TRENDS IN CANADIAN SECURITIES CLASS ACTIONS: 2023 UPDATE

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Pace of Filings Continues to Decline

26 March 2024

NERA 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 latest update on trends in Canadian securities class actions, highlighting key trends we observed in 2023. 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

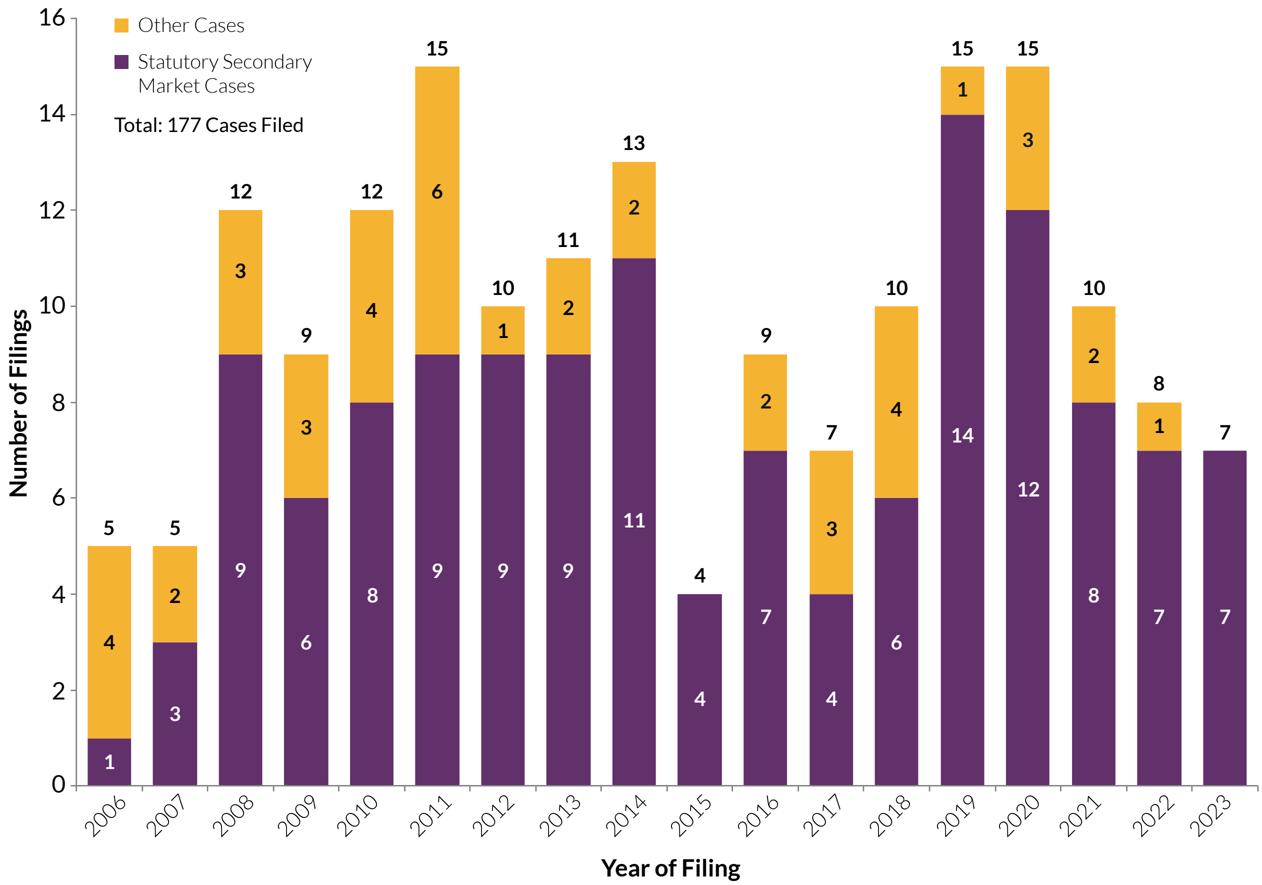
- The pace of new filings of securities class actions continued to slow in 2023 with seven new cases filed, one fewer than the eight cases filed in 2022 and less than half of the peak of 15 new filings observed in each of 2019 and 2020. See Figure 1.

- All seven filings in 2023 are Statutory Secondary Market cases (i.e., involving 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). Six of these seven cases are shareholder class actions involving companies with shares listed on public stock exchanges. A seventh case involves allegations of negligence brought against a trustee and manager of certain exchange traded funds (ETFs).

- Three of the seven new cases were filed only in Ontario, two cases were filed only in British Columbia, one case was filed in both Ontario and British Columbia, and one case was filed only in Alberta. No new cases were filed in Quebec for the second consecutive year.

- The proportion of new filings brought in Ontario has declined since the coming into force of amendments to the Ontario Class Proceedings Act, which introduced a stricter test for class certification. Of the 29 cases filed in the 3.25 years since the amendments came into force on 1 October 2020, only 15 (52%) were filed in Ontario. This is a notable decline from the preceding 3.25 years in which 27 of 39 new cases (69%) were filed in Ontario. At the same time, the proportion of new cases filed in British Columbia has increased to 31% since 1 October 2020, up from only 13% of new cases during the preceding 3.25 years.

