THE SECURITIES LITIGATION REVIEW

Sixth Edition

Editor
William Savitt

THE LAWREVIEWS

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CONTENTS

PREFACE v
William Savitt

Chapter 1 SEC ENFORCEMENT: A PRACTICAL GUIDE FOR PRIVATE EQUITY FUND MANAGERS 1
Eva Ciko Carman, Jason E Brown, Kirsten Boreen Liedl and Daniel Flaherty

Chapter 2 AUSTRALIA 15
Luke Hastings and Andrew Eastwood

Chapter 3 BRAZIL 39
Rodrigo Carneiro, Fernando Zorzo and Eider Avelino Silva

Chapter 4 CANADA 49
Laura Paglia and Matthew J Epp

Chapter 5 CHINA 60
Zhou Yuhua

Chapter 6 DENMARK 72
Karsten Kristoffersen and Josefine Movin Østergaard

Chapter 7 ENGLAND AND WALES 85
Harry Edwards and Jon Ford

Chapter 8 FRANCE 108
Bertrand Cardi and Nicolas Mennesson

Chapter 9 GERMANY 122
Lars Röh and Tobias de Raet

Chapter 10 ITALY 141
Daniele Geronzi, Stefano Parlatore, Daria Pastore and Bianca Berardicurti

Chapter 11 LUXEMBOURG 153
Frank Mausen, Paul Péporté, Thomas Drugmanne and Kristina Vojtko

Chapter 12 MALAYSIA 164
Wan Kai Chee and Tan Yan Yan

Chapter 13 NEW ZEALAND 176
Chris Curran, Marika Eastwick-Field and Nathaniel Walker

Chapter 14 PORTUGAL 196
Nuno Salazar Casanova and Nair Maurício Cordas

Chapter 15 RUSSIA 209
Sergey Yuryev

Chapter 16 SINGAPORE 219
Vincent Leow and Nicholas Kam

Chapter 17 SOUTH KOREA 231
Tony Dongwook Kang

Chapter 18 SWEDEN 245
David Ackebo and Andreas Johard

Chapter 19 SWITZERLAND 261
Jodok Wicki, Kaspar Landolt, Dominique Gemperli and Roxana Sharifi

Chapter 20 TAIWAN 279
Edward Liu and Eunice Chen

Chapter 21 UNITED STATES 288
William Savitt and Noah B Yavitz

Appendix 1 ABOUT THE AUTHORS 315
Appendix 2 CONTRIBUTORS' CONTACT DETAILS 331

PREFACE

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

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

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

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

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

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

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

A further ambition of this review is to observe and report important regulatory and litigation trends, both within and among countries. This perspective reveals several significant patterns that cut across jurisdictions. In the years since the financial crisis of 2008, nearly every jurisdiction reported an across-the-board uptick in securities litigation activity – an increase that will likely be recapitulated by the covid-19 pandemic currently roiling society and the global economy. Many of the countries featured in this volume have seen increased public enforcement, notably including more frequent criminal prosecutions for alleged market manipulation and insider trading, often featuring prosecutors seeking heavy fines and even long prison terms.

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

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

An important example is the matter of cross-border securities litigation, treated by each of our contributors. As economies and commerce in shares become more global, every jurisdiction is confronted with the need to consider cross-border securities litigation. The chapters of this volume show jurisdictions grappling with the problem of adapting national litigation systems to a problem of increasingly international dimensions. How the competing demands of multiple jurisdictions will be satisfied, and how jurisdictions will learn to work with one another in the field of securities regulation, will be a story to watch over the coming years. We look forward to documenting this development and other emerging trends in securities litigation around the world in subsequent editions.

