The Securities Litigation Review

Third Edition

Editor
William Savitt

The Law Reviews

THE SECURITIES LITIGATION REVIEW

The Securities Litigation Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Securities Litigation Review, - Edition 3
(published in June 2017 – editor William Savitt)

For further information please email
Nick.Barette@thelawreviews.co.uk

THE SECURITIES LITIGATION REVIEW

THIRD EDITION

Editor
William Savitt

THE LAWREVIEWS

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall,
Sophie Emberson, Laura Lynas

MARKETING AND READERSHIP COORDINATOR
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Robbie Kelly

SUBEDITOR
Janina Godowska

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2017 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2017, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-910813-64-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE GAMBLING LAW REVIEW

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THE ISLAMIC FINANCE AND MARKETS LAW REVIEW

THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW

THE CONSUMER FINANCE LAW REVIEW

THE INITIAL PUBLIC OFFERINGS REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BAE, KIM & LEE LLC

BÄR & KARRER LTD

CMS, RUSSIA

DARROIS VILLEY MAILLOT BROCHIER

DE BRAUW BLACKSTONE WESTBROEK NV

HANNES SNELLMAN ATTORNEYS LTD

HERBERT SMITH FREEHILLS

JINGTIAN & GONGCHENG

LINDENPARTNERS PARTNERSCHAFT VON RECHTSANWÄLTEN MBB

LOYENS & LOEFF

MAYER BROWN JSM

MORI HAMADA & MATSUMOTO

OSLER, HOSKIN & HARCOURT LLP

ROPES & GRAY

TADMOR & CO YUVAL LEVY & CO

TRINDADE SOCIEDADE DE ADVOGADOS

UGHI E NUNZIANTE STUDIO LEGALE

URÍA MENÉNDEZ

WACHTELL, LIPTON, ROSEN & KATZ

CONTENTS

PREFACE ... v
William Savitt

Chapter 1 SEC ENFORCEMENT AGAINST PRIVATE EQUITY: A PRACTICAL GUIDE FOR PRIVATE FUNDS ... 1
Eva Ciko Carman, Jason E Brown and Kirsten Boreen Liedl

Chapter 2 AUSTRALIA ... 10
Luke Hastings and Andrew Eastwood

Chapter 3 BELGIUM ... 32
Grégoire Jakhian and Mathias Lamberty

Chapter 4 BRAZIL ... 50
Marcelo Trindade and Fabiana Martins de Almeida

Chapter 5 CANADA ... 63
Mark A Gelowitz, Allan D Coleman and Robert Carson

Chapter 6 CHINA ... 76
Peng Xuejun, Sun Shiqi, Hu Ke and Liu Siyuan

Chapter 7 ENGLAND & WALES ... 91
Karen Anderson and Harry Edwards

Chapter 8 FRANCE ... 112
Bertrand Cardi and Nicolas Mennesson

Chapter 9 GERMANY ... 123
Lars Röh and Martin Beckmann

Chapter 10 HONG KONG ... 139
Thomas So and Wilson Fung

Chapter 11 ISRAEL......151
Yechiel Kasher, Ittai Paldor and Amir Scharf

Chapter 12 ITALY......160
Giuseppe De Falco and Luigi Cascone

Chapter 13 JAPAN......172
Mugi Sekido, Shinichiro Yokota and Shiho Ono and Yuko Kanamaru

Chapter 14 KOREA......180
Tony Dongwook Kang

Chapter 15 NETHERLANDS......193
Jan de Bie Leuveling Tjeenk and Dennis Horeman

Chapter 16 PORTUGAL......204
Nuno Salazar Casanova and Nair Maurício Cordas

Chapter 17 RUSSIA......215
Sergey Yuryev

Chapter 18 SPAIN......225
Cristian Gual Grau and Manuel Álvarez Feijoo

Chapter 19 SWEDEN......237
David Ackebo, Björn Kristiansson and Jacob Frank

Chapter 20 SWITZERLAND......252
Matthew T Reiter and Thomas U Reutter

Chapter 21 UNITED STATES......267
William Savitt and Noah B Yavitz

Appendix 1 ABOUT THE AUTHORS......291
Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS......307

PREFACE

This third edition of *The Securities Litigation Review* is a guided introduction to the international varieties of enforcing rights related to the issuance and exchange of publicly traded securities.

Unlike most of its sister international surveys, this review focuses on litigation – how rights are created and vindicated against the backdrop of courtroom proceedings. Accordingly, this volume amounts to a cross-cultural review of the disputing process. While the subject matter is limited to securities litigation, which may well be the world's most economically significant form of litigation, any survey of litigation is in great part a survey of procedure as much as substance.

As the chapters that follow make clear, there is great international variety in private litigation procedure as a tool for securities enforcement. At one extreme is the United States, with its broad access to courts, relatively permissive pleading requirements, expansive pretrial discovery rules, readily available class-action principles and generous fee incentives for plaintiffs' lawyers. At the other extreme lie jurisdictions like China, where private securities litigation is complex, expensive, seldom remunerative and accordingly quite rare. As the survey reveals, there are many intermediate points in this continuum, as each jurisdiction has evolved a private enforcement regime reflecting its underlying civil litigation system, as well as the imperatives of its securities markets.

This review reveals an equally broad variety of public enforcement regimes. Canada's highly decentralised system of provincial regulation contrasts with Brazil's Securities Commission, a powerful centralised regulator that is primarily responsible for creating and enforcing Brazil's securities rules. Every country has its own idiosyncratic mixture of securities lawmaking institutions; each provides a role for self-regulating bodies and stock exchanges but no two systems are alike. And while the European regulatory schemes have worked to harmonise national rules with Europe-wide directives – an effort now challenged by the imminent departure of the United Kingdom from the European Union – few countries outside Europe have significant institutionalised cross-border enforcement mechanisms, public or private.

