the reasonable expectations of the Plaintiffs and the Class Members by engaging in unlawful tipping as described in paragraphs 90A, 90B and 90C herein.

101C. The BIM Officers and Directors further disregarded the reasonable expectations of the Plaintiffs and the Class Members by putting their own interests ahead of the interests of BIM, the Plaintiffs and the Class Members, by approving and supporting the Joint Bid which resulted in the accelerated vesting of the stock options of the BIM Officers and Directors to their personal benefit, as particularized herein.

[70] Second, to the extent that subjective expectations arise, the Supreme Court of Canada has made it clear that an individual's reasonable expectations are evaluated objectively but direct evidence is not necessarily required. See *BCE, supra* and in particular the paragraphs quoted. The court also set out at paras. 72-88 of its decision a series of factors that assist in the exercise, including:

- commercial practice;
- the nature of the corporation;
- relationships between claimants and other corporate actors;
- past practice;
- a claimant's own available preventive steps;
- representations and agreements; and

- the fair resolution of conflicting interests between stakeholders.

[71] In *Ford Motor Co. of Canada v. OMERS, supra,* the court stated:

> [65] I can find no support for the proposition that there must be evidence, in the form of testimony, from the shareholders as to their expectations. The existence of reasonable expectations is a question of fact and like any question of fact can be proved by direct evidence or by drawing reasonable inferences from circumstantial evidence. This point is made by the Divisional Court in *Arthur v. Signum Communications Ltd.*, [1993] O.J. No. 1928 (Div. Ct.), at para. 7: [page108]
>
> > The state of a man's mind as to the future -- intentions and expectations -- is a question of fact. In determining that fact, there is no error in looking at prior statements and drawing an inference based on the respective weight of all the individual pieces of evidence. It is a pure question of fact what Arthur's intentions and expectations were at the material time and a pure question of fact whether they were reasonable.
>
> [66] Where the minority shares in a public company are widely held it may be difficult to adduce cogent direct evidence of the reasonable expectations of the shareholders. In such cases, it is open to the trial judge to infer reasonable expectations from the company's public statements and the shared expectations about the way in which a public company should be run. As Farley J. said in *820099 Ontario Inc. v. Harold E. Ballard Ltd.*, [1991] O.J. No. 266, 3 B.L.R. (2d) 113 (Gen. Div.), at para. 129, aff'd [1991] O.J. No. 1082, 3 B.L.R. (2d) 113 (Div. Ct.), "It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as his own individual 'wish list'. They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders."
>
> [67] This court has held as much in *Themadel Foundation v. Third Canadian General Investment Trust Ltd.* (1998), 1998 CanLII 973 (ON CA), 38 O.R. (3d) 749, [1998] O.J. No. 647 (C.A.), at pp. 753-54 O.R.:
>
> > The public pronouncements of corporations, particularly those that are publicly traded, become its commitments to shareholders within the range of reasonable expectations that are objectively aroused. In *Naneff v. Con-Crete Holdings Ltd.* (1995), 1995 CanLII 959 (ON CA), 23 O.R. (3d) 481 at p.490, 23 B.L.R. (2d) 286 (C.A.), Galligan J.A. put it as follows:
> >
> > > The law is clear when determining whether there has been oppression of a minority shareholder, the court must determine what the reasonable expectations of that person were according to the arrangements which existed between principals. The cases on this issue are collected and analyzed by Farley J. in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at p. 123 (Ont. Gen. Div.), affirmed (1991), 3

> B.L.R. (2d) 113 (Ont. Div. Ct.). I agree with his comment at pp. 185-86:
>
> > Shareholder interests would appear to be intertwined with shareholder expectations. It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as his own individual "wish list". They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders.

[72] See also *Ernst and Young Inc. v. Essar Global Fund Ltd.*, *supra.*

[73] The defendants' reliance on *Clearspring* seems misplaced. To reiterate, Justice Myers wrote:

> [57] ... I have no issue with a representative plaintiff proving the expectations of those whom it represents by leading evidence establishing an inference as to those stakeholders' subjective and reasonable expectations. Expectations can be proven through inference like any other fact.

