COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Round v. MacDonald, Dettwiler and Associates Ltd.,* 2012 BCCA 456

Date: 20121102
Docket: CA039489

Between:

Lesley Round

Appellant
(Petitioner)

And

MacDonald, Dettwiler and Associates Ltd., Daniel Friedmann, Magued Iskander, Peter Louis, Robert Phillips, Terrance W. Piche, Marshall Prentice, Gordon D. Thiessen, Martin Willard, and Anil Wirasekara

Resopndents
(Respondents)

Before: The Honourable Mr. Justice Low
The Honourable Mr. Justice Groberman
The Honourable Madam Justice A. MacKenzie

On appeal from Supreme Court of British Columbia, October 21, 2011
(*Round v. MacDonald, Dettwiler and Associates Ltd.*, 2011 BCSC 1416,
Victoria Registry 10-4687

Oral Reasons for Judgment

Counsel for the Appellant: E.F.A. Merchant, Q.C.
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Place and Date of Hearing: Vancouver, British Columbia
November 2, 2012

Place and Date of Judgment: Vancouver, British Columbia
November 2, 2012

[1] **A. MACKENZIE J.A.**: This is an appeal from an order of a Supreme Court chambers judge dismissing the appellant, Lesley Round's, application pursuant to Part 16.1 of the *Securities Act*, R.S.B.C. 1996, c. 418 (the "*Act*") for leave to commence an action for damages for misrepresentation of material facts and failure to disclose material changes.

[2] As the chambers judge noted, these new statutory causes of action came into force in British Columbia on July 4, 2008, and were created in favour of "a person who acquires or disposes" of shares during the period between the breach and its correction. The statutory causes of action form part of the secondary market liability provisions of the *Act.* The secondary market is the market in a company's shares after the shares have been issued or distributed by the company and are trading publicly.

[3] The legislation requires that an intended plaintiff obtain leave of the court before a secondary market liability claim can be commenced. She must establish the claim is brought in good faith and there is a "reasonable possibility" that if leave is granted, the claim will be resolved in her favour at trial (section 140.8(2) of the *Act).*

[4] The chambers judge dismissed the application on two essential grounds. Specifically, he found there was no possibility Ms. Round could succeed at trial because 1) the material facts upon which Ms. Round relied all occurred before the statutory cause of action in Part 16.1 of the *Act* existed and the legislation does not apply retrospectively; and 2) Ms. Round has no cause of action because she did not acquire or dispose of her shares on the secondary market, but instead acquired the shares from MDA's treasury through her voluntary participation in an Employee Share Purchase Plan.

[5] For the reasons that follow, I find the chambers judge was correct on both grounds: Part 16.1 does not apply retrospectively, and Ms. Round did not meet the statutorily required condition of having acquired or disposed of her shares on the secondary market. Therefore, I find the judge properly exercised his discretion to

refuse leave to commence the proposed action. Accordingly, I would dismiss this appeal.

[6] Furthermore, I would not interfere with the exercise of the judge's discretion in awarding costs to the Respondents.

Background Facts

[7] Between October 2002 and December 2008, Ms. Round worked for the respondent company, MacDonald, Dettwiler and Associates Ltd. ("MDA"). During this time, she received an entitlement to a total of 195 common shares of MDA under a voluntary Employee Share Purchase Plan. Under this plan, automatic payroll deductions were made on a monthly basis, the funds accumulated in the employee's account, and the administrator of the plan periodically bought shares from MDA's treasury. The shares were held by the administrator until the employee withdrew them.

[8] During three periods in 2008 – January 1 to January 8, April 8 to April 10, and May 8 to May 12 – no shares were allotted to Ms. Round's employee account. In December 2008, Ms. Round filed an election to withdraw shares from her employee account. These shares were delivered to her and there is no evidence she disposed of them.

[9] On November 17, 2010, Ms. Round sought leave by petition in the Supreme Court to begin a secondary market liability claim under Part 16.1 of the *Act* against MDA and certain directors, officers, and employees of MDA (collectively, the "Respondents"). Ms. Round alleged that MDA had failed to disclose and misrepresented facts about a proposed sale of one of its divisions to Alliant Techsystems Inc. ("ATK"). Specifically, Ms. Round alleged that MDA wrongfully failed to disclose the fact that it was in negotiation before the sale to sell a division, and the fact that the sale was subject to approval by the Minister under the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.).

