

Defending Securities Class Actions in Canada



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Overview

Ten years ago, on December 31, 2005, Part XXIII.1 of the Ontario *Securities Act* came into force, opening the door for investors to successfully pursue securities class actions in Canada. This anniversary presents an opportunity to assess the developments in the law and practice around securities class actions during that time, and to discuss what these developments mean for issuers, directors, officers, auditors, underwriters and other market participants at risk of being named in securities class action lawsuits.

By way of overview, the following trends have emerged:

- If the share price of a public issuer suffers a sudden and material drop, there is a significant risk that the issuer will be sued. Plaintiffs also tend to bring claims against the CEO, CFO, and other directors and officers as a matter of course. Plaintiffs also frequently bring claims against auditors and underwriters, particularly where there was a primary market offering during the proposed class period.
- Lawsuits have been most frequently brought against issuers in the mining,¹ oil & gas and financial services industries. Issuers have also been at an increased risk of being sued where they are facing regulatory proceedings².

¹ For more information, refer to our blog post entitled "[Increasing Risk of Class Actions for Mining Companies?: NI 43-101 technical reports](#)" on [canadianclassactiondefence.com](#).

² For more information, refer to our blog post entitled "[Increased Risk of Securities Class Actions with Regulatory Proceedings](#)" on [canadianclassactiondefence.com](#).

While the risk of a lawsuit is particularly high when an error or omission is detected and the issuer itself releases a corrective disclosure, the possibility of an action can arise whenever there is a material drop in the issuer's share price attributed to previously undisclosed information.

- Defending a putative securities class action can be complex and resource-intensive. Even when issuers, directors, officers and others have strong defences, securities class actions can divert significant attention from their business, depress share values due to market uncertainty, impede the raising of capital, harm reputations and lead to enforcement proceedings.
- A positive recent development has been the recognition by Canadian courts that Part XXIII.1 is built on a delicate balancing of interests and that the interests of defendants and their stakeholders must be protected.³ It is particularly encouraging that, as described below, Canadian courts have dismissed several proposed actions at a preliminary stage,⁴ and significantly narrowed the issues in several others.

Notwithstanding a decade of experience, securities class actions in Canada are still at a relatively early stage. Notably, there has not yet been a trial of any claims brought under Part XXIII.1, and there are many important issues that remain to be interpreted by the courts. When we revisit this on the 15th or 20th anniversary of Part XXIII.1, the practice may look quite different.

This paper analyzes developments in the law and practice to date, including: (i) jurisdictional issues and cross-border claims; (ii) the statutory requirement that the plaintiff obtain leave of the court before commencing a claim under Part XXIII.1; and (iii) the current treatment of common law claims for negligent misrepresentation. We hope that this analysis will be a useful resource for market participants, both in avoiding litigation or, where they are faced with a securities class action lawsuit, developing effective strategies for navigating, narrowing and potentially disposing of the lawsuit at an early stage.

³ For more information, refer to our Update entitled "[Long-Awaited Supreme Court of Canada Securities Class Actions Trilogy Changes Little](#)" on [osler.com](#).

⁴ For more information, refer to our Updates entitled "[Encouraging Trend in Securities Class Action Decisions Protects Issuers from Unmeritorious Claims](#)" and "[Recent Secondary Market Securities Class Action Decision Demonstrates that the Leave Requirement May Have Teeth After All](#)" on [osler.com](#).

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Background and Overview of Part XXIII.1

The Ontario Legislature enacted Part XXIII.1 on the heels of several major securities fraud and accounting scandals in the United States, including Enron and Worldcom, and closer to home, Bre-X and Livent. Canada's other provinces and territories have since adopted similar legislation modelled on Part XXIII.1. For ease of reference, and because the majority of securities class actions to date have been brought in Ontario, this paper focuses on the provisions of Part XXIII.1 of the Ontario *Securities Act* (although many of the principles are likely of general application).⁵

The primary goal of Part XXIII.1 is deterrence. The Allen Committee – which was the driving force in recommending and establishing the framework for the statutory civil liability model that became Part XXIII.1 – concluded that the failure of public corporations to comply with continuous disclosure requirements is a problem from the perspective of both actual incidents and public perception. The Committee recommended a statutory civil liability regime as a means to improve the quality of continuous disclosure in Canada

