Class Action Defence Quarterly

VOLUME 14, NUMBER 2 Cited as (2019), 14 C.A.D.Q. DECEMBER 2019

• THE SUPREME COURT OF CANADA "LEVELS" CLASS CERTIFICATION •

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INTRODUCTION

On September 20, 2019, the Supreme Court of Canada ("SCC") released *Pioneer Corp. v. Godfrey*,[1] the most significant decision from the Court on commonality since the Court's 2013 "Trilogy"[2] of cases. The decision is a remarkable pronouncement on what plaintiffs must show at the class certification stage to satisfy the certification judge that class members' diverse individual claims are sufficiently common to proceed together.

In *Pioneer*, by an 8:1 majority, the Court outlined a test for certifying loss as a common issue that diverges significantly from what the plaintiff must show to establish liability at trial. The Court endorsed the B.C. Court of Appeal's ruling that for indirect purchaser class actions, commonality of "loss-related" issues could be satisfied by providing a plausible methodology capable of showing "one or more" purchasers at the requisite purchaser "level" suffered loss.[3] This was held to be sufficient by the Court, despite acknowledging that at trial showing loss to the level would not establish liability to any given class member.

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CLASS ACTION DEFENCE QUARTERLY

Class Action Defence Quarterly is published four times per year by LexisNexis Canada Inc., 111 Gordon Baker Road, Suite 900, Toronto ON M2H 3R1 by subscription only.

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ISBN 0-433-45402-4 (print) **ISSN 1911-2270**
ISBN 0-433-45405-9 (PDF) **ISSN 1911-2289**
ISBN 0-433-45407-5 (print & PDF)

Subscription rates: $410.00 per year (print or PDF)
$565.00 per year (print & PDF)

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Historically we have seen fierce initial battles at the class certification stage over commonality. This is unsurprising given the complexity of the actions and significance of what is at stake: thousands if not millions of putative class members may unite, seeking millions if not billions of dollars. Having endorsed the "level" approach to certification of common issues in competition cases, what remains to be seen is whether the initial battle will now shift focus to the precise formulation of common issues or to the preferable procedure criterion in class proceedings and the implications of the disconnect between certification and trial on the "level" question — an issue left unaddressed by the Court in *Pioneer*.

In addition, while the decision has direct implications for actions involving allegations of anticompetitive conduct, the Court's approach to certification will undoubtedly impact the approach to commonality in other instances.

THE DECISION ON APPEAL

Pioneer is similar to the many price-fixing class actions that have proliferated over the past decade in Canada. The plaintiff alleged that between 2004 and 2010, the defendants — manufacturers or suppliers of optical disc drives ("ODD") — had unlawfully conspired to raise the prices of ODDs (and indirectly, prices of products containing ODDs like computers) contrary to Section 45 of the *Competition Act*.[4] The plaintiff relied on the statutory right of action in the *Competition Act* (Section 36), the tort of civil conspiracy, unlawful means tort, unjust enrichment and waiver of tort.

The plaintiff sued not only on behalf of purchasers who directly or indirectly purchased ODDs made by the defendants, but also on behalf of "umbrella purchasers" — persons who directly or indirectly bought ODDs made by other manufacturers not involved in the cartel who allegedly increased their prices in response to the defendants' pricing. While the ability of umbrella purchasers to sue had been litigated in the U.S., this case was one of the first where the defendants invited a Canadian court to decide the issue.

Mr. Justice Masuhara of the B.C. Supreme Court certified the action as a class proceeding, subject to certain exceptions and conditions.[5] The B.C. Court of Appeal upheld the decision.[6]

ISSUES DETERMINED BY THE SCC

The SCC last addressed certification in competition class actions in its 2013 "Trilogy." Since then, every competition case brought before the courts has been certified. Nevertheless, these cases raised a number of hotly debated issues, five of which were addressed in *Pioneer*:

