Stikeman Elliott

Securities Litigation – Canada chapter

By Alexander D. Rose and Sinziana R. Hennig

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Securities Litigation

Contributing editors

Antony Ryan and Philippe Z Selendy

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Contributing editors

Antony Ryan
Cravath, Swaine & Moore LLP

Philippe Z Selendy
Selendy & Gay PLLC

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law
Business
Research

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87 Lancaster Road
London, W11 1QQ, UK
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Fax: +44 20 7229 6910

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Securities Litigation 2019

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Securities Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Greece, Korea and Nigeria.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Antony Ryan of Cravath, Swaine & Moore LLP and Philippe Selendy of Selendy & Gay PLLC for their continued assistance with this volume.

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Canada

Alexander D Rose and Sinziana R Hennig
Stikeman Elliott LLP

1 Describe the nature and extent of securities litigation in your jurisdiction.

In Canada, securities litigation can refer to a variety of proceedings, including civil proceedings relating to securities transactions, enforcement proceedings by provincial securities regulators and industry self-regulatory organisations, and litigation relating to shareholder disputes, change of control, and other corporate law issues.

This chapter will focus on civil proceedings relating to securities transactions brought in the common law provinces of Canada (ie, excluding the civil law jurisdiction of Quebec). Such civil proceedings mainly take the form of investor class actions seeking damages for misrepresentations in issuers' disclosure. Investors may allege misrepresentations either in initial disclosure documents such as prospectuses and offering memoranda ('primary market' claims), or in the continuous disclosure of material changes required under securities legislation ('secondary market' claims).

For constitutional reasons, securities regulation in Canada has so far occurred entirely at the provincial level, although legislation and regulatory instruments are harmonised between the provinces to a significant extent. Class proceedings legislation is also enacted by the individual provinces, and although it is broadly similar among the common law provinces that have enacted it, it may vary in particulars. This chapter is based on the law of Ontario, where the Toronto Stock Exchange (TSX) is located, most Canadian securities transactions take place, and the large majority of Canadian securities class actions are filed, except where we specifically highlight differences between the law of Ontario and that of other provinces.

Since 2006, when Ontario introduced Canada's first statutory cause of action for secondary market misrepresentation, the number of new securities class actions commenced each year increased substantially from 2008 through to 2014, and has decreased in recent years. The new securities class actions commenced in recent years have almost all been secondary market claims.

The risk of facing a new securities class action remains lower for companies listed on Canadian securities exchanges than for those listed on major US exchanges. However, securities class actions in Canada are settled or dismissed at much lower rates than in the United States, at least in part because statutory secondary market claims are still a developing area of law and there has been protracted litigation regarding the circumstances in which such claims can be brought. Although many secondary market class actions have been certified, there have not yet been any reported trial decisions.

Securities litigation in Canada often has cross-border aspects, as many issuers trade both on the TSX and on one or more major US exchanges, and may face parallel claims in both countries. A significant emerging issue, discussed below, is whether and when courts in Canadian provinces may certify global classes that include investors resident or trading in the United States or other foreign countries.

2 What are the types of securities claim available to investors?

Investors frequently assert a mix of common law claims and claims under provincial securities legislation.

Common law claims

At common law, the main types of securities claims available to investors are negligent or fraudulent misrepresentation. These causes of action require investors to prove that they reasonably relied upon the misrepresentation and suffered damage as a result. As courts often conclude that detrimental reliance is an issue that is individual to each investor, which cannot be determined on a class-wide basis, standalone claims of common law misrepresentation typically cannot be certified as class actions.

Investors may be able to assert other common law causes of action in specific circumstances, such as claims of:

- negligence in providing tax opinions used to market certain investments;
- conspiracy to manipulate the market for a security; or
- breach of contract or breach of fiduciary duty claims against brokers.

Statutory claims

The main claims available under provincial securities legislation are for misrepresentation either in primary market documents or in secondary market continuous disclosure. These statutory causes of action are available without regard to whether the investor relied on the misrepresentation, and consequently remove a major obstacle to class certification.

Securities legislation also provides less commonly used causes of action, including for misrepresentation in takeover bid circulars, for failure to deliver required disclosure documents, and for damages resulting from insider trading.

Investors may also bring claims of oppression under the federal or provincial business corporations act pursuant to which the issuer is incorporated. Oppression applications require investors to show that their reasonable expectations were violated by corporate acts that were oppressive, unfairly prejudicial, or unfairly disregarded their interests. A wide range of remedies is available, including compensation.

3 How do claims arising out of securities offerings differ from those based on secondary-market purchases of securities?

Statutory claims for misrepresentations in offering documents are available only to investors who purchased in the primary market (not in the secondary market) during the period of distribution under the offering document. Claims may be brought against the issuer, its underwriters, directors and persons (such as experts) whose consent or signature was required for the offering document.

Statutory claims are available for secondary market purchasers in respect of misrepresentations in documents released or in public oral statements made by or on behalf of a public company, or where the company has failed to make the timely disclosure of material changes in its business, operations or capital required by provincial securities legislation. Claims may be brought against the company or its directors, officers, 'influential persons' including controlling shareholders and their officers and directors, and experts quoted in the company's disclosure.

Leave of the court is required to commence secondary market claims only. The leave test is merits-based: the court will grant leave only if satisfied that the action is being brought in good faith and there is a 'reasonable possibility' of success. The Supreme Court of Canada has held that this requires plaintiffs to 'offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim.'

