NERA ECONOMIC CONSULTING

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Filings Fall from a Cannabis-Fueled High

By Bradley A. Heys, Robert Patton, and Jielei Mao

Insight in Economics™

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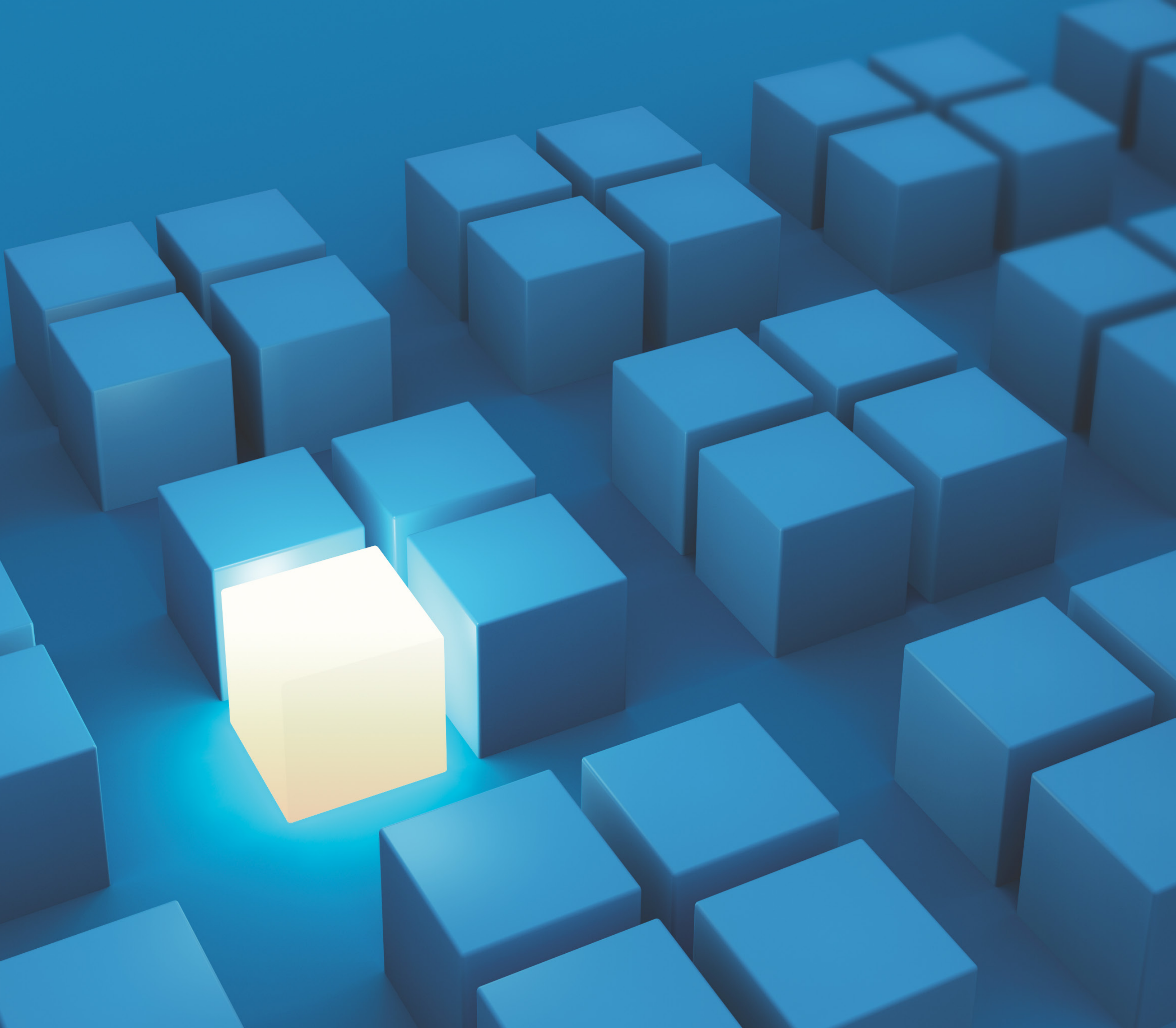

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Introduction

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 2021 update on trends in Canadian securities class actions, highlighting the key trends we observed in 2021. Interested readers looking for more information or who have specific questions are invited to contact the authors directly.