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

William Savitt
Wachtell, Lipton, Rosen & Katz
New York
May 2020

Chapter 4

CANADA

Laura Paglia and Matthew J Epp[1]

I OVERVIEW

i Sources of law

Securities laws in each of Canada's 10 provinces and three territories provide the legal foundation for legal and regulatory requirements related to the capital markets. Multiple sources inform securities laws. 'Laws' include and are informed by each provincial Securities Act and any regulations or rules pursuant to those acts blanket rulings, orders and decisions issued by each provincial securities regulator, National Instruments agreed to by the Canadian Securities Administrators (CSA)[2] and decisions of provincial courts.[3]

ii Regulatory authorities

Securities matters are not currently federally regulated in Canada. Each province and territory has its own securities regulator, provincial Securities Act and provincial case law from its own regulator or court. The CSA is an umbrella organisation and informal body comprising Canada's provincial and territorial securities regulators. Its goal is to achieve consensus on policy decisions and governing principles impacting Canadian capital markets. As a result, securities markets are also governed by National Instruments, promulgated by the CSA, which apply to such matters as the distribution of securities, disclosure obligations, securities transactions (such as mergers, acquisitions and takeover bids) and registration matters.

Enforcement of securities law is achieved in part by provincial securities commissions, which function as specialist administrative tribunals, and in part by provincial courts. The provincial securities commissions have delegated to certain self-regulatory organisations (SROs) the power to regulate the conduct of securities and mutual fund dealers, under the supervision of CSA members. The primary SROs in Canada are the Investment Industry Regulatory Organization of Canada (IIROC), the Chambre de la Sécurité Financière (CSF)

1 Laura Paglia and Matthew J Epp are partners at Borden Ladner Gervais LLP.

2 The Canadian Securities Administrators are the Alberta Securities Commission, the British Columbia Securities Commission, the Manitoba Securities Commission, the Financial and Consumer Services Commission (New Brunswick), the Office of the Superintendent of Securities Service Newfoundland and Labrador, the Office of the Superintendent of Securities (Northwest Territories), the Nova Scotia Securities Commission, the Nunavut Securities Office, the Ontario Securities Commission, the office of the Superintendent of Securities (Prince Edward Island), L'Autorité des Marchés Financiers (Quebec), the Financial and Consumer Affairs Authority of Saskatchewan and the Office of the Yukon Superintendent of Securities.

3 With rights of appeal ultimately to the Supreme Court of Canada.

and the Mutual Fund Dealers Association of Canada (MFDA).[4] IIROC governs investment dealers and performs exchange surveillance. The MFDA governs mutual fund dealers in Canada (other than in Quebec). The CSF governs mutual fund dealers in Quebec. Exchanges monitor compliance by listed companies with their listing agreements, terms and policies. They may deny approval of certain transactions, require corrective action (disclosure), halt or suspend trading, or deny or terminate a listing.

The Integrated Market Enforcement Team (IMET), an investigation unit of the Royal Canadian Mounted Police, may investigate securities-related crimes. Public prosecutors in provincial offices or equivalents may prosecute contravention of securities laws, as well as of criminal laws, before a court. In some provinces, the enforcement staff of a provincial commission may also bring securities law contraventions before a court.

iii Common securities claims

Regulatory proceedings may vary widely in subject matter. Enforcement statistics from key Canadian regulators are listed in this chapter.

Civil claims from retail investors are often related to the suitability of the investment and to various forms of misrepresentation. They may be brought individually or by class action. Relief by shareholders, officers, directors and other 'proper persons' is also at times sought against a corporation by derivative action or the pursuit of an oppression remedy.

II PRIVATE ENFORCEMENT

i Forms of action

Retail investors with a claim not exceeding 350,000 Canadian dollars or more may submit, at no cost, a written complaint to the Ombudsman for Banking Services and Investments (OBSI). The OBSI follows an informal process in accordance with its Terms of Reference to reach a non-binding recommendation for restitution. Quebec's provincial regulator, the Autorité des Marcheés Financiers (AMF), provides a mediation service to all clients of registered dealers and advisers. With the exception of Quebec registrants and investment fund managers, all market registrants are required to participate in the OBSI process.[5] In addition, IIROC and MFDA members also have mandatory requirements with respect to reporting complaints to them and with respect to the handling of such complaints.[6] IIROC members must also submit to binding arbitration for any claims of 500,000 Canadian dollars or less at the investor's option,[7] although this option is rarely used as, unlike the OBSI, arbitration costs are incurred.