Figure 1. **Canadian Securities Class Actions Filed by Year**
2006–2023

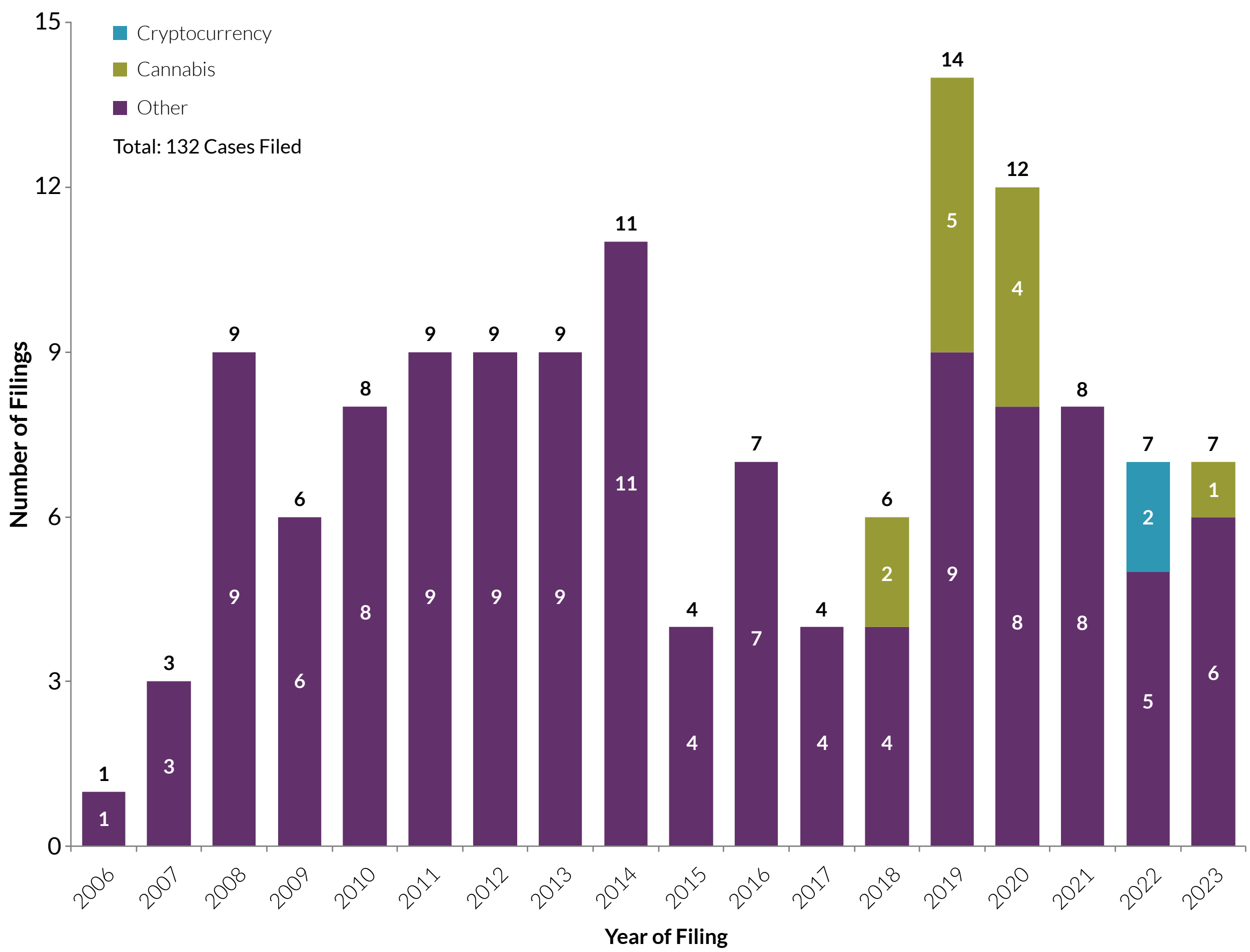


- In the 18 years since the introduction of Securities Act provisions for civil liability in respect of an issuer's continuous disclosure obligations, there have been 134 Statutory Secondary Market cases filed in Canada—an average of approximately seven filings per year.[3]

Filings by Industry and Economic Sector

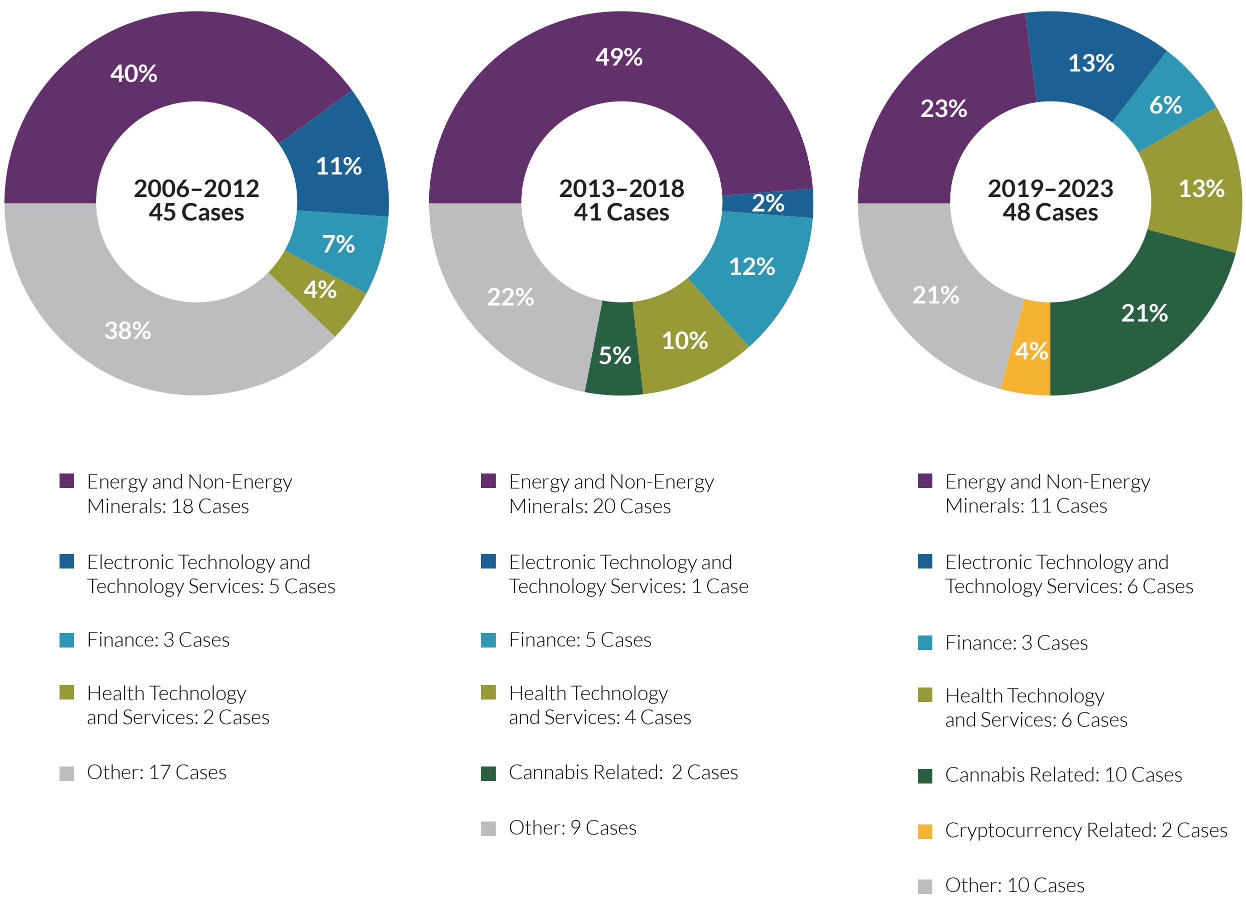
- Two of the seven new Statutory Secondary Market cases filed in 2023 involve companies in the energy minerals sector. Each of the finance, health technology, industrial services, and distribution services sectors account for a single filing in 2023. 2023 also saw the first filing involving a company operating in the cannabis sector since 2020. None of the new filings in 2023 involve the cryptocurrency sector after two Statutory Secondary Market cases and one other case involving that sector were filed in 2022. See Figure 2.

