**CROSS-BORDER SECURITIES**

**cross-border securities class actions**

The final act of the *Kaynes v. BP plc* saga was played out in a Texas District Court in September 2015, after more than three years of litigation – all of which took place before the pleadings were closed. The Texas Court dismissed the plaintiff’s third attempt to bring a class action on behalf of Canadian BP securities holders who bought prior to the Deep Water Horizon oil spill. As Margaret Waddell explains, effectively, the Texas Court found that the claim was an abuse of process, and in any event, it was out of time. The author notes that this case serves as an excellent example of the importance of how a class action should be framed to drive the desired result.

**AUTOMOBILE-RELATED CLAIMS**

**automobile misrepresentation class action**

In 1983, in a proposed class action for breach of warranty and breach of representation on behalf of all persons who bought a 1971 or 1972 Pontiac Firenza, the Supreme Court of Canada found in *G.M. (Canada) v. Naken* that a class action was inappropriate as it would uselessly complicate the resolution of the class members’ claims, each having a different car history, a different interest and varying contractual arrangements. However, as Vincent de l’Étoile and Antoine Brylowski explain, the recent decision of the Court of Appeal of Quebec in *Martel v. Kia Canada Inc.*, questions whether a long-lasting jurisprudential trend is in jeopardy.

**SECURITIES CLASS ACTIONS**

**the Supreme Court of Canada weighs in**

On December 4, 2015, the Supreme Court of Canada released its long-awaited decision in a trilogy of securities class action appeals. The three appeals, argued together in the Ontario Court of Appeal and at the Supreme Court, primarily concerned the interaction in Ontario’s secondary market liability regime between the leave requirement and the limitations period. As Guy White explains, regrettably, this aspect of the decision is unlikely to be of much interest to the securities litigation bar, due to statutory amendments, which have rendered the Supreme Court’s decision on this point academic going forward. The Supreme Court does provide some useful, albeit somewhat cursory guidance on two other issues – the threshold for obtaining leave, and the certification of parallel common law misrepresentation claims – and the Court’s comments on *nunc pro tunc* and special circumstances will be of interest to practitioners who encounter those more esoteric doctrines.
Cross-border Securities Class Actions – Where Are We After Kaynes v. BP?

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The final act of the Kaynes v. BP plc saga was played out in a Texas District Court in September 2015, after more than three years of litigation – all of which took place before the pleadings were closed. The Texas Court dismissed the plaintiff’s third attempt to bring a class action on behalf of Canadian BP securities holders who bought prior to the Deep Water Horizon oil spill. Effectively, the Court found that the claim was an abuse of process, and in any event, it was out of time. This case served as an excellent example of the importance of how a class action should be framed to drive the desired result.

Procedural History of the Kaynes Litigation

Kaynes’ original action was commenced in Alberta in 2012. Although the plaintiff is resident in Ontario, and his securities were purchased on the NYSE, Alberta was chosen because a BP subsidiary (whose operations were unrelated to the Deepwater Horizon disaster) is present in that forum, and some of his securities were purchased through an Alberta broker.

On the motion for leave to serve the claim on BP outside of the jurisdiction, the Master found, (i) first, that there was no real and substantial connection to Alberta, and (ii) in any event, the plaintiff had failed to establish that it had a good, arguable case of common law negligent misrepresentation. The Master declined to take into consideration the plaintiff’s stated intent to bring an application for leave to commence a statutory secondary market misrepresentation claim, since no such application had been commenced. The plaintiff decided to commence a fresh claim in Ontario, naming only BP, plc.

Kaynes’ success in Ontario was not much greater. The new claim asserted a cause of action under Part XXIII.1 of the Securities Act on behalf of a proposed class of all Canadians who purchased BP securities during the period of May 9, 2007 to May 28, 2010; but, the proposed class excluded those who purchased their securities on the NYSE and who opted out of the then pending U.S. class proceeding. In framing the class to exclude those who would be captured by the U.S. proceeding, this case differed from the tactic taken by the plaintiff in Silver v. Imax, where the originally certified class included the U.S. security holders, given that the U.S. case was not then certified. The class definition seems to have been framed in this manner to afford “respect for the autonomous jurisdictions involved.”

