Panel #3: Jurisdictional Issues Involving Foreign Investors, Foreign Exchanges and Foreign Public Companies

This panel examined the circumstances under which Canadian courts are willing to take jurisdiction over securities class actions in which Canadian investors have invested through foreign exchanges and the implications for Canadian investors, particularly in light of *Kaynes v BP, PLC,* 2014 ONCA 580. In *Kaynes*, the Court of Appeal For Ontario considered whether Ontario has or should assert jurisdiction over claims of proposed class members who purchased shares of the defendant issuer on foreign exchanges. Writing for the Court, Justice Sharpe held that while Ontario does have jurisdiction *simpliciter*, Ontario should decline to exercise that jurisdiction on grounds of *forum non conveniens*.

Panellists:
Hannah Buxbaum, John E. Schiller Chair in Legal Ethics at University of Indiana Maurer School of Law,
Larry Lowenstein, Partner at Osler, Hoskin & Harcourt LLP, and
Douglas Worndl, Partner at Siskinds LLP.

Moderator:
Cynthia Williams, Osler Chair in Business Law at Osgoode Hall Law School, York University.

Mr. Worndl and Mr. Lowenstein disagreed on the implications of the *Kaynes* decision on investor recovery. Mr. Worndl argued that *Kaynes* is an unfortunate decision from an investor perspective because it ultimately makes class actions less viable. Mr. Worndl argued that the Court sidestepped the explicit legislative intent of Part 23.1 of the Ontario *Securities Act*, which is that the *Act* has extraterritorial application, and therefore inappropriately over-relied on the principle of comity. Mr. Lowenstein, who represented the defendant issuer in *Kaynes*, has a different view of the case, and began his remarks by stating that the Supreme Court of Canada refused leave to appeal, possibly suggesting that the case does not have dire implications. Mr. Lowenstein stated that notwithstanding Part 23.1, there must be a "real and substantial" connection to the jurisdiction. He ended his remarks by stating that despite the laudable goal of avoiding the duplicity of proceedings, there will be litigation on both sides of the border because of entrepreneurial plaintiff counsel.

According to Professor Buxbaum, *Kaynes* arguably endorsed a fragmented approach to securities litigation, in which a claim can be brought in the jurisdiction in which the securities are traded. Professor Buxbaum was struck by Justice Sharpe's comment that this jurisdiction standard is a "prevailing international standard," as many other countries have adopted a different jurisdiction standard. Professor Buxbaum went onto compare the American courts' approaches to assuming jurisdiction. The Supreme Court of the United States endorsed the "exchange-based" rule in the *Morrison v National Australia Bank*, 561 U.S. 247 decision. She argued

that *Kaynes* is arguably broader than *Morrison*, as *Morrison* was merely about regulatory jurisdiction (the reach of anti-fraud laws). In terms of the implications of the shift to an exchange-based jurisdiction rule is that global class actions are precluded, and local investors that trade abroad have to sue abroad (which may make the right illusory). Moreover, class actions are less viable, and this increases pressure on public enforcement. She concluded her remarks by noting that the bundle of rights an investor has in a "security" includes a remedy.