Figure 2. **Filings Involving Statutory Secondary Market Claims**
2006–2023



- While cases involving companies in the energy and non-energy minerals sector continue to represent a substantial fraction of Statutory Secondary Market cases, they have accounted for a smaller portion of cases over the past five years than in previous years (23% of new filings in the period from 2019 to 2023, down from 49% of new filings in the period from 2013 to 2018). Cases involving companies operating in the cannabis and health technology and services sectors account for a correspondingly larger portion of cases in the most recent period. See Figure 3.

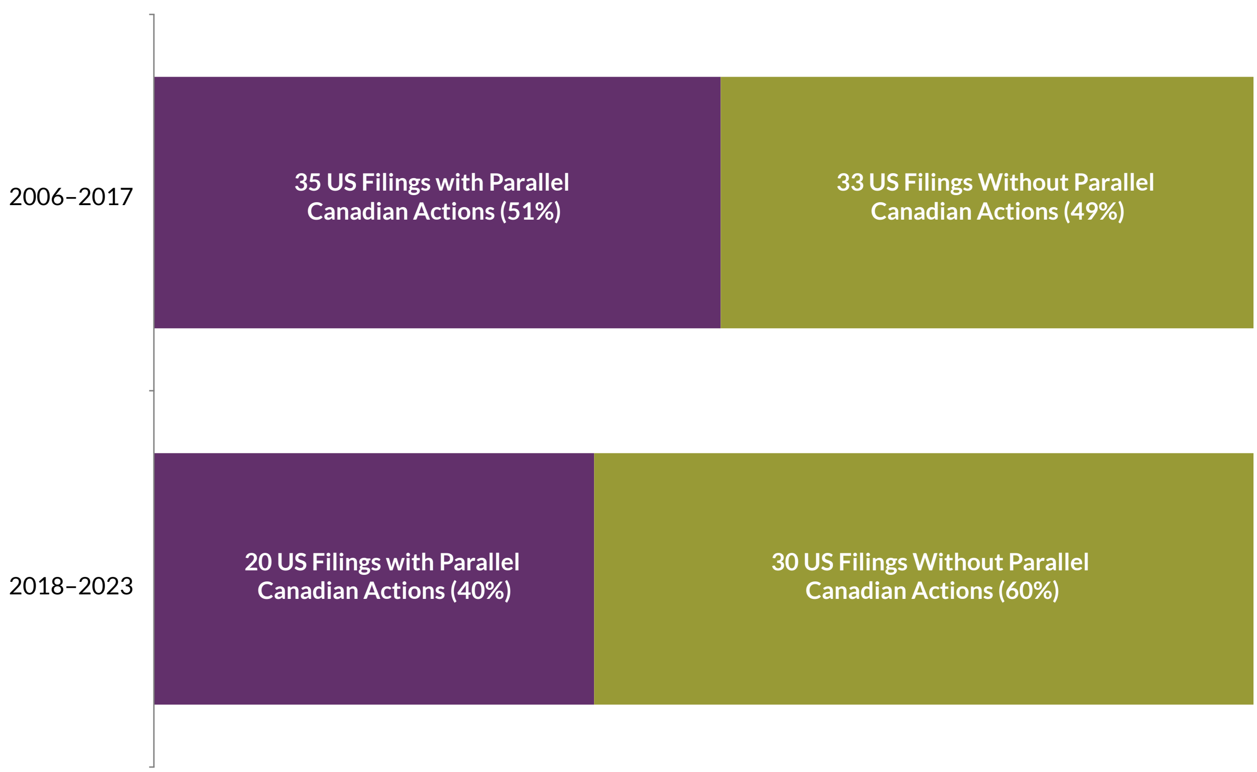
Figure 3. **Filings of Statutory Secondary Market Cases by Industry and Economic Sector**
2006–2012, 2013–2018, and 2019–2023



Cross-Border Cases

- Three of the seven new cases filed in Canada during 2023 also had a parallel US action as of the end of the year. No other Canadian-domiciled companies were named as defendants in US securities class actions filed during 2023.
- In the six-year period from 2018 through 2023, only 40% of the cases filed in the US against Canadian-domiciled companies involved a parallel filing in Canada, down from 51% for cases filed in the preceding 12-year period from 2006 through 2017. While it is possible the proportion of US filings involving Canadian-domiciled companies with parallel filings in Canada may ultimately be higher than 40% if some of the most recent filings eventually have parallel Canadian filings, it now appears less likely that a US filing involving a Canadian-domiciled company will involve a parallel filing in Canada. See Figure 4.