At the outset, BP brought a motion to stay the claim insofar as it was asserted on behalf of any putative class members who had purchased their shares on a foreign exchange, alleging that the Ontario Court did not have jurisdiction over the foreign class members’ claim, or alternatively on the basis of forum non conveniens. BP conceded that the Ontario Court had jurisdiction over the miniscule number of proposed class members that had purchased their shares on the TSX before the company delisted from that exchange. At first instance, BP’s motion was denied.

However, the plaintiff’s success was short-lived. The Court of Appeal reversed the motion judge’s decision with respect to forum non conveniens. First it applied the ratio from its earlier decision in Abdula v. Canadian Solar

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1 2009 CanLII 72334 (ON SC).
2 In 2013, the U.S. class action settled, resulting in the U.S. security holders being carved out of the Canadian class action. Silver v. Imax, 2013 ONSC 1667.
3 Per Corbett J. denying leave to appeal from certification of the global class in Imax, at paragraph 65, Silver v. Imax, 2011 ONSC 1035.
4 BP’s evidence was that trading of the ADS on the TSX during the proposed class period amounted to 0.001% of the volume of trading on both the NYSE and the London Stock Exchange. The plaintiff’s evidence was that about 1,500 Canadians held approximately 2% of all outstanding BP securities during the class period.
5 Kaynes v. BP plc, 2013 ONSC 5802.
6 2014 ONCA 580.
Inc., and found that Ontario did have jurisdiction *simpliciter* over the claims of the entire class. But, it concluded on grounds of *forum non conveniens* that Ontario should not take jurisdiction over the claims asserted on behalf of Canadians who purchased BP shares on any foreign exchange. Leave to appeal to the Supreme Court of Canada was denied. So, in realistic terms, the plaintiff was left with a non-viable class.

In a last ditch attempt to resuscitate the class, the plaintiff commenced an action in Texas asserting the same cause of action as the Ontario claim, i.e., a secondary market misrepresentation claim under Part XXIII.1 of the OSA. BP’s motion to dismiss the Texas action was granted summarily.

In dismissing the action, District Court judge Ellison found that all of the proposed class members in Kaynes’ action were already members of the extant U.S. class action. Based upon the terms of the appointment of the U.S. lead plaintiffs, they had the right to decide what causes of action they would pursue on behalf of the class. As a member of that class, Kaynes was bound by that order, and precluded from bringing a separate class action based upon another cause of action arising from the same events. Furthermore, Justice Ellison found that the claim was statute barred, since it was based upon alleged misrepresentations made in May 2007 and 2008, and the claim was not commenced until April 2012, after the three-year limitation period mandated by section 138.14 of the OSA had expired. Justice Ellison declined to exercise the discretion vested in him under subsection 138.3(6) of the OSA to treat all of BP’s alleged misrepresentations from 2007 to 2010 as a single, continuing misrepresentation made in 2010. He found there was no compelling justification for the plaintiff’s delay in bringing the action before the claim expired in May 2011, given that the Deepwater Horizon spill had occurred a year prior to that, in April 2010.

**What Follows From the Ontario Court of Appeal’s Decision in Kaynes?**

After more than three years of preliminary motions, and appearances before various levels of courts in multiple jurisdictions, the curtain has finally closed on Kaynes’ proposed class action. However, the case will have a lasting legacy in the field of cross-border securities class proceedings. Importantly, it serves as a bellwether of the Ontario Court’s current attitude towards taking jurisdiction over global securities class actions. It demonstrates that just because the Court has jurisdiction *simpliciter* over a claim does not mean that it will automatically assume that Ontario is the superior jurisdiction for its adjudication. The message to be taken from the OCA’s reasons is that if there is only a tenuous connection to the jurisdiction, and the fundamental legal issues will involve interpretation and application of the law of another jurisdiction that overall has a stronger connection to the claim, then the aggrieved party should take their dispute to that jurisdiction. As a matter of comity, if the court with the stronger connection can provide access to justice, and that jurisdiction’s law demonstrates the forum’s expectation and willingness to adjudicate the claim, the Ontario Court will be inclined to defer to the foreign jurisdiction.