[74] Consequently, I see no material difference between Justices Newbould and Myers, except perhaps a semantic one, as the latter suggested. (For the sake of completeness, I note that Justice Myers' decision was upheld by the Court of Appeal at 2017 ONCA 1016 without comment about the discussion of proof of reasonable expectations.)

[75] One final point before leaving the topic, the *Shaw v. BCE, supra* decision is dated and appears out of step with subsequent decisions such as *BCE, Ford,* and *Essar.*

"Buying into Oppression"

[76] The defendants also say that a shareholder is not entitled to compensation in respect of oppressive conduct that preceded it becoming a shareholder because it would be a windfall to them. They rely on *Ford v. OMERS, supra.*and in particular, paras. 112-115. Their submission is outlined at paras. 98-99 of their factum:

> 98. ...The Plaintiffs' theory is that Baffinland securities sold on the secondary market after January 14, 2011 were sold at "too low a price." If that is true, the purchaser of that security purchased it at a corresponding "too low a price", such that if she then proceeded to sell that security on the secondary market, tendered it into the Joint Offer or had her security acquired pursuant to the Plan of Arrangement, she cannot also claim to have suffered damages. Any claim for having sold or tendered at too low a price is entirely offset from having acquired the security at too low a price. Only one putative class member who disposed of the same shares after January 14, 2011 can have a claim for having sold at "too low a price". For example, a secondary market seller and a secondary market purchaser of the same shares who tendered to the Joint Offer cannot both succeed in claiming damages for disposing of the shares at "too low a price". By including secondary market sellers in the

> proposed class, the Plaintiffs have created a conflict among putative class members.
>
> 99. In the alternative, the January 14, 2011 date provides an inadequate reference point for defining the class as it relates to secondary market sellers. Apart from the reference date after which sales on the secondary market are captured, there also needs to be a reference date for the acquisition of shares that precedes the allegedly oppressive conduct. Otherwise, it would allow for shareholders who acquired shares in Baffinland after the alleged oppressive conduct to form part of the class. As noted above, oppression law only permits compensatory claims by persons who were shareholders at the time of the oppressive conduct.

[77] At first blush, there is some attraction to this argument and consequently, it bears discussion.

[78] The OMERS case was a valuation application to determine the fair value of OMERS' common shares. The dissenting shareholders sought an oppression remedy under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 with respect to a transfer pricing system. A significant issue at the trial was whether the dissenting shareholders were entitled to a remedy for past oppression. The trial judge held that as a matter of law, a person had to be a shareholder at the time of the alleged oppression. OMERS appealed.

[79] The Court of Appeal noted first that "the fact that a complainant "bought into oppression" does not automatically preclude an action under s. 241 of the *CBCA* [para. 105]. The court then reviewed the remedies available for oppression. It considered OMERS' argument that its claim related to oppressive conduct by Ford over a ten year period. Consequently, it submitted that all shareholders, no matter when their shares were acquired, were entitled to share in the remedy. The court disagreed. It reasoned:

> 110 I disagree with the OMERS shareholders that the distinction between personal causes of actions and derivative actions is a useful one for the purpose of determining the appropriate remedy under s. 241. Section 241 includes both personal remedies and remedies that benefit the corporation as a whole – for instance, para. (3)(h) gives the court the power to set aside a transaction or contract to which a corporation is a party and to compensate the corporation. However, in my view, the nature of relief that a court can grant must be anchored in the remedy sought, rather than turning on any distinction between personal and derivative causes of action.
>
> 111 It seems to me that it would be a serious mistake to attempt to confine the broad discretion granted courts by the oppression remedy within a formal construct of causes of action. To do so could bring with it all the complexities of the common law as to when a shareholder might, notwithstanding the rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (Eng. V.-C.) maintain a personal action and thrust those complexities into the oppression remedy. Parliament could not have intended such a result. The breadth of the remedy to which these shareholders are entitled must turn on the wording of the statutory provisions.