Trends in Filings

Cases Filed by Year

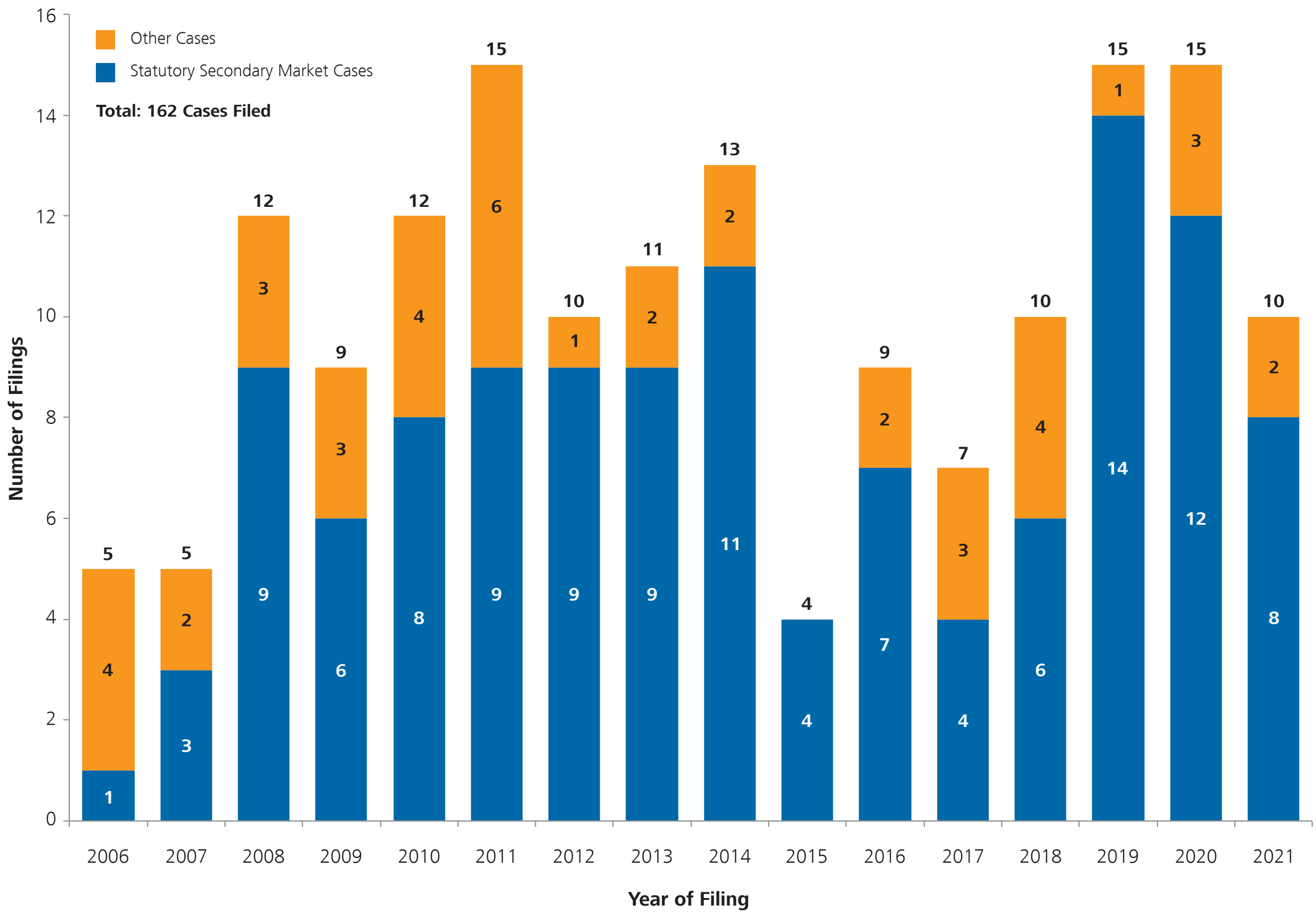
- Ten new securities class actions were filed during 2021, five fewer than the all-time high of 15 cases filed in each of 2011, 2019, and 2020. See Figure 1.

- All 10 new filings in 2021 involve companies with shares listed on public stock exchanges. Eight of those involve allegations of misrepresentations and/or omissions in violation of the continuous disclosure obligations pursuant to the statutory secondary market civil liability provisions of the provincial securities acts (i.e., "Statutory Secondary Market" cases).

- Four of the 10 new cases were filed in Ontario, one of which also has a corresponding action filed in Quebec. Two cases were filed only in Quebec and three cases were filed in British Columbia. One case was filed in Yukon, the first ever filing of a securities class action in that territory.

- We are aware of only two Canadian securities class actions with allegations directly related to the ongoing COVID-19 pandemic—both filed in 2020. This contrasts with the experience in the US in which there have been 53 cases filed with pandemic-related claims over the last two years (2020–2021).

Figure 1. **Canadian Securities Class Actions Filed by Year**
2006–2021



- It has now been 16 years since the new Securities Act provisions came into effect, introducing civil liability in respect of an issuer's continuous disclosure obligations. Since then, there have been 120 Statutory Secondary Market cases filed in Canada—an average of approximately 7.5 cases per year.[3]

