

Securities Class Actions in Canada: 10 Years Later

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Agenda

1. Brief overview of securities law in Canada
2. The study
3. 6 key trends from 10 years of secondary market securities class actions
4. Conclusion



Brief overview of securities law in Canada: A decade to secondary market civil liability

94% of capital market trading occurs in the secondary market

A statutory civil liability regime wasn't introduced until 2005.
Until then investors could only rely on common law remedies – this meant proving
actual detrimental reliance.

It took 10 years to put the legislation in place

Debate to achieve the appropriate balance: deterrence vs. compensation.
In the end, a deterrence model was preferred.



What are some unique aspects of the 2005 regime?

- Investors are not required to prove detrimental reliance
- Lower burden of proof: Strict liability for misrepresentation in “core documents”
- Damages are capped at the greater of \$1 M or 5% of the company’s market capitalization
- To discourage strike suits, plaintiffs must obtain leave to commence a statutory action



The study





Key trends from 10 years of secondary market securities class actions

Defendants

1. Courts have played a key role in interpreting procedural provisions, including the leave threshold and the limitation period
2. Disproportionately high percentage of mining companies targeted
3. Gatekeepers were rarely, if ever, named as defendants
4. Not a single case has been heard on its merits, but 46% have settled
5. While retail investors are more likely to start an action, institutional investors obtain settlements ~3X higher (\$29M vs. \$10M)



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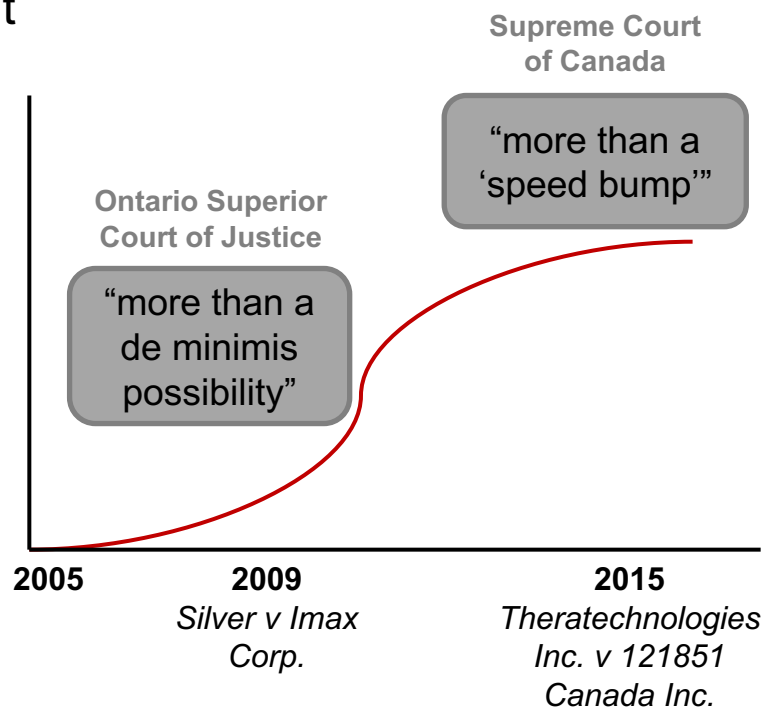
Defendants



1. Courts have played a key role: leave requirement

Leave Requirement:

- A plaintiff is required to establish that:
 - i. The action is brought in good faith; and
 - ii. There is a reasonable possibility of success
- Courts have gradually raised the bar for plaintiffs to obtain leave under the second requirement