We should not, however, let the more obvious dissimilarities of the world's securities disputing systems obscure the very significant convergence in the objectives and design of international securities litigation. Nearly every jurisdiction in our survey features a national securities regulatory commission, empowered both to make rules and to enforce them. Nearly every jurisdiction focuses securities regulation on the proper disclosure of investment-related information to allow investors to make informed choices, rather than prescribing investment

rules. Nearly every jurisdiction provides both civil penalties that allow wronged investors to recover their losses and criminal penalties designed to punish wrongdoers in the more extreme cases.

Equally notable is the fragmented character of securities regulation in nearly every important jurisdiction. Alongside the powerful national regulators are subsidiary bodies – stock exchanges, quasi-governmental organisations, trade and professional associations – with special authority to issue rules governing the fair trade of securities and to enforce those rules in court or through regulatory proceedings. Just as the world is a patchwork of securities regulators, so too is virtually each individual jurisdiction.

The ambition of this volume is to provide readers with a point of entry to these wide varieties of regulations, regulatory authorities and enforcement mechanisms. The country-by-country treatments that follow are selective rather than comprehensive, designed to facilitate a sophisticated first look at securities regulation in comparative international perspectives, and to provide a high-level road map for lawyers and their clients confronted with a need to prosecute or defend securities litigation in a jurisdiction far from home.

A further ambition of this review is to observe and report important regulatory and litigation trends, both within and among countries. This perspective reveals several significant patterns that cut across jurisdictions. In the years since the financial crisis of 2008, nearly every jurisdiction has reported an across-the-board uptick in securities litigation activity. Many of the countries featured in this volume have seen increased public enforcement, notably including more frequent criminal prosecutions for alleged market manipulation and insider trading, often featuring prosecutors seeking heavy fines and even long prison terms.

Civil securities litigation has continued to be a growth industry as the 2008 crisis has given rise to a new normal in the private enforcement of securities laws. While class actions are a predominant feature of US securities litigation, there are signs that aggregated damages claims are making significant inroads elsewhere. Class claims are now well established as part of the regulatory landscape in Australia and Canada, and there appears to be accelerating interest around the world in securities class actions and other forms of economically significant private securities litigation. Whether and where this trend takes hold will be one of the important securities law developments to watch in coming years.

This suggests the final ambition for *The Securities Law Review*: to annually reflect where this important area of law has been, and where it is headed. Each chapter contains both a section summarising the year in review – a look back at important recent developments – and an outlook section, looking towards the year ahead. The narrative here, as with the book as a whole, is of both divergence and convergence and divergence, continuity and change – with divergence and change particularly predominant this year, following political upheaval in the United States and Britain that could herald a sharp break from international cooperation and forceful government regulation in the global finance capitals of New York and London.

An important example is the matter of cross-border securities litigation, treated by each of our contributors. As economies and commerce in shares become more global, every jurisdiction is confronted with the need to consider cross-border securities litigation. The chapters of this volume show jurisdictions grappling with the problem of adapting national litigation systems to a problem of increasingly international dimensions. How the competing demands of multiple jurisdictions will be satisfied, and how jurisdictions will learn to work

with one another in the field of securities regulation will be a story to watch over the coming years. We look forward to documenting this development and other emerging trends in securities litigation around the world in subsequent editions.

Many thanks to all the superb lawyers who contributed to this third edition. For the editor, reviewing these chapters has been a fascinating tour of the securities litigation world, and we hope it will prove to be the same for our readers. Contact information for our contributors is included in Appendix 2. We welcome comments, suggestions and questions, both to create a community of interested practitioners and to ensure that each edition improves on the last.

William Savitt
Wachtell, Lipton, Rosen & Katz
New York
June 2017

Chapter 5

CANADA

Mark A Gelowitz, Allan D Coleman and Robert Carson[1]

I OVERVIEW

i Sources of law

Canada does not have a national securities regulator. Canada's provinces and territories have enacted securities laws and regulations and established provincial securities regulators tasked with the enforcement of those laws and regulations.[2] While there is a great degree of harmonisation across the various provinces, there can be important differences. Securities regulation in Canada therefore consists of a patchwork of legislation, regulations, rules, instruments and policies.

Capital markets are also regulated by stock exchanges, the most notable of which is the Toronto Stock Exchange (TSX), and self-regulatory organisations such as the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada, all of which are subject to the oversight of the provincial securities commissions.[3] These stock exchanges and self-regulatory organisations typically have by-laws, procedures and other rules that regulate the capital markets activity that falls within the scope of their jurisdiction.

The Criminal Code of Canada[4] contains a few offences that relate to securities and capital market matters, including general offences such as fraud that can apply in the securities context, and offences particular to securities, such as manipulation of a stock exchange and insider trading. However, provincial securities legislation also contains quasi-criminal provisions.

Business corporation statutes also have a bearing on securities regulation. For example, this legislation addresses aspects of corporate governance and the exercise of shareholder rights such as voting and proxy solicitation, and also includes robust statutory protections of minority shareholders in the form of the oppression remedy.[5]

1 Mark A Gelowitz and Allan D Coleman are partners and Robert Carson is an associate at Osler, Hoskin & Harcourt LLP.

2 See, e.g., Ontario Securities Act, RSO 1990, Chapter S-5; General Regulation under the Securities Act, RRO 1990, Reg 1015; and National Instrument 45-106: 'Prospectus and Registration Exemptions'.