> 112 While s. 241 contemplates remedies that benefit the corporation or shareholders as a whole, it is nevertheless founded on the principle of a wrong done to a shareholder or identifiable group of shareholders. Section 241(2)(a) [the provision relied upon in this case] is drawn in broad terms but it depends upon a finding that the complained of act or omission by the corporation or any of its affiliates "is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer".
>
> 113 In this case, the OMERS shareholders seek the personal remedy of compensation under s. 242(3)(j) as "an aggrieved person", not an order "compensating the corporation" under s. 242(3)(h), and they must therefore show entitlement to compensation. Compensation excludes any notion of a windfall for wrongs done to others in the past.
>
> 114 As the trial judge said at paras. 252 to 254, the effect of any past oppression would normally be reflected in the market price of the shares at the time the shareholder purchased them. Thus, any purchase was at a market price "that implicitly reflected the publicly reported earnings of Ford Canada under the transfer pricing structure to that point in time".
>
> 115 Justice Farley made the same point in *Royal Trust Corp. of Canada v. Hordo* (1993), 10 B.L.R. (2d) 86 (Ont. Gen. Div. [Commercial List]), a decision relied upon by the trial judge in this case. At para. 17, Farley J. said:
>
> > [A] sale of those shares from a holder who may have been oppressed does not carry with it the right to collect damages for such oppression. If this is the case it is clear that the value of those shares in the market would have decreased to compensate for the amount of the oppression. That benefit should generally remain with the person who is actually oppressed.
>
> I agree. To award a shareholder for past oppression would not be compensation but a windfall.

[80] Recall that the plantiffs seek various declaratory relief, and damages or rescission. In respect of the oppression remedy specifically, they seek declaratory relief from which the financial claim presumably flows. It seems to me that this is a personal remedy of compensation to the shareholders and not an order compensating the corporation. As the court noted in OMERS, compensation to aggrieved shareholders necessarily excludes any notion of a windfall for wrongs done to others in the past. In other words, compensation should be restricted to those actually oppressed.

[81] Nevertheless, I have concluded that the defendants' argument should not prevail. That is because it fails to take into account the plaintiffs' formulation of the case. Their theory as articulated in the material filed on this motion is that the market was essentially controlled by the joint bid after January 14, 2011. The effect was to deprive class members of the opportunity to sell their shares for more than $1.50 – regardless of when their shares were acquired.

Remedies sought

[82] The defendants object to the plaintiffs pleading and seeking relief under the *OSA* and for oppression, insider trading and unjust enrichment. They say that to the extent the oppression remedy arises from alleged misrepresentations, the plaintiffs should seek their remedy exclusively under the *OSA*. They make the point that if the plaintiffs reasonably expected that Baffinland would comply with the disclosure requirements under the securities legislation, they would also reasonably expect recourse under securities laws. I do not agree that as a matter of logic, one expectation would necessarily follow the other.

[83] The defendants additionally submit that the unjust enrichment and insider trading claims do not raise any separate common issues. This objection can be quickly dealt with. First, in any kind of litigation, a plaintiff can plead various causes of action – for example, negligence and breach of contract. There is nothing inherently objectionable about that. Different causes of action may provide different remedies or measures of damage. This case is no different. In my view, a plaintiff is entitled to frame its claim as it sees fit, subject of course to the cause of action being tenable at law. It also bears noting that notwithstanding that various causes of action are advanced, the plaintiffs cannot be awarded duplicative damages. In other words, there can be no double recovery. Further, the submission is belied by the proposed common issues questions related to these claims:

> 9. Were the Offerors and Waheed, or any of them, in a "special relationship" with BIM within the meaning of the *OSA* (and, as applicable, the equivalent provisions of the Other Canadian Securities Acts)?
>
> 10. Did the Offerors and Waheed, or any of them, propose to make a take-over bid for the securities of BIM or become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with BIM?

