Securities Class Actions and Extra-territoriality: A View from Canada

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Securities class actions are a relatively new phenomenon in Canada for two main reasons. First, class procedures are available across the country only since 2004 (though since 1978 in Quebec and 1992 in Ontario). Second, until very recently, only traditional claims of fraud or misrepresentation were available to investors. Since 2005, however, most Canadian provinces have amended their securities legislation to introduce a right of action in secondary market liability for continuous disclosure (see for e.g. (Quebec, Ontario, BC). This action is particularly attractive as it does not require plaintiffs to prove any reliance although it is usually accompanied by damages limitations and a loser-pays rule for costs. Given the constitutional division of power, there is currently no federal securities law or class action legislation in Canada. As a result, multijurisdictional securities class actions can arise in Canada in an interprovincial sense as well as in an international sense. Moreover, many major Canadian firms are listed on both Canadian and US exchanges. In all of these cases, challenges in terms of jurisdiction and applicable law can occur.

The arrival of these new causes of action has had an immediate impact on the number of securities class action filings in Canada. While the period 1997 and 2007 yielded between one and five a year, there were 10 claims filed in 2008 and 9 in 2009. In terms of value, ongoing claims are seeking close to 3 billion Canadian dollars (1 CDN$ = .94 US$). During the 2002-2008 period, there were 9 Canada/US cross-border settlements compared to 11 domestic settlements. Of the 21 pending actions, eight involve claims where parallel actions are also under way in a US jurisdiction – often the result of a so-called copy-cat action filed in a Canadian jurisdiction. (Data sources can be found here and here.)

So far, only one action (against IMAX) has been certified in Ontario as a global class specifically including investors who purchased on either the TSX or NASDAQ exchanges, whether Canadian or not. The Ontario legislation specifies that claims can be brought against an issuer reporting in Ontario or an issuer with a "real and substantial connection to Ontario". This second and potentially

extra-territorial jurisdictional criterion has not been tested in court yet.

This brief overview of the legislative context for securities class actions in Canada exposes the uncertainty facing both potential plaintiffs and defendants given the paucity of judicial interpretation of the new statutory claims. The recent Ontario decision in the IMAX case suggests that choice-of-law challenges are not a bar to certification of a class that includes investors from several jurisdictions within and outside Canada. This is consistent with decisions in class actions outside the securities field, where Canadian courts have been receptive to multijurisdictional actions whether in terms of certification or recognition of foreign settlements. Despite some doctrinal debate on the constitutional aspects of those decisions, the Supreme Court of Canada has recently refused to intervene, deferring to provincial legislators the task of dealing with the complexity inherent to these cross-border disputes.

The US Supreme Court's decision in *Morrison* is unlikely to signal any important change for Canadian investors or class counsel. The fact that so many Canadian corporations are registered with American exchanges should give them access to US courts. For claims against firms listed only in Canada, investors whether local or foreign can seek remedies largely equivalent to those available under American law in most Canadian provinces. If anything, the ruling in *Morrison* might increase traffic towards Canadian courts given their potentially greater openness to multijurisdictional securities class actions.