3 The Ontario Securities Commission has issued recognition orders pursuant to Section 21.1(1) of the Ontario Securities Act recognising these entities.

4 Criminal Code, RSC, 1985, Chapter C-46.

5 This legislation may be federal or provincial, depending on the form of an issuer's incorporation. See, e.g., Canada Business Corporations Act, RSC 1985, Chapter 44; Ontario Business Corporations Act, RSO 1990, Chapter B.16.

The common law also plays a role in the private enforcement of breaches of applicable securities law – for example, the common law tort of negligent misrepresentation is often relied on in proceedings concerning the adequacy of an issuer's public disclosure.[6]

ii Regulatory authorities

The primary regulators responsible for enforcement of securities law in Canada are the provincial securities commissions. For ease of reference, this article focuses on the provisions of the Ontario Securities Act and the Ontario Securities Commission, as Ontario is Canada's most populous province and is the home of the Toronto Stock Exchange.

The Commission has broad rights to investigate the conduct of capital market participants in Ontario. Where the Commission concludes that an enforcement proceeding is warranted, the Commission typically proceeds in one of two fora, as described below.[7]

The staff of the Commission can bring administrative enforcement proceedings before a panel of commissioners. The commissioners constitute an independent branch of the Commission. These proceedings seek to prevent future harm to, and to protect investor confidence in, Ontario's capital markets under Section 127 of the Ontario Securities Act. Enforcement proceedings generally take the form of a public hearing before a panel of three commissioners, who have the power to make findings concerning whether a breach of the Securities Act has occurred or whether there has been conduct contrary to the public interest. The panel also has the power to impose a variety of sanctions (see Section III.iv, *infra*) including fines and limiting a respondent's ability to participate in the capital markets in Ontario.

Alternatively, the staff of the Commission can initiate and prosecute quasi-criminal proceedings in the Ontario Court of Justice under the Ontario Provincial Offences Act.[8] Although these proceedings are often considered regulatory, they carry penal consequences, including the possibility of imprisonment for individuals and significant monetary penalties.

In certain situations, market participants can themselves invoke proceedings before the Commission that resemble enforcement proceedings by seeking relief from the Commission such as a cease-trade order in the context of an unsolicited takeover bid.[9]

Self-regulatory organisations can bring enforcement proceedings to regulate the conduct of market participants within their sphere and protect the integrity of capital markets.[10]

iii Common securities claims

The majority of securities claims in Canada are class actions based on allegations of misrepresentations in an issuer's continuous disclosure or a failure to make timely disclosure

6 See, e.g., *McKenna v. Gammon Gold Inc*, 2010 ONSC 1591.

7 The Commission can also apply to court for certain orders, including a declaration that a person has not complied with or is not in compliance with securities law (Ontario Securities Act, Section 128) or an order appointing a receiver over the property of a company (Ontario Securities Act, Section 129).

8 In contrast, criminal charges under the Criminal Code, a federal statute, are typically brought by Crown counsel in the criminal court system. Those cases follow strict criminal procedures set out in the Criminal Code.

9 In some cases, the applicant must first establish that it has standing to make an application before the Commission. See, e.g., the Commission's Reasons in *Re Catalyst Group Inc.* (25 April 2016), available at: www.osc.gov.on.ca.

10 See, e.g., IIROC Dealer Member Rules, Rules 19 and 20 and the IIROC Sanction Guidelines.

of material changes in the issuer's business. As discussed in Section II, *infra*, the Ontario Securities Act provides different statutory private rights of action to investors depending on whether the alleged misrepresentation affected the primary market (e.g., securities sold under a prospectus or offering memorandum) or the secondary market (e.g., securities sold by investors over the facilities of a stock exchange). The content of the right of action and the available defences also depend on whether the misrepresentation was included in a document or a public oral statement, and, if in a document, on the nature of the document. In addition to these statutory rights of action, shareholders commonly seek to invoke the common law tort of negligent misrepresentation. The key limitation of the common law tort, however, is that the investor must prove actual reliance on the alleged misrepresentation in buying or selling shares.[11]

Most misrepresentation claims are brought against the issuer and some or all of its directors and executive officers. The statutory rights of action also permit investors to bring these claims against experts (including auditors), underwriters and others. There are significant defences, including due diligence defences and a defence for reliance on an expert, that are available in certain circumstances.[12]

Although the Ontario Securities Act provides a right of action to seek damages for insider trading, private proceedings in respect of insider trading are not particularly common. This is likely due, in large part, to the fact that the Ontario Securities Act only provides for the party who suffered damages in a trade to seek damages against the counter-party to that trade, and therefore does not facilitate class actions.[13]

There are a variety of potential claims against an issuer or its directors and officers that may be available under business corporation statutes in Canada, including:

a oppression claims alleging that the conduct of a corporation was oppressive, unfairly prejudicial to, or unfairly disregarded the interests of shareholders or other potential complainants;[14]

b derivative actions that allow shareholders (typically minority shareholders) and other complainants to apply to the court for leave to bring an action on behalf of a corporation to redress harm to the corporation;[15] and

c the exercise of dissent and appraisal remedies in connection with certain corporate transactions, including amalgamations and going-private transactions.[16]

In recent years, Canada has also seen a rise in litigation arising from shareholder activism, including proxy fights in both the provincial securities commissions and the courts.

---

11 Quebec is a civil law jurisdiction and, while the Quebec Securities Act contains similar statutory rights of action to those in the Ontario Securities Act, plaintiffs may also seek to bring misrepresentation claims under the Civil Code of Quebec.