**The Real and Substantial Connection Analysis Was in Error**

It is arguable that in Kaynes, the OCA erred in its Van Breda *analysis*, although it reached the correct conclusion. The Court held that there was a real and substantial connection between the claim and the jurisdiction because Kaynes alleged that BP had released its public disclosure documents containing misrepresentations into Ontario.
thereby committing the statutory tort of secondary market misrepresentation. Although not argued by either party, I would suggest that Part XXIII.1 of the OSA in fact establishes a new presumptive connecting factor, i.e., any public issuer that is found to be a responsible issuer is thereby subject to the jurisdiction of the Ontario Court (and the OSC) to answer for its secondary market misrepresentations. A responsible issuer is, by definition, either a reporting issuer or an issuer “with a real and substantial connection to Ontario.” As LeBel J. said in Van Breda at paragraph 92: “All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum.” Patently, Part XXIII.1 calls for a responsible issuer to answer legal proceedings in Ontario, just as a responsible issuer may be called upon to answer the OSC for other breaches of the legislation.

BP did not dispute that it had been a reporting issuer for part of the class period, and that thereafter it continued to be a responsible issuer under the OSA. Given the concession by BP that it is a responsible issuer, it was not necessary for the OCA to resort to an analysis of whether the claim alleged that a statutory tort had taken place in the jurisdiction. The jurisdiction of the Court over the defendant had already been established by operation of the OSA, and BP’s admission that it was a responsible issuer. Van Breda, at paragraph 91, confirms that the list of presumptive connecting factors is not closed. Connections that give rise to a relationship with the forum that is similar in nature to the ones that result from the four original presumptive factors, including treatment of the connecting factor in a statute can form the basis of new or additional presumptive connecting factors. The OSA establishes such a presumptive connecting factor. It demonstrates a relationship between the subject matter of the litigation and the forum, reaching beyond the jurisdiction’s borders. A responsible issuer reasonably should expect to be called upon to comply with its terms, or be subject to the consequences spelled out in the legislation, whether regulatory or with respect to the civil causes of action it created. Hence, claims under Part XXIII.1 of the OSA against foreign responsible issuers should be presumptively found to be within the jurisdiction of the Ontario courts.

The Facts in Kaynes Drove the Result

If the Court of Appeal in Kaynes had approached jurisdiction simpliciter from this perspective, it might have reached a different conclusion on forum conveniens, particularly given the policy objective of Part XXIII.1 to assist in enforcement of the OSA through class proceedings. However, that is unlikely. In large measure, the unusual facts in Kaynes drove the result. The fact that there was already a pending U.S. class action for all NYSE purchasers (which would include the plaintiff) that looked likely to be certified was a significant factor weighing against the Ontario Court taking jurisdiction. Particularly, since all the NYSE purchasers could have their claims adjudicated in the U.S., there was no particular advantage to giving them the option of choosing a Canadian proceeding for much the same relief. The U.S. has a well-established and robust securities class action system that provides meaningful access to justice for class members. Since only 2% of BP’s security holders were resident in Canada, and the volume of trading on the TSX was infinitesimally smaller than the trading on the NYSE or the London exchange, and the plaintiff’s proposed class already excluded anyone who purchased on the NYSE and who did not opt out of the U.S. class action, avoiding duplication of litigation was a compelling factor in favour of the U.S. proceeding.12

Unfortunately, the reasons of the OCA do not fully come to grips with the rights of the tiny number of Canadians who may have obtained common shares on a European exchange, and who have now been foreclosed from any class proceeding. Why the Court declined to take jurisdiction over these shareholders, when the class action would be proceeding in respect of the TSX purchasers, and no class action procedure is otherwise available to them in the U.K. cannot be

12 If the U.S. action was certified (and it was), the Canadian class would be even less than 2% of BP’s shareholders, since an opt out regime acknowledges that the average person will not take proactive steps to participate in or exclude themselves from a class proceeding in which their individual stake is small.
answered on the ground of limiting duplicative proceedings. The decision to exclude the U.K. purchasers as well rests on the comity analysis.

**Comity Should Not Lead to Deferring to the Exchange on Which Securities Are Traded When the Issuer Is in Compliance With Ontario Law**

An important part of the OCA’s *forum conveniens* analysis was based upon consideration of the applicable legislation. From after about half way through the class period, the content of BP’s communications to Canadian securities holders were governed by the American securities regulatory regime. At the time it delisted, BP provided an undertaking to the TSX that it would continue to provide to its Canadian security holders “all disclosure material that it is required to send or provide to U.S. resident holders of [BP’s] securities of the same class … under applicable U.S. federal securities laws or exchange requirements.” Given the extent to which the plaintiff’s misrepresentation claim would be subject to the application of American law, the scales tipped further in favour of ceding jurisdiction to the U.S. proceeding.

