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5-Year Retrospective: Securities Litigation

Over the past five years, the Commercial List has clarified important points for issuers, underwriters, and securities lawyers to keep in mind in all kinds of securities litigation and regulatory proceedings.

- When the Ontario Securities Commission (OSC) can have a receiver appointed and with what powers
- Underwriters' indemnity rights against the issuers with whom they work
- How securities class actions can proceed against insolvent issuers

Receiverships Under the *Securities Act*

When Can the OSC Have a Receiver Appointed?

In 2025, the Commercial List clarified what the OSC needs to prove to have a receiver appointed under section 129 of the *Securities Act*: does it need to show a "strong *prima facie* case" or only that it has "serious concerns of a breach of the *Securities Act*"? The Commercial List had applied the "serious concern" standard in 2023 in *Ontario Securities Commission v Traders Global Group Inc*, but the issue came up again for decision in 2025.

In *Ontario Securities Commission v Cacoeli Asset Management* , the issuer contended for the "strong *prima facie* case" standard. Justice Steele agreed with the OSC that it needs to show only "serious concerns of a breach of the *Securities Act*" for the Court to act under section 129 to appoint a receiver. The Court of Appeal agreed.

Both courts stressed that a receivership is a tool the OSC can use during an ongoing investigation to understand an issuer's circumstances before all the facts are fully known. Imposing too high a standard to appoint a receiver, they explained, would hinder that ability and undermine the OSC's role in protecting the public.

When Can an OSC Receiver Access Privileged Material?

Ontario Securities Commission v Go-To Developments Holdings Inc addressed when a receiver appointed under the *Securities Act* may access privileged communications of the company subject to receivership. The company's principal

objected to the receiver obtaining over 11,000 emails he had exchanged while working for the company, some of which the company's counsel held.

Justice Steele held that the terms of the order appointing the receiver governed. The order appointed the receiver in part to investigate the company's dealings, including with a company called ASD, and to protect investors. As the emails in question were exchanged with a representative of ASD, the receiver had the power to waive privilege over the emails. The Court emphasized that the added investigatory aspect of a receivership sought by the OSC differentiated it from a receivership in the insolvency context.

When Issuers May Have to Fund Their Underwriters' Defence of Claims

In *Securities Act* primary market class actions, both issuers and underwriters are often targets.

Typically, underwriting agreements between the issuer and its underwriters will require the issuer to indemnify its underwriters against liability and the costs of defending such a lawsuit.

In *Clarus Securities Inc v Aphria Inc*, the Court considered whether the issuer had to indemnify its underwriters for the cost of defending a class action where both were named defendants. Justice Dunphy held that common indemnity language in an underwriting agreement requires an issuer to advance funds to underwriters for the cost of defending claims, even where those claims allege intentional wrongdoing by the underwriters.

The exclusion in the agreement for losses caused by "the negligence, willful misconduct, or fraud" of the underwriters applied only after a final judgment determined the underwriters had committed one of those wrongs. Unless or until a final judgment was rendered, the issuer was obligated to advance funds for the indemnification of the underwriters.

Clarus is a reminder for issuers (and underwriters) to keep up to date with judicial interpretations of underwriting agreement language and to update that language accordingly.

How *Securities Act* Class Actions May Proceed Against Insolvent Issuers

Litigation against Kew Media involved managing a misrepresentation class action under the *Securities Act* where the issuer company was in receivership proceedings.

While the Commercial List was managing only the receivership proceedings and not the proposed securities class action, it had to consider whether it should lift the stay of proceedings that

ordinarily applied to a company in receivership to permit the proposed class action to proceed.

Justice McEwen lifted the stay against Kew Media on an unopposed motion for the limited purpose of allowing the securities class action to proceed and enabling the plaintiff class to advance its claims against Kew Media. However, the lift stay order restricted the plaintiff class to enforcing any judgment obtained only against Kew Media's insurers and the defendants, not the issuer itself. The Court certified the class action in 2023.

The Commercial List continues to address important issues for participants in the capital markets and their counsel, both before litigation or regulatory proceedings start and when they are ongoing. Issuers, underwriters, and all those involved in securities proceedings should keep up to date with the Court's guidance.

Read our Commercial List Year in Review: 5-Year Retrospective for more.