

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** Theratechnologies inc. *v.* 121851 Canada inc., 2015 SCC 18, [2015] 2 S.C.R. 106 | **Date:** 20150417  **Docket:** 35550 |

Between:

Theratechnologies inc., Yves Rosconi and Paul Pommier

Appellants

and

121851 Canada inc.

Respondent

- and -

Mouvement d’éducation et de défense des actionnaires

Intervener

**Coram:** McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

|  |  |
| --- | --- |
| **Reasons for Judgment:**  (paras. 1 to 56) | Abella J. (McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring) |

Theratechnologies inc. *v.* 121851 Canada inc., 2015 SCC 18, [2015] 2 S.C.R. 106

Theratechnologies inc.,

Yves Rosconi and Paul Pommier Appellants

v.

121851 Canada inc. Respondent

and

Mouvement d’éducation et de défense des actionnaires Intervener

**Indexed as: Theratechnologies inc. *v.* 121851 Canada inc.**

2015 SCC 18

File No.: 35550.

2014: December 1; 2015: April 17.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for quebec

*Securities — Statutory disclosure obligations — Action for damages — Prior judicial authorization — Pharmaceutical company in process of obtaining approval to market new drug — Questions on drug’s potential side effects raised as part of approval process — Questions publicized by stock quotation enterprises resulting in drop of pharmaceutical company’s share price — Corporate shareholder seeking to institute class action for breach of company’s disclosure obligation — Action requiring prior judicial authorization based on whether there is a “reasonable possibility that it will be resolved in plaintiff’s favour” — Securities Act, CQLR, c. V-1.1, ss. 5.3, 73, 225.4.*

In the spring of 2010, Theratechnologies inc. (Thera) was awaiting the approval of the United States Food and Drug Administration (FDA) for a new drug to reduce excess abdominal fat among HIV patients. As its application proceeded, Thera regularly updated its shareholders and the Commission des valeurs mobilières du Québec about developments in the FDA process. It also regularly informed its shareholders about the results of its clinical trials measuring the safety and efficacy of the drug, including potential side effects. The trials indicated that the benefits of the drug could be “achieved without significant side effects”.

As is common during the new drug approval process, the FDA referred a number of questions about this drug to an expert Advisory Committee, including questions about its potential side effects. The FDA also made these questions public as part of a package of briefing materials on its website. Thera believed the briefing documents it had already provided to the FDA and the clinical results it had already made public to its investors offered a comprehensive response to the specific questions the FDA had posed. When the questions were publicized by stock quotation enterprises, the price of the company’s shares dropped. 121851 Canada inc., a holding company, sold its shares in Thera during this period. Ultimately, the drug was approved by the FDA and Thera’s share price recovered.

121851 sought authorization under s. 225.4 of the *Securities Act* to bring a class action for damages against Thera, claiming that the information about the potential side effects of the drug and the FDA’s questions about those side effects amounted to a material change in Thera’s business, operations or capital, triggering timely disclosure obligations under s. 73 of the *Securities Act*.

Under s. 225.4, the court is a gatekeeper, and grants authorization “if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff”. The Motions Judge concluded that the authorization mechanism in s. 225.4 of the *Securities Act* imposed a higher threshold than art. 1003 of the *Code of Civil Procedure*, which deals with the authorization of class actions generally, but found sufficient evidence to support the conclusion that 121851’s action had a reasonable possibility of success. The Court of Appeal agreed with the Motions Judge that the screening mechanism under s. 225.4 was more stringent than for the authorization of a class action under art. 1003 of the *Code of Civil Procedure* and required more than a mere possibility of success. It also agreed that the threshold was met in this case.

*Held*: The appeal should be allowed.

Section 225.4 of the *Securities Act* is part of a new regime to address breaches of continuous disclosure obligations in the secondary market, the market in which a company’s shares are traded publicly after they have been issued or distributed by the company. The reforms were inspired by the recommendations of the Allen Committee, suggested after a number of high profile misrepresentations at publicly traded companies. The Committee concluded that the remedies available to investors injured by misleading disclosure in the secondary trading market were so difficult to pursue, that they were largely illusory. As a result, it recommended the creation of a statutory civil liability regime that would help investors sue issuers, directors, and officers who violated statutory disclosure obligations.

Under Quebec’s new regime, when a security is acquired or transferred at the time of a false declaration or omission of information that should have been disclosed, the fluctuation in the value of the security is presumed to be attributable to that fault. Investors are thereby released from the burden of demonstrating that the variation in the market price of the security was linked to the misinformation or omission, and from demonstrating that they personally relied on that misinformation or omission in buying or transferring the security. In order to discourage the kind of strike suits that had become common in the United States under more investor-friendly regimes, the Quebec scheme established an authorization mechanism — s. 225.4 — to permit only actions in good faith and with a “reasonable possibility” that the claim would be resolved “in favour of the plaintiff”. The regime reflected an attempt to strike a balance between preventing unmeritorious litigation and strike suits and, at the same time, ensuring that investors have a meaningful remedy when issuers breach disclosure obligations.