4 On 12 December 2019, the CSA announced that it would undertake a review of the regulatory framework for IIROC and the MFDA and stated that it expects to publish a consultation paper by mid-2020, re-examining the policy reasons for the current regulatory framework.

5 National Instrument 31-103: Registration Requirements, Exemptions and Ongoing Registrant Obligations, Sections 13.14–13.16.

6 IIROC Dealer Member Rules (2 January 2018) (IIROC Rules), Rule 2500B (Client Complaint Handling) and Rule 3100B (Reporting Obligations); Rules of the Mutual Fund Dealers Association (4 January 2016) (MFDA Rules), Rule 2.11 (Client Complaint Handling) and Rule 1.4 (Reporting Obligations).

7 IIROC Rules, Rule 37.

ii Procedure

Retail investors can also initiate a claim in the civil court system, as individuals or as part of a class action, to seek damages.

Class proceedings legislation exists in most provinces. The legislation is procedural and provides requirements for such matters as the certification of a class, notice, settlement, legal fees and opt-in or opt-out provisions. The test for certification generally requires that a cause of action is disclosed by an identifiable class of two or more persons that raises common issues, and renders a class action the preferable procedure through the appropriate representative plaintiff.[8] Currently, a class action may still be certified if damages require individual assessments, different remedies are sought for different class members or common issues are not shared by all class members.[9]

iii Settlements

Settlements of class actions are subject to court approval. The test for approval of a settlement of a class proceeding is whether the settlement is fair and reasonable and in the best interests of the class. On a motion for approval of a settlement of a class proceeding, the court must consider whether: (1) there are any indicators of collusion or conflicts of interest in the settlement or the process leading to the settlement that might call into question its fairness; and (2) the compromise embodied by the settlement falls within the range of reasonableness in the particular circumstances of the case.[10] In Ontario, the court has found the same test to be applicable under the class proceedings legislation of that province as in Section 138.1 of the Ontario Securities Act, RSO 1990, c. Section 5 (OSA) discussed below.[11]

Securities class actions – deemed reliance

There are various 'deemed reliance' provisions in the OSA that render misrepresentation susceptible to class actions in Ontario. Liability arises with respect to these misrepresentations without regard to whether the purchaser relied on the misrepresentation. Part XXIII of the OSA imposes civil liability for misrepresentation in the primary market. There is liability for misrepresentation in an (amended) prospectus, takeover bid circular, director or officer's circular, and issuer bid circular.[12] A right of action for misrepresentation, without reliance, lies against such individuals as the issuer, underwriters, directors and others who consented to the disclosure or signed the prospectus.[13]

8 Class Proceedings Act, 1992, SO 1992, c6, Section 5 (CPA). On 9 December 2019, Ontario's Attorney General Introduced Bill 161 in the Legislative Assembly as the 'Smarter and Stronger Justice Act, 2019' aimed at providing amendments to various statutes to provide 'better, more affordable justice for families and consumers'. Proposed changes to the CPA are included in Bill 161. Suggested amendments to the CPA include amendments to the certification test to put greater significance on a class proceeding as the 'preferable procedure', in turn, including whether a class proceeding is 'superior' to all 'reasonably available means' to address relief for class member and whether questions of fact or law predominate over questions impacting class members individually.

9 CPA, Section 6.

10 *McDonald v. Home Capital Group*, 2017 ONSC 5004.

11 CPA, Section 29(2); *McDonald v. Home Capital Group*, 2017 ONSC 5004.

12 Ontario Securities Act, RSO 1990, c. Section 5 (OSA), Sections 130 (1) and 131(1)–(3).

13 OSA, Section 130(1).

Among the defences available is that of a 'reasonable investigation'. A reasonable investigation provides reasonable grounds for a belief that there was no misrepresentation. It is in turn subject to a standard of reasonableness required of a prudent person in the circumstances.[14] Damages recoverable cannot exceed the price at which the securities were offered. For underwriters, damages cannot exceed the total public offering price represented by the portion of the distribution underwritten.[15]

