Securities Litigation

In 13 jurisdictions worldwide

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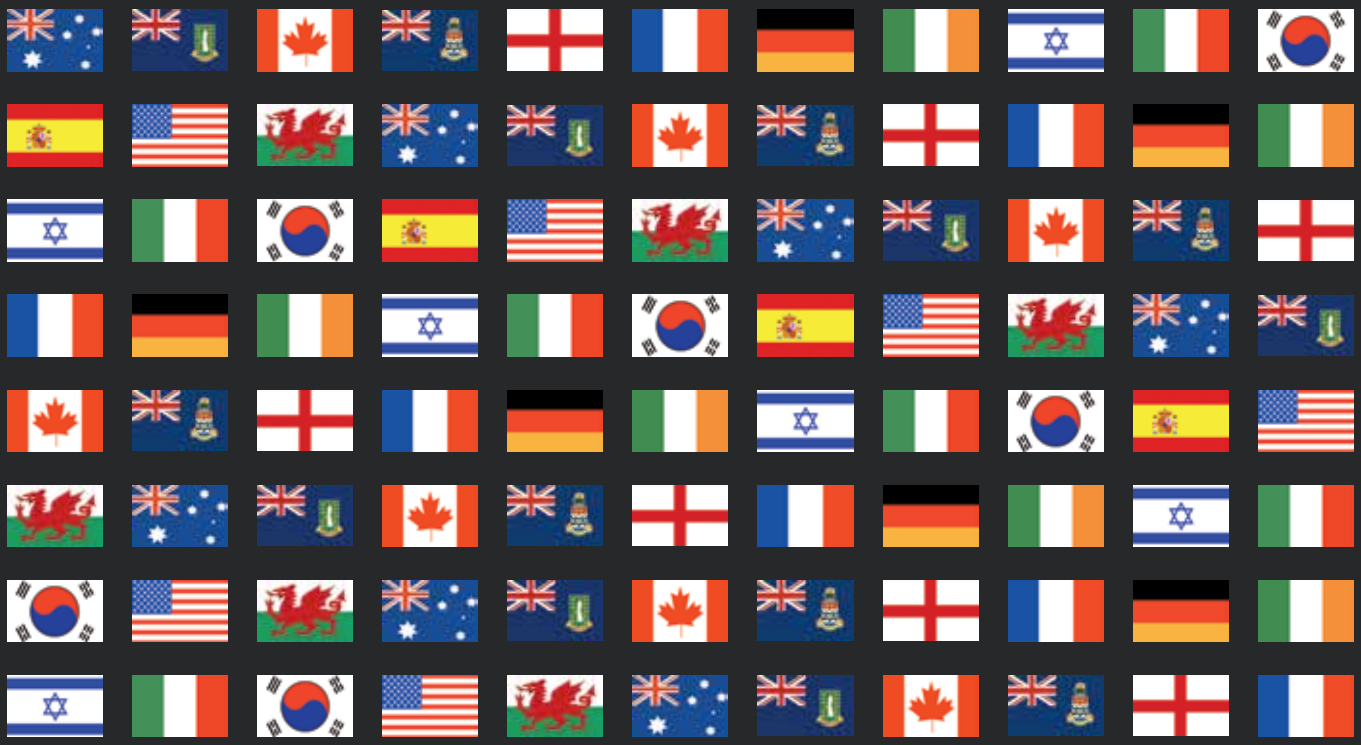

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GETTING THE DEAL THROUGH

Canada

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

In answering these questions, we have focused on civil and class proceedings in Ontario and the other common law provinces, excluding Quebec as it operates as a civil code jurisdiction and is beyond the scope of our practice.

Claimants seeking compensation for losses arising out of securities transactions may assert common law causes of action, such as negligent or fraudulent misrepresentation, statutory causes of action for misrepresentation, or both.

Provincial class proceedings legislation across Canada permits securities claims to be prosecuted as class actions. Unlike common law claims for misrepresentation, the statutory causes of action for misrepresentation in a prospectus or other disclosure document do not require proof of reliance upon the impugned representation, making certification of these causes of action as class proceedings easier to accomplish.

Since the enactment of the statutory cause of action for misrepresentation relating to secondary market securities transactions, the number of securities class actions commenced in Canada has increased dramatically.

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

Provincial securities legislation creates the following statutory causes of action specific to losses arising out of securities transactions, which obviate the need for claimants to prove reliance upon the misrepresentation giving rise to the claim:

Misrepresentations in offering documents

A right of action for damages by a purchaser of securities offered by a prospectus against the issuer or selling security holder, each underwriter, director and officer of the issuer, and others, for misrepresentation in the prospectus.

A right of action for damages by a purchaser of securities offered by an offering memorandum against the issuer and selling security holder for misrepresentation in the offering memorandum.

Misrepresentations relating to securities transactions in the secondary market

A right of action by a purchaser or seller of securities of a responsible issuer against specified defendants including the issuer, its officers, directors, experts and 'influential persons' in respect of the issuer's release of a document (including any document filed or required to be filed with the securities commission, such as a press release, financial statement or prospectus) containing a 'misrepresentation', as defined.