1. **At Certification, a Methodology to Show that Loss Reached Purchaser "Level":** The majority agreed with the two lower courts that "loss-related" issues would satisfy the commonality criterion under the *Class Proceedings Act* if the plaintiff establishes that there is a plausible methodology capable of showing "one or more" purchasers at the requisite purchaser "level" suffered loss as a result of the defendants' conduct.[7] In dissent, Justice Côté would have required that the methodology be capable of sorting out at trial which purchasers did (or did not) suffer loss.[8]
2. **At Trial, a Methodology to Show that Each Class Member Suffered Loss:** The SCC parted ways with the lower courts and held that *at trial*, only class members who suffered loss would be able to establish liability and recover damages. Merely showing that loss reached a purchaser level would not establish liability to any given class member.[9]
3. **Umbrella Purchasers Can Sue:** The majority held that umbrella purchasers — persons who were overcharged by non-cartel members — can sue under Section 36(1) of the *Competition Act*. They disagreed with Justice Côté, who held that such claims should be barred because they are too remote and expose defendants to indeterminate liability.[10] The majority reasoned that umbrella effects are not indeterminate but are pre-determined by the alleged intention of the conspirators to raise prices across the market.[11] Nevertheless, the majority recognized the significant burden of proving at trial that umbrella purchaser losses are causally linked to defendants' alleged conspiratorial conduct.[12]
4. **No Complete Code:** All nine judges agreed that Section 36 of the *Competition Act* is not an exclusive remedy: plaintiffs are not precluded from also suing for breaches of the Act based under other legal grounds such as common law torts and equitable doctrines like unjust enrichment.[13]
5. **Discoverability and Fraudulent Concealment Apply to the Limitation Period:** Section 36(4) of the *Competition Act* prohibits plaintiffs from starting actions under Section 36(1) based on a violation of Section 45 more than two years from the later of "a day on which the conduct was engaged" (Section 36(4)(a)(i)) or the final disposal of related criminal proceedings (Section 36(4)(a)(ii)). Certain defendants contended the claim was out of time, being commenced more than two years after the end of the alleged cartel. The majority concluded that the limitations "clock" in Section 36(4)(a)(i) should only start when the action was "discoverable" — when the plaintiff knew or ought to have known with reasonable diligence the material facts supporting the claim.[14] Justice Côté disagreed, holding that the clear language of Section 36(4) did not permit one to read-in discoverability.[15] However, she agreed with the majority (for slightly different reasons) that it was not plain and obvious that the fraudulent concealment doctrine could not apply to delay the running of the limitation period, leaving the issue to be determined by the trial judge.[16]

The balance of this article explores the Court's controversial approach to commonality.

THE MAJORITY'S LEVEL APPROACH TO COMMONALITY

In *Microsoft*, the SCC reaffirmed the importance of certification as a "meaningful screening device", being neither a determination of the merits nor mere superficial, symbolic scrutiny.[17] The Court explained that there must be a sufficient factual basis to allow the matter to proceed "without foundering at the merits stage" because the statutory criteria for certification had not been met.[18]

The *Microsoft* Court also reaffirmed that commonality should be approached purposively and is the "central notion of a class proceeding": individuals resolve common concerns in one proceeding rather than through inefficient, repetitive proceedings.[19]

All of the SCC judges in *Pioneer* accepted that in order to prove liability and recover damages, an individual class member must show that they actually suffered loss. Taking a purposive approach, the logical starting point for certification would be to ask whether the plaintiff has a plausible plan to establish such losses at the common issues trial. Otherwise, the case would founder, devolving into individual inquiries.

However, the majority posed a different question to determine certification of 'loss-related' questions: whether the plaintiff's method is capable of showing that at least one (unidentified) purchaser at the "level" of the distribution chain suffered loss. They reasoned that:[20]

> [S]howing that loss reached the indirect purchaser level satisfies the criteria for certifying a common issue, since it will significantly advance the litigation, is a prerequisite to imposing liability … and will result in "common success" as explained in *Vivendi*, given that success for one class member will not result in failure for another. Showing loss reached the requisite purchaser level will advance the claims of all the purchasers at that level.

CRITICISMS OF THE LEVEL APPROACH IN DISSENT

In a spirited dissent, Justice Côté observed that "a determination at a common issues trial of whether loss reached the indirect purchaser *level* in the distribution chain is of no assistance in resolving the question of whether the defendants are actually liable to any or all of the indirect purchasers".[21] Since the level approach did not dispose of any element of liability for the class members, it did not "advance the litigation in any meaningful way",[22] and did not satisfy the commonality requirement:[23]

> [T]he fact that losses might have occurred somewhere at the indirect purchaser level in the distribution chain does not assist us in determining which specific indirect purchasers suffered losses in order to identify the class members to whom the Defendants might be liable. If the common issues trial judge finds that overcharges were passed on to at least one unidentifiable indirect purchaser, there would still be a need for individual trials; therefore, duplication of fact-finding would not be eliminated (*Dutton*, at para. 39). And if such individual trials are indeed required, then proof that loss occurred somewhere at the indirect purchaser level is not truly "necessary to the resolution of each class member's claim", is not a "substantial common ingredient" of their causes of action, and cannot in fact result in "success" for any of those indirect purchasers….

The majority identified only one extreme scenario where the "level" approach might advance the litigation: if the plaintiff failed to show that any purchasers in the level suffered harm, then the action would be dismissed.[24] Justice Côté responded that "it is unclear why any representative plaintiff would seek the certification of a question that can meaningfully 'advance the litigation' only if it results in failure for all indirect purchasers" and held that "it would be a gross waste of private and public resources to litigate if the only prospective 'benefit' was to show that there was no point bringing the case in the first place".[25] A further thought: the failure of class counsel to establish an average loss using a class-wide methodology such as a regression may not permit the inference that the individual claims of all class members should be dismissed. It may be that some members suffered losses (and thus, may have valid claims) but those losses had no impact on the average for the class.