Part XXIII.I of the OSA imposes civil liability for secondary market disclosure without regard to reliance by the purchaser.[16] A right of action for misrepresentation, without reliance, lies against the issuer, officers and directors, 'influential persons' and experts if the misrepresentation is contained in their opinion and they consented in writing to its reliance.[17] A right of action also exists for public oral statements[18] and for failure to make timely disclosure of a material change.[19] Considerations for the assessment of damages are set out in the OSA.[20]

Multiple misrepresentations or multiple instances of failure to make timely disclosure of a material change that have a common subject may be treated as a single misrepresentation or failure in the discretion of the court.[21] Again, among the several defences available is that of a reasonable investigation with the factors for consideration by the court set out in the OSA.[22]

An action for misrepresentation in the secondary market requires leave of the court, which is granted where the action is brought in good faith and there is a reasonable possibility that the action will be resolved in favour of the plaintiff. The OSA sets out a procedure for affidavit materials, filing and notice requirements.[23]

A limitation period applies. No action shall be commenced later than the earlier of three years from the date the misrepresentation in the document or public oral statement is made or six months after the issuance of a press release announcing that leave has been granted.[24]

Other actions against the corporation

Pursuant to the Canada Business Corporations Act, RSC 1985, c. C-44 (CBCA) and similar legislation in other provinces, a 'complainant', generally defined as a shareholder, officer, director or 'any other person who, in the discretion of the Court is a proper person' may bring a derivative action to pursue a claim on behalf of a corporation.[25] A derivative action requires leave of the court, who must be satisfied that the complainant is acting in good faith and the action is in the interest of the corporation.[26] A complainant may also seek an oppression

14 OSA, Sections 130(4), (5), 131(5)(d) and 132.
15 OSA, Sections 130(6) and 130(9).
16 OSA, Section 138.3(1).
17 OSA Section 138(1).
18 OSA, Section 138.1(2).
19 OSA, Section 138.1(4).
20 See, for example, OSA, Section 138.5.
21 OSA Section 138.3(6).
22 OSA Section 138.4(6)(7) The OSA also distinguishes 'core documents' from others in Section 138.4(1)(3).
23 OSA Section 138.1(1).
24 OSA Section 138.14.
25 Canada Business Corporations Act, RSC 1985, c. C-44 (CBCA), Section 238.
26 CBCA, Section 239.

remedy,[27] which does not require leave and which is a broad remedy that may extend to many types of 'unfair conduct'. The court will consider whether there is evidence to support the breach of reasonable expectation asserted by the relevant interest of the stakeholder.[28] Complainants may seek both remedies.

III PUBLIC ENFORCEMENT

i Forms of action

Regulatory enforcement actions are generally brought by provincial securities commissions or SROs. There is a sharing and overlapping of responsibilities between securities commissions and SROs. In addition, a market participant may have overlapping of responsibilities to multiple securities commissions and SROs and may face a number of investigations by different regulators for the same set of facts.

ii Procedure

These securities regulators may bring allegations of securities misconduct to a hearing before an adjudicative panel of the securities commission or SRO and seek monetary sanctions, suspensions and prohibitions as market participants.

In some jurisdictions, staff of the provincial securities commission may directly prosecute cases of a quasi-criminal nature in court. In others, these cases may be referred to public prosecutors for prosecution in the courts.

Enforcement staff of provincial securities commissions investigate possible market misconduct or breaches of securities legislation under an investigation order issued by the chair (or a designate) of the Commission. The order sets out the scope of the investigation. To carry out their investigation, enforcement staff have the power to compel the production of documents and testimony.

Generally, when an investigation order or examination order is issued, information about the investigation or any examination or evidence of a person must not be disclosed to anyone other than the counsel representing the examined person. The only exception is where a formal request is made to the provincial commission and the commission consents to disclosure by issuing an order.[29]

Depending on the nature of the matter and the evidence they have gathered, enforcement staff may initiate a proceeding before the relevant commission,[30] or prosecute a respondent for a breach of securities legislation by initiating a quasi-criminal proceeding in the court.

A public proceeding begins with the issuance of a notice of hearing regarding a statement of allegations, which must be proven at a public hearing or resolved by public settlement agreement. Rules applicable to the conduct of hearings and related procedural issues are set out in rules of practice applicable to each commission.