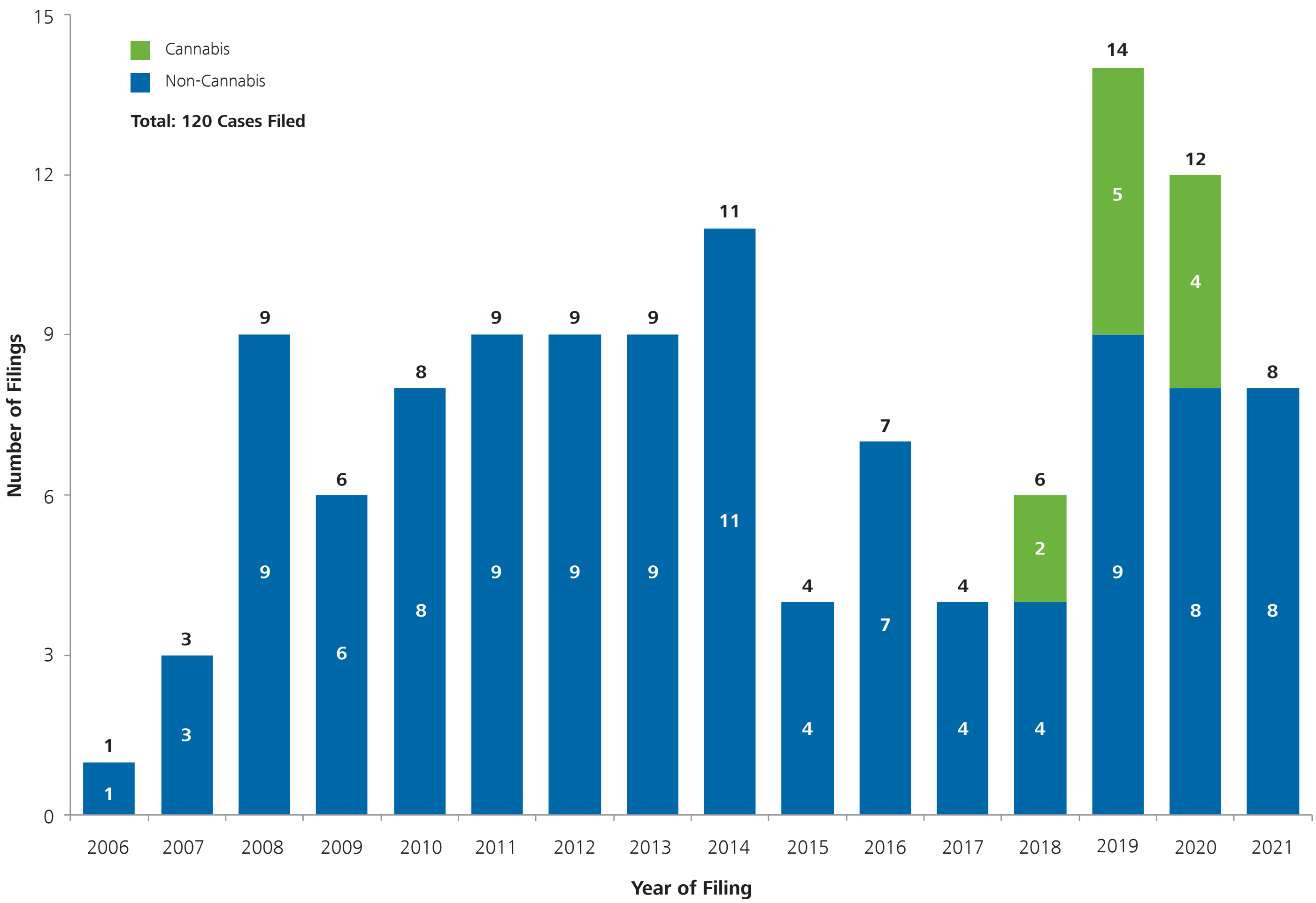
- Eight Statutory Secondary Market cases were filed in 2021, fewer than the 12 such filings in 2020, but still higher than the relatively small number of such cases filed each year from 2015 through 2018. The 2021 total is also in line with the average of 8.7 new cases filed per year over the seven-year period from 2008 to 2014. In retrospect, the period from 2015 to 2018 appears to have been a temporary lull in the pace of new Statutory Secondary Market filings.

Filings by Industry and Economic Sector

- We noted in our report last year that the increases in the number of Statutory Secondary Market cases in 2019 and 2020 were driven by filings involving cannabis-related businesses. In contrast, in 2021, there were no new filings in Canada involving issuers in the cannabis sector (although one new filing in the US during 2021 involves a Canadian-domiciled company operating in the cannabis sector)—likely reflecting the dramatic increase and subsequent decrease in the value of the shares of cannabis-related companies over this period.

- The eight new Statutory Secondary Market cases filed in 2021 is in line with the number of non-cannabis-related Statutory Secondary Market cases filed in 2019 and 2020. See Figure 2.

Figure 2. **Filings Involving Statutory Secondary Market Claims**
2006–2021



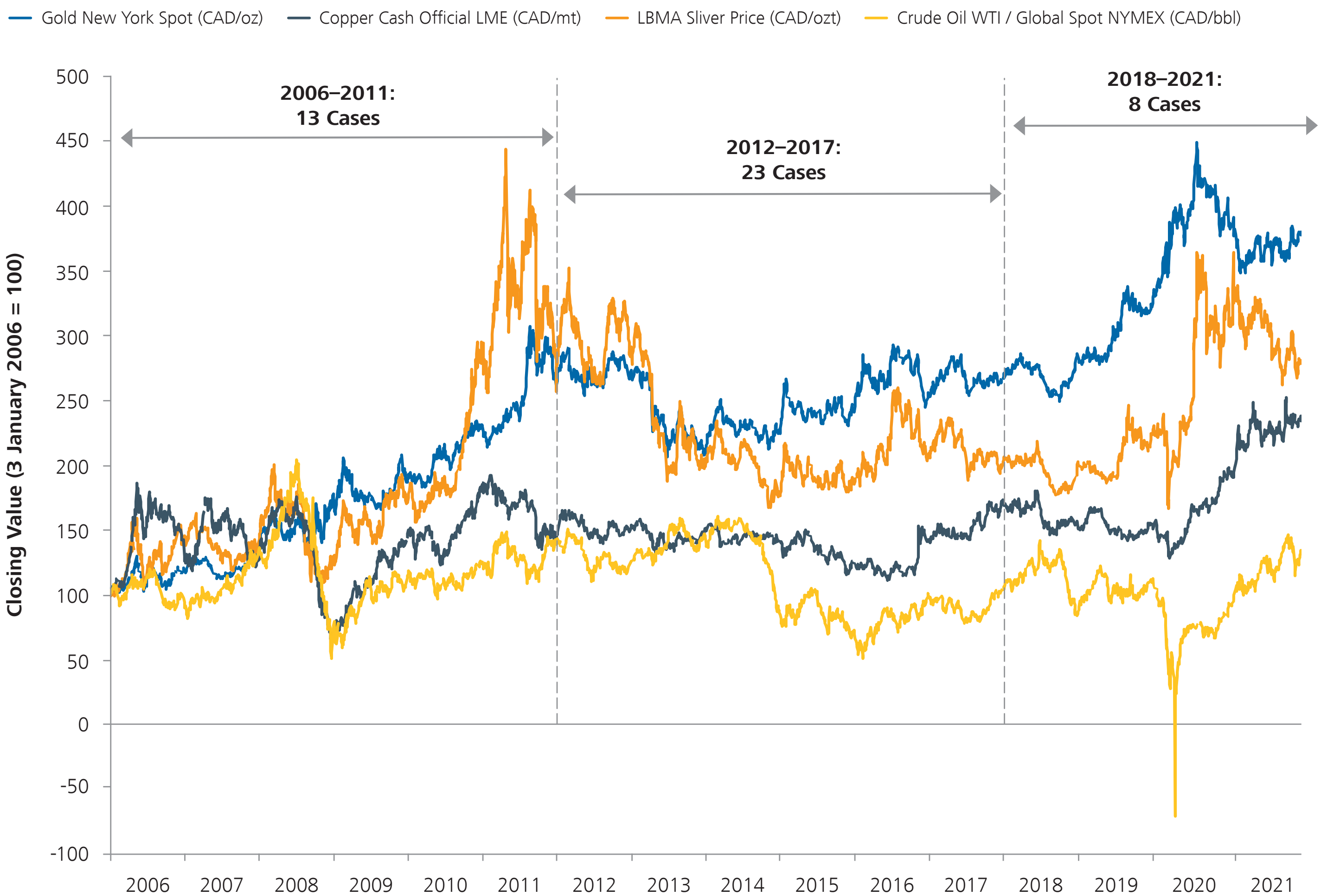
- Consistent with recent years, four of the 10 new filings in 2021 involve companies in the non-energy minerals sector and three involve companies in the technology services sector. The remaining three cases involve companies in the health services, process industries, and producer manufacturing sectors.

