CITATION: Silver v. IMAX, 2013 ONSC 1667
COURT FILE NO.: CV-06-3257-00
DATE: 20130319

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARVIN NEIL SILVER and CLIFF COHEN

Plaintiffs

- and -

IMAX CORPORATION, RICHARD L. GELFOND, BRADLEY J. WECHSLER, FRANCIS T. JOYCE, NEIL S. BRAUN, KENNETH G. COPLAND, GARTH M. GIRVAN, DAVID W. LEEBRON and KATHRYN A. GAMBLE

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: K. van Rensburg J.

COUNSEL: D. Lascaris, S. Kalloghlian and M. Robb, for the Plaintiffs
P. Steep and D. Peebles, for the Defendants

Reasons for Decision on Motion

I. Nature of the Motion

[1] This is another chapter in the proceedings involving alleged misrepresentation to the secondary market in respect of the financial reporting and recognition of revenue for theatre systems of IMAX Corporation ("IMAX"), a Canadian public company whose shares are dual-listed on the TSX and the NASDAQ.

[2] This motion arises out of the fact that there are overlapping class proceedings in Ontario and in the U.S. with respect to the subject matter of this

action. The U.S. Proceedings were described in my decision certifying a global class in this action (the "Certification Decision").[1] My decision respecting the timing, content and distribution of the notice of certification (the "Notice Decision")[2] referred to the developments that had occurred by that stage, when a proposed settlement was pending in the U.S. Proceedings. The settlement has now received approval from the U.S. Court, subject to an order amending the class definition in these proceedings.

[3] In this motion, the defendants seek an order amending the class definition in this action to exclude from the certified class all persons who will be bound by a final judgment approving the pending settlement of the U.S. Proceedings.

[4] The settlement in the U.S. Proceedings is conditional on an order from this court amending the class in this way. If the order is granted, there will be no further review by the U.S. Court, and the settlement in the U.S. Proceedings will be concluded.[3] If the order is not granted, the settlement will not proceed, and the U.S. Action will revert to the stage it was at when the settlement was reached, that is, as a proposed class action that had not yet been certified.

[5] The defendants assert that this court has authority under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA") to amend the class definition, and that, consistent with the principles of comity, the court should respect the jurisdiction and authority of the U.S. court that has already considered, among other things, the fairness of the proposed settlement.

[6] In *Currie v. McDonald's Restaurants of Canada Ltd.*, (2005), 74 O.R. (3d) 321 (C.A.), the Court of Appeal established the test for recognition by an Ontario court of a foreign judgment approving a class action settlement, so as to preclude an action for the same relief in our jurisdiction. The case involved the enforcement of a U.S. judgment approving a class action settlement that purported to bind Ontario residents. The defendants in the present case assert

that the order requested should be granted because the U.S. Court, which had jurisdiction, has already approved the settlement. In the alternative, they argue that this court should apply the factors in *Currie*, to grant the order requested, and to thereby facilitate the conclusion of the settlement reached in the U.S. Proceedings.

[7] The plaintiffs' counsel contend that this motion is in substance a request for the court to approve a settlement, and that the court should decline to do so because the settlement is insufficient and unfair. They point out that this is a case of first impression, that there is no precedent for the relief that the defendants are seeking, and that, if the order is granted, as they put it, the effect will be to "rip the guts out" of the pending Ontario class action. Since almost no one opted out of the U.S. settlement class, what will be left in the Ontario action will be a much smaller class, comprised almost entirely of only TSX purchasers (approximately 15% of the global class certified by this court).

[8] I have set out the arguments of the parties only briefly at this stage. Later in this decision I will consider their submissions in greater detail.

II. The Cross-Border Context

[9] In his decision refusing leave to appeal from both the Certification Decision and my decision granting leave for the plaintiffs to pursue a statutory claim for secondary market misrepresentation (the "Leave Decision"),[4] Corbett J. had this to say about the parallel proceedings:

> van Rensburg J. accurately stated and applied the test for defining classes in class proceedings. The implementation of Her Honour's decision, in a manner harmonious with proper respect for the exercise of jurisdiction by the American courts, will, no doubt, unfold over time as the two cases proceed. ...
>
> ... [The U.S. Action and the Ontario Action] are and should be complementary, to achieve a proper vindication of the rights of plaintiffs, fair process for the defendants and plaintiffs, respect for the autonomous jurisdictions involved, and an integrated and efficient resolution of claims. This requires common sense,

> judicial comity, and fair process. It does not require balkanization of class proceedings, but rather sensitive integration of them.[5]

[10] Corbett J.'s hope for a "sensitive integration" of the parallel proceedings does not appear to have been realised. Nevertheless, he identified certain objectives that in my view are relevant here: the vindication of the rights of plaintiffs, fair process for the defendants and plaintiffs, and respect for the autonomous jurisdictions involved.

[11] There have been numerous settlements of parallel class actions approved by Canadian courts that have involved a resolution of all pending proceedings.[6] While this may be the typical practice, and while there have been calls for reform, especially in respect of parallel class actions in Canadian provinces, there is currently no legal requirement for the integration of parallel class proceedings, or for the co-operation of cross-border counsel and courts in the litigation or resolution of such proceedings.[7]

[12] The legal position is therefore that the court in each jurisdiction where an overlapping class proceeding is pending, is autonomous. Parallel proceedings are permissible and not uncommon. The actions may or may not proceed in tandem; counsel may or may not consult with or work with one another. Ultimately, one case may reach judgment before the other. This is, as U.S. conflicts of laws expert, Professor Patrick Borchers, puts it, "the day of reckoning",[8] after which the second court would be asked to recognize the judgment of the other court, so as to preclude the continuation of the parallel proceedings in favour of persons bound by the settlement.

[13] The defendants could have settled the U.S. Proceedings, and obtained the approval of the U.S. Court, and then sought to enforce the settlement here by precluding the claims of the overlapping class members. They did not proceed in this manner, instead seeking in advance an order that would have the effect of

preclusion of the claims of overlapping class members who did not opt out of the U.S. Settlement, by removing such persons from the certified Ontario class.

[14] The defendants contend that it was necessary and reasonable to proceed in this manner rather than to face the uncertainty of not knowing whether a judgment approving a U.S. settlement would be given preclusive effect in Ontario. In *Currie,* after all, the Ontario court refused to enforce a U.S. judgment approving a settlement to preclude a pending Ontario proceeding. In *Canada Post Corporation v. Lépine*, 2009 SCC 16, [2009] S.C.R. 549, the decision of a Québec court refusing to give preclusive effect to an Ontario judgment approving the settlement of a national class action, was upheld on appeal. In *Hocking v. Haziza*, 2008 QCCA 800, [2008] Q.J. No. 34 (C.A.), the Québec Court of Appeal upheld a decision refusing to recognize and enforce an Ontario judgment approving a national class action settlement. In *Meeking v. The Cash Store Inc.*, 2012 MBQB 58, [2012] M.J. No. 60 (Q.B.), the Manitoba Court of Queen's Bench recognized the preclusive effect of an Ontario judgment approving a multi-provincial class action settlement (except with respect to certain claims where inadequate notice had been given).