[10] Ms. Round also alleged that MDA misrepresented the status of the agreement. Ultimately, on May 9, 2008, the Minister responsible for administering the *Investment Canada Act* refused to approve the sale. Ms. Round further alleged that MDA failed to make timely disclosure of the Minister's decisions, as MDA did not disclose the conditional refusal dated April 8, 2008, until April 10, 2008, and did not disclose the final rejection of the sale by the Minister on May 9, 2008, until May 12, 2008.

[11] Ms. Round intended to bring a class action if she were granted leave under Part 16.1 of the *Act*.

Chambers Judgment

[12] The chambers judge refused Ms. Round's application for leave to commence the proposed action under Part 16.1 of the *Act* for several reasons.

[13] First, the judge found that Part 16.1 of the *Act* came into force after the alleged misrepresentations and failures to disclose and it does not have retroactive application. The judge noted that Part 16. 1 of the *Act* came into force on July 4, 2008, and all the events material to the existence of a cause of action and their legal consequences were complete by no later than May 23, 2008, when the price of MDA shares traded higher than immediately before the Minister announced his final decision to reject the sale transaction.

[14] The judge further held statutes are presumed to apply prospectively and there is nothing in the *Act* to indicate the Legislature intended the statutory causes of action to operate retroactively.

[15] Ms. Round argued that MDA's non-disclosure and misrepresentations were not completed by July 4, 2008. She submitted that MDA had failed to make a filing with SEDAR by July 4, 2008, and the events were therefore ongoing after the date the *Act* came into force. In rejecting this argument, the judge held MDA's news release, issued on May 9, 2008, was sufficient disclosure to the public to comply with MDA's substantive disclosure obligations. Furthermore, the critical fact that the

Minister had rejected the proposed sale was filed with SEDAR before July 4, 2008. The judge also held that even if MDA was technically in breach of an obligation to file a Material Change Report on SEDAR, that breach had no effect on the market price of MDA's shares.

[16] The judge also rejected Ms. Round's argument that she was entitled to rely on parallel secondary market liability provisions in Ontario legislation that was in force at the relevant times, as Ontario law was not pleaded.

[17] Second, the judge held Ms. Round did not have a right to bring an action under Part 16.1 of the *Act*, as the secondary market liability provisions do not confer a cause of action on a person who acquired shares from a treasury and did not acquire or dispose of the shares on the secondary market.

[18] The judge also rejected Ms. Round's argument that she need not have a personal cause of action in order to be able to advance the claim on behalf of others who do. The judge found that s. 140.3 of the *Act* clearly states that the cause of action resides with "a person who acquires or disposes" of shares during the periods of breach and s. 140.8 of the *Act* stipulates that the Court may only grant leave where it is satisfied that "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff" (emphasis added). The judge held these provisions clearly indicate an action can only be brought by a person who has a personal cause of action.

[19] The judge concluded that these two grounds were sufficient to dispose of the application, as Ms. Round had not demonstrated she would have any prospect of succeeding at trial.

[20] However, the judge went on to address other arguments made by the parties. In response to Ms. Round's argument that the test to be applied on applications for leave under Part 16.1 of the *Act* should be a low threshold, favouring the party seeking leave, the judge made the following comments:

> [72] Much of this argument neglects the plain wording of the statute. It will be recalled, first, that the test for leave involves the court being satisfied that there is "a reasonable possibility that the action will be resolved at trial in favour of the plaintiff": s. 140.8(2)(b). Additionally, section 140.8(3) states:
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> > Upon an application under this section, the plaintiff and each defendant must serve and file with the court one or more affidavits setting forth the material facts upon which each intends to rely.
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> [73] Taken together, several propositions emerge from these sections. First, the leave application involves a review of evidence. Each side is required to provide evidence of material facts upon which each intends to rely. Secondly, the analysis must involve a weighing and balancing of the evidence of each side. It is not sufficient for the court simply to rely on material filed by the plaintiff. Thirdly, the test involves an assessment of the merits of the proposed action on the evidence. The court must analyze the evidence to decide whether it is satisfied that the "reasonable possibility" test is satisfied. …

[21] The judge rejected Ms. Round's argument that the bar for granting leave should be set lower than the test on certification for a class action. The judge held that the test for granting leave is distinct from the test involved in the certification of class actions; unlike the test for leave, the test for certifying class actions is not a merits test and the court does not analyze or weigh the likelihood of success at trial in deciding whether to certify the action.