⁵ The securities legislation of Ontario and other provinces also contain a similar but distinct statutory civil liability regime in respect of disclosures in “primary market” offerings and certain types of circulars. See, e.g., Part XXIII of the Ontario *Securities Act*. This regime is beyond the scope of this white paper. In practice, relatively few class actions have been brought under this primary market regime, in part because the primary market is only a small portion of the securities marketplace in Canada.



and, correspondingly, public confidence in our capital markets. A secondary goal of Part XXIII.1 is partial compensation for investors who have been harmed by misleading disclosure. Before Part XXIII.1, it was generally accepted that the common law remedies available to investors were so difficult to pursue that they were largely illusory. The primary impediment was that remedies had to be pursued under the common law tort of misrepresentation, which requires an investor to prove, among other things, that he or she relied on the misrepresentation – that is, that he or she actually read or heard the impugned representation and took it into account in making investment decisions. This tended to make the common law claims unsuitable for certification as a class action. Part XXIII.1 was designed to facilitate certification of statutory claims in class actions because, unlike common law claims of misrepresentation, the statutory claims do not require investors to prove that they relied on the misrepresentation.

In exchange for this powerful statutory right of action, Part XXIII.1 includes significant protections for defendants that are intended to strike a careful balance between the interests of investors and those of issuers, directors, officers, long-term investors and other market participants. The most important protections in Part XXIII.1 include:

- **The Leave Requirement:** Section 138.8 requires a plaintiff to obtain leave of the court before an action can be commenced under Part XXIII.1. This requirement is intended to protect issuers and related parties, including their long-term shareholders, from the costs and distraction associated with claims that have little or no chance of success. To obtain leave, the plaintiff must

satisfy the court that the action is brought in good faith and that there is a reasonable possibility that the action will be resolved at trial in the plaintiff's favour.

- **Damage Caps:** Part XXIII.1 prescribes “liability limits” that restrict the exposure for different categories of defendants. The liability limit for an issuer is the greater of (i) 5% of the issuer’s market capitalization and (ii) \$1 million. The limit for a director or officer is the greater of (i) 50% of his or her aggregate compensation from the issuer and its affiliates and (ii) \$25,000. With the exception of the issuer, the limits do not apply to defendants who are found to have authorized, permitted or acquiesced in the making of a misrepresentation with knowledge that it was untrue. In other words, they will not protect a person who intentionally participated in the making of material misrepresentations. The liability limits are intended to counterbalance the powerful statutory right of action and prevent the issuer and related parties from potentially debilitating levels of financial exposure. They also provide helpful parameters for estimating a defendant’s potential liability at an early stage of the proceeding.
- **Statutory Defenses:** Several important defences are also available to protect market participants who have taken reasonable steps to ensure the accuracy of their disclosures:
 - **Reasonable Investigation:** Section 138.4(6) provides that a person will not be liable if that person proves that before the release of the document or oral statement containing the misrepresentation, that person conducted a reasonable investigation and had no reasonable grounds to believe that the document or statement contained a misrepresentation.⁶ Section 138.4(7) lists factors that the court will consider in making the determination, including the knowledge, experience and function of the person or company at issue. The court will also consider the existence and nature of any system that has been put in place to ensure compliance with the issuer’s continuous disclosure obligations, as well as the reasonableness of reliance on that disclosure compliance system.
 - **Reliance on Experts:** Section 138.4(11) provides that a defendant will not be liable with respect to any part of a document or oral statement that includes, summarizes or quotes from an expert report or opinion if the defendant had no reasonable grounds to believe that a misrepresentation or failure to disclose has occurred. To rely on this defence, the defendant must also show that the expert consented in writing to the use of the report or opinion and that the defendant fairly represented the expert’s report

The liability limits are intended to counterbalance the powerful statutory right of action and prevent the issuer and related parties from potentially debilitating levels of financial exposure.

⁶ The same defence applies to omissions: a director will not be liable if he conducted (or caused to be conducted) a reasonable investigation and had no reasonable grounds to believe that the failure to make timely disclosure would occur.

or opinion. This defence only extends to those portions of an alleged misrepresentation or omission that are attributable to an expert report or opinion. A defendant can still be found liable for misrepresentations or omissions in another part of a public statement.