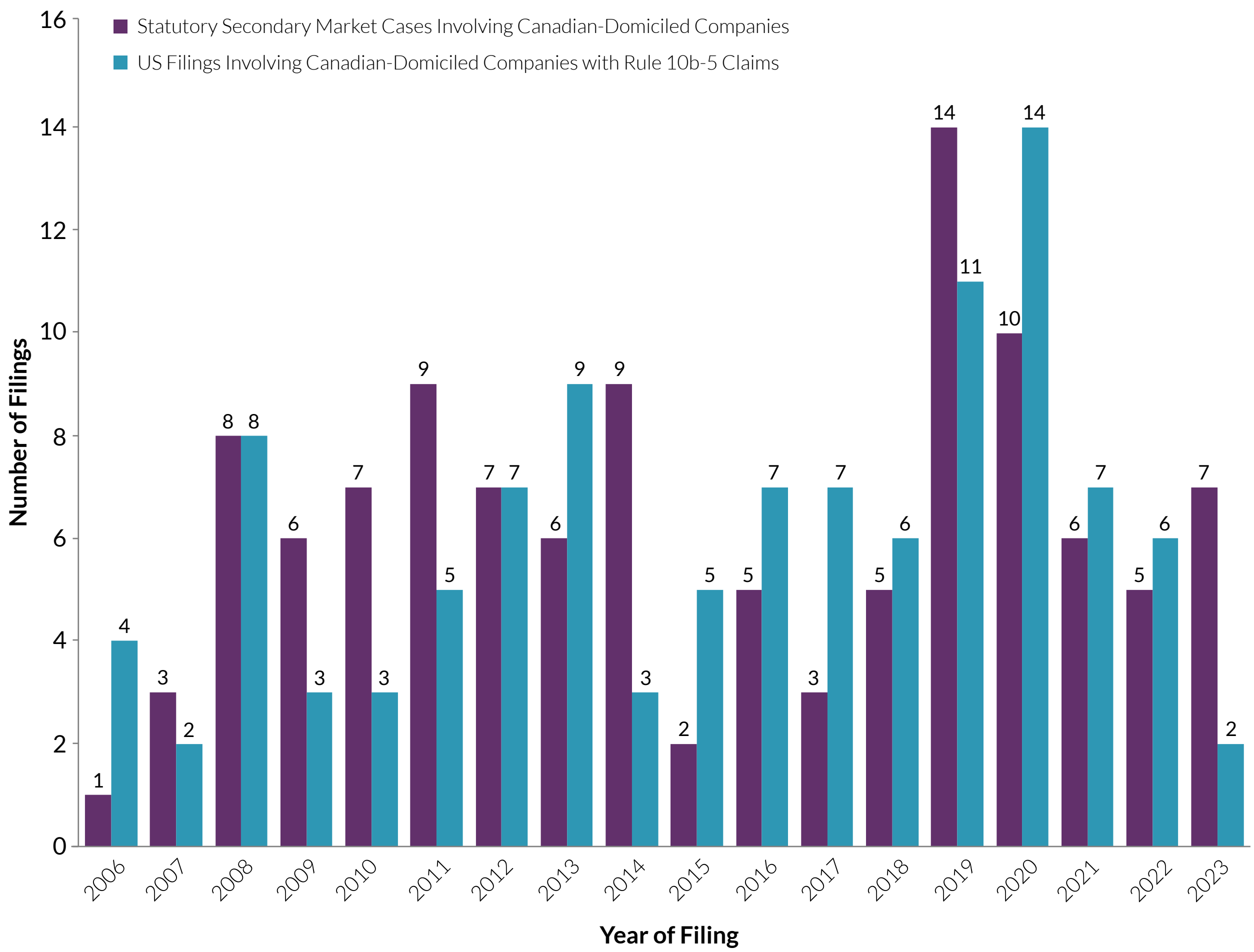
Figure 4. US Filings Involving Canadian-Domiciled Companies With and Without Parallel Canadian Actions
2006–2017 and 2018–2023



Status of US Filings Against Canadian-Domiciled Companies

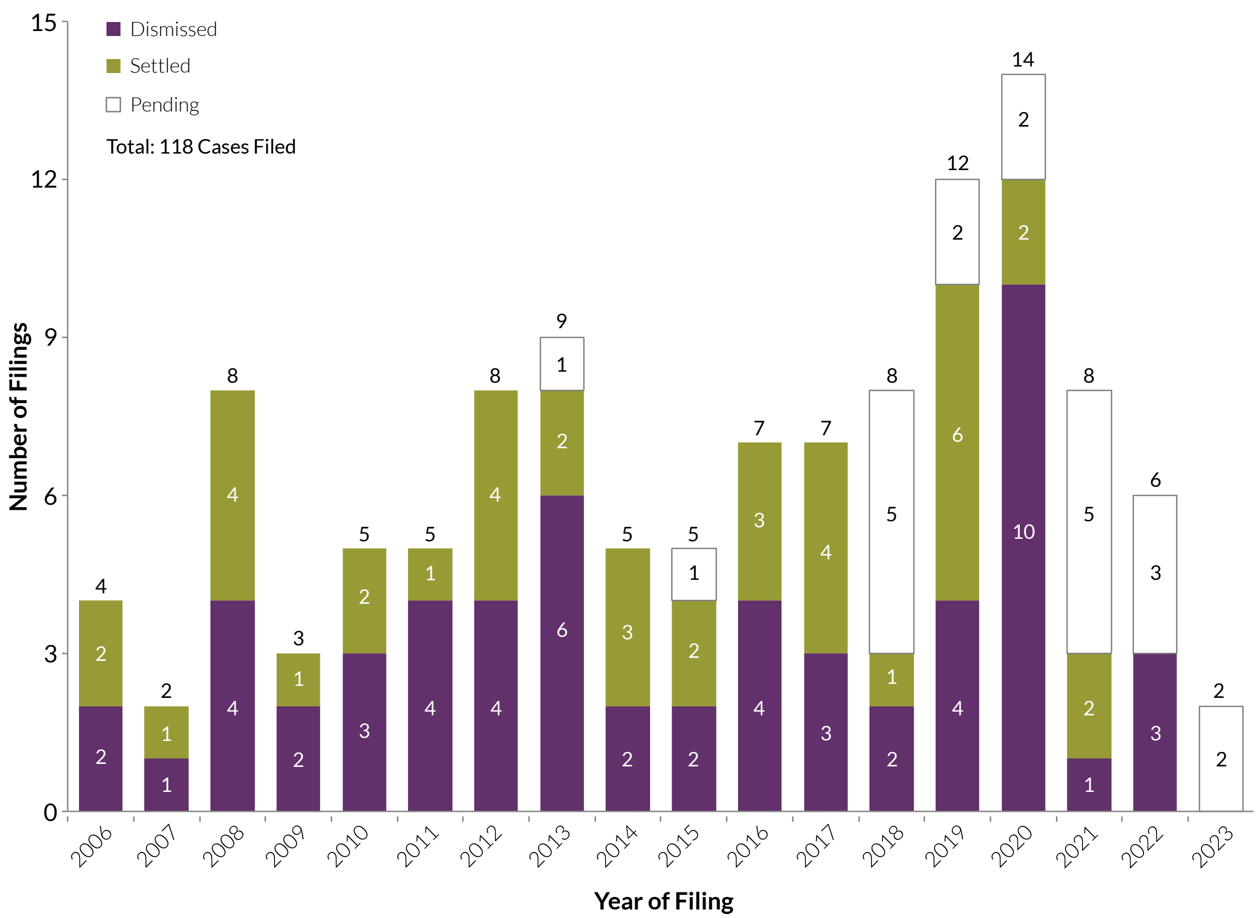
- While the pace of Canadian Statutory Secondary Market cases involving Canadian companies, excluding cases involving foreign issuers, has remained relatively steady over the last three years, the number of US Rule 10b-5 filings (secondary market claims) against Canadian-domiciled companies declined sharply in 2023. In 2023, just two Canadian-domiciled companies were the subject of new US Rule 10b-5 filings, down from a peak of 14 new filings in 2020. See Figure 5.