[22] The judge also dismissed Ms. Round's argument that s. 140.8(3) of the *Act* requires each respondent to swear, file, and serve a personal affidavit and if the respondents fail to do so, leave should be automatically granted. The judge held that s. 140.8(3) only requires each party to file evidence, in affidavit form, of material facts on which it intends to rely. It does not require each defendant to swear his or her own affidavit.

[23] Finally, the judge held, apart from the issues of the applicability of Part 16.1 of the *Act* and Ms. Round's right to bring this action, the evidence did not demonstrate that Ms. Round had any prospect of succeeding at trial.

[24] The judge awarded costs to the Respondents on Scale B.

Issues on Appeal

[25] Ms. Round alleges the chambers judge erred by:

1. concluding Ms. Round should not automatically have been granted leave to proceed against the nine defendants who failed to file evidence, as required by s. 140.8(3) of the *Act*;
2. concluding Ms. Round does not have a reasonable possibility of succeeding at trial; and
3. awarding costs to the respondents.

Discussion

[26] I will first address Ms. Round's application to adduce fresh evidence, and then address Ms. Round's second ground of appeal.

Application to adduce fresh evidence

[27] Ms. Round seeks an order, pursuant to Rule 31(1) of the *Court of Appeal Rules*, for leave to adduce further evidence. Specifically, she seeks to adduce the Affidavit of Dawn Hunter ("Hunter Affidavit"), sworn October 11, 2011, and the Affidavit of Lesley Round ("Round Affidavit"), sworn February 3, 2012.

[28] The test for the admissibility of fresh evidence is set out in *R. v. Palmer*, [1980] 1 S.C.R. 759 at 775-76:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
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> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief;
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> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[29] Ms. Round says the fresh evidence consists of information which has always been known to the Respondents. She submits that the information contained in the Hunter Affidavit was not known to her until days before Mr. Justice Harris released

his decision and she did not recognize the significance of the information contained in the Round Affidavit until after the release of Harris J.'s decision.

[30] Ms. Round urges the Court to consider that nine of the ten Respondents failed to file affidavits, therefore hampering Ms. Round's ability to present the true facts of the case. Ms Round says this factor weighs in favour of granting the application for leave to introduce further evidence.

[31] Ms. Round also submits the fresh evidence is very relevant and credible. She says the Hunter Affidavit shows MDA learned that the Minister disallowed the sale transaction a full month before publicly disclosing this material fact. She further says the Round Affidavit demonstrates Ms. Round did in fact "acquire" shares of MDA when she was employed by MDA, contrary to the findings of Harris J.

[32] In my view, Ms. Round has failed to meet the test in *Palmer*. First, the evidence was available at the time Ms. Round made the application before the chambers judge and she has not demonstrated that the proposed evidence could not have been adduced at trial with reasonable due diligence.

[33] Secondly, in my view, the fresh evidence is not relevant to either of the issues upon which, as will be explained, I would dispose of this appeal. The alleged fact that MDA may have learned of the Minister's rejection of the sale transaction earlier is irrelevant if Part 16.1 of the *Act* did not apply at that time. In addition, evidence showing Ms. Round allegedly "acquired" shares during the relevant time period is irrelevant, as a cause of action only arises under Part 16.1 of the *Act* if the shares were acquired on the secondary market.

[34] Accordingly, I would dismiss the application to adduce fresh evidence.

Reasonable Possibility of Succeeding at Trial

[35] The chambers judge held there was no reasonable possibility of Ms. Round succeeding at trial because 1) the relevant events occurred before the statutory cause of action in Part 16.1 of the *Act* existed and the legislation does not apply

retrospectively, and 2) Ms. Round has no cause of action, as she did not acquire or dispose of her shares on the secondary market.