Why the Court declined to take jurisdiction in *Kaynes* rests heavily on its facts, as well as an apparent misunderstanding of the prevailing American law, which infused the comity analysis. The case, therefore, should not be taken as saying that an Ontario Court will always decline jurisdiction over claims involving securities obtained on a foreign exchange. To the contrary, at paragraph 32, the Court confirmed its early conclusions in *Abdula v. Canadian Solar* that Part XXIII.1 of the OSA is intended to have extra-territorial application. It applies to both foreign issuers who have a real and substantial connection to Ontario (paragraph (b) of the definition of responsible issuer) and it also extends to securities traded on a foreign exchange (given the lack of reference to a requirement that the securities be publicly traded in Ontario or Canada). Hence, *Kaynes* should not be read as a directive from the Court that all claims by security holders who acquired their holdings on a foreign exchange will be foreclosed from litigating Part XXIII.1 claims in Ontario. Rather, any foreign responsible issuer that raises *forum non conveniens* arguments will still be put to the test of establishing to the satisfaction of the Court that there is a superior jurisdiction in which the claim can and ought to be adjudicated.

When putting in evidence of *forum non conveniens*, issuers should not presume that the findings of the OCA with respect to American law in *Kaynes* are correct or that they are binding. They were findings of fact, based upon the record before the Court, and on their face, they appear to misapply *Morrison v. National Australia Bank*, as well as the purport of the legislation vesting jurisdiction to hear secondary market misrepresentation claims in U.S. Federal District Courts (i.e., versus state courts).

To date, there has been only one Ontario decision that has applied *Kaynes* on a similar motion, *Airia Brands Inc. v. Air Canada*. In that case, Justice Leitch reiterated that the Court should consider the laws of the foreign jurisdiction(s), and whether the assumption of jurisdiction is consistent with comity, prevailing international norms, as well as the reasonable expectations of the parties. On a *forum conveniens* motion, these are the factors upon which both parties should focus.

In future cases, plaintiffs should also focus their arguments on the very broad language of subsection 138.3(1) of the OSA, which demonstrates a legislative intent to facilitate claims being brought in Ontario against responsible issuers, not only by affected Canadian purchasers, but by anyone who acquires securities from a responsible issuer after the release of a document containing a misrepresentation. Just as subsection 138.3(1) does not limit its application to securities traded on a local exchange, the right of action is available to any “person or company who acquires or disposes of the issuer’s security….” The OSA should be interpreted broadly, in keeping with its remedial purpose, and not be given less weight than the regulatory legislation in any other jurisdictions where the responsible issuer also has a presence. The Court’s jurisdiction is grounded in supervising the acts of the public issuer in this jurisdiction that affect Ontario’s capital markets – conduct for which the issuer should be called to answer in this jurisdiction.

13 2015 ONSC 5332.
CLASS ACTION

This argument refutes the suggestion of the OCA at paragraph 50 of its reasons in Kaynes that it “would surely come as no surprise to purchasers who used foreign exchanges that they should look to the foreign court to litigate their claims.” There is no factual support for this assumption. As La Forest J. said in Tolofson v. Jensen, at paragraph 35: “The truth is that a system of law built on what a particular court considers to be the expectations of the parties, or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law.” Undertaking a comity analysis that includes assumptions regarding class members’ expectations falls squarely within the form of analysis that La Forest J. warned against. Indeed, in today’s world economy in which securities can be bought and sold on a variety of exchanges, there is no reason why a shareholder should be presumed to expect to litigate in the jurisdiction where the security happened to be purchased on a particular day. To the contrary, the shareholder can and should expect that if the issuer has a real and substantial connection to this jurisdiction, then the issuer should be held accountable for its failure to comply with the laws of this jurisdiction by the courts of this forum.
AUTOMOBILE-RELATED CLAIMS

The Consumer Protection Act Fuels Automobile Misrepresentation Class Action in Quebec: Misfire or Upcoming Trend?

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In 1983, in a proposed class action for breach of warranty and breach of representation on behalf of all persons who bought a 1971 or 1972 Pontiac Firenza, the Supreme Court of Canada found in G.M. (Canada) v. Naken1 that a class action was inappropriate as it would uselessly complicate the resolution of the class members’ claims, each having a different car history, a different interest and varying contractual arrangements.

