

**CITATION:** Browne v. Horizons ETF Corp., 2022 ONSC 3441  
**COURT FILE NO.:** CV-20-00646401  
**DATE:** 20220608

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** EUAIN BROWNE, BENJAMIN NEITSCH, and FAISAL YASIN, Plaintiffs

– and –

HORIZONS ETF CORP., HORIZONS ETFS MANAGEMENT (CANADA) INC., STEVEN J. HAWKINS, JULIE STAJAN, KEVIN S. BEATSON, MCGREGOR SAINSBURY, GEOFF SALMON, WARREN LAW, WAN YOUN CHO and THOMAS PARK, Defendants

**BEFORE:** Justice E.M. Morgan

**COUNSEL:** *David Rosenfeld and David Sterns*, for the Plaintiffs  
*Seumas Woods and Ryan Morris*, for the Defendants

**HEARD:** June 8, 2022

**SEQUENCING – MOTIONS TO AMEND, LEAVE TO PROCEED, CERTIFICATION**

[1] At this case conference, counsel for the Plaintiffs advise that they seek to amend their pleading. Defendants have already served a Statement of Defence; they do not consent to the amendment. Defendants’ counsel are of the view that the claims being added have been barred by recent case law.

[2] Plaintiff’s counsel have provided me with their Notice of Motion and proposed amended pleading, together with a letter setting out their arguments in full. However, I do not have anything filed by the Defendants in respect of the motion to amend. I am not in a position to actually hear and determine the Plaintiff’s motion for leave to amend in the context of this case conference. It will have to be argued as a proper motion.

[3] This action began as a primary market securities claim, but the proposed amendment to the pleadings adds a secondary market claim which will require a motion for leave to proceed under Part XXIII.1 of the *Securities Act*, RSO 1990, c. S.5 (“OSA”). Plaintiffs’ counsel propose arguing the leave motion under the OSA together with a certification motion under the *Class Proceedings Act, 1992*, SO 1992, c. 6 (“CPA”), as there is substantial overlap in the issues and arguments raised in those two motions. The sequencing question that arises here is whether the motion to amend the Plaintiff’s pleading is to be argued together with those two motions or is to be scheduled as a separate and preliminary motion.

[4] Defendants' counsel argues that the motion to amend should go first. Their view is that if they are successful in challenging the amendment it will eliminate the secondary market claims and will thereby dispense of any need for a leave motion. Plaintiffs' counsel argues that the motions should all be heard together. Their view is that if the motion to amend is argued first it will likely spawn an appeal which will mean further delaying the entire action.

[5] My inclination is to have the three motions heard together. That way, if there is to be an appeal it can be an appeal of any or all of the motions together. As case management judge, I have discretion under the *CPA* to schedule these matters as efficiently as possible. It seems to me that scheduling them together is not only the most expeditious way to proceed, but is the best way to foster access to justice under the circumstances.

[6] I do not see any legal impediment to hearing the three motions at the same time. As Plaintiffs' counsel point out, courts are authorized to hear and determine a motion for certification on the basis of a proposed amended statement of claim: *Brake v. Canada (Attorney General)*, 2019 FCA 274. By the same logic, there is no reason that a court cannot hear and determine a motion for leave to proceed on the basis of a proposed amended statement of claim. The leave argument, like the certification argument, will in any case involve the question of whether the pleadings demonstrate a viable cause of action.

[7] This overlap in arguments makes hearing the motions together the best option. There is nothing to be gained by replaying these arguments on separately scheduled motion days, and much to be lost in terms of time, potentially separate appeals, etc. I would prefer to avoid what Justice Strathy has called "litigation by installment": *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146 at para. 15.

[8] The Plaintiffs' motions to amend their pleading, for leave to proceed under the *OSA*, and for certification under the *CPA*, will be heard together over four days: from February 28, 2023 to March 3, 2023.



**Date:** June 8, 2022

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Morgan J.