COURT OF APPEAL FOR ONTARIO

CITATION: Rooney v. ArcelorMittal S.A., 2016 ONCA 630
DATE: 20160817
DOCKET: C60949

Simmons, Gillese and Hourigan JJ.A.

BETWEEN

Peter Rooney and Archie Leach

Plaintiffs (Appellants)

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 (Respondents)

Proceeding under the *Class Proceedings Act, 1992*

Michael G. Robb, Douglas M. Worndl and Emilie Maxwell, for the appellants Peter Rooney and Archie Leach

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

Andrea Burke and Michael Finley, for the respondents 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

Alan L. W. D'Silva, for the respondents Richard D. McCloskey, John Lydall, and Danielle Dimitrov

Heard: May 4, 2016

On appeal from the order of Justice Helen A. Rady of the Superior Court of Justice, dated July 20, 2015.

Hourigan J.A.:

Overview

[1] This appeal is about the interpretation of s. 131(1) of the *Securities Act*, R.S.O. 1990, c. S.5. That subsection provides that, in the context of a misrepresentation in a take-over bid circular, the security holders of the offeree issuer may sue on account of that misrepresentation. Two issues arise. The first is whether the security holder must choose between suing the offeror and suing the offeror's directors and other individuals who signed or approved the take-over bid circular. The second is whether security holders who sold their shares in the secondary market can rely on s. 131(1) to assert a claim based on a misrepresentation in a take-over bid circular. Both issues are questions of first impression before this court.

[2] With respect to the first issue, the motion judge found that a plaintiff who wants to bring an action under s. 131(1) must make an election as to whom it will sue. As I will explain below, in my view, the motion judge focused too narrowly on the plain meaning of s. 131(1). The modern principle of statutory interpretation requires the court to look not only to the plain meaning of a particular provision

but to the surrounding context in which the words of that provision are found. Here, once you pan the analytical lens out to view s. 131(1) as part of a larger scheme of civil liability for misrepresentation in securities markets, the motion judge's interpretation cannot be sustained.

[3] With respect to the second issue, the motion judge found that security holders who transacted in the secondary market cannot rely on s. 131(1) to assert a claim. In my view, the motion judge was correct in her analysis on this point. The argument that secondary market participants have a cause of action under s. 131(1) ignores the legislative scheme and history of the *Securities Act*.

[4] In these reasons, I consider first the background facts to put the legal analysis in context. In the analysis section, I first review the modern principle of statutory interpretation. I then consider the two issues identified above in light of that principle.

Background

[5] The appellants were security holders of the respondent, Baffinland Iron Mines Corporation ("Baffinland"). On September 22, 2010, Baffinland was the target of a hostile take-over bid by a group headed by the respondent, Jowdat Waheed. Mr. Waheed had previously been hired by Baffinland to provide strategic advice to its board. The respondent, ArcelorMittal S.A., first made a friendly bid for Baffinland on its own behalf and then ultimately submitted a joint

take-over bid with Mr. Waheed's group. That joint take-over bid expired in February 2011.

[6] As required by the *Securities Act*, the joint take-over bid included a take-over bid circular, which was sent to all of Baffinland's security holders and filed with the Ontario Securities Commission (the "OSC"). Pursuant to their obligations under the Act, the directors and officers of Baffinland considered the bid and prepared a directors' circular. This document was also provided to all of Baffinland's security holders and was filed with the OSC.

[7] The appellants commenced a class action alleging that the circulars failed to disclose material information and that the information that was disclosed in the circulars was materially misleading and replete with misrepresentations about the business and affairs of Baffinland. They sued the persons and companies who signed and filed the circulars, alleging that, as a consequence of the defendants' conduct, they received less for their Baffinland securities than they otherwise would have.

[8] The appellants rely on s. 131(1) of the *Securities Act*, which provides as follows:

> **131. (1)** Where a take-over bid circular sent to the security holders of an offeree issuer as required by the regulations related to Part XX, or any notice of change or variation in respect of the circular, contains a misrepresentation, <u>a security holder may</u>, without regard to whether the security holder relied on the

> misrepresentation, elect to exercise a right of action for rescission or damages against the offeror or a right of action for damages against,
>
> > (a) every person who at the time the circular or notice, as the case may be, was signed was a director of the offeror;
> >
> > (b) every person or company whose consent in respect of the circular or notice, as the case may be, has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by the person or company; and
> >
> > (c) each person who signed a certificate in the circular or notice, as the case may be, other than the persons included in clause (a). [Emphasis added.]