12 In addition, Canadian courts have imposed limits on the liability of certain defendants: see, for example, *Hercules Management v. Ernst & Young*, [1997] 2 SCR 165, which addresses the scope of the duty of care that auditors owe in relation to secondary market investors.

13 In contrast, the British Columbia Securities Act provides a broader right of action (Section 136).

14 Canada Business Corporations Act, Section 241; Ontario Business Corporations Act, Section 248.

15 Canada Business Corporations Act, Sections 238–240; Ontario Business Corporations Act, Sections 246–247.

16 Canada Business Corporations Act, Section 190; Ontario Business Corporations Act, Section 185.

II PRIVATE ENFORCEMENT

i Forms of action

As noted above, the majority of securities class actions in Canada are based on claims of misrepresentations in an issuer's public disclosure or its failure to make timely disclosure of material changes. Traditionally, it had been difficult for Canadian investors to pursue lawsuits alleging negligent misrepresentations at common law because of the requirement that an investor prove that it actually relied to its detriment on the alleged misrepresentation. Canadian courts have generally found that the need to prove reliance in complex individual inquiries has rendered common law securities misrepresentation claims unsuitable for certification as class actions.[17] However, the governing securities legislation of each province now contains statutory rights of action for misrepresentations in both the primary and secondary markets that do not require the investor to prove reliance. These types of action were designed to proceed as class actions in appropriate circumstances and the courts have found they are particularly suited to that procedure.[18]

Part XXIII.1 of the Ontario Securities Act, which contains the statutory right of action for misrepresentations affecting the price of securities in the secondary market, provides a variety of important statutory protections for issuers and other defendants, including the following:[19]

a The plaintiff must first bring a motion seeking leave of the court to commence an action. To obtain leave, the plaintiff must establish that the action is brought in good faith and there is a reasonable possibility that the action will be resolved in the plaintiff's favour.[20]

b Defendants generally have the protection of 'liability limits' (see Section II.iv, *infra*), unless found to have authorised, permitted or acquiesced in the making of a misrepresentation with knowledge that it was untrue.[21]

c Defendants have the benefit of a 'reasonable investigation' defence and a 'safe harbour' for forward-looking information, provided certain requirements are met. In certain circumstances, reliance on an expert constitutes a defence.[22]

ii Procedure

Private enforcement actions are typically commenced in the courts of the relevant province.[23] The unfortunate result is that parallel proceedings regarding the same subject matter are often brought in multiple provinces. This problem is particularly acute in securities class

17 See, e.g., *McKenna v. Gammon Gold Inc*, 2010 ONSC 1591. In some circumstances, Canadian courts have certified certain common issues relating to common law misrepresentation claims where they are also certifying essentially the same common issues for parallel statutory claims. Notably, however, most courts have refused to certify common issues relating to reliance or causation: see, e.g., *Green v. CIBC*, 2015 SCC 60.

18 See, e.g., *Bayens v. Kinross Gold Corp*, 2014 ONCA 901 at paragraph 136.

19 The primary market right of action also includes important statutory protections and defences, including a due diligence defence.

20 Ontario Securities Act, Section 138.8.

21 Because the liability limits do not apply to common law misrepresentation claims, class counsel often try to bring common law claims alongside the statutory claims.

22 Ontario Securities Act, Section 138.4.

23 In certain situations, particularly where a potential violation of securities law is alleged (but has not yet occurred), jurisdiction may lie with the provincial securities commissions rather than the courts.

actions. Ultimately, however, claims are typically litigated in a single jurisdiction on behalf of a proposed national class of investors who are alleged to have been harmed by the alleged misrepresentation.

For certain claims in the securities context, the applicable legislation imposes an initial gatekeeping stage before the action can be commenced. For example, as described above, secondary market actions brought under Part XXIII.1 cannot proceed unless the plaintiff satisfies the court on a motion or application that the action is brought in good faith and there is a reasonable possibility that the action will be resolved at trial in the plaintiff's favour.[24] A shareholder who seeks to bring a derivative action on behalf of a corporation under the applicable business corporation statute must obtain leave of the court, which requires the shareholder to, among other things, satisfy the court that the shareholder is acting in good faith and that it appears to be in the interests of the corporation that the action be brought.[25]

The pleading requirements vary depending on the nature of the claim. For example, a common law negligent misrepresentation claim requires the plaintiff to plead that each class member detrimentally relied on the alleged misrepresentation. As there is no fraud-on-the-market presumption in Canada, it is generally insufficient to plead reliance on the market price of the securities.[26] Another important distinction is that Canadian misrepresentation claims, whether statutory or at common law, do not have the *scienter* requirement that exists in Rule 10b-5 actions in the United States.

An action cannot be brought as a class proceeding unless the court has granted certification of the proceeding as a class action. In Ontario, the plaintiff must establish each of the following requirements:

a the pleadings disclose a cause of action;
b there exists an identifiable class of two or more persons;
c there are common issues as between members of the proposed class;
d proceeding by way of a class action is the 'preferable procedure'; and
e a representative plaintiff exists who would fairly and adequately represent the interests of the class.[27]

In most civil proceedings, the parties have the right to both documentary discovery and oral discovery before trial. Discovery rights are prescribed by statutes or rules of court, but can generally be varied by agreement of the parties or by order of the court. In actions, parties generally have a positive duty to produce copies of all relevant, non-privileged documents to the opposing parties. Oral discovery of a corporation is commonly limited to the examination of a single representative of the corporation.

Once certified, class proceedings will generally proceed in a manner that is largely similar to standard civil proceedings. The common issues will usually be tried first, followed by any remaining individual issues.