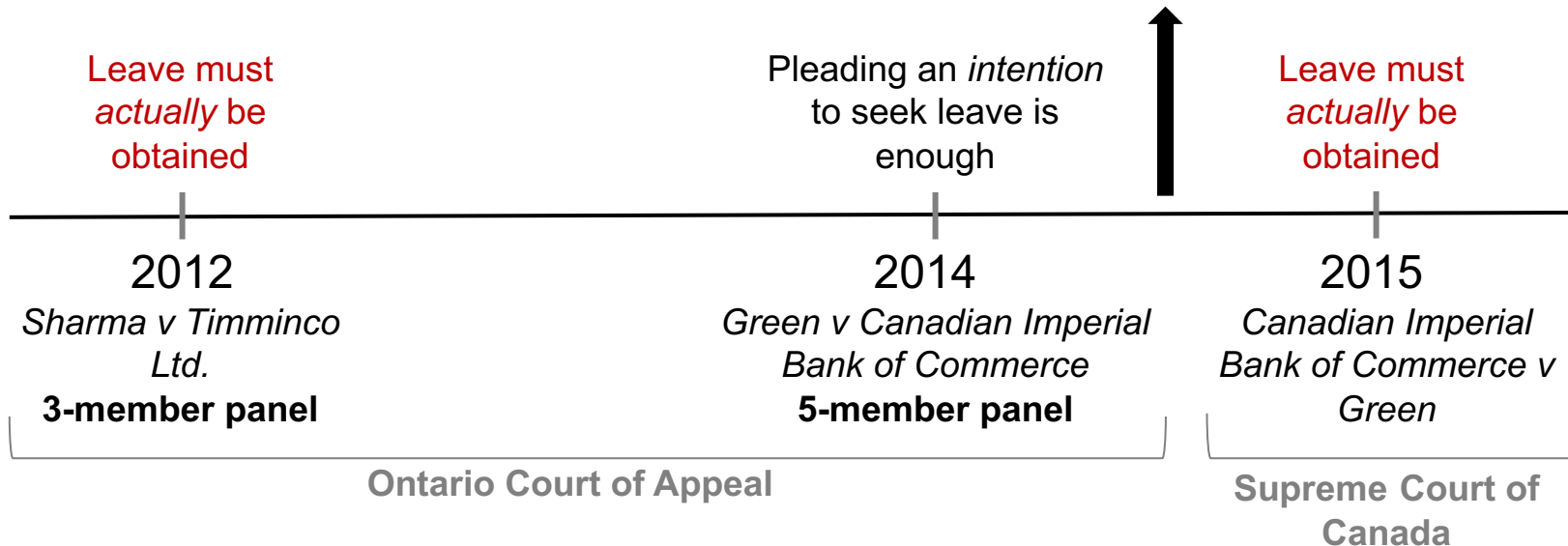
1. Courts have played a key role: limitation period

- Under the 2005 regime, actions must be commenced within:
 - **3 years** after the misrepresentation; and
 - **6 months** after leave is obtained
- As per the *Class Proceedings Act*, commencing a class action suspends the relevant limitation period
- Judges have debated what suspends the limitation period:
 - Pleading an *intention* to seek leave; or
 - *Actually* obtaining leave
- This has created uncertainty in the application of limitation periods



1. Courts have played a key role: limitation period

The Ontario legislature amended its legislation to expressly state that filing a notice of motion for leave suspends the limitation period. Alberta, Manitoba, New Brunswick, and Nova Scotia have made similar amendments.



Plaintiffs will be more likely to start actions in the 5 provinces that have amended the limitation period provisions, rush their leave applications, or discouraged altogether in more complex cases.



