The Securities Litigation Review

Second Edition

Editor
William Savitt

Law Business Research

The Securities Litigation Review

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This article was first published in The Securities Litigation Review, 2nd edition
(published in May 2016 – editor William Savitt).

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Second Edition

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-11-9

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

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ACKNOWLEDGEMENTS

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

BÄR & KARRER AG

BONELLIEREDE

DARROIS VILLEY MAILLOT BROCHIER

HERBERT SMITH FREEHILLS

JINGTIAN & GONGCHENG

LINDENPARTNERS PARTNERSCHAFT VON RECHTSANWÄLTEN MBB

LOYENS & LOEFF

MAYER BROWN JSM

OSLER, HOSKIN & HARCOURT LLP

TADMOR & CO YUVAL LEVY & CO

TRINDADE SOCIEDADE DE ADVOGADOS

URÍA MENÉNDEZ

WACHTELL, LIPTON, ROSEN & KATZ

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EDITOR'S PREFACE

This second 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 work to harmonise national rules with Europe-wide directives, 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. 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 also been a growth industry in the wake of the 2008 crisis. 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, continuity and change.

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 second 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
May 2016

Chapter 4

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

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.

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]

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.

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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.

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.

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 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:

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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.

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).

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.

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]

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.

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.

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 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

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.

24 Ontario Securities Act, Section 138.8.

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

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.

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:

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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.

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.

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]

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.

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).

32 Ontario Securities Act, Section 138.5(1).

33 Ontario Securities Act, Section 138.5(3).

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 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]

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

35 Ontario Securities Act, Section 138.7(2).

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.

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 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).

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.

45 Ontario Securities Act, Section 122(8).

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.

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;

46 See, e.g., *Re Belteco Holdings Inc*. (1998), 21 OSCB 7743.

47 OSC Rules of Procedure, Rule 12.

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*.

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

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.

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]

Notably, however, in a significant decision released in 2014, the Court of Appeal for Ontario held that even though it could exercise jurisdiction to hear a claim against BP, PLC arising from the *Deep Water Horizon* oil spill, it should decline to exercise that jurisdiction on the basis of *forum non conveniens* – particularly the principle of comity, which required the Court to consider the implications of departing from the international norms in England and the United States, where the vast majority of the shares were traded.[55] Accordingly, 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.

V YEAR IN REVIEW

According to research by NERA, there were approximately 52 unresolved securities class actions in Canadian courts representing more than C$55 billion in total claims as of the end of 2015.[56] Only four new securities class actions were filed during 2015. The majority of the unresolved claims are putative or certified class actions alleging misrepresentations affecting the price of shares in the secondary market.

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 2015 across Canada:[57]

a 108 total proceedings were commenced involving, in aggregate, 165 individuals and 101 companies.

b Almost half of the respondents were alleged to have engaged in wrongdoing related to illegal distributions (123 of 266 respondents). Other common categories included fraud (64 respondents) and market manipulation (18 respondents).

c Matters were concluded against 350 respondents. More than half of the matters proceeded through a contested hearing before a tribunal. Approximately 24 per cent of the matters were concluded by way of settlement agreement.

d Approximately C$138.3 million was ordered in fines and administrative penalties, and approximately C$111.7 million was ordered in restitution, compensation and disgorgement. (Both of those figures are significant increases from the previous year.) The majority of fines were laid in cases of illegal distributions, fraud, illegal insider trading and misconduct by registrants.

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

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

55 *Kaynes v. BP, PLC*, 2014 ONCA 580, leave to appeal to SCC refused. [2014] SCCA No. 452.

56 www.nera.com/publications/archive/2016/trends-in-canadian-securities-class-actions--2015-update.html.

57 http://er-ral.csa-acvm.ca/wp-content/uploads/2016/02/CSA_AnnualReport_English_20151.pdf.

In 2015, the Ontario Securities Commission introduced a revised version of its proposed whistle-blower programme, which offers eligible whistle-blowers a payment of up to C$5 million. The Commission aims to have the programme, which would be the first of its kind in Canada, in place in 2016.

The Supreme Court of Canada released a decision in a trilogy of putative securities class actions that addressed important issues regarding securities misrepresentation claims in Ontario. These issues included the standard and application of the test for leave to commence an action under Part XXIII.1 of the Ontario Securities Act, the certifiability of common law claims for negligent misrepresentation alongside parallel statutory claims, and the limitation period for commencing claims under Part XXIII.1.[58]

In the largest hostile bid in Canada in 2015, which was structured as a 60-day 'permitted bid' under the target's existing shareholder rights plan, the Alberta Securities Commission permitted an additional tactical shareholder rights plan (which the target's board adopted after the announcement of the bid) to remain in effect for 91 days from the formal commencement of the bid.[59] This may be the last major poison-pill decision before the implementation of proposed amendments to Canada's takeover bid regime that will prescribe the amount of time a target issuer is given to respond to a hostile takeover bid.

The government of Canada and the governments of several provinces including Ontario and British Columbia (but not Alberta or Quebec) issued draft legislation for public comment as part of an initiative named the Cooperative Capital Markets Regulatory System.[60] 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 opening the door to collective actions to recover damages caused by 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 2016, but their deadlines will almost certainly be pushed back.

VI OUTLOOK AND CONCLUSIONS

2016 is likely to bring additional clarification around the Ontario Securities Commission's approach to insider trading.

In March 2015, a panel of the Commission found a former lawyer and four investment advisers to have engaged in tipping and insider trading.[61] That decision is currently under appeal before the Ontario Divisional Court. While Canada's enforcement agencies have not had great success obtaining criminal convictions for insider trading and

58 *Green v. CIBC*, 2015 SCC 60. See also *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18 with respect to the test for leave to commence an action under Quebec's similar statutory secondary market right of action.

59 *Re Suncor Energy Inc.*, 2015 ABASC 984.

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

61 www.osc.gov.on.ca/en/Proceedings_rad_20150324_azeffp-2.htm.

tipping, the Commission appears to be willing to rely on its public-interest powers to combat insider trading, which the panel described as 'a cancer which erodes public confidence in the capital markets'.

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.

Appendix 1

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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.

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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

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