THE SECURITIES LITIGATION REVIEW

Fifth Edition

Editor
William Savitt

THE LAWREVIEWS

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Fifth Edition

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William Savitt

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PREFACE

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

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

As the chapters that follow make clear, there is great international variety in private litigation procedure as a tool for securities enforcement. At one extreme is the United States, with its broad access to courts, relatively permissive pleading requirements, expansive pretrial discovery rules, readily available class-action principles and generous fee incentives for plaintiffs' lawyers. At the other extreme lie jurisdictions like 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 (possible) imminent 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, 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. 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 the 2008 crisis gave rise to a new normal in 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 annually reflect where this important area of law has been, and where it is headed. Each chapter contains both a section summarising the year in review – a look back at important recent developments – and an outlook section, looking towards the year ahead. The narrative here, as with the book as a whole, is of both convergence and divergence, continuity and change – with divergence and change particularly predominant in recent years, following political upheaval in the United States and Britain that could herald 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 fifth 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 2019

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 foundation for legal and regulatory requirements related to the capital markets. Multiple sources inform securities laws. 'Laws' include and are informed by:

a each provincial Securities Act and any regulations or rules pursuant to those acts;
b blanket rulings, orders and decisions issued by each provincial securities regulator;
c National Instruments agreed to by the Canadian Securities Administrators (CSA);[2] and
d 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:

a the distribution of securities;
b disclosure obligations;
c securities transactions, such as mergers, acquisitions and takeover bids; and
d registration matters.

Enforcement of securities law is achieved in part by provincial securities commissions that function as specialist administrative tribunals and in part by provincial courts. The provincial

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

2 The Canadian Securities Administrators is 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'Autorite des Marches 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.

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) and the Mutual Fund Dealers Association of Canada (MFDA). IIROC governs investment dealers and performs exchange surveillance. The MFDA governs mutual fund dealers in Canada (other than in Canada, except 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:

a deny approval of certain transactions;
b require corrective action (disclosure);
c halt or suspend trading; or
d 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, 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 C$350,000 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 AMF,[4] provides a mediation service to all clients of registered dealers and advisers. With the exception of Quebec, registrant, investment fund managers and 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

4 Autorité des Marches Financiers.

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

the handling of such complaints.[6] IIROC members must also submit to binding arbitration for any claims of C$500,000 or less at the investor's option,[7] though this option is rarely used as, unlike the OBSI, arbitration costs are incurred.

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] A class action may still be certified if:

a damages require individual assessments;
b different remedies are sought for different class members; or
c 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:

a 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
b 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's or officer's

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.

8 Class Proceedings Act, 1992, SO 1992, c6, Section 5 (CPA).

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.

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]

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

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

bring a derivative action to pursue a claim on behalf of a corporation.[25] A derivative action requires leave of the court, which must be satisfied 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 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 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.

25 Canada Business Corporations Act, RSC 1985, c. C-44 (CBCA), Section 238.

26 CBCA, Section 239.

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.

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 a 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 the 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.

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 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.

Though investor restitution is not directly within the power of these public remedies, it is a common element to 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 C$5 million 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 judgments.

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

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 Marches Financiers de France, Abu Dhabi Global Market Financial Services, the Financial Conduct Authority, European Union authorities including the European Securities and Markets Authority, the International Organisation 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, 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 the 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]

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.

V YEAR IN REVIEW

i Private remedies

Secondary market liability

MDC Partners Inc (MDC) was federally incorporated in Canada. It had a registered office in Toronto and a head office in New York State. In October 2014, the SEC began an investigation into the reimbursement of executive expenses and its accounting practices and summoned documents. MDC formed a special committee of independent directors to investigate issues raised by the SEC. After the market closed on 27 April 2015, MDC released a statement disclosing the SEC summons and the creation of the Special Committee. The next day, its share price dropped 20 per cent on the TSX and NASDAQ.