A right of action by a purchaser or seller of securities of a responsible issuer against the issuer and others in respect of a public oral statement by an authorised person about the business or affairs of the issuer that contains a misrepresentation.

A right of action by a purchaser or seller of securities of a responsible issuer against the issuer and others in respect of the release of a document or making of an oral statement relating to the issuer that is made by an 'influential person' that contains a misrepresentation.

A right of action by a purchaser or seller of securities of a responsible issuer against the issuer and others in respect of a failure by the issuer to make timely disclosure of a 'material change', which is a defined term.

The following common law claims can be brought with respect to losses arising out of securities transactions:

- negligent misrepresentation: a right of action by a purchaser or seller of securities who suffered financial loss as a result of his or her reasonable reliance upon an untrue statement that was negligently made, where the person who made the statement owed the claimant a duty of care based upon a 'special relationship' between them;
- fraudulent misrepresentation: a right of action by a purchaser or seller of securities who suffered financial loss as a result of reliance upon a false statement made by a person who knew that the statement was false (or was so reckless that he or she did not care whether he or she was speaking the truth) and intended that the recipient rely and act upon it;
- negligence: a right of action by a purchaser or seller of securities who suffered loss as a result of another person's breach of duty;
- breach of fiduciary duty: a right of action by a purchaser or seller of securities against another who stands in a fiduciary relationship with the claimant where the fiduciary breached his or her duty to act in the best interests of the claimant and the claimant suffered a loss as a result of that breach of duty; and
- breach of contract: failure to execute an order to buy or sell securities may give rise to a claim for breach of contract.

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

Claims arising out of securities offerings

Statutory claims relating to securities offerings are limited to alleged misrepresentations in a prospectus or other offering document or documents incorporated therein by reference. For claims relating to misrepresentations in a prospectus, only persons who bought securities pursuant to the prospectus on the primary market during the period of distribution are proper claimants.

Statutory defences, including a defence of reasonable investigation, are available to all defendants except the issuer or selling security holder, whose only available defences are that there was no misrepresentation, or that the purchaser bought the securities with knowledge of the misrepresentation. There is no liability for forward-looking statements, provided certain conditions are met, including the inclusion of 'reasonable cautionary language' proximate to the forward-looking information alleged to constitute the misrepresentation.

Damages are limited to the amount raised by the offering. For underwriters named as defendants, liability is limited to the portion of the distribution that each underwrote.

Claims arising out of secondary market purchases

Statutory claims for purchases on the secondary market may be brought if there was a misrepresentation in any document filed or required to be filed with the provincial securities regulator, or in an oral statement made by an authorised person or 'influential person', or if the issuer failed to make timely disclosure of a material change ('statutory secondary market claims'). 'Core documents', defined to include a prospectus, financial statement, and management discussion and analysis, attract a lower liability threshold. For misrepresentations in a non-core document or in a public oral statement, the plaintiff bears the onus of proving that the defendant knew or deliberately avoided acquiring knowledge that the non-core document or oral statement contained a misrepresentation, or through action

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or failure to act, was guilty of 'gross misconduct' in connection with the release of the non-core document or oral statement.

Leave of the court is required to commence a statutory secondary market claim. The court shall only grant leave where it is satisfied that the action is being brought in good faith, and there is a 'reasonable possibility' that the claim will succeed at trial.

A statutory defence of reasonable investigation is available to all defendants. However, the onus is on the defendant to establish that, prior to the release of the document or making of the oral statement containing the misrepresentation, the defendant conducted or caused to be conducted a reasonable investigation and that the defendant had no grounds to believe that the document or oral statement contained a misrepresentation. A defendant may also escape liability if he or she proves that the plaintiff acquired or disposed of the security with knowledge that the document or public oral statement contained a misrepresentation, or the allegedly non-disclosed material change.

Damages caps may apply. For issuers, the cap is the greater of C$1 million or 5 per cent of the issuer's market capitalisation.

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

Yes. Statutory secondary market claims are available only in respect of publicly traded securities. Common law claims for negligent misrepresentation are available for both publicly traded and privately issued securities, but require the claimant to prove that he or she reasonably relied upon the misrepresentation and suffered damage as a result.

If an offering memorandum is provided to investors, regardless of whether the securities are privately issued, a statutory cause of action that dispenses with the need to prove reliance is available.

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

See questions 2 and 3.

The common law claims are the same across Canada, excluding Quebec. However, the limitation period applicable to those claims will differ by province.

The statutory causes of action in provincial securities legislation across Canada are substantially the same, if not identical, although the rules of court in each province are somewhat different.

Currently, there is no federal securities statute in Canada.

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

The statutory causes of action for misrepresentation require the plaintiff to establish that the document (or oral statement) contains an untrue statement of a material fact or omits to state a material fact that is required to be stated or that is necessary to make the statement not misleading.

'Material fact' is defined by the provincial securities statutes to mean a fact that would reasonably be expected to have a significant effect on the market price or value of the securities. The test for materiality is objective and is generally referred to as the market impact test.