LOSS-RELATED COMMON ISSUES AND PREFERABLE PROCEDURE

When a class is certified, the court approves a list of common issues to be answered by the trial judge. The wording of the common issues is important because they govern the scope of the common issues trial.

In *Pioneer*, the actual certified "loss-related" issues were acknowledged to be ambiguous, i.e. "Did the Class Members suffer economic loss?" The majority observed:[26]

> These questions were stated broadly enough that they could be taken as asking whether *all* class members suffered economic loss or whether *any* class members suffered economic loss. And, because they could be taken in two different ways they might, following the common issues trial, be answered in different ways.

The formulation of the common questions matters because the certification court must also be satisfied that a class action is a "preferable procedure." Normally this is not a significant hurdle if positive answers to the common questions are capable of establishing liability across the class. But if such questions are not capable of establishing liability (i.e., the question only asks whether "anyone" suffered loss) then the court must evaluate if the individual issues (i.e., proving which individuals suffered loss) overwhelm the common issues, and the court may well decide that the case should be not certified.[27]

IMPLICATIONS FOR PREFERABLE PROCEDURE NOT ADDRESSED IN *PIONEER*

Yet the majority's approach in *Pioneer* in effect approved the common question of whether "any" class member(s) suffered economic loss, without addressing the implications of its decision for the preferable procedure analysis. In fairness, the preferable procedure criterion was not argued before the Court. Still, a siloed approach to assessing statutory criteria for certification is ill-advised. Common issues should not be assessed in complete isolation from preferable procedure: if the common issues are not capable of establishing liability to any class member, further individual trials for proving liability are inevitable. These consequences bear directly on whether a class proceeding is a preferable procedure.

This is of particular concern in competition cases where classes are sprawling and proving loss is typically the most contentious and complex issue. In that context it is difficult to imagine individual trials for proving loss (and therefore liability) that would not overwhelm the process. Indeed, while assessing preferability, the B.C. Court of Appeal recently remarked:[28]

> The concept of comparing the import of common issues in relation to individual issues has particular resonance in indirect purchaser cases. In these cases, there are normally some common issues relating to the cause of action, and some individual issues relating to the individual circumstances of the class members. Whether common issues predominate over individual issues will often depend on whether loss on a class-wide basis can be considered a common issue, which would support certification, or whether loss will have to be established individually for the class members, which will likely make a class proceeding unmanageable.

Given the centrality and complexity of loss-related issues in competition claims, it is difficult to reconcile the standard of commonality approved by the Court in *Pioneer* with a purposive approach to the preferable procedure criterion. If certification is to be a meaningful screening device against unmanageable proceedings, then one would expect courts to reject a proposed action that necessarily requires the predominant, most expensive and contentious dispute to be litigated through thousands of individual trials.

It is disappointing that the Court did not take the opportunity to offer *obiter* addressing the interplay between commonality and preferable procedure. Some observers might look to the majority's view — that showing loss reached a purchaser "level" would "significantly advance the litigation" — as a signal that they wanted such cases to move forward as class proceedings in spite of the risks the trial may devolve

into individual inquiries. At the same time, one should also not lose sight of the influence of the plaintiff's expert opinion that all class members would have been impacted by the anti-competitive behaviour. While the majority did not overtly rely on that opinion when deciding commonality, they noted that the plaintiff intended to use the expert's methodology at trial to prove all class members suffered loss.[29]

The extent to which *Pioneer* might affect the preferable procedure analysis may have to wait until courts are unambiguously asked to certify a common issue of whether "any" (as opposed to all) class member(s) suffered loss. Going forward, one would expect defendants and courts to pay close attention to the preferability analysis and the precise formulation of loss-related common issues. Courts should not endorse ambiguous common issues when such ambiguity only serves to increase uncertainty and cost in litigating the common issues trial. It is not fair or efficient to proceed since the evidence and argument will differ depending on what is the proposed loss question.

FURTHER THOUGHTS

Respectfully, the Canadian "level" standard for certification of loss-related issues approved in *Pioneer* is not a meaningful screening device. The purpose of the commonality requirement is to screen-out claims that will founder at the merits stage by reason that there are insufficient common litigation concerns among class members.[30] Yet the SCC in *Pioneer* in effect approved certification on the basis of common issues that will not resolve the predominant litigation concern of class members — whether they suffered loss or not. This puzzling standard of commonality undermines the very purpose of the commonality criterion and, at least potentially, the preferable procedure criterion.

The "level" standard also stands in sharp contrast to antitrust class actions in the U.S., where at certification a plaintiff must provide a methodology showing that all or nearly all class members were injured. Generally, where the number of uninjured class members is likely to be more than *de minimis*, individual inquiries of injury-in-fact are said to predominate over common ones.[31]

The implications of the SCC's generous approach to commonality are not limited to competition actions: we expect to see ripple effects in applications to certify other types of cases. Still, *Pioneer* is positive for defendants in that it confirms the plaintiff's trial burden to prove which class members suffered loss. This should allow defendants to explore more aggressive post-certification strategies and inform their evaluation of liability in settlement negotiations.