Further differences between the two types of claims are addressed below, including differences as to what constitutes actionable misrepresentation, the available defences and remedies, and the applicable limitation periods.

4 Are there differences in the claims available for publicly traded securities and for privately issued securities?

Yes. Statutory secondary market misrepresentation claims are only available with respect to publicly traded securities.

5 What are the elements of the main types of securities claim?

Statutory claims

To establish primary market misrepresentation, the plaintiff must prove that it purchased a security offered under a prospectus or offering memorandum during the period of distribution, and the offering document contained a misrepresentation (as defined in the next question).

To establish secondary market misrepresentation, the plaintiff must prove that (i) there was a misrepresentation in a document released or a public oral statement made by or on behalf of a public company, or a failure to make timely disclosure of a material change, and (ii) the plaintiff acquired or disposed of the company's securities after the misrepresentation or failure to disclose, and before it was publicly corrected.

Common law claims

For negligent misrepresentation, the plaintiff must prove that:

- there was a duty of care based on a 'special relationship' between the representor and the representee;
- the representation was false or misleading;
- the representor acted negligently in making the misrepresentation;
- the representee reasonably relied upon the misrepresentation; and
- the reliance was detrimental to the representee, in the sense that harm resulted.

For fraudulent misrepresentation, the plaintiff must prove that:

- the representor made a false representation;
- the representor made the misrepresentation knowing that it was false, or recklessly without caring whether it was true or false;
- the representor intended that the representee rely on the misrepresentation; and
- the representee did rely on it in entering into the transaction.

6 What is the standard for determining whether the offering documents or other statements by defendants are actionable?

For purposes of the statutory claims, a misrepresentation is an untrue statement of material fact or an omission to state a material fact that was either required to be stated or necessary to make a statement not misleading in the circumstances. Securities legislation provides that a fact is material if it would reasonably be expected to have a significant effect on the market price or value of securities (a standard known as the 'market impact' test). Despite the statutory definition of materiality, Canadian courts have also applied the 'reasonable investor' test from US securities law: a fact may be considered material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to invest and at what price, in that it would have significantly altered the 'total mix' of information available.

A statutory secondary market claim can also be advanced on the basis of a failure to make timely disclosure of a material change as required by securities legislation. A 'material change' is defined 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, and can include a decision by the board of directors or senior management of the issuer to implement a material change.

For common law misrepresentation claims, the plaintiff must prove on a balance of probabilities that a factual representation was untrue, inaccurate, or misleading. Forecasts and opinions are not actionable on this basis unless they contain implied misstatements of existing facts. Omissions are also not actionable, except where the omission renders a positive representation misleading.

7 What is the standard for determining whether a defendant has a culpable state of mind?

There is no culpable state of mind requirement for statutory primary market claims, or for secondary market claims of misrepresentation in 'core' documents or against experts. For all other secondary market claims, the plaintiff must prove that the defendant knew of the misrepresentation, deliberately avoided acquiring knowledge of it, or was guilty of gross misconduct in connection with the misrepresentation.

Certain defendants may be able to raise a due diligence defence to statutory misrepresentation claims as discussed at question 12.

For common law claims, plaintiffs must establish that the defendants acted negligently, knowingly, or with recklessness as to the truth or falsity of the representation.

8 Is proof of reliance required, and are there any presumptions of reliance available to assist plaintiffs?

Proof of reliance is not required for the statutory claims, but is required for common law negligent misrepresentation claims. Presumptions of reliance are not available; in particular, the 'fraud on the market' theory has not been accepted in Canada. As a result, reliance is generally considered a claimant-specific issue, requiring individual evaluation and fact-finding, and therefore inherently unsuitable for class certification.

9 Is proof of causation required? How is causation established?

For statutory misrepresentation claims, the plaintiff is not required to prove causation. The onus is on the defendant to prove that all or part of the claimed damages are attributable to a change in the value of the security unrelated to the alleged misrepresentation or failure to make timely disclosure.

For common law misrepresentation claims, the plaintiff must prove that the loss for which compensation is claimed was caused by reliance on the misrepresentation.

10 What elements present special issues in the securities litigation context?

The following elements have presented special issues in recent cases:

- Materiality: As discussed in question 6, for misrepresentation claims under securities legislation, there is both a statutory definition of a 'material' fact or change (the market impact test), and an alternative test adopted by Canadian courts from US federal securities law (the reasonable investor test). The recent decision in *Paniccia v MDC Partners Inc*, 2018 ONSC 3470 [MDC Partners] highlights the importance of the materiality element. The court denied leave to commence a statutory claim for secondary market misrepresentation because all of the alleged misrepresentations lacked materiality. The plaintiff alleged that the issuer had omitted to disclose a regulatory subpoena, and had made various misrepresentations with respect to executive compensation, accounting practices and internal controls. The court held that the mere receipt of a regulatory subpoena was not a material fact that triggered a duty to disclose. Furthermore, in the absence of any restatement of the issuer's financial statements, withdrawal of the auditors' unqualified opinions, criminal or regulatory findings, or acknowledgment of any misrepresentation of material fact by the issuer, the plaintiff had to adduce some other evidence to establish materiality of the alleged misrepresentations, and had failed to do so. Evidence from an expert accountant did not assist the plaintiff: the court noted that the expert was qualified to opine on what was material from an accountant's or auditor's perspective, but not on what was a material fact or material change for purposes of securities legislation, which is a legal test.
- Reliance: As discussed in question 2, the element of reliance poses a significant obstacle to class certification of common law misrepresentation claims, since reliance will usually be an individual issue that is not amenable to determination on a class-wide basis. Reliance is not an element of statutory misrepresentation claims.
- Public correction: A public correction of the alleged misrepresentation is an element of the statutory cause of action for secondary market misrepresentation. Damages are measured as the difference between the price paid or received for securities while the misrepresentation was operative, and the trading price of the securities following its public correction. There is no statutory