24 Ontario Securities Act, Section 138.8.

25 Canada Business Corporations Act, Sections 238–240; Ontario Business Corporations Act, Sections 246–247.

26 *Carom v. Bre-X Minerals Ltd* (1998), 41 OR (3d) 780 (Gen Div).

27 Ontario Class Proceedings Act, 1992, SO 1992, Chapter 6, Section 5(1). The requirements for certification will be different in each province although there will be significant overlap in the legislation. For the procedure in Quebec, see Civil Procedure of Quebec, Articles 1002–1006.

An important feature of civil proceedings in Canada is that costs typically 'follow the event', which usually means that the losing party pays a portion of the successful party's costs. This can apply on a range of steps in a proceeding including both interlocutory motions and trials. There are important differences among the provinces and types of proceedings – for example, in British Columbia the loser-pays rule generally does not apply in class actions. However, as a general rule, costs awards are at the discretion of the courts.

iii Settlements

While settlements in commercial litigation do not necessarily require court approval of the settlement, settlements in proceedings commenced under class proceedings legislation generally require court approval, as may settlements brought under the oppression remedy provisions of business corporation statutes.[28] When considering whether a settlement in a class proceeding is fair and reasonable, Canadian courts tend to consider the following types of factors, among others:

a the likelihood of success;
b the amount and nature of discovery or investigation;
c recommendation and experience of counsel;
d recommendation of neutral parties such as a mediator;
e future expenses, likely duration of litigation and risk;
f the number and nature of objections; and
g the presence of arm's-length bargaining.[29]

Where the settlement occurs before the action has been certified as a class proceeding, the general practice is that the parties will seek certification 'for settlement purposes only' to facilitate the settlement and bind class members to its terms. Class members are typically given notice of a proposed settlement and the opportunity to object and to opt out of the settlement.

Class counsel are typically required to obtain court approval of their fees.[30] Canadian courts tend to consider factors such as the time expended, the risks undertaken, and the results achieved, among others, in establishing the quantum of fees awarded.

iv Damages and remedies

Primary market misrepresentation claims under Part XXIII of the Ontario Securities Act are subject to particular rules regarding the calculation of damages and availability of other remedies. For example, an investor who purchases a security offered by a prospectus that contains a misrepresentation can elect whether to seek damages or rescission against the issuer or underwriter.[31]

28 There are often differences in the regimes of different provinces as to whether a putative class action can be settled, discontinued or withdrawn before certification without court approval. In Ontario, Court approval is almost invariably required. In the context of the oppression remedy, see specific requirements for court approval of steps, including withdrawal and discontinuance in certain circumstances: Ontario Business Corporations Act, Section 249; Canada Business Corporations Act, Section 242(2).

29 See, e.g., *Metzler Investment v. Gildan Activewear*, 2011 ONSC 1146.

30 Ontario Class Proceedings Act, Sections 32 and 33.

31 Ontario Securities Act, Section 130(1).

Secondary market claims brought under Part XXIII.1 of the Ontario Securities Act are also subject to prescribed rules regarding damages. First, Part XXIII.1 provides a formula for assessing damages. In general, the damages payable for misrepresentations are calculated with regard to the price paid and the price at which the investor disposed of the securities following the corrective disclosure.[32] The defendant will not be liable for any amount that the defendant proves is attributable to a change in market price unrelated to the misrepresentation.[33] As the drop in share price attributable to the misrepresentation would only occur after its public correction, price fluctuations before the corrective disclosure would typically be viewed as unrelated to the misrepresentation. This means that the true measure of damages would generally be measured with reference to the amount of the decline in share price following the corrective disclosure, after controlling for other contemporaneous market events.

Second, in claims under Part XXIII.1 of the Ontario Securities Act, most defendants have the protection of liability limits, which vary by defendant.[34] For example:

a the liability limit for an issuer is the greater of 5 per cent of its market capitalisation and C$1 million; and

b the liability limit for a director or officer of an issuer is the greater of C$25,000 and 50 per cent of the aggregate of the director's or officer's compensation from the issuer and its affiliates.

The liability limits do not apply for a person or company, other than the responsible issuer, if the person or company authorised, permitted or acquiesced in the making of the misrepresentation while knowing that it was a misrepresentation.[35]

The liability limits do not apply to common law misrepresentation claims. Accordingly, class counsel often try to bring common law claims alongside statutory claims. The calculation of damages in common law claims is based primarily on common law principles and attempt to put the investor back in the position that he or she would have been in had the misrepresentation not been made.

III PUBLIC ENFORCEMENT

i Forms of action

There are two principal forms of enforcement proceedings brought by the Ontario Securities Commission: administrative proceedings and quasi-criminal proceedings.

Administrative enforcement proceedings before a tribunal of commissioners are most common. These can take a variety of forms but typically involve an investigation phase followed by a hearing. The tribunal has a broad power to make orders in the public interest, including in some situations in which the respondent has not breached securities law.

Alternatively, the Commission may bring quasi-criminal proceedings in the Ontario Court of Justice for certain offences prescribed in the Ontario Securities Act, including

32 Ontario Securities Act, Section 138.5(1).

33 Ontario Securities Act, Section 138.5(3).

34 Ontario Securities Act, Section 138.1 (liability limit) and Section 138.7(1).

35 Ontario Securities Act, Section 138.7(2).

insider trading and tipping, misrepresentations in disclosure documents, and other breaches of securities law.[36] The offences generally carry a maximum fine of C$5 million or a maximum prison sentence of five years less a day, or both.[37]

The Commission has the right to apply to the Court to seek certain relief, including for a declaration that a person or company has not complied with securities law[38] or appointing a receiver or liquidator over the property of a person or company.[39]

The Criminal Code contains criminal offences unique to securities law (such as market manipulation), and general economic crimes (such as fraud) that may arise in the securities context.[40] Criminal offences are typically prosecuted by Crown counsel, regardless of whether the offences relate to securities law.