[9] The respondents brought various motions to strike the appellants' statement of claim. Those motions were largely unsuccessful. However, there are two rulings on the motions to strike that the appellants appeal to this court. First, the ruling that the appellants are required under s. 131(1) to elect whether to sue the offerors under the joint bid or their respective directors and signatories. Second, the ruling that security holders who transacted in the secondary market may not assert a claim pursuant to s. 131(1) of the Act.

Analysis

(1) Modern Principle of Statutory Interpretation

[10] The starting point in a review of the modern principle of statutory interpretation is *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27. That case provides both general guidance on the proper approach to statutory interpretation and specific guidance on how to apply that approach where the plain meaning of a provision appears to conflict with its underlying statutory purpose.

[11] *Rizzo Shoes* is the best known authority for how to approach the task of statutory interpretation and has been cited more than 3,000 times by courts at all levels. Iacobucci J., writing for the court, endorsed Driedger's "modern principle" of statutory interpretation, at para. 21, quoting the following passage from Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87:

> Today there is only one principle or approach, namely, 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.

With these words, the Supreme Court fully embraced Elmer Driedger's "modern principle" of statutory interpretation. But to fully appreciate the significance of this statement, we have to ask: "modern" compared to what?

[12] Ruth Sullivan explains that, in the nineteenth and for much of the twentieth centuries, statutory interpretation was dominated by the plain meaning rule. That rule held that where the words of a statute were clear and unambiguous, the courts applied them as they were written – even if legislative intention or practical considerations pointed in another direction. At times, courts relied instead on the so-called golden rule, which allowed courts to depart from the plain meaning of a statute but only when that meaning lead to absurd results.: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2014), at §2.13-2.17.

[13] The modern principle takes a more holistic view. As Iacobucci J. explained in *Rizzo Shoes*, at para. 21, the modern principle "recognizes that statutory interpretation cannot be founded on the wording of the legislation alone." Sullivan expands on this idea, at §2.18: "Today, as the modern principle indicates, legislative intent, textual meaning and legal norms are all legitimate concerns of interpreters and each has a role to play in <u>every</u> interpretive effort" (emphasis added).

[14] That is the general guidance that *Rizzo Shoes* provides in all cases involving statutory interpretation. Equally important for present purposes is the guidance the case provides in circumstances where the plain meaning of a provision appears to conflict with its underlying statutory purpose. The issue in *Rizzo Shoes* was whether employees who lost their jobs when their employer

went bankrupt were entitled to termination and severance pay under the *Employment Standards Act, 1981*, S.O. 1981, c. 22 (the "*ESA*"). That statute provided that such benefits were payable when a claimant's employment was "terminated by an employer": see ss. 40 and 40*a*. The question was whether bankruptcy acted as a "termination" for purposes of the Act.

[15] The judge at first instance held that it did. He reasoned that the object and intent of the *Employment Standards Act* was to provide minimum employment standards and to benefit and protect employees' interests. As remedial legislation, the Act should be given a fair, large, and liberal interpretation to advance its goals.

[16] The Court of Appeal for Ontario disagreed. It focused on the plain meaning of the impugned provisions and concluded that the rights to termination and severance pay were limited to situations where the employer actively terminates the employee – not when the termination results by operation of law, as in a bankruptcy.

[17] Iacobucci J. identified the fundamental tension as follows, at para. 20:

> At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush,

> bankruptcy does not fit comfortably into this interpretation.

[18] It was in this context that Iacobucci J. repudiated the view that statutory interpretation could be "founded on the wording of the legislation alone." Instead, the words of the statute had to be read in their entire context, having regard not just to their ordinary and grammatical meaning but also to the scheme and object of the Act and to the legislature's intention.

[19] Iacobucci J. examined the Court of Appeal's reasoning in light of this standard and found it "incomplete". He explained his conclusion, at para. 23:

> Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized.

[20] Applying the modern principle to the case before him, Iacobucci J. concluded that the impugned provisions of the *Employment Standards Act* should be interpreted to include the employees whose jobs were terminated as a result of their employer's bankruptcy. He held the following with respect to the Court of Appeal's restrictive interpretation of the word "termination":

- It was incompatible with the object of the Act, which was to protect employees;

- It was incompatible with the object of the termination and severance pay provisions themselves, which was to provide employees with a cushion against the adverse economic effects of termination without notice; and
- It would lead to absurd results because it would distinguish between employees' entitlement to benefits based on whether they were dismissed the day before or the day after their employer's bankruptcy became final.

