## Panel #1: Relationship between Public Regulatory Enforcement and Private Securities Class Actions

What is the relationship between public regulatory enforcement and private securities class actions? Are they complimentary, or unnecessarily duplicative? These are some of the many questions considered by the first panel.

Panellists:
**Wendy Berman,** Partner at Cassels Brock & Blackwell LLP
**James D. Cox**, Brainerd Currie Professor of Law at Duke University School of Law
**Adam Pritchard**, Frances and George Skestos Professor of Law at University of Michigan Law School and
**Joel Rochon**, Partner at Rochon Genova LLP.
Moderator for Panel:
**Poonam Puri**, Professor of Law at Osgoode Hall Law School, York University

Mr. Rochon and Ms. Berman provided insight into the implications of *AIC Limited v Fischer*, 2013 SCC 69, [2013] 3 SCR 949 [*Fischer*]. In *Fischer*, a group of mutual fund managers were the subject of an investigation conducted by the Ontario Securities Commission (OSC). The fund managers eventually entered into agreements with the OSC that paid investors millions in settlement. The agreement with the OSC did not preclude the possibility of civil proceedings against the mutual fund managers. Following the settled agreements, the investors applied to certify a class action against the fund managers relating the same conduct.

The Supreme Court of Canada focussed on the branch of the statutory requirement for certification under the Ontario *Class Proceedings Act*, which requires that "a class proceeding would be the preferable procedure for the resolution of the common issues." Specifically, the Court compared the proposed class proceeding with the non-litigation OSC proceedings from the point of view of providing access to justice. Notably, in comparing the proposed class proceeding with the OSC proceedings, the Court noted that investor participation in the processes leading to compensation is an important factor to consider and one that weighs heavily in favour of finding that the class proceeding meets the preferability requirement. Moreover, the Court noted that the regulatory nature of, and the limited participation rights for investors in the OSC proceedings, coupled with the absence of information about how the OSC staff assessed investor compensation support the conclusion that significant procedural access to justice concerns remain which the proposed class action can address. The Court considered the substantive outcome of the OSC proceedings and their impact on the preferability analysis, namely that substantive access to justice concerns remain.

Mr. Rochon, who acted for the plaintiffs in *Fischer* at all court levels, argued that the OSC and class counsel could exist harmoniously together in facilitating investor recovery. In the *Fischer* case, as the OSC has limited resources, there was "considerable money left on the table," and as in his view that the OSC did not

engage directly with investors, class counsel claimed it on behalf of harmed investors. In Mr. Rochon's reading of the *Fischer* case, the Supreme Court prevented a situation whereby an issuer can go to the OSC, cut a deal and be immune from future actions. In contrast, Ms. Berman, who acted for AGF Funds (one of the defendants) at the trial court, argued that in commencing public enforcement proceedings, the OSC took on the mantle of an investor recovery program. The OSC retained outside experts and diligently investigated the alleged misconduct, and it was an adversarial process leading to the settlement. Moreover, in Ms. Berman's view, "there will always be the spectre of money left on the table." She argues that as a result of *Fischer*, there will be a chilling effect on the OSC to come up with creative solutions with issuers.

Professors Pritchard and Cox provided insight into the American experience with regard to the respective roles of public and private enforcement. Professor Pritchard provided a summary of the results of his empirical study (with Professor Stephen J. Choi) of the deterrent effect of class actions and Securities Exchange Commission (SEC) investigations in preventing people from committing fraud. Notably, his study indicates that for issuers subject to both an SEC investigation and a class action, a restatement had been issued. Moreover, class actions seem more likely to target struggling firms, while larger market capitalization companies are usually the subjects of SEC investigations. Professor Pritchard concluded that there is no evidence to suggest SEC investigations are superior to class actions. He went onto summarize the results of his empirical study of corporate law suits in the United States filed in tandem with securities class actions. Ms. Berman noted that this "piggybacking" is not a phenomenon in the United States.

Professor Cox provided insight into the inspection results of auditors of the Public Company Accounting Oversight Board (PCAOB), a private-sector, non-profit corporation created by the *Sarbanes-Oxley Act* to oversee the audits of public companies. Professor Cox noted that the inspection results revealed a number of deficiencies, with a mode of five mistakes. He then spoke about a couple of policy options to make the audit opinion letter a more robust form of communication, including making the audit committee's questions public and including going concern qualifications in the letter.