Both MFDA and IIROC also have their own rules of procedure applicable to their proceedings, which vary, in some instances, from those of provincial securities commissions.

27 CBCA, Section 241.

28 *BCE Inv v. 1976 Debenture holders*, 2008 SCC 69 (CanLII).

29 For example, OSA, Section 17.

30 For example, OSA Section 127.

iii Settlements

Enforcement staff of the multiple Canadian regulators negotiate settlement agreements under which respondents agree to sanctions. Settlement agreements usually involve an agreed statement of facts, admissions of a regulatory breach and an agreed-upon sanction (which can include a reprimand, fine, costs, and bans on or suspension from trading and other activities). Further, settlement agreements act as a waiver of the right to appeal.

The process for approval of a settlement agreement may be set out in the applicable rules of procedure for that regulator. By way of example, Rule 12 of the Rules of Procedure of the Ontario Securities Commission sets out the process for settlements with that commission.

A settlement agreement is submitted for approval by a panel or a single commissioner. One or more confidential conferences may be held. A notice of hearing for a settlement hearing is then issued and a public settlement hearing takes place. If the panel is satisfied the agreement is in the public interest, the agreement will be approved. Reasons for the decision will also be provided.

In Ontario, the Revised Credit for Cooperation Program (released in March 2014)[31] allows for no-contest pleas with the Ontario Securities Commission (OSC). This does not exist in other provinces, where no-contest pleas are not allowed by those commissions.

Although investor restitution is not directly within the power of these public remedies, it is a common element of public settlement agreements and a mitigating factor to sanctions.

iv Sentencing and liability

In addition to monetary sanctions, provincial securities commissions may suspend or revoke registration. They may also issue cease trade orders, prohibit individuals from acting as officers or directors or prohibit individuals from trading in securities.

In the event of SRO rule violations, the SROs may impose administrative penalties, which include membership suspension or revocation, restrictions and fines. By way of example, IIROC has issued Sanction Guidelines. Its fines are limited to a maximum of 5 million Canadian dollars per contravention or an amount equal to three times the profit made or loss avoided. In general, either a disciplined individual or IIROC enforcement staff can appeal IIROC disciplinary decisions to the relevant provincial or territorial securities commission or the applicable reviewing body. An appeal will involve a review of the merits of the liability or penalty decision, or both.

In Alberta and Prince Edward Island, an SRO may register a 'decision' with the superior court with the result that it then has a civil judgment against the member that it can enforce, like all civil judgements.

IV CROSS-BORDER ISSUES

Certain provincial securities commissions have signed multiple memoranda of understanding with a number of foreign securities regulators. These include the United States Securities and Exchange Commission, the Financial Industry Regulatory Authority, the United States Commodity Futures Trading Commission, the Australian Securities and Investments Commission, Autorité des Marchés Financiers de France, Abu Dhabi Global Market

31 Ontario Securities Commission (OSC), OSC Staff Notice 15-702 (13 March 2014) available online: www.osc.gov.on.ca/en/SecuritiesLaw_sn_20140311_15-702_revised-credit-coop-program.htm.

Financial Services, the Financial Conduct Authority, European Union authorities (including the European Securities and Markets Authority), the International Organization of Securities Commissions, the China Securities Regulatory Commission and the Hong Kong Securities and Futures Commission.

A common issue is whether a Canadian province can assume jurisdiction over securities issues involving foreign residents or jurisdictions. This issue has received the following recent judicial treatment.

A class action was proposed against HSBC Holdings by investors in HSBC Holdings' shares or its American depository receipts (ADRs). The purchases were made on foreign stock exchanges. The allegation was that investors overpaid for their ADRs because HSBC holdings, which is regulated by foreign regulators, made false disclosures. It was held that an Ontario company does not carry on business in Ontario only by virtue of the fact that it owns shares of a subsidiary that operates in the jurisdiction. Further, it was found that even though the alleged misrepresentation was made in Ontario, it did not constitute a real and substantial connection to Ontario as such a finding would amount to universal jurisdiction for claims arising out of commercial activities. Lastly, the court also emphasised that it would have otherwise declined jurisdiction on the grounds that the United Kingdom was the more appropriate forum, as most of the trading occurred on the London Exchange and the corporation was based in the United Kingdom, where most of the witnesses and evidence were located. The defendants were awarded approximately C$1 million in costs.[32] The appeal was dismissed. Among the Ontario Court of Appeal's rationale was that the legislature did not intend that 'Ontario would become default jurisdiction for issuers around the world whose securities were purchased by residents of Ontario'. In addition, the ability to download disclosure material from a home computer in Ontario did not establish a connective factor.[33]