- Over the past four years, Statutory Secondary Market cases involving companies in the energy and non-energy minerals sector have accounted for a smaller portion of new filings than in previous years (20% of new filings in the period from 2018 to 2021, down from 52% of new filings in the period from 2012 to 2017). See Figure 3.

Figure 3. **Filings of Statutory Secondary Market Cases by Industry and Economic Sector**
2006–2011, 2012–2017, and 2018–2021

- The ebb and flow of new cases in the energy and non-energy minerals sector appears to be influenced by fluctuations in commodity prices: the relatively large number of new cases involving mining and oil companies in the period up to 2017 followed significant declines in the prices of precious metals and oil; and relatively fewer cases in the period since correspond to generally rising commodity prices. See Figure 4.

Figure 4. **Daily Closing Prices for Selected Commodities (3 January 2006 = 100) and Filings of Energy and Non-Energy Minerals Statutory Secondary Market Cases**



Note: In April 2020, oil prices briefly fell to negative values (meaning a seller would have to pay a buyer to receive a barrel of oil). This unprecedented event has been attributed to a sharp fall in demand with the onset of the COVID-19 pandemic and a price war between Russia and Saudi Arabia after OPEC and its allies failed to reach an agreement on deeper supply cuts. The resulting steady supply of oil in the face of record-low demand led to a shortage of storage space for oil.

Cross-Border Cases

- Only two of the 10 new cases filed in Canada during 2021 had a parallel US shareholder class action as of the end of the year.

- Five other Canadian-domiciled companies were named as defendants in US securities class actions during 2021 but were not the subject of a Canadian action as of 31 December 2021. Two of these five companies are in the mining sector, one operates in the cannabis industry, one is in the pharmaceuticals industry, and one is a fintech business.

- In the four-year period from 2018 to 2021, only 37% of the cases filed in the US against Canadian-domiciled companies also involved a parallel filing in Canada, down from 51% for cases filed in the preceding 12-year period from 2006 to 2017. While it is possible that the proportion of US filings involving Canadian-domiciled companies that also have parallel filings in Canada may ultimately be higher than 37% if some of the most recent filings eventually also have parallel Canadian filings, an increasing proportion of new US filings involving Canadian-domiciled companies seem to be US-only cases. See Figure 5.

Figure 5. **US Filings Involving Canadian-Domiciled Companies With and Without Parallel Canadian Actions**
2006–2017 and 2018–2021

Status of US Filings Against Canadian-Domiciled Companies

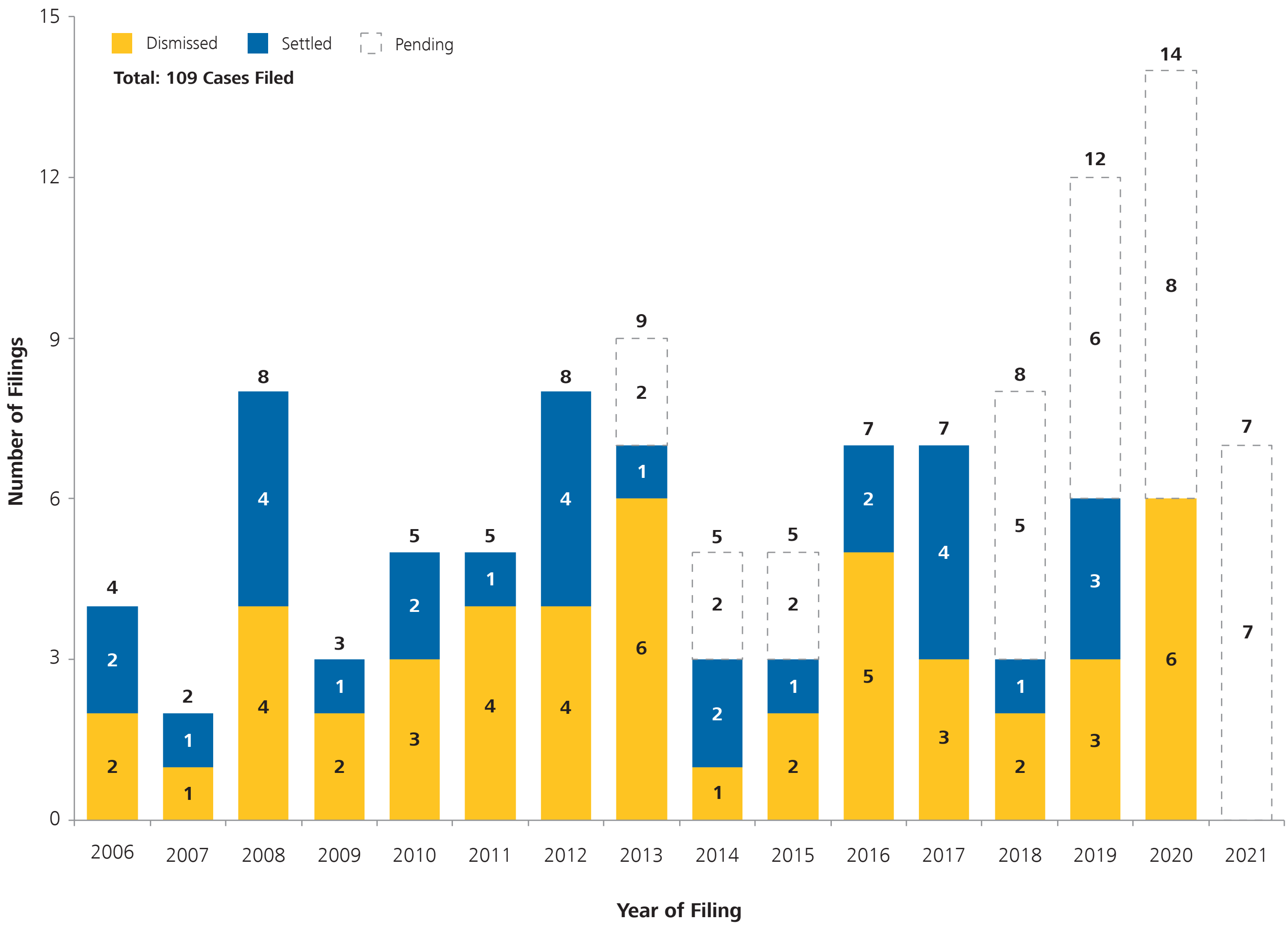
- Thirty-two of the 109 securities class actions filed in the US against Canadian-domiciled companies between 2006 and 2021 remained active at the end of 2021. All 32 active cases were filed in 2013 or later, and 26 of these cases were filed within the last four years.