The TSX and other self-regulatory organisations, including IIROC, have their own enforcement procedures for regulating the capital market participants within their purview. These organisations have the ability to invoke a variety of sanctions, including suspension or termination of market access or fines.[41]

ii Procedure

Most regulatory proceedings in the securities context begin with an investigation by one or more provincial securities commissions or by another law enforcement agency, such as the Royal Canadian Mounted Police. A major difference between private and public enforcement in Canada is that the securities commissions have very broad investigative powers, including the power to conduct examinations of a wide range of potential witnesses, including examinations under oath.[42] The Commission also has a broad power to compel issuers and potential witnesses to produce documents as part of the investigation.[43]

Administrative regulatory proceedings under Section 127 of the Ontario Securities Act typically commence when the Commission issues a notice of hearing and files a statement of allegations. The proceedings progress in accordance with the Commission's Rules of Procedure, which provide, among other things, for the parties to make pre-hearing motions, including motions seeking the production of documents or the exclusion of evidence.

In the ordinary course, proceedings under Section 127 are determined following an oral hearing before a panel of commissioners. The rules are set out in the Commission's Rules of Procedure, and are also governed by the Ontario Statutory Powers Procedure Act.[44] As

---

36 In Ontario, proceedings are typically prosecuted by Commission staff. In some jurisdictions, the proceedings are referred to Crown counsel.

37 The fine may be higher for certain offences, such as insider trading or tipping: Ontario Securities Act, Section 122(4).

38 Ontario Securities Act, Section 128.

39 Ontario Securities Act, Section 129.

40 See, e.g., Criminal Code, Sections 380 (fraud), 382 (fraudulent manipulation of stock exchange transactions) and 382.1 (prohibited insider trading).

41 See, e.g., IIROC Dealer Member Rules, Rules 19 and 20 and the IIROC Sanction Guidelines.

42 Where the predominant purpose of an investigation moves from the purely regulatory sphere to 'the determination of penal liability', the investigation powers become more circumscribed: see, e.g., *R. v. Jarvis*, [2002] 3 SCR 757.

43 See Ontario Securities Act, Part VI.

44 Ontario Statutory Powers Procedure Act, RSO 1990, Chapter S.22.

a general rule, hearings are open to the public but the panel may hold all or a portion of the hearing in camera in certain circumstances. The hearings usually involve live testimony of witnesses and argument by the parties.

Quasi-criminal proceedings brought under Section 122 of the Ontario Securities Act are governed by the procedural rules in the Ontario Provincial Offences Act and generally proceed as ordinary criminal proceedings before a judge in the Ontario Court of Justice.[45] The proceedings are typically prosecuted by the Commission (rather than Crown counsel).

iii Settlements

Settlements in administrative enforcement proceedings are generally subject to the approval of a Commission tribunal, which determines whether the terms of the settlement are fair and reasonable in the circumstances and within acceptable parameters. The Commission generally gives significant deference to the recommendations of the Commission staff who negotiated the agreement. The Commission also considers specific and general deterrence as a significant factor. The Commission may also consider factors such as:

a the seriousness of the allegations;
b the size of any profit (or loss avoided) from the illegal conduct;
c whether the respondent has recognised the seriousness of the improprieties or shown remorse;
d whether the respondent cooperated with the investigation; and
e the effect that the sanctions might have on the livelihood of the respondent.[46]

Settlement agreements commonly contain, among other things, a statement of the relevant facts admitted by the respondent. The payment of the Commission's investigation or hearing costs are commonly a negotiated term of the settlement.

In 2014, the Ontario Securities Commission announced that, in certain circumstances, it would allow 'no-contest' settlements under which respondents do not make formal admissions respecting their misconduct. Any decision to accept or reject a proposed no-contest settlement would be made by a Commission panel considering the particular circumstances.

The Ontario Securities Commission Rules of Procedure prescribes basic parameters for settlements in administrative enforcement matters under Section 127.[47] Among other features, the Rules provide that once a proposed settlement is reached, Commission staff or a respondent typically request an *in camera* settlement conference with a panel to review the proposed settlement prior to it being submitted to the Commission for approval. The panel is entitled to give guidance on the adequacy of the specific settlement proposal.

Where a settlement is approved, the Commission's practice is to make the settlement public immediately, in the absence of exceptional circumstances.

In criminal or quasi-criminal proceedings, a settlement resulting in a guilty plea must be approved by the Court. The Court maintains jurisdiction to determine the appropriate sentence. In the securities context, courts have considered factors such as whether there were elements of fraud or breach of trust in the offence, whether there was planning and deliberation in the offence, whether the respondent was working with others to carry out the offence, and mitigating factors such as an early guilty plea, remorse or restitution.