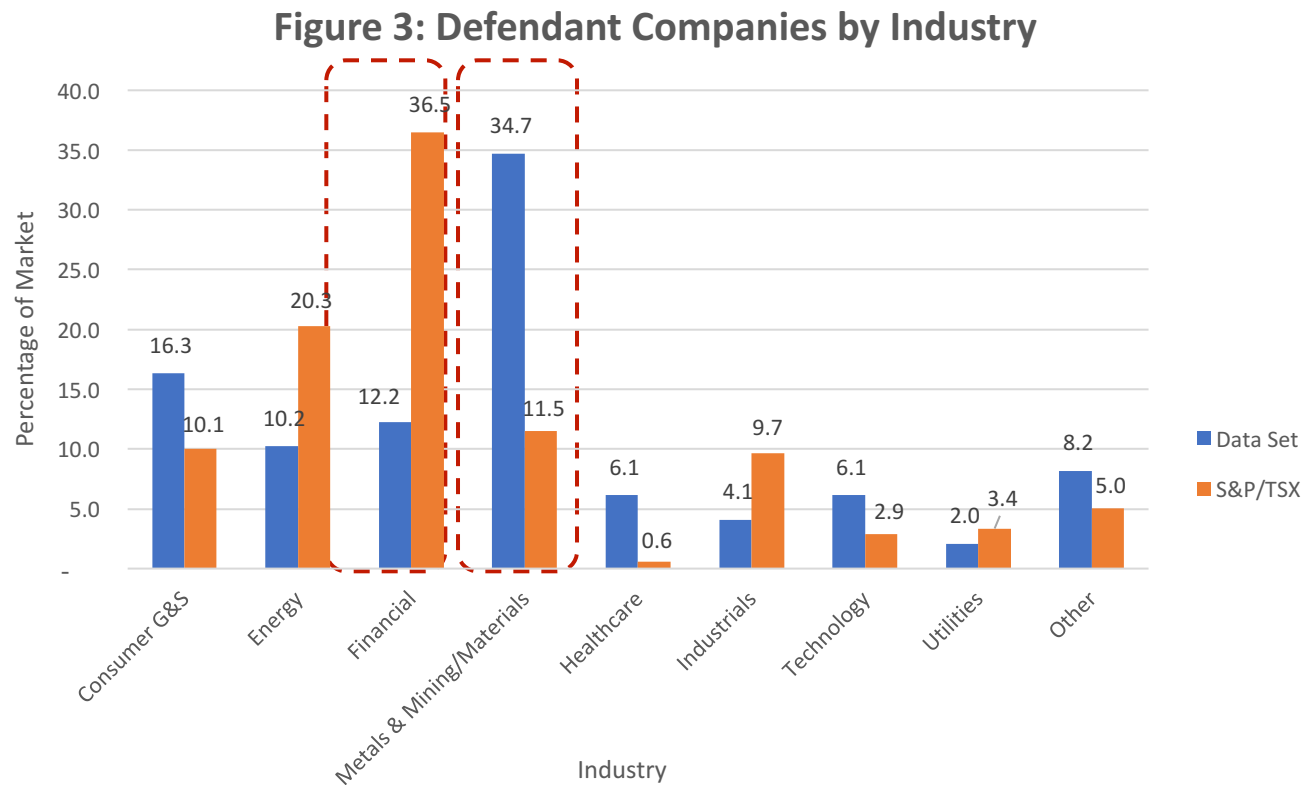
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2. Mining companies represent a disproportionately high percentage of defendants

Mining companies represent 35% of defendants, but only 12% of the S&P/TSX Composite Index





3. Gatekeepers were rarely, if ever, named as defendants

Under the 2005 regime, experts are not liable unless an expert report, opinion, or statement contains the misrepresentation, and it is quoted or summarized with the expert's consent

In 70 of the 74 cases (95%), companies and/or their officers & directors were named as defendants

Company's Gatekeepers

Lawyers
0 cases
0%

Underwriters
7 cases
9%

Auditors
13 cases
18%



In 2016, LPB Holdings v Allied Nevada Gold Corp. held that underwriters are not "experts" under the secondary market statutory regime