Issue 1: Retroactivity of Part 16.1 of the Act

[36] In finding that Part 16.1 of the *Act* does not apply to Ms. Round's intended action, the judge stated:

> [34] In my view, the evidence on the record and allegations contained in the intended action demonstrate that all of the events material to the existence of a cause of action had occurred and their legal consequences were complete before the cause of action existed. Certainly, they were completed by no later than May 23, 2008, when the price of MDA shares traded higher than immediately before the Minister announced his final decision to reject the sale transaction. By that date, any alleged misrepresentation or failure to disclose had been corrected and any effect on market price had evaporated and, with it, any continuing claim by any holder of the shares to a loss or damage as a result of the alleged breaches.
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> [35] I agree with MDA's argument that to apply the civil liability provisions of Part 16.1 to the facts here, all of which predate the creation of the causes of action, would be to give the statute a retroactive or retrospective application. At the time of the events in issue these statutory causes of action did not exist, even if it could be anticipated that they would be brought into force sometime in the future. The proposition that statutes creating a cause of action cannot apply to events before their enactment without having a retroactive effect is sound: Côté, *supra* at 183.
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> ...
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> [39] In this case, there is nothing in the legislative scheme that indicates that the Legislature has turned its mind to the effects and benefits of retroactivity and determined that they outweighed the potential for disruption or unfairness.
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> [40] I conclude, therefore, that the statutory causes of action operate prospectively and not either retroactively or retrospectively.

[37] Ms. Round advances three arguments as to why the judge erred in finding Part 16.1 of the *Act* does not apply to her proposed action.

[38] First, Ms. Round submits Part 16.1 is procedural and therefore applies retrospectively. She points to Part 23.1 of the *Ontario Security Act*, R.S.O. 1990 c. S.5 ("*OAS*"), and contends it is substantially identical to Part 16.1 of the *Act*. Ms. Round says she could have sought relief under Part 23.1 of the *OSA* and argues

that the *OSA* creates substantive rights, while Part 16.1 of the *Act* simply provides a procedural scheme to facilitate the enforcement of those rights in British Columbia.

[39] Second, Ms. Round submits Part 16.1 of the *Act* was enacted to protect the public and therefore the presumption against the retroactive application of the statute does not apply. Ms. Round relies on *Brosseau v. The Alberta Securities Commission*, [1989] 1 S.C.R. 301, for this proposition.

[40] Third, Ms. Round submits her right of action arose after Part 16.1 of the *Act* came into force, as MDA still has not disclosed the Minister's final decision in the manner and at the time required under the *Act*. Ms. Round acknowledges MDA issued a news release on May 9, 2008, but says the news release was not filed, was not authorized by an executive officer, and does not disclose the nature and substance of the material change. She further says MDA contravened the *Act* by failing to file a Material Change Report on SEDAR.

[41] I would not accede to any of Ms. Round's arguments on this issue. The conclusion of the chambers judge on the applicability of the presumption against retroactive application of legislation is supported by the authority he cited that "retroactive operation of a statute is highly exceptional, whereas prospective operation is the rule": Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Scarborough: Carswell, 2000) at 169. See also *Angus v. Sun Alliance Insurance Co.*, [1998] 2 S.C.R. 256 at 262, which both the majority and the dissent endorsed in the recent decision in *R. v. Dineley*, 2012 SCC 58 at paras. 10 and 45. Ms. Round has not identified any error which would form a basis for interfering with the judge's conclusion.

[42] In *Dineley*, Deschamp J., for the majority, at para. 15, also approved the following statement of La Forest J. from *Angus* at 265-266:

> Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use. … Alteration of a "mode" of procedure in the conduct of a defence is a very

> different thing from the removal of the defence entirely. [Emphasis in original.]

In the present case, the legislation creates a new obligation. It is therefore substantive and does not apply retroactively. *Dineley* makes it clear the real question on retroactivity is whether the legislation creates new consequences for completed acts or imposes new substantive obligations.

