Cassels

Outlook 2021: Securities Class Actions Trends

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We believe that the following securities class action developments are largely issuer/defendant friendly, but their impact on the number and types of future securities class action filings remains to be seen.

First Merits Decision Brings Hope to Defendants

The leave test for secondary market disclosure misrepresentation cases under Part XXIII.1 of the Ontario *Securities Act* (the *Securities Act*) has been well developed through case law, including by the Supreme Court of Canada. While this test is intended to be a significant screening mechanism, and has been described as "more than a speed bump," the courts are still clearly guided by the principle that the *Securities Act* is remedial legislation that should be interpreted broadly and purposively.[1] The resulting reality is that a large percentage of proposed secondary market cases survive the leave motion, and most of these cases then go on to settle.[2]

Notably, 2021 saw the first decision of a secondary market securities class action on its merits. The plaintiff in *Wong v. Pretium Resources* alleged that the mining company defendant made a misrepresentation by omission when it did not disclose in a timely manner the negative opinion of one of its consultants concerning the mineral resources estimate prepared by another consultant. While Justice Belobaba had previously granted leave to the plaintiff to proceed with this claim,[3] he dismissed the claim on its merits on the defendant's summary judgment motion, finding that there was no misrepresentation and that, in any event, the defendants were entitled to a reasonable investigations defence.[4]

The significance of this decision is the commentary and insight on the relationship between the test for leave to proceed with a secondary market class action and a finding on the merits of the action. Justice Belobaba noted that while "leave to proceed will be granted if there is enough evidence to clear the 'reasonable possibility' hurdle," the defendants may still prevail "when the matter is litigated in full and the plaintiff's hurdle is the more demanding 'balance of probabilities.'"[5]

In addition to demonstrating that the merits threshold is more onerous than the leave threshold, this decision provides useful guidance to issuers when making disclosure decisions. At the merits hearing, sufficient evidence was presented to allow Justice Belobaba to dislodge his initial views of the significance of the negative opinion of the consultant and to conclude that the defendant "acted properly throughout" in coming to its conclusion that the negative opinion was unreliable and, therefore, not a material fact that had to be disclosed. Helpfully, Justice Belobaba also commented that "[n]othing is achieved by flooding the market

with unhelpful information" and that the idea of "simply disclosing everything and letting the market make sense of it has been unequivocally rejected."[6]

We hope that this first merits decision will encourage defendants to persist in defending the merits of secondary market class actions once leave has been granted, as plaintiffs and defendants alike can only benefit from further case law guidance in this area.

Impact of Ontario Class Action Amendments

As we discussed in last year's Outlook, Ontario's class proceedings legislation underwent significant changes through amendments that apply to class proceedings commenced after the effective date of October 1, 2020. Among other things, the amended certification test under the *Class Proceedings Act, 1992* requires that common issues in a proposed class action *predominate* over individual ones, and the proposed action be *superior* to any other reasonably available means of resolving the claims of the plaintiff class or the conduct of the defendant. The amended legislation also encourages pre-certification motions by defendants, where preliminary motions may narrow or dispose of issues in a proceeding.

While the majority of the amendments have yet to be tested or applied by the Ontario courts, a recent decision confirmed the legislative intention regarding pre-certification motions, finding that a motion that can arguably dispose of the proceeding in whole or in part, or can narrow the issues or the evidence, *must* be heard before certification, *unless* the court orders that the two motions be heard together.[7] This decision confirms that the new amendments should enable defendants to move earlier and more aggressively against weak or problematic claims. On the other hand, we may see plaintiffs filing certification and leave motion records more quickly, so that they are better positioned to ask that any preliminary motions be heard in tandem with leave and certification.

2021 Filings

While the year is not yet done, it appears that securities class action filings in Canada are declining as compared to 2020, when the number of new filings surpassed 2019 and matched the prior record set in 2011.[8] Further, while four of the fifteen class actions filed in 2020 were against reporting issuers in the cannabis industry (as compared to five in 2019), we are not aware of any cannabis-related class actions being filed in 2021 – which may be attributed to the maturing of issuers operating in the cannabis industry. Moving forward, we expect to see a rise in secondary market disclosure class actions in the Environmental, Social and Governance area.

Key Takeaways

The combination of the more stringent test for certification and the first decision on the merits suggest that defendants who face securities class actions in Ontario may have a better chance of success on preliminary motions and/or in defending cases on their merits post-leave. Issuers who find themselves on the receiving end of a new securities class action need experienced class action counsel who can provide reasoned advice on the best forum for success. Issuers who face difficult disclosure decisions will similarly benefit from experienced advice on any related litigation risk.

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[1] *Kauf v. Colt Resources, Inc.*, 2019 ONSC 2179 at paras. 53-39.

[2] See for example: *Vecchio Longo Consulting Services Inc. v. Aphria Inc.*, 2021 ONSC 5405; Gowanlock v. Auxly Cannabis Group Inc., 2021 ONSC 4205; Miller *v. FSD Pharma, Inc.*, 2020 ONSC 4054; *Miller v. FSD Pharma Inc.*, 2021 ONSC 911; *Dyck v. Tahoe Resources Inc.*, 2021 ONSC 5712.

[3] 2017 ONSC 3361.

[4] 2021 ONSC 54.

[5] 2021 ONSC 54 at para. 3.

[6] 2021 ONSC 54 at paras. 64-65.

[7] *Dufault v. Toronto Dominion Bank,* 2021 ONSC 6223.

[8] *Trends in Canadian Securities Class Actions: 2020 Update*, NERA Economic Consulting, March 2, 2021.