There is also a statutory right of action by a purchaser or seller of securities in respect of a failure by the issuer to make timely disclosure of a 'material change', defined to mean a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer. The latter element is the same objective test for materiality contained in the definition of 'material fact'. The definition of 'material change' in Ontario was recently amended to include a decision to implement a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer, where the decision is made by the board of directors or other persons acting in a similar capacity, or by senior management of the issuer, who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable.

For common law claims of negligent misrepresentation, the onus is on the plaintiff to prove, on a balance of probabilities, that the representation was untrue, inaccurate or misleading. An incomplete statement or silence can give rise to a claim for negligent misrepresentation if a statement renders inaccurate or incomplete an express or implied representation that was previously made. Opinions and forward-looking statements or forecasts cannot support a claim for negligent misrepresentation at common law, unless they import by implication misstatements of existing fact.

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

For primary market liability, the plaintiff must prove that the offering document contains a misrepresentation. There is no knowledge or negligence inquiry. The onus then shifts to the defendant, who may avoid liability if certain statutory defences apply. For non-issuers and non-selling security holders, this includes a statutory defence of reasonable investigation.

For statutory secondary market claims, the same standard applies for core disclosure documents. For non-core disclosure documents and public oral statements, a plaintiff must show that the defendant knew of the misrepresentation, deliberately avoided acquiring knowledge of the misrepresentation or is guilty of gross misconduct.

Common law claims have different standards and generally require the defendant to have had knowledge, been reckless or been negligent. Those standards are set out in question 2.

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

Proof of reliance is not required for statutory misrepresentation claims, but is for the common law cause of action for negligent misrepresentation.

There is no fraud on the market claim available under common law in Canada. A claim for negligent misrepresentation at common law requires proof of actual detrimental reliance on the misrepresentation. Whether a plaintiff relied upon a misrepresentation is a question of fact and may be inferred from the circumstances.

Indicia of reasonable reliance include advice or information provided in the course of the defendant's business or given in response to a specific enquiry or request (see *Hercules Management Ltd v Ernst & Young* (1997), 146 DLR (4th) 577 (SCC)).

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

For statutory misrepresentation claims, loss causation must be established. Defendants are liable only for the amount of the depreciation in the value of the issuer's shares that can be shown to have resulted from the misrepresentation or failure to make timely disclosure. Defendants may claim contribution and indemnity from other potentially culpable parties and are liable only for the proportion of the loss attributable to their conduct, except where knowing deception is proven.

Causation is an element of common law claims. A defendant's actionable conduct only attracts an award of damages where it can be shown that the culpable conduct caused the loss at issue.

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

No statutory secondary market claim has yet been taken to trial, making it difficult to generalise about difficulties with these claims and defences.

Aspects of the statutory secondary market claim that may present special issues for claimants are the need to obtain leave of the court to bring the claim (see question 3) and the statutory liability limits (or 'damages cap').

The liability limit caps the quantum of damages that may be awarded against defendant issuers, directors and officers of an issuer, and others. For an issuer, the cap is the greater of 5 per cent of the issuer's market capitalisations and C$1 million. For directors and officers, it is the greater of C$25,000 and 50 per cent of the aggregate of the compensation paid to the director or officer from the issuer and its affiliates in circumstances where the plaintiff fails to prove that the director or officer authorised, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure, while knowing that it was a misrepresentation or a failure to make timely disclosure.

The statutory definition of 'misrepresentation' may also prove to be problematic for both plaintiffs and defendants. 'Misrepresentation' is defined as an untrue statement of material fact or an omission to state a material fact that is required to be stated or necessary not to make a statement misleading. 'Material fact' is a fact that would reasonably be expected to have a significant effect on the market price or value of the securities. The standard for assessing materiality is objective, requiring a demonstration that there is a substantial likelihood that a reasonable shareholder would consider an omitted fact to be significant in his or her deliberations regarding whether to purchase or sell a security. However, it is also highly contextual, and may depend in part on the issuer's industry and market. In short, there is no 'bright line' test of materiality.

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The requirement to prove reasonable reliance upon a misrepresentation makes a common law claim for negligent misrepresentation more difficult for claimants to prove, and also to certify, unless the common law claim is joined with a statutory misrepresentation claim that is being certified. Reliance-based claims have been characterised by some Canadian courts as 'particularly unsuitable for resolution in a class proceeding' (*Bayens et al v Kinross Gold Corporation et al*, 2014 ONCA 901, paragraph 130). However, where a common law misrepresentation claim is advanced alongside a tenable statutory claim, the goals of judicial economy and access to justice, which are relevant to the evaluation of whether a class proceeding is the preferable procedure for resolution of the common issues, will support certification of the common law cause of action.

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

For common law claims, the limitation period is prescribed by provincial legislation. For example, in British Columbia, Ontario and Alberta, it is two years from the date of discovery of the claim. Some provincial limitations period legislation includes an 'ultimate' limitation period, which is the maximum outside time limit past which the basic limitation period cannot be extended. Both Ontario and British Columbia have a 15-year ultimate limitation period.