[21] In considering the arguments advanced on this appeal, this court must take the modern approach described by Iacobucci J. It is not permissible or helpful to look at the words of s. 131(1) in isolation and without regard to the scheme and object of the Act and to the legislature's intention.

(2) Election of Potential Defendants

(a) Nature of the Issue

[22] The parties agree that s. 131(1) requires a security holder to choose between suing the offeror for rescission and suing the offeror for damages, since the Act treats these as mutually exclusive causes of action. The controversy lies in determining whether the provision also requires a security holder to choose between suing the offeror and suing the offeror's directors and the other individuals listed in clauses (a) to (c).

[23] The appellants were able to point to one previous case where the Superior Court certified a class action under s. 131(1) against both offerors and their

directors and signatories, but the question whether the security holders in that case should instead have been put to an election does not appear to have been raised: see *Allen v. Aspen Group Resources Corp.* (2009), 81 C.P.C. (6th) 298 (Ont. S.C.).

[24] That said, in *Allen*, Strathy J. (as he then was) described s. 131(1) in *obiter* as giving an offeree's security holders a right of action against an offeror and its directors and signatories, at para. 8:

> The teeth of the take-over bid provisions are found in s. 131, which give the shareholders of the target company a civil remedy in damages, as well as a claim against the offeror for rescission, in the event of misrepresentation or non-disclosure in the take-over bid circular. The remedy can be exercised not only against the offeror corporation, but also against the directors or officers of the offeror who signed the circular, experts whose reports appeared (with their consent) in the circular, and those – such as auditors – who signed a certificate in the circular. [Emphasis added.]

[25] While Strathy J.'s comments are not determinative of the issue, they lend weight to the appellants' preferred interpretation of s. 131(1).

[26] The motion judge acknowledged, at para. 132, that s. 131(1) "is not as clearly expressed as it could be". She also found it "unlikely", at para. 131, that the very experienced counsel and judge in *Allen* would have overlooked the election issue.

[27] Despite these reservations, the motion judge accepted the respondents' interpretation. She gave four reasons, at para. 132:

- The "plain and grammatical meaning" of the operative words in the section "appear to require an election" as between a right of action against the offeror and a right of action against its directors.
- The combined use of the word "elect" and the word "or" in s. 131(1) "seems to demonstrate" that the right of action against an offeror and against the persons listed in cls. (a) to (c) are mutually exclusive.
- The "statutory context" of s. 131(1) supports the conclusion that the legislature "intended to create mutually exclusive rights of action" against an offeror on the one hand and the offeror's directors on the other.
- The legislative history of s. 131(1) "suggests that the legislature deliberately avoided creating concurrent statutory rights of action" against an offeror and the persons listed in cls. (a) to (c).

(b) Positions of the Parties

[28] The appellants submit that the *Securities Act* is remedial legislation aimed at protecting investors and must be interpreted consistent with that purpose. They argue that the only election required under s. 131(1) is for a security holder to decide whether to sue the offeror for rescission or for damages; a security

holder electing to sue the offeror for damages may also sue the offeror's directors and signatories for damages.

[29] The appellants note that, in its first iteration, s. 131(1) (then s. 127) clearly contemplated concurrent causes of action against the offeror and the offeror's directors and signatories. At the time of first reading, the section provided "a right of action for rescission or damages against the offeror, and a right of action for damages" (emphasis added) against the individual directors and signatories: Bill 7, *An Act to revise the Securities Act*, 2nd Sess., 31st Leg., Ontario, 1978, cl. 127(1). The draft bill went to committee and returned for a second reading with what the appellants say was a clarification that the security holder had to elect between rescission and damages, by virtue of the "and" preceding the words "a right of action for damages" being replaced by an "or". Ultimately, the bill passed with that altered language:

First reading	**Second reading/final version**
127(1) Where a take-over bid circular sent to the offerees of an offeree company as required by Part XIX contains a misrepresentation, every such offeree … has a right of action for rescission or damages against the offeror, and a right of action for damages against [the offeror's directors and signatories to the take-over bid circular]. [Emphasis added.]	127(1) Where a take-over bid circular sent to the offerees of an offeree company as required by Part XIX contains a misrepresentation, every such offeree … may elect to exercise a right of action for rescission or damages against the offeror or a right of action for damages against [the offeror's directors and signatories to the take-over bid circular]. [Emphasis added.]