[15] In an expert report filed by the defendants in support of this motion, Professor John Coffee, a U.S. class actions expert, observed:

> ...[N]o rational defendant will be willing to settle under a procedure that gives those class members who are currently covered by both classes the right to claim compensation under the U.S. Action, while also reserving the right to share under a potentially higher judgment (or settlement) later obtained in the Ontario Action. If the class members in the Ontario Action who purchased on Nasdaq were allowed to remain in both classes, the defendants could be required to fund two overlapping resolutions on both sides of the border (either two settlements, or the present settlement in the U.S. Action and a later judgment in the Ontario Action).
>
> ....
>
> This prospect makes it foolish for defendants to settle in the U.S. Action because that earlier settlement would be an illusory settlement that did not cap their liability to the overlapping members of these two classes. Faced with this two-

> front war, defendants cannot settle – unless the class definition in the second action is adjusted to eliminate the overlap, or a global settlement is reached.[9]

[16] Accordingly, the central issue in this motion is whether this court should recognize the settlement that has been approved by the U.S. Court and give effect to the settlement by carving out of the certified global class those persons who would be covered by the U.S. Settlement, or whether such persons should remain in the Ontario class until their claims are determined in these proceedings, whether on the merits, or in the context of a court-approved settlement of *these* proceedings.[10]

III. Decision

[17] For the reasons that follow, the relief sought by the defendants is granted. The class in these proceedings is amended as per the proposed wording in paragraph 25 of the Defendants' Reply Factum.[11]

[18] In arriving at this decision, I have applied the factors from the Court of Appeal's decision in *Currie* with respect to when a decision of a foreign court purporting to settle claims of class members that are the subject of parallel proceedings in Ontario, will be given preclusive effect. Having determined that the U.S. Court has a "real and substantial connection" with the claims of the overlapping class members, I have considered whether there was procedural fairness in the treatment of such claims (including the adequacy of notice and representation in the proceedings). Having found that the U.S. Settlement should be recognized, I have considered all of the circumstances, including the current status of these proceedings, before concluding that the Ontario Action is no longer the "preferable procedure" for the determination of the claims of class members whose claims are covered by, and who have not opted out of, the U.S. Settlement. The class definition in these proceedings is amended accordingly.

IV. Relevant Facts

A. The Parallel Class Proceedings

[19] In 2006, eight law suits were filed against IMAX, some of its executives and its external auditor, in the United States District Court for the Southern District of New York (the "U.S. Court"), alleging misrepresentation and omissions regarding revenue recognition for theatre systems, in violation of federal securities laws. These proceedings were consolidated into a single action in the U.S. Court (the "U.S. Action" or the "U.S. Proceedings").

[20] This action was commenced in Ontario in 2006. The action is based on facts which are substantially identical to those alleged in the U.S. Action, that IMAX made material misrepresentations and omissions regarding revenue recognition for theatre systems. The action asserts common law causes of action and claims relief under the statutory cause of action for secondary market misrepresentation under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (the "OSA").

[21] The certified class in the Ontario proceedings is defined as:

> All persons, other than the Excluded Persons[12], who acquired securities of IMAX during the Class Period on the TSX and on the NASDAQ on or after February 17, 2006 and held some or all of those securities at the close of trading on August 9, 2006.

[22] The certified class in Ontario is a global class. It includes all persons who acquired IMAX shares on the NASDAQ and the TSX and held such shares during the relevant class period, irrespective of where they live.

[23] Originally the plaintiff in the U.S. proceedings sought to certify a global class. As a result of the U.S. Supreme Court's decision in *Morrison v. National Australian Bank Ltd.*, 130 S. Ct. 2869 (2010), the effect of which was to exclude

from U.S. securities class actions purchasers of shares on foreign exchanges, the plaintiff in the U.S. action was obliged to narrow the class definition to exclude IMAX investors who purchased their shares on the TSX.

[24] The proposed class in the U.S. Proceedings, and that which has been certified for settlement purposes (the "U.S. Settlement Class"), consists of:

> All persons and entities who purchased or otherwise acquired IMAX shares on the NASDAQ from February 27, 2003 through July 20, 2007.

[25] The parallel proceedings are overlapping, and not co-extensive. The overlapping class members are NASDAQ traders who acquired and held their IMAX shares between February 17, 2006 and August 9, 2006.

[26] The substance and progress of the parallel U.S. Proceedings were described in some detail in my earlier decisions.[13] What is relevant at this stage is that, between December 2009 (when this action was certified as a class proceeding and leave was granted to pursue the statutory claim) and September 2011, the Ontario action was progressing more rapidly than the U.S. Proceedings, in which there had been a number of interlocutory motions and orders, concerning, in particular, the appointment of a lead plaintiff.

[27] The timing gap that was widening between the two proceedings caused concern to the current U.S. lead plaintiff, The Merger Fund ("TMF"), appointed in April 2011, prompting its intervention in these proceedings with respect to the timing and content of notice to the class that this action had been certified. At that time, the U.S. Proceeding had not been certified, although a motion for certification was pending.[14]

[28] The Notice Decision in these proceedings was released on March 28, 2012, rejecting TMF's attempt to delay notice to the class in these proceedings and its contention that notices in the two actions should proceed together. It was

in the course of argument on the notice issue that it was disclosed that settlement negotiations were underway, restricted to the U.S. Proceedings, and eventually that there was a proposed settlement. What was known at that time about the procedure that was expected to be followed in the U.S. Proceedings with respect to the settlement was described in the Notice Decision.[15]

[29] What has occurred is generally what was anticipated and described in the Notice Decision, with one important difference: it was originally contemplated that this motion to amend the class in Ontario would precede the fairness hearing approving the settlement in the U.S. Proceedings. The parties amended their agreement in March 2012,[16] and the fairness hearing occurred in June 2012, before this motion was heard. As a result, the U.S. Settlement has received all necessary approvals by the U.S. Court, and is subject only to the condition that the class be amended in these proceedings.

B. Settlement Efforts

[30] Evidence was before the court in this motion with respect to the efforts that were made to settle both proceedings (although the substance of the parties' settlement positions and their offers were not disclosed).[17]

[31] There were two formal attempts to settle both actions together, in mediations that took place in 2008 and 2010, each conducted by an experienced and respected retired judge. Each mediation was attended by counsel for the plaintiffs and defendants from both jurisdictions. In 2009, there was an attempt to settle both actions in a meeting between both sets of IMAX counsel and the plaintiffs' counsel in the Ontario proceedings only.[18]

[32] In April 2011, TMF was appointed as the new lead plaintiff in the U.S. Action. At that time, according to defence counsel:

> ...a further course of settlement negotiations began, with certain differences: while the proposed class was by then confined to only NASDAQ purchasers (and so no longer mirroring the Class in the Ontario Action), given the decision in the *Morrison* case; that proposed class also had greater certainty, as the U.S. Court had rejected the argument of the IMAX defendants in the U.S. Action that those NASDAQ shareholders should instead be members of only the Class in the Ontario Action, as a "superior" vehicle for the claims of those shareholders.[19]

[33] The negotiations at that time were confined to a resolution of the U.S. Proceedings, and class counsel in these proceedings were not invited to participate (and were unaware of the negotiations until September 2011).

[34] On November 2, 2011, the parties to the U.S. Proceedings entered into a preliminary settlement agreement for the benefit of the U.S. Settlement Class. Ontario class counsel were advised of the agreement and were offered the opportunity to discuss a resolution of this action on a comparable basis.

[35] On May 3, 2012, the defendants in these proceedings delivered to class counsel a formal "with prejudice" Offer to Settle the claims of the TSX class members for a sum (US$1.33 million) which was intended to reflect a *pro rata* portion of the U.S. Settlement, taking into account the shorter class period in the Ontario action and the lower trading volume on the TSX. The U.S. Settlement sum (US$12 million) is inclusive of costs, while the offer in the Ontario action is exclusive of costs.[20] The estimated value of the U.S. Settlement for the overlapping class members is US$8.9 million, including legal fees.[21]

C. Preliminary Court Approval of the Settlement in the U.S. Action

[36] On January 26, 2012, the parties to the U.S. Proceedings signed a formal Stipulation and Agreement of Settlement. On February 1, 2012, Buchwald J. (the judge who had case managed the U.S. Proceedings since their inception) granted an order giving preliminary approval to the proposed settlement, certifying the U.S. Settlement Class for the purposes of the proposed settlement, and directing that the U.S. Settlement Class be given notice of the proposed

settlement and of the intention of the plaintiff to schedule a date for a fairness hearing.

[37] Class counsel in the Ontario proceedings had input into the content of the notices, and the wording of the notices was changed to reflect their concerns.[22]

[38] On March 12, 2012, an Amended Stipulation and Agreement of Settlement was signed. The amendments, among other things, provided for the fairness hearing to occur before this motion was argued.

[39] On March 28, 2012, Buchwald J. granted an Amended Order for Preliminary Approval of the Final Settlement and Notices.