The “reasonable possibility” that the claim would be resolved in favour of the plaintiff required under s. 225.4 sets out a different and higher standard than the general threshold for the authorization of a class action under art. 1003 of the *Code of Civil Procedure*. Under art. 1003, the court seeks only to identify whether “the facts alleged seem to justify the conclusions sought”, that is, whether the applicant has established “a good colour of right”. The Quebec legislature used different language in s. 225.4 to create a more meaningful screening mechanism in the securities context so that costly strike suits and unmeritorious claims would be prevented. The threshold requires that there be a reasonable or realistic chance that the action will succeed.

A case with a realistic chance of success requires the claimant to offer some credible evidence in support of the claim. Courts must therefore undertake a reasoned consideration of the evidence to ensure that the action has some merit, but the authorization stage under s. 225.4 should not be treated as a mini-trial. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. A full analysis of the evidence is unnecessary. What *is* required is sufficient evidence to persuade the court that there is a realistic chance that the action will be resolved in the claimant’s favour.

121851 claims that Thera breached s. 73 of the *Securities Act*, which requires issuers to provide timely disclosure of material changes to investors. A material change has two components. There must be a change in the business, operations or capital of the issuer and the change must be material, which means it would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer. 121851 argues that when Thera received the FDA briefing materials for the Advisory Committee, it should have issued a responsive press release. But 121851 has not pointed to any evidence that could qualify as a change in Thera’s operations, capital or business as described in s. 5.3 of the *Securities Act*. The results of the clinical trials, including potential side effects, were disclosed to shareholders as they became available. There was no new information about the side effects of the drug that required timely disclosure when the FDA mentioned those side effects in the briefing materials.

Nor has 121851 pointed to any evidence to suggest that the questions the FDA posed to its advisory committee about these side effects, or the contents of its briefing package more generally, departed in any way from the regular and routine process through which the FDA assesses whether a drug should be approved. Rather, they are a routine step in the FDA’s work to determine whether a drug’s benefits outweigh its risks. It is difficult to characterize these questions as any kind of change to Thera’s business, operations, or capital requiring a reassuring public response from Thera.

Because the evidence does not credibly point to a material change that could have triggered disclosure obligations, there is no reasonable possibility that 121851’s action under s. 73 of the *Securities Act* could succeed.

**Cases Cited**

**Distinguished:** *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; **referred to:** *Cartaway Resources Corp. (Re)*, 2000 BCSECCOM 88, [2000] B.C.S.C.D. No. 92 (QL); *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310, 306 O.A.C. 107; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347; *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65; *Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*, 2013 ONSC 4083, 44 C.P.C. (7th) 80; *Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222, leave to appeal refused, 2011 ONSC 1035, 105 O.R. (3d) 212; *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25, 3 C.P.C. (7th) 261; *Round v. MacDonald, Dettwiler and Associates Ltd.*, 2011 BCSC 1416, aff’d 2012 BCCA 456, 39 B.C.L.R. (5th) 44; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2014 ONSC 1057, 49 C.P.C. (7th) 12; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2014 ONCA 90, 118 O.R. (3d) 641; *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331; *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

**Statutes and Regulations Cited**

*Act to amend the Securities Act and other legislative provisions*, S.Q. 2007, c. 15 [Bill 19].

*Civil Code of Québec*, arts. 1457, 1607.

*Code of Civil Procedure*, CQLR, c. C-25, art. 1003.

*Securities Act*, CQLR, c. V-1.1, ss. 5 “material fact”, 5.3, 73, 225.4.

*Securities Act*, R.S.A. 2000, c. S-4, s. 147.

*Securities Act*, R.S.B.C. 1996, c. 418, s. 85.

*Securities Act*, R.S.N.S. 1989, c. 418, s. 81.

*Securities Act*, R.S.O. 1990, c. S.5, ss. 75, 138.8(1).

*Securities Act*, S.N.B. 2004, c. S-5.5, s. 89(1).

**Authors Cited**

Canadian Securities Administrators. “National Policy 51-201 Disclosure Standards”, reproduced in (2002), 25 OSCB 4492.

Canadian Securities Administrators. “Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of ‘Material Fact’ and ‘Material Change’”, CSA Notice 53-302, reproduced in (2000), 23 OSCB 7383.

Falutz, Julian, et al. “Effects of Tesamorelin, a Growth Hormone-Releasing Factor, in HIV-Infected Patients With Abdominal Fat Accumulation: A Randomized Placebo-Controlled Trial With a Safety Extension” (2010), 53 *J. Acquir. Immune Defic. Syndr.* 311.

Gillen, Mark R. *Securities Regulation in Canada*, 3rd ed. Toronto: Thomson Carswell, 2007.

Groia, Joseph, and Pamela Hardie. *Securities Litigation and Enforcement*, 2nd ed. Toronto: Carswell, 2012.

Johnston, David, Kathleen Doyle Rockwell and Cristie Ford. *Canadian Securities Regulation*, 5th ed. Markham, Ont.: LexisNexis, 2014.

