Trends in Canadian Securities Class Actions: 2014 Update
The Docket Continues to Grow as New Filings Outpace Settlements

By Bradley A. Heys, Mark L. Berenblut, and Jacob Dwhytie

Includes a Summary of US Securities Class Actions and UK Regulatory Enforcement Trends
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10 February 2015

Introduction

Canadian securities class actions continued to be filed at a steady pace in 2014. Eleven new securities class actions were filed during 2014, equaling the number of new cases filed in 2013. Our database now includes a total of 123 Canadian securities class actions filed over the 18-year period of 1997 through 2014.

The number of outstanding cases continued to grow in 2014 as the 11 new securities class actions more than offset the seven cases which were resolved (or tentatively resolved) during the year. Of the seven resolved cases, six were settled and one was dismissed.

As of 31 December 2014, there were a total of 60 unresolved securities class actions representing more than $35 billion in total claims.

Ten of the 11 new filings in 2014 involved claims under the secondary market civil liability provisions of the provincial securities acts (“Statutory Secondary Market” cases, previously referred to as “Bill 198” cases). These 10 new Statutory Secondary Market cases are equal in number to the cases filed in 2013. In total, 63 Statutory Secondary Market cases have been filed since the statutory amendments first started coming into force at the end of 2005. Of these, 38 cases (60 percent), representing more than $32 billion in total claims, remain unresolved at the end of 2014. 22 Statutory Secondary Market cases (35 percent) have settled, and three (5 percent) have been dismissed. Including the partial settlements in the class action involving Sino-Forest, defendants in these cases have collectively agreed to pay more than $345 million to resolve these claims.
Trends in Filings

Eleven new securities class actions were filed in 2014, equaling the number of new cases filed in 2013, and consistent with the average number of new cases filed per year (11.4 cases) over the preceding five years, 2009-2013. Of the 123 Canadian securities class actions filed over the period 1997 to 2014, 68 of these (55 percent) were filed within the last six years. See Figure 1.

Figure 1. **Cases Filed by Year and Allegation Type**

1997 – 2014

Note: “Responsible Issuer Case” refers to a case brought by investors in securities (e.g., common shares) issued by a Responsible Issuer as that term is defined in the Securities Act (Ontario) and parallel legislation in other Canadian provinces. “Statutory Secondary Market” refers to a case brought under the continuous disclosure provisions of the provincial securities acts. We report a single filing where multiple causes of action have been commenced in respect of substantially similar facts.
Shareholder Class Actions
Each of the new cases filed in 2014 is a shareholder class action, as was the case in each of 2012 and 2013. The most recently filed non-shareholder securities class action cases are those involving allegations related to Ponzi schemes and investment funds filed in 2011.

Seven of the 11 new cases filed in 2014 involve issuers with securities listed on the Toronto Stock Exchange (“TSX”). Three cases involve issuers with securities listed on the TSX Venture Exchange (“TSX-V”) and one case involves Fonds de solidarité FTQ, the shares of which are not publically listed.

Over the last six years (2009 through 2014), a total of 46 class actions have been filed against TSX-listed companies, representing approximately 3 percent of the average number of companies listed over that period, or an average annual litigation risk of approximately 0.5 percent (unchanged from last year). In addition, over the same six-year period, filings have been brought against nine companies listed on the TSX-V, representing 0.4 percent of the average number of TSX-V listed companies (implying an average annual litigation risk of approximately 0.07 percent—slightly higher than the 0.05 percent we reported last year).

Statutory Secondary Market Cases
Ten of the 11 new filings in 2014 involve claims under the secondary market civil liability provisions of the provincial securities acts (i.e., Statutory Secondary Market cases). This level of filings of new Statutory Secondary Market cases is generally in line with the pace of such filings since 2008 and maintains the trend of a higher volume of cases following the coming into force of those statutory provisions since the end of 2005. There have now been 63 cases filed with claims under these new statutory provisions. See Figure 2.

Figure 2. Filings of Statutory Secondary Market Cases 2006 – 2014

Total: 63 Cases Filed

<table>
<thead>
<tr>
<th>Year of Filing</th>
<th>Number of Filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
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<tr>
<td>2014</td>
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</tr>
</tbody>
</table>
Filings by Province
Perhaps not surprisingly, filings of securities class actions continue to be concentrated in Ontario:

- Eight of the 11 new cases filed in 2014 were filed in Ontario, only one of which (a case relating to Barrick Gold) also involves a claim filed in other provinces (Alberta, Saskatchewan, and Quebec).

- Of the three new cases filed in 2014 that were not filed in Ontario, one (involving Asia Packaging Group) was filed in both Alberta and British Columbia, one (involving Newport Exploration Ltd.) was filed only in British Columbia, and one (involving Fonds de solidarité FTQ) was filed only in Quebec.

Historically, approximately 78 percent of all new securities class actions involve a filing in Ontario, 24 percent involve a filing in Quebec, and 20 percent involve filings in provinces other than Ontario and Quebec. Approximately 23 percent of all cases involve claims filed in more than one province. This distribution of filings across provinces has not changed significantly over time.

Cross-Border Cases
Four of the 11 new cases filed in 2014 (36 percent) also involve parallel class actions filed in the US. Three of these involve issuers with securities cross-listed on both the TSX and the NYSE (Allied Nevada Gold, Barrick Gold, and Penn West Petroleum Ltd.). The fourth cross-border case is the filing relating to SouthGobi Resources (whose shares are listed on the TSX and the Hong Kong Stock Exchange). A US case relating to SouthGobi’s parent company, Turquoise Hill Resources (whose shares are listed on both the TSX and the NYSE), was filed in 2013.

Of the total of 63 Statutory Secondary Market cases, 26 (41 percent) have also involved parallel US class actions. Each of these cross-border cases involves companies whose securities were listed on a Canadian exchange and either listed on one of the major US stock exchanges or traded over-the-counter in the US.
US Securities Class Actions Against Canadian Companies
In addition to the four new cross-border cases mentioned above, five other US claims were filed in relation to Canadian-domiciled companies during 2014. These include claims relating to the following Canadian companies:

- Aeterna Zentaris Inc.,
- Altair Nanotechnologies Inc.,
- Equal Energy Ltd.,
- Nymox Pharmaceutical Corporation, and
- Talisman Energy Inc.

As we have noted in our prior reports, since 2006 approximately half of all US filings against Canadian companies correspond to a parallel claim in Canada. See Figure 3.

Figure 3. **US Filings Against Canadian-Domiciled Companies by Year of US Filing**

Note: If multiple securities class actions with similar allegations are filed against a Canadian-domiciled company in US federal court we treat them as a single filing if in the same circuit, and as separate filings if in different circuits. As a result, some US filings share the same parallel Canadian action. If similar class actions are filed against a company in Canada, we treat them as single filing, whether in the same or different provinces.
Mining and oil and gas sectors continue to account for a substantial share of new filings.

Industry Sectors
Cases involving companies in the mining and oil and gas sectors continue to account for a substantial share of new filings. Seven of the 11 new filings in 2014 (64 percent) involve companies in the energy and non-energy minerals sectors.

Notably, cases involving companies in the financial sector (excluding claims against companies who provided financial services to reporting issuers) have declined in the last five years. From 2010 to 2014, approximately 14 percent of new filings involved an issuer in the finance industry, compared to 31 percent of new filings in the period from 1997 to 2009.

Filings of Canadian securities class actions by industry sector for the period 1997 through 2014 are illustrated in Figure 4.

![Figure 4: Filings by Industry Sector 1997 – 2009 and 2010 – 2014](image)

Note: Cases are coded based on the industry sector for the issuer of the securities that are the subject of the litigation.
**Time to Filing**

For cases filed during 2014, the median time to filing from the end of the proposed class period was 4.6 months and the average was 7.1 months. This time to filing is generally in line with the median time to filing for cases filed in the last eight years (since 2007). See Figure 5.

Three of the 11 new cases in 2014 were filed less than one month after the end of the proposed class period (these are the cases involving Penn West Petroleum Ltd., Imperial Metals Corp., and WesternOne Inc.). Ten of the 11 new cases were filed within one year of the end of the proposed class period. The case against Fonds de solidarité FTQ (the one non-Statutory Secondary Market securities class action filed in 2014) was filed in Quebec three years after the end of the proposed class period.

![Figure 5. Median Time to Filing from the End of the Proposed Class Period](image)

**Note:** Based on 97 cases filed from 2003 through 2014 for which we have information regarding both the filing date and the class period end date.
Six Canadian securities class actions were settled in 2014 for total payments of approximately $38.4 million.

Trends in Resolutions

Settlements
In 2014, six Canadian securities class actions were settled, or tentatively settled, matching the total number of settlements in 2013 and double the number of settlements in 2012. Defendants in these six settling cases agreed to pay a total of approximately $38.4 million. The average of these settlements is $6.4 million, and the median is also $6.4 million. Five of these settlements were of Statutory Secondary Market cases, with an average settlement amount of $5.7 million. The median settlement is $5.9 million.

The number of settlements by year is illustrated in Figure 6 below.

Note: A settlement in 1997 is not shown in the chart above.
Our database now includes settlement amounts for 50 of the 53 settlements in Canadian securities class actions (excluding partial settlements) from 1997 through 2014. Across these 50 settlements, the median settlement is $10.7 million. The average settlement across these cases is $79.5 million—a figure heavily skewed by two exceptionally large settlements, both relating to Nortel Networks Corp.

There have been 22 settlements of Statutory Secondary Market cases through 31 December 2014. The average settlement in these 22 cases is $8.7 million, and the median is $7.0 million. The average settlement as a percentage of claimed compensatory damages in these cases is 13.8 percent, and the median is 10.6 percent. Although interesting as a measure of the outcome of a case relative to the initial claim, we note that these figures relating to settlements as a percentage of claimed compensatory damages may not fairly reflect the level of recovery of any actual compensable losses incurred by plaintiffs. Estimates of aggregate damages to the class (which are often prepared by experts in these cases subsequent to the filing of a claim, but generally not made public) may differ significantly from the claimed damage amounts initially set out in a statement of claim.

Of the 22 settlements in Statutory Secondary Market cases so far, 15 were domestic-only cases and seven were cross-border cases. The 15 domestic-only cases settled for an average value of $6.8 million, representing 13.4 percent of claimed compensatory damages; the corresponding medians are $3.9 million and 7.6 percent.

There have been seven settlements of cross-border Statutory Secondary Market cases for an average settlement amount of $12.8 million (the median is $9.5 million)—about twice the amount of the typical settlement in domestic-only cases. Across these seven cross-border Statutory Secondary Market cases, settlements average 14.9 percent of claimed compensatory damages (the median is 11.0 percent).

Of 21 settlements of Statutory Secondary Market cases where the information is available to us, five (24 percent) were certified and granted leave prior to settlement, and 16 (76 percent) were settled prior to the leave and certification stages (and certified for the purpose of settlement).

**Dismissals**

A case involving Southern China Livestock was denied certification during 2014. This case, which was not a Statutory Secondary Market case and so did not require the Court’s leave to proceed under the *Securities Act* (Ontario), involved allegations against the company’s auditor, Schwartz Levitsky Feldman LLP.

Also, in December 2014 the Ontario Court of Appeal upheld a 2013 ruling of the Ontario Superior Court denying leave and certification in the class action relating to Kinross Gold Corp. This case was recorded in our database as dismissed in 2013 based on the initial ruling.

Of the 123 securities class actions filed since 1997, nine (7.3 percent) have been dismissed as of the end of 2014. Of the 63 Statutory Secondary Market cases, three (4.8 percent) have been dismissed so far.
Pending Cases

Number of Pending Cases

At the end of 2014, 60 Canadian securities class actions remained unresolved—more than double the number of such cases five years ago, and nearly three times the number of cases on the docket at the end of 2006. See Figure 7.

Figure 7. Cases Pending as of 31 December

As of December 31

Number of Pending Cases


0 10 20 30 40 50 60

Note: Cases that are initially dismissed but subsequently overturned on appeal are shown as pending at each year end since the date of initial filing. Cases that have been dismissed are not included among the pending cases from the year of the initial dismissal decision even if they may still be subject to appeal.
The 60 unresolved cases pending at the end of 2014 represent more than $35 billion in claims, including both compensatory and punitive damages. All but six of these cases were filed in 2007 or later. See Figure 8.

Figure 8. **Status of Cases at Year-End by Year of Filing**
1997 – 2014

<table>
<thead>
<tr>
<th>Year of Filing</th>
<th>Active</th>
<th>Dismissed</th>
<th>Discontinued</th>
<th>Settled</th>
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Total: 123 Cases Filed
Pending Statutory Secondary Market Cases

Thirty-eight of the 60 unresolved cases (63 percent) are Statutory Secondary Market cases, representing more than $32 billion in claimed damages, or about 91 percent of the total outstanding claims.

Twenty-seven of these 38 unresolved Statutory Secondary Market cases had not yet reached at least one of the leave or class certification stages at the end of 2014. Nine of the remaining 11 unresolved Statutory Secondary Market cases have each been granted leave and certification. Three of these were granted leave and certification during 2014 including the cases involving Baja Mining Corp., Canadian Imperial Bank of Commerce, and Celestica Inc., although the cases involving CIBC and Celestica are the subject of an appeal to the Supreme Court of Canada ("SCC"). The case involving Canadian Solar has been granted leave to proceed under the Securities Act (Ontario), but has not yet been certified as a class action. Leave to pursue statutory claims was denied in the case involving Timminco, but there remain outstanding common law claims which have not yet been certified as a class action.

In our 2013 update, we made note of certain Statutory Secondary Market cases in which Canadian courts addressed jurisdictional issues, including the cases involving Facebook and BP, whose shares are not listed on a Canadian exchange. In 2014, the Ontario Court of Appeal ("OCA") released its decision in the matter involving BP. The OCA held that Ontario did have jurisdiction over claims of investors who purchased BP securities on US and UK exchanges because BP had undertaken to provide disclosure documents to Ontario shareholders (thereby creating a real and substantial connection between the plaintiff’s claim and Ontario). However, the OCA ultimately stayed the plaintiff’s claim on the basis of forum non conveniens, finding that the claims were better suited for the courts in the US and/or the UK rather than in Ontario.

Pending US Cases Against Canadian Companies

As of 31 December 2014, there were also 21 pending US cases against Canadian-domiciled companies. See Figure 9.

Figure 9. Status of US Filings Against Canadian-Domiciled Companies
as of 31 December 2014
Looking Forward

Our database now includes 123 Canadian securities class actions, 60 of which remain unresolved at year-end.

Looking forward, we will be keeping an eye on the possible impacts on class actions of the proposed changes to the Canadian securities regulation landscape. The federal government and the governments of several provinces (including Ontario, B.C., Saskatchewan, New Brunswick and P.E.I.) have signed on to a memorandum of understanding towards the development a more cooperative capital markets regulatory system. The potential impact on securities class actions depends on if, when, and in which jurisdictions the proposed Provincial Capital Markets Act (“PCMA”) and Capital Markets Stability Act (“CMSA”) are enacted, and the extent to which the legislation changes the procedural and substantive aspects of the civil liability regime.

It will also be interesting to observe the impact on the level of securities class actions and their resolution of two eagerly anticipated decisions of the SCC which may be handed down during 2015. In 2014, the SCC heard an appeal in the Quebec case relating to Theratechnologies and the authorization of a class action based on the secondary market liability regime under the Securities Act (Quebec). The SCC has also agreed to hear appeals relating to the decision of the special five-judge panel of the OCA in the cases involving IMAX, CIBC, and Celestica (with respect to issues relating to the limitation period). We understand this case will be before the Court in February 2015.

Finally, the recent volatility in the global commodities and currency markets merits some attention. As we go to press, oil prices and the Canadian dollar have fallen dramatically over the past several months raising questions regarding the near term impacts on companies in the oil sector and on the Canadian and world economies more generally. Historically, class action filings in the US have tended to increase in the years following dramatic economic upheavals, such as the bursting of the “dot-com” bubble in the early 2000s and the credit crisis of five or six years ago. Whether we will see a similar increase in filings in Canada following the next episode of economic volatility remains to be seen.
Notes

1 Bradley Heys is a Vice President, Mark Berenblut is a Senior Vice President, and Jacob Dwytie is a Consultant with NERA Economic Consulting. We thank Andrea Laing and Renzo Comolli for helpful comments on earlier drafts. We also thank Jielei Mao, Alison Taylor, and David Ogilvie for valuable research assistance with this paper. We appreciate the contributions of Svetlana Starykh to this and previous editions of this study. These individuals receive credit for improving this paper. All errors and omissions are our responsibility.

2 Subsequent to the publication of our 2013 Report, we became aware of a case involving Northland Resources filed in 2013, which increased the number of new cases in 2013 to 11 from the 10 previously reported.

3 These resolved cases do not include the case relating to Kinross which we had reported as dismissed in last year’s update. In December 2014, the Ontario Court of Appeal upheld the 2013 decision of the Ontario Superior Court to deny leave and certification. Bayens v. Kinross Gold Corporation, 2014 ONCA 901. We record a case as dismissed based on the most recent ruling of the court even though such a dismissal may still be subject to appeal.

4 The case involving Canadian Imperial Bank of Commerce was dismissed in the first instance (as we reported last year), but was overturned on appeal during 2014. 2014 ONCA 90 (CanLII).

5 This figure includes a settlement with the underwriter defendants in the amount of $32.5 million which was announced in January 2015, but appears to have been reached in December 2014.

6 Number of TSX-listed companies obtained from the December issues of The MiG Report published by TSX Inc. for 2009 to 2014.

7 Ibid.

8 The US case involving Barrick Gold was filed in 2013.

9 The newly added 2013 Northland Resources case increased the median time to file for 2013 from that reported in our 2013 report.

10 The database includes settlements from both Canadian-only and cross-border filings.

11 2014 ONSC 4118.

12 One additional case involving Borealis Infrastructure Management Inc. was discontinued in 2011.

13 It is possible that some of the cases filed in earlier years have now been abandoned.

14 In January 2015, leave and certification were granted in the case involving Sino-Forest. 2015 ONSC 439 (CanLII).

15 This case was dismissed in 2012, but was overturned on appeal by the OCA, 2014 ONCA 90 (CanLII).


17 As stated in the Note to Figure 3, our US database records multiple filings where actions are filed against the same defendant in more than one federal court circuit (unless they are subsequently consolidated).
US Trends:

Summary of NERA study on US Securities Class Actions

US Securities class action settlement amounts plummeted in 2014 according to the latest edition of NERA’s annual study of US federal securities class actions. Co-authors Dr. Renzo Comolli and Svetlana Starykh examined a wide range of data and draw from more than 20 years of NERA research on case filings and settlements in the US. The authors find settlement amounts declined 38 to 61 percent in 2014, based on analysis of the cases included in NERA’s calculations. The median settlement amount in 2014 was $6.5 million, the lowest in 10 years.

The decrease in settlement amounts was more marked after the much-anticipated Supreme Court decision in Halliburton v Erica P. John Fund, compared to the first part of 2014. On the other hand, filings of new securities class actions of the type addressed by the Court increased 14 percent after the decision was issued, compared to the time in which the decision was pending.

More generally, 168 securities class actions involving alleged violations of Rule 10b-5, Section 11, or Section 12 were filed in 2014, an 11 percent increase over 2013 and a 30 percent increase over 2010. Now, a Section 11 case is pending before the Supreme Court: Omnicare v Laborers District Council. (Section 11 cases are frequently used by the plaintiff bar to target IPOs.) The Supreme Court’s decision, expected in the first half of 2015, could tighten or loosen the pleading standards for these types of cases. NERA’s report shows that in recent years 73 percent of Section 11 cases have been brought in Circuits that currently require the tighter standard.

UK Trends

Summary of NERA Study on Regulatory Enforcement in UK Financial Markets

According to NERA’s Trends in Regulatory Enforcement in UK Financial Markets: 2014/15 Mid-Year report, the Financial Conduct Authority (FCA) and its predecessor, the Financial Services Authority, had as of 30 September 2014 imposed more than £1 billion in fines over the prior two-and-a-half years. This compares to less than £320 million in fines imposed over the entire decade prior to 1 April 2012.

Over the 2013/14 financial year, the FCA handed down £420.8 million in fines to individuals and firms, and £427.3 million in 2012/13. Fines for the 2014/15 financial year, which ends on 31 March 2015, are on pace to reach their highest level to date, with a total of £221 million imposed as at 30 September 2014. These record fine levels have been driven by a handful of large fines imposed on financial institutions, including several fines in connection with alleged manipulation of LIBOR and other benchmark lending rates.

However, fines against individuals have fallen substantially, both in number and aggregate amount, a trend seemingly at odds with the FCA’s emphasis on enforcement against individuals as an integral part of its “credible deterrence” strategy. Since reaching a peak in 2011/12 of £19.9 million, total fines against individuals have declined to £3.9 million in 2013/14 and £1.7 million in the first-half of 2014/15.
About NERA

NERA Economic Consulting (www.nera.com) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA’s economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world’s leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

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