[30] The appellants submit that this change was intended to clarify that a plaintiff has a cause of action for rescission or for damages but not for both. The originally-drafted wording suggested that a plaintiff could sue the offeror for rescission and the offeror's directors and signatories for damages, an outcome precluded by the use of the words "may elect" and "or" in the final version.

[31] The appellants agree with the motion judge's observation that s. 131(1) is "not as clearly expressed as it could be". But they argue that this ambiguity favours a large and liberal interpretation that would advance the purposes of the *Securities Act*. Those purposes, set out in s. 1.1 of the Act, are as follows:

> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in capital markets.

[32] Instead, the appellants submit, the motion judge focused on the plain meaning of s. 131(1) without an appreciation of its surrounding context. The result is an unduly narrow interpretation that frustrates rather than furthers the legislature's purposes.

[33] The respondents submit that the motion judge interpreted s. 131(1) correctly. In support of their argument that s. 131(1) requires a security holder to choose whom to sue, the respondents compared the wording of the Ontario legislation with other provincial securities statutes that clearly permit or preclude concurrent causes of action against both the offeror and its directors and

signatories. For example, s. 132(1) of British Columbia's *Securities Act*, R.S.B.C. 1996, c. 418, provides that if a take-over bid circular contains a misrepresentation, a person who received the circular has a right of action for:

> (a) rescission against the offeror, <u>or</u>
>
> (b) damages against
>
> > (i) each person who signed the certificate in the circular or notice,
> >
> > (ii) every director of the offeror at the time the circular or notice was signed,
> >
> > (iii) every person whose consent has been filed as prescribed, <u>and</u>
> >
> > (iv) <u>the offeror</u>. [Emphasis added.]

[34] In other words, security holders have to elect between an action for rescission or for damages but, if they opt to sue for damages, they may sue both the offeror and the offeror's directors and signatories.

[35] Subsection 205(1) of Alberta's *Securities Act*, R.S.A. 2000, c. S-4, uses the same wording as the Ontario legislation but is formatted in a way that – according to the respondents – underscores that the security holder has to elect whom to sue. That subsection provides that, if a take-over bid circular contains a misrepresentation, a security holder may elect to exercise a right of action:

> (a) for rescission or damages against the offeror, <u>or</u>
>
> (b) for <u>damages</u> against

> (i) every person who, at the time the circular or notice was signed, was a director of the offeror,
>
> (ii) every person or company whose consent has been filed, but only with respect to reports, opinions or statements that have been made by them, and
>
> (iii) each person who signed a certificate in the circular or notice. [Emphasis added.]

[36] Like the appellant, the respondents also rely on the changes made to the wording of the subsection between the first and second reading of the bill. They argue that the change shows that the legislature made a conscious decision to require plaintiffs to elect to sue either the offeror or the offeror's directors and signatories.

[37] The main point that the respondents make is that, if the legislature intended to permit a plaintiff to sue both the offeror and its directors and signatories for damages, it could have easily done so by using clear language. However, when pressed in oral argument, they could not offer an explanation for how their interpretation advances the purposes of the *Securities Act* or the scheme for statutory liability for misrepresentation in take-over bid circulars.

(c) Application of the Modern Principle

[38] A proper interpretive approach to s. 131(1) requires the court to consider this provision in its entire context, with regard to its ordinary and grammatical

meaning, and in harmony with the scheme of the Act, the object of the Act, and the intention of the legislature.

[39] The first part of the analysis is a consideration of s. 131(1) in its entire context. Subsection 131(1) is found in Part XXIII of the *Securities Act*, titled "Civil Liability". Part XXIII creates civil liability for misrepresentation in a prospectus (s. 130), an offering memorandum (s. 130.1), and a take-over bid circular (s. 131). A contextual approach means that the language of each of these provisions informs the interpretation of the others. The distinguishing feature of ss. 130 and 130.1 for purposes of this appeal is that those sections explicitly create mutually exclusive causes of action: a plaintiff can sue for rescission or for damages, but not both.