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1 [2019] S.C.J. No. 42, 2019 SCC 42. DLA Piper (Canada) LLP acted for a defendant which was released from the action before the case reached the SCC.

2 The trilogy of cases released by the Supreme Court of Canada in 2013 consists of *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] S.C.J. No. 57, 2013 SCC 57; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013] S.C.J. No. 58, 2013 SCC 58; and *Infineon Technologies AG v. Option consommateurs*, [2013] S.C.J. No. 59, 2013 SCC 59.

3 For further discussion of the B.C. Court of Appeal's "level" approach to commonality, see our earlier article "On the 'Level' After Godfrey: Proving Liability in Canadian Price Fixing Class Actions," *Class Action Defence Quarterly*, Vol 12, No. 2, December 2017 ["On the 'Level'"].

4 R.S.C. 1985, c. C-34.

5 [2016] B.C.J. No. 979, 2016 BCSC 844.

6 [2017] B.C.J. No. 1618, 2017 BCCA 302.

7 [2019] S.C.J. No. 42, 2019 SCC 42, at para. 107.

[8] At paras. 212, 235-236.

[9] At paras. 117-120.

[10] At para. 184.

[11] At paras. 72-73.

[12] At para. 77.

[13] Majority at paras. 85-89; Justice Côté, dissenting but not on this issue, at paras. 193-198.

[14] At paras. 31-50.

[15] At paras. 155-165.

[16] At paras. 166-175.

[17] At para. 103.

[18] At para. 104.

[19] At para. 106.

[20] At para. 108.

[21] At para. 222, emphasis in original.

[22] At para. 217.

[23] At para. 224, emphasis in original.

[24] At para. 109.

[25] At para. 225. Justice Côté quoted from our article analyzing the "level" standard adopted by lower courts: On the 'Level', *supra* note 3.

[26] At para. 91, emphasis in original.

[27] This happened to the umbrella purchaser claimants in *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 137 [*Ewert*]. The authors are counsel for certain defendants in that case.

[28] *Ewert* at para. 117.

[29] See paras. 95-96, 99-102, 119. The plaintiff's expert had two distinct approaches to the harm issue: an opinion that all class members would have suffered harm and use of regressions based on data. Only the regression appeared to be a methodology capable of use at trial (the difficulty being that the regressions would not answer the "all" question but would only yield averages). The opinion itself was based on several assumptions and thus would likely be inadmissible at trial unless those assumptions could be established on common evidence. One of the key assumptions would be that the defendants consistently followed a conspiracy, without deviation; if there were transactions when the conspiracy was not followed, those customers would not have a loss. Whether that assumption would hold seemingly would involve assessments of the prices actually charged in individual transactions as opposed to an assessment of evidence common to the class.

[30] *Microsoft* at paras. 104, 106.

[31] See, for example, *In re: Rail Freight Fuel Surcharge Antitrust Litigation*, No. 18-7010 (D.C. Cir. 2019) and *In re: Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018), where the proposed classes contained too many uninjured members (12.7% and 10%, respectively), which meant that individual inquiries would be necessary to determine who suffered loss and who did not. Such inquiries were found to predominate impermissibly.

• A MATTER OF *CONVENIENS*: JURISDICTION IN SECONDARY MARKET CLASS ACTIONS INVOLVING TRADES ON FOREIGN EXCHANGES •

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INTRODUCTION

Securities class actions with cross-border elements pose a unique set of conflict of laws issues and related issues of class definition. Over the past five years, Ontario courts have addressed two questions in secondary market class actions where the issuers' securities traded on foreign exchanges. First, does the Ontario court have jurisdiction *simpliciter* over the claims of investors who traded on foreign exchanges? Second, is the Ontario court *forum non conveniens* for these investors' claims? The answers to these questions inform the class definition, and in particular, whether the court can and should exercise jurisdiction over a class defined based on investors' residence in the province or in Canada, the place of trading, or some combination of the two.

This article will provide background regarding (1) the extra-territorial application of the statutory secondary market liability regime and (2) the 2014 decision in *Kaynes v. BP plc*, in which the Ontario Court of Appeal concluded that the prevailing international standard bases jurisdiction on the place of trading. The article will then review recent cases (3) confirming that Ontario courts lack jurisdiction over claims against foreign companies listed only on foreign exchanges, and (4) presenting a more complicated picture for companies listed both in Ontario and on a foreign exchange ("**interlisted issuers**"). The issue is particularly significant as secondary market class actions are disproportionately brought against interlisted issuers: although such issuers account for only 15-20% of TSX listings, approximately half of the securities class actions filed in Canada from 2011 to 2017 were against interlisted issuers facing parallel proceedings in the U.S.[1]