- Forward-Looking Information: Section 138.4(9) provides a “safe harbour” for forward-looking information where certain requirements are met including, among other things, a reasonable basis for the conclusion or projection, reasonable cautionary language identifying the forward-looking information as such and identifying the factors that could cause the actual results to differ materially from the forward-looking information.

- **Non-Core Documents and Public Oral Statements:** Different forms of disclosure are treated differently under Part XXIII.1. “Core documents” – which are defined to include prospectuses, directors’ circulars, MD&A, annual financial statements, interim financial reports and other defined documents – are distinguished from “non-core documents” and public oral statements. While both core and non-core documents and public oral statements can be a source of liability under Part XXIII.1, plaintiffs bear a higher burden in establishing defendants’ liability in respect of a misrepresentation in a non-core document or public oral statement.

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Frequency and Value of Securities Class Actions

The following statistics were obtained from the most recent study published by NERA Economic Consulting.⁷ According to that study, as of the end of 2015:

- 68 claims had been filed under Part XXIII.1 or its counterparts in other Canadian jurisdictions. Of these:
 - 29 have settled, for an aggregate amount of more than \$463 million
 - 5 have been dismissed (and one has been discontinued)
 - 33 remained unresolved at the end of 2014, with claimed damages of more than \$51 billion
 - 22 had not reached either leave or certification
 - 7 had been granted leave and certification
 - 2 more were granted leave without certification have been decided
 - 1 was denied leave on the Part XXIII.1 claim
 - 1 reached the leave stage and the Court's decision is under reserve

⁷ For more information, refer to the study entitled "Trends in Canadian Securities Class Actions: 2015 Update" on nera.com. NERA publishes annual studies on trends in class actions in Canada and the United States.

- Of the 68 claims, 29 involved a parallel U.S. proceeding. Each of these cross-border cases involved companies whose securities were listed on a Canadian exchange and either listed on a major U.S. stock exchange or traded over-the-counter in the United States. In contrast, it appears to be relatively common for U.S. plaintiffs to bring claims in the United States against Canadian companies even where there is no corresponding Canadian action filed. NERA's research shows that, since Part XXIII.1 came into force, approximately half of all U.S. filings against Canadian companies also see a parallel claim in Canada.
- NERA's statistics show that almost 80% of all securities class actions in Canada include the filing of a claim in Ontario. Approximately 1 in 4 cases involves a filing in more than one province. The vast majority of cases are filed against TSX-listed companies, though a smaller proportion are brought against TSX Venture-listed companies.





Jurisdiction

In enacting the statutory cause of action in s. 138.3 of Part XXIII.1, the Ontario Legislature chose not to establish a “bright line” rule as to its jurisdictional scope. This contrasted with the approaches taken in the United Kingdom and (eventually) the United States,⁸ which largely limit the application of those countries’ respective statutory causes of action for secondary market misrepresentations to claims involving securities traded on domestic exchanges.⁹

The reach of Ontario’s cause of action is broader. It applies to “responsible issuers,” which includes not only reporting issuers (e.g., issuers whose securities trade on an exchange in Ontario), but any other issuer “with a real and substantial connection to Ontario, any securities of which are publicly traded.” The inclusion of the “real and substantial connection” requirement was the Legislature’s recognition of the constitutional limit established by the Supreme Court to both the reach of a provincial court’s jurisdiction to hear a dispute and the application of a province’s laws to interprovincial or international situations.¹⁰ While acknowledging the constitutional limitation, the Legislature

8 In its 2010 decision in *Morrison v. National Australia Bank*, the U.S. Supreme Court held that the statutory cause of action set out in section 10(b) of the U.S. Federal *Securities Exchange Act of 1934* (and SEC Rule 10b-5, promulgated thereunder in 1942) only applied to “the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”

9 Section 90A of the United Kingdom’s *Financial Services and Markets Act 2000* provides a cause of action that only applies to securities traded on certain designated markets within the European Union.

10 The “real and substantial connection” test, established by the Supreme Court in its 1975 decision in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 SCR 393, was substantively restated by the Court in its 2012 decision in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.



nevertheless intended that issuers could be subject to the cause of action even if they did not list their securities for trading on an Ontario exchange.