D. Notices In the Two Proceedings

[40] In my Notice Decision, I determined that notice of certification of these proceedings should take place independent of the progress of the U.S. Action. I also determined that the notice should advise members of the overlapping class of the pendency of the U.S. Action, but not its status, as class members were not being put to any election in this action as a result of the notice. The approved notice would advise class members that their participation in the U.S. Proceedings would not prevent their inclusion in the class in these proceedings. I noted that the U.S. notices, by contrast, would need to contain more fulsome information about the options available to class members in order to permit them to make an informed choice.[23]

[41] Notice in these proceedings was published on April 27, 2012, after notification by class counsel to defence counsel three days earlier that this would occur. Notice was published in the U.S. Proceedings on April 26, 2012, one day before the notice in these proceedings.[24]

[42] The notice in the U.S. Action described the two actions, and noted some differences between the proceedings. It then advised overlapping class members that electing to remain bound by the U.S. Settlement, even if no claim for compensation was made, would bar ongoing participation in the Ontario Action:

> If the Canadian Order is entered and becomes final, you will not be permitted to recover in both cases and if you do not exclude yourself from the U.S. Action, you will automatically be deemed to be a member of the Class in the U.S. Action, and therefore excluded from the Canadian Class in the Canadian Action. For members of the Canadian Class, a detailed description of the Canadian Action as well as details regarding how to exclude yourself from this action (and thereby participate in the Canadian Action) are contained below.
>
> ....
>
> **Submit a Proof of Claim and Release Form**
> This is the only way to be eligible to receive any portion of the Settlement Fund. If you are a member of the Canadian Class and the Canadian Order is entered and becomes final, you cannot participate in that lawsuit if you submitted a Proof of Claim and Release Form in the U.S. Action (or if you did not opt out of the U.S. Action).
>
> **Do Nothing**
> Receive no payment. Give up your right to file your own or participate in any other lawsuit (including the Canadian Action) against the Defendants concerning the claims asserted by the Class. If you are a member of the Canadian Class and the Canadian Order is entered and becomes final, you must affirmatively have excluded yourself from the U.S. Action to be eligible to recover in the Canadian Action.
>
> ....
>
> **U. What will happen if I do nothing at all?**
> If you fail to file a timely Proof of Claim and Release in response to this Notice, you'll get no money from this Settlement. If you fail to exclude yourself, you will nevertheless release the Released Parties from the Released Claims in the Settlement, even if you do not file a Proof of Claim and Release. If you fail to exclude yourself and the Canadian Order is entered and becomes final, you will remain a member of the U.S. Action, and you cannot participate in the Canadian Action, which will be a Released Claim. "Released Claim" means: (i) with respect to the Released Parties: the release by all Class Members of all claims that were alleged in the U.S. Action, or the Canadian Action. ...

[43] The Notice advised overlapping class members of their rights in the Ontario Action and provided contact information for Siskinds LLP, including their website address.

[44] The U.S. claims administrator communicated with 426 individuals and organizations, identified by IMAX as holding shares, as well as 1,813 other institutions which may have traded IMAX shares in their own, or their clients' accounts during the class period, and thereafter mailed out 85,695 copies of the notice at the request of the original recipients and others. Along with press releases and publications in various newspapers in the U.S. and Canada, a total of 87,934 copies of the notice were mailed out to possible members of the U.S. Settlement class. Where a mailing was returned as undeliverable, the claims administrator followed up where possible to obtain updated addresses. The claims administrator launched a settlement website that contained the notice, among other relevant documents. The form of summary notice that had been approved by the U.S. Court was published in various newspapers, including The Globe and Mail and the National Post and in the French language in La Presse, and via electronic newswires.

E. The U.S. Fairness Decision

[45] A hearing to consider the final approval of the U.S. Settlement (the "Fairness Hearing") was held on June 14, 2012, resulting in the Memorandum and Order of Buchwald J. dated June 20, 2012 (the "U.S. Fairness Decision")[25]. No class member attended at the Fairness Hearing to dispute the proposed settlement. Class counsel in these proceedings did not seek to intervene, either directly or indirectly, in the process. A transcript of the hearing was filed in these proceedings.

[46] There were seven opt out letters received. Although five of the seven shareholders (individuals or couples) were members of the overlapping class, none of them stated that they had opted out in preference for the Ontario Action, or with an intention to litigate their rights here.[26]

[47] There was one objector, an investment advisor resident in the U.S., who is an overlapping class member. His letter stated that he had spoken with class counsel in this case, and he attached copies of reports obtained from class counsel, in particular, the report of Frank C. Torchio (the "Torchio Report"), which was filed in response to this motion.[27] Among other grounds for the objection, the objector asserted that the settlement was not for a fair and reasonable sum, "when one considers the advantages of the Canadian legal regime for persons who bought shares in the Canadian class period".[28]

[48] Buchwald J. provided reasons for her decision that the US$12 million settlement was "fair, reasonable and adequate", and would be approved. In her reasons she reviewed the six year history of the U.S. Action and referred to the extensive discovery on the merits and related to certification that had taken place, including the production and review of hundreds of thousands of pages of documents produced by the defendants, the review of transcripts of interviews conducted by the U.S. Securities and Exchange Commission (the "SEC"), and transcripts of examinations conducted in the Ontario Action. She considered the history of the formal mediations leading to the settlement. With respect to the substance of the settlement, she specifically referred to the objector letter that raised two substantive issues about the proposed settlement: first, that the Ontario Action was a superior vehicle for recovery, and second with respect to the proposed plan of allocation.

[49] With respect to the alleged superiority of the Ontario proceedings[29] Buchwald J. stated:

> Given the existence of the Canadian Action, it has been periodically suggested in the course of this litigation that the parallel class action proceedings to the north offer a better forum for the resolution of this general controversy.... Indeed, the one objection to the amended settlement alleges that comparative attractiveness of the Canadian Action. We again "decline to deny certification on th[is] ground [citing the court's reasoning on an earlier certification motion]".... Moreover, there is now a further factor in play that we find resolves any lingering doubt as to

> whether this class action is superior: the American Class has secured a certain recovery of millions of dollars against defendants through the advocacy of lead plaintiff's counsel here whereas the Canadian Class continues to litigation in the hope of securing a settlement or judgment. [Footnote referring to the May 3, 2012 offer in the Ontario Action]. It is no less true in the context of securities class action litigation that a bird in hand is worth two in the bush. Finally, to the extent that members of the American Class who are also members of the Canadian Class – it is estimated that 83.9% of the shares of IMAX involved in the Canadian Action were purchased on the NASDAQ... – share the opinion conveyed in the one objection that the Canadian Action promises a superior alternative for them to recover their investment losses they would "presumably have excluded themselves from the settlement class." ... As noted earlier, there were only seven exclusion requests despite the extensive notice [references omitted].[30]

[50] The other substantive issue raised by the objector, and addressed in the Torchio Report, related to the plan of allocation of the settlement funds. Buchwald J. considered the point to be one of a difference of opinion between experts. She stated:

> ...While we have no reason to doubt that the expert retained by plaintiffs' counsel in the Canadian Action is as qualified to opine on this topic as the expert retained by [U.S. class counsel] here and moreover that his rationale for further segmenting the share price inflation in the plan of allocation is not unreasonable [referring to the Torchio Affidavit], it is well established that damages calculations in securities class actions often descend into a battle of experts...In the context of settlement approval, however, the rationale here for setting inflation at a constant rate throughout the entire portion of the settlement class period that preceded the initial corrective disclosure and that was covered by subsequently restated financial results need not overwhelm in our estimation all competing theories of damages. Instead, the rationale need only be reasonable and rational, which it is.[31]

[51] Buchwald J. noted that perhaps the most significant factor to be weighed in considering the adequacy of the settlement was the reaction of the class. After extensive notice, with 87,000 notices having been sent out, only one investor objected to the settlement and only seven opted out of the settlement class. The judge noted that, "this demonstration of discontent is but a whisper amidst an otherwise thundering roar of silence".[32]

[52] Accordingly, Buchwald J. found that the notice provided to members of the class was adequate. She certified the class for the purpose of settlement, and approved the settlement and the plan of allocation, and she reserved her decision on the requested attorneys' fees and expenses pending further briefing on these issues from lead plaintiff's counsel.[33]

[53] Professor Coffee noted in his expert report that, "the standard procedures for the approval of a class action settlement in U.S. federal courts, which are well-developed, protective, and have been applied to thousands of class action settlements, [were] followed in this case".[34]

V. Positions of the Parties

[54] At this point, I return to articulate the positions of the parties as set out in their facta and arguments to this court.