1. Extra-Territorial Application of the Statutory Regime

The secondary market liability provisions of Part XXIII.1 of the Ontario *Securities Act*[2] apply in relation to "responsible issuers," defined to mean (a) a "reporting issuer", or (b) "any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded".[3] The category of "responsible issuers" is therefore broader than that of "reporting issuers", which captures companies that have carried out primary market distributions in Ontario or have had their securities listed on Ontario stock exchanges. A "responsible issuer" may also be "any other issuer… securities of which are publicly traded" (by implication, outside Ontario), provided that the issuer has a "real and substantial connection to Ontario." The statutory definition references the real and substantial connection test applied by Canadian courts in assuming jurisdiction over extra-provincial defendants.[4]

Although Part XXIII.1 was enacted in 2006, its extra-territorial scope was not tested until the 2011 decision in *Abdula v. Canadian Solar Inc.*[5] This was a proposed secondary market class action by an Ontario resident against a federally-incorporated company with offices in Ontario whose shares traded only on NASDAQ. The defendants moved for a stay or dismissal of the action, arguing that Canadian Solar was not a "responsible issuer" because its shares traded only on a U.S. market, regulated by U.S. federal securities laws. The defendants argued that the legislative history of the secondary market provisions showed an intent to provide a pan-Canadian civil liability regime only for issuers whose securities traded in Canada, subject to continuous disclosure obligations in any province or territory. The defendants also argued that this interpretation was consistent with the constitutional limits on the province's authority to legislate extra-territorially.

The Court of Appeal held that the definition of "responsible issuer" specifically envisages extra-territorial application, not limited to issuers whose securities are publicly traded in Canada, and rejected the argument that the legislation was constitutionally inapplicable to an issuer that was listed only on a foreign exchange but carried on business in Ontario.[6]

2. The *Kaynes* Decisions

In *Kaynes v. BP plc*,[7] the Court of Appeal confirmed that Part XXIII.1 can have extra-territorial application

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to trading on foreign exchanges.[8] The Court went on to consider whether it had and should exercise jurisdiction over the claims of all Canadian residents who had acquired BP securities during the class period, wherever those securities were purchased.[9]

BP was a U.K. corporation headquartered in London, which did not carry on business in Canada.[10] BP securities traded on exchanges in the U.K., Germany, and the New York Stock Exchange ("**NYSE**"). Although BP had been listed on the TSX, the "overwhelming majority" of Canadians who had acquired BP shares, including the plaintiff, had done so on foreign exchanges.[11] In 2009, BP was delisted from the TSX due to low trading volume and ceased to be a reporting issuer in Ontario, subject to an undertaking to continue sending its Canadian security holders the same disclosure as it was required to send to its US security holders under US securities laws.[12] A parallel proceeding in the United States advanced claims for all investors on US exchanges, including the Ontario plaintiff.[13]

BP conceded that Ontario had jurisdiction over the claims of class members who purchased their shares on the TSX, but disputed jurisdiction over all other class members' claims.[14]

The Court of Appeal held that there was jurisdiction *simpliciter* over the claims of the foreign exchange purchasers. The cause of action under s. 138.3 OSA was a "statutory tort," analogous to negligent misrepresentation, which is committed in the place where the misrepresentation is received and relied upon.[15] Although the disclosure containing the alleged misrepresentation was released in the U.S., BP's undertaking meant that its U.S. disclosure would be received and relied upon by its shareholders in Ontario. This established the presumptive connection factor of a tort committed in Ontario.[16]

The Court of Appeal held, however, that the motion judge had erred in principle in failing to decline jurisdiction over claims in relation to foreign exchange trading on grounds of *forum non conveniens*.[17] The Court identified a "prevailing international standard tying jurisdiction to the place where the securities were traded."[18] Justice Sharpe held that: "the principle of comity requires the court to consider the implications of departing from the prevailing international norm or practice, particularly in an area such as the securities market where cross-border transactions are routine and the maintenance of an orderly and predictable regime for the resolution of claims is imperative."[19] Adhering to the prevailing international standard based on place of trading would avoid a multiplicity of proceedings in different jurisdictions over the same claims of the same parties.[20] This standard was also consistent with investors' reasonable expectations, as 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."[21]

In contrast, using negligible trading on the TSX as a "toehold for bringing foreign exchange purchasers under the jurisdiction of an Ontario court" was "opportunistic" and a "classic example of the 'tail wagging the dog.'"[22] The Court therefore stayed the plaintiff's claims on behalf of Canadian residents who had purchased BP securities on foreign exchanges.

In 2016, the Court of Appeal lifted the stay.[23] Following the stay, claims in the U.S. under federal securities laws for the alleged misrepresentations prior to November 2007 were finally dismissed. Mr. Kaynes commenced a class proceeding in the U.S. court asserting such claims under Ontario law. BP successfully moved to have the proceeding dismissed. On the motion to dismiss, BP argued that Mr. Kaynes' claims were governed by Ontario law, could not be advanced in the U.S. class action, and did not fall within the exclusive jurisdiction of the U.S. courts.[24]

The Court of Appeal concluded that it was appropriate to lift the stay given that: (i) Mr. Kaynes was precluded from having his claim heard on the merits in the U.S. by purely procedural barriers; and (ii) BP had changed position and accepted that the claims on behalf of Canadian investors on U.S. exchanges were governed by Ontario law. The decision in *Kaynes 2016* is not simple to reconcile with *Kaynes 2014*, but does appear to reflect the unusual circumstances and developments in that case, rather than any change in the principles enunciated in *Kaynes 2014*.