Pritchard, A. C., and Janis P. Sarra. “Securities Class Actions Move North: A Doctrinal and Empirical Analysis of Securities Class Actions in Canada” (2010), 47 *Alta. L. Rev.* 881.

Quebec. Assemblée nationale. Commission permanente des finances publiques. “Étude détaillée du projet de loi no 19 — Loi modifiant la Loi sur les valeurs mobilières et d’autres dispositions législatives”, *Journal des débats de la Commission permanente des finances publiques*, vol. 40, no 10, 1re sess., 38e lég., 25 octobre 2007, p. 1-2.

Toronto Stock Exchange. Committee on Corporate Disclosure. *Final Report — Responsible Corporate Disclosure: A Search for Balance*. Toronto: The Exchange, 1997.

APPEAL from a judgment of the Quebec Court of Appeal (Rochon, Bouchard and Gascon JJ.A.), 2013 QCCA 1256, [2013] R.J.Q. 1128, [2013] AZ-50988427, [2013] Q.J. No. 7925 (QL), 2013 CarswellQue 10168 (WL Can.), affirming a decision of Blanchard J., 2012 QCCS 699, [2012] AZ-50834966, [2012] J.Q. no 1529 (QL), 2012 CarswellQue 1636 (WL Can.). Appeal allowed.

*Pierre Y. Lefebvre* and *Philippe Charest-Beaudry*, for the appellants.

*Michel Savonitto* and *Vicky Berthiaume*, for the respondent.

*Éric Lemay* and *Dimitri Lascaris*, for the intervener.

The judgment of the Court was delivered by

1. Abella J. — The genesis of this case was a new drug application to the U.S. Food and Drug Administration (FDA) by a pharmaceutical research and development company based in Montréal. As is common during the new drug approval process, the FDA referred a number of questions about this drug to an expert Advisory Committee, including questions about the drug’s potential side effects. The FDA also made these questions public as part of a package of briefing materials on its website. When the questions were publicized by stock quotation enterprises, the price of the company’s shares dropped sharply.
2. A holding company that sold its shares during this period sought authorization to bring a class action for damages under s. 225.4 of the *Securities Act*, CQLR, c. V-1.1, alleging a breach of statutory disclosure obligations.
3. In 2007, changes to the *Securities Act* created a new statutory cause of action that enabled investors to bring claims against reporting issuers who breach their obligation to disclose material facts and changes to their shareholders. Actions for damages may not be brought without the prior authorization of the court pursuant to s. 225.4. A court will grant authorization “if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff”. The issue in this appeal is whether there was a “reasonable possibility” of success within the meaning of this provision.
4. I agree with the Court of Appeal that the threshold set out in s. 225.4 for authorization requires more than a mere possibility of success, but, with great respect, do not share its conclusion that the threshold was met in this case.

Background

1. Theratechnologies inc. (Thera) is a pharmaceutical research and development company based in Montréal and listed on the Toronto Stock Exchange. 121851 Canada inc. is a holding company. Roger St-Germain is its sole shareholder and director. At the relevant time, 121851 Canada inc. had 190,000 Thera shares.
2. On June 1, 2009, Thera filed a new drug application with the FDA for tesamorelin, a drug to reduce excess abdominal fat among HIV patients. The FDA’s Center for Drug Evaluation and Research is charged with reviewing and evaluating new drug applications from companies like Thera. Its role is to decide whether the studies submitted by the drug’s sponsoring company — typically, its manufacturer — show the new drug to be safe and effective. If the sponsoring company demonstrates that the drug’s benefits outweigh its known risks, the FDA will approve it.
3. As part of its usual process of evaluating the safety and efficacy of a drug, the FDA will often convene a meeting of an expert Advisory Committee. The FDA provides this Advisory Committee with two packages of briefing materials in advance of the meeting, one containing information prepared by the FDA and the other containing information prepared by the sponsoring company. The FDA’s package includes a background introductory memorandum that sets out the crucial considerations associated with the application, and questions the FDA wishes to submit to its Advisory Committee to answer upon review of the Briefing Package. Based on the information in the Briefing Package, an Advisory Committee may decide to recommend approval or disapproval of a new drug application. The FDA generally follows the advice of the Advisory Committee, but is not bound to do so.
4. As its application proceeded through this FDA process, Thera regularly updated its shareholders and the Commission des valeurs mobilières du Québec about developments in the application process. On November 5, 2009, Thera issued a press release announcing that the FDA had requested an opinion from its Endocrinologic and Metabolic Drugs Advisory Committee about Thera’s application. On January 18, 2010, Thera announced that the Advisory Committee would meet on February 24, 2010 to discuss its application. On January 25, 2010, Thera issued another press release indicating that the Advisory Committee meeting had been postponed. And on February 25, 2010, it announced that the meeting had been rescheduled for May 27, 2010. On March 22, 2010, it issued a press release confirming this date.
5. Between 2005 and the end of 2008, as part of its efforts to gain FDA approval for tesamorelin, Thera undertook two “phase-three” clinical trials of the drug that aimed to test its safety and efficacy among HIV patients. A phase-three clinical trial is a randomized, relatively large-scale test of a drug’s safety and therapeutic effect on patients. Because the growth hormone that tesamorelin triggers is associated with increased risk of diabetes, the clinical trials measured the blood sugar levels of participating patients to evaluate potential side effects of the drug.
6. Throughout this period, Thera regularly disclosed information about the progress of its clinical trials to its shareholders. In its 2008 Annual Notice, Thera commented on the results of its studies showing a “good safety profile”, and indicated it would study tesamorelin’s effects related to glucose intolerance.
7. In a press release on November 11, 2009, Thera announced the combined results of its phase-three clinical trials, which indicated that possible side effects of the drug on blood sugar were not clinically significant. On March 1, 2010, Thera announced the publication of these results in an article in the *Journal of Acquired Immune Deficiency Syndromes*,concluding that the benefits of the drug were “achieved without significant side effects or perturbation of glucose”.
8. In April 2010, Thera provided the FDA with a Briefing Package that contained a description of tesamorelin and a summary of the results from the different clinical studies that Thera had already disclosed to its investors. This Briefing Package is traditionally made public by the FDA when it publishes its own briefing materials. In its Briefing Package, Thera explained that