A. Position of the Defendants

[55] The defendants assert that this motion is reasonable and necessary in order to ensure, in advance, that the U.S. Settlement will be given preclusive effect in Ontario. If the overlapping class members who have not opted out of the U.S. Settlement are removed from the Ontario class, then the settlement can proceed. The settlement has already been approved in the U.S. Proceedings, and it is not for this court to consider its substantive adequacy. Each overlapping class member was given notice in the U.S. Proceedings, and had the ability to choose whether to remain in the class in the U.S. Action or to opt out. Almost 100% of the overlapping class members chose to be bound by the U.S. Settlement. The removal of such persons from the certified class in Ontario does not affect the jurisdiction and ability of this court to determine the rights of the remaining class members, who are unaffected by such determination.

[56] The defendants contend that, since an order amending the class is a condition of the U.S. Settlement, the refusal of this court would deprive the overlapping class members of the benefits of a settlement. This court should recognize the order of the U.S. Court certifying the settlement class and approving the fairness of the settlement, as an order made within that court's jurisdiction. In the alternative, the court should apply the *Currie* factors, for determining whether a class action settlement would be given preclusive effect in Ontario, and grant the order requested. Once the U.S. order is recognized, according to the defendants, there is no discretion in this court to refuse the relief requested.

B. Position of Class Counsel

[57] Class counsel submit that the motion should be dismissed for a number of reasons. They assert that there are procedural impediments to the relief sought. First, they argue that the defendants are seeking to relitigate the certification motion to redefine a class that was certified as a global class, and second, that the motion is, in substance, an attempt to convert this action into an opt in class action, which is not available in Ontario.

[58] They also argue that the U.S. Settlement constitutes, in effect, a settlement of this class proceeding, which, under the CPA, requires the approval of this court. Such approval has not been sought, and if it were, it should be denied because the U.S. Settlement is neither reasonable nor fair to the members of the class who are NASDAQ purchasers.[35] If the *Currie* factors are applied, recognition of the U.S. judgment approving the settlement should be refused because the interests of the overlapping class members were not adequately represented.

VI. Issues to be Determined

[59] My reasons for decision from this point will address the issues raised by the parties according to the following outline and headings:

A. Authority to Amend the Class

1. What is the authority to amend the class under the CPA?
2. Is this an attempt to relitigate a question already determined by this court?
3. Are the defendants seeking to create an impermissible opt in class action?
4. Is the existence of the U.S. Settlement irrelevant to the "preferability" analysis?

B. Relevant Criteria for the Amendment of the Class: Step One – Recognition of the U.S. Fairness Decision

1. Is the U.S. Court's "real and substantial connection" to the claims of the overlapping class members sufficient?
   (a) Recognition of Foreign Judgments
   (b) Recognition in the Class Proceedings Context
2. What is the result of applying the *Currie* factors?
   (a) "Real and Substantial Connection"
   (b) Notice and Procedural Fairness
   (c) Adequate Representation
3. Conclusion re: Recognition of the U.S. Fairness Decision

C. Is this motion in substance a motion for approval of a settlement in an Ontario class action under s. 29(2) of the CPA?

D. Relevant Criteria for the Amendment of the Class: Step Two – "Preferable Procedure"

1. What factors are relevant in determining whether it would be the "preferable procedure" to amend the class?
2. Access to Justice for the Overlapping Class Members
   (a) Alleged Advantages to Litigating the Claims in Ontario
   (b) Evidence Supporting the Claims
   (c) Maximum Damages and the Value of the U.S. Settlement
3. Access to Justice for the TSX Purchasers
4. "Access to Justice" Generally

5. Other Relevant Factors

VII. Analysis

A. Authority to Amend the Class

1. What is the authority to amend the class under the CPA?

[60] Section 8(3) of the CPA provides general authority for the court to amend an order certifying a proceeding as a class proceeding. Where circumstances relevant to certification have changed, section 10, which is more specific, is engaged. Section 10(1) provides with respect to decertification or amendment of a certification order, as follows:

> 10(1). Where it appears conditions for certification not satisfied – On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5(1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.

[61] Under s. 10(1), in order to grant the relief sought, the court must find that at the time the motion is brought, one or more of the conditions under subsections 5(1) and (2) are no longer satisfied. The section specifically contemplates an amendment to a certification order based on changed circumstances: *LeFrancois v. Guidant Corp.*, [2009] O.J. No. 2481 (S.C.J.), at para. 24. As Cullity J. noted in *Pearson v. Inco Ltd.*, [2009] O.J. No. 780 (S.C.J.), at paras. 22 to 26, a motion for decertification or to amend a certification order, is not an appeal from the certification order, and the moving party has the burden of showing that the earlier decision would not have been made in light of new evidence, including evidence of facts that have subsequently occurred.

[62] Apart from s. 5(1)(d) of the CPA, defence counsel relied on s. 5(1)(c), that there are no longer common issues between the overlapping class members and the TSX purchasers, and s. 5(1)(e), that the representative plaintiffs no longer

adequately represent people who have elected, by their failure to opt out, to remain in the U.S. Settlement Class. I do not intend to address these arguments (which were not made in any detail), except to say that, on the evidence before me in this motion, my earlier analysis of these aspects of the test for certification would not be affected by reason of the availability of a settlement in the parallel U.S. Proceedings.

[63] In my view, the certification requirement that is directly engaged in this motion is under s. 5(d) of the CPA: whether, having regard to all of the developments in the U.S. Proceedings, and considering the status of this action, and all other relevant circumstances, this action remains the preferable procedure for the determination of the claims of the overlapping class members who have not opted out of the U.S. Settlement.

2. Is this an attempt to relitigate a question already determined by this court?

[64] Class counsel assert that, since the U.S. Proceedings were already underway when the certification motion was argued, and were not considered an impediment to the certification of a global class, the Certification Decision in this regard is *res judicata,* and it is not open to the defendants to ask the court to revisit the decision through this motion.

[65] As I have already noted, s. 10(1) contemplates that a class can be amended if a requirement for certification is no longer met. Class counsel's argument therefore implies that there are no new circumstances for the court to consider.

[66] At the time of certification, a global class was opposed by the defendants on the basis that there were pending proceedings in the U.S. which sought to certify a global class.[36] At that time, there was only a pending application for certification in the U.S. Proceedings, and there was no certainty that certification

would be achieved in that jurisdiction. In the Certification Decision, I concluded (at para. 133) that "the prospect that a similar proceeding might be certified in another jurisdiction is not sufficient to prevent the court from certifying a global class in Ontario".

[67] The Certification Decision contemplated however that this issue could be revisited depending on what occurred in the parallel U.S. Proceedings. I referred to the decision of the Divisional Court in *Mignacca et al. v. Merck Frosst Canada Ltd. et al.* (2009), 95 O.R. (3d) 269 (S.C.J.) at para. 39, where, in the context of parallel proceedings in two Canadian provinces, the court recognized that certification orders are not final judgments, but "interlocutory procedural orders that may be amended at any time as the cases proceed".

[68] If, at the time the certification motion was before the court, there had been a pending settlement in the U.S. Proceedings that could encompass the claims of the NASDAQ traders, that would certainly have been a relevant factor in deciding whether to certify a global class.

[69] Accordingly, this motion is not an attempt to relitigate an issue that was determined on a final basis in the Certification Decision; rather, as anticipated by the CPA and confirmed by decisions of this court, a certification order can be amended, including by redefinition of the certified class, in order to respond to changed circumstances. It is incumbent on the moving parties, in this case the defendants, to establish that the proposed amendment to the class is warranted.