- Of these 109 filings, 101 cases have included claims under US Rule 10b-5, which relates to claims in respect of secondary market transactions.[4]

- Of the 77 cases that had been resolved by the end of 2021, 29 cases (38%) were resolved by way of settlement and 48 cases (62%) were dismissed.

- The status of all 109 US securities class actions involving Canadian-domiciled companies by year of filing is illustrated in Figure 6.

Figure 6. **Status of US Filings Against Canadian-Domiciled Companies**
2006–2021

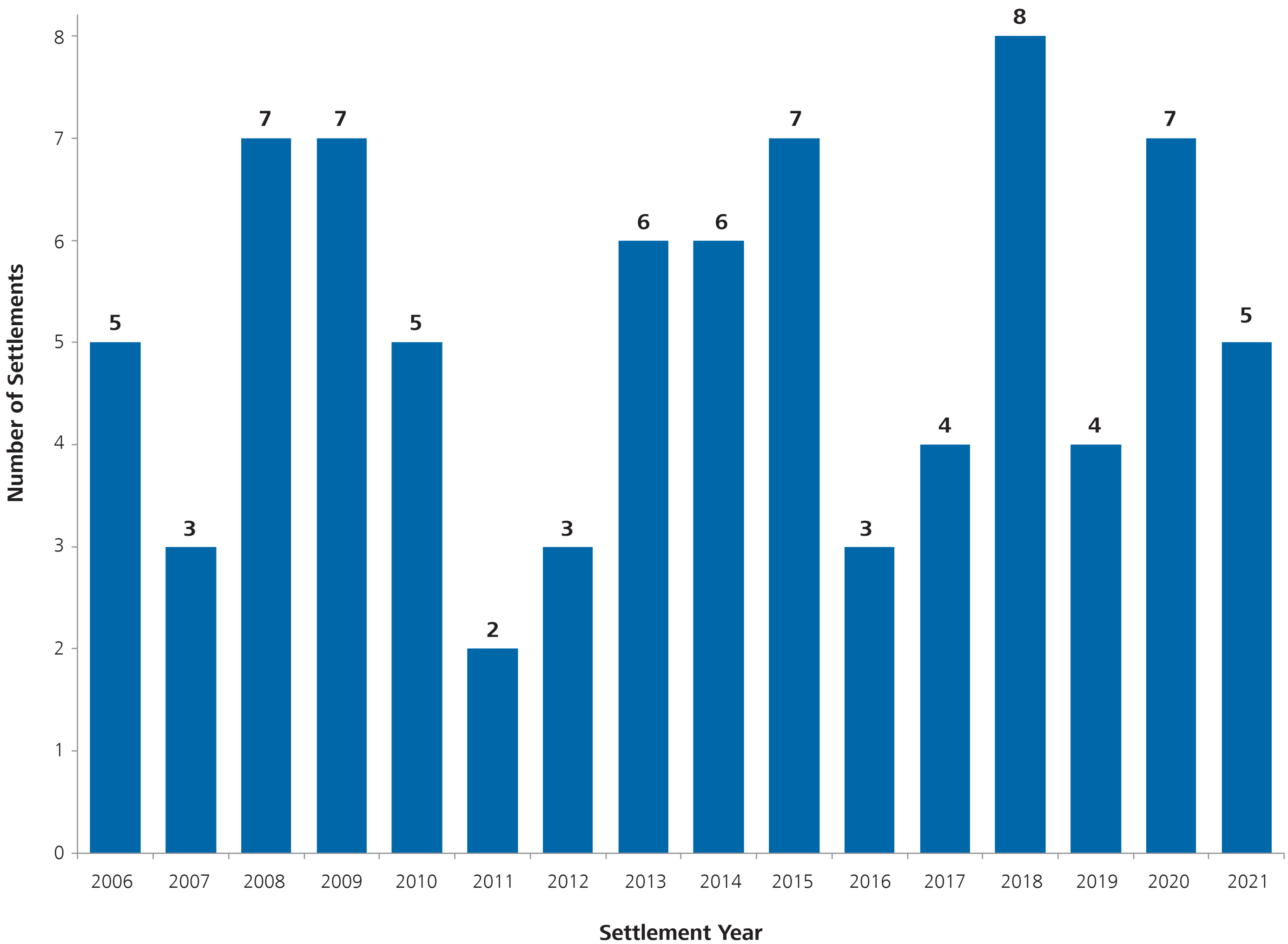


Trends in Resolutions

Number of Settlements and Median Settlement Amount by Year

- Five Canadian securities class actions were settled during 2021, down from seven settlements in 2020. See Figure 7.