Despite the relative breadth of scope of the Ontario cause of action, a series of decisions released since its introduction have provided useful guidance on the limits of its application, and arguably pushed it closer towards (although still a distance from) the exchange-based jurisdictional tests in the United States and United Kingdom. In summary:

- An Ontario court unquestionably has jurisdiction to hear a claim relating to securities traded over an exchange located in Ontario.
- In appropriate circumstances, an Ontario court will also have jurisdiction to hear a claim relating to securities that are not traded on an exchange located anywhere in Canada. Examples of situations where issuers who do not trade on an Ontario exchange may nevertheless be held to have a real and substantial connection to Ontario include: (i) where the issuer has a head office, or even a registered or principal executive office, in Ontario;¹¹ (ii) where the issuer regularly carries on business in Ontario;¹² (iii) where the alleged misrepresentations were contained in documents presented or released in Ontario;¹³ and (iv) where the issuer releases a document containing an alleged misrepresentation outside of Ontario, but knows that it is required to send that document to security holders in Ontario.¹⁴

¹¹ *Abdula v. Canadian Solar Inc.*, 2012 ONCA 211 (*Canadian Solar*).

¹² *Canadian Solar*.

¹³ *Canadian Solar*.

¹⁴ *Kaynes v. BP, PLC*, 2014 ONCA 580 (*Kaynes*), leave to appeal dismissed 2015 CanLII 14728.

- Even where an Ontario court has determined that a real and substantial connection exists, it may still decline its jurisdiction if there is a clearly more appropriate forum for the resolution of the dispute. In a recent example, the Court of Appeal for Ontario declined jurisdiction over claims of Canadian purchasers of securities traded on U.S. and European exchanges. That decision was based on principles of international comity and a recognition that countries largely limit their jurisdiction to claims involving securities traded on domestic exchanges.¹⁵

In addition to providing guidance as to when issuers may be subject to the cause of action, courts have also opined on which plaintiffs can assert the cause of action. Specifically, Ontario courts will take jurisdiction over a global class of purchasers for claims based on securities that traded only on an Ontario exchange.¹⁶ Courts have also shown some willingness to certify a global class for claims based on securities traded outside Canada (provided it otherwise has jurisdiction over the defendant issuer) on a “wait and see” basis, reserving the right to later carve out the portion of the class who purchased outside of Ontario in deference to a parallel proceeding in another jurisdiction.¹⁷

Jurisprudence has therefore gone a significant way in establishing predictable boundaries that allow an issuer to determine whether it may be subject to the statutory cause of action in Part XXIII.1. While its jurisdictional reach is still much wider than comparable regimes in the United States and United Kingdom, concerns that existed at the time of enactment as to whether Ontario would see a flood of securities class actions that had tenuous connections to the jurisdiction (at best) have largely been quelled.

A related but independent problem is that plaintiffs’ lawyers frequently commence essentially identical claims – each seeking to represent the same national class – in multiple provinces. These parallel proceedings cause unnecessary costs, complexity and delay, with the risk of more severe consequences like conflicting judgments. Canada will ultimately need to develop a better solution to curtail this unnecessary practice. In the meantime, defendants are left to argue that cases should be stayed or dismissed in accordance with applicable jurisdictional and conflicts of laws principles, including forum non conveniens, and the doctrine of abuse of process.

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¹⁵ *Kaynes and Silver v. IMAX Corp.*, 2013 ONSC 1667 (*Silver*).

¹⁶ *Ainslie v. Afexa Life Sciences Inc.*, 2010 ONSC 4294 and *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637.

¹⁷ *Silver*. For more information, refer to our Update entitled “Class Members in Ontario Securities Action Can Be Bound by Settlement of Parallel U.S. Class Proceeding” on osler.com.

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Leave

One of the most important protections for defendants in Part XXIII.1 is section 138.8, which requires a plaintiff to obtain leave of the court before an action can be commenced under Part XXIII.1. This gatekeeping function was designed to quickly weed out actions that have little chance of success and strike suits brought to extract a quick settlement. To obtain leave, the plaintiff must satisfy the court that the action is brought in good faith and that there is a reasonable possibility that the action will be resolved at trial in the plaintiff's favour.

Initial fears that the leave requirement would be nothing more than a “speed bump” have turned out to be largely unfounded. The Supreme Court of Canada recently confirmed that the leave test is intended to be a “robust deterrent screening mechanism” to ensure that cases without merit are prevented from proceeding.¹⁸ Since 2012, many defendants have used the leave test to their advantage, resulting in the dismissal of several proposed actions¹⁹ and significant narrowing of the issues in several others.²⁰

¹⁸ *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18 (*Theratechnologies*).

¹⁹ For more information, refer to our Updates entitled “[Encouraging Trend in Securities Class Action Decisions Protects Issuers from Unmeritorious Claims](#)” and “[Recent Secondary Market Securities Class Action Decision Demonstrates that the Leave Requirement May Have Teeth After All](#)” on [osler.com](#).

²⁰ See, e.g., *Theratechnologies*; *Bayens v. Kinross Gold Corp.*, 2014 ONCA 901 (*Kinross*); *Coffin v. Atlantic Power Corp.*, 2015 ONSC 3686.



Although the law surrounding the leave test continues to evolve, the following principles appear to be emerging:

- The Court will determine on the basis of the evidentiary record whether it is plain and obvious that the pleading has no reasonable prospect of success. The Supreme Court of Canada recently described the leave test as follows: “whether, having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs’ case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success.”²¹
- The test is based on a “paper record,” consisting of affidavit evidence and the transcripts of any cross-examinations on the affidavits. The court “must undertake a reasoned consideration of the evidence to ensure that the action has some merit.”²²
- Defendants are not required to file affidavits opposing the leave motion. The leave stage is for the benefit of the defendants, and they are not forced to expose themselves to preliminary cross-examination and associated document production.²³

²¹ *Theratechnologies*. For more information, refer to our blog post entitled “A “Reasonable Possibility” According to the Supreme Court of Canada – Dismissing Prior Authorization of Secondary Market Proposed Class Action” on canadianclassactiondefence.com.

²² *Kinross*. For more information, refer to our blog post entitled “A “Reasonable Possibility” According to the Supreme Court of Canada – Dismissing Prior Authorization of Secondary Market Proposed Class Action” on canadianclassactiondefence.com.

²³ *Ainslie v. CV Technologies Inc.* (2008), 93 O.R. (3d) 200 (S.C.J.).

- Where defendants do elect to lead affidavit evidence, the plaintiff is entitled to cross-examine the affiant, and this may lead to the plaintiff obtaining some measure of early documentary disclosure. While the full scope of this disclosure has not been finally resolved, a recent decision confirmed that, although filing an affidavit may lead to narrow and discrete requests to inspect documents referred to in an affidavit, an issuer's decision to lead evidence in opposition to the leave motion should not lead to massive production obligations prior to the leave motion.²⁴ Defendants are nevertheless wise to take a cautious approach, as discussed below, since leading evidence could inadvertently assist the plaintiff in meeting its burden.
- In appropriate cases, defendants may also be able to use the statutory defences in Part XXIII.1 to defeat the leave motion. The legal test appears to be an inverted form of the plaintiff's leave test – i.e., the defendant must show that there is no reasonable possibility that they will not be able to establish the defence at trial. In a recent decision,²⁵ the Court refused to allow the plaintiffs to proceed against directors and officers who had conducted a reasonable investigation and reasonably relied on advice from the issuer's auditor, even though the Court granted leave to proceed against the issuer.

The leave stage, if properly managed, presents a helpful opportunity to dismiss or narrow the issues in a claim at an early point in the proceedings. But it can also present a serious risk: picking the wrong battles could expose the defendants to an early form of evidentiary disclosure and actually improve the plaintiff's position on the motion. Worse, it could lead to the Court making findings based on a limited record that give the general public the impression that the defendants have done something negligent or even fraudulent. Defendants need to develop sophisticated strategies to use the leave stage effectively. The following considerations are important:

- **What type of evidence, if any, should defendants lead in opposition to the leave motion?** Strategies²⁶ range from leading nothing, to leading only expert evidence, to leading a full-throated defence to rebut the plaintiff's claim. In many of the initial cases, defendants chose to lead minimal evidence on the substantive allegations out of fear that the plaintiffs would be able to cross-examine the defendants' witnesses and obtain rights to documentary production that could help the plaintiffs

The leave stage, if properly managed, presents a helpful opportunity to dismiss or narrow the issues in a claim at an early point in the proceedings.

²⁴ *Mask v. Silvercorp Metals Inc.*, 2014 ONSC 4161. For more information, refer to our blog post entitled "No Early 'Fishing Expedition' for Evidence In Proposed Securities Class Action" on canadianclassactiondefence.com.

²⁵ *Rahimi v. SouthGobi Resources*, 2015 ONSC 5948. For more information, refer to our blog post entitled "Reasonable Investigation Defence Shields Directors and Officers from Securities Class Action" on canadianclassactiondefence.com.

²⁶ For more information, refer to our blog post entitled "To File Or Not To File Evidence? That Is The Question For Defendants Facing Securities Class Actions" on canadianclassactiondefence.com.

meet their leave burden. But as courts gradually confirmed that the leave test is intended to be a robust screening mechanism, defendants began leading more substantial responding records in appropriate cases.

Here are some suggested steps for defendants in determining the most appropriate approach to this evidentiary question:

- Assess the available evidence about the critical facts that go to the heart of the plaintiff's allegations as soon as possible.
 - Analyze whether the factual foundation of the plaintiff's claim can be proven to be false based on contemporaneous documents. The less questions of witness credibility are in play, the greater the likelihood a motions judge will be able to find no reasonable chance of success based on a paper record without the plaintiff having had the benefit of discovery.
 - Examine the extent to which the plaintiff's claim depends on the opinion of an expert and the quality of that opinion. In particular, focus on the factual underpinnings on which the plaintiff's expert opinion is based. In one recent case, based on evidence filed by the defendants, the court found that the plaintiffs' primary expert: (1) relied on irrelevant data; (2) ignored relevant data that did not support his opinion; and (3) mischaracterized or misunderstood the import of existing data.²⁷ When a plaintiff's claim is dependent on an expert opinion that is refuted from a factual standpoint, this can enable the court to conclude that the plaintiff has not met its burden, on the evidence, of establishing that the claim has a reasonable possibility of success.
 - Consider whether any of the statutory defences – e.g., reasonable investigation – have a prospect of succeeding at the leave stage.
- **When should the leave motion be heard?** Until recently, most judges and many parties preferred to argue the leave and class certification motions together. The rationale seemed to be that parties could save costs from the duplication of overlapping evidence and arguments. But some judges now seem to be more willing to hear and decide the leave motion before certification, which can avoid the significant costs of responding to a certification motion, particularly where the defendants have a legitimate shot at success in defeating the plaintiff's leave motion.

Ultimately, the strategy on the leave test needs to be tailored to the individual case and the parties' objectives. The most significant point is that courts have shown that they are willing to consider and dispose of clearly unmeritorious proceedings – or clearly unmeritorious claims within proceedings – at an early stage.

Strategies range from leading nothing, to leading only expert evidence, to leading a full-throated defence to rebut the plaintiff's claim.

²⁷ Kinross.



Parallel Common Law Claims for Misrepresentation

In almost every securities class action, the plaintiff seeks to bring both statutory claims under Part XXIII.1 and common law claims under the tort of negligent misrepresentation. The primary reasons are that the common law claims are not subject to a leave requirement and do not have damages caps.

In the early days of Part XXIII.1, it seemed unlikely that these parallel common law claims could be certified as class actions. After all, Part XXIII.1 was enacted in large part because common law misrepresentation claims were generally unsuitable for certification. Defendants had reason for optimism in early decisions declining to certify common law claims which reasoned that allowing them to proceed would allow the plaintiff to circumvent the careful balancing of rights in Part XXIII.1.²⁸

However, recent appellate decisions have permitted certification of some common issues relating to parallel common law claims in some circumstances. The law appears to be developing along the following lines:

²⁸ See, e.g., *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637. For more information, refer to our Update entitled "[Green v. CIBC: Recent Decision Gives Defendants to Securities Class Actions Cause for Optimism](#)" on [osler.com](#).



- If Part XXIII.1 claims are granted leave to proceed, some common issues relating to the parallel common law claims may be capable of certification.²⁹ Importantly, most courts have so far refused to certify issues of reliance and causation as common issues, instead confirming that each plaintiff must prove these issues at a subsequent individual inquiry in order to succeed on the common law claim.
- If Part XXIII.1 claims are refused leave, the parallel common law claims should not be certified.³⁰ Recent decisions have reasoned that permitting the common law claims to proceed would be a waste of time and money: if the statutory claims do not have a reasonable possibility of success, the Court should not permit the parallel common law claims to proceed when they are based on the same facts and present the additional hurdles of proving reliance, causation, damages and other significant issues.

The most important development is arguably that Canadian courts have refused to certify common issues relating to reliance. Instead, each investor in the class asserting a common law claim must establish at a minimum that he or she detrimentally relied on the alleged misrepresentation in making the investment decision, and that this reliance on the misrepresentation caused the alleged damages. This is a notable departure from the U.S. approach of the “fraud-on-the-market” doctrine, which essentially provides that where certain conditions are met, investors can avoid the need to demonstrate individual

²⁹ *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60. For more information, refer to our Update entitled “[Long-Awaited Supreme Court of Canada Securities Class Actions Trilogy Changes Little](#)” on [osler.com](#).

³⁰ *Kinross*. For more information, refer to our Update entitled “[Encouraging Trend in Securities Class Action Decisions Protects Issuers from Unmeritorious Claims](#)” on [osler.com](#).

reliance by invoking a rebuttable presumption that the price of shares trading in an efficient market reflects all public material information (including misrepresentations).³¹ Canadian courts have consistently rejected plaintiffs' attempts to import the fraud-on-the-market doctrine or any presumption of reliance into Canadian law, holding that neither the doctrine nor the related efficient market theory can supplant the need for investors to prove individual reliance in common law misrepresentation claims.³²

In the near future at least, it appears that some portions of common law claims may be allowed to proceed beyond the certification stage where the court also grants the plaintiffs leave to pursue the statutory claims. This has a few consequences:

- The common law claims increase the cost and complexity of defending securities class actions.
- The common law claims distort and frustrate settlement discussions. One of the benefits of the damages caps in Part XXIII.1 is that they narrow the range of possible damages awards and have the potential to facilitate settlement discussions by allowing plaintiffs and defendants to develop realistic estimates of potential damages.
- It is debatable whether the common law claims will have any meaningful benefits to plaintiffs outside of the most exceptional circumstances. In practice, given the need for each plaintiff to prove reliance on the alleged misrepresentation in making the investment decision, it is hard to see how individual issues of reliance could ever be efficiently or effectively resolved for large numbers of class members. This is not to say that there is no risk of liability for common law claims. The risk needs to be assessed on the unique circumstances of each case. But in most cases, the common law claims may present more of a nuisance than anything else.

At this point, there is not much that defendants can do to get rid of these common law claims outside of defeating the leave motion or negotiating their withdrawal. It is helpful that defendants continue to resist certification of common law claims given that they simply do not make sense as part of an efficient securities liability regime.

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³¹ Even the fraud-on-the-market doctrine has come under fire in recent years, with some justices of the U.S. Supreme Court questioning in the 2013 *Amgen* decision whether the doctrine rests on a faulty economic premise. Although the Supreme Court ultimately maintained the doctrine in the 2014 *Halliburton* decision, the Court did confirm that defendants should have the opportunity before certification, rather than at trial, to rebut the presumption through evidence that the alleged misrepresentation did not actually affect the price of the shares.

³² See, e.g., *Canadian Imperial Bank of Commerce v. Green*, 2014 ONCA 90. For more information, refer to our Update entitled "[Ontario Court of Appeal Addresses Important Questions for Securities Class Action Claims, Overrules Its Prior Decision Enforcing Limitation Periods](#)" on [osler.com](#).



Limitation Period

Section 138.14 of Part XXIII.1 sets out the limitation period for claims brought pursuant to s. 138.3. It provides that such claims must be commenced within three years of the date that an alleged misrepresentation is made (or, in the case of a failure to disclose, within three years of the date on which the disclosure was required to be made). The limitation period is intended, in large part, to provide certainty to the issuer and other market participants.

In 2012, an intense debate arose in the jurisprudence with respect to the interplay between: (i) section 28 of the Class Proceedings Act, which suspends the limitation period upon the commencement of the class proceeding; and (ii) the requirement in section 138.8 that the plaintiff obtain leave of the court before an action can be commenced. Specifically, could the putative class proceeding be said to have been “commenced” before leave to commence that action had been granted? And if not, did that mean that if a motion for leave had not been argued and granted before the expiry of the three-year limitation period (something that very well could be beyond the plaintiff’s ability to control), the action would be statute-barred?

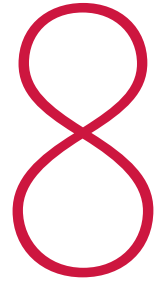
In a trilogy of decisions that ultimately made their way to the Supreme Court of Canada together,³³ a majority of the Supreme Court held that the Class Proceedings Act did not suspend the running of the limitation period until

³³ *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60. For more information, refer to our Update entitled “Long-Awaited Supreme Court of Canada Securities Class Actions Trilogy Changes Little” on osler.com.

leave had been granted. In other words, plaintiffs were required to obtain leave before the expiry of the three-year limitation period, or else claims under the statutory cause of action would be statute-barred. However, the Court also held that relief from the strict application of the limitation period could be granted, by way of courts issuing orders granting leave *nunc pro tunc* (i.e., backdating their orders to before the expiry of the limitation period), but only in appropriate circumstances.

While of obvious interest to the parties to those particular cases, the Supreme Court's decision will have little application to future claims brought under Part XXIII.1. That is because, before the cases made their way to the Supreme Court, the Legislature stepped in to amend Part XXIII.1 to provide that the limitation period is automatically suspended on the date the plaintiff files a motion with the court seeking leave.





Future Issues & Key Takeaways

The developments that we have seen over the past 10 years deal primarily with preliminary issues, such as the test for leave, jurisdiction and the certification of common law claims. In the next 10 years, as the cases where leave has been granted potentially make their way to and through trial, we may begin to see decisions on substantive legal issues that will substantively affect securities class actions in Canada. There are still a wide range of important issues that need to be determined, including for example, how jurisdictional conflicts among provinces will be resolved, what constitutes corrective disclosure, the scope of the statutory defences and how they will be applied in the face of a full evidentiary record, and the complexities presented in damages calculations where there are multiple alleged misrepresentations and corrective disclosures (which could give rise to conflicts with the class).

Despite its' relative infancy, class actions brought pursuant to Part XXIII.1 are here to stay and pose a significant risk to issuers and other market participants. The best defence against a securities class action is, of course, to avoid the circumstances giving rise to the lawsuit in the first place. Issuers can decrease their chances of being sued by, for example, (i) ensuring they have robust procedures in place for vetting public disclosures, (ii) fostering an environment where "bad news" gets elevated quickly within the organization to avoid allegations of misrepresentation by omission, and (iii) retaining appropriate experts, including accounting experts, to provide guidance on difficult disclosure issues at the time decisions are being made.³⁴

Yet even faced with a lawsuit, defendants can take solace in the facts that (i) the leave requirement meant to filter out clearly unmeritorious claims has been meaningfully applied by Canadian courts, (ii) issuers who do not have a meaningful presence or connection to Canada will likely not find themselves brought within the ambit of an Ontario court's jurisdiction on the basis of tenuous or dubious connections to the jurisdiction, and (iii) the statutory damages caps help provide reasonable predictability in determining potential exposure at an early stage. While significant development in the area is still to come, issuers, directors, officers and insurers should be reassured that – with the partnership of experienced, successful defence counsel – a quick, unpalatable settlement is far from their only alternative.

34 While such risk management procedures are beyond the scope of this paper, there are several useful resources available on Osler's Risk Management & Crisis Response page: osler.com/expertise/services/risk-management-and-crisis-response.

Osler's Corporate and Securities Litigation team has successfully defended clients in many of the leading and most complex securities class action cases in Canada. We have an excellent track record in opposing and defeating leave and class certification and winning early resolutions in every major jurisdiction in Canada. Our team has broad and deep experience guiding clients through the most complex business critical challenges.

For more information about Osler's Corporate and Securities Litigation Practice Group, visit [osler.com/securitieslitigation](https://www.osler.com/securitieslitigation).

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