[t]he effect of tesamorelin administration on glycemic parameters was a theoretical safety concern because of well known diabetogenic effect of GH [growth hormone]. In the Phase 3 studies, no clinically significant differences were observed over 52 weeks between tesamorelin 2 mg and placebo for changes from baseline in FBG, insulin, HOMA-IR, and HbA1c. With regard to FBG shifts and changes in glucose categories, as well as shifts in HbA1c categories, greater differences from baseline occurred in the tesamorelin group. Nevertheless, there was some reversal of these effects after the first 26 weeks. Overall, the data suggest no major safety concerns with regard to glucose homeostasis and that any glycemic changes can be managed in clinical practice. [Emphasis added.]

1. On May 11, 2010, the FDA sent Thera a briefing document it had prepared for the Advisory Committee meeting, including a copy of a Background Introductory Memorandum which contained questions about tesamorelin’s side effects. FDA policy was to publish on its website all the materials assembled for the new drug application at least 48 hours before an Advisory Committee meeting. In accordance with its policy, on May 25, the FDA published the information it had compiled about tesamorelin, including the briefing materials compiled by both Thera and the FDA.
2. The FDA’s Background Introductory Memorandum attracted the attention of stock quotation enterprises, including Dow Jones who, on the basis of the questions that the FDA had asked its Advisory Committee, expressed concern that tesamorelin could increase the risk of diabetes. At about 9 a.m. on May 25, for example, Dow Jones issued a press release that said: “FDA: Theratechnologies Drug Cuts Abdominal Fat In HIV Patients”. A minute later, it issued a second press release: “FDA: Proposed Theratechnologies Drug Might Increase Diabetes Risk”. At about 9:30 a.m., it released a short article that underscored the efficacy of the drug, but also drew attention to the fact that some patients in the study had experienced an increased risk of diabetes. The article did not specify that Thera’s clinical results had concluded that the effects of tesamorelin on the glycemic parameters of these patients were minor, transitory, and easily clinically managed.
3. Thera did not react publicly because it believed the briefing documents it had already provided to the FDA and the clinical results it had already made public to its investors offered a comprehensive response to the specific questions the FDA had posed.
4. When Mr. St-Germain became aware of the Dow Jones press releases on May 25, he decided to sell his company’s shares of Thera, resulting in a net loss of $271,752 from the shares’ value on May 21, 2010. For the next two days, Thera’s shares were traded extensively and their price dropped by 58 percent. On May 27, 2010, the Toronto Stock Exchange stopped all transactions of Thera’s shares. The same day, the Advisory Committee unanimously voted in favour of approving Thera’s new drug application for tesamorelin. Thera announced this news by press release late that afternoon. On May 28, when trading of Thera’s stock resumed, its share price recovered. The FDA approved the new drug application on November 10, 2010.
5. 121851 sought judicial authorization under s. 225.4 of the *Securities Act* to launch a class action proceeding for damages, claiming that the information that diabetes was among the potential side effects of tesamorelin and the FDA’s questions about those side effects amounted to a material change in Thera’s business, operations or capital, triggering timely disclosure obligations in the form of a reassuring press release under s. 73 of the *Securities Act*:

**73.** A reporting issuer shall provide periodic disclosure about its business and internal affairs, including its governance practices, timely disclosure of a material change and any other disclosure prescribed by regulation in accordance with the conditions determined by regulation.

Section 225.4 states:

**225.4** No action for damages may be brought under this division without the prior authorization of the court.

The request for authorization must state the facts giving rise to the action. It must be filed together with the projected statement of claim and be notified by bailiff to the parties concerned, with a notice of at least 10 days of the date of presentation.

The court grants authorization if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff.

