

# 2014 Securities Class Actions Year in Review:

Five Developments That Will  
Change the Landscape



*Blakes*  
LAWYERS



## The year 2014 brought further development and maturity to Canadian securities class action regimes but the case law continues to reveal discordant themes.

Preliminary issues relating to jurisdiction, the leave test and certification remained a primary focus, while the Supreme Court of Canada's granting of leave in four securities class actions will open the door to a new level of appellate guidance that will hopefully resolve some of the most significant controversies arising from the early cases interpreting Part XXIII.1 of the Ontario *Securities Act* (OSA) and its provincial counterparts. These controversies include the interpretation of the statutory limitation provision, the leave standard, and the appropriateness of certifying "common-law claims" advanced in tandem with statutory secondary market misrepresentation claims.

As the case law continues to develop, active securities class actions are piling up. Eleven new securities class actions were filed in Canada in 2014, including eight in Ontario. According to trends data compiled in a recent report by NERA Economic Consulting,<sup>1</sup> these figures match the number of actions filed in 2013 and bring the total number of pending actions in Canada to 60, more than double the number five years ago. These active securities class actions represent more than C\$35-billion in total claims. Additionally, six securities class actions were settled or tentatively settled in 2014, collectively worth C\$38.4-million. The average of these settlements was C\$6.4-million, and the median was C\$6.4-million.

<sup>1</sup> NERA Economic Consulting's complete report, *Trends in Canadian Securities Class Actions*, is available at: <http://www.nera.com/publications/archive/2015/trends-in-canadian-securities-class-actions-2014-update-the-do.html>.

# ONE

## The Trilogy: Limitation Period Rulings and Implications

In February 2014, the Ontario Court of Appeal overturned one of its own recent precedents regarding the interpretation of the limitation period for commencing a secondary market class action under Part XXIII.1 in a trilogy of cases: *Green v. CIBC*, *IMAX v. Silver* and *Celestica v. Millwright Regional Council of Ontario Pension Trust Fund* (altogether referred to as the Trilogy). The Supreme Court, which heard the Trilogy appeal on February 9, 2015 and now has the decision under reserve, will now have the final say on how the statutory limitation period should be applied.

In 2012, the Ontario Court of Appeal confirmed, in *Sharma v. Timminco*, that plaintiffs must obtain leave to pursue a claim under Part XXIII.1 within three years of the alleged misrepresentation in accordance with section 138.14 of the OSA. However, the Court of Appeal panel that heard the Trilogy appeal reversed *Timminco*, holding that the section 138.14 limitation period is suspended as long as plaintiffs issue a statement of claim asserting common-law misrepresentation claims and plead an intention to seek leave to plead the statutory cause of action within the requisite three-year period. The Court of Appeal concluded that members of the proposed class are protected from the expiry of the limitation period from the point in time when the representative plaintiff “asserts” the statutory cause of action under Part XXIII.1. It held that an action is “asserted” when a statement of claim expressing the intention to pursue such a claim is issued.

In July, the Ontario legislature amended the OSA. It now provides that the limitation period governing a Part XXIII.1 claim is suspended *on the date the application for leave is filed with the court* and resumes running on disposition of the motion. While the amendment arguably addresses the controversy over how the statutory limitation period is to be applied going forward, several other issues that the Supreme Court will consider remain central to the future of securities class action litigation in Canada.

For example, the Supreme Court may consider whether the Court of Appeal appropriately considered section 138.14 within Part XXIII.1 as a whole, keeping in mind that the underlying purpose and policy objectives of the secondary market liability regime and that its various provisions are intended to operate harmoniously. Commentary from the Supreme Court about the interpretative approach taken by the Court of Appeal will likely influence the approach taken by lower courts interpreting other provisions of Part XXIII.1.

### **The Leave Standard**

As the appeal in the *Green* case stemmed from the denial of leave and certification at the motions level, the Supreme Court will also consider the appropriate application of the leave test under the OSA. The OSA provides that leave for a proposed secondary market class action should only be granted if the claim is brought in good faith and the plaintiff has a “reasonable possibility of success at trial.”

The Court of Appeal agreed with the motions judge in *Green* that the leave requirement constitutes “a preliminary low-level merits based leave test” but went on to observe that further judicial guidance as to the application of the test is unnecessary because it was the same as the test applied to determining the adequacy of a pleading. In other words, the Court of Appeal arguably lowered the threshold for granting leave *below* the standard that earlier motions judges have articulated.

