Trends in Canadian Securities Class Actions: 2019 Update
Cannabis Litigation Leads to New Highs

By Bradley A. Heys, Robert Patton, and Jielei Mao
There have now been 100 Statutory Secondary Market cases filed in Canada in the 14 years since the new Securities Act provisions first started coming into effect. The 14 cases filed in 2019 is the greatest number of filings in any single year and follows four years of relatively few filings.

Five of the 14 new filings in 2019 (36%) involve companies in the cannabis industry. Additionally, of the 12 Canadian-domiciled companies named as defendants in 14 US shareholder class actions, eight operate in the cannabis industry.
Trends in Canadian Securities Class Actions: 2019 Update
Cannabis Litigation Leads to New Highs

By Bradley A. Heys, Robert Patton, Jielei Mao¹

19 March 2020

Introduction

NERA Economic Consulting maintains a proprietary database of information regarding Canadian securities class actions (the NERA Canadian Securities Class Action database).²

We are pleased to present our 2019 update on trends in Canadian securities class actions. We have prepared a streamlined report highlighting the key trends observed in 2019 in a concise format that we hope you will enjoy. Interested readers looking for more information or with specific questions are invited to contact the authors directly.

Trends in Filings

Cases Filed by Year

• Fourteen new securities class actions were filed in 2019, four more than in 2018 and the second highest number of filings historically (one fewer than the 15 cases filed in 2011). See Figure 1.

• The new filings in 2019 all involve companies with shares listed on public stock exchanges and allegations of misrepresentations and/or omissions in violation of the continuous disclosure obligations claims pursuant to the statutory secondary market civil liability provisions of the provincial securities acts (i.e., Statutory Secondary Market cases).

• Nine of the 14 new cases were filed in Ontario, three of which also have corresponding actions filed in Quebec. Two cases were filed only in Quebec, and three cases were filed only in British Columbia, the first new securities class actions filed in that province since 2015.
In the 14 years since the new Securities Act provisions came into effect, there have been 100 Statutory Secondary Market cases filed in Canada. The 14 cases filed in 2019 is the greatest number of filings in any single year and follows four years of relatively few filings. See Figure 2.
Filings by Industry and Economic Sector

- Notably, five of the 14 filings in 2019 (36%) involve companies in the cannabis industry.

- Two of the 14 new filings in 2019 (14%) involve defendants in the health technology and services sector. Six of the 44 cases filed from 2015 to 2019 (14%) involve companies in this sector, compared with only one out of 49 cases (2%) filed between 2011 and 2014.

- Only one of the cases filed in 2019 involved a company in the energy and non-energy minerals sector (a case relating to Just Energy Group Inc.), in contrast to the historical concentration of cases filed against issuers in that industry. See Figure 3.
Cross-Border Cases

- Five of the 14 new cases filed in 2019 also involve parallel cases filed in the United States, two of which involve cannabis companies.

- In total, 12 Canadian-domiciled companies were named as defendants in 14 US shareholder class actions filed in 2019. Eight of these companies operate in the cannabis industry.

- Of the 14 cases filed in the US, five have corresponding class actions in Canada, not including one for which a filing in Canada was made in January 2020.

- In the three-year period 2017 to 2019, only 37% of the cases filed in the US against Canadian-domiciled companies also involved a parallel filing in Canada, down from 53% for cases filed in the 11-year period from 2006 to 2016. See Figure 4.
Status of US Filings against Canadian-Domiciled Companies

- As at the end of 2019, 33 of the 92 securities class actions filed in the US against Canadian-domiciled companies between 2006 and 2019 remained active (see Figure 5). Twenty-two of these active cases were filed in the past two years.4

- Of 69 cases filed between 2006 and 2017, 20 cases (29%) were resolved by way of settlement, 38 cases (55%) were dismissed, and 11 cases (16%) remain unresolved at the end of 2019.
Trends in Resolutions

Number of Settlements and Median Settlement Amount by Year

- Four Canadian securities class actions were settled in 2019, half as many as were settled in 2018.

- Settlement amounts in these four cases range from $3.3 million to $37.7 million, with an average of $13.5 million and a median of $6.5 million.