The plaintiffs sought leave to commence the action for secondary market liability pursuant to Section 138.1(1) of the OSA alleging misrepresentations in public filings including annual and quarterly financial reports. Among the misrepresentations alleged was the failure to disclose the SEC investigation and summons.

Leave was denied. Misrepresentation pursuant to the OSA is 'an untrue statement of material fact' or 'an omission to state a material fact that is required to be stated to make a statement not misleading in light of the circumstances in which it was made'. None of the alleged misrepresentations were found to be material. 'Materiality' is fact-specific. Information could be 'considered material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether to invest and at what price'.[35] The court agreed with the holding in *Re: Lions Gate Entertainment Corp,* 2016 US Dist. LEXIS 7721SEC, which held that a regulator's investigation did not trigger a duty to disclose. In the court's view, a reasonable investor would 'expect the company would respond to the subpoena, cooperate with the investigator, and conduct an internal investigation and then determine whether there was a material fact to correct or a material change to report to its investors'.[36]

Hostile takeover

As a result of a joint hearing, the OSC and the Financial and Consumer Affairs Authority of Saskatchewan (FCAAS) cease traded a shareholder rights plan adopted by CanniMed Therapeutics Inc (CanniMed). CanniMed's plan was in response to an unsolicited takeover bid by Aurora Cannabis Inc (Aurora).[37]

CanniMed had proposed an acquisition of Newstrike Resources Inc (Newstrike). Aurora launched a hostile bid which was supported by four CanniMed shareholders holding approximately 38 per cent of CanniMed shares. These shareholders entered into hard lock-up agreements with Aurora that committed them to tender to Aurora's bid and vote against alternative transactions including Newstrike.

CanniMed's board of directors adopted a poison pill that restricted Aurora from acquiring CanniMed shares, except those tendered to its bid, and prevented Aurora from entering into any more lock-up agreements.

This is the first 'poison pill' decision by Canadian securities regulators under the new takeover bid regime that was adopted across Canada in May 2016. The regime includes a

35 *Sharbern Holding Inc v. Vancouver Airport Centre Ltd*, 2011 SCC 23.

36 *Paniccia v. MDC Partners Inc*, 2018 ONSC 3470.

37 *Re Aurora Cannabis Inc*, 2018 ONSEC 10.

longer 105-day, as opposed to 35-day, period to respond to an unsolicited bid, which may be shortened where the target issues a news release announcing that it intends to effect an 'alternative transaction'.

Aurora applied for and was denied this exemptive relief. Among their reasons, the Commissions stated that abbreviating the 105-day period was not necessary in the circumstances to facilitate the choice by CanniMed shareholders between the transactions.

The Commissions upheld the lock-up agreements and stated that lock-up agreements are a 'lawful and established feature' of the merger and acquisition process and are of increased importance in the new takeover bid regime. They held that the agreements did not automatically result in Aurora and the locked-up shareholders acting jointly or in concert.

The Commissions cease traded the poison pill adopted by CanniMed as they concluded it constrained choice by target shareholders.

ii Public remedies

A national regulator

In *Re Pan-Canadian Securities Regulation,*[38] the Supreme Court of Canada reviewed a cooperative proposal by the federal government for a single regulator and held it was constitutional. Provinces can elect to opt in by passing their own legislation to adopt the national regulations and national regulator proposed.

Insider trading

In Ontario, a person is guilty of insider trading if he or she trades in securities of an issuer with material non-public information while in a 'special relationship' with the issuer.[39] The range of a special relationship is broad and includes those who have or are considering a relationship with the issuer, such as employees, directors and consultants. A person in a special relationship with an issuer also may be found liable for tipping (as tipper) if he or she informs another person (as tippee) of the material non-public information outside the ordinary course of business.