In December 2014, the Ontario Court of Appeal released its decision in *Bayens v. Kinross Gold Corporation*, a further decision considering the leave standard. The decision clarifies the standard for obtaining leave to advance statutory claims for secondary market misrepresentation. The Court of Appeal upheld the trial court's decision denying leave, confirming that the "reasonable possibility of success" standard for leave is the correct standard and that it is a "relatively low threshold, merits-based test." The Court of Appeal in *Bayens* clarified the comments of the Trilogy panel about the test for leave and its relationship to a motion to strike. It stated that the leave standard is the same *standard* applied when deciding certification motions or whether to strike a pleading, but that the *evidentiary basis* in each scenario is different. In the latter instance, no evidence is filed and the facts pleaded are assumed to be true. On the leave motion, however, evidence must be adduced and scrutinized.

### ***The Certification of Common-Law Claims***

The motions judge in *Green* confirmed that both the "fraud on the market doctrine" and the "efficient market theory," which are recognized and affirmed by U.S. courts as supporting theories of class-wide reliance and have enabled the certification of secondary market misrepresentation cases, are not applicable in Canada. Accordingly, absent legislation allowing otherwise, each member of the class must prove individual reliance on an impugned misrepresentation in order to pursue a common-law misrepresentation claim.

The motions judge in *Green* determined that a class proceeding would not be the preferable procedure for resolving reliance-based claims because it would "give rise to individual issues of causation and reliance that would be unmanageable." Part XXIII.1 was enacted, in part, to overcome the difficulty of proving reliance on a class-wide basis. Significantly, if common-law misrepresentation claims were pursued in the form of securities class actions, various protections that Part XXIII.1 offers to defendants, including liability limits that in some cases would significantly reduce a defendants' liability exposure will not apply.

On appeal, the Trilogy panel concluded that inferred reliance may provide a basis for the certification of common-law misrepresentation claims in certain limited circumstances. However, it agreed with the motions judge that it would not be appropriate to certify the reliance-based common issues in the particular circumstances of *Green*. The panel disagreed with the motions judge's determination that other proposed common issues that related to the common-law claims but that did not raise individual issues should not be certified. The appeal panel certified these common issues and observed that individual trials could be ordered to determine the individual issues of reliance and damages raised by the common-law claims.

The Court of Appeal in its subsequent decision in *Bayens* further clarified that a denial of leave for statutory misrepresentation claims does not automatically mean that a class action will not be the preferable procedure for pursuing common-law claims. Nonetheless, it noted that standalone common-law negligent misrepresentation claims in securities cases are generally unsuitable for certification given the difficulty of managing individual issues of causation and reliance. For this reason, the Court of Appeal, in *Bayens*, concluded that a class action was not the preferable procedure for resolving the common-law claims, meaning that neither the statutory nor the common-law misrepresentation claims would proceed as class-wide claims.

Without definitively ruling out the possibility of securities class actions premised entirely on common-law claims, the *Bayens* decision suggests that such claims will have a low prospect of certification. The seemingly discordant approaches taken by the motions judge in *Green* and the Court of Appeal in *Bayens* on one hand, and the Court of Appeal in *Green* on the other, is characteristic of many seemingly incongruous positions that have emerged from the early Part XXIII.1 cases and highlights the need for the Supreme Court to bring greater consistency to the interpretation of the secondary market liability provisions.

## TWO

## Theratechnologies: Reconciling the Leave Test with Certification Procedures in Quebec

In February 2014, the Supreme Court of Canada granted leave to appeal in *Theratechnologies Inc. v. 1218511 Canada Inc.*, a case from the Quebec Court of Appeal that considered the leave standard under the Quebec *Securities Act* (QSA) and whether a right of appeal from a Superior Court decision granting leave to pursue secondary market misrepresentation claims may be pursued in a class proceeding.

The plaintiff sought certification of an action against Theratechnologies and certain officers and directors for alleged failure to comply with continuous disclosure obligations pursuant to the QSA. The plaintiff sought certification of the action and required leave of the court to pursue a claim for misrepresentation on the secondary market. As in Ontario, the leave test in Quebec requires a plaintiff to demonstrate that the action is brought in good faith and that there is a reasonable possibility that it will be resolved in its favour at trial.

The motions judge granted certification and leave to pursue the statutory secondary market misrepresentation claims. The defendants appealed both aspects of the decision. In Quebec, an order granting certification of a class proceeding is not subject to appeal, although there is no express prohibition on appealing a decision granting leave to commence a statutory secondary market misrepresentation action.