For statutory claims for damages for misrepresentation in an offering document, the limitation period is the earlier of 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or three years after the date of the transaction that gave rise to the cause of action. If the claim is for rescission, the action must be commenced within 180 days of the transaction that gave rise to the cause of action.

For statutory secondary market claims, the limitation period is three years from the date of the release of the document or making of a statement containing the misrepresentation or, in the case of a failure to make timely disclosure, three years after the date upon which the requisite disclosure was required to be made. Whether it is sufficient to issue a claim indicating an intention to obtain leave to commence the statutory claim within the three-year period, or whether leave must be granted before the expiry of the three-year period, will be decided by the Supreme Court of Canada in 2015.

In exceptional situations, the 'special circumstances' doctrine may permit a court to allow a claim to be amended to advance a cause of action that would otherwise have been time barred. Whether the doctrine permits the limitation period for statutory misrepresentation claims to be extended is unclear, at least in Ontario (see *Dugal v Manulife Financial Corp* [2011] OJ No. 1240 (SCJ); and *Millwright Regional Council of Ontario Pension Trust Fund v Celestica Inc* [2012] OJ No. 5083 (SCJ)).

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

The statutory defence of 'reasonable investigation', available in respect of statutory secondary market claims, places the onus on the defendant to establish that, before the release of the allegedly misleading document or public oral statement, the defendant conducted or caused to be conducted a reasonable investigation, and that the defendant had no reasonable grounds to believe that the document or oral statement contained the alleged misrepresentation. The court will consider all relevant circumstances, including factors such as the existence of any system designed to ensure that the issuer meets its continuous disclosure obligations. Much will depend on how this test is applied and interpreted.

For professional advisers such as lawyers and auditors, defeating claims of common law negligence and negligent misrepresentation brought by disgruntled investors based upon novel theories of liability before trial, on the basis that no duty of care was owed to the plaintiffs, has proven to be a challenge. The courts' willingness to certify novel claims of negligence based upon theories of liability that avoid the need to prove individual reliance is also problematic (see *Lipson v Cassels Brock & Blackwell* [2011] OJ No. 5062 (SCJ); and [2013] OJ No. 1195(CA)).

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

For statutory claims of misrepresentation in a prospectus or offering document, either rescission or damages are available. The measure of damages is the depreciation in the value of the security as a result of the misrepresentation. In no case can the amount recoverable exceed the price at which the securities were offered. No underwriter is liable for more than the total public offering price represented by the portion of the distribution that it underwrote.

For statutory claims concerning securities transactions relating to misrepresentations in public disclosure documents or oral statements, the measure of damages is determined by a formula set out in the legislation. Liability caps apply, as described in question 10. Awards of punitive damages are not permissible (see *Frank v Farlie, Turner & Co LLC*, 2012 ONSC 5519).

For common law tort claims of negligence or negligent misrepresentation, a plaintiff is entitled to be compensated for all reasonably foreseeable loss resulting from the breach of duty. Damages for negligent misrepresentation are intended to put the purchaser or seller back in the position that he or she would have been in had the misrepresentation not been made, subject to the plaintiff's duty to mitigate and avoid unnecessary losses. In general, damages will be limited to the losses actually incurred as a result of the misrepresentation, not amounts that the plaintiff expected to receive (see *BG Checo International Ltd v British Columbia Hydro and Power Authority* [1993] 1 SCR 12; and *Re Blue Range Resource Corp* [2000] AJ No. 14 (QB)).

At common law, rescission is available for a misrepresentation that gives rise to a total failure of consideration.

In contrast, for breach of contract, a plaintiff is entitled to be put in the position that it would have been in had the contract been performed as agreed.

A broader range of remedies is available for breach of fiduciary duty, including but not limited to declaratory relief, rescission, imposition of a constructive trust and compensatory damages intended to put the plaintiff in the position that it would have been in but for the breach. The remedies are discretionary and designed to address both fairness between the parties and maintenance of the integrity of the fiduciary relationship (see *McBride Metal Fabricating Corp v H & W Sales Company Inc* [2001] OJ No. 1536 (CA)).

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

The rules of court in each province govern the adequacy of pleadings. In general, a statement of claim must plead the constituent elements of the cause of action asserted and include a concise statement of the material facts upon which the claimant relies in support, but not the evidence by which the facts will be proven.

Where fraud or misrepresentation is alleged, the pleading must contain full particulars.

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

The following procedural mechanisms are available:

Motion to strike a pleading

On a motion of this nature, the onus is on the defendant to establish that it is plain and obvious that the claim has no reasonable chance of success at trial. The statement of claim is to be read by the court generously to accommodate drafting deficiencies. The facts pleaded are assumed to be true. No evidence is admissible, although the court may consider documents referred to in the pleadings. The motion will not be granted simply because the cause of action is novel, provided it has some chance of success at trial. Matters of law that are not fully settled in the jurisprudence will not be determined on the motion. It is open to the court to grant leave to the plaintiff to amend the claim if it is capable of being amended to assert a valid cause of action.

Motion to determine a question of law

A motion to determine a question of law raised by the pleading where its determination may dispose of all or part of the action or shorten the trial is available where the material facts are not in dispute and the law on the point is settled, for example, where the issue is whether a limitation period has expired and no facts relevant to that issue are in dispute.

Motion for summary judgment

A motion for a summary judgment results in a decision on the merits concerning a claim or defence, without a conventional trial. In Ontario, a plaintiff or defendant may, after a statement of defence has been delivered,

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bring a motion for summary judgment based upon supporting affidavits addressing the merits of the case. The rules of court of other provinces also permit such motions. In general, the motion will be granted where the court is satisfied that there is no genuine issue for trial.

Recent amendments to the Ontario Rules of Civil Procedure have greatly expanded the circumstances in which these motions may be brought and determined (see *Hryniak v Mauldin*, 2014 SCC 7).

Motion re: jurisdiction or forum non conveniens

A motion to determine whether the jurisdiction in which a claim is commenced is a proper forum to decide the claim or whether another forum is better suited, on a consideration of the facts, the law and comity, to hear the matter. See questions 29 to 32.

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

In Canada, corporations are exposed to vicarious liability in respect of the actionable acts or omissions of their employees and agents.

There is no concept of 'controlling person' liability. However, the statutory cause of action for misrepresentation in secondary market disclosure documents and oral statements extends liability to secondary actors including directors, officers of the issuer who authorised, permitted or acquiesced in the release of the document or making of the oral statement, and others.

The statutory cause of action for misrepresentation in a prospectus extends liability to every director of the issuer at the time that the document was filed with the securities commission, every person who signed the prospectus, and others.

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

As mentioned in question 16, the statutory causes of action extend liability for misrepresentations in offering and secondary market disclosure documents to directors.

Directors may also be held liable for public oral statements they make relating to the business or affairs of the issuer that contain a misrepresentation and, as set out in question 5, may also attract liability if disclosure is not made of decisions to make material changes to the business of the issuer, even if the change has not yet occurred.

The business judgment rule, which precludes a court from substituting its opinion for that of the board where the decision taken was within a range of reasonableness, cannot be relied upon by a director to qualify or undermine the duty of disclosure in the securities context (see *Kerr v Danier Leather Inc* [2007] SCJ No. 44).

Directors are potentially liable at common law for negligence, negligent misrepresentation and breach of fiduciary duty. In general, directors may only be found personally liable where their actions are independently tortious and have been undertaken in furtherance of interests distinct from those of the corporation.

Directors do not owe fiduciary duties or duties of care to shareholders. Directors' duties are owed solely to the corporation. Oppression remedies in Canadian corporations' statutes provide shareholders and other stakeholders with remedies that can be employed to relieve the consequences of a director's breach of duty to the corporation in appropriate circumstances.

Issues of fiduciary duty are particularly pronounced in the context of takeover bids, as discussed in question 2.

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

As discussed in question 2, the statutory causes of action extend liability for misrepresentations in offering disclosure documents to underwriters, who must certify that the offering document contains full, true and plain disclosure to the best of their knowledge and belief. A statutory defence of reasonable investigation may be asserted by underwriters.

Underwriters have no liability to secondary market purchasers under the statutory regimes.

Underwriters have been sued for negligence and negligent misrepresentation in relation to statements made in offering documents. However, whether underwriters owe a duty of care to purchasers in the secondary market has yet to be decided.

Underwriters may claim contribution and indemnity from others, including the issuer and its directors. Where the issuer has sought protection from its creditors in insolvency proceedings, an underwriter's claim for contribution and indemnity from the issuer may fail, even in the face of an indemnity agreement with the issuer. In *Re Sino-Forest Corporation*, 2012 ONCA 816, the Court of Appeal held that claims by an underwriter (and an auditor) for indemnity in respect of claims made by shareholders of the issuer were 'equity claims' and, therefore, ranked behind both secured and unsecured creditors of the issuer. The same is not true for underwritings of debt offerings.

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

Auditors are among certain defined 'experts' that may be subject to statutory civil liability under provincial securities legislation for both primary and secondary market misrepresentations. Audited financial statements filed with securities regulators are required to be accompanied by an auditor's report, which opines on the financial statement's compliance with generally accepted accounting principles (now international financial reporting standards), as determined by an audit conducted in accordance with generally accepted auditing standards. The audit report is often incorporated by reference into offering documents.

In *Hercules Management Ltd v Ernst & Young* (1997), 146 DLR (4th) 577 (SCC), the Supreme Court of Canada found that policy concerns about the risk of indeterminate liability to a potentially indeterminate class of shareholders will limit the liability of auditors in relation to claims flowing from reliance upon the auditor's reports for investment purposes. On that basis, the defendant auditors were not held liable for misstatements in the corporation's financial reports.

Certain issues faced by underwriters are also faced by auditors, as mentioned in question 18.

20 In what circumstances does your jurisdiction allow collective proceedings?

Collective proceedings may proceed either by way of representative action or class action. Typically, securities claims are brought by way of class action. The test for certification is procedural. In general, a class proceeding will be certified if the court is satisfied that:

- the pleadings disclose a cause of action, determined solely upon the pleadings;
- there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- the claims or defences of the class members raise common issues;
- a class proceeding would be the preferable procedure for the resolution of the common issues; and
- there is a representative plaintiff who would fairly and adequately represent the interests of the class, has a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and has no conflicts with other members of the proposed class.

Evidence is required to establish that there is some basis in fact for the last four elements of the test.

In general, common law negligent misrepresentation claims in securities cases are not suitable for certification unless they are joined with statutory claims, because proof of reliance typically is treated as a claimant-specific issue, requiring individualised evaluation and fact-finding.

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

Opt-out.

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

Some provincial class proceedings legislation establishes a method for assessing damages on an aggregate basis. In *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, the Supreme Court of Canada determined that, while the question of whether damages can be determined on an aggregate basis can be certified as a common issue in an appropriate case, those statutory provisions are procedural in nature and cannot be used to establish liability. Accordingly, 'the common issue whether damages assessed in the aggregate are an appropriate remedy is only determined at the common issues trial, after a finding of liability is made' (*Bayens et al v Kinross Gold Corporation et al*, 2014 ONCA 901, paragraph 118).

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

Class proceedings are typically case managed. The court retains jurisdiction to make any order it considers appropriate in respect of the conduct of a class proceeding.

The court will certify class proceedings on the criteria set out above in response to question 20.

The court is required to specify procedures for determining individual claims, and to supervise the execution of judgments and distribution of awards of damages.

Court approval of the following is required:

- any agreement respecting fees and disbursements between a solicitor and representative party;
- the manner of providing notice and the contents of notice of certification of a class action; and
- settlement of any class action if it is to bind all class members.

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

The provincial securities commission in the province where a statutory secondary-market claim is brought is entitled to receive a copy of the application for leave and any affidavits and facta filed with the court. In addition, the commission has the right to intervene in the action, application for leave and any appeal against any decision in the action.

In some circumstances, securities commissions can order certain types of restitutionary remedies as part of a settlement of securities regulatory proceedings. In theory, such settlements could potentially displace a class action as the preferable procedure for resolving the dispute. However, in its recent decision in *AIC Limited v Fisher* [2013] 3 SCR 949, the Supreme Court of Canada allowed a class action to proceed even in the face of a restitutionary order by the Ontario Securities Commission.

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

In Ontario, funding for plaintiffs in class proceedings may be available from the Class Proceedings Fund (the Fund) established by the Law Society Amendment Act (Class Proceedings Fund), 1992, S.O. 1992, c 7, which is administered by the Class Proceedings Committee. The Committee receives a levy of 10 per cent on any damages award or settlement in funded proceedings, along with repayment of funded disbursements. Defendants may apply for payment from the Fund in respect of any costs award against a plaintiff who received financial support from the Fund.

Only Ontario and Quebec have established public funding for class proceedings.

Canadian courts have also approved several third-party funding arrangements before certification of a class proceeding where the evidence establishes that the funder did not incite the litigation and the compensation structure is fair. In some cases, third-party funders have been required to post security for the defendant's costs.

Contingency arrangements are also permissible.

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

In general, Canada has a 'loser pays' system whereby the unsuccessful party will be ordered to pay a portion of the successful party's costs. The factors to be considered by the court in fixing costs include, in addition to success, the complexity and importance of the matter, any offer to settle, unreasonable conduct by any party that unduly lengthened the proceeding, the hourly rate claimed and time spent.

In civil proceedings in Ontario, there are three costs scales: partial, substantial and full indemnity, which is generally considered to provide complete reimbursement of all amounts the client had to pay his or her lawyer in relation to the litigation. Costs are typically awarded on a partial indemnity scale, unless there is a reason to justify an award of costs on a higher scale. In fixing an amount for costs, the overriding principles applied by the courts are proportionality, fairness and reasonableness.

However, for class actions, some provinces, including British Columbia, have a 'no costs' regime, in which each side bears its own costs except where there is injustice or misconduct by a party. In Ontario, section 31(1) of the Class Proceedings Act, 1992, S.O. 1992, c 6 permits the court to consider whether the class proceeding was a test case, raised a novel issue of law or involved matters of public interest in determining whether to award costs.

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

Investment funds in Canada are structured either as corporations or, far more frequently, as unit trusts, which issue units to investors instead of shares. There has not been a significant recent volume of private civil litigation involving corporate mutual funds. Litigation involving investment funds structured as trusts is also uncommon, notwithstanding the size of the market for such funds.

It is common for fund management to be delegated to a manager under the applicable declaration of trust creating the funds, and for investment funds structured as trusts to provide that the trustee and manager are required to act honestly, in good faith and in the best interests of the unit holders of the fund, and to exercise the care and skill that a reasonably prudent person would exercise in comparable circumstances.

Litigation involving funds is either predicated on complaints against dealers with respect to how the funds are sold, or complaints against fund managers concerning how they are managed. These latter classes of claim are typically based on the manager's fiduciary duty under the fund's governing trust document. A significant example of such litigation is the class proceeding leading to the decision of the Supreme Court of Canada in *AIC Limited v Fischer* [2013] 3 SCR 949, which involved certain alleged market timing conduct by fund managers that the plaintiff alleged caused losses to long-term investors in the funds at issue. The decision of the Supreme Court involved the appropriateness of the class proceeding for certification and is discussed in question 24.

In addition to traditional investment funds, there are also segregated funds issued by solvency-regulated insurance companies, which have generated a limited volume of litigation. Some such claims have been maintained as class actions on the basis of common contractual undertakings with limited success (see, for example, *Fantl v Transamerica Life Canada* (2013), 39 CPC (7th) 338 (Ont SCJ), affirmed 2013 ONCA 580, where only narrow contract-based claims were allowed to proceed).

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

According to the September 2014 Mid-Year Review of the Canadian structured finance market issued by DBRS, the Canadian structured finance market is dominated by Term Asset Backed Securities to the extent of approximately 45 per cent, asset-backed commercial paper (ABCP) to the extent of approximately 32 per cent, and structured notes to the extent of approximately 22 per cent. In terms of market-wide asset mix, credit card receivables are the most significant asset class, followed by automobile and equipment, home equity lines of credit, residential mortgages, commercial mortgages and trade receivables. Securities issued under these vehicles are normally traded pursuant to exemptions under applicable securities legislation.

Apart from issues arising between dealers and investors to whom they sell structured products, claims with respect to structured finance programmes, as in most jurisdictions, reside with the responsible trustees and are largely specific to the programme documentation.

There are no issues specific to claims by or on behalf of financial guarantee insurers. Monoline financial guarantee insurers as such have little direct involvement in the Canadian market. There are no licensed monoline financial guarantee insurers in Canada. Rather, credit enhancement tends to take the form of specific arrangements to cover losses or other risks associated with a programme, such as recourse provisions, senior or subordinated security structures, standby letters of credit and (as was notably the case in the Canadian ABCP market) liquidity facilities.

There is not a significant volume of structured-finance specific litigation in Canada. The leading case remains a 2005 decision of the Ontario Court of Appeal (*Metropolitan Toronto Police Widows and Orphans Fund v Telus Communications Inc* (2005), 75 OR (3d) 784 (CA)).

The most significant defining developments concerning structured finance litigation in Canada arose out of the collapse of the ABCP market in the summer of 2007. The crisis in that case was not primarily an asset quality issue but a liquidity issue. Investors in August of 2007 stopped rolling non-bank sponsored ABCP in particular, giving rise to a liquidity crisis that became acute when disputes arose with liquidity providers as to whether

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Update and trends

In early 2015, the Supreme Court of Canada will hear a trilogy of cases relating to securities class actions arising out of the decision of the Ontario Court of Appeal in *Green v Canadian Imperial Bank of Commerce*, *Silver v IMAX*, and *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v Celestica Inc*, 2014 ONCA 90 (the 'Green trilogy'). In the Green trilogy, the Ontario Court of Appeal reversed its earlier decision in *Sharma v Timminco*, 2012 ONCA 107, in which the Court of Appeal had decided that leave to bring a statutory claim for secondary-market misrepresentation must be obtained within the statutory three-year limitation period. In the Green trilogy, a rare five-person panel of the Court of Appeal decided that its earlier decision was wrong, and that pleading an intention to seek leave to commence a statutory claim was sufficient to suspend the limitation period pursuant to section 28 of the Ontario Class Proceedings Act, 1992, even if leave is not actually granted within the three-year period. The decision of the Supreme Court of Canada will finally resolve this issue.

Now that the Supreme Court of Canada has provided significant guidance on the elements of the test for certification of class actions in Canada (interpreting it in a manner that advances the goals of judicial economy, behaviour modification and access to justice), it is anticipated that defendants will focus increasingly on using the certification motion to narrow class definition and the issues to be certified as common, on making greater use of motions for summary judgment to eliminate claims at an early stage of the proceeding, and on moving common issues through to trial.

their liquidity covenants were triggered. To avoid a market collapse, the major players in the market arrived at a negotiated solution that led to a restructuring of most ABCP conduits under a federal insolvency statute, the Companies Creditors Arrangement Act, permitting the term of outstanding paper to be extended to match the maturity of the assets backing the affected ABCP conduits. Apart from the proceedings leading to court approval of the market restructuring, there was surprisingly little litigation arising out of the 2007 market crises.

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

A foreign resident bringing a claim in Canada must satisfy the common law tests applicable to the assumption of jurisdiction described by the Supreme Court of Canada in *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572. The assumption of jurisdiction is appropriate where there exists a real and substantial connection between the forum and the parties or the subject matter of the dispute. Identifying a real and substantial connection requires the court to assess objective factors that connect the legal situation or the subject matter of the litigation with the forum.

Four presumptive connecting factors will justify a court in assuming jurisdiction:

- residence or domicile of the defendant in the jurisdiction;
- carrying on business in the jurisdiction by the defendant;
- committing a tort in the jurisdiction; and
- entering into a contract connected with the dispute in the jurisdiction.

Courts in Canada can identify new presumptive connecting factors based on principles of order and fairness, and the similarity of the proposed new connecting factor with existing factors. A defendant can rebut a presumption of jurisdiction based on a presumptive connecting factor by establishing facts that demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

Even if the court assumes jurisdiction, it can still decline to exercise it if there is another, more appropriate forum for resolving it. If a defendant raises an issue of forum non conveniens, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must show that the alternative forum is clearly more appropriate and that it would be fairer and more efficient to choose an alternative forum and to deny the plaintiff the benefits of his or her decision to select a forum.

In *Abdula v Canadian Solar Inc*, 2012 ONCA 211, 110 O.R. (3d) 256, the Ontario Court of Appeal found that it was appropriate for an Ontario court to assume jurisdiction over statutory misrepresentation claims based on trading on foreign exchanges involving shares issued by a Canadian-domiciled issuer. Later, in *Kaynes v BP, PLC*, 2014 ONCA 580, the same court affirmed that Canadian courts have jurisdiction over statutory secondary market misrepresentation claims by Canadians in relation to trades made on foreign exchanges. As discussed in question 31, however, the court in *Kaynes* declined to exercise its jurisdiction on grounds of forum non conveniens.

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

As discussed in question 29, courts in Canada have indicated a willingness to assume jurisdiction over secondary-market misrepresentation claims against foreign issuers in relation to trading on foreign exchanges, but only where the trades are made by Canadians who received and relied upon the issuer's disclosure in Canada.

As noted above, and as discussed below, the court in *Kaynes v BP, PLC*, 2014 ONCA 580 declined jurisdiction over such claims on the basis that Ontario was not an appropriate forum to resolve them.

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

Canadian courts faced with multiple claims in different jurisdictions will, as noted in question 29, entertain motions to stay the Canadian proceeding on *forum non conveniens* grounds. In rare circumstances, anti-suit injunctions are available, but these are rarely granted given Canadian courts'

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respect for principles of comity. There is no absolute rule requiring courts to avoid an international multiplicity of proceedings. If multiple claims continue, Canadian courts can give effect to principles of issue estoppel and res judicata where a foreign proceeding is resolved first.

In *Kaynes v BP, PLC*, 2014 ONCA 580, a primary basis for the court to decline jurisdiction over the claims based on trading by Canadians on foreign exchanges was respect for principles of comity applicable to securities litigation claims. Citing an international consensus favouring the litigation of claims in the place where the relevant trades took place, the court noted that 'the principle of comity requires the court to consider the implications of departing from the prevailing international norm or practice, particularly in an area such as the securities market where cross-border transactions are routine and the maintenance of an orderly and predictable regime for the resolution of claims is imperative.' The court, while acknowledging that it had jurisdiction over such claims, declined to exercise it on the basis of principles of international comity.

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

Foreign court judgments in securities litigation will be recognised and enforced in a manner similar to the manner in which judgments are recognised and enforced in other civil cases. With the rare exception of reciprocal enforcement of judgments legislation in certain provinces (which is rarely resorted to), enforcement of foreign judgments is largely governed by the common law. Courts in Canada will recognise and enforce foreign judgments where the foreign court assumed jurisdiction on a basis the Canadian court would recognise as legitimate. See the discussion of the Supreme Court of Canada in *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572, concerning the real and substantial connection test for assuming jurisdiction, in question 29.

If it is demonstrated that the foreign court appropriately assumed jurisdiction, a foreign judgment will be enforced, except in rare cases where a defendant establishes that it would be contrary to public policy to do so, such as where there has been a denial of natural justice, or where the substance of the judgment offends a fundamental norm of public policy in Canada.

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

Private arbitration is always available where parties to litigation agree to it. A person seeking redress from an investment dealer in Canada has the following additional options.

A client of a registered securities dealer or advisor outside the province of Quebec may submit a request for compensation to the federal Ombudsman for Banking Services and Investments (OBSI), which offers a free independent and confidential dispute resolution or mediation service. If the OBSI forms the view that a firm has acted unfairly or offered deficient advice, it can recommend that the firm restore the financial position of the complainant to a maximum of C$350,000. These recommendations are not binding, but the OBSI can publicly name firms that do not act on its recommendations. For complainants, the OBSI process is advantageous because it is free and does not require legal representation.

Claims against investment dealers in Canada that are members of and regulated by the Investment Industry Regulatory Organization of Canada (IIROC) can also be submitted to private arbitration by a single arbitrator through the IIROC's arbitration programme. Under this programme, arbitrators are empowered to award up to C$500,000 plus interest and legal costs. Arbitration fees are divided equally among the parties, and legal counsel for the parties can participate in the process.

Private arbitration in Canada has similar advantages and disadvantages to those applicable to private arbitration elsewhere. It can have the advantage of being expeditious and confidential. In Canada, it has the disadvantage of allowing for limited automatic rights of appeal to the courts.

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Getting the Deal Through

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Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign Judgments
Environment
Foreign Investment Review
Franchise
Gas Regulation
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Insurance Litigation
Intellectual Property & Antitrust
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