45 Ontario Securities Act, Section 122(8).
46 See, e.g., *Re Belteco Holdings Inc.* (1998), 21 OSCB 7743.
47 OSC Rules of Procedure, Rule 12.

iv Sentencing and liability

The Ontario Securities Act prescribes the types of orders that the Commission can make in the public interest in a regulatory proceeding under Section 127, which include orders:

a requiring a person or company to pay an administrative penalty of not more than C$1 million for each failure to comply with securities law;

b requiring a person or company who has not complied with Ontario securities law to disgorge amounts obtained as a result of the non-compliance;

c suspending the registration, recognition or exemption granted to a person or company under securities law;

d directing that trading in any securities by or of a person or company cease, either temporarily or permanently;

e prohibiting the acquisition of securities by a person or company; and

f prohibiting a person from acting as a director or officer of an issuer or registrant.[48]

The Commission has a very broad jurisdiction to make these orders in the public interest and, in determining the appropriate penalty, the Commission will generally consider factors relating to the protection of investors and the fostering of fair and efficient capital markets and confidence in capital markets generally. The Supreme Court of Canada has stated that the purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets.[49] Some of the factors that the Commission has considered in the past include the seriousness of the allegations, the respondent's experience in the marketplace, whether the respondent has recognised the seriousness of the improprieties, the size of any profit or loss avoided from the illegal conduct, whether the sanction imposed may serve to deter not only those involved in the case being considered, but any like-minded people from engaging in similar abuses of the capital market, and any mitigating factors.[50] The Commission is generally not bound by its previous orders.

In addition, in many cases, the Commission has the power to order respondents to pay costs of the Commission's investigation, the costs of the hearing, or both.[51]

Section 122 of the Ontario Securities Act provides that a person or company found guilty of an offence under Section 122 is generally liable to a fine of not more than C$5 million or to imprisonment for a term of not more than five years less a day, or to both.[52] In exercising its sentencing discretion, the Court may consider the types of factors described in Section III.iii, *supra*.

48 The Ontario Securities Commission has the jurisdiction to issue other orders in certain circumstances, such as the power to freeze assets of any person until the Commission or a court orders otherwise: Ontario Securities Act, Section 126.

49 *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 SCR 132.

50 See, e.g., *Spork v. Ontario Securities Commission*, 2014 ONSC 2467.

51 Ontario Securities Act, Section 127.1.

52 For certain offences, like insider trading, the fine could be higher: Ontario Securities Act, Section 122(4). In criminal prosecutions under the Criminal Code, the potential sentences and penalties vary depending on the offence. The Court has discretion, within the parameters of the Criminal Code, to sentence a defendant as appropriate in the circumstances.

IV CROSS-BORDER ISSUES

As a general rule, Canadian courts are able to exercise jurisdiction over a dispute where there is a 'real and substantial connection' between the subject matter of the dispute and the province or between the defendant and the province.[53] Foreign issuers should be aware that Canadian courts have tended to take broad approaches to jurisdiction and have shown a willingness to certify a global class in certain circumstances.[54] In appropriate circumstances, Canadian courts may decline to exercise jurisdiction over claims against a foreign issuer where the foreign issuer does not have a particularly substantial connection to Canada or parallel claims are being brought in another jurisdiction with a closer connection to the subject matter of the dispute.

As noted above, an unfortunate aspect of the provincial system of regulation is that parallel proceedings regarding the same subject matter are often brought in multiple provinces. This problem is particularly acute in securities class actions because plaintiffs' lawyers often commence essentially identical claims in different provinces on behalf of the same national classes. This can result in unnecessary costs, complexity and delay, with the risk of more severe consequences, such as conflicting judgments. There is no formal legislative protocol to resolve this issue, so defendants are left to argue that cases should be stayed or dismissed in accordance with applicable jurisdictional and conflict-of-laws principles, including *forum non conveniens*, and the doctrine of abuse of process.

V YEAR IN REVIEW

According to research by NERA, there were approximately 54 unresolved securities class actions in Canadian courts representing more than C$55 billion in total claims as of the end of 2016.[55] Nine new securities class actions were filed during 2016. The majority of the unresolved claims are putative or certified class actions alleging misrepresentations affecting the price of shares in the secondary market. There were few securities class action developments in 2016, although several decisions confirmed important protections for defendants, including for underwriters, investment banks and other advisers.[56]

An increasingly common but contentious issue in Canadian securities class actions is plaintiffs seeking to obtain non-party discovery from people or companies located in the United States for use in the Canadian actions.[57] These '1782 orders' are typically obtained *ex parte* in a US court, without any notice to the Canadian courts or the defendants. This is a relatively novel issue in Canadian law, and different provinces took different approaches in 2016. In a Quebec proceeding, the court permitted the plaintiffs to obtain non-party discovery of a former employee, although the court noted that it would ultimately control the admissibility of the evidence.[58] In a recent decision, however, the Ontario Superior Court of Justice declined to follow that reasoning and ordered the plaintiffs not to take any steps

53 See, e.g., *Abdula v. Canadian Solar*, 2012 ONCA 211.

54 See, e.g., *Silver v. Imax Corp*, [2009] OJ No. 5585.

55 www.nera.com/publications/archive/2017/trends-in-canadian-securities-class-actions-2016-update.html.

56 *LBP Holdings v. Allied Nevada Gold Corp.*, 2016 ONSC 1629; *Goldsmith v. National Bank of Canada*, 2016 ONCA 22.

57 28 U.S.C. § 1782.

58 *Catucci v. Valeant Pharmaceuticals International Inc.*, 2016 QCCS 3431 aff'd 2016 QCCA 1349.

under the 1782 subpoena without further order of the Ontario court.[59] The court confirmed that the plaintiffs' use of the Section 1782 procedure was impermissible and circumvented important aspects of Ontario procedure.