definition of 'public correction'. The public correction need not be made by the issuer of the security, and could in principle take any form, including statements by the issuer, rating agencies, market analysts or short-sellers. The public correction need not be a mirror-image of the alleged misrepresentation or a direct admission that a previous statement was untrue, but must be reasonably capable of revealing to the market the existence of a prior misrepresentation. The *MDC Partners* decision discussed above is also notable as the first case in which leave to proceed with a statutory secondary market action was denied in part because the plaintiff had failed to plead any public correction of some of the alleged misrepresentations.

11 What is the relevant limitation period? When does it begin to run? Can it be extended or shortened?

Common law claims are subject to the limitation periods set out in provincial limitation statutes. In most provinces, including Ontario, the limitation period generally applicable to civil claims is two years from the date when the plaintiff discovered or could reasonably have discovered that it had a claim.

Securities legislation prescribes special limitation periods for statutory misrepresentation claims. For statutory primary market claims, the limitation period for seeking rescission is 180 days from the date of the purchase of securities. The limitation period for damages claims is the earlier of three years after the date of the transaction or 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action.

For statutory secondary market claims, the limitation period is three years from the release of the document or statement containing the misrepresentation, or from the failure to make timely disclosure. The interplay between this limitation period and the requirement for leave to commence a statutory secondary market action has been heavily litigated. In *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60, the Supreme Court of Canada held that leave must be obtained before the end of the three-year period, but that courts have the discretion to grant leave retroactively ('nunc pro tunc') where the motion for leave was filed within the limitation period but granted after its expiry. As this litigation was ongoing, Ontario's securities legislation was amended in 2014 to provide that filing a motion for leave to bring a secondary market action suspends the three-year limitation period.

12 What defences present special issues in the securities litigation context?

Provincial securities legislation contains multiple defences tailored to primary or secondary market claims, and to different categories of defendants. The two most significant types of defences are addressed here.

First, all defendants can avoid liability if they can establish that the plaintiff traded with knowledge of the misrepresentation. This is the only defence available to the issuer or selling security holder in a primary market claim.

Second, defendants other than the issuer or selling security holder in a primary market claim can also raise various due diligence defences.

For primary market claims, experts have a due diligence defence, broadly speaking, if (i) they had reasonable grounds after reasonable investigation to believe that the offering document fairly represented their expert opinion, and (ii) the part of the offering document based on their opinion did not contain a misrepresentation. Non-experts have a due diligence defence if (i) they had no reasonable grounds for believing that there was a misrepresentation in any expertised part of an offering document, and (ii) they had reasonable grounds after reasonable investigation for believing that there was no misrepresentation in the non-expertised parts of the offering document. The standard of reasonableness is that required of a prudent person in the circumstances of the particular case. The plaintiff has the onus of disproving due diligence.

For secondary market claims, defendants bear the onus of proving that they conducted or caused to be conducted a reasonable investigation and had reasonable grounds to believe that there was no misrepresentation or failure to make timely disclosure. The reasonableness of the investigation is determined based on all relevant circumstances, including a number of enumerated factors, such as the defendant's knowledge, experience, function, and office; the existence and nature of any system designed to ensure that the issuer meets its continuous disclosure obligations; and whether reliance on such a system was reasonable.

13 What remedies are available? What is the measure of damages?

In the context of statutory claims, investors who purchased securities in the primary market from the issuer or from an underwriter may elect to exercise a right of rescission. All investors may claim damages. In broad terms, the measure of damages is the difference between the price paid or received by the claimant for the securities and the trading price following general disclosure or public correction of the misrepresentation or non-disclosure. As noted at question 9, defendants have the onus to prove that all or part of the damages claimed for the change in the value of the security were unrelated to the alleged misrepresentation or non-disclosure.

The statutory damages are subject to caps. For primary market claims, damages are limited to the amount raised by the offering (and for underwriting defendants, to the portion of the distribution that each underwrote). For secondary market claims, damages are capped at different 'liability limits' for different defendants. The liability limit for the issuer is the greater of 5 per cent of its market capitalisation and C$1 million. The liability limit for directors and officers is the greater of C$25,000 and 50 per cent of the aggregate of the director or officer's compensation by the issuer. The liability limit for experts is the greater of C$1 million and the revenue earned from the issuer during the 12 months preceding the misrepresentation. For defendants other than the issuer, the liability limit does not apply if the plaintiff proves that they acted with knowledge of the misrepresentation. Damages awarded and settlements paid in statutory secondary market actions in other provinces count towards the liability limit.

In the context of common law misrepresentation claims, either rescission or damages are available, in principle. Damages are awarded to compensate the plaintiff for losses suffered in reliance on the misrepresentation, not to put the plaintiff in the position in which it would have been had the representation been correct.

14 What is required to plead the claim adequately and proceed past the initial pleading?

Leave of the court is required to plead statutory secondary market claims (see question 3). No other special pleading requirements apply in securities litigation.

The general pleading requirements in civil litigation are that the statement of claim must plead the elements of each cause of action, including a concise statement of the material facts on which the plaintiff relies, but not the evidence by which those facts are to be proved. Where fraud or misrepresentation are alleged, the pleading must contain full particulars.

