A LOOK AT THE SUPREME COURT OF CANADA'S DECISION IN *THERATECHNOLOGIES INC. V 121851 CANADA INC.*, ADDRESSING THE NATURE OF THE SCREENING MECHANISM SET FORTH IN THE *QUEBEC SECURITIES ACT*, AND THE FINDING OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL ON THE DUMPING AND SUBSIDIZING OF OIL COUNTRY TUBULAR GOODS

THERATECHNOLOGIES INC. V. 121851 CANADA INC., 2015 SCC 18

► DECISION DATE: APRIL 17, 2015

The Supreme Court of Canada rendered a landmark decision on the nature of the screening mechanism set forth in s. 225.4 of the *Quebec Securities Act*, CQLR, c. V-1.1. This mechanism was designed to filter claims made against publicly-traded companies under the statutory civil liability regime for breaches of disclosure obligations in the secondary market.

The decision is of national interest, since the Quebec screening mechanism is highly similar to the ones in place in all other Canadian provinces and emerges directly out of Canada-wide efforts to develop a more meaningful and accessible form of recourse for investors.

The screening mechanism intends to limit actions against public companies to those that are instituted in good faith and have a "reasonable possibility" of being resolved at trial in favour of the plaintiff.

In this particular case, the good faith of the claimant was not in question. Rather, the Supreme Court of Canada agreed with the Court of Appeal and the motions judge that the notion of "reasonable possibility" of success is a different and higher standard than the general threshold for authorizing class actions set forth in article 1003 of the *Code of Civil Procedure of Québec*, CQLR, c. C-25.

A more meaningful screening mechanism in the securities context was created to prevent costly strike suits and unmeritorious claims from proceedings. As such, the screening mechanism should be a robust deterrent and not a mere "speed bump."

The courts play a crucial gatekeeping role, and therefore need to give reasoned consideration to the evidence so as to ensure that the action has a realistic chance of success.

The claimant needs to offer both a plausible analysis of the applicable legislative provisions and sufficient credible evidence in support of the claim without the need to proceed as if it were at trial.

After defining the screening mechanism of s. 225.4 of the *Quebec Securities Act*, the Supreme Court of Canada analysed the alleged breach of Theratechnologies Inc.'s obligation under s. 73 of the *Securities Act,* which provides for a timely disclosure of material changes to its investors.

It referred to s. 5.3 of the *Securities Act,* which defines "material change," and revisited its two decisions in *Pezim v. British Columbia (Superintendent of Brokers),* [1994] 2 S.C.R. 557 and *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331.

It confirmed that a "material change" has two components – a change in the business, operations or capital of the issuer, and a change that is material – and that both elements are required to trigger an obligation of timely disclosure.

The Supreme Court of Canada concluded that the questions raised by the *Food and Drug Administration* with regard to the side effects of a medication under review and that caused the negative market reaction did not constitute a "material change" which triggers the obligation to disclose.

The Supreme Court of Canada added that public companies do not have the duty to reassure investors at every stage of a regulatory approval process and that there are risks to excessive disclosure.

As a result, the Supreme Court of Canada concluded that because the evidence does not credibly point to a material change that could have triggered timely disclosure obligations, there is no reasonable possibility that Plaintiff's action under s. 73 of the *Quebec Securities Act* could succeed.

Fasken Martineau DuMoulin LLP acted for Theratechnologies. The Fasken Martineau team consisted of Pierre Lefebvre and Philippe Charest Beaudry.

Savonitto et Associés Inc. represented 121851 Canada Inc with a team made up of Michel Savonitto, Vicky Berthiaume and Martine Trudeau.

Siskinds LLP represented the intervener, Mouvement d'éducation et de défenses des actionnaires, with a team comprising Éric Lemay and Dimitri Lascaris.

CANADIAN INTERNATIONAL TRADE TRIBUNAL RELEASES FINDING IN INJURY INQUIRY

► DECISION DATE: APRIL 6, 2015

On April 6, 2015, The Canadian International Trade Tribunal (CITT) ruled in favour of Tenaris Canada in an injury inquiry.

CITT found a threat of injury to Canadian production caused by the dumping of Oil Country Tubular Goods (OCTG) that originated or were exported from Chinese Taipei, The Republic of India, The Republic of Indonesia, The Republic of the Philippines, The Republic of Korea, The Kingdom of Thailand, The Republic of Turkey, Ukraine and The Socialist Republic of Vietnam.

The finding will result in anti-dumping protection for up to five years against imports of OCTG from the named countries. The decision was significant, as nine countries were named in the anti-dumping case making it arguably one of the most complex anti-dumping cases in recent years.

With the decline in oil prices, obtaining a trade remedy against unfairly priced imports was especially important to Tenaris and represents a significant win for the Canadian OCTG market, promising to restore market-based competition. The Canadian OCTG market is worth around $2 billion annually.

McMillan LLP represented Tenaris Canada in the Canadian International Trade Tribunal injury inquiry. The team consisted of Geoffrey Kubrick (international trade) and Jonathan O'Hara (advocacy & litigation).

Other Canadian producers included Evraz Canada, which was represented by **Cassidy Levy Kent (Canada) LLP**, and Energex Tube and Welded Tube of Canada, which was represented by Lawrence Herman of **Herman & Associates**. The Cassidy Levy Kent team included Christopher Kent, Christopher Cochlin, Andrew Lanouette, Hugh Seong Seok Lee, Christopher McLeod, Chenxi Peng and Ron Erdmann.