The Court of Appeal concluded that the leave requirement, in the context of a statutory secondary market claim, differs in significant ways from a motion for certification. While the QSA aims to promote access to justice for shareholders who allege to have been harmed, the intention of the leave requirement is to prevent frivolous or opportunistic “strike-suits” at a preliminary stage to avoid subjecting defendants to the costs and expenses of unmeritorious litigation. In keeping with this legislative objective and the interests of justice, the Court of Appeal concluded that an appeal of the leave decision should be available. Thus, in a proposed class proceeding brought together with an application for leave to pursue claims pursuant to Article 225.4 of the QSA, defendants can appeal the leave decision but not certification. *Theratechnologies* was heard by the Supreme Court of Canada on December 1, 2014, and the decision is pending.

## THREE

## Kaynes v. BP: The Court of Appeal Limits Claims Against Foreign Issues

In August 2014, in a decision that will be particularly important to public issuers who are not reporting issuers in Canada but do business here, the Ontario Court of Appeal indicated that Ontario courts can be expected to take a relatively restrained approach in determining whether they should adjudicate class actions involving foreign issuers whose securities do not trade on a Canadian exchange. Specifically, when there is another jurisdiction better suited to hear a proposed class proceeding, the Ontario court should consider the appropriateness of declining jurisdiction.

In *Kaynes v. BP, PLC*, the plaintiff attempted to commence a securities class action in Ontario on behalf of Canadian investors who purchased securities in BP regardless of where they were acquired. BP common shares trade exclusively over the London Stock Exchange, but a small minority of the proposed class had purchased depository receipts (DRs) on the Toronto Stock Exchange (TSX), while others had acquired American depository receipts over the New York Stock Exchange. BP DRs had ceased trading in Canada, and BP had ceased to be a reporting issuer in Canada more than two years before the Deep Water Horizon incident, although BP continued to provide disclosure documents to its Canadian investors.

The motions judge determined that a claim for misrepresentation under the OSA was a statutory tort presumptively connected to Ontario and took jurisdiction over the proposed class action. While the Court of Appeal agreed that a real and substantial connection existed, it held that the Ontario court should not exercise its jurisdiction on the basis of *forum non conveniens*, as the U.S. and the U.K. were the more appropriate forums. The Court of Appeal emphasized that in cases that involve the trading of securities, the principles of order and fairness require adherence to the prevailing international standard that typically ties jurisdiction to the place where the securities are actually traded. Given the extent of international and cross-border transactions in securities matters, the court further observed that developing a coherent and predictable standard for jurisdiction in such cases is crucial.

Thus, going forward, the Court of Appeal's decision in *Kaynes* will decrease the likelihood that Ontario will attract class actions with questionable ties to the province, particularly when most or all of the securities at issue were purchased on a foreign exchange.



# FOUR

## Excalibur: Special Opportunities and the Global Class

Although not a Part XXIII.1 case, the Ontario Superior Court of Justice's decision in *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP* released in September 2014 is significant given that courts at the certification stage of a class action must increasingly determine whether an identifiable class exists and whether to certify a "global" class. Justice Perell held that while Ontario courts have the jurisdiction to certify a national or global class under the *Class Proceedings Act* (CPA), the real question is whether the court *should* assume jurisdiction as a matter of conflict of laws.

The decision in *Excalibur* turned on the nature and extent of the connections between the case and Ontario. Justice Perell identified four factors relevant to the question of whether a global class should be certified including: (1) whether an Ontario court has jurisdiction *simpliciter* over the defendant, (2) whether the Ontario court can assume jurisdiction over a non-resident class member, (3) whether it would be reasonable for a non-resident class member to expect that his or her rights could be fairly determined by what to him or her would be a foreign court, and (4) whether a non-resident class member would be accorded procedural fairness, including adequate notice and genuine opportunity to opt out of the proceeding.

Justice Perell determined that the proposed claim had virtually no connection to Ontario, other than the fact that the defendant accounting firm resided in the province. Only two of the 57 investors comprising the proposed class were Canadian. The investments at issue were made in U.S. dollars in a U.S. corporation for a transaction governed by American corporate and securities laws. The transaction included an audit report from an Ontario auditor, but the standard of care associated with the audit was largely determined by American accounting standards. Justice Perell also questioned the fairness of assuming jurisdiction over foreign class members, emphasizing that it was unreasonable for them to expect their legal claims to be adjudicated in Ontario and noting that they may be better off pursuing claims in their own domestic courts.