Figure 5. **Statutory Secondary Market Cases Involving Canadian-Domiciled Companies and US Filings Involving Canadian-Domiciled Companies with Rule 10b-5 Claims**
2006–2023



- Twenty-one of the 118 securities class actions filed in the US against Canadian-domiciled companies between 2006 and 2023 remained active at the end of 2023. All 21 active cases were filed in 2013 or later, and 19 of those cases were filed within the last six years.
- Of these 118 filings, 109 have included claims under US Rule 10b-5.[4]
- Of the 97 filings that had been resolved by the end of 2023, 40 (41%) were settled and 57 (59%) were dismissed.
- The status of all 118 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**
2006–2023

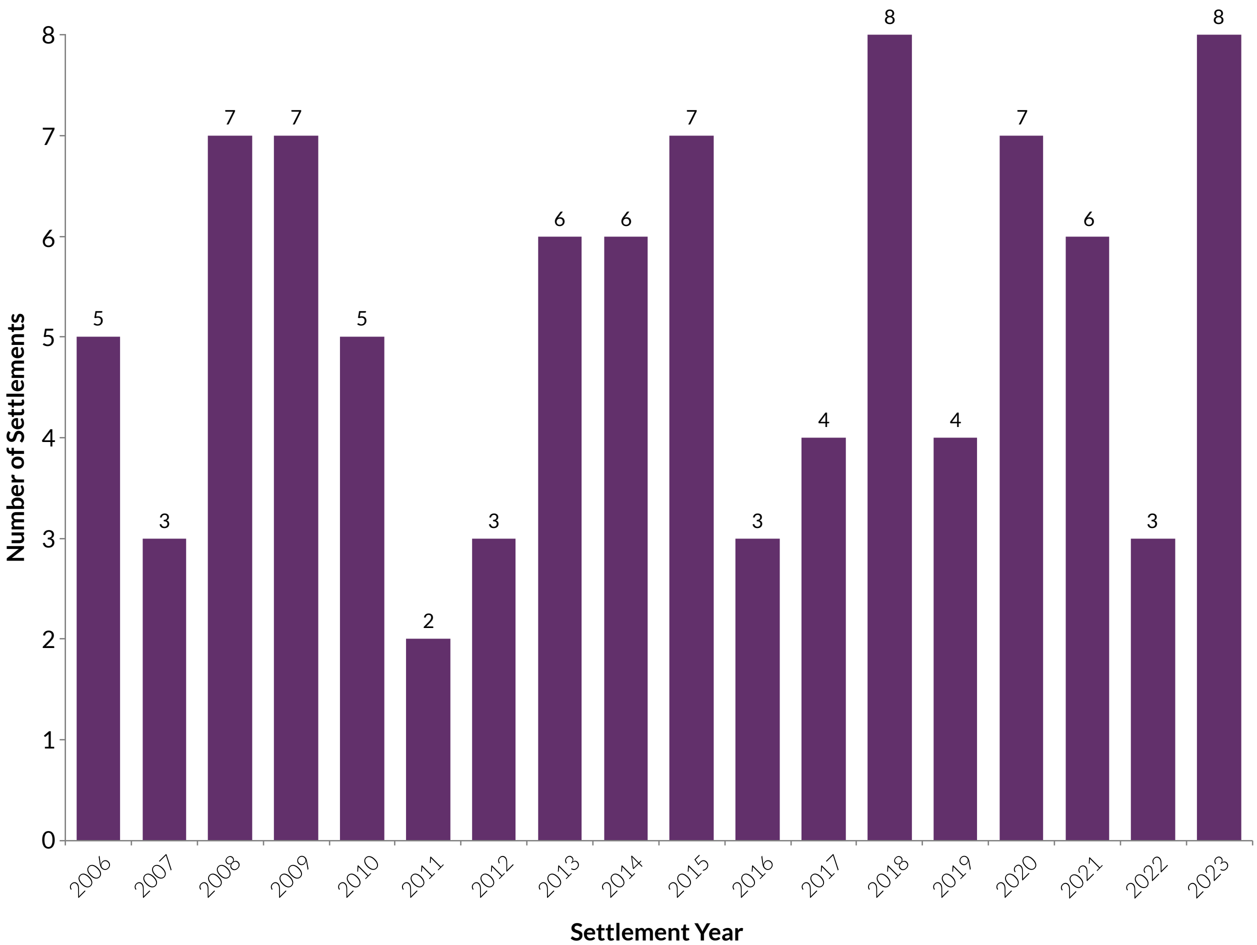


TRENDS IN RESOLUTIONS

Number of Settlements and Median Settlement Amount by Year

- Eight Canadian securities class actions were settled during 2023, an increase over the three settlements in 2022 and six settlements in 2021 and equaling the highest number of settlements in any calendar year. See Figure 7.