Figure 7. **Settlements**
2006–2021



Note: Includes settlements of cases filed in 1997 or later. 2016 settlements include partial settlements in the case relating to Sino-Forest Corporation.

- The largest settlement in 2021 relates to the case involving Canadian Imperial Bank of Commerce (CIBC). The $125 million settlement in that case is the eighth-largest settlement to date (before any adjustment for inflation).

- In addition to the five settled cases in 2021, there were several partial settlements in the cross-border case relating to CannTrust Holdings Inc. during the year. Together, these settlements total $126 million. Claims against an audit firm remained unresolved at the end of the year.

- In addition to the settlement in the CIBC case, four other cases settled in 2021 for amounts ranging from $2.4 million to $5.6 million. The average of these four settlements is $3.8 million and the median is $3.6 million.

- The top 20 settlements in our database of Canadian securities class actions by global settlement amount (expressed in Canadian dollars), along with the Canadian- and US-specific settlement amounts (where available), are shown in Table 1.

Table 1. **Top 20 Settlements as of 31 December 2021, Ranked by Global Settlement Amount**

			Settlement Amount ($Million)		
Rank	Case	Settlement Year	Global	Canada	US
1	Valeant Pharmaceuticals International Inc.†	2020	$1,719.1	$124.0	US $1,210.0
2	Nortel Networks Corp.	2006	$1,318.3	n.a.	n.a.
3	Nortel Networks Corp. (II)	2006	$1,197.8	n.a.	n.a.
4	Portus Alternative Asset Management	2008	$611.1	$611.1	-
5	Sino-Forest Corporation*†	2012–2016	$163.5	$163.5	-
6	Biovail Corp.	2008	$140.7	n.a.	n.a.
7	CannTrust Holdings Inc.*†	2021	$126.0	n.a.	n.a.
8	Canadian Imperial Bank of Commerce†	2021	$125.0	$125.0	-
9	YBM Magnex International, Inc.	2002	$120.0	n.a.	n.a.
10	Endo International plc†	2020	$110.4	$0.7	US $82.5
11	SNC-Lavalin Group Inc.†	2018	$110.0	$110.0	-
12	Manulife Financial Corporation†	2017	$69.0	$69.0	-
13	Norbourg Asset Management Inc.	2011	$55.0	$55.0	-
14	Kinross Gold Corporation†	2015	$53.8	$12.5	US $33.0
15	Penn West Petroleum Ltd.†	2016	$53.0	$26.5	$26.5
16	Transamerica Life Canada*	2009	$52.0	$52.0	-
17	Hollinger International, Inc.	2008	$47.9	n.a.	n.a.
18	Mount Real Corp.*	2016	$43.0	$43.0	-
19	Cinar Corp.	2003	$42.9	n.a.	n.a.
20	Atlas Cold Storage Holdings Inc.	2008	$40.0	$40.0	-

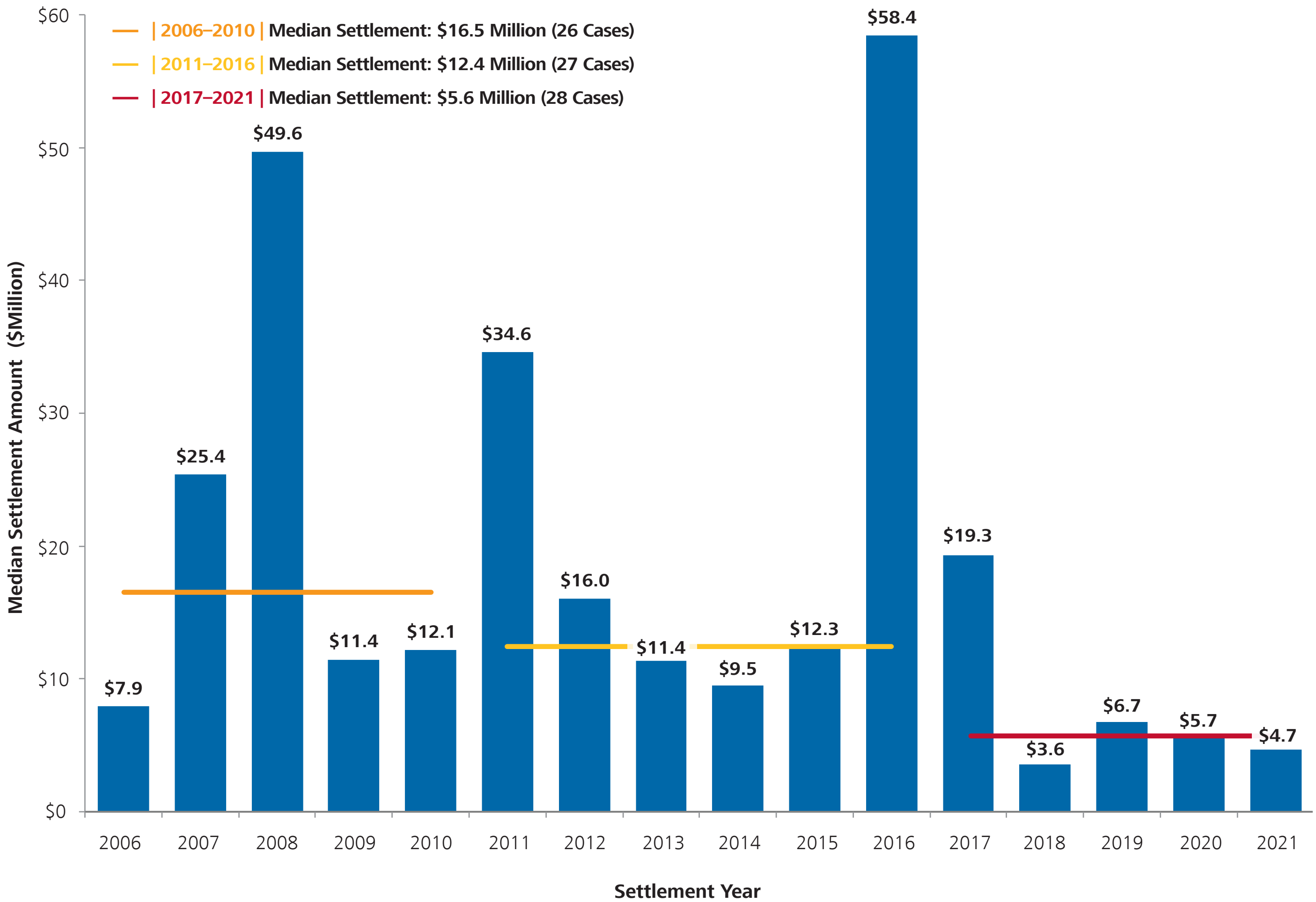
* Case is only partially settled. Settlement amount shown is the total of all partial settlements as of the end of 2021. Settlement year is determined by the year of the final settlement in Canada for fully resolved cases. "Global" and "Canada" settlement amounts originally expressed in US dollars are converted to Canadian dollars at the exchange rate prevailing at the time of the settlement.