15 What are the procedural mechanisms available to defendants to defeat, dispose of or narrow claims at an early stage of proceedings? What requirements must be satisfied to obtain each form of pretrial resolution?

For statutory secondary market claims, the leave requirement is a legislated screening mechanism intended to dispose of unmeritorious litigation, or 'strike suits', at an early stage. As noted in question 3, the leave test is merits-based and requires the plaintiff to establish that the action is being brought in good faith, and that there is a 'reasonable possibility' of success, which requires both a plausible analysis of the applicable legislative provisions and some credible evidence in support of the claim.

The procedural mechanisms available to defendants to dispose of claims at an early stage are otherwise those generally available in civil litigation, namely:

- jurisdictional challenges: defendants may challenge the court's jurisdiction over foreign defendants or in respect of securities traded in a foreign jurisdiction, or seek a stay of proceedings in favour of a more appropriate forum based on the doctrine of forum non conveniens;
- motions to strike pleadings: the test is whether it is plain and obvious that the claim discloses no reasonable cause of action. The facts pleaded are assumed to be true. Evidence is not admissible, although the court can consider any documents incorporated by reference in the pleadings;

- determination of a question of law: a court may determine a question of law raised by the pleading, where the determination could dispose of all or part of the action, substantially shorten the proceeding, or result in a substantial saving of costs. Evidence is admissible with leave or on consent, but the motion will generally not succeed where material facts are in dispute; and
- summary judgment: Defendants may move for summary judgment on part or all of the claim. Motions for summary judgment are generally based on affidavits and out-of-court cross-examinations, although judges have the power to order 'mini-trials' with limited presentation of oral evidence. Summary judgment will be granted where there is no genuine issue for trial, meaning that the judge is able to reach a fair and just determination on the merits, which includes making necessary findings of fact and applying the law to the facts, without the benefit of a conventional trial process. In 2014, the Supreme Court of Canada strongly endorsed summary judgment as a proportional, accessible and affordable alternative to the conventional trial (*Hryniak v Mauldin*, 2014 SCC 7).

In addition, where it would be uneconomical for investors to pursue claims individually, the requirement for class action certification (see question 23) may serve as another important procedural mechanism for effectively defeating a claim at an early stage. The certification hearing is one of the earliest steps in a proposed class proceeding, occurring before discovery, and typically before delivery of the statement of defence.

16 Are the principles of secondary, vicarious or 'controlling person' liability recognised in your jurisdiction?

There is no general concept of 'controlling person' liability in Canada. However, provincial securities legislation provides causes of action against various individual defendants for misrepresentation in an issuer's disclosure.

Primary market claims may be brought against each director of the issuer at the time when the prospectus was filed, and each person who signed the prospectus or who consented to disclosure of information in it.

Secondary market claims may be brought against each director of the issuer at the time of the misrepresentation, each officer who authorised, permitted or acquiesced in the misrepresentation, and each 'influential person' (including controlling shareholders, promoters or insiders) and director or officer of the influential person who knowingly influenced the release of the misrepresentation.

In addition, investors may obtain remedies against directors, officers, and controlling shareholders on applications for relief from oppression under the applicable federal or provincial corporations statute (see question 17).

At common law, actions against corporate directors, officers or employees can only proceed where there are allegations of fraud, lack of authority, or that the individual defendants' actions are themselves tortious or exhibit a separate identity or interest from that of the company.

17 What are the special issues in your jurisdiction with respect to securities claims against directors?

Directors are potential defendants in each of the main types of securities claims.

- In statutory primary market claims, directors of the issuer at the time when a prospectus or amendment containing a misrepresentation was filed are potentially jointly and severally liable with the issuer, subject to due diligence or other defences.
- In statutory secondary market claims, directors of the issuer at the time when a document containing a misrepresentation was released, and directors who authorised or acquiesced in making a public oral statement containing a misrepresentation or in a failure to make timely disclosure, are potentially liable up to the greater of C$25,000 and 50 per cent of their compensation from the issuer, subject to due diligence or other defences.
- Common law claims against directors may proceed, as noted above, where the director's actions are themselves tortious or exhibit a separate identity or interest from that of the company.

While courts reviewing directors' actions often apply the business judgment rule, deferring to directors' business decisions so long as they fall within a range of reasonableness, this deference does not apply where directors failed to make required disclosure under securities law.

In addition to securities law claims, the Supreme Court of Canada recently confirmed in *Wilson v Alharayeri*, 2017 SCC 39, that directors may be personally liable to compensate shareholders under oppression remedies in corporate statutes, particularly where the director has derived a personal benefit or acted in bad faith.

Directors' personal exposure from securities claims is limited by the fact that companies obtain directors' and officers' (D&O) liability insurance, and can and generally do indemnify directors against expenses and damages incurred in proceedings in which they are involved because of their association with the company, to the extent that the director did not breach fiduciary duties owed to the company. The D&O liability insurer will often be the party defending claims against individual directors.

18 What are the special issues in your jurisdiction with respect to securities claims against underwriters?

Underwriters are potential defendants in statutory claims for primary market, but not secondary market, misrepresentation. Underwriters have also been sued for negligence and negligent misrepresentation in relation to offering documents.