Figure 7. **Settlements**
2006–2023

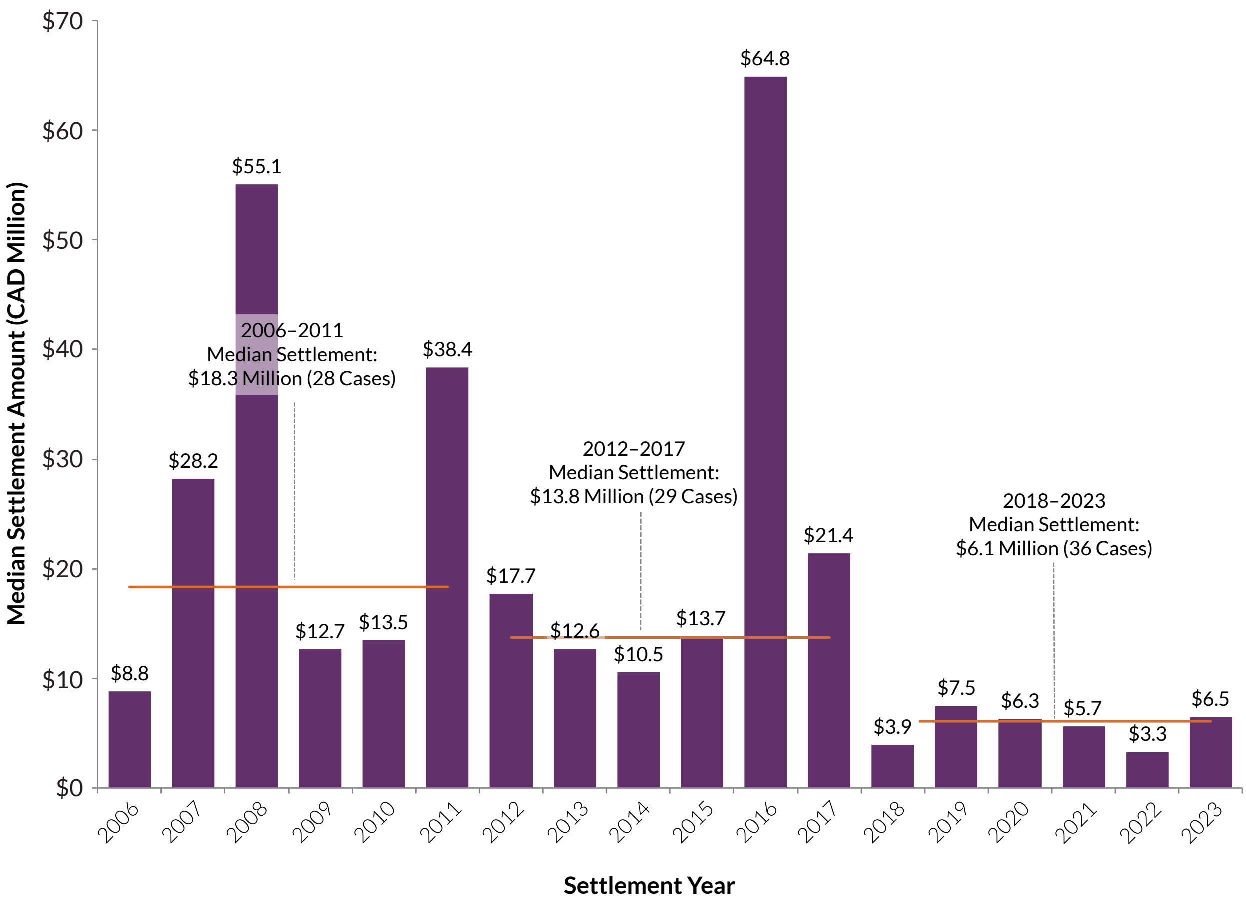


Note: Includes settlements of cases filed in 1997 or later. One of the settlements in 2016 relates to a partial settlement in the case relating to Sino-Forest Corporation. One of the settlements in 2021 relates to a partial settlement in the case relating to CannTrust Holdings Inc.

- Four of the eight settlements in 2023, including the three largest settlements, relate to cases with parallel proceedings in the US involving the following issuers:
    - Tahoe Resources Inc. (settled for US$33 million);
    - Toronto-Dominion Bank (settled for $22 million in the Canadian proceeding in 2023 and for US$13.3 million in the US proceeding in 2019);
    - Northern Dynasty Minerals Ltd (settled for US$8.5 million); and
    - iAnthus Capital Holdings, Inc. (settled for $500,000 in the Canadian proceeding and for US$2.9 million in the US proceeding).[5]
- The other four settlements in 2023 include a $7 million settlement in the case involving Transamerica Life Canada (specifically to resolve tracking error claims relating to the management of the Can-Am Fund) 20 years after the case was first filed and settlements in the cases involving Imperial Metals Corporation (for $6 million), Xebec Adsorption Inc. (for $5 million), and Auxly Cannabis Group Inc. (for $4 million).[6]

- Median settlements over the last six years continue to be lower than in the past (after adjusting for inflation). The median settlement across the 36 settlements reached over the last six years is $6.1 million—56% lower than the median settlement of $13.8 million for the 29 settlements reached during the six-year period from 2012 to 2017 and 67% lower than the median settlement of $18.3 million for the 28 cases settled during the six-year period from 2006 to 2011.[7] See Figure 8.

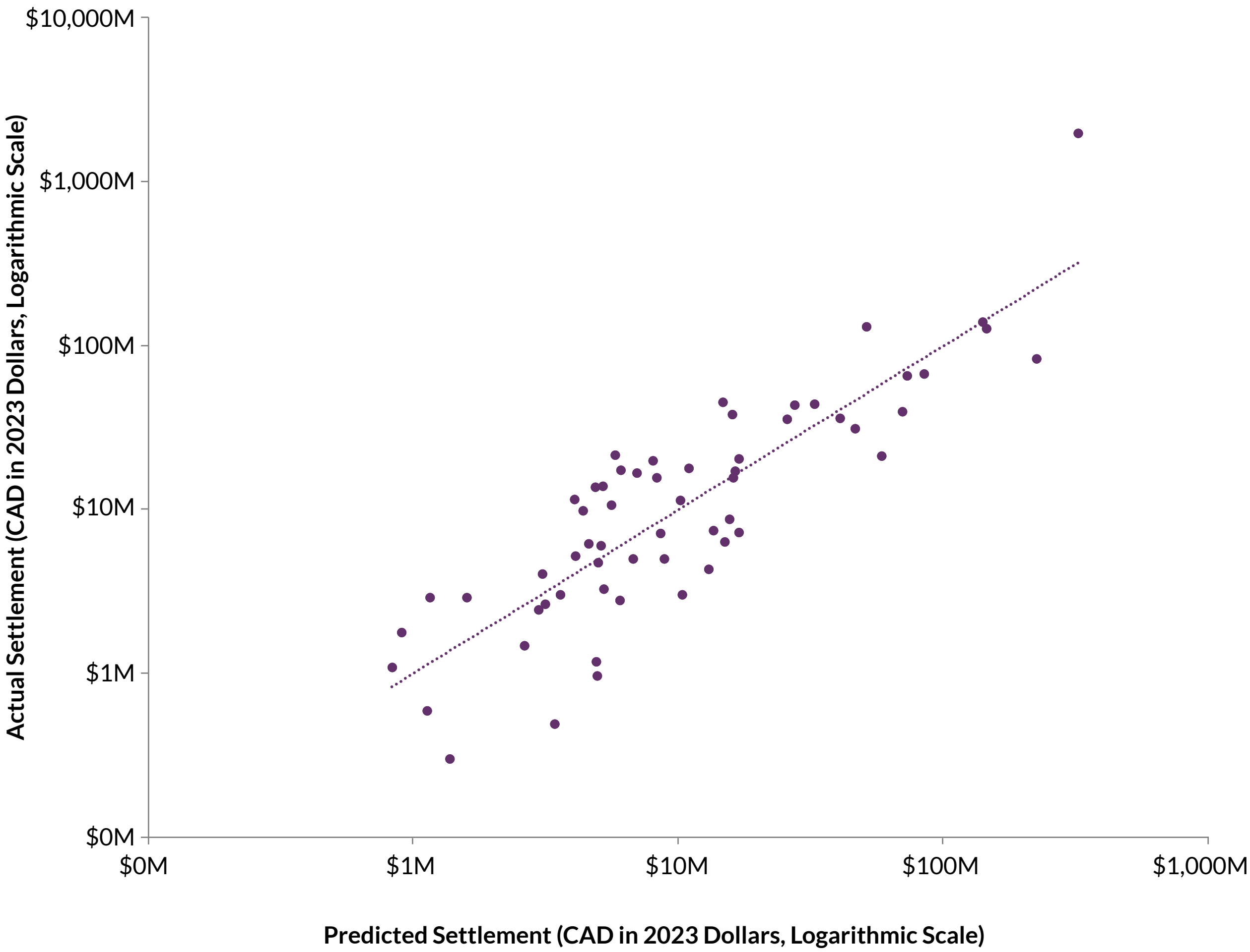
Figure 8. **Median Settlements Amounts**
2006–2023