3. Are the defendants seeking to create an impermissible opt in class action?

[70] The plaintiffs' counsel argue that there is another impediment to the relief sought by the defendants. They assert that the defendants are seeking to convert this action into an impermissible opt in action, since the amendment of the class definition would require class members to take the positive step of

excluding themselves from the U.S. Action in order to remain in the Ontario class. Our courts have consistently refused to approve procedures that would convert our opt out process to one requiring a member to opt in before obtaining the benefit of the class proceedings: *Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 7506, [2011] O.J. No. 5806 (S.C.J.), at paras. 41 and 42; *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (S.C.J.), at para. 117; and *Ramdath v. George Brown College of Applied Arts and Technology*, 2010 ONSC 2019, [2010] O.J. No. 1411 (S.C.J.), at para. 150.

[71] The concern underlying the refusal to sanction an "opt in" procedure is based on the policy objective of enhancing access to justice. Class members may not take the steps required to opt in for any number of reasons other than indifference to the action. The requirement to opt in can result in the reduction of the class size in an arbitrary and inappropriate manner, and reduce the effectiveness of class proceedings in achieving their objectives.[37]

[72] In the cases where our courts have refused to accept a procedure, even one supported by class counsel, that requires class members to do something affirmative to remain in the action, it was clear that adding an extra step would have converted the *Ontario* action into an opt in proceeding. Class members would be required to take an active step in order to remain part of the action, and therefore eligible to pursue their claims in the litigation and to receive compensation. None of these cases involved parallel class proceedings in which class members would have the right to recover in other proceedings.

[73] The opt out procedure is a cornerstone of our class proceedings regime, and serves to protect class members' litigation autonomy. The presumption is that, by not opting out, the NASDAQ purchasers made a decision to participate in the US. Settlement instead of pursuing a remedy on their own or in another civil proceeding, including this action.

[74] In this case the court is not being asked to approve a procedure that would convert *this action* into an opt in proceeding. The overlapping class members' procedural rights are not being compromised; through the U.S. notice, they were put to an election. If they opted out, they have chosen to remain in the Ontario class. If not, they are eligible to receive the benefit of the U.S. Settlement. They are not being denied the right to possible compensation unless they take some affirmative step; in fact, they gain the right to compensation in the U.S. Proceedings.

4. Is the existence of the U.S. Settlement irrelevant to the "preferability" analysis?

[75] Class counsel argue that, based on the authority of *Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47, [2012] O.J. No. 343 (C.A.), leave to appeal to the Supreme Court of Canada granted at [2012] S.C.C.A. No. 135, the existence of a settlement in a parallel proceeding is irrelevant to the "preferable procedure" analysis, and would not prevent the certification of a global class in this action, or the continued inclusion in the certified class, of persons whose claims would be covered by the U.S. Settlement.

[76] In *Fischer*, the Court of Appeal considered an action where it was alleged that the defendant mutual fund managers permitted securities market conduct called "market timing" in certain of the mutual funds they managed, resulting in significant losses to long-term investors.

[77] The Ontario Securities Commission (the "OSC"), after an investigation into alleged breaches of the OSA, had concluded a settlement with the defendant fund managers, which resulted in payments to investors in the relevant mutual funds. The judge at first instance, in refusing to certify a class proceeding arising out of the same factual circumstances, concluded that the completed OSC proceedings and settlement agreements fulfilled the judicial economy, access to

justice and behaviour modification purposes of the CPA, and that a class proceeding would therefore not be the "preferable procedure" for determining the claims.[38] The Divisional Court disagreed and construed the action as claiming losses that had not been recovered through the OSC settlement.[39]

[78] The Court of Appeal ultimately certified the proceeding as a class action. In his reasons for a unanimous court, Winkler J.A. noted at para. 8, that the preferability analysis involves an examination of the fundamental characteristics of the proposed alternative proceeding (including the scope and nature of the jurisdiction and remedial powers of the alternative forum, the procedural safeguards that apply, and the accessibility of the alternative proceeding), and a comparison of these characteristics to those of a class proceeding, in order to determine which is the preferable means of fulfilling the judicial economy, access to justice and behaviour modification purposes of the CPA. Winkler J.A. concluded that, notwithstanding that substantial compensation had resulted from the earlier process, the OSC proceeding was of a regulatory nature, where investors did not participate, and where the settlement agreements signed by the defendants expressly contemplated that they could face civil law suits. It was an error to consider the *amount* of compensation achieved by the OSC proceedings. Winkler J.A. stated, at para. 79, that "the preferable procedure inquiry must instead focus on the underlying purpose and nature of the alternative proceeding as compared with the class proceeding".

[79] *Fischer* is not authority that a settlement of another proceeding involving the matters in dispute in a proposed class proceeding is always irrelevant to the preferability analysis. At issue in that case was the effect of a settlement of a regulatory proceeding. A class proceeding was found to be the preferable procedure notwithstanding that the OSC settlement afforded compensation to affected persons, because of the regulatory nature of the OSC's jurisdiction and

its remedial powers, as well as the lack of participatory rights afforded to affected investors in the proceedings (at para. 10).

[80] In the present case, the alternative proceeding is a parallel class action in which a settlement is pending. Unlike the regulatory proceedings before the OSC in *Fischer,* the U.S. Proceedings provide a vehicle for compensation to affected investors, and share with the Ontario class proceeding the objectives of achieving access to justice, behaviour modification and judicial economy. As such, the existence of an approved settlement of a parallel class action in the U.S. Court is clearly relevant to the question of whether the Ontario Action remains the preferable procedure for resolving the claims of overlapping class members who have not opted out of the settlement.

[81] At the time of the certification motion the parallel proceedings were at an early stage, had not been certified as a class proceeding, and the defendants had taken the position that the U.S. Court should decline to deal with the claims, in favour of the jurisdiction of this court.

[82] At this stage, there is not only a settlement available in the U.S. Proceedings; that settlement has been approved by the U.S. Court, and overlapping class members have elected to be covered by the settlement because they have not opted out. The question is whether at this stage in the Ontario Action, a class proceeding that includes all members of the overlapping class, or one that is redefined as the defendants propose, would be the "preferable procedure". I turn now to consider the factors relevant to this determination.

B. Relevant Criteria for the Amendment of the Class: Step One – Recognition of the U.S. Fairness Decision

1. Is the U.S. Court's "real and substantial connection" to the claims of the overlapping class members sufficient?

[83] The first step in determining whether to amend the class involves this court's recognition of the U.S. judgment approving the settlement. Defence counsel asserts that, once satisfied that the U.S. Court had jurisdiction, this court should automatically grant the order requested, in the interests of comity. Class counsel argue that the order sought should not be made in the absence of a determination by this court that the settlement is substantively adequate and fair.

[84] My analysis rejects both of these extreme positions, for reasons I will explain. While the first step is to determine whether to recognize the U.S. judgment, it is necessary but not sufficient to conclude that the U.S. Court had jurisdiction in the sense of a real and substantial connection to the cause of action and the overlapping class members. In determining the issue of recognition, I conclude that the *Currie* factors apply, involving a consideration of the U.S. court's "real and substantial connection" to the claims of overlapping class members, whether they were accorded procedural fairness, including adequate notice, and whether their interests were adequately represented.

[85] Since this is not an application for the enforcement of a final judgment of the U.S. Court, the inquiry does not end with the question of recognition. The U.S. Settlement is conditional on an order of this court amending the class, which requires consideration of whether this class action remains the "preferable procedure" for resolving the claims of overlapping class members who have not opted out of the U.S. Settlement. The second step in the analysis will be to consider the factors that are relevant to the exercise of that discretion. My analysis rejects the position of class counsel in this motion, that nothing less than this court's review and approval of the U.S. Settlement under s. 29 of the CPA, will suffice.

(a) Recognition of Foreign Judgments

[86] The principles relevant to the recognition and enforcement of foreign judgments are well-established. Ordinarily our courts are not concerned with the substantive merits of the dispute, or how it would be determined under Canadian law. Rather, as La Forest J. noted in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at para. 36, "absent a breach of some overriding norm, other states as a matter of comity will ordinarily respect [the application of law within its territorial limits] and are hesitant to interfere with what another state chooses to do within those limits".