In another case, the Ontario Court of Appeal allowed a class consisting mostly of non-resident investors to proceed in an action against an accounting firm. In this case, the investor class, which was predominantly resident in the United States, had invested in a US company, Southern Livestock International Inc (Southern Livestock), whose subsidiaries owned farming operations in China. Southern Livestock retained a New York-based investment bank to solicit investors. The investment bank distributed a private placement memorandum to accredited investors, which included an audit report by the accounting firm named as the defendant to the class action. The accounting firm was sued for an allegedly negligent audit report. The Ontario Court of Appeal held that Ontario had jurisdiction because the defendant was resident in Ontario, the report was prepared in Ontario and the class comprised a discrete body of investors.[34]

The Canada Cannabis Act[35] renders it legal to possess, consume, produce and distribute cannabis across Canada as of 17 October 2018. There are multiple cannabis companies dually listed in Canada and in the United States, exposing them to the risk of being subject to multiple civil and regulatory proceedings in both jurisdictions based on substantially the same facts and allegations.

32 *Yip v. HSBC Holdings PLC*, 2017 ONSC 6848 (Can LII).

33 *Yip v. HSBC Holdings PLC*, 2018 ONCA 626.

34 *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2016 ONCA 916.

35 S.C. 2018 c. 16.

V YEAR IN REVIEW

i Private remedies

Primary and secondary market liability

An investor plaintiff's class action against a defendant exchange-traded fund (ETF) provider was dismissed.[36] The main cause of action was the breach of an alleged duty of care owed by the ETF manufacturer and manager to investors by selling an ETF that was allegedly too risky to be actively managed. The court held that the relationship between the investor and the ETF fund was limited in light of the lack of warranty or guarantee of returns. The prospectus described the ETF as speculative and high risk and did not undertake to actively manage the ETF or stop investor losses. The relationship was described as one between a product vendor and purchaser, which is typically addressed by way of contractual obligations rather than tort claims for economic loss. In addition, the action plead a cause of action pursuant to Part XXIII of the OSA, which, as explained above, imposes civil liability for misrepresentation in the primary market. The court concluded that the only connection between ETFs and the primary market was that it required the filing of a prospectus and issuance of receipt by the appropriate regulator. Otherwise, ETFs traded on the secondary market, where the purchases occurred. No secondary market liability claim had been made pursuant to Section 138.1, Part XXIII.I of the OSA, which, as also stated, imposes liability for secondary market disclosure without regard to reliance by the purchaser.

Part XXIII.I of the OSA was considered by the Ontario Superior Court in the context of whether investors in a Chilean gold mine could obtain leave to commence a class action against a gold company.[37] Investors alleged that relevant information was omitted from public reporting, with partially true contradictory information later released. The court held that the test for leave, though meant to prevent non-meritorious claims from burdening the justice system, is not an onerous one. The court stated: 'the judge may say to herself that the chances of the defendant succeeding at trial are excellent – 80 or even 90 per cent. This still leaves a 10 to 20 per cent chance of success for the plaintiff, enough to clear the "reasonable possibility" hurdle.' The alleged misrepresentation that the court held met the test for leave was argued by the defence to comprise a legal opinion. This argument was rejected on the basis that there was no language to qualify it as an opinion and based on American jurisprudence that, in any event, opinions can contain facts, which in turn can be misrepresented.