19 What are the special issues in your jurisdiction with respect to securities claims against auditors?

Auditors are potential defendants in statutory misrepresentation claims. In the primary market context, prospectuses must contain audited financial statements, and auditors must give signed consent to the inclusion of their audit opinion. Accordingly, auditors are potentially liable as persons whose consent accompanied the filing of the prospectus containing the alleged misrepresentation. In the secondary market context, claims may be brought against auditors whose disclosed reports, statements or opinions contained the alleged misrepresentation. Secondary market damages against auditors are limited to the greater of C$1 million and the revenue that the auditor and its affiliates earned from the issuer and its affiliates in the 12 months preceding the misrepresentation.

Auditors may also be liable in common law negligent misrepresentation or simple negligence, provided that they owe a duty of care to the plaintiffs. In *Hercules Managements Ltd v Ernst & Young*, [1997] 2 SCR 165, the Supreme Court of Canada held that auditors owe a duty of care only to parties who use audit reports for the specific purposes for which they were prepared, as any broader duty of care would expose auditors to indeterminate liability to an indeterminate class. The Court held that audit reports are prepared to assist the collectivity of shareholders in overseeing management; as the plaintiffs had relied on the reports for the different purpose of making individual investments, their claims failed.

The Supreme Court confirmed these principles in a recent decision, *Deloitte & Touche v Livent Inc (Receiver of)*, 2017 SCC 63, which awarded C$40.4 million in damages against auditors for performing a negligent audit of the company's annual financial statements that failed to detect fraud by the company's principals. The Court held that the auditors could not rely on either the defence of illegality or of contributory fault, because the fraudulent acts of the company's directors could not be attributed to the company.

20 In what circumstances does your jurisdiction allow collective proceedings?

Securities litigation typically proceeds by way of class action, which requires court certification. A court will certify a class proceeding if:

- the pleadings disclose a cause of action;
- there is an identifiable class of two or more persons;
- class members' claims raise common issues;
- a class proceeding would be the preferable procedure for resolving the common issues; and
- there is a representative plaintiff who would fairly and adequately represent the interests of the class, has a workable plan for the proceeding, and does not have a conflict of interest with other class members.

The first criterion is assessed on the face of the pleadings. The proposed representative plaintiff must provide evidence to establish 'some basis in fact' for the other four criteria, which is a low standard. There are no requirements of numerosity or typicality for class certification.

21 In collective proceedings, are claims opt-in or opt-out?

The courts in Ontario and most other provinces certify opt-out classes, including national classes. Ontario courts have even certified opt-out global classes in a small number of securities class actions.

22 Can damages be determined on a class-wide basis, or must damages be assessed individually?

Provincial class proceedings statutes provide that courts may assess aggregate damages on a class-wide basis. In most provinces, courts may make use for this purpose of statistics or sampling that might not otherwise be admissible as evidence. Courts may either establish individual hearings or claims procedures to determine each member's entitlement to part of the aggregate award, or may distribute the award on a proportionate or average basis.

In *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, the Supreme Court of Canada held that aggregate damages provisions are procedural in nature and cannot be used to prove loss to the class as a whole where loss is an element of liability. Aggregate assessment of damages can be certified as a common issue, but one that should only be determined after a finding of liability.

The assessment of damages in statutory misrepresentation claims is discussed at question 13. With respect to negligent misrepresentation claims, *Bayens v Kinross Gold Corporation*, 2014 ONCA 901, the Ontario Court of Appeal concluded that aggregate assessment of damages could not be certified as a common issue because reliance was not a common issue. Individual trials would be required to determine reliance, liability and any consequential damages.

23 What is the involvement of the court in collective proceedings?

Courts must certify actions as class proceedings, based on the criteria set out in question 20.

Courts play a more active role in the management of class actions than in civil litigation generally. In Ontario, class proceedings legislation provides for compulsory case management. Particular judges have been designated to manage class proceedings. The same judge will hear all pretrial motions, but will not preside at trial unless the parties agree. Judges have broad discretion to make any order they consider appropriate regarding the conduct of a class proceeding to ensure its fair and expeditious determination.

Following a common issues trial, courts may give directions regarding the procedures for conducting any determinations of individual issues, and supervise the execution of judgments and distribution of awards.

Courts must also approve: any notice of certification of a class proceeding; discontinuance, abandonment or settlement of a class proceeding; and agreements respecting fees and disbursements between the representative plaintiff and counsel.

24 What role do regulators, professional bodies, and other third parties play in collective proceedings?

Provincial securities commissions may participate in secondary market actions, which are almost invariably collective proceedings. Securities commissions are entitled to notice of applications for leave to proceed with statutory secondary market actions, of decisions granting leave, and of any appeals, as well as copies of the materials in each case. Commissions may intervene as of right in the leave application, the secondary market action, and any related appeals.

While securities commissions do not have the power to order collective redress for investors, they can obtain investor compensation terms as part of settlement agreements in enforcement proceedings. In *AIC Limited v Fischer*, 2013 SCC 69, the defendant mutual fund managers argued that a market timing class action against them should not be certified because proceedings before a securities commission, which had already resulted in a settlement including C$108.1 million in investor compensation, were a preferable alternative procedure. The Supreme Court of Canada rejected this position, holding that the regulatory nature of the enforcement proceedings, the limited participatory rights for investors, the absence of information as to how the regulators arrived at the settlement amount, and the potential for additional recovery all led to the conclusion that the proposed class action could still provide significant access to justice.