[43] The judge also correctly refused to rely on the *OSA*, as Ontario law was not pleaded in the petition; clearly, the Court could not give leave under the BC legislation to bring an action under Ontario legislation.

[44] Ms. Round also appears to raise the Ontario legislation to say the BC legislation does not attach new consequences to completed acts, because the legislation of another jurisdiction already attaches those consequences. This argument has no merit. The question of whether the *Act* is intended to be retroactive cannot depend on the existence of legislation in another jurisdiction. Therefore, even had Ms. Round pleaded the Ontario legislation, it would not have improved her prospects.

[45] Furthermore, I agree with the Respondents that *Brosseau* does not apply in the circumstances. As the Respondents point out, this Court has restricted the scope of *Brosseau*. In *B.C. Hydro & Power Authority v. British Columbia (Environmental Appeal Board)*, 2003 BCCA 436, 17 B.C.L.R. (4th) 210 at paras. 70-71 (overturned on a different point: 2005 SCC 1, [2005] 1 S.C.R. 3), Newbury J.A., stated:

> [70] L'Heureux-Dubé, J. summarized this passage of ***Brosseau*** by saying the presumption applies "only to prejudicial statutes" (p. 318), and that since the statutory amendment under consideration in ***Brosseau*** was "designed to protect the public, the presumption . . . [was] effectively rebutted" (p. 321). As noted by Professor Sullivan (*supra*, 4th ed., at 561), the latter comment of L'Heureux-Dubé J. was, with respect, perhaps misleading: the presumption is not rebutted simply by showing that the purpose of a provision is to protect the public. The emphasis is not on the intention or motivation of the Legislature, but on the consequences attached by the legislation to the past acts or conduct. Moreover, as Mr. Singleton argued, virtually every statute is designed to protect the public or the public interest in some way. Obviously, the ***Waste Management Act*** is intended to do so. But Part 4 clearly does not attach "benevolent

> consequences" to prior events. It attaches new liabilities to conduct (even conduct expressly authorized under permits issued by the Crown) that previously did not attract liability; and that consequence is "prejudicial" to those affected, though perhaps not "punitive" or "penal".
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> [Emphasis added.]

[46] As in *B.C. Hydro*, the legislation in this case attaches new liabilities to conduct that previously did not attract liability and therefore imposes prejudicial consequences. The above principle in *BC Hydro* is therefore apt and I would endorse it.

[47] The chambers judge also correctly found MDA fulfilled all its disclosure obligations by May 12, 2008, after it had disclosed the Minister's rejection of the proposed sale in a news release issued on May 9, 2008, and it had disclosed the Minister's rejection in documents that were filed with SEDAR on May 12, 2008. The judge correctly concluded that the news release was sufficient disclosure to the public under the secondary market liability provisions in the *Act.* As the Respondents note, s. 140.3(4) is only available with respect to securities that have been acquired or disposed of before the "subsequent disclosure of the material change"; it does not require subsequent disclosure of the material change in the manner required by the *Act* and therefore "subsequent disclosure" does not require filing a Material Change Report with SEDAR.

[48] Finally, the chambers judge correctly found Ms. Round's cause of action is not ongoing, as no damages were incurred after May 23, 2008, at the latest. The judge found that after May 23, 2008, the market price of MDA shares had rebounded and was higher than before the Minister announced his final decision.

Issue 2: Acquired or Disposed of on the Secondary Market

[49] It was not disputed before the chambers judge that Ms. Round acquired her shares through her participation in the Employee Share Purchase Plan and that those shares were distributed from MDA's treasury. Neither she nor the plan administrator acquired them from the secondary market. In considering whether the

secondary market liability provisions in the *Act* applied to Ms. Round's shares, the judge said:

> [58] The question is, therefore, whether the secondary market liability provisions can confer a cause of action on a person who acquired shares from treasury and did not acquire or dispose of them on the secondary market.
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> [59] MDA argued that a distribution of shares from a company's treasury to an employee is exempt from Part 16.1 (the secondary market liability provisions) if the distribution is voluntary. It is not in dispute that Ms. Round received her entitlement to shares through her voluntary participation in the Employee Share Purchase Plan.
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> [60] The basis of this argument is that Part 16.1 does not apply to the acquisition of an issuer's security pursuant to a distribution that is exempt from s. 61, unless the acquisition is within a class of prescribed acquisitions: see s. 140.2(b). In other words, the distribution must meet two conditions. It must be exempt from s. 61. If it is exempt, it must also not fall within a class of prescribed acquisitions.
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> [61] The first question, therefore, is whether this distribution is exempt from s. 61. Section 61 provides that an issuer must not distribute a security unless a prospectus has been filed, unless an exemption applies. A distribution includes: "(a) a trade in a security of an issuer that has not been previously issued": see s. 1(1) definition of "distribution". It is not in dispute that Ms. Round's shares were a distribution within the meaning of this definition.
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> [62] The next aspect of this question is whether this distribution is exempt from the requirement that a prospectus be filed. Section 2.24 of National Instrument 45-106 Prospectus and Registration Exemptions, B.C. Reg. 269/2005 (now replaced by B.C. Reg. 227/2009) exempts from the prospectus requirement a distribution "by an issuer of its own issue... with an employee... if participation in the distribution is voluntary". This provision applies to Ms. Round's acquisition of her shares. It follows that the distribution of shares to Ms. Round is exempt from s. 61.
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> [63] The second question is whether, nonetheless, the "acquisition is within a class of prescribed acquisitions". If it were, Part 16.1 would apply. It is clear however that the distribution here does not fall within a class of prescribed acquisitions. The class of "prescribed acquisitions" referred to in s. 140.2 is set out in s. 185.3 of the Securities Rules, B.C. Reg. 194/97. These Rules relate to the resale of securities and takeover bids. The distribution of shares to Ms. Round does not fall within the class of "prescribed acquisitions".
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> [64] In the result, the secondary market liability provisions do not apply to confer a cause of action on Ms. Round in respect of the shares she acquired through the Plan.

> The judge concluded:
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> [67] Having acquired her shares as an employee through a voluntary plan from the company's treasury and neither having acquired them from the second market nor having disposed of them there, Ms. Round does not have a cause of action against the intended defendants. She is not a person who in her capacity as a plaintiff can demonstrate a reasonable possibility that the action will be resolved at trial in her favour.

[50] Ms. Round argues the judge erred in finding Ms. Round's shares were a "distribution" within the meaning of s. 140.2(b) of the *Act*. She says her shares do not fall within the definition of "distribution" in s. 1.1 of the *Act*, as there was no evidence the shares had not been "previously issued". Ms. Round also relies on the definition of "treasury shares" in the UK *Companies Act*, 2006, c. 46, to argue treasury shares are issued shares.

[51] I observe that Ms. Round has changed her position from the position she took at the hearing below. As noted by the chambers judge, at para. 61, it was not in dispute that Ms. Round's shares were a distribution within the meaning of the *Act*.

[52] Ms. Round further argues the judge erred in holding this "distribution" was exempt from s. 61 of the *Act*. She says the phrase "Unless exempted under this *Act*" in s. 61 means that any exemptions must be found in the *Act*, without reference to regulations or other sources. As the *Act* itself does not contain any exemptions, Ms. Round submits her shares are not exempt from s. 61, and therefore Part 16.1 applies to her intended action.

[53] Ms. Round's submissions fail to persuade me that the chambers judge made any error in his reasoning as to whether the secondary market liability provisions in the *Act* applied to Ms. Round's shares. In my view, the judge correctly held Ms. Round's shares were a "distribution" within the meaning of the *Act*. As the Respondents point out, the treasury shares were issued by MDA expressly for the voluntary Employee Share Purchase Plan. There is nothing in the evidence to refute the finding that they were issued expressly for this purpose.

[54] Nor would I accede to Ms. Round's argument that any exemptions from s. 61 of the *Act* must be found in the *Act* itself, not in any regulations. As the Respondents point out, s. 33(6) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, provides that "If an enactment refers to a matter 'under' a named or unnamed Act, an Act in that reference includes regulations enacted under the authority of that Act." Thus, the phrase "Unless exempted in this *Act*" in s. 61 of the *Act* refers to exemptions in the *Act* itself and in any regulations enacted under the authority of the *Act*, including National Instrument 45-106.