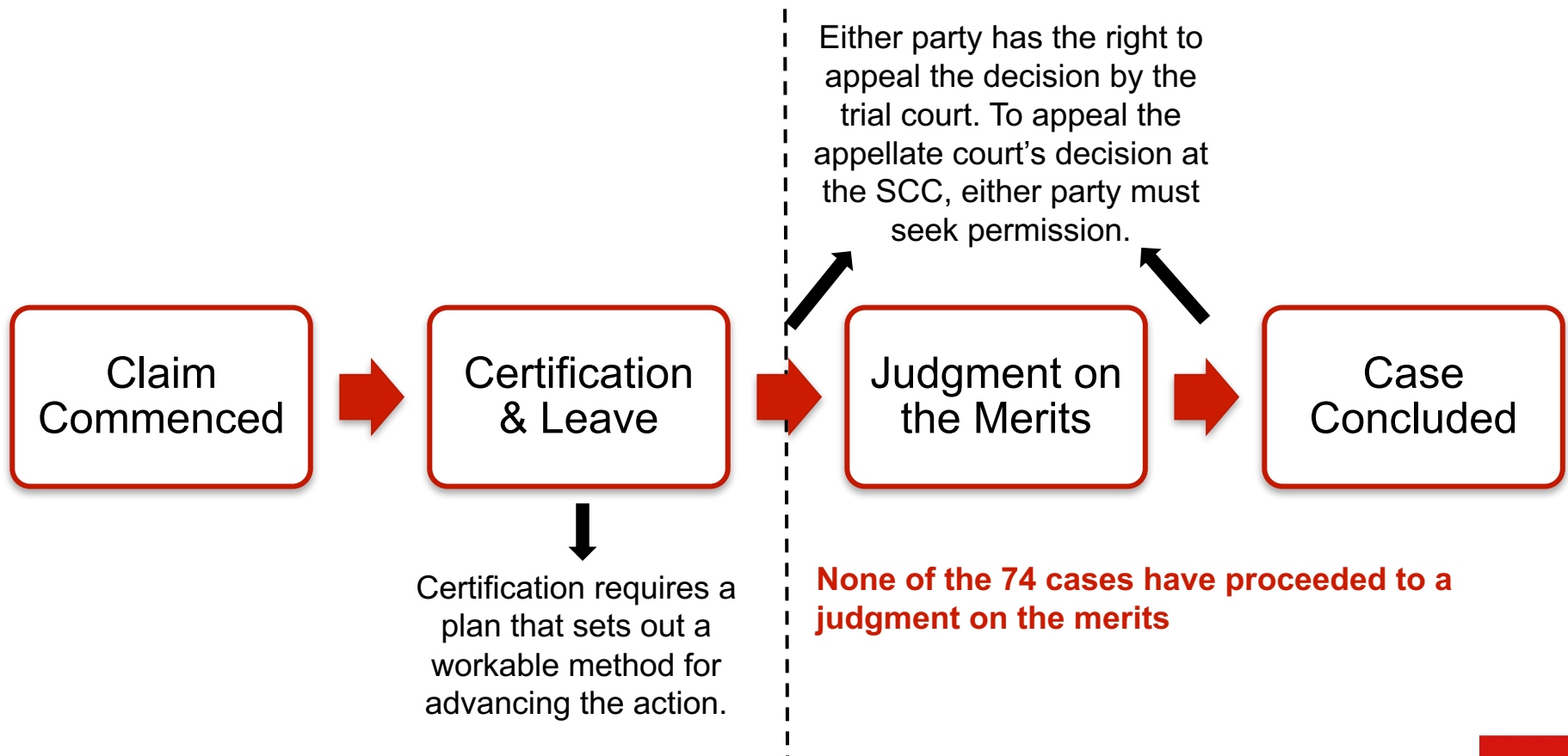
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4. Onerous certification and leave requirements build an early barrier

Progression of Action



Average time to settlement or case dismissal ~3 years

4. Parties seem to be incentivized to reach early settlements

58% of cases were settled, dismissed, or time barred
Settlements ranged from \$105K to \$166M (median \$12M)

59% of cases ongoing

Only 1 case dismissed



68% of the cases that settled were only certified for the purpose of settlement



What are the different pressures for plaintiffs and defendants to settle early?



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5. Retail investors are more likely to be representative plaintiffs

Retail Investors

- X Do not have the resources or expertise to pursue litigation
- ✓ New regime has made it easier to bring forth a class proceeding
- ✓ Contingency fee arrangements and third-party litigation financing available

Institutional Investors

- ✓ More sophisticated, better informed, and have more resources
- X Often face conflicts of interest in acting as representative plaintiffs
- X May not be inclined to divert resources away from core business of investing

Plaintiff's counsel plays a key role and will actively search for a representative plaintiff.
It may be relatively easier to find a retail investor.

5. However, institutional investors reach settlements nearly 3X more

Retail Investors

Average
Settlement:
\$10M

Institutional Investors

Average
Settlement:
\$29M

While the type of investor does not influence whether a settlement is obtained, cases led by institutional investors tend to result in 3X the settlement value.



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Conclusion: While the 2005 regime has eliminated several barriers for investors, there is room for further refinement

1. Given that the caps on damages were determined a decade ago, do they need to be adjusted to accurately reflect today's market?
2. Has the leave requirement gone too far? Should courts lower the bar for plaintiffs to obtain leave?

Thank You. Questions?