The Canadian Securities Administrators, the council of the provincial and territorial securities regulators in Canada, reported on the following statistics relating to enforcement by securities regulators in 2016 across Canada:[60]

a A total of 56 proceedings were commenced involving, in aggregate, 72 individuals and 72 companies.

b More than half of the respondents were alleged to have engaged in wrongdoing related to illegal distributions (82 of 144 respondents). Other common categories included fraud (23 respondents), illegal insider trading (12 respondents) and market manipulation (8 respondents).

c Matters were concluded against 262 respondents. More than half of the matters proceeded through a contested hearing before a tribunal. Approximately 21 per cent of the matters were concluded by way of settlement agreement.

d Approximately C$62 million was ordered in fines and administrative penalties, and approximately C$350 million was ordered in restitution, compensation and disgorgement. (The latter figure was a significant increase from the previous year, largely on account of four no-contest settlements.) The majority of fines were laid in cases of illegal distributions and fraud.

In March 2015, a panel of the Commission found a former lawyer and four investment advisers to have engaged in tipping and insider trading. The Ontario Divisional Court recently upheld the Commission's decision and confirmed that a high degree of deference is given to the Commission's decisions.[61] While Canada's enforcement agencies have not had great success obtaining criminal convictions for insider trading and tipping, this case showed that the Commission may be able to rely on circumstantial evidence and its public-interest powers to combat insider trading.

In 2016, the Ontario Securities Commission became the first Canadian regulator to implement a 'bounty-based' whistle-blower programme, which offers eligible whistle-blowers a payment of up to C$5 million. The Office of the Whistleblower reported that it received more than 30 tips in its first two and a half months.

The government of Canada and the governments of several provinces, including Ontario and British Columbia (but not Alberta or Quebec), received public comments on draft legislation as part of an initiative named the Cooperative Capital Markets Regulatory System.[62] These participating jurisdictions seek to establish a national securities regulator to replace the patchwork of different legislation, rules, instruments and policies that regulate securities transactions and capital markets across the country. The draft legislation proposes a variety of changes to securities litigation and enforcement proceedings including, among other things, by shifting certain onuses to defendants in misrepresentation claims and by

59 *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 87. This decision is currently under appeal.

60 www.csasanctions.ca/.

61 *Finkelstein v. Ontario (Securities Commission)*, 2016 ONSC 7508.

62 See http://ccmr-ocrmc.ca/.

opening the door to collective actions to recover damages arising from insider trading. The participating jurisdictions announced that they hope to enact the legislation in each of the participating provinces and to make the cooperative regulator operational in 2018.

VI OUTLOOK AND CONCLUSIONS

In 2017, we are likely to see incremental developments in litigation and enforcement in Canada. The Supreme Court of Canada is expected to rule in a significant case that may clarify issues relating to audit standards and the audit process, and has the potential to affect securities class actions.[63] It will also be interesting to watch the development of the Ontario Securities Commission's whistle-blower programme, including as the first tips begin moving toward enforcement proceedings (and other commissions consider implementing similar procedures). We also expect that governments participating in the Cooperative Capital Markets Regulatory System will continue their efforts to establish a national securities regulator and to advance the legislation and regulations that could form the basis for future securities law in Canada.

63 *Livent Inc. v. Deloitte & Touche*, Supreme Court of Canada Court File No. 36875.

OSLER, HOSKIN & HARCOURT LLP

100 King Street West
1 First Canadian Place
Suite 6200, Box 50
Toronto
Ontario M5X 1B8
Canada
Tel: +1 416 362 2111
Fax: +1 416 862 6666
mgelowitz@osler.com
acoleman@osler.com
rcarson@osler.com
www.osler.com

MARK A GELOWITZ

Osler, Hoskin & Harcourt LLP

Mark A Gelowitz is a senior litigation partner at Osler. He is the co-chair of the firm's national corporate and securities litigation group. Mark has a business-focused civil and securities litigation, appellate and international commercial arbitration practice. His practice covers a wide variety of issues in corporate and commercial law including mergers and acquisitions litigation, director and officer liability, oppression, mining litigation and class actions. He has appeared before the Supreme Court of Canada, the Ontario, Alberta, British Columbia and Yukon Courts of Appeal, the superior trial courts of numerous provinces and the Ontario and British Columbia Securities Commissions. Mark completed two appellate judicial clerkships, the first with the late Chief Justice ED Bayda of the Saskatchewan Court of Appeal in 1986 and the second with the late Justice John Sopinka of the Supreme Court of Canada in 1989. He completed the BCL degree at Oxford University in 1989, between his clerking experiences. Mark has had a number of legal publications including a book co-authored with the late Justice Sopinka entitled *The Conduct of an Appeal* (third edition, LexisNexis, 2012). Mark maintains a blog on recent developments in Canadian appellate law and practice at Conductofanappeal.com.

ALLAN D COLEMAN

Osler, Hoskin & Harcourt LLP

Allan D Coleman is a partner in the litigation department at Osler and is the co-chair of the firm's national corporate and securities litigation group. He has a wide-ranging practice, with particular emphasis on corporate and securities litigation. He has developed significant expertise in advising public companies involved in litigation arising from major mergers and acquisitions and other business-critical transactions. Allan also represents public issuers in class proceedings relating to alleged misrepresentations made in prospectuses, financial statements and other public disclosure documents. In addition, as part of his securities litigation practice, he has advised public companies and registrants in the context of inquiries and investigations by the Ontario Securities Commission. Allan also has extensive

commercial litigation experience, including class action defence work and conducting complex commercial arbitrations, including disputes arising from asset purchase agreements and shareholder agreements.

ROBERT CARSON

Osler, Hoskin & Harcourt LLP

Robert Carson is an associate in the litigation department of Osler and is a member of the firm's corporate and securities litigation group. He has acted for issuers and other market participants in a variety of securities and corporate governance litigation, including securities class actions, proxy fights, and oppression proceedings.