"n.a." indicates that no allocation of a global settlement amount as between the Canadian and US cases is available.

† Indicates Statutory Secondary Market case.

- Median settlement amounts (after adjusting for inflation) have trended down over time. The median settlement across the 28 settlements reached over the last five years is $5.6 million—55% lower than the median settlement of $12.4 million for the 27 settlements reached between 2011 and 2016, and 66% lower than the median settlement of $16.5 million for 26 cases settled during the five-year period from 2006 to 2010.[5] See Figure 8.

Figure 8. **Median Settlement Amounts**
2006–2021



Notes: Based on 80 out of 81 cases settled during the period from 2006 to 2021 for which we have information regarding the settlement amount. Settlement amounts have been adjusted for inflation to 2021 dollars. This figure also includes the cumulative partial settlement amount to date for the case involving Sino-Forest Corporation in 2016.

Other Resolutions

- In 2021, the case involving Pretium Resources Inc. ("Pretium") was dismissed by way of a summary judgment, with the court finding that, "[t]here was no omission of any material fact" and that "[t]here were no misrepresentations."[6] This is the first dismissal of a Statutory Secondary Market case subsequent to leave having been granted.[7]

- In 2021, motions for certification were denied in three cases, including one of the cases involving SNC-Lavalin Group Inc. (another case involving SNC-Lavalin remains active) and the cases involving Alio Gold Inc. and Cronos Group Inc. Subsequent to the end of 2021, motions for leave of the court and class certification were denied in two other cases—one involving Lundin Mining Corporation and another involving Silver Wheaton Corp.[8]

- Three other cases were discontinued during 2021, namely the cases involving the Oversea Chinese Fund (filed in 2011), North American Palladium Ltd. (filed in 2015), and Canada Goose Holdings Inc. (filed in 2020).

- An appeal of a 2020 decision denying leave to proceed in the case involving Imperial Metals Corporation was granted during 2021 (the leave motion remained outstanding at year-end). Another appeal of a 2020 leave decision (relating to Crystal Wealth Management Systems Ltd.) was dismissed.