[87] In *Beals v. Saldanha*, [2003] 3 S.C.R. 416, the majority of the Supreme Court held that, once a real and substantial connection between the foreign court and the cause of action is established, a court must consider whether there is a legal defence to recognizing and enforcing a foreign judgment. The three traditional defences are fraud, public policy and natural justice. Public policy does not extend to differences in recovery between legal regimes, but is a defence of narrow application, to address perceived injustices that "offend our sense of morality" (at paras. 75 and 76). Natural justice refers to procedural fairness and not to fairness in respect of the merits of the case (at para. 64). LeBel J. also observed that the "law of conflicts needs to take new possibilities for abuse into account and to ensure an appropriate recalibration of the balance between respect for the finality of foreign judgments and protection of the rights of Canadian defendants" (at para. 217).

[88] In the *Beals* case, the court determined that a judgment of a Florida court should be enforced notwithstanding that the amount of the judgment appeared disproportionate to the value of the land originally in dispute. In other words, the judgment was enforceable even if the domestic court might have decided the case differently. As LeBel J. subsequently noted in *Pro Swing Inc. v. Elta Golf*

Inc., 2006 SCC 612, [2006] 2 S.C.R. 612, at para. 12, "absent evidence of fraud or a violation of natural justice or of public policy, the enforcing court is not interested in the substantive or procedural law of the foreign jurisdiction in which the judgment sought to be enforced domestically was rendered".

[89] Accordingly, foreign judgments will ordinarily be recognized by our courts in circumstances where we would expect our judgments to be recognized: where the court has properly taken jurisdiction in the sense that there is a "real and substantial connection" between the cause of action and the court, and absent a defence to enforcement based on a violation of public policy or natural justice or evidence of fraud. The fact that the case may have been decided according to different domestic principles and laws, is irrelevant to the question of enforcement.

[90] Defence counsel argue that the principles of comity recognized in these decisions mandate recognition of the U.S. Court's decision approving the settlement. This argument, however, ignores the context of the question of recognition in this case. First, this is not a two-party action, where the only parties are the plaintiff who has chosen the court and the defendant who has attorned in some manner to the original court's jurisdiction. This is a class proceeding, where, in addition to the named parties, the interests of absent class members who did not directly invoke the jurisdiction of the foreign court are engaged. Second, there are existing parallel proceedings underway, and this court has already assumed jurisdiction over the claims of the class members who are sought to be bound by the foreign judgment approving the settlement.

(b) Recognition in the Class Proceedings Context

[91] In a typical two-party action, the plaintiff selects the jurisdiction in which to commence an action, and the defendant would have the opportunity to contest the jurisdiction of the court, or to argue for a more appropriate forum. Parallel

proceedings between the same parties arising from the same cause of action are unusual, and if commenced, one action would likely be stayed.

[92] In class proceedings, multiple multi-jurisdictional proceedings are tolerated, and may be necessary where, as here, the classes are different or overlap but are not identical. Class members do not initiate the action, but their interests are represented, and in an opt out jurisdiction, they become bound by the result of the proceeding without their direct participation.

[93] The question of the court's jurisdiction over plaintiffs (rather than defendants) is unique to class proceedings. The additional factor in the recognition of class proceeding judgments is the protection of the "absent plaintiff", the class member who did not choose to come before the court, but whose rights will be determined in the proceeding. Sharpe J.A. described the issues as follows, at paras. 16 and 17 of *Currie*:

> Recognition and enforcement rules should take into account certain unique features of class action proceedings. In this case, we must consider the situation of the unnamed, non-resident class plaintiff. In a traditional non-class action suit, there is no question as to the jurisdiction of the foreign court to bind the plaintiff. As the party initiating proceedings, the plaintiff will have invoked the jurisdiction of the foreign court and thereby will have attorned to the foreign court's jurisdiction. The issue relating to recognition and enforcement that typically arises is whether the foreign judgment can be enforced against the defendant.
>
> Here, the tables are turned. It is the defendant who is seeking to enforce the judgment against the unnamed, non-resident plaintiffs. The settling defendants, plainly bound by the judgment, seek to enforce it as widely and as broadly as possible in order to preclude further litigation against them. Henry Paul Monaghan, "Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members" (1998) 98 Columbia L. Rev. 1148, at pp. 1155-56, warns of the need to guard against potential abuses by settling class action defendants who "welcome class action suits as a vehicle for limiting overall liability, sometimes at bargain-basement prices". *Before enforcing a foreign class action judgment against Ontario residents, we should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected.* [Emphasis added.]

[94] In *Currie*, the Court of Appeal considered an application in Ontario to enforce a class action settlement in Illinois that purported to encompass the claims of Ontario residents, by staying an Ontario class proceeding that had been commenced on behalf of Ontario residents. The Ontario action was not yet certified. The defendants sought to preclude the Ontario action by asserting that the Ontario plaintiff, and those he proposed to represent, were bound by the Illinois settlement from which they failed to opt out.

[95] In *Currie*, the court observed that it was not sufficient that there was jurisdiction in the sense of a substantial connection between the foreign court and the parties sought to be bound by its judgment. In respect of the enforcement of a foreign class proceeding judgment, the principles of order and fairness are engaged. Sharpe J.A. noted, at para. 25:

> To address the concern for fairness, it is helpful to consider the adequacy of the procedural rights afforded the unnamed non-resident class members in the [U.S.] action. Before concluding that Ontario law should recognize the jurisdiction of the Illinois court to determine their legal rights, we should be satisfied that the procedures adopted in the [U.S] action were sufficiently attentive to the rights and interests of the unnamed non-resident class members. Respect for procedural rights, including the adequacy of representation, the adequacy of notice and the right to opt out, could fortify the connection with Illinois jurisdiction and alleviate concerns regarding unfairness. Given the substantial connection between the alleged wrong and Illinois, and given the small stake of each individual class member, it seems to me that the principles of order and fairness could be satisfied if the interests of the non-resident class members were adequately represented and if it were clearly brought home to them that their rights could be affected in the foreign proceedings if they failed to take appropriate steps to be removed from those proceedings.

[96] Sharpe J.A. described the test as follows, at para. 30:

> In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness, including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. I would add two qualifications: First, as stated by La Forest J. in Hunt v. T&N plc, supra, at p.

> 325 S.C.R., "the exact limits of what constitutes a reasonable assumption of jurisdiction" cannot be rigidly defined and "no test can perhaps ever be rigidly applied as no court has ever been able to anticipate" all possibilities. Second, it may be easier to justify the assumption of jurisdiction in interprovincial cases than in international cases: see Muscutt v. Courcelles (2002), 60 O.R. (3d) 20, [2002] O.J. No. 2128 (C.A.), at paras. 95-100.

[97] The *Currie* factors are accordingly: (a) whether there was a real and substantial connection linking the cause of action to the foreign court; (b) whether the rights of the absent class members were adequately represented; and (c) whether absent class members were accorded procedural fairness, including adequate notice. These factors relate to when a court will "attach jurisdictional consequences" to an unnamed plaintiff's failure to opt out. In other words, all of these factors are relevant to the question of the original court's jurisdiction over the claims of the absent class members. The defences to enforcement, of fraud, or breach of natural justice or public policy would continue to operate.[40]

[98] In my statement of the test, I have substituted for Sharpe J.A.'s references to "non-resident" class members, the word "absent". Contrary to the defendants' submissions in this case, I do not consider the decision in *Currie*, and the identification of the relevant factors, as dependent on the fact that the court was dealing with Ontario residents. The jurisdiction of our courts is not limited to the determination of claims involving residents of this province. In speaking of comity, the Supreme Court has adopted the definition, that "[comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens *or of other persons who are under the protection of its laws*". [Emphasis added.][41]

[99] The question therefore is whether the foreign settlement should be enforced against unnamed persons whose interests fall within the jurisdiction of this court, which is the jurisdiction where their claims are sought to be precluded.

The interests to be protected are those of the "absent plaintiffs" (meaning claimants who are not directly before the court but are members of the class).