1. The Motions Judge concluded that the authorization mechanism in s. 225.4 of the *Securities Act* imposed a higher threshold than art. 1003 of the *Code of Civil Procedure*, CQLR, c. C-25 (*C.C.P.*), which deals with the authorization of class actions generally, but found sufficient evidence to support the conclusion that 121851’s action had a reasonable possibility of success.
2. An appeal by Thera to the Court of Appeal was dismissed. The Court of Appeal agreed with the Motions Judge that the screening mechanism under s. 225.4 was more stringent than for the authorization of a class action under art. 1003 of the *Code of Civil Procedure* and required more than a mere possibility of success. It noted that the legislative intention behind s. 225.4 was to make the provision a more robust screening mechanism.
3. Based on documentary evidence and Mr. St-Germain’s testimony, the Court of Appeal was of the view that there was a reasonable possibility that the action would be resolved in his company’s favour. As a result, it upheld the order authorizing an action for damages.

Analysis

1. Section 225.4 of the *Securities Act* is part of a new regime of statutory civil liability to address breaches of disclosure obligations in the secondary market, the market in which a company’s shares are traded publicly after they have been issued or distributed by the company. This provision sets out two substantive criteria for the authorization of an action for damages: the action must be brought in good faith and there must be a reasonable possibility that it will be resolved in favour of the claimant. There is no dispute that 121851’s action is brought in good faith. This case turns then on the interpretation of “a reasonable possibility” that 121851’s action will be resolved in its favour. The history and objectives of the authorization mechanism set by s. 225.4 in the context of the *Securities Act* as a whole assist in this exercise.
2. Like its counterparts elsewhere in Canada, Quebec’s *Securities Act* requires companies whose shares are traded in the secondary market to regularly disclose certain information to their security holders and the provincial securities regulator: s. 73; *Securities Act*, R.S.B.C. 1996, c. 418, s. 85; *Securities Act*,R.S.A. 2000, c. S-4, s. 147; *Securities Act*,R.S.O. 1990, c. S.5, s. 75; *Securities Act*, R.S.N.S. 1989, c. 418, s. 81; *Securities Act*,S.N.B. 2004, c. S-5.5, s. 89(1).
3. Continuous disclosure obligations fall into two categories: periodic disclosure and timely disclosure. Periodic disclosure must be made at regular intervals, typically through the regular provision of documents such as proxy circulars, financial statements and insider trading reports. In these regularly issued documents, companies must disclose all material *facts* — that is, anything “that may reasonably be expected to have a significant effect on the market price or value of securities issued”: *Securities Act* (Quebec), s. 5 “material fact”.
4. Timely disclosure obligations, on the other hand, are imposed only when there has been a material *change* in the issuer’s affairs. Material changes, which arise from changes in the issuers’ business, operations or capital, must be disclosed at the time they occur: *Securities Act* (Quebec), s. 5.3; Mark R. Gillen, *Securities Regulation in Canada* (3rd ed. 2007), at p. 211; David Johnston, Kathleen Doyle Rockwell and Cristie Ford: *Canadian Securities Regulation* (5th ed. 2014), at p. 249.
5. Both periodic and timely disclosure obligations are designed to increase fairness in the secondary market:

[Continuous disclosure] . . . is designed to create a “level playing field” where all investors have access to the same information and all pricing and investment decisions are made from the same starting point. Of course, investors may still value securities differently, depending on how they interpret that information. Different investors have different goals, typically balanced between risk and return. Riskier investments generally yield higher returns, and vice versa. Securities regulation does not tell investors what to do, nor steer them toward or away from particular investments. It should, however, ensure that they have enough information to assess properly the risks involved and make fully informed decisions. [Footnote omitted; Johnston, Rockwell and Ford, at p. 249.]

As a result, the policy of ensuring this “level playing field” reified in statutory continuous disclosure obligations has been called “the most fundamental principle of securities regulation”: *Cartaway Resources Corp.* *(Re)*, [2000] B.C.S.C.D. No. 92 (QL), at para. 216; *Cornish v. Ontario Securities Commission* (2013), 306 O.A.C. 107 (S.C.J.), at para. 40.

1. Disclosure also supports capital market efficiency by helping investors target the most deserving securities and enhancing the accountability of corporate management: *Cornish*,at para. 40. As investors realize that they have the necessary information, they become more confident in the securities market, and their consequent increased participation leads to more efficient markets: Johnston, Rockwell and Ford, at p. 249.
2. Section 225.4 emerged directly out of Canada-wide efforts to develop a more meaningful and accessible form of recourse for investors. 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: A. C. Pritchard and Janis P. Sarra, “Securities Class Actions Move North: A Doctrinal and Empirical Analysis of Securities Class Actions in Canada” (2010), 47 *Alta. L. Rev.* 881, at p. 885. 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: Joseph Groia and Pamela Hardie, *Securities Litigation and Enforcement* (2nd ed. 2012), at p. 352.
3. In Quebec, investors faced a similarly heavy burden under the *Civil Code*. To establish civil liability, claimants were required to prove a fault, such as the publication of misinformation or the failure to meet a statutory disclosure obligation; that they suffered prejudice; *and* that there was a causal link between the fault and the prejudice — that is, that they had relied on the misinformation in making the trade: arts. 1457 and 1607 of the *Civil Code of Québec.* Demonstrating the requisite causal link proved to be particularly onerous in the securities context: Quebec, National Assembly, Committee on Public Finance, “Étude détaillée du projet de loi n° 19 — Loi modifiant la Loi sur les valeurs mobilières et d’autres dispositions législatives”, *Journal des débats de la Commission permanente des finances publiques*, vol. 40, No. 10, 1st Sess., 38th Leg., October 25, 2007 (“Étude detaillée”), at p. 2.
4. 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”: Committee on Corporate Disclosure, *Final Report — Responsible Corporate Disclosure: A Search for Balance* (Toronto Stock Exchange, 1997), at p. 5. 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.
5. 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: “Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of ‘Material Fact’ and ‘Material Change’”, CSA Notice 53-302, reproduced in (2000), 23 OSCB 7383. 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:

This screening mechanism is designed not only to minimize the prospects of an adverse court award in the absence of a meritorious claim but, more importantly, to try to ensure that unmeritorious litigation, and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process. By offering defendants the reasonable expectation that an unmeritorious action will be denied the requisite leave to be commenced, the 2000 Draft Legislation should better enable defendants to fend off coercive efforts by plaintiffs to negotiate the cash settlement that is often the real objective behind a strike suit. [Emphasis added; *ibid*., at p. 7390.]

1. In 2002, Ontario became the first province to implement the Canadian Securities Administrators’recommendations by inserting a new liability regime into its *Securities Act*. The legislation included a screening mechanism that limited actions against public companies for breaches of continuous disclosure obligations to those actions instituted in good faith with “a reasonable possibility” of being resolved at trial in favour of the plaintiff: s. 138.8(1).
2. Quebec implemented the recommendations of the Canadian Securities Administrators through Bill 19, *An Act to amend the Securities Act and other legislative provisions*, S.Q. 2007, c. 15, which received assent on November 9, 2007. When Bill 19 was before the legislature, Monique Jérôme-Forget, the Minister of Finance at the time, said:

[translation] The recourse proposed in Bill 19 is highly harmonized with that in place in Ontario, which is recourse that strongly inspired the other provinces and territories. Only the necessary adjustments were made to reflect civil law notions and vocabulary, and to ensure its harmonious integration into the Québec legislative corpus, including the Securities Act, into which it will be incorporated.

(“Étude détaillee”, at p. 1)

1. Under this regime, when a security is acquired or transferred at the time of a false declaration or omission of information that should have been disclosed, the fluctuation in the value of the security is presumed to be attributable to that fault. Investors were thereby released from the heavy burden of demonstrating that the variation in the market price of the security was linked to the misinformation or omission, and from demonstrating that they personally relied on that information or omission in buying or transferring the security.
2. The scheme also establishes an authorization mechanism to permit only actions in good faith with a “reasonable possibility of success”. As the Court of Appeal noted, Quebec’s new regime therefore reflected an attempt to strike a balance between preventing unmeritorious litigation and strike suits and, at the same time, ensuring that investors have a meaningful remedy when issuers breach disclosure obligations.
3. Given this history, I agree with the Court of Appeal and Motions Judge that the “reasonable possibility” of success required under s. 225.4 sets out a different and higher standard than the general threshold for the authorization of a class action under art. 1003 of the *C.C.P.* Under art. 1003, the court seeks only to identify whether “the facts alleged seem to justify the conclusions sought” — that is, whether the applicant has established “a good colour of right”: *Infineon Technologies AG v. Option consommateurs*,[2013] 3 S.C.R. 600, at para. 62; *Guimond v. Quebec (Attorney General)*,[1996] 3 S.C.R. 347, at paras. 5 and 9-10; *Marcotte v. Longueuil (City)*, [2009] 3 S.C.R. 65, at para. 94. As this Court pointed out in *Infineon Technologies*, the low threshold for authorizing a class action under art. 1003 of the *C.C.P.* reflects the “twin objectives of deterrence and compensation that animate the class action system”: para. 125.
4. The Quebec legislature used different language in s. 225.4 to create a more meaningful screening mechanism in the securities context so that costly strike suits and unmeritorious claims would be prevented. Courts are given an important gatekeeping role, which requires them to conduct a preliminary examination of the impugned action or inaction to assess whether it could be said to have a reasonable possibility of success: Pritchard and Sarra, at p. 893. The question before us is as Belobaba J. asked in *Ironworkers Ontario Pension Fund (Trustee of)* *v. Manulife Financial* *Corp*. (2013), 44 C.P.C. (7th) 80 (Ont. S.C.J.):

Is this simply a screening mechanism to keep out “strike suits” that are plainly unmeritorious and have no chance of success? Or, is this a preliminary merits test that should have more bite? [para. 36]