[40] Subsection 130(1) provides as follows:

> 130. (1) Where a prospectus, together with any amendment to the prospectus, contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution or during distribution to the public has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against,
>
> > (a) the issuer or a selling security holder on whose behalf the distribution is made;
> >
> > (b) each underwriter of the securities who is required to sign the certificate required by section 59;

> (c) every director of the issuer at the time the prospectus or the amendment to the prospectus was filed;
>
> (d) every person or company whose consent to disclosure of information in the prospectus has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by them; and
>
> (e) every person or company who signed the prospectus or the amendment to the prospectus other than the persons or companies included in clauses (a) to (d),

or, where the purchaser purchased the security from a person or company referred to in clause (a) or (b) or from another underwriter of the securities, the purchaser may elect to exercise a right of rescission against such person, company or underwriter, in which case the purchaser shall have no right of action for damages against such person, company or underwriter. [Emphasis added.]

[41] Similarly, s. 130.1 provides as follows:

130.1 (1) Where an offering memorandum contains a misrepresentation, a purchaser who purchases a security offered by the offering memorandum during the period of distribution has, without regard to whether the purchaser relied on the misrepresentation, the following rights:

> 1. The purchaser has a right of action for damages against the issuer and a selling security holder on whose behalf the distribution is made.
>
> 2. If the purchaser purchased the security from a person or company referred to in paragraph 1, the purchaser may elect to exercise a right of rescission against the person or company. If the purchaser

> exercises this right, the purchaser ceases to have a right of action for damages against the person or company. [Emphasis added.]

[42] Then comes s. 131(1), which provides that a security holder "may… elect to exercise a right of action for rescission or damages against the offeror or a right of action for damages against" the individuals listed in clauses (a) to (c).

[43] When s. 131(1) is read in this context, it is my view that the legislature intended to underscore that, just as in ss. 130 and 130.1, a plaintiff can pursue a right of action for rescission or a right of action for damages against the offeror, but not both.

[44] Analyzing the sections adjacent to s. 131(1) reveals another clue about its proper interpretation: the Act allows a plaintiff to sue both the issuer and the issuer's directors and underwriters (under s. 130) and both the issuer and the selling security holder (under s. 130.1) for damages. Why would s. 131(1) require a plaintiff suing for misrepresentation in a take-over bid circular to choose his or her adversary when a plaintiff suing for misrepresentation in a prospectus or an offering memorandum is not required to make such a choice?

[45] The next part of the analysis is a consideration of the words of s. 131(1) in their ordinary and grammatical meaning. As explained above, the motion judge principally based her interpretation of s. 131(1) on the plain meaning of the word

"or", which she interpreted as an exclusive "or" – i.e. one that indicates mutually exclusive options. I disagree.

[46] As Ruth Sullivan explains, in ordinary usage, "or" can be either inclusive (A or B or both) or exclusive (A or B, but not both), and it is up to the reader to decide which one the writer intended: Sullivan, at §4.97. In other words, the default plain meaning of "or" is not exclusive.

[47] In *Garner's Modern American Usage*, 3d ed. (New York: Oxford University Press, 2009), Bryan Garner goes further, arguing that the default plain meaning of "or" is actually inclusive. In lamenting the popularity of what he regards as the unnecessary legal phrase "and/or", Garner explains, at pp. 45-46: "If you are offered a coffee or tea, you may pick either (or in this case, neither), or you may for whatever reason order both. This is the ordinary sense of the word, understood by everyone and universally accommodated by the simple *or.*" Garner advises that, if a writer intends to use the exclusive "or", he or she should make this intention explicit.

[48] In my view, the first "or" in s. 131(1) ("elect to exercise a right of action for rescission or damages against the offeror") should be read exclusively, since rescission and damages are treated as alternative causes of action in Part XXIII of the Act. The second "or" ("or a right of action for damages against…") should

be read inclusively – a plaintiff electing to sue for damages can sue the offeror, the offeror's directors and signatories, or both.

[49] In her reasons, the motion judge held as follows, at para. 134: "it seems very unlikely that the word 'or' be [read] both exclusively and inclusively within the span of a few words." I disagree. As I have just explained, the plain meaning of "or" can be either inclusive or exclusive. "Or" is not a term of art that must be given a consistent interpretation throughout a legislative text.

[50] Next, s. 131(1) must be read harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature. As noted above, the legislative purposes of the *Securities Act* are outlined in s. 1.1: to protect investors from "unfair, improper or fraudulent practices" and to foster "fair and efficient capital markets" and confidence in those markets.

[51] There is nothing in the public record that explains why the wording of the subsection was changed between first and second reading. As noted above, both the appellants and the respondents argue that the change favours their interpretation. I am not able to discern the legislature's intention from this change and thus it is of limited assistance in conducting this part of the statutory interpretation analysis.