Although emanating from Ontario, that case was largely echoed in Quebec’s jurisprudence. As a result, it has proven very difficult to institute class actions against motor vehicle manufacturers in the province. Given the intrinsically individual experience with an automobile (each owner having a different purchase experience and each automobile having a unique use and service history), the Court of Appeal of Quebec has indicated on occasions that a particularly careful approach was required when analyzing each of the authorization criteria in proposed class actions in that type of industry.2

Over the years, various cases have highlighted the singularity and individually driven analysis required when attempting to litigate automobile-related claims.3

However, the recent decision of the Court of Appeal of Quebec in Martel v. Kia Canada Inc.,4 questions whether a long-lasting jurisprudential trend is in jeopardy. In that case, the Court of Appeal adopted a more lenient approach towards the authorization criteria and authorized the institution of a class action based on alleged misrepresentations over the frequency of service required for the appropriate maintenance of the defendant’s vehicles.

The Petitioner had purchased her vehicle further to the representations made in Kia’s manual that servicing would only be required every 12,000 km. However, when she first brought her vehicle to be serviced by her dealer for regular maintenance, the Petitioner was informed that more frequent servicing was required given Quebec’s unique meteorological conditions. Several months later, she was informed that oil changes were even more frequently required than initially indicated in the owner’s manual. On both occasions, she agreed to follow the manufacturer’s recommendations, which led her to greater and more frequent servicing fees.

The Petitioner thus instituted a proposed class action alleging before sale misrepresentations on behalf of all Kia vehicle owners for which the service and maintenance program required by the dealer differs from the service and maintenance program as described in the owner’s manual. The proposed class action included six different Kia models manufactured over four years.

The Superior Court of Quebec firstly dismissed the proposed class action.5 Indeed, the Court emphasized that it is not possible to determine if misrepresentations from the content of the owner’s manual occurred for all class members and if any given putative class members had read the owner’s manual before or after having purchased his or her vehicle.

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3 See, for example, Fortin v. Mazda Canada Inc., 2014 QCCS 2617 (under appeal); Tanner v. Nissan Canada Inc., 2012 QCCS 5956; Robitaille v. Mazda Canada Inc., 2010 QCCS 2630.
4 2015 QCCA 1033.
As a result, the Superior Court of Quebec found that no common issues arose in this case (the criterion of article 1003(b) of the Code of Civil Procedure) and that it was impossible to determine if an identifiable class existed (the criterion of article 1003(c) of the Code of Civil Procedure). Also, the Court came to the conclusion that the Petitioner was not an adequate representative (the criterion of article 1003(c) of the Code of Civil Procedure), having failed to conduct an enquiry before instituting her proposed class action and to identify another individual that would be in the same position as her.

The Court of Appeal set aside that decision and authorized the proposed class action. At the outset, the Court of Appeal was of the view that the motion judge had imposed a too heavy burden on the Petitioner at the authorization stage. Relying on the rulings of the Supreme Court of Canada in Infineon Technologies AG v. Option consommateurs and Vivendi Canada Inc. v. Dell’Aniello, the Court reminded that the authorization phase is a screening mechanism for which the Petitioner’s burden is low. The Petitioner needs only to show an arguable case. As for the substance of the proposed class action, the Court of Appeal indicated that the allegations of the claim could amount to misleading representations under Quebec’s Consumer Protection Act:

218. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

Misleading representations are categorized as “Prohibited Business Practices” under the CPA, which also provides for two mutually exclusive recourses:

- a breach of a substantive obligation of the CPA: this recourse does not require evidence of a prejudice, does not allow the defendant to demonstrate that the plaintiff did not suffer a prejudice from the impugned conduct and permits the claiming of punitive damages (CPA, section 272).

Of course, alleged misleading representations are a breach of a substantive obligation of the CPA. A claim based on such allegations is thus subject to the recourse provided for by section 272 of the CPA.

After having determined that this legal framework applied, the Court of Appeal came to the conclusion that all the authorization criteria were met in light of the following rationale:

[Translation] In the case at bar, the Appellant did not have to prove or even demonstrate that the frequency of the service required was an important element for her or other Kia owners included in the proposed class action. The main issue raised by the class action instituted by the Appellant rather seeks to determine if the frequency of the service disclosed in the owner's manual is false, and whether this amounts to misleading representations and, eventually, a prohibited business practice under the CPA.

