

NO DISCOVERY BEFORE LEAVE IN SECONDARY MARKET SECURITIES ACTIONS

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A recent Ontario court decision confirms that a plaintiff in an action for secondary market securities misrepresentation under the *Securities Act* is not entitled to documentary discovery of the defendants before they obtain leave of the court to bring their action. The decision of Justice Akbarali in [Kwong v. iAnthus Holdings Inc. et. al.](#) emphasizes that the leave mechanism provided in the Act is a balance struck by the legislature to protect investors and promote disclosure while avoiding the American experience of predatory ‘strike suits’.^[1]

Securities legislation in Ontario and other provinces creates a [statutory cause of action](#) against companies and certain individuals for misrepresentations in the secondary securities market. Importantly, the statutory cause of action does not require plaintiffs to prove that they relied on a misrepresentation in order to recover damages. This makes a statutory claim more amenable to class proceedings than traditional common law claims. However, the legislation provides an important gate-keeping function for courts to prevent unmeritorious ‘strike suits’ against public issuers: a plaintiff must obtain leave from the Court to commence a claim.^[2] To obtain leave, the plaintiff must show that their claim has a reasonable chance of success at trial based on “some credible evidence”.^[3] The leave motion is “more than a speed bump” and is “a robust deterrent screening mechanism so that cases without merit are prevented from proceeding”.^[4]

The plaintiff in *Kwong* alleges various misrepresentations or omissions by the defendant cannabis company, its CFO and its former CEO. The plaintiff brought a motion in 2021 for the requisite leave under the *Securities Act*. The Court set a schedule for the exchange of evidence and cross-examinations on the leave motion. Following delivery of the defendants’ motion records, the plaintiffs requested production of certain documents from the defendants *before* they delivered their reply record.^[5] He brought a motion before the Court to compel the productions he sought.

Justice Akbarli rejected the plaintiff’s motion. She noted that previous jurisprudence “established that plaintiffs seeking leave ... have no entitlement to documentary or oral discovery”^[6] and that a moving party on a leave motion is “not permitted ‘to engage in a discovery-like ‘rummage’ through the defendant’s corporate files ‘in the hope of uncovering something helpful to her case.’”^[7] She noted that various procedural rules that

sometimes require the production of documents on a motion were not engaged by the plaintiff's request. The plaintiff wanted documents that were not specifically referenced in the defendants' leave motion affidavits.^[8] Justice Akbarali held that while a party does have an opportunity to compel some production during cross-examination, they cannot do so before serving their own reply affidavit.^[9]

The *Kwong* decision explains that the leave mechanism provided in the *Securities Act* is the balance struck by the legislature to protect investors from misrepresentations, on the one hand, and to avoid the American experience of predatory strike suits, on the other.^[10] Justice Akbarali concluded that until "the leave threshold is passed, the legislature has decided that defendants are only subject to the production obligations that go along with being examined on an affidavit in accordance with the rules of court."^[11]

McMillan represents certain of the defendants in *Kwong*.

[1] *Kwong v. iAnthus Capital Holdings, Inc.*, [2022 ONSC 1400](#) [*Kwong*] at [para 20](#).

[2] *Canadian Imperial Bank of Commerce v. Green*, [2015 SCC 60](#) [*Green*] at [para 67](#).

[3] *Green*, [2015 SCC 60](#) at [para 121](#).

[4] *Kwong* at [para 2](#), citing *Bradley v. Eastern Platinum Ltd.*, [2016 ONSC 1903](#) at [para 51](#).

[5] *Kwong* at [para 10](#).

[6] *Kwong* at [para 5](#).

[7] *Kwong* at [para 5](#), citing *Mask v. Silvercorp Metals Inc.*, [2014 ONSC 5727](#).

[8] *Kwong* at [para 9](#).

[9] *Kwong* at [para 10](#).

[10] *Kwong* at [para 20](#), citing *Baldwin v. Imperial Metals Corporation*, [2021 ONCA 838](#) at [para 16](#).

[11] *Kwong* at [para 20](#).

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A Cautionary Note

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