

## Focus BUSINESS LAW

# Long arm of the misrepresentation tort

A pair of class action rulings set out jurisdiction parameters for Canadian plaintiffs



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Recent decisions of the Supreme Court of Canada and the Court of Appeal for Ontario have provided guidance to the class actions bar on who is a proper representative plaintiff and on behalf of whom a class proceeding may be brought.

In August, the Court of Appeal released its much anticipated decision in *Kaynes v. BP* [2014] O.J. No. 3731, an appeal from Justice Barbara Conway's dismissal of BP's jurisdictional challenge to a proposed class proceeding in Ontario. At issue was the application of Ontario's secondary-market misrepresentation provisions of the *Securities Act* to trades made on foreign exchanges by Canadian residents. The court affirmed that the Ontario courts do have jurisdiction over Canadian purchasers on foreign exchanges, but allowed the appeal on the basis that Ontario was not the appropriate forum.

The Court of Appeal's decision continued its move towards making misrepresentation a long-armed tort, while limiting jurisdiction in cases where entrepreneurial class proceedings interfere with considerations of comity with foreign jurisdictions.

The action arose out of the April 2010 BP oil spill in the Gulf of Mexico. The plaintiff commenced an action on behalf of residents of Canada who acquired BP shares or other securities between May 2007 and May 2010. A class action in the United States District Court for the Southern District of Texas was commenced on behalf of purchasers on the New York Stock Exchange. The Ontario action purported to capture Canadian purchasers on the NYSE who opted out of the Texas proceedings.

The representative plaintiff in Ontario purchased his securities of BP on the NYSE. BP was at all times a U.K. company headquartered in England and its shares traded on the NYSE and the London Stock Exchange. BP's securities were also traded on the Toronto Stock Exchange until January 2009, when BP ceased to be a reporting issuer in Ontario and its shares were delisted from the TSX, on the condition that it undertake to send relevant



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investor documents to shareholders in Canada.

BP conceded that the Ontario court had jurisdiction over claims by Canadian residents who purchased securities on the TSX. However, it argued that the Ontario court had no jurisdiction over purchasers on foreign exchanges, even if resident in Canada.

The Court of Appeal affirmed the lower court's ruling that Ontario did have jurisdiction *simpliciter* over the statutory cause of action for secondary-market misrepresentation involving Canadians who purchased shares on foreign exchanges. It did so by applying the criteria in *Club Resorts Ltd. v. Van Breda* [2012] S.C.J. No. 17, which sets out four presumptive criteria for establishing a real and substantial connection to the forum. The Court of Appeal applied jurisprudence suggesting that misrepresentation torts can be committed where the information is received (or presented) and relied upon. Accordingly, it found that the tort was committed in Canada when BP sent documents to Canadian investors: "In my view, the legislature could not have intended that a foreign corporation such as BP could avoid the reach of Ontario's securities regime simply because the initial point of release [of documents containing the alleged misrepresentation] was outside Ontario," Justice Robert J. Sharpe held.

Having found jurisdiction *simpliciter*, the court went to find that the Ontario court should nonetheless decline jurisdiction on the basis of *forum non conveniens*.

The court applied the concept of comity from *Van Breda* — that the court should adopt an atti-

tude of respect and deference to other states. It noted the exclusive jurisdiction asserted by the U.S. and U.K. in secondary-market liability legislation in respect of trades on its exchanges. The court also remarked that the overwhelming majority of Canadians who acquired BP equity shares did so on foreign exchanges, and not on the TSX.

In those circumstances, the court agreed with BP's submission that allowing the plaintiff to use

negligible trading on the TSX to ground the action was "opportunistic and a classic example of the tail wagging the dog." The court also held that Canadians trading on foreign exchanges should reasonably expect that any legal claims arising therefrom might properly be litigated elsewhere.

The court has evidenced a desire to close the door on "entrepreneurial" class counsel in circumstances involving trading on foreign exchanges, particularly

where proceedings have already been commenced in jurisdictions with closer ties to the issuer company and/or the trading activity.

At the same time, in affirming that it will take an expansive view of jurisdiction *simpliciter* where the recipient of a misrepresentation is resident in Canada, the court has left open the door to proceedings where the same considerations of comity are not triggered.

Although a particular factual matrix was at play in the *Kaynes* decision, it provides broader guidance to the plaintiff and defence class action bar at a time when national and global class action proceedings are being brought with greater frequency, and shows that the Ontario courts are prepared to make tough decisions that affect the rights of the Canadian investing public.

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## Lawyer faces suspension for Photoshop follies

A phony brush with greatness has landed a Los Angeles lawyer in trouble she can't Photoshop her way out of. Svitlana Sangary faces a possible suspension, reports latimes.com, because more than 50 photos of her beaming beside celebrities including U.S. president Barack Obama, Dr. Phil, George Clooney and Kim Kardashian posted on her website proved to be false. Judge Donald Miles of the State Bar Court of California said in his decision that Sangary failed to remove the images after being warned they were false advertising, disregarded the disciplinary process and responded to the charges with a 16-page soliloquy that had little or nothing to do with the case. He recommended a six-month suspension. In her defence, Sangary said she was photographed with "talented and successful people" at charity and political events, but experts testified that "many, and perhaps all" of the photos were doctored "to make it appear as though [Sangary] was in the presence of a celebrity." In some cases it appeared she even used the same picture of herself. The California Supreme Court will decide on the recommendation. —STAFF