[52] The appellants point to the following features of the statutory scheme for misrepresentation in a take-over bid circular, which they say demonstrate that the motion judge's interpretation is incorrect:

- OSC Form 62-504F1, which prescribes the contents of a take-over bid circular, states that offerors must disclose "any material facts concerning the securities of the offeree issuer" and "any other matter… known to the offeror… that would reasonably be expected to affect the decision of the security holders of the offeree issuer to accept or reject the offer."
- A take-over bid circular must be accompanied by a certificate stating: "The foregoing contains no untrue statement of a material fact and does not omit to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made."
- Section 99 of the Act, repealed in 2015, provided that a take-over bid circular "shall contain a certificate of the offeror" and must be signed, if the offeror is a person or company other than an individual, by each of the following: the CEO, the CFO, and two directors.

[53] I agree. If the motion judge's interpretation is correct, this scheme falls apart. What point is there in requiring the offeror's directors and officers to sign a certificate affirming the integrity of the take-over bid circular if s. 131(1) forces a plaintiff into an election that could let those people off the hook? And what

statutory purpose is served by forcing an innocent investor to choose which allegedly bad actor to sue? Why should a wrongdoer get a free pass?

[54] To interpret s. 131(1) as requiring this kind of election puts the security holder in an untenable position: if the security holder elects to sue the offeror, there is a risk that the offeror might go bankrupt before the security holder can recover. If the security holder elects to sue the offeror's directors and signatories, there is a risk that the individual defendants might make themselves judgment-proof. Neither scenario advances the cause of investor protection.

[55] In applying the modern principle of statutory interpretation to s. 131(1), I conclude that the motion judge erred in holding that the subsection requires a plaintiff to choose between suing the offeror and suing the offeror's directors and signatories. A plaintiff electing to sue for damages rather than rescission may sue both the offeror and the offeror's directors and signatories.

(3) Secondary Market

(a) Nature of the Issue

[56] The appellants submit that security holders who sold their securities in the secondary market during the currency of, and in connection with, the take-over bid, rather than tendering their securities to the take-over bid, can also assert a claim pursuant to s. 131(1).

[57] The motion judge did not accept that argument, holding that non-tendering sellers could not advance a s. 131(1) right of action for the following reasons:

- Subsection 131(1) allows for a right of rescission and shareholders who sold in the secondary market could not exercise that right. Thus, by necessary implication, the language of the subsection excludes secondary market transactions.
- Part XXIII.1 of the *Securities Act* extends a remedy to secondary market sellers.
- The aim of s. 131(1) is to assist sellers in making an informed choice about whether to tender an offer to a bid, not to make an informed decision about the sale of shares on the secondary market.

(b) Positions of the Parties

[58] The appellants note that s. 131(1) refers to "security holders" and is not qualified by any other condition. They argue that, had the legislature intended to restrict the s. 131 right of action, it would have been a straightforward task to add appropriate limiting language. In their view, there is no basis for treating class members who tendered in the take-over bid and those whose shares were compulsorily acquired differently from those who sold in the secondary market.

[59] The appellants further submit that the Act requires that accurate and complete information related to a take-over bid be provided to security holders.

This disclosure requirement is consistent with the issuer's on-going disclosure obligations and is not directed solely to security holders who are determining whether to tender to a bid. It is the appellants' position that all sellers who are the victims of misrepresentations in circulars should have the right to sue because any distortion of the sale price caused by the misrepresentations affects all sellers.

[60] The respondents submit that the order striking out the s. 131 secondary market claims is consistent with the liability scheme under the *Securities Act*, the content of the forms required by s. 131, and the availability of rescission as a remedy.

[61] The respondents' position is that Part XXIII.1 is designed to provide a remedy to security holders who trade in the secondary market, whereas s. 131 is restricted to target security holders who tender and sell their shares pursuant to a take-over bid. In their submission, the appellants' attempted reliance on s. 131 in the context of trades in the secondary market is nothing more than an attempt to bypass the leave requirements, liability caps, and other elements of Part XXIII.1 included by the legislature as part of the balance struck in creating statutory secondary market liability for misrepresentations.

(c) Application of the Modern Principle

[62] Again, a proper interpretive approach to the issue requires the court to consider the words of s. 131(1) in their entire context, with regard to their ordinary and grammatical meaning, and in harmony with the scheme of the Act, the object of the Act, and the intention of the legislature.

[63] The term "security holder" must be read in the context of the surrounding words in the subsection. As the motion judge noted, it is significant that rescission is an available remedy under the subsection. Obviously, rescission is not available to a security holder who sold in the secondary market and is only available to a security holder who transacted directly with the offeror by tendering to the take-over bid.