Another investor plaintiffs' class action was also dismissed against an investment adviser, dealer and related personnel alleging in part a 'one size fits all' investment strategy, largely in energy securities and some private equities, that was unsuitable for investors and a failure to supervise.[38] The court held in part that:

> *[52] Different clients likely would have had differing risk tolerances, objectives, and time horizons depending on their personal circumstances and the composition of their investment portfolios. In addition, some clients may have purchased or sold securities based on information or advice received from sources other than [the investment advisors].*

36 *Wright v. Horizons ETFS Management (Canada) Inc.*, 2019 ONSC, 3827 (Can LII).

37 *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160.

38 *Fisher et al. v. Richardson GMP et al.*, 2019, ABQB 450.

> *[53] These facts are essential to the nature, scope, and extent of the duty each Defendant owed to members of the Proposed Class. The result is that the suitability claims are personal to each client and this factual matrix makes identification of the class complicated and problematic*

Although the court identified various common issues, it held that a class action was not the preferable procedure because these issues did not materially advance the proceeding, rendering individual assessments after a trial still necessary to determine whether any particular class member had a compensable claim. The case confirmed that allegations of unsuitable investment advice raise issues intrinsically individualistic to each investor's personal and financial circumstances and are, therefore, not appropriate for certification.

In contrast, certification was granted in a class action brought against the trustee and manager of certain mutual funds on behalf of holders of those mutual funds through a discount broker. The claim sought damages and other relief related to the payment of allegedly unearned management fees. The key allegations relied in part on duties allegedly owed pursuant to trust agreements and representations allegedly made in Fund Facts and Simplified Prospectuses in the relevant period.[39]

Corporate governance

The OSC has encouraged the creation of Special Committees early in any process involving a potentially material conflict of interest transaction, such as going private transactions by management or large shareholders, in accordance with Multilateral Instrument 61-101-Protection of Minority Security Holders in Special Transactions.[40] In its decision, the OSC has also advised that if a board establishes a special committee when it is not legally required to, the disclosure related to its process will be subject to the same scrutiny as if a special committee was strictly necessary.

ii Public remedies

With regard to pending litigation

Canadian regulators continue to refuse to grant a stay where their proceedings arise from the same facts as pending litigation.[41]

With regard to insolvency

The Alberta Queen's Bench held that administrative penalties imposed by the Alberta Securities Commission (ASC) against an individual survived his discharge in bankruptcy.[42] Exceptions pursuant to the Bankruptcy and Insolvency Act include (1) fines or penalties imposed by a court; (2) debt or liability arising out of fraud, embezzlement, misappropriation, or misappropriation while acting in a fiduciary capacity; and (3) debt or liability arising from obtaining property or services by false pretences or fraudulent misrepresentation. The underlying policy consideration was that a 'debtor who has engaged in fraudulent or dishonest conduct is not entitled to a fresh start offered by a general discharge of bankruptcy'. The court stipulated that not all regulatory penalties would survive discharge. In this instance, the

39 *Stenzler v. TD Asset Management Inc.*, 2020 ONSC, 111.

40 *The Catalyst Capital Group Inc. (Re)*, 2020 ONSEC 6.

41 *Re: Lutheran Church-Canada, the Alberta-British Columbia District*, 2019 ABASC 43.

42 *Alberta Securities Commission v. Hennig*, 2020 ABQB 48 (CanLII).

individual had misrepresented financial statements, participated in market manipulation, not abided by insider trading reporting requirements, benefitted from investor funds and made misrepresentations to the ASC.

In lieu of payment to the ASC, administrative penalties have been paid to the Monitor in the context of the Companies' Creditors Arrangement Act[43] for distribution to investors.[44]

The first publicly offered bitcoin fund

The cryptocurrency landscape continues to evolve worldwide. On 29 October 2019, the OSC issued its reasons for the decision to allow a Canadian investment fund manager to offer the first publicly offered bitcoin fund in Canada.[45] The OSC held that although the risks of price manipulation in the bitcoin market exist, in this instance, the risk was mitigated, in part, by the fund's investment parameters and restrictions. In this regard, the fund's prospectus stated that the fund would: (1) invest in bitcoin only, not in all crypto-assets; (2) pursue a buy and hold strategy, not an active trading strategy; and (3) only buy and sell bitcoin on regulated exchanges. A qualified auditor could also conduct an audit based on other evidence obtained from third parties to comply with generally accepted accounting principles. From a policy perspective, the OSC held that a refusal of the opportunity to invest in bitcoin through a public fund might lead to the suggestion that investors should acquire bitcoin through unregulated vehicles. The OSC supported the notion of professionalising the investment in risky assets through a publicly regulated fund to mitigate risk.