1. I am aware that there has been some discussion in the Ontario and British Columbia courts about what the threshold is, all seeking to find a balance between preventing cases without a realistic prospect of success but encouraging those with a likelihood of success: *Silver v. Imax Corp*. (2009), 66 B.L.R. (4th) 222 (Ont. S.C.J.), at para. 324, leave to appeal refused (2011), 105 O.R. (3d) 212 (Div. Ct.); *Dobbie v. Arctic Glacier Income Fund* (2011), 3 C.P.C. (7th) 261 (Ont. S.C.J.), at paras. 129-30; *Round v. MacDonald, Dettwiler and Associates Ltd.*, 2011 BCSC 1416, at para. 76, aff’d (2012), 39 B.C.L.R. (5th) 44 (C.A.); *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.* (2014), 49 C.P.C. (7th) 12 (Ont. S.C.J.), at para. 112; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.* (2014), 118 O.R. (3d) 641 (C.A.), at paras. 81-89.
2. In my view, as Belobaba J. suggested in *Ironworkers*, the threshold should be more than a “speed bump” (para. 39), and the courts must undertake a reasoned consideration of the evidence to ensure that the action has some merit. In other words, to promote the legislative objective of a robust deterrent screening mechanism so that cases without merit are prevented from proceeding, the threshold requires that there be a reasonable or realistic chance that the action will succeed.
3. A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success — and the time and expense they impose — are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What *is* required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant’s favour.
4. 121851 alleges that Thera breached its obligation under s. 73 of the *Securities Act* to provide timely disclosure of material changes to its investors. Section 5.3 of the *Securities Act* defines a “material change” as

a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer, or a decision to implement such a change made by the directors or by senior management of the issuer who believe that confirmation of the decision by the directors is probable.

As this statutory definition makes clear, a material change has two components. There must be a change in the business, operations or capital of the issuer and the change must be material, which means it would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer: *Securities Act*,s. 5.3. Both elements are required to trigger an obligation of timely disclosure.

1. 121851 argues that a material change occurred on May 11, 2010, when Thera received the FDA briefing materials, which included a Background Introductory Memorandum asking the Advisory Committee to comment on “the findings of glucose intolerance and development of diabetes associated with Egrifta [tesamorelin] therapy and its impact on longterm cardiovascular risk”. This information was made public on May 25, 2010, when the FDA posted the memorandum, alongside all the briefing materials it had generated on tesamorelin, on its website.
2. In my view, however, 121851 has not pointed to any evidence that could qualify as a material change in Thera’s operations, capital or business as described in s. 5.3 of the *Securities Act*. And without some evidence of a material change that corresponds to the statutory requirements, 121851’s action cannot reasonably hope to succeed.
3. Tesamorelin operates by activating a growth hormone, which, in other contexts, has been associated with an increased risk of diabetes. Thera’s phase-three clinical trials measured the blood sugar levels of participating patients to evaluate the risk associated with this potential side effect. The trials compared five glycemic parameters recognized by the scientific community and the American Diabetes Association in patients taking tesamorelin and patients taking a placebo, and revealed that tesamorelin did not have a clinically significant effect on the glucose levels of patients.
4. The results of the clinical trials were disclosed to shareholders as they became available. In its November 2008 Annual Notice, for example, Thera summarized its clinical results to date and noted that

the administration of [the hormone] is not indicated for glucose-intolerant patients, a condition often observed in these patients. Consequently, Theratechnologies decided to study the effect of tesamorelin in the treatment of this condition. Highlights of the study included a good safety profile, a clear effect on body composition and a clinically relevant reduction in visceral fat while subcutaneous fat was preserved.

1. On November 11, 2009, Thera, in collaboration with two external experts, presented the combined results of its two phase-three clinical trials at the 12th European AIDS Conference. The fact of this presentation and its content were disclosed to investors via a press release, which stated that “[n]o clinically important changes in glucose parameters were observed after treatment with tesamorelin . . . .”
2. On March 1, 2010, Thera issued a press release announcing the publication of a study detailing its combined clinical results in the publicly available *Journal of Acquired Immune Deficiency Syndromes*. The press release provided a link to the study, which included an abstract highlighting the clinical results and concluding that the potential side effects of tesamorelin were not significant:

Tesamorelin reduces visceral fat by approximately 18% and improves body image distress in HIV-infected patients with central fat accumulation. These changes are achieved without significant side effects or perturbation of glucose. [p. 311]