[84] These questions on their face raise separate common issues. (I pause here to note that the plaintiffs intend to delete reference to Mr. Waheed as the defendants have requested.)

[85] Finally, s. 131(11) of the *OSA* specifically permits other causes of action to proceed with respect to those who have a s. 131 claim. It reads:

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

Miscellaneous Challenges to Common Issues

[86] The defendants seek modification of the wording of some of the proposed common issues. The plaintiffs have agreed to most. The only remaining objection can be quickly dealt with.

[87] The proposed additional words in common issues 1, 5, 11, 13, 15 and 17 ("as pleaded and particularized in Schedule B of the Second Fresh as Amended Statement of Claim") are unnecessary. The common issues will be adjudicated on the basis of the case as pleaded. Further, it is possible that the common issues will be changed or refined as the case proceeds through documentary and oral discoveries.

Preferability and Litigation Plan

[88] The plaintiffs propose that the common issues trial should be heard either with or before the valuation proceeding. The dissenting shareholders agree. The defendants want the valuation proceeding to be scheduled and heard as soon as practicable. Their submission essentially advocates that the valuation proceeding is the preferable procedure because it will set the ceiling on any potential damages for class members. If the value of the shares is equal to or less than the joint offer price, it is unlikely that issues of liability would be litigated.

[89] They submit:

- Justice Leitch's earlier stay decision expires upon the determination of the certification and as a result, the request must be considered *de novo*;
- the dissenting shareholders do not form part of the class;
- the interim stay was granted five years ago but this action is still a long way from trial;
- in contrast, the valuation proceeding can be heard within a reasonably short time;
- the issues in the valuation application are distinct from those at a common issues trial;
- contrary to the dissenting group's submission, there are no real or credible access to justice issues for them given its composition and the potentially large recovery if the court agrees with their estimation of share value;
- the decision in the valuation proceeding will not be determinative of Mr. Rooney's damages;
- there is no overlap in factual or legal issues in dispute in the two proceedings.

[90] The defendants also propose that the plaintiffs be permitted to intervene in the valuation application on behalf of the class. The defendants would not oppose.

[91] Rule 6.01 deals with consolidation and common hearings. It provides:

> 6.01(1) Where two or more proceedings are pending in the court and it appears to the court that,
>
> (a) they have a question of law or fact in common;
>
> (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under this rule, the court may order that,
(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
(e) any of the proceedings be,
(i) stayed until after the determination of any other of them, or
(ii) asserted by way of counterclaim in any other of them.

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.

[92] In my view, the stay should be continued. There is no change in circumstance that would justify any conclusion contrary to Justice Leitch's findings quoted above, which I interpret to be essentially findings of fact. I am also persuaded that there are access to justice issues for the dissenting group. The cost of litigation is obviously more manageable if shared with the class. I see no merit to the defendants' contention that if successful, the dissenting group would be entitled to a significant sum of money and as a result, there are no real access to justice issues. This submission ignores that the cost of litigation – including the experts' fees – is generally front end loaded. Further, I do not understand why the composition of the dissent group is relevant. Certainly none of them could provide the required expert opinion.

[93] It is also worthwhile to remember that the stay, which the dissenting group supports, works to their detriment in the sense that they remain uncompensated for their shares.

[94] Finally, a class action is otherwise the preferable procedure for the class. There is really no other economically feasible or judicially manageable way to have the issues adjudicated. The logistical issues of when and how the valuation proceeding is to be adjudicated can be determined at some later time.

Representative Plaintiff

[95] There is no good reason to conclude that the proposed plaintiffs are unsuitable. They are perhaps not as actively involved in the prosecution of the action as other persons might be but that does not seem to be a sufficient reason to disqualify them.

[96] The issue is whether they are capable of understanding the proceeding and providing instructions. There is no evidence that the plaintiffs do not meet this requirement.

Miscellaneous Issues

Costs of Notice

[97] I see no compelling reason why this issue need be dealt with at this time. It can be addressed at some later point.