25 What options are available for plaintiffs to obtain funding for their claims?

Plaintiffs have three principal options for funding securities litigation:

- Contingency fee arrangements are legally permitted, and are prevalent in class proceedings, where counsel for the proposed class may often have a more significant economic stake in the litigation than the representative plaintiff.
- Third-party litigation funding agreements have now received court approval in several class proceedings, and are gaining in popularity. The agreements approved to date have generally involved the funder agreeing to satisfy any adverse costs award in exchange for a percentage of commission (in the range of 3 to 10 per cent) on any settlement or judgment obtained on behalf of the class. Courts have indicated that such agreements are acceptable where they promote access to justice for class members, leave control of the litigation to the representative plaintiff, and do not over-compensate the third party funder.
- Public funding for class proceedings is available in Ontario from the Class Proceedings Fund. The Fund covers disbursements, including experts' fees, and indemnifies plaintiffs against costs awards, but does not cover ongoing solicitor costs. If the plaintiff succeeds or settles, the Fund is entitled to 10 per cent of the proceeds, plus repayment of any funded disbursements. Funding is awarded based on considerations including the strength of the case, but also the public interest, which may not often be engaged in securities class actions.

26 Who is liable to pay costs in securities litigation? How are they calculated? Are there other procedural issues relevant to costs?

Civil litigation in Canada operates on a 'loser pays' system, wherein the court can and generally does order the unsuccessful party to pay a portion of the successful party's costs.

In exercising the discretion to award costs, courts aim to fix an amount that is fair and reasonable for the unsuccessful party to pay in all of the circumstances of the case. Relevant factors include:

- indemnifying the successful party, having regard to the rates charged and hours spent by its counsel;
- the amount of costs that the unsuccessful party could reasonably expect to pay;
- the amount claimed and recovered in the proceeding;
- the complexity of the proceeding;
- the importance of the issues;
- the conduct of the litigation; and
- any offers to settle.

In Ontario, costs are normally awarded on the 'partial indemnity' scale (circa 60 per cent of actual costs that were reasonably incurred), but may in exceptional cases be awarded on the higher 'substantial indemnity' scale (circa 90 per cent of actual costs that were reasonably incurred), or even on a full indemnity basis.

In class proceedings, the representative plaintiff is responsible for any adverse costs award, while other class members are generally not. There are some modifications to the ordinary costs rules, intended to ensure that the threat of an adverse costs award does not deter potential representative plaintiffs from bringing meritorious cases. In Ontario, courts assessing costs in class proceedings may decline to award costs or award reduced costs where the proceeding was a test case, raised a novel point of law, or involved a matter of public interest. In several jurisdictions, including British Columbia, costs may not be awarded in class proceedings that have reached the certification stage, except where a party has engaged in misconduct or in exceptional circumstances where it would be unjust to deprive the successful party of costs.

Plaintiffs may be ordered to post security for the defendant's costs, particularly if the plaintiff is ordinarily resident outside the jurisdiction, or is a corporation or nominal plaintiff with insufficient assets in the jurisdiction to satisfy a costs award. An emerging issue in this area is whether an undertaking by a third-party litigation funder to pay any adverse costs award is an acceptable form of security for costs, particularly where the third-party funder is a foreign entity with assets outside Canada.

Update and trends

In November 2018, the Supreme Court of Canada ruled on a reference regarding the constitutionality of a proposed system of pan-Canadian securities regulation, which was supported by the federal government and five provinces including Ontario. The proposed Cooperative System would require voluntary participation from the provinces, and would consist of a scheme of uniform provincial securities legislation, complementary federal legislation focusing on criminal offences and systemic risk, and a single national regulator with delegated authority from the federal government and participating provinces. The Supreme Court held that the Cooperative System would not involve improper fettering or delegation of provincial legislative authority, and that the most recent version of the draft federal legislation would be a valid exercise of the federal Parliament's trade and commerce power. Despite this ruling, it remains to be seen whether any progress will be made towards a cooperative system of national securities regulation, in light of strong opposition from other provinces.

On the enforcement front, it was a mixed year for insider trading prosecutions. In *Finkelstein v Ontario Securities Commission*, 2018 ONCA 61, the Ontario Court of Appeal upheld findings of liability based on circumstantial evidence, as well as significant sanctions, in the high-profile insider trading and tipping case of five individuals who traded based on material non-public information obtained by a Toronto lawyer regarding a takeover bid. A Quebec court stayed a prosecution for insider trading in advance of a C$4.5 billion acquisition by Amaya Gaming Group Inc (Amaya) six weeks into the hearing, due to the regulator's repeated failures to meet its disclosure obligations to the respondents. In relation to the same acquisition, the Ontario Securities Commission (OSC) approved a settlement including substantial monetary penalties with executives of an investment fund manager who admitted to insider trading and illegal tipping. In February 2019, however, the OSC dismissed the case against an investment adviser alleged to have purchased Amaya shares based on tips from one of the settling respondents, after concluding that enforcement staff had not proven that he knew or ought to have known that the tipper was in a special relationship with the issuer (ie, in a position to have inside knowledge).

27 Are there special issues in your jurisdiction with respect to interests in investment funds? What claims are available to investors in a fund against the fund and its directors, and against an investment manager or adviser?

The claims available to investors in funds are primarily mis-selling claims against dealers, or claims relating to breach of fiduciary duties or negligence by the funds' investment managers. The most notable example of the latter was the class action leading to the Supreme Court of Canada decision in *AIC Limited v Fischer* [2013] 3 SCR 949, discussed at question 24, in which investors alleged that fund managers had breached their fiduciary duties and been negligent in failing to take steps to protect the funds against market timing activities.