3. No Jurisdiction Over Foreign Corporations Listed on Foreign Exchanges

In *Yip v. HSBC Holdings plc*,[25] the Court of Appeal reaffirmed the principles in *Kaynes 2014* and underscored that Ontario is not a "universal jurisdiction" for secondary market securities class actions.

As in *Kaynes 2014*, the defendant issuer was a U.K. company, which did not carry on business in Canada, and whose securities traded exclusively on foreign exchanges. The distinguishing factor from *Kaynes 2014* was that the defendant issuer had never been listed on any Canadian exchange.

At first instance, Perell J. held that there was a presumptive real and substantial connection based on the commission of a tort in Ontario, the place where the plaintiff and other securities holders had received or acted upon the alleged misrepresentations.[26] This presumptive connecting factor was rebutted, however, as the ability of Ontario securities holders to download HSBC Holdings' online materials in Ontario was an "extremely weak connection," which did not point to any real relationship between the subject-matter of the litigation and Ontario.[27] Finding a real and substantial connection in these circumstances would amount to creating "universal jurisdiction" in respect of securities misrepresentation claims.[28]

The Court of Appeal upheld this conclusion, and rejected the plaintiff's submission that the words "real and substantial connection" in the definition of a "responsible issuer" should be given a uniquely broad, "purposive" interpretation.[29] The legislative and judicial histories of the "real and substantial connection" test demonstrated the desire to avoid jurisdictional overreach, and Ontario's investors, capital markets, and financial system would not benefit from creating a universal jurisdiction for secondary market misrepresentations.[30]

In the alternative, both Perell J. and the Court of Appeal held that Ontario was *forum non conveniens* based on the principles set out in *Kaynes 2014*, including the principle that "the more appropriate forum for secondary market claims will often favour the forum of the exchange(s) where the securities trade,"[31] and the importance of comity in cross-border securities litigation.[32] Rejecting any suggestion of an inconsistency between its 2014 and 2016 decisions, the Court of Appeal held that: "The law did not change in *Kaynes* (2016); the facts changed."[33]

Leon v. Volkswagen AG, released shortly after, reached the same result on a similar fact pattern.[34] The issuer was a German company, which did not carry on business in Canada, and whose securities traded exclusively on foreign exchanges and had never traded in Canada. Justice Belobaba granted the issuer's motion to dismiss or stay a proposed class action on behalf of Ontario residents, finding that there was no jurisdiction *simpliciter*. In the alternative, Ontario was *forum non conveniens* as the U.S. and Germany were clearly more appropriate. The case is notable for affirming that, as a matter of comity, Ontario courts should defer to foreign jurisdictions even if class action procedures are not available there or there are significant differences in limitation periods.[35]

4. Recent Decisions Involving Interlisted Issuers

Since *Kaynes 2014*, two cases have considered whether Ontario courts should assume jurisdiction over trades in securities of interlisted issuers on foreign exchanges.

In *Paniccia v. MDC Partners Inc.*,[36] the defendants brought a motion to limit the proposed class to investors who had traded on the TSX. As in *Kaynes 2014*, the issuer had been interlisted on the TSX and a US exchange (NASDAQ), but had voluntarily delisted from the TSX due to low trading volume. During the proposed class period, the overwhelming majority of trading had occurred on NASDAQ, with only a small fraction of trading in Canada. In contrast to *Kaynes 2014*, the proposed class proceeding in the US had already been dismissed with prejudice.

Justice Perell refused to exclude the NASDAQ purchasers from the proposed class despite concluding that: (i) the US was the place where the defendants carried on business, where the alleged misconduct occurred, and where the key witnesses and evidence

were located;[37] (ii) the US court was more appropriate based on the principle of comity, which carried particular weight given that American securities law asserts exclusive jurisdiction of US courts over claims arising from securities trading in US territory;[38] and (iii) advancing the case in Canada after the US court had already dismissed a proposed US class proceeding had an "aroma of forum shopping."[39]

Justice Perell based his decision on three considerations.[40] First, the defendants had accepted that it was appropriate for a court in Ontario to try the claims of the TSX purchasers, and Perell J. interpreted this as an implicit concession that Canadians who purchased on NASDAQ could also have their issues of fact appropriately tried in Ontario. Second, the comity concerns were "substantially attenuated" for a general reason and a reason specific to the case.[41] The general reason was that the extra-territorial application of the OSA secondary market liability provisions meant that "Canadian intrusion on comity is accepted when some of the defendant's securities are traded on a Canadian stock market." Justice Perell observed that this was arguably "a contravention of principles of comity between sovereign nations and not a desirable way to administer global marketplaces."[42] The specific reason was that the motion judge concluded that the comity concerns largely "dissipated" because the proposed class was limited to Canadian investors.[43] Third, Perell J. concluded, based on a choice of law analysis, that Ontario law would apply to the claims in respect of trades on the NASDAQ.[44]