Letters of Credit

[98] On November 21, 2013, the court approved a litigation funding agreement between a third party funder and the plaintiffs. The order required the payment into court, at three stages of the litigation, as security for the defendants' costs. The funds were to be in the form of cash, certified cheque, money order or an irrevocable letter of credit in a form acceptable to the plaintiffs, their counsel, and the Accountant of the Superior Court of Justice.

[99] The order also provided that if the third party funder failed to post the security ordered, the defendants were at liberty to move to have the action stayed or dismissed.

[100] The first deposit of $500,000 in the form of a letter of credit was duly made as the order stipulated. It contains an expiry date but is subject to annual renewal at the discretion of the financial institution, in this case the Bank of Montreal. The beneficiary of the letter of credit is the Accountant of the Superior Court. The letter contains the following language:

> Bank of Montreal ("the Bank") hereby issues its irrevocable standby letter of credit for an amount not exceeding CAD 500,000.00 (Canadian Dollars five hundred thousand only) on behalf of Maurice Blackburn Pty Ltd. (ABN 21 105 657 949), Suite 179 Chetwynd Street, North Melbourne, 3051 Victoria, Australia ("the Applicant") in favour of Accountant of the Superior Court of Justice, Ontario, Canada ("the Beneficiary") in connection with claims funding international's (CFI) obligations under court order and funding agreement per court file no. 3967-11CP dated 21 November 2013 of Ontario Superior Court of Justice.
>
> Expiry Date: 30 November 2014
>
> It is a condition of this letter of credit that it shall be deemed to be automatically extended, without amendment, for one (1) year from the present or any future expiration date hereof, but not beyond November 30, 2017 (final expiry date), unless at least thirty (30) days prior to any such expiry date (excluding 2017, expiry date), we shall notify you in writing, by registered mail or courier, that we have elected not to renew this letter of credit for any additional period.

[101] On November 1, 2017, the letter of credit was amended. It now provides:

> Expiry date has been amended to November 30, 2018.
>
> This irrevocable standby letter of credit is still subject to automatic extension clause.
>
> Final expiry date has now been amended to November 30, 2019.

[102] The defendants ask the court to provide direction to the Accountant that a letter of credit subject to annual renewals and an expiry date is not satisfactory. They further ask that the action be stayed until suitable security is posted. In my experience, letters of credit are almost invariably subject to renewal.

[103] The letter of credit is obviously irrevocable for its term. However, if not renewed and replaced, I recognize that the promise of security for the defendants' costs disappears. In my view, the appropriate solution is to give direction to the Accountant that if the Bank gives the requisite 30 day notice that it does not intend to renew, the Accountant is to call on the letter of credit for payment.

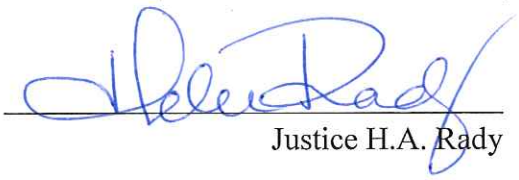
Approval of Statement of Claim

[104] The defendants oppose paras. 32A(c) and 74(g) of the proposed second as amended statement of claim. The defendants say that the proposed amendments do not comply with my earlier order because they still do not adequately identify the business plans and strategies being referenced. The defendants complain that the defect prevents them from knowing the case they must meet.

[105] I agree. The proposed pleading respecting the business plans and strategies is so generic as to be unhelpful. Subject to those two paragraphs being better particularized, the draft is otherwise approved.

Conclusion

[106] I am satisfied that the plaintiffs have met each of the requirements of s. 5 of the *CPA* and the action will therefore be certified as a class proceeding, subject to all of the necessary amendments to conform with these reasons.



Justice H.A. Rady

Released: May 18, 2018

CITATION: Rooney v. ArcelorMittal et al, 2018 ONSC 1878
COURT FILE NO.: 3957-11CP
DATE: 20180518

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

REASONS FOR JUDGMENT

Rady J.

Released: May 18, 2018