Note: Based on 91 of 92 cases settled during the period from 2006 to 2023 for which we have information regarding the settlement amount. Settlement amounts have been adjusted for inflation to 2023 dollars. This figure also includes the cumulative partial settlement amounts for the cases involving Sino-Forest Corporation in 2016 and CannTrust Holdings Inc. in 2021, for a total of 91 cases.

- Settlements of Statutory Secondary Market cases are highly correlated with the size of potential investor losses (a NERA-defined scaling factor that compares an estimate of class members' actual aggregate gains or losses during the class period to an estimate of aggregate gains or losses from investing in the S&P/TSX Composite Index over the class period), the market capitalization of the issuer prior to the start of the class period, and the economic sector of the issuer. Our new Canadian predicted settlement model based on these variables explains about 73% of the variation in settlement amounts over the period 2006–2023.[8] See Figure 9.

Figure 9. **Predicted vs. Actual Settlements**
Statutory Secondary Market Cases Settled by 31 December 2023

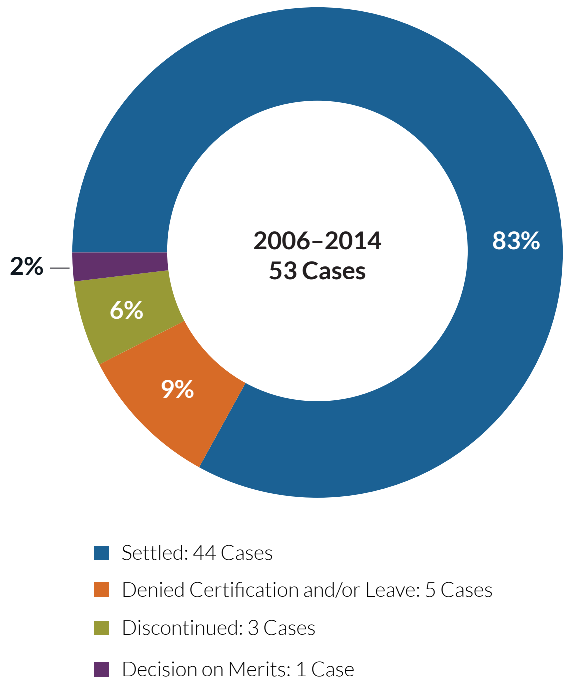


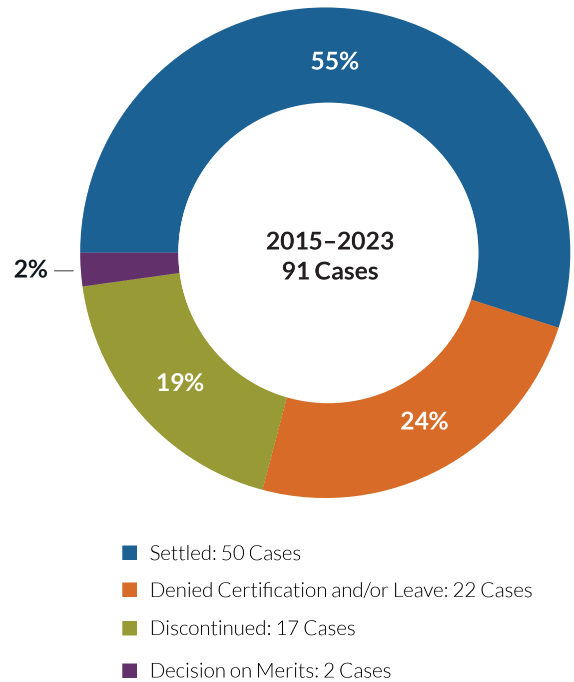
Note: Based on 60 cases with Statutory Secondary Market claims settled during the period from 2006 to 2023 involving allegations of misrepresentations or omissions leading the market price of a security to be inflated for which we have information regarding the settlement amount. Settlement amounts have been adjusted for inflation to 2023 dollars. Excludes partial settlements.

Other Resolutions

- In our 2022 update, we noted the cases involving Alio Gold Inc. and Cronos Group Inc. were remitted to the trial court after successful appeal of prior decisions denying motions for class certification. Following the certification hearings in 2023, both cases were certified.[9]
- We also noted in 2022 that the motion for class certification was denied in the case involving Lundin Mining Corporation. In 2023, leave of the court was granted on appeal and the issue of certification was remitted to the trial court.[10] That decision, which turns on the issue of what constitutes a "material change" under the Ontario Securities Act, has been further appealed to the Supreme Court of Canada.
- In 2023, motions for leave of the court and class certification were denied in a Quebec case involving Hexo Corp.
- Three cases were discontinued during 2023, including the Statutory Secondary Market cases involving Ceridian HCM Holding Inc. and Nuvei Corporation (after a $300,000 partial settlement with the auditor defendant was approved in early 2023) and another case relating to a Horizons ETF.
- Canadian securities class actions are now less likely to be resolved by way of settlement than in the past. From 2006 to 2014, 83% (44 cases) of the 53 cases resolved were settled. In contrast, over the last nine years (2015–2023) only 55% (50 cases) of the 91 cases resolved were settled, while the proportion of resolved cases that have been denied certification and/or leave or were voluntarily discontinued increased to 43% in the 2015 to 2023 period, up from 15% of cases resolved in the 2006 to 2014 period. See Figure 10.