In *Finkelstein*,[40] information regarding a takeover bid was obtained by a lawyer working on the bid who then told an investment adviser, who passed it to an accountant, who passed it on to other tippees who traded on the information and informed at least one of their clients of the information. The OSC found that all these individuals, including the successive tippees, were in a special relationship with the issuer. The Divisional Court dismissed appeals of all the respondents to the OSC proceeding except one tippee where it held that the OSC had made a number of errors and overturned that conviction. The OSC and one of the respondents appealed to the Ontario Court of Appeal. The Ontario Court of Appeal confirmed that successive tippees were in a special relationship with the issuer. It set out a series of factors it considered relevant to determining whether the tippee would reasonably assume that the material non-public information passed on to him or her came from a person 'in a special relationship with the issuer'.

38 2018 SCC 48.

39 Section 76(5)(e) of OSA.

40 *Finkelstein v. Ontario Securities Commission*, 2018 ONCA 61.

The list of non-exhaustive factors or 'groups of circumstantial evidence' includes:

a the relationship between the tipper and tippee;

b whether the tipper and tippee work in a setting where transactions and material non-public information are discussed and they know they cannot take advantage of confidential information;

c the nature and detail of the material non-public information;

d the time between the tippee receiving the material non-public information and trading; and

e whether the tippee took any steps to verify the information, had ever owned the particular stock before and whether it was a large trade for the tippee.

The Ontario Court of Appeal stated that the inference that the tippee 'ought reasonably to have known' that the tipper was in a special relationship will be stronger where the tippee is a market registrant.

Definition of security/imprisonment

In July 2014, the OSC had issued orders against Daniel Tiffin and his company Tiffin Financial Corporation (TFC) regarding promissory notes they had traded. The sanctions included a five-year prohibition on trading in securities. Afterwards, Tiffin solicited C$700,000 from six investors who were also given promissory notes. Tiffin and TFC were charged with breaches of the OSA including trading:

a in securities without being registered;

b without filing a prospectus; and

c while subject to prohibition.

The Ontario Superior Court of Justice dismissed the charges and held that the promissory notes were private loan agreements and not 'securities' as defined by the OSA.[41] In reaching this conclusion, the Court applied the family resemblance test of the United States Supreme Court.[42]

The family resemblance test presumes:

a the note is a security unless it resembles instruments that are not considered securities after examining the borrower's motivation for raising the money;

b whether the borrower's plan resembles common trading for speculation or investment;

c the expectation of the investing public; and

d whether there is a regulation to protect the investor outside of securities laws.

The OSC appealed.

The appeal was allowed. In the Court's view, the court at first instance erred in its analysis because a 'security' was clearly defined in the OSA and reflects policy differences with the US approach. Six months incarceration was ordered. Part of the reasoning to support a period of incarceration was:

a Tiffin's defiance of the OSC's cease trade order;

b Tiffin's use of the funds for luxury goods;

41 *Ontario Securities Commission v. Tiffin*, 2016 ONCJ 543.

42 *Reeves v. Ernst & Young*, 494 US 56.

c the substantial amounts that remained owing under the promissory notes; and
d prior OSC penalties.

Support letters from clients were among the mitigating factors.[43] The Ontario Court of Appeal has granted leave to appeal this most recent decision.[44]

VI OUTLOOK AND CONCLUSIONS

The Canada Cannabis Act[45] renders it legal to possess, consume, produce and distribute cannabis across Canada as of 17 October 2018. It is anticipated the resulting emerging industry will include increased litigation and regulatory scrutiny.

The cryptocurrency landscape continues to evolve worldwide. On 11 June 2018, the CSA published Staff Notice 46-308, Securities Law Implications for Offering of Tokens, stating that though most of the offering of tokens it reviewed involved investment contracts, the fact that a token has a utility is not solely conclusive of whether the offering constitutes a distribution of securities. The Provincial Securities Commission may increasingly seek to prosecute cryptocurrency investment products.

43 *Ontario Securities Commission v. Tiffin*, 2018 ONSC 3047.
44 *Ontario Securities Commission v. Tiffin* 2018 ONCA 943.
45 S.C. 2018 c. 16.

Appendix 1

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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 rights litigation, mergers and acquisition/takeover bid litigation and directors' and officers' liability.

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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, the 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.

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