In 2018, class actions were commenced against mutual fund trustees and managers affiliated with seven leading Canadian financial institutions, relating to 'trailing commissions' or 'trailer fees' intended to compensate mutual fund dealers for investment advice provided to investors. The proposed class actions are each at an early stage, and allege that the fund trustees and managers improperly paid 'unearned' trailer fees to discount brokers who are prohibited from providing investment advice to clients.

Enforcement by securities regulators has also been an active area of litigation. In particular, the Ontario Securities Commission (OSC) has focused in recent years on improper sales practices and on charging of excess fees by mutual fund firms. From 2014 to 2017, the OSC approved no-contest settlements with eight major financial firms, including subsidiaries of each of Canada's 'Big Five' banks, to compensate mutual fund investors who had been charged excess fees, with the total compensation estimated at C$342 million. In another notable recent case, OSC staff brought proceedings against a fund manager for failing to take appropriate steps to determine whether a conflict of interest existed before investing C$15 million in client money in exchange-traded funds from an entity with whom the manager had just concluded certain strategic agreements. The enforcement proceeding resulted in a settlement including a C$2.9 million voluntary payment by the fund manager (*Re Questrade Wealth Management Inc*, 41 OSCB 9422).

28 Are there special issues in your country in the structured finance context?

The structured finance instruments commonly used in Canada are asset-backed commercial paper (ABCP), term asset-backed securities (ABS), including both residential mortgage-backed securities (RMBS) and commercial mortgage-backed securities (CMBS), and to a lesser extent, structured notes. There is also a substantial market in Canadian covered bonds.

Structured finance instruments will generally meet the definition of a 'security', and therefore be regulated under provincial securities legislation. As with all securities, issuances of structured finance products may occur either by way of a public offering under a prospectus, or by private placements pursuant to exemptions from prospectus requirements. The latter is more common, with most structured finance products issued to institutional investors such as financial institutions and pension funds under an offering memorandum, pursuant to exemptions from prospectus requirements for 'accredited investors' or for distributions of highly rated short-term debt securities.

Investors in structured finance products may make statutory primary market claims for misrepresentations in the prospectus or offering memorandum. The common law claims available in respect of structured finance products will depend on the product documentation, which may include limited recourse clauses restricting investors' claims or may appoint a security trustee responsible for enforcement for the benefit of the investors.

The most significant structured finance litigation in Canada occurred as a result of the ABCP market collapse in August 2007. The subprime mortgage crisis in the United States prompted Canadian investors to question the quality of the assets backing commercial paper and stop reinvesting in non-bank ABCP, preventing its roll-over upon maturity. Liquidity providers took the position that a market disruption had not occurred, so their obligations to provide liquidity facilities were not triggered. These circumstances created a sudden and acute liquidity crisis. Key market participants entered into a standstill agreement known as the 'Montreal Accord', which was repeatedly extended while a restructuring plan was developed. The C$32 billion third-party ABCP market was successfully restructured with court approval in 2009, with the exception of one dispute between one conduit and its liquidity provider (B*arclays Bank PLC v Devonshire Trust*, 2013 ONCA 494).

29 What are the requirements for foreign residents or for holders of securities purchased in other jurisdictions to bring a successful claim in your jurisdiction?

For statutory primary market claims, only investors who were solicited in and purchased securities pursuant to a distribution in a province may bring claims under that province's securities legislation (*Pearson v Boliden*, 2002 BCCA 624).

For statutory secondary market claims, the legislation provides that the cause of action is available in respect of any public company with a 'real and substantial connection' to the province; hence, in principle, such legislation can have extraterritorial application to claims in respect of securities purchased in foreign jurisdictions.

Subject to these considerations, whether a foreign resident or foreign purchaser of securities can bring a successful claim in a Canadian province depends solely on the answer to the next question, namely whether the investor can establish that the courts of the province have and should exercise jurisdiction over the claim.

30 What are the requirements for investors to bring a successful claim in your jurisdiction against foreign defendants or issuers of securities traded on a foreign exchange?

Canadian courts will entertain claims with a foreign element provided that the court has jurisdiction (known as jurisdiction simpliciter) on the basis of a real and substantial connection between the subject matter of the litigation and the forum. Certain connections give rise to a rebuttable presumption of jurisdiction. The Supreme Court of Canada in *Club Resorts Ltd v Van Breda*, 2012 SCC 17, recognised four presumptive connecting factors in tort cases:

- the defendant is domiciled or resident in the province;
- the defendant carries on business in the province;
- the tort was committed in the province; or
- a contract connected with the dispute was made in the province.

These presumptive connecting factors also apply to the causes of action for misrepresentation under securities legislation, which are effectively 'statutory torts' (*Kaynes v BP plc*, 2014 ONCA 580).

Ontario courts have found jurisdiction simpliciter with respect to claims of foreign residents or foreign purchasers of securities where the defendant issuer carried on business in Ontario (eg, *Abdula v Canadian Solar*, 2012 ONCA 211) or released documents outside Ontario that it was legally required to provide to Ontario shareholders (*Kaynes v BP plc*, 2014 ONCA 580), or where defendant auditors prepared an audit report in Ontario for a private placement in the United States to a group consisting almost exclusively in non-Canadian investors (*Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP*, 2016 ONCA 916). On the other hand, the Ontario Court of Appeal recently held that there was no jurisdiction simpliciter over the claims of Canadian residents who purchased securities traded exclusively on foreign exchanges and where the issuer did not carry on business in Canada. The Court held that mere fact that investors could access the issuer's public disclosure online from Ontario was not enough to establish jurisdiction simpliciter, as this would make Ontario a 'universal jurisdiction' for secondary market misrepresentations made anywhere in the world (*Yip v HSBC Holdings Inc*, 2018 ONCA 626 [*Yip v HSBC*]).