1. Through these press releases, Thera disclosed to its shareholders that it was monitoring tesamorelin’s side effects, including on patients’ blood sugar levels. It provided both summaries and full studies detailing the results of its clinical trials. There is no allegation that any of these reports were either false or misleading. A reasonable investor who read Thera’s news releases would have known that blood sugar issues and diabetes were potential side effects of the drug, and that Thera’s clinical trials had found they were not clinically significant.
2. As a result, this case can be distinguished from *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, in which the Court held that information contained in drilling results regarding a mining company’s exploration site could constitute a material change in the “business, operations, assets or ownership of the issuer”, since they could reasonably be expected to significantly affect the company’s assets. Unlike the drilling results at issue in *Pezim*, the potential side effects of tesamorelin had already been disclosed to shareholders well before the FDA published its questions and the rest of its briefing materials. There was no new information about the side effects of tesamorelin that required timely disclosure as of May 11, 2010.
3. 121851’s argument is more analogous to the claim in *Kerr v. Danier Leather Inc.*,[2007] 3 S.C.R. 331. The company, which was making an initial public offering (IPO) of its shares, had issued preliminary prospectuses which included a sales forecast for the fourth quarter of the fiscal year to its potential investors. Unseasonably warm weather, however, knocked the company’s sales forecasts off track as the quarter progressed. After its IPO had closed, the company disclosed its intra-quarterly results in a press release, triggering a sharp drop in its share value. Although the company ultimately realized its initial sales forecasts, the claimants launched a class action, alleging that the company had withheld the intra-quarterly results to ensure the success of its IPO.
4. This Court held that the intra-quarterly results did not constitute a material change to the business, operations or capital of the company because the warm weather that triggered the drop in sales was external to the company and its business:

. . . a change in intra-quarterly results is not itself a change in the issuer’s business, operations or capital and, for that matter, does not necessarily signal that a material change has occurred. Sales often fluctuate (as here) in response to factors that are external to the issuer.

It almost goes without saying that poor intra-quarterly results may *reflect* a material change in business operations. A company that has, for example, restructured its operations may experience poor intra-quarterly results because of this restructuring, but it is the restructuring and not the results themselves that would amount to a material change and thus trigger the disclosure obligation. Additionally, poor intra-quarterly results may motivate a company to implement a change in its business, operations or capital in an effort to improve performance. Again, though, the disclosure obligation would be triggered by the change in the business, operations or capital, and not by the results themselves. [Emphasis in original; paras. 46-47.]

1. The same is true in this case. 121851 argues that the FDA’s preoccupation with the side effects represents a material change in Thera’s operations, business or capital. But it has not pointed to any evidence to suggest that the questions the FDA posed to its Advisory Committee about these side effects, or the contents of its Briefing Package more generally, departed in any way from the regular and routine process through which the FDA assesses whether a drug should be approved. Nor is there any evidence that the questions reflected new and undisclosed information about tesamorelin. In fact, the evidence on the record suggests the opposite. It is FDA policy to prepare briefing materials for an Advisory Committee, including information compiled by both the FDA and the sponsoring company, and to post those materials two days before an Advisory Committee meeting. Questions from the FDA to its expert Advisory Committee about the side effects of a drug do not constitute a departure from the normal FDA process, or, necessarily an indication of whether the drug will be approved. Rather, they are a routine step in the FDA’s work to determine whether a drug’s benefits outweigh its risks. As such, it is difficult to characterize these questions as any kind of change to Thera’s business, operations, or capital requiring a reassuring public response from Thera.
2. 121851 argues that the market’s reaction demonstrates that the FDA’s concerns about side effects constitute a material change. It points out that the Canadian Securities Administrators’ “National Policy 51-201 Disclosure Standards” includes among its list of potentially “material” information “any development that affects the company’s resources, technology, products or markets”: Article 4.3. Because this example falls under the subheading of “changes in business and operations”, 121851 submits that the FDA’s questions are a development that could be considered a material change.
3. This section of the policy, however, deals with the market impact of events, not whether they are best characterized as material facts or material changes. To adopt this list as dispositive of whether there was a change in the business, operations or capital of a reporting issuer would collapse the distinction between material facts and material changes, significantly expanding timely disclosure obligations beyond what is required by statute. This would, in effect, allow the Canadian Securities Administrators’ policy to amend Quebec’s securities legislation, contrary to this Court’s ruling in *Pezim*.
4. It is true that Thera had sometimes disclosed routine aspects of the FDA process in press releases to its shareholders in the months leading up to the Advisory Committee meeting, but this does not bring the FDA’s questions to its Advisory Committee within the statutory definition of a material change. Thera had a statutory duty to disclose material changes in its operations, capital or business in a timely manner, not to reassure its investors at every stage of the FDA approval process.
5. Finally, even if Thera had issued a press release on May 11, 2010 after it received the FDA’s briefing materials, it is not clear what reassurance Thera could have provided at this stage, given that the outcome of the FDA process, as every reasonable investor would have known and as Thera repeatedly made clear, is always uncertain. As the U.S. Supreme Court acknowledged in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), there are risks of excessive disclosure, which could “simply . . . bury the shareholders in an avalanche of trivial information — a result that is hardly conducive to informed decisionmaking”: pp. 448-49, cited in *Cornish*, at para. 41.
6. Because the evidence does not credibly point to a material change that could have triggered timely disclosure obligations, there is no reasonable possibility that 121851’s action under s. 73 of the *Securities Act* could succeed. I would allow the appeal with costs.

*Appeal allowed with costs.*

Solicitors for the appellants: Fasken Martineau DuMoulin, Montréal.

Solicitors for the respondent: Savonitto & Ass. inc., Montréal.

Solicitors for the intervener: Siskinds, Desmeules, avocats, Québec; Siskinds, London.