

Ontario Court of Appeal lifts stay in cross-border class action

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[Introduction](#)

[Background](#)

[Canadian action stayed](#)

[US proceedings](#)

[Court of appeal decision](#)

[Comment](#)

Introduction

The Ontario Court of Appeal recently lifted a stay of a class proceeding. In *Kaynes v BP*(**1**) the plaintiff sought damages for alleged misrepresentations made to shareholders by BP. The alleged misrepresentations centred on the 2010 Deepwater Horizon oil spill.

Class actions were commenced in Canada and the United States, which led the court of appeal to grant the order to stay proceedings at first instance and find Ontario to be *forum non conveniens*. The court was forced to revisit the stay due to developments in the US proceedings.

Background

The proposed representative plaintiff in the Canadian proceeding purchased his BP securities on the New York Stock Exchange (NYSE). The plaintiff alleged that BP misrepresented its operational and safety programmes in its public disclosure prior to the Deepwater Horizon oil spill. The plaintiff contended that the explosion and spill constituted "corrective disclosure" and revealed the deficiencies in the earlier disclosure. The plaintiff further maintained that BP misrepresented its clean-up efforts following the spill.

Canadian action stayed

BP brought a motion to stay the action on the grounds of *forum non conveniens*, which was granted on appeal. (**2**) The court of appeal concluded that while Ontario has jurisdiction to hear claims relating to securities purchased on the NYSE and other foreign exchanges, BP had shown Ontario to be an inconvenient forum. The basis for this conclusion was the existence of the US class action and the fact that the US Securities and Exchange Act, 1934, asserted exclusive jurisdiction over claims such as those brought by the plaintiff. The US action and the assertion of exclusive jurisdiction pursuant to the US Securities and Exchange Act were enough to convince the court of appeal to stay the action on the grounds of *forum non conveniens*, despite jurisdiction not otherwise being an issue.

US proceedings

In the US district court, BP accepted the plaintiff's position that the action was based on Ontario law, and as such the US Securities and Exchange Act did not provide for jurisdiction. The district court dismissed the class proceeding on two grounds:

- The pre-explosion claim was based on the Ontario Securities Act(**3**) and, in the district court's opinion, this claim was statute barred; and

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- The district court made an order in December 2010 which appointed lead plaintiffs to represent the class; however, these lead plaintiffs had not brought a pre-explosion claim based upon the Ontario Securities Act. As the Canadian plaintiffs were part of the same class as the lead plaintiffs, they would be required to bring a separate class action for the pre-explosion misrepresentations under the Ontario Securities Act.

Court of appeal decision

Following the decision in the United States, the plaintiff moved to have the stay of the class proceeding in Ontario lifted. The court of appeal considered whether the dismissal of the pre-explosion claim in the United States constituted facts arising after its initial decision which justified lifting the stay.

Ultimately, the court of appeal referenced the dismissal of the US claim, coupled with BP's acceptance of Ontario law, as being sufficient grounds to lift the stay:

"In our view, these developments taken as a whole, are sufficient to justify lifting the stay. It was certainly not brought to our attention or in our contemplation that the moving party's claim would be dismissed by the US District Court... It is also significant that BP now accepts that the moving party's claim is governed by Ontario law and therefore does not assert that it falls within the exclusive jurisdiction of the US courts."⁽⁴⁾

The court of appeal noted that if the stay were not lifted, then the plaintiff in Ontario would face a "purely procedural barrier" and would be prevented from having the claim heard on the merits. Accordingly, the court of appeal lifted the stay and in doing so declined to comment on whether the plaintiff's claim may be time barred, as found by the US district court.

Comment

The court of appeal's decision demonstrates the interrelated nature of cross-border class proceedings. In appropriate instances, courts in both Canada and the United States will look to the substantive and procedural law in each jurisdiction when considering the conduct of class proceedings. In Canada, the existence of a foreign class action may be sufficient to stay Canadian claims, unless a plaintiff will be prevented from pursuing its substantive rights.

For further information on this topic please contact [Andy McDonnell](#) or [Matthew Fleming](#) at Dentons by telephone (+1 416 863 4511) or email (andy.mcdonnell@dentons.com or matthew.fleming@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

- (1) *Kaynes v BP PLC* 2016 ONCA 601.
- (2) *Kaynes v BP PLC* 2014 CarswellOnt 10971.
- (3) RSO 1990, c S5.
- (4) *Supra* note 1 at Paragraphs 16 and 17.

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