[100] In an article addressing the recognition of multi-jurisdiction class action judgments in Canada, Professor Janet Walker observed that class actions reflect the interests of unnamed plaintiffs who could not or would not sue separately, and that residence is not typically a criterion for inclusion in a certified class. She stated:

> ... Courts do not ordinarily make jurisdictional rulings based on the claimants' residence. Class actions regimes do not work that way either unless the class description itself refers to residence. On the contrary, recognizing a class action judgment precludes claims from being brought in the local courts by all those who fall within the description of the class, whether they are residents or non-residents....[42]

[101] In another article dealing with cross-border class actions, Professor Walker stated:

> ...In most discussions of crossborder class actions, emphasis has been placed on the jurisdiction of the court to adjudicate claims of absent class members, whether resident or non-resident. This is because the legislative regimes that support class actions are understood as enabling courts to decide class actions by expanding the jurisdiction of courts to enable them to decide the claims not only of named plaintiffs, but also of absent class members.[43]

[102] In this case, neither the certified class in Ontario nor the U.S. Settlement Class defines membership in the class with reference to a class member's residence. Rather, the class is defined based on whether the IMAX shareholder acquired his or her shares on the NASDAQ or the TSX, within the relevant class period. Purchasers of IMAX shares on the NASDAQ could be resident anywhere, including in Canada. Indeed, the notice program in the U.S. Settlement certification included publication in three Canadian newspapers. While counsel have assumed that most NASDAQ purchasers would be resident in the U.S., there was no evidence in this regard, as residence was irrelevant to the class definition.

[103] The overlapping class members are those who traded their shares on the NASDAQ, irrespective of where they live. A global class having been certified in this jurisdiction, the claims of all of the class members have come under the authority of this court. This court has already determined that there is a real and substantial connection between the claims of all class members, including those who acquired their shares on the NASDAQ, and Ontario. A non-resident absent plaintiff and a resident absent plaintiff are in the same position in this certified class proceeding. Neither has selected the forum in which to litigate and, unless or until they opt out, or they are excluded from the certified class by an order of this court, their interests fall within the protection of this court.

[104] Accordingly, it is appropriate to consider the *Currie* factors in determining whether the judgment approving the U.S. Settlement should be recognized.

2. What is the result of applying the *Currie* factors?

(a) "Real and Substantial Connection"

[105] The first part of the *Currie* test is easily met in this case. There is no question that there is a real and substantial connection between the cause of action of the overlapping class members and the U.S. Court. This is not contested by class counsel in this case. The U.S. Court clearly has a connection to the claims of the persons who acquired their shares of IMAX on the NASDAQ. IMAX is subject to the *Securities Exchange Act of 1934*,[44] which provides a remedy for shareholders under Rule 10b-5.[45]

(b) Notice and Procedural Fairness

[106] The next part of the analysis is to examine whether the overlapping class members were accorded procedural fairness, including adequate notice.

[107] Buchwald J. confirmed the adequacy of the notice and its dissemination under U.S. law, in her decision approving the U.S. Settlement.[46]

[108] The adequacy of notice, as a procedural safeguard to the rights of absent class members, is to be determined by this court, whose own authority over the claims of the overlapping class members is sought to be precluded. This does not mean that Ontario notice requirements are sufficient or necessary. As noted in *Currie*, at para. 42,[47] in assessing the fairness of the foreign proceedings, "the courts of this country must have regard to fundamental principles of justice and not to the letter of the rules which, either in our system, or in the relevant system, are designed to give effect to those rules."

[109] In this case, the notice made specific reference to the Ontario Action, and set out clearly the options available to the overlapping class members. Class counsel in these proceedings had input into the content of the U.S. notices.[48] Understandably, having provided such input, class counsel did not challenge the substance of the notice before this court; nor did they argue that its distribution was inadequate.

[110] The fact that the notices in the U.S. Action were sufficient is important, because it is through the process of notice that absent plaintiffs are afforded litigation autonomy. In this case, it is through the notice in the U.S. Action that the overlapping class members were given a choice, and as the defendants' counsel contend, having been informed about the Ontario Action, they made an election to accept the U.S. Settlement instead of continued involvement in these proceedings, when they did not opt out.

[111] Plaintiffs' counsel assert that the failure to opt out may well have occurred through apathy or disinterest, and that this court should not assume that overlapping class members in fact prefer the U.S. Settlement over their continued participation in these proceedings. That ignores however a

fundamental feature of opt out class proceedings. In an opt out system, the issue is not whether or how an actual choice is made by a class member, but whether class members have the opportunity to make an informed choice.

[112] In this case, unlike *Currie,* the existence of the parallel proceedings was fully and clearly communicated through the notices. The presumption is that class members understood the options available to them and the consequences of their failure to opt out; that is, that subject to an order of this court amending the class, they would be bound by the settlement reached in the U.S. Action.

[113] In this motion, class counsel did not challenge the fairness of the process that was followed by the U.S. Court in approving the settlement. The procedure complied with the requirements of U.S. law and practice (as confirmed by the expert opinion of Professor Coffee), and is consistent with what would have occurred in a Canadian court.

[114] The class proceedings regime in which the U.S. Settlement was reached, is structurally similar to our own: it is an opt out system, with court supervision of the proceedings, including certification, and court approval of settlement, notices and costs. In determining whether to approve the settlement of a class proceeding as "fair and reasonable and in the best interests of the class," our courts consider such factors as: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the settlement terms and conditions; (d) the recommendation and experience of counsel; (f) the future expense and likely duration of litigation and risk; (g) the recommendation of neutral parties, if any; (h) the number of objectors and the nature of objections; (i) the presence of good faith, arms length bargaining and the absence of collusion; (j) the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and (k) information conveying to the court the dynamics of and the positions taken by the

parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.), [1998] O.J. No. 2811, at pp. 440 to 444.

[115] The same factors were considered by Buchwald J. in her determination that the U.S. Settlement was fair, reasonable and adequate.[49]

[116] There was no argument by class counsel about how the U.S. Court dealt with the issues procedurally; rather their principal objection (which is addressed below as a question of adequacy of representation) is that the court did not consider the merits of the settlement having regard to remedies available to class members under Ontario law.

(c) Adequate Representation

[117] Adequacy of representation refers to both the representation of class members by the representative plaintiff and by class counsel in the foreign proceeding. There is no question that TMF, a substantial IMAX shareholder that traded on the NASDAQ, was an appropriate representative plaintiff for those who acquired their shares on the NASDAQ. TMF was approved by the U.S. Court as lead plaintiff,[50] and was accepted by this court as an intervenor on the motion respecting notice.[51] U.S. counsel, Abbey Spanier Rodd and Abrams LLP, is recognized as able counsel experienced in class action and securities litigation.

[118] Defence counsel assert that the U.S. Court's approval of TMF as lead plaintiff and Abbey Spanier as class counsel, is determinative of the question of adequate representation. I disagree. As with the question of notice, this court is not bound by the determination of the U.S. Court that there was adequate representation, but must satisfy itself on this issue, as part of the recognition question. At this stage, the question is whether the interests of the class

members sought to be bound by the U.S. Settlement were adequately represented in the proceedings that led to the settlement.

[119] The question of adequacy of representation was not addressed in detail in *Currie*. Sharpe J.A. referred to the issue at para. 26 as follows:

> In the circumstances of this case, it is not necessary for me to consider the issue of adequacy of representation in detail. I note, however, that American commentators have raised the "race-to-the bottom" concern: see Monaghan, "Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members" (1998) Columbia L.Rev. 1148, at pp. 1155-56]. A sophisticated defendant may persuade plaintiffs' counsel to accept a sharply discounted recovery rate for non-resident (including Canadian or Ontario) plaintiffs. The foreign representative plaintiff's interests may conflict with those of the Ontario class, or not fully encapsulate the interests of the Ontario class. Recognition and enforcement rules must be attentive to these possibilities and retain sufficient flexibility to address concerns of this nature.