Status of Cases at 2021 Year-End: Leave and Certification

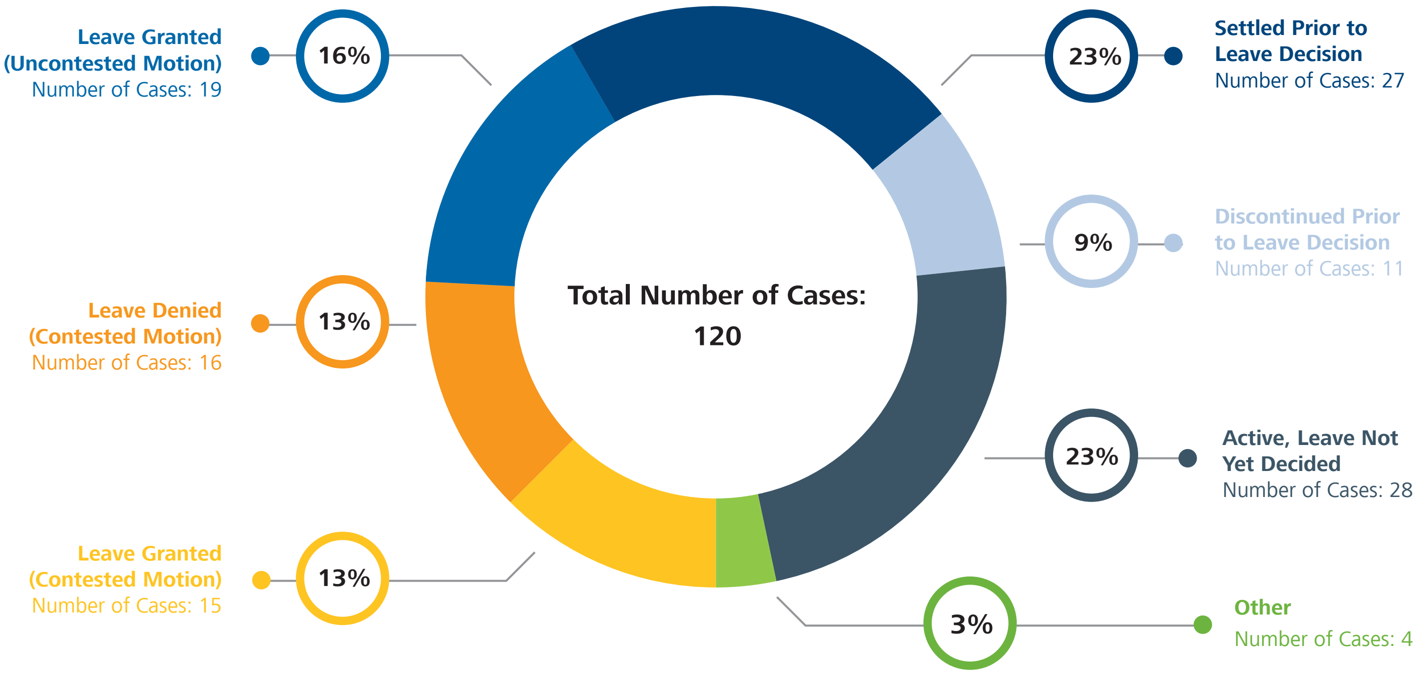
- During 2021, leave to pursue Statutory Secondary Market claims was granted in the cases involving Tahoe Resources Inc., Aphria Inc, and Auxly Cannabis Group Inc. The first two of these three cases were also certified as class actions during 2021.

- Class certification was also granted in three other cases during 2021: the cases involving Horizons ETFs Management (Canada) Inc., Northwynd REIT, and Discovery Air Inc.

- Of the 120 Statutory Secondary Market cases filed through the end of 2021, 36 remain active—28 of these 36 cases had not yet reached the leave stage of the litigation as of the end of 2021; eight cases have been granted leave of the court and remain unresolved.

- Consistent with the comment by Justice Belobaba in a recent decision that, while the leave motion is "more than a speed bump, it is not the Matterhorn," an almost equal number of cases have been granted leave (15) as have been denied leave (16) where the motion for leave has been contested.[9] In 19 other cases, leave applications were not contested by defendants, with eight of those being cases in which leave was granted for the purpose of settlement. See Figure 9.

Figure 9. **Status of Statutory Secondary Market Cases**



Looking Forward

- The pace of filings of new securities class actions tends to ebb and flow with stock market volatility. When stock prices generally, or for companies operating in a particular sector, fall sharply, shareholder class actions tend to follow.

- For example, the nine new cases involving cannabis companies filed during 2019 and 2020 came at a time of significant adjustment in that emerging industry and a sharp decline in cannabis company share prices. After a relatively stable 2020, 2021 again witnessed significant volatility in the industry and it will be interesting to see if more cases follow in the coming years.

- Market trends may also explain the relative paucity of new filings directly related to the COVID-19 pandemic. At the onset of the COVID-19 pandemic in March 2020, the TSX/S&P Composite Index declined by about 30%. However, the market recovered relatively quickly and was up nearly 90% over its pandemic low by the end of 2021, including a gain of more than 20% in 2021 alone. On the other hand, as we go to press, the pandemic continues to be a major theme driving the Canadian economy and financial markets, so it remains to be seen whether any additional volatility in 2022 and beyond will lead to an increase in the pace of filings.

- One interesting US trend during 2021 that could potentially appear in Canada going forward was a sharp increase in the number of cases related to special purpose acquisition companies (SPACs): 24 cases in 2021 as compared to only one case in 2020. While the vast majority of SPACs are listed for trading in the US, some SPACs are listed on the TSX, and US SPACs may acquire Canadian companies. To the extent that Canada sees an increase in SPAC-related activity in the coming years, we might also expect to see a corresponding increase in the pace of filings given the recent experience south of the border.

Notes

1 Bradley A. Heys is a Managing Director, Robert Patton is a Director, and Jielei Mao is a Senior Analyst with NERA Economic Consulting. We also thank Janeen McIntosh for helpful comments on an earlier draft, and Francesco Luraschi 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 own.

2 The NERA Canadian Securities Class Action database includes information relating to 195 securities class action cases filed in Canada since 1997. This paper also draws on NERA's proprietary US Securities Class Action database.

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, and in other provinces in subsequent years.

4 Of the 101 filings that include claims under US Rule 10b-5, six also include claims under Section 11 of the Securities Act of 1933. Of the other eight filings, seven involve claims under Section 11, Section 12 of the Securities Act of 1933, and/or Section 14 of the Securities Exchange Act of 1934, and one includes breach of fiduciary duty claims.

5 The settlement amount is not available for one settlement reached in the 2006–2010 period. The cumulative partial settlement amount to date for the case involving Sino-Forest Corporation is included in 2016.

6 *Wong v. Pretium Resources*, 2021 ONSC 54.

7 Leave was granted in the Pretium case in 2017 on a contested motion and the case was certified as a class action by consent in 2019.

8 Motions in both of these cases were heard in 2021, with the decisions released in January 2022. Silver Wheaton Corp. is now known as Wheaton Precious Metals Corp.

9 *Wong v. Pretium Resources, 2021 ONSC 54. See also DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160, at para. 36. Justice Belobaba credits class counsel in the Barrick case, Peter Jervis, for this analogy.

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 more than six decades, we 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 issues arising from competition, regulation, public policy, strategy, finance, and litigation.

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Contacts

For further information, please contact:

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

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

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