*Excalibur* may appear inconsistent with Justice van Rensburg's decision to certify a global class of investors in an early motion decision in *Silver v. IMAX Corporation*.<sup>2</sup> However, as Justice Perell noted in the *IMAX* case, the defendant company is a Canadian corporation with a registered office in Ontario and an Ontario reporting issuer trading on the TSX. Further, the alleged misrepresentations in *IMAX* were purportedly made in financial statements prepared in accordance with Canadian GAAP. There were also proportionately more investors in *IMAX* whose claims had a real and substantial connection to Ontario (15 per cent) than in *Excalibur* (two per cent). It may, nonetheless, be difficult for future litigants to reconcile the *IMAX* and *Excalibur* decisions, and the cases may be another example of the seemingly contradictory strains of jurisprudence in securities class action jurisprudence that ultimately need to be reconciled at the appellate level.

<sup>2</sup> This case is an earlier proceeding in the *IMAX* action that forms part of the *Trilogy*.

# FIVE

## Mask v. Silvercorp: Production Obligations at the Leave Stage

In Ontario, a motion for leave to commence a secondary market misrepresentation claim is generally heard concurrently with a motion to certify the proposed action. Though often heard simultaneously, each serves a different purpose with distinct evidentiary burdens on the plaintiff. In *Mask v. Silvercorp Metals Inc.*, the plaintiff sought leave to commence an action pursuant to Part XXIII.1 against a mining issuer and two of its officers. Prior to the hearing of the leave and certification motions, the plaintiff served requests to inspect documents under the Ontario *Rules of Civil Procedure* for production of hundreds of documents referred to in the affidavits filed by the defendants in opposition to the motions in order to review them prior to cross-examinations. The defendants resisted the request, claiming that it amounted to a “fishing expedition.”

Justice Belobaba agreed that the request “ran afoul” of the legal principles of specificity, relevance, proportionality, prejudice, timeliness and privilege in a way that would unfairly prejudice the defendants. Justice Belobaba held that the rule cannot be used as a “fishing rod,” especially before cross-examinations have been conducted in respect of a leave motion. The concern identified by Justice Belobaba echoes an observation made by Justice Perell in his leave decision in the *Celestica* case earlier in 2014 where he noted that if a defendant does not have evidence to support the granting of leave, this is “the end of the matter.” A defendant is under no obligation to provide a plaintiff with “early discovery” or other evidence to support leave.

These decisions arguably contrast with the decision of Justice van Rensburg in the previously mentioned early production motion in the *IMAX* case that resulted in the plaintiffs being ordered to produce a large volume of documents in connection with cross-examinations on their affidavits in opposition to the leave motion, further underscoring the need for clarity from appellate courts on these issues.

## The Road Ahead

The divergent themes and approaches that emerge from a review of these recent securities cases demonstrates just how much hinges on the Supreme Court’s decisions in the Trilogy and *Theratechnologies*. Will they provide greater direction and guidance to lower courts? Will they provide greater clarity and predictability for litigants? At this point, all that can be said with certainty is that the Canadian securities class action landscape will look very different at the end of 2015 than it does now.

## OUR SECURITIES LITIGATION TEAM

The Blakes Securities Litigation group handles all aspects of securities litigation, including class actions. The Benchmark Canada Awards, which recognize the accomplishments of the leading litigators and litigation law firms, named Blakes “Class Actions Firm of the Year” in 2015 and “Securities Firm of the Year” in 2014.

For more information on the Firm’s securities litigation expertise, please contact:

### TORONTO

**Nigel Campbell**  
Direct: 416-863-2429  
nigel.campbell@blakes.com

**Jeff Galway**  
Direct: 416-863-3859  
jeff.galway@blakes.com

**Andrea Laing**  
Direct: 416-863-4159  
andrea.laing@blakes.com

**Ryan Morris**  
Direct: 416-863-2176  
ryan.morris@blakes.com

**Seumas Woods**  
Direct: 416-863-3876  
seumas.woods@blakes.com

### MONTRÉAL

**Marc-André Landry**  
Direct: 514-982-5060  
marcandre.landry@blakes.com

**Robert Torralbo**  
Direct: 514-982-4014  
robert.torralbo@blakes.com

### CALGARY

**Melanie Gaston**  
Direct: 403-260-9732  
melanie.gaston@blakes.com

**Mark Morrison**  
Direct: 403-260-9726  
mark.morrison@blakes.com

**David Tupper**  
Direct: 403-260-9722  
david.tupper@blakes.com

### VANCOUVER

**Sean Boyle**  
Direct: 604-631-3344  
sean.boyle@blakes.com

MONTRÉAL  
OTTAWA  
TORONTO  
CALGARY  
VANCOUVER  
NEW YORK  
LONDON  
BAHRAIN  
AL-KHOBAR\*  
BEIJING  
SHANGHAI\*