None of these considerations provided any basis for distinguishing the case from *Kaynes 2014*. In *Kaynes 2014*, the proposed class had also been limited to Canadian residents, and the defendants had also conceded that it was appropriate to have the claims of TSX purchasers determined in Ontario. In both cases, the dispute was solely over whether Ontario was the appropriate forum for the claims of Canadians who had traded on foreign exchanges. The Court of Appeal in *Kaynes 2014* recognized that the OSA envisaged extra-territorial application. That potential for extra-territorial application was what gave rise to comity concerns. The Court of Appeal did not simply "accept" the "Canadian intrusion on comity," but rather concluded that "the principle of comity strongly favours declining jurisdiction" in the same circumstances as in *MDC Partners*.

The result in *MDC Partners* was precisely what the Court of Appeal cautioned against in *Kaynes 2014* permitting the plaintiff to use negligible relative trading on the TSX as a "toehold" for bringing the foreign exchange purchasers under the jurisdiction of the Ontario court.[45] The cases are not reconcilable.[46] *MDC Partners* can perhaps best be explained as having been decided after *Kaynes 2016* created some confusion as to the interpretation of *Kaynes 2014*, and before the Court of Appeal reaffirmed the principles from *Kaynes 2014* in *Yip*.

A 2019 decision from Perell J., however, is consistent with *MDC Partners* rather than *Kaynes 2014* and *Yip*. In *Cappelli v. Nobilis Health Corp.*, the plaintiff brought a motion for leave under Part XXIII.1 and for certification.[47] The action had originally been brought on behalf of a proposed class consisting of all investors who had traded on the TSX. At certification, the plaintiff proposed to amend the class definition to add Canadians who had purchased shares on the NYSE, whose claims under US securities laws had by that point been dismissed in parallel US proceedings. The defendant argued that the plaintiff was barred by the limitation period under OSA s. 138.14 from asserting claims on behalf of new class members.

Justice Perell held that it was not too late to add Canadians who purchased shares of a Canadian corporation on a foreign exchange.[48] He reasoned that there were, from the outset of the action, three options for the class definition: (1) a global class of purchasers on the TSX; (2) a global class of purchasers on the TSX plus a Canadian national class of purchasers on the NYSE; or (3) a global class of purchasers on the TSX and the NYSE. Citing *MDC Partners*, Perell J. noted that: "Option #3 and a genuinely global class action might raise *forum conveniens* and other conflict of law concerns, but there are no such concerns with option #2."[49] As the Canadian purchasers on the NYSE were "always potential class members", Perell J. held that there was no prejudice to the defendant in adding

them regardless of the limitation period.[50] He denied leave to proceed under Part XXIII.1, however, and dismissed the certification motion.

The reasoning in *Nobilis* on the issue of class definition is clearly inconsistent with *Kaynes 2014*, in which the Court of Appeal held that there were significant conflict of laws concerns with including Canadian purchasers on the NYSE in an Ontario class action, and stayed their claims as *forum non conveniens*.

CONCLUSIONS

The Court of Appeal's decision in *Yip* has confirmed that Ontario is not a universal jurisdiction for secondary market securities class actions, and that Ontario courts lack jurisdiction *simpliciter* over claims against foreign companies listed only on foreign exchanges, even when those claims are advanced on behalf of classes limited to Canadian or Ontario residents.

Yip has also reaffirmed the principles in *Kaynes 2014*, including the "prevailing international standard tying jurisdiction to the place where the securities were traded" in cases involving interlisted issuers. The situation with respect to interlisted issuers is, however, complicated by the subsequent *MDC Partners* and *Nobilis* decisions, which held that it is appropriate to include Canadian residents who traded on foreign exchanges in the Ontario class action.

The approach proposed in *Nobilis*, of taking jurisdiction over a global class of TSX purchasers plus a class of Canadian residents who traded in any jurisdiction, creates the prospect of overlap with class actions in other major jurisdictions (notably, the U.S.) that base jurisdiction on place of trading, with the potential for multiple litigation and conflicting decisions. It also creates uncertainty about defendants' potential exposure and makes it harder to conduct settlement negotiations, as the volume of trading by Canadian resident investors on an exchange may not be readily ascertainable.

Given the frequency of secondary market class actions against interlisted issuers, including in recent filings, it seems likely that the inconsistency between the lower court decisions and *Kaynes 2014* will have to be addressed in the near future.

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1 Bradley A. Heys and Robert Patton, *Trends in Canadian Securities Class Actions: 2018 Update* (NERA Economic Consulting, February 2019) at p. 2. Online: https://www.nera.com/content/dam/nera/publications/2019/PUB_2018_Recent_Trends_Canada_0219.pdf.