[120] The "race to the bottom" concern recognizes that class action settlements may be susceptible to manipulation.[52] Improvident settlements may result from bargaining between defendants and plaintiff's counsel who are motivated by self-interest in their fees. A "reverse auction" may occur where the defendant in parallel class actions "picks the most ineffectual class lawyers to negotiate a settlement with, in the hope that the [applicable] court will approve a weak settlement that will preclude other claims against the defendant".[53]

[121] In an article commenting on the implications of the *Currie* decision for Canadian plaintiffs, Ellen Snow described the potential for a reverse auction as a question of adequacy of representation as follows:

> One often noted problem surrounds the adequacy of representation of foreign plaintiffs. While class action legislation generally imposes an obligation on the trial judge to ensure that the plaintiff class is well represented, which includes a duty to consider the interests of absent class members, there remains the real threat of ruthless dealings by plaintiff counsel. It is not unheard of that counsel, motivated by lure of substantial fees from a settlement, may opt to negotiate an earlier resolution at the expense of plaintiffs' rights. Unscrupulous counsel may use *res judicata* as a bargaining chip to entice defendants into settlement. Henry Monaghan notes that defendants in such actions may use the settlement option for limiting liability. Defendants may forge a settlement, often at low or

> discounted rate, with one set of plaintiffs' counsel and use that as a means to bind other claimants to the low settlement amount and preclude other similar suits being brought. Plaintiffs' counsel receives fees from the settlement before any division amongst the members of the class occurs and, therefore, may not be discouraged from entering a self-dealing transaction...Thus, negotiated settlements may not reflect the merits of a claim but may instead be driven by the sharpness of counsel and defendants. In such circumstances, it seems contrary to notions of justice to hold the right of action by domestic plaintiffs to be precluded by the existence of a foreign settlement.[54]

[122] What underlies the concern about settlement class actions and reverse auctions is that the interests of class members may be sacrificed for the benefit of class counsel, whose interest in their fee is in conflict with the interest of maximizing the value of the settlement. The determination of whether class members' interests were adequately represented in a class action settlement, engages concerns about the potential for class counsel's self-interest to conflict with class members' interests. As one author notes, these abuses are likely to occur where class actions may be settled with little judicial supervision.[55]

[123] In the present case, the U.S. Settlement occurred after six years of litigation, and extensive documentary discovery. There were several rounds of negotiations, in which the Ontario plaintiffs' counsel participated at various stages, including in two mediations with experienced mediators. This was clearly not a "settlement class action", in the sense of a class action commenced only for the purpose of effecting a speedy settlement, or a settlement entered into with minimal judicial oversight. I agree with the assessment of Professor Coffee (who coined the term "reverse auction"),[56] that the progress of this matter does not suggest that a "race to the bottom" or "reverse auction" took place in the present case.[57]

[124] While plaintiffs' counsel acknowledged in argument that there is no proof that the particular settlement in this case resulted from a "reverse auction" (an argument that is difficult to make in any event without putting their own positions during settlement negotiations before the court), they assert that granting the

relief sought in this case would encourage this kind of behaviour by competing class counsel in other cases. I will consider that argument later in this decision, when addressing the "preferable procedure" issue and the factors relevant to the court's discretion to grant the order requested.

[125] Class counsel's principal argument opposing recognition of the U.S. Settlement, is that the interests of the overlapping class members were not adequately represented because U.S. class counsel failed to take into account in their negotiations, and in their representations to the U.S. Court, the potential for an enhanced recovery for class members under Ontario law and procedure. They argued that, because parallel proceedings were outstanding in Ontario that would have afforded a better recovery, it was the duty of class counsel to bring this to the attention of the U.S. Court, and to seek to justify the U.S. Settlement under Ontario law.

[126] The defendants assert that there was no obligation at law on the part of U.S. counsel or the U.S. Court to analyze the claims of the U.S. Settlement class members who were all NASDAQ traders, from the perspective of Ontario law and procedure. I agree with this submission.

[127] In circumstances where class members' claims may be subject to different legal regimes, adequate representation may require that this concern be addressed. This may involve the appointment of separate representative plaintiffs, with or without subclasses. In *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, [2010] O.J. No. 1057 (S.C.J.), for example, Strathy J. certified a class in a primary market misrepresentation case, but required the appointment of a separate representative for class members located outside Canada who purchased their shares in Canada, and left open the possibility that a party may wish to plead foreign law with respect to the rights of class members outside Ontario (at para. 117). Indeed, in the Certification Decision in this case, after

adopting a "wait and see" approach to the conflict of laws issues, I referred to the potential need to recognize subclasses if differences in the applicable law affecting the claims of NASDAQ traders emerged (at para. 164).

[128] While it is possible (but not certain) that the NASDAQ traders' claims might have been determined in these proceedings under Ontario law,[58] there has been no determination in this action that this would in fact be the case. Although the defendants for the purpose of this motion were prepared to accept that Ontario law would apply to the NASDAQ traders' claims, their Statement of Defence pleads that U.S. law would apply.[59] The choice of law question for determination of the NASDAQ traders' claims remains a live issue in these proceedings. By contrast, in the U.S. Proceedings, there was never any question that Ontario law would be applied by the U.S. Court; rather the argument that was made, and rejected by Buchwald J., was that certification should be refused on the basis that an Ontario class proceeding would be "superior" to litigation in the U.S. Had the action proceeded in the U.S. Court, all of the class members' claims would have been determined under the applicable U.S. legislation.

[129] The claims of the NASDAQ traders are presumptively subject to U.S. law. As such, I am not persuaded that there was any obligation on the part of U.S. class counsel in this case to justify to the U.S. Court the merits of the settlement having regard to Ontario law.

3. Conclusion re: Recognition of the U.S. Fairness Decision

[130] I am satisfied that the U.S. Fairness Decision should be recognized in this jurisdiction, as the decision of a court that was made within its jurisdiction, and in circumstances where there was order and fairness in the treatment of the claims of overlapping class members in the notice they were given respecting the options available to them, in the process before the U.S. Court, and in their representation in the proceedings resulting in court approval of the settlement.

[131] Typically, in determining whether to recognize and enforce a foreign judgment, there would be a further inquiry as to whether there are any defences to recognition. As noted earlier, the defences are fraud, denial of natural justice and breach of public policy.

[132] The traditional defences to recognition of a foreign judgment were not argued in this case (although class counsel argued against the relief sought by the defendants on a number of other grounds). The defences of fraud and breach of public policy (which, according to *Beals,* is restricted to a perceived injustice that "offends our sense of morality") are not engaged in this case. The defence of denial of natural justice is subsumed in the question of whether there was procedural fairness afforded to the absent class members. In *Currie,* the questions of order and fairness, including the adequacy of notice, although relevant as well to natural justice, were treated as part of the jurisdictional inquiry, and not specifically as defences to recognition,[60] and that is how I have approached the issue.

[133] Some authors have suggested that the traditional defences to enforcement should be expanded, when determining whether a foreign class action settlement should preclude a local class proceeding.[61] It is unnecessary to consider this issue, which was not raised directly by either side. In this case, the U.S. Settlement is not final, but dependent on an order from this court. The question of recognition arises in the context of the proposed amendment of a certification order, and as such, there remains a discretion in this court to make or to refuse the order in question. Before turning to the factors relevant to the "preferable procedure" issue, there is a challenge by class counsel to the procedure followed in this case, which, for lack of a better place in the analysis, I will address at this point.

C. Is this motion in substance a motion for approval of a settlement in an Ontario class action under s. 29(2) of the CPA?

[134] The principal argument of Ontario class counsel is that the U.S. Settlement is inadequate when measured against Ontario law and procedure. They assert that this court should conduct its own fairness hearing before granting the relief requested because this motion is "in substance" a motion to approve a settlement of the Ontario action, which should have been brought under s. 29(2) of the CPA.

[135] While the relief sought would have the effect of precluding further claims by persons who have elected to be bound by the U.S. Settlement, this fact alone does not transform the current motion into a motion for approval of a settlement. That would be impossible, as the settlement is not supported by Ontario class counsel, and the matter is not before this court as a resolution of the Ontario Action, even if the order requested would result in the preclusion of further litigation of the overlapping class members' claims in Ontario. The settlement of all or part of the claims in the Ontario Action would require the agreement of the authorized representatives of the parties in *this* action. That of course has not occurred. What has occurred is the result of the existence of overlapping parallel proceedings, where two courts have exercised jurisdiction over the claims of the same persons.

[136] The adequacy of the U