Figure 10. **Resolutions of Canadian Securities Class Actions by Type**
2006–2014 and 2015–2023





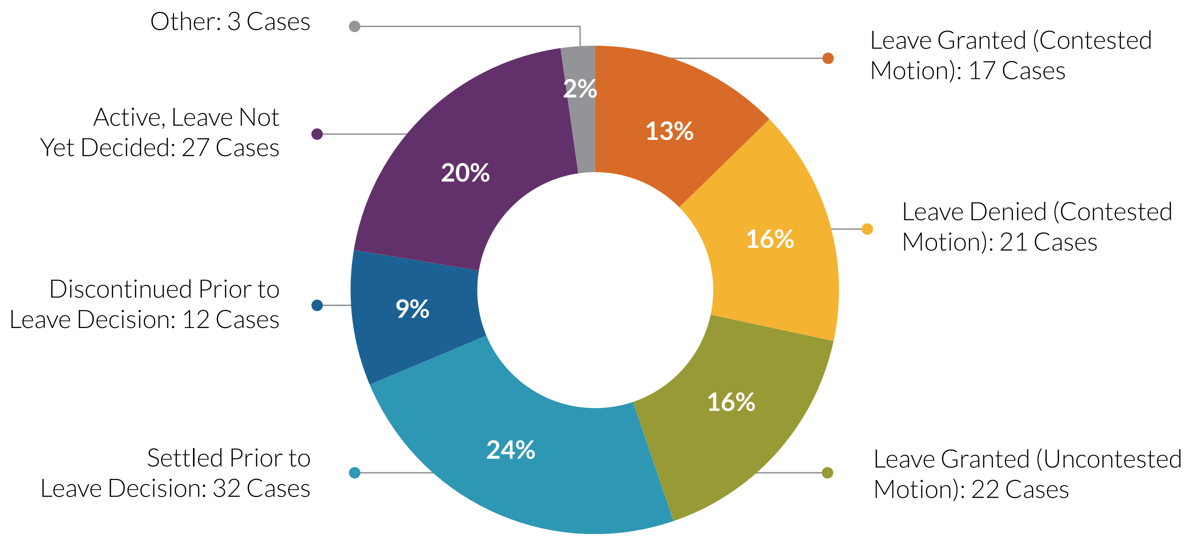
Note: Includes resolution of cases filed in 1997 or later. One of the settlements in 2016 relates to a partial settlement in the case relating to Sino-Forest Corporation. One of the settlements in 2021 relates to a partial settlement in the case relating to CannTrust Holdings Inc.

STATUS OF CASES AT 2023 YEAR-END: LEAVE AND CERTIFICATION

- In addition to the case involving Lundin Mining Corporation for which leave to pursue Statutory Secondary Market claims was granted on appeal as noted above, leave to pursue Statutory Secondary Market claims was granted and the class was certified in the cases involving Kew Media Group Inc. and Just Energy Group Inc. (both on consent of the parties), and class certification was also granted in the cases involving Alio Gold Inc. and Cronos Group Inc.
- Of the 134 Statutory Secondary Market cases filed through the end of 2023, 37 cases remain active. Of these 37 active cases, 10 cases have been granted leave of the court and 27 cases had not yet reached the leave stage of the litigation as of the end of 2023.

- In 38 cases in which the motion for leave has been contested, leave was granted in 17 cases (45%) and denied in 21 cases (55%). In 22 other cases, leave applications were not contested by defendants, with nine of those being cases in which leave was granted for the purpose of settlement. See Figure 11.

Figure 11. **Status of Statutory Secondary Market Cases**
As of 31 December 2023



LOOKING FORWARD

- While the pace of securities class action filings continued to be relatively slow in 2023, that trend might reasonably be expected to reverse following the next period of increased market volatility, as it generally has in the past.

- It will be interesting to observe in the coming years whether we see a continuation or a reversal of the recent decline in the proportion of new cases being filed in Ontario (which appears to be correlated with the 2020 amendments to the Ontario Class Proceedings Act as noted above).

- Cryptocurrency is another area of potential interest going forward. In the US, there have been more than 10 new securities class actions involving cryptocurrency per year since 2020.[11] In contrast, Canada has seen a total of only four securities class action filings relating to cryptocurrency—and none in 2023. Only time will tell whether we see more Canadian filings in this sector in the coming years.

- Finally, it also remains to be seen what effect new or enhanced issuer reporting obligations—such as disclosure requirements relating to environmental, social, and governance (ESG) factors and practices or with respect to cybersecurity incidents—might have on the pace of filings of Canadian securities class actions.

NOTES

1 Bradley A. Heys is a Senior Managing Director, Robert Patton is a Managing Director, and Jielei Mao is a Consultant at NERA. We thank David Tabak for his review of an earlier draft and David Oglivie, Valeria Mireles, and Lucia Wang 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 the paper. All errors and omissions are our own.

2 The NERA Canadian Securities Class Action Database includes information relating to 210 securities class action cases filed in Canada since 1997. In counting the number of cases filed, NERA treats filings in multiple provinces relating to the same or similar allegations as a single case. This paper also draws on NERA's proprietary US Securities Class Action Database. All dollar figures are in Canadian dollars unless otherwise specified.

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 109 filings that include claims under US Rule 10b-5, seven also include claims under Section 11 of the Securities Act of 1933. Of the other nine of the 118 filings that do not include claims under US Rule 10b-5, eight 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 After the settlement approval hearing in February 2024, the court released its decision to not approve the $500,000 settlement. *Kwong v. iAnthus Capital Holdings Inc.*, 2024 ONSC 1311.

6 Transamerica Life Canada is now known as ivari. Another component of this case involving claims of management fee overcharge settled in 2009.

7 The settlement amount is not available for one settlement reached in the 2006–2011 period. The cumulative partial settlement amount to date for the case involving Sino-Forest Corporation is included in 2016 and for the case involving CannTrust Holdings Inc. is included in 2021.

8 In particular, and as depicted in Figure 9, the model explains about 73% of the variation in the natural log of settlement amounts.

9 *0116064 B.C. Ltd. v Alio Gold Inc.*, 2023 BCSC 1310. *Badesha v. Cronos Group, Inc.*, 2023 ONSC 5678.

10 *Markowich v. Lundin Mining Corporation*, 2023 ONCA 359.

11 "Recent Trends in Securities Class Action Litigation: 2023 Full-Year Review," NERA, 23 January 2024, Figure 9, available at https://www.nera.com/insights/publications/2024/recent-trends-in-securities-class-action-litigation--2023-full-y.html.

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