[64] The appellants submit that the availability of a rescission option under s. 131(1) is not determinative. They point out that, while rescission is not an available remedy for secondary market participants, that does not by necessary implication preclude the other available remedy of damages. The appellants also observe that there is no right of rescission in s. 131(2), which provides for a right of action with respect to misrepresentation in a directors' circular.

[65] I would reject these arguments. I agree with Perell J.'s reasoning in *Tucci v. Smart Technologies Inc.*, 2013 ONSC 802, 114 O.R. (3d) 294, at para. 42, that it would be an anomalous result if s. 131(1) provided different remedies

depending on whether a security holder tendered into the bid or sold into the secondary market. The availability of rescission as a remedy is an indication that the legislature designed the subsection for the benefit of security holders who could use all of the available remedies.

[66] Furthermore, the absence of the remedy of rescission in s. 131(2) simply reflects the fact that, unlike offerors, directors of a take-over bid target have no ability to return shares tendered to and taken up pursuant to a bid.

[67] Also significant for this part of the analysis is the content of the forms required by s. 131. The prescribed forms for the take-over bid circular (Form 62-504F1), the issuer bid circular (Form 62-504F2), and the directors' circular (Form 62-504F3) each impose a catch-all obligation to disclose matters "that would reasonably be expected to affect the decision of the security holders of the offeree issuer to accept or reject the offer." This language is consistent with the notion that the focus of s. 131 is a security holder's decision whether to tender to a bid, not a security holder's decision whether to trade on the secondary market. Further support can be found in *Allen*, at para. 5, where Strathy J. states that take-over bid rules are designed to provide security holders of the target company with sufficient information to make an informed decision about whether to tender to a bid.

[68] Turning now to the ordinary and grammatical meaning of the term security holder, I agree with the appellants' submission that there are no restrictions or qualifiers on the term. I also agree that it would have been an easy task for the legislature to add appropriate limiting language.

[69] The critical part of the analysis regarding the scheme of the Act, the object of the Act, and the intention of the legislature is the interplay between s. 131(1) and Part XXIII.1 of the Act, which provides a statutory cause of action for secondary market participants. The parties do not agree on whether that cause of action is available in the context of a take-over bid.

[70] The appellants submit that they do not have a right of action under that part of the Act. They note that, under s. 138.2(c), the Part XXIII.1 civil liability regime does not apply to, among other things, "the acquisition or disposition of an issuer's security in connection with or pursuant to a take-over bid, except as prescribed by regulation". According to the appellants, "in connection with" would include sellers who sold Baffinland securities in the secondary market in the context of a take-over bid.

[71] In any event, the appellants argue that, even if the sellers in the secondary market could avail themselves of the Part XXIII.1 right of action, s. 138.13 explicitly provides that the remedy does not derogate from any other rights of action a claimant may have. Their position is that there is no reason why a

plaintiff who sold in the secondary market could not have rights of action under s. 131 and Part XXIII.1 in different circumstances. In the case of Part XXIII.1, limited by the words “in connection with” in s. 138.2(c), the appellants suggest that a plaintiff might sue under Part XXIII.1 after a take-over bid has come to an end. The appellants suggest no such limitations on the application of s. 131.

[72] The respondents submit that the definition of a core document in Part XXIII.1 specifically includes “a take-over bid circular, an issuer bid circular, a directors’ circular, a notice of change or variation in respect of a take-over bid circular, issuer bid circular or directors’ circular”. Thus, they argue that the right of action would be available to secondary market traders in this case.

[73] In my view, the respondents make a compelling argument on the availability of Part XXIII.1 in the context of a take-over bid and their position should be preferred. Why would the legislature include circulars within the definition of core documents if the intention was not to grant a right to sue with respect to those documents? And why would the legislature include such a statutory right of action if it already existed under s. 131(1)? The legislature must be presumed to have a created a coherent and consistent legislative scheme. It is highly unlikely that the legislature would enact a redundant right of action.

[74] I am also not persuaded by the appellants’ suggestion that those who sell their securities on the secondary market are able to avail themselves of both

remedies. The availability of s. 131 to these sellers would render Part XXIII.1 nugatory. If s. 131 provides an unfettered right to sue, why would a plaintiff ever chose to sue under Part XXIII.1 and thus to be subject to the leave requirement and liability caps imposed by that Part?