The Court of Appeal thus came to the conclusion that the proposed class action showed a good color of right, raised common issues, contained an identifiable class and that the Petitioner was an adequate representative, no formal inquiry being required in this case. Of course, in Quebec, a judgment authorizing a class action is not determinative on the parties’ rights, is not indicative of the plaintiff’s likelihood of success at the outcome of the dispute, and has no impact on the defendant’s rights to challenge the merits of the claim by all available means.

Along with other recent cases, the Martel v. Kia Canada Inc. case confirms the ongoing trend toward leniency at the authorization stage in Quebec. However, it is too early to
tell if that case marks a new beginning for proposed class actions in the automotive industry.

Considering the uniqueness of an automobile’s history once it exits the dealership, claims invoking performance issues, alleged defects or other issues pertaining to a vehicle should remain subject to the same rigorous approach at the class action authorization stage that was developed by our courts over the last decades, highlighting the singularity and individually driven analysis required to assert such proposed claims.
The Supreme Court of Canada Weighs in on Securities Class Actions

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On December 4, 2015, the Supreme Court of Canada released its long-awaited decision in a trilogy of securities class action appeals.

The three appeals, argued together in the Ontario Court of Appeal and at the Supreme Court, primarily concerned the interaction in Ontario’s secondary market liability regime between the leave requirement and the limitations period. Regrettably, this aspect of the decision is unlikely to be of much interest to the securities litigation bar, due to statutory amendments, which have rendered the Supreme Court’s decision on this point academic going forward. The Supreme Court does provide some useful, albeit somewhat cursory guidance on two other issues – the threshold for obtaining leave, and the certification of parallel common law misrepresentation claims – and the Court’s comments on nunc pro tunc and special circumstances will be of interest to practitioners who encounter those more esoteric doctrines.

Statutory and Case Law Background

Part XXIII.1 of Ontario’s Securities Act creates a cause of action for buyers and sellers of securities of an issuer when the issuer has made a misrepresentation or has failed to make timely disclosure. Unlike a claim for common law misrepresentation, this statutory claim does not require proof of reliance, an issue that is often irreducibly individual and impossible to resolve as a common issue. This makes the statutory cause of action particularly well-suited for class proceedings.

The cause of action under Part XXIII.1 is subject to a three-year limitation period and a leave requirement. Before commencing an action, a plaintiff must bring a motion to the court to obtain leave. The leave requirement is intended to serve a “gatekeeping” function, by preventing meritless “strike suits,” which are commenced to pressure defendants into unjust settlements.

In a 2012 decision, Sharma v. Timminco, the Ontario Court of Appeal determined that a plaintiff must be granted leave before the three-year period expires, or the action is time-barred. In 2014, the Court of Appeal reconsidered and reversed Timminco, holding that the tolling provision in Ontario’s class proceedings legislation operates to suspend the limitations period when a cause of action under Part XXIII.1 is asserted in a statement of claim, even if leave has not yet been granted. This decision was appealed to the Supreme Court, and in CIBC v. Green, the Supreme Court ruled 4-3 in favour of the Timminco position that the limitations period is not suspended until leave is granted.

However, in July 2014, following the Ontario Court of Appeal’s decision, the legislation was amended to provide expressly that the limitations period is suspended on the date when a motion for leave is filed with the court, rendering the Supreme Court’s decision on the limitations issue academic for future litigants.

The Threshold for Leave

Defendants in the CIBC appeal argued that the threshold test applied by the motion judge was too lenient. The statute requires that the plaintiff demonstrate “a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.” The motion judge, upheld by the Court of Appeal, characterized this as a relatively low threshold, concluding that leave should be denied only if “having...
On this issue, the Supreme Court unanimously adopted the analysis from its recent decision in *Theratechnologies inc. v. 121851 Canada inc.* where the Court considered a similar provision in the Quebec **Securities Act**. The Supreme Court observed that there was no difference in the wording between the Quebec and Ontario statutes, and held that the same threshold test applied to leave motions under the Ontario legislation.

In *Theratechnologies*, the Supreme Court affirmed that the “reasonable possibility” of success at trial test was more than a “speed bump” and that it requires the plaintiff to demonstrate that there is a “reasonable or realistic chance that [the plaintiff] will succeed.” The Court stated that the plaintiff must “offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim.” Leave was denied in *Theratechnologies* because the evidence did not credibly point to any material change that could have triggered disclosure obligations, and therefore, there was no chance for the plaintiff to succeed.