2 *Securities Act*, R.S.O. 1990, c S.5 [***OSA***].

3 OSA s. 138.1, definition of "responsible issuer."

4 *Club Resorts Ltd. v. Van Breda*, [2012] S.C.J. No. 17, 2012 SCC 17.

5 *Abdula v. Canadian Solar*, [2011] O.J. No. 4067, 2011 ONSC 5105 [***Abdula* SCJ**], aff'd [2012] O.J. No. 1381, 2012 ONCA 211 [***Abdula* OCA**]. Prior to this, van Rensburg J. raised but did not decide the issue in certifying a "global class" of investors who had acquired securities on the TSX and NASDAQ in *Silver v. Imax Corp*, [2009] O.J. No. 5585, 184 A.C.W.S. (3d) 28 (S.C.J.) [***Imax***], see especially paras. 154 and 164, leave to appeal ref'd [2011] O.J. No. 656, 2011 ONSC 1035.

6 *Abdula* OCA at paras. 39, 46-47, and 88.

7 *Kaynes v. BP plc*, [2014] O.J. No. 3731, 2014 ONCA 580 [***Kaynes 2014***].

8 *Kaynes 2014* at para. 32.

9 *Kaynes 2014* at para. 2.

10 *Kaynes 2014* at para. 7.

11 *Kaynes 2014* at paras. 6 and 44.

12 *Kaynes 2014* at para. 7.

13 *Kaynes 2014* at paras. 10 and 40.

14 *Kaynes 2014* at para. 3.

15 *Kaynes 2014* at paras. 12-14.

16 *Kaynes 2014* at paras. 23-34.

17 *Kaynes 2014* at para. 4.

18 *Kaynes 2014* at para. 52.

19 *Kaynes 2014* at para. 48.

20 *Kaynes 2014* at para. 52.

21 *Kaynes 2014* at paras. 50-51.

[22] *Kaynes 2014* at para. 49.

[23] *Kaynes v. BP P.L.C*, [2016] O.J. No. 4058, 2016 ONCA 601 [***Kaynes 2016***].

[24] *Kaynes 2016* at paras. 15, 17, and 19-20.

[25] *Yip v. HSBC Holdings plc,* [2018] O.J. No. 3681, 2018 ONCA 626 [***Yip ONCA***].

[26] *Yip v. HSBC Holdings plc*, [2017] O.J. No. 4729, 2017 ONSC 5332 [***Yip ONSC***] at paras. 206-209.

[27] *Yip ONSC* at paras. 210-211.

[28] *Yip ONSC* at para. 213.

[29] *Yip ONCA* at paras. 10-15.

[30] *Yip ONCA* at paras. 19, 31, 73, and 78.

[31] *Yip ONCA* at paras. 60 and 75.

[32] *Yip ONSC* at paras. 230-231.

[33] *Yip ONCA* at paras. 64-65, 68, 70, and 75.

[34] *Leon v. Volkswagen AG*, [2018] O.J. No. 4252, 2018 ONSC 4265 [***Leon***].

[35] *Leon* at paras. 44-50.

[36] *Paniccia v. MDC Partners Inc*., [2017] O.J. No. 6389, 2017 ONSC 7298 [***MDC Partners***].

[37] *MDC Partners* at para 49.

[38] *MDC Partners* at para 52.

[39] *MDC Partners* at para 57.

[40] Also summarized in *MDC Partners* at para 71.

[41] *MDC Partners* at para 52.

[42] *MDC Partners* at para 54.

[43] *MDC Partners* at para 55.

[44] *MDC Partners* at paras 50-51.

[45] *Kaynes 2014* at para 49.

[46] The decision on the Rule 21 motion was appealed on this basis, but the action and the pending appeal were both dismissed on consent after the plaintiff's motion for leave to proceed with claims under Part XXIII.1 was dismissed in *Paniccia v. MDC Partners Inc*., [2018] O.J. No. 3077, 2018 ONSC 3470.

[47] *Cappelli v. Nobilis Health Corp*., [2019] O.J. No. 1804, 2019 ONSC 2266.

[48] *Nobilis* at para 51.

[49] *Nobilis* at para 52.

[50] *Nobilis* at para 50.

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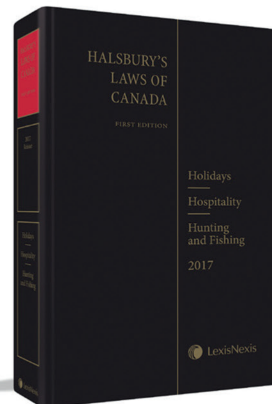

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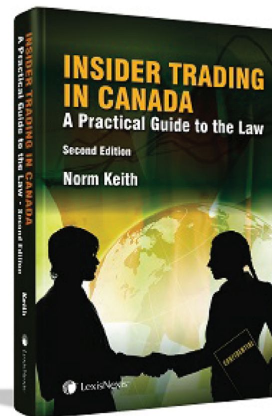

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