[75] What is perhaps most troubling about the appellants' submission on this issue is that it ignores the history of the development of the law regarding secondary market liability in this country. That history was recently and succinctly recounted by Abella J. in *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106. She explained, at para. 27, that legislation aimed at secondary market liability grew out of "Canada-wide efforts to develop a more meaningful and accessible form of recourse for investors." She continued as follows, at paras. 27, 29-30:

> Historically, Canadian investors in the secondary trading market did not have access to a statutory cause of action when they suffered losses as a result of breaches of legislated continuous disclosure obligations. In common law jurisdictions, investors had to rely on the tort of negligent misrepresentation, which required, among other things, that investors prove that they had relied on the misinformation or omission of information to their detriment. Because it was extremely difficult to prove such reliance when securities were purchased in the secondary market, this requirement put meaningful redress out of reach for many who were harmed by dubious disclosure practices.
>
> During the 1990s, following a series of high profile misrepresentations and incidents of questionable disclosure practices among publicly traded companies

> in Canada, the Toronto Stock Exchange created the Allen Committee to re-examine the regime governing disclosure in the secondary market. The Allen Committee concluded that the "current sanctions and funding available to regulators... are inadequate" and "the remedies available to investors in secondary trading markets who are injured by misleading disclosure are so difficult to pursue that they are, as a practical matter, largely hypothetical". It recommended the creation of a statutory civil liability regime that would help investors sue issuers, directors, and officers who violated their statutory disclosure obligations.
>
> The Canadian Securities Administrators, an umbrella organization of Canada's provincial and territorial securities regulators, adopted most of the Committee's recommendations and began developing proposals to implement them across Canada. Despite the fact that the Allen Committee had not recommended it, and in order to discourage the kind of strike suits that had become common in the United States under more investor-friendly regimes, the Canadian Securities Administrators recommended that in addition to reducing the burden of proof on investors, the new liability regime should include a "screening mechanism" to ensure that only claims with a reasonable chance of success would be brought. [Citations omitted.]

[76] In 2002, the Ontario Legislature introduced Bill 198, which included a proposed amendment to the *Securities Act* to add civil liability for secondary market disclosure. That Bill was never proclaimed in force. Following further rounds of consultations, in late 2004, Bill 149 was introduced. That Bill contained the amendments that added Part XXIII.1 to the *Securities Act*. Bill 149 came into force on December 31, 2005: see *Abdula v. Canadian Solar Inc.*, 2012 ONCA 211, 110 O.R. (3d) 256, leave to appeal refused, [2012] S.C.C.A. No. 246.

[77] Clearly there was a gap in the legislative scheme with respect to secondary market participants. The legislature filled that gap. They did so on the basis that there was no statutory right of action for secondary market participants. In providing that right of action, the legislature headed the advice of Cardozo J. in *Ultramares Corporation v. Touche*, 174 N.E. 441 (N.Y. App. Ct. 1931) that the law should not admit "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." It was for this reason that the legislature included a leave requirement and capped liability. I agree with the submission of the respondents that the appellants' attempted reliance on s. 131(1) for secondary market participants is an impermissible attempt to avoid the restrictions placed on the operation of the statutory cause of action found in Part XXIII.1.

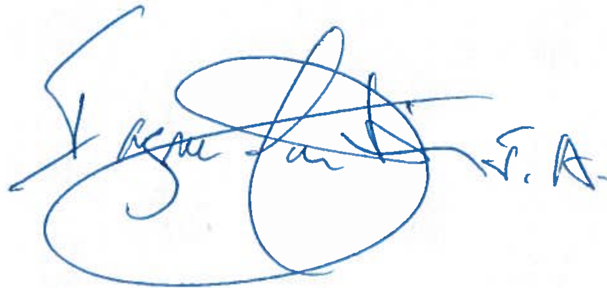
[78] In my view, applying the modern principle of statutory interpretation to this issue, the appellants cannot succeed. While the plain meaning of the term "security holder" might support the broad interpretation they urge upon us, that interpretation is not supported by the context in which it appears and is inconsistent with the scheme of the Act, the object of the Act, and the intention of the legislature.

Disposition

[79] I would grant the appeal in part and order that paragraph 7 of the Order be set aside, the reference in paragraph 8 of the Order to an election be set aside, and the s. 131 claims be permitted to proceed. Given the divided success on the appeal, I would make no order as to costs.

Released:

AUG 1 7 2016



I agree. [illegible] JA