The test articulated in *Theratechnologies* remains very general, and more detailed guidance will have to await future cases. While the Supreme Court’s decision affirms that the leave requirement is intended to be a real hurdle to screen out meritless claims, what this will mean in practice remains to be seen.

**Parallel Common Law Misrepresentation Claims**

A second issue raised by the **CIBC** defendants concerned the certification of issues related to common law misrepresentation claims. The plaintiffs advanced a common law misrepresentation claim in addition to their claim under Part XXIII.1, and sought certification of seven common issues relating to the common law claim. The motion judge refused to certify all seven issues, holding that reliance, a necessary element of common law misrepresentation, was not capable of determination on a common basis, and that a class action was not the preferable procedure for resolving a reliance-based claim.

The Ontario Court of Appeal upheld the motion judge’s refusal to certify common issues regarding reliance and damages, but held that five of the issues, which related to the intent and conduct of the defendant, should be certified because their resolution would advance the class members’ individual claims.

On appeal to the Supreme Court, the **CIBC** defendants argued that the common law claim failed the preferable procedure analysis because the statutory cause of action under Part XXIII.1 was specifically intended by the legislature to be the preferable procedure for resolving misrepresentation claims in class actions. They argued none of the common issues relating to the common law claim should be certified. The Supreme Court disagreed, stating that the argument confused procedure and substantive causes of action. The Supreme Court held that the preferable procedure analysis requires a court to assess whether a class proceeding is the preferable procedure, not whether a specific cause of action is preferable. Accordingly, the Supreme Court upheld the decision of the Court of Appeal to certify five of the seven issues as common issues.

As a result of this holding, we are likely to continue to see common law misrepresentation claims asserted alongside statutory claims in securities class actions, even if issues of reliance and damages must be determined at individual trials.

**Nunc Pro Tunc Orders and Special Circumstances**

While the Supreme Court was unanimous on the two additional issues raised in the **CIBC** appeal, the Court split badly on the main limitation period issue. Three justices, led by Justice Côté, held that all three actions were time-barred, and the Court’s power to backdate its orders, known as “*nunc pro tunc,*” could be applied only narrowly to save the
claims against certain defendants in one of them. Three justices, led by Justice Karakatsanis, held that none of the actions were out of time. Justice Cromwell agreed with Justice Côté that the limitations periods had expired, but would apply the *nunc pro tunc* doctrine more liberally to save the plaintiff’s claims in two of the three. In the result, the plaintiffs succeeded in the *CIBC* and *IMAX* actions, and the defendants in *Celestica*.

The statutory interpretation issue has been overtaken by the amendments, but the Court’s comments on *nunc pro tunc* and special circumstances will be of interest for the future application of these doctrines.

Four justices considered *nunc pro tunc* orders and confirmed that the Court has this discretion, but also cautioned that it must not be used to undermine the purpose of the legislation at issue, including a limitation period. In the cases before her, Justice Côté would grant a *nunc pro tunc* order only in respect of certain defendants in *IMAX*, where the delay was caused solely by the court. Deferring to the motion judges’ conclusions, Justice Cromwell would grant *nunc pro tunc* orders in *CIBC* and *IMAX*. All four justices agreed that the order was not available in *Celestica*, where the motion for leave had not been brought prior to the expiry of the limitations period. The remaining three justices declined to address the *nunc pro tunc* doctrine, in light of their conclusion that the limitation periods had not expired.

Special circumstances is an equitable doctrine whereby a court can permit a plaintiff to add a party or cause of action to a statement of claim after the expiry of the relevant limitation period. The three justices who addressed the special circumstances doctrine concluded that the leave requirement precluded its application – a pleadings amendment could not have cured the expiry of the limitations period, because the plaintiffs could not have amended their pleadings to include the statutory claim until they obtained leave, and they had not obtained leave before expiry. We can thus conclude that special circumstances, if it is available, will only be available where a pleadings amendment could have been made within the limitation period.

**Conclusion**

*CIBC v. Green* provides some guidance on the leave threshold and the certification of parallel common law claims in securities class actions, and the Supreme Court’s comments on *nunc pro tunc* and special circumstances will be of interest to practitioners who have cause to engage those doctrines. In large part, however, *CIBC v. Green* provides only general guidance, leaving the practical details to be worked out in the subsequent jurisprudence.