A court with jurisdiction simpliciter in an action has the discretion to stay that action on the basis of the doctrine of forum non conveniens, if the defendant can show that another forum would clearly be more appropriate based on factors such as the locations of parties and witnesses, the possibility of conflicting judgments, and problems related to recognition or enforcement of judgments.

In securities class actions, courts can consider whether to exercise jurisdiction over the claims of foreign residents or purchasers either on an application for a stay based on forum non conveniens, or in the course of determining the appropriate scope of the class for certification. This is a complex and developing area of law.

In *Kaynes v BP Plc*, 2014 ONCA 580, the Ontario Court of Appeal declined jurisdiction over secondary market claims of Canadian residents who purchased shares on NASDAQ, citing the 'prevailing international standard tying jurisdiction to the place where securities were traded', and rejecting the plaintiff's attempt to use negligible trading on the TSX as a 'toehold' for bringing foreign exchange purchasers under the jurisdiction of an Ontario court. In 2016, the Court lifted the stay and allowed Canadian NASDAQ purchasers' claims to proceed in Ontario after a US court dismissed the proposed representative plaintiff's Ontario law claims. In the recent decision in *Yip v HSBC*, the Court reaffirmed that the more appropriate forum for secondary market claims will generally be the forum of the exchange where the securities traded.

In other cases, Ontario courts have certified global classes including investors who purchased securities in foreign private placements or on foreign exchanges. In the earliest such case, the certification judge indicated that this was done on a provisional basis, to 'wait and see' how conflict of law issues would develop, and subsequently revised the scope of the class to exclude US exchange purchasers who were part of a settlement class in a parallel US proceeding (*Silver v Imax*, 2013 ONSC 1667).

31 How do courts in your jurisdiction deal with multiple securities claims in different jurisdictions?

Canadian courts are often confronted with parallel securities litigation in other jurisdictions, particularly the United States. The existence and status of the parallel litigation are relevant factors in considering whether to stay the claims of investors who purchased securities in the foreign jurisdiction on the basis of forum non conveniens, or whether to certify a class including such investors. In *Kaynes v BP plc*, 2014 ONCA 580, the Ontario Court of Appeal noted that litigation in more than one jurisdiction over the same claims of the same parties should be avoided, and relied on this principle to conclude that claims should be litigated in the jurisdiction where the securities were purchased. Despite that, Ontario courts have permitted claims to proceed in this jurisdiction on behalf of foreign purchasers whose claims had already been advanced and dismissed in US proceedings.

Courts in Canada are prepared to recognise foreign class action settlements in the circumstances discussed in question 32.

32 What are the requirements in your jurisdiction to enforce foreign-court judgments relating to securities transactions?

Foreign court judgments relating to securities transactions may be recognised and enforced under the common law rules applicable to civil judgments generally. Courts in Canada will recognise and enforce foreign judgments provided that the foreign court had jurisdiction according to the Canadian court's own rules for jurisdiction, embodied in the real and substantial connection test described at question 30. The defences to recognition and enforcement are limited and narrowly interpreted, and include that the foreign judgment was procured by fraud, that the foreign proceeding failed to meet the standards of natural justice, or that enforcement would be contrary to Canadian public policy.

Courts in Canada will recognise a foreign class action settlement, and prevent members of the foreign settlement class from prosecuting similar claims domestically, provided that: (i) there was a real and substantial connection linking the cause of action to the foreign court; (ii) the rights of 'absent' class members (ie, those other than the representative plaintiff) were adequately represented; and (iii) absent class members were accorded procedural fairness, including adequate notice. These principles were applied in the securities litigation context in *Silver v Imax*, where, as noted at question 30, the Ontario court initially certified a global class including purchasers of securities on NASDAQ, but later revised the class to exclude NASDAQ purchasers who chose not to opt out of a court-approved settlement in a parallel US proceeding.

Stikeman Elliott

Alexander D Rose **arose@stikeman.com**
Sinziana R Hennig **shennig@stikeman.com**

5300 Commerce Court West
199 Bay Street, Toronto
Ontario M5L 1B9
Canada

Tel: +1 416 869 5500
Fax: +1 416 947 0866
www.stikeman.com

33 What alternatives to litigation are available in your jurisdiction to redress losses on securities transactions? What are the advantages and disadvantages of arbitration as compared with litigation in your jurisdiction in securities disputes?

Arbitration is generally available as an alternative to litigation in Canada, and potentially offers greater speed, confidentiality and a more tailored and hence less costly procedure. Arbitration may occur either where there is a contract containing a mandatory arbitration clause between an investor and a defendant to a securities claim, or where the parties consent to arbitrate after a dispute has arisen.

Arbitration has not been a prominent alternative to litigation in the securities context to date. The main defendants in securities claims are issuers and their directors and officers, who are not in contractual relationships with investors, and hence, cannot rely on mandatory arbitration clauses. Voluntary arbitration is also uncommon, because securities disputes are often class claims, and class arbitration is not a developed field in Canada.

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Contact us

Alexander D. Rose
arose@stikeman.com

Sinziana R. Hennig
shennig@stikeman.com