VI OUTLOOK AND CONCLUSIONS

i Regulatory burden reduction

On 27 June 2019, the ASC issued a Consultation Paper 11-701, Energizing Alberta's Capital Market (ASC Consultation Paper) recognising the province's significant representation in the energy sector, pipeline and related services and setting out a series of preliminary recommendations to reduce 'red tape' and stimulate economic growth in its traditional areas and in new areas. The results of the Consultation Paper are pending.

On 19 November 2019, the OSC released its report, Reducing Regulatory Burden in Ontario's Capital Markets, in response to its solicited feedback from various stakeholders and outlining specific ways in which the OSC would reduce unnecessary administrative burden on Ontario market participants (OSC Report). The OSC Report comprised 107 broad ranging decisions and recommendations, the full potential benefits will be subject to market assessment over time.

ii Client-focused reforms

On 3 October 2019, the CSA released final rule amendments to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations and the associated Companion Policy (the Client-Focused Reforms), which came into force on 31 December 2019 and become effective over phased-in transition periods of two years ending

43 RSC 1985, c C-36. This is a federal Act that provides avenues for financially distressed corporations to restructure their affairs.

44 *Re Lutheran Church-Canada, the Alberta-British Columbia District*, 2019 ABASC 140.

45 *3iQ Corp. (Re)*, 2019 ONSEC 37.

31 December 2021. IIROC and the MFDA are expected to amend their rules within that time frame. The Client-Focused Reforms imposed enhanced know your client, know your product, suitability, training, conflicts management, record keeping, policies and procedures and internal control obligations on market participants across registration categories involved in distribution. The impact of the Client-Focused Reforms on these market participants is currently unknown, but expected to pose challenges for smaller market players in particular.

iii Covid-19

At the time of writing, global markets are in the midst of the covid-19 outbreak, to which Canadian securities regulators, government and market participants are seeking to respond as the situation evolves.

Appendix 1

ABOUT THE AUTHORS

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Laura Paglia is the regional co-lead of Borden Ladner Gervais' securities litigation and regulatory group. Laura has practised in securities law and regulatory matters throughout her legal career.

Laura's practice encompasses the representation of numerous full service and discount investment dealers, mutual fund dealers, futures dealers, investment funds, underwriters, private funds, investment banks, introducing and clearing firms, investment advisers, portfolio managers, compliance professionals, research analysts, directors and officers, industry associations and other market participants.

Laura provides ongoing legal advice on compliance, regulatory and securities industry issues as well as representation in civil proceedings and a variety of regulatory proceedings and investigations conducted by provincial securities commissions, the Investment Industry Regulatory Organization of Canada, the Mutual Fund Dealers Association of Canada and other regulatory bodies, the Crown and federal criminal authorities.

Laura's practice includes disputes in respect of various alleged securities law breaches, shareholder right litigation, mergers and acquisition and take-over bid litigation, and directors' and officers' liability.

Laura provides various in-house training programmes for market participants and is a frequent speaker on and written contributor to topical securities issues.

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Matthew is a partner in the Calgary office of Borden Ladner Gervais LLP, and is a member of our commercial litigation group. His practice focuses on complex securities litigation, class actions, commercial and shareholder disputes although he regularly is retained on complex matters of all types.

Matthew regularly represents investment and real estate industries professionals in civil proceedings, and acts as lead counsel for large corporations in front of industry tribunals, including the Law Society of Alberta, the Mutual Fund Dealers Association, Investment Industry Regulatory Organization of Canada (IIROC), the Alberta Securities Commission and the Real Estate Council of Alberta. He has been involved in significant arbitral proceedings, including those in the electricity and real estate development industries, and general corporate and commercial matters including employment issues.

Matthew also represents real estate developers and investment professionals in complex class actions.

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