[55] Finally, Ms. Round argues the judge erred in holding an action under Part 16.1 of the *Act* can only be brought by a person who is properly a plaintiff. Ms. Round relies on s. 140.9 of the *Act*, which addresses the notice requirements when leave is granted and refers to "A person that has been granted leave to commence an action under s. 140.3" (emphasis added). Ms. Round says the word "person" is broader than the word "plaintiff". The chambers judge correctly disposed of this argument as follows:

> [57] I cannot accede to this latter argument. Section 140.3 of the *Act* is explicit that the cause of action resides with "a person who acquires or disposes" of shares of an issuer during periods of breach. The leave requirement, under s. 140.8, stipulates that the court may only grant leave where it is satisfied that, "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff" (emphasis added). Jointly these provisions make it apparent that an action can only be brought by a person who has a cause of action and is, thereby, properly a plaintiff. If Ms. Round does not personally have a cause of action, leave cannot be granted to start the action.

[56] In summary, it is my view that the chambers judge was correct in finding there was no reasonable possibility of Ms. Round succeeding at trial because the legislation does not apply retroactively to the relevant events and Ms. Round has no cause of action.

[57] This conclusion is sufficient to dispose of the appeal. It is therefore unnecessary to address the arguments that her intended action has a reasonable prospect of success on the merits. I would add, however, that there is no merit to

Ms. Round's argument that s. 140.8(3) of the *Act* requires each defendant to swear, file, and serve a personal affidavit and since the respondents failed to do so, leave should automatically have been granted. As the judge said, s. 140.8(3) only requires each party to file evidence, in affidavit form, of material facts on which it intends to rely. It does not require each defendant to swear his or her own affidavit.

Costs

[58] Ms. Round submits the chambers judge erred in awarding costs to the Respondents, as the no-costs regime in s. 37 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*"), governs the award of costs in this case. Ms. Round argues the large cost award defeats the purpose of class proceedings legislation and has a chilling effect upon the willingness of wronged investors to bring meritorious claims, as the risk is far greater than the possible benefit.

[59] The Respondents submit this cost award is not governed by the *CPA* as the no-costs regime in the *CPA* is not engaged before the hearing of the class action certification application. The Respondents also point to Rule 1-2(a) of the *Supreme Court Civil Rules*, which provides that the *Rules* govern every proceeding in the Supreme Court, unless an enactment otherwise provides. As the *Act* is silent on the issue of costs, the regular principles under the *Rules* apply and costs are awarded to the successful party.

[60] The Respondents also say there is no evidence to support the suggestion Ms. Round's counsel has not indemnified Ms. Round. They note that representative plaintiffs in class action proceedings often enter into retainer agreements with class counsel that provide indemnification from adverse costs awards.

[61] I agree with the Respondents' submissions that the no-costs regime in the *CPA* does not apply to these proceedings.

[62] In *Seidel v. TELUS Communications Inc.,* 2009 BCCA 383, 96 B.C.L.R. (4th) 24, the Court said:

> [2] We are of the view that the costs of the appeal should follow the normal course set out in s. 23 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, and be awarded to the appellant, which was successful on the appeal. The action was not certified prior to the stay, and s. 37 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, which provides for a "no costs" regime in respect of certified class actions, had not yet been engaged. The respondent is seeking financial gain on behalf of herself and others in the proposed class, and the issue in the action is not one of consequence to the community as a whole. The action is not properly characterized as public interest litigation: see *Smith v. Canada (Attorney General)*, 2006 BCCA 407, 56 B.C.L.R. (4th) 333.

[63] It follows that the judge properly exercised his discretion by awarding costs to the Respondents. I would not interfere with the award of costs.

Conclusion

[64] I would dismiss this appeal.

[65] **LOW J.A.**: I agree.

[66] **GROBERMAN J.A.**: I agree.

[67] **LOW J.A.**: The application to adduce fresh evidence is dismissed. The appeal is dismissed.

"The Honourable Madam Justice A. MacKenzie"