

Litigation

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Court of Appeal Limits Ontario Jurisdiction Over Securities Class Actions Involving Foreign Issuers

The Ontario Court of Appeal has placed an important limitation on securities class actions in Ontario. In *Kaynes v. BP*, the Court ruled that Ontario is not the preferred jurisdiction for secondary market liability class actions involving securities purchased on foreign stock exchanges, notwithstanding where the holders of these securities reside. The decision aligns Ontario practice with that of the U.S. and U.K., where the courts' jurisdiction is limited by statute to cases where the securities at issue are purchased on domestic exchanges. The result is that secondary market liability class actions in Ontario will be limited to cases where the claimants purchased their securities in Canada.

Background

Kaynes is an appeal from a decision of Justice Conway of the Ontario Superior Court of Justice, who dismissed a motion by the defendant company BP, plc for an order staying the proposed class action. BP argued that Ontario courts did not have jurisdiction over the claims of proposed class members, including the representative plaintiff, who purchased their securities on foreign stock exchanges. BP also argued that Ontario was not the appropriate forum for the proceeding.

The plaintiff's proposed class action relates to various alleged misrepresentations in documents BP provided to investors before and after the April 2010 Deepwater Horizon oil spill in the Gulf of Mexico. The claim asserts the statutory cause of action for secondary market liability established by Part XXIII.1 of the Ontario *Securities Act*. The proposed class includes all residents of Canada who acquired BP securities

between May 2007 and May 2010, regardless of where those securities were purchased.

Justice Conway dismissed BP's motion for a stay, recognizing that Ontario courts had jurisdiction to hear the claim. BP then appealed this decision to the Ontario Court of Appeal.

Ontario Court of Appeal Decision

The Ontario Court of Appeal upheld Justice Conway's finding of a sufficient connection between the statutory cause of action and Ontario. Although BP shares did not trade on any Canadian stock exchanges, BP was required by law to provide shareholders resident in Canada with the documents containing the alleged representations. The release of these documents to Ontario shareholders was deemed to be an act sufficiently connected to Ontario to provide Ontario courts with jurisdiction.

However, the Court of Appeal identified errors of law in Justice Conway's finding that Ontario was the appropriate forum in which to adjudicate the claims of Canadian shareholders. In arriving at its decision that Ontario is a *forum non conveniens*, the Court held that:

1. Courts have discretion to decline jurisdiction when another forum has a more appropriate connection to the action. This is based on the principle of comity and respect for the courts and legal systems of other countries. Although there is no exhaustive list of factors to be considered, this discretion should only be exercised to ensure fairness to the parties and the efficient resolution of the dispute.
2. The U.S. has a well-established statutory regime governing class actions which confers jurisdiction on U.S. courts only when the securities transaction at issue took place on a U.S. stock exchange. The U.K. statutory cause of action for secondary market liability is similarly only available to those claimants who purchased securities on certain designated markets in the European Union.

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3. A claim for secondary market liability must be considered in the full international context of the securities law regimes of the relevant countries. Asserting Ontario jurisdiction over claims resulting from securities issued on foreign exchanges would be inconsistent with both U.S. and U.K. law.
4. The prevailing international standard tying jurisdiction to the place where the securities were traded ensures order and fairness and avoids a multiplicity of proceedings involving the same claims.

The Court of Appeal concluded that BP had demonstrated that the U.S. was clearly a more appropriate forum to adjudicate the claims involving securities purchased outside of Canada. The Court of Appeal therefore stayed the plaintiff's claim and granted leave to amend the pleadings in the class action to include only those claimants who purchased shares on a Canadian stock exchange.

Key Points for Canadian Companies

Based on *Kaynes*, investors should expect that claims for secondary market liability must be pursued in the jurisdiction where the relevant securities were purchased and not where the holders of the securities reside. The decision aligns Ontario law with that of the U.S. and U.K. and promotes the principle of comity in securities class actions. Accordingly, it is unlikely that Ontario will be an appropriate venue for a class action when the defendant company does not list its shares on the TSX or another comparable Canadian stock exchange.

For further information on securities class actions or the *Kaynes* decision, please contact any member of our Litigation Law Group.