- Median settlement amounts have trended down over time. For the 25 settlements reached over the past five years, the median settlement is $6.4 million—46% lower than the median settlement of $11.8 million for the 22 settlements reached between 2010 and 2014, and 64% lower than the median settlement of $17.6 million for 22 of 23 cases settled during the 2006–2009 period. See Figure 6.
Other Resolutions

- One case was discontinued during 2019—a case filed against Barrick Gold Corp. in 2018. A case filed against Barrick Gold in 2014 remains active.

- In 2019, the court denied leave to proceed in a case against BP plc, which was filed in 2012 in relation to the Deepwater Horizon oil spill.

Note: Based on 69 out of 70 cases settled during the period from 2006 to 2019 for which we have information regarding the settlement amount. Settlement amounts have been adjusted for inflation to 2019 dollars. The settlement amount is not available for one settlement reached in the 2006–2009 period.
Status of Cases at 2019 Year-End Leave and Certification

- In 2019, the Ontario Court granted leave to pursue certain (but not all) statutory secondary market claims in a case involving Barrick Gold (the case first filed in 2014), and the Alberta Court granted leave and certification of certain statutory secondary market claims in the case involving Ithaca Energy Inc. (first filed in 2015). The Ithaca Energy case is the first decision of an Alberta Court on a motion for leave under the statutory secondary market liability provisions of the Securities Act.

Of the 100 Statutory Secondary Market cases filed through the end of 2019:

- Leave applications have been contested in 25 cases, with leave granted in 12 cases (48%) and denied in 13 cases (52%). Leave applications were not contested in 13 other cases, and in three of them, leave was granted for the purposes of settlement.

- Twenty-six cases were settled prior to any decision regarding leave of the court;

- Statutory Secondary Market claims were discontinued in one case (although other aspects of that case remain unresolved), and seven cases were discontinued in their entirety prior to any leave decision.

- Twenty-five unresolved cases had not yet reached the leave stage of the litigation as of the end of 2019.

- Three other cases that appear to be no longer active never reached the leave stage.

Looking Forward

- Cases involving issuers in the cannabis industry drove filings to new highs in 2019. This is perhaps unsurprising given the early stage of the industry and the recent volatility in the market prices of cannabis-related securities. It will be interesting to see whether this high will be fleeting or whether class counsel will be hungry to file similar cases going forward.

- Other factors that may affect filings and resolutions are the proposed substantive and procedural amendments to the Ontario Class Proceedings Act, which are expected to pass into law in 2020 and will apply to cases filed after the amendments come into force. These amendments include a change to the test for certification (by introducing a requirement for common factual and legal issues to predominate over individual issues, similar to the test applied in the US) and changes to the rules regarding precertification motions. Some commentators have suggested that these amendments may make certification more difficult for plaintiffs and may lead to some cases being pursued in other provinces perceived as more plaintiff-friendly.
Notes

1 Bradley A. Heys is a Director, Robert Patton is an Associate Director, and Jielei Mao is a Senior Analyst with NERA Economic Consulting. We thank Janeen McIntosh for comments on an earlier draft. We also thank David Ogilvie and Mattia Dolci 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 report. All errors and omissions are our own.

2 The NERA Canadian Securities Class Action database includes information relating to 169 securities class action cases filed in Canada since 1997.

3 The new provisions of the provincial securities acts that enabled Statutory Secondary Market cases first came into force in Ontario at the end of 2005.

4 One additional case filed in the last two years was dismissed.
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 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.

NERA’s clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world’s largest economic consultancies. NERA serves clients from more than 25 offices across North America, Europe, and Asia Pacific.

Contacts
For further information, please contact:

Bradley A. Heys
Director
Toronto: +1 416 868 7312
brad.heys@nera.com

Jielei Mao
Senior Analyst
Toronto: +1 416 868 7316
jielei.mao@nera.com

Robert Patton
Associate Director
Toronto: +1 416 868 7318
robert.patton@nera.com

To receive publications, news, and insights from NERA, please visit www.nera.com/subscribe.

The opinions expressed herein do not necessarily represent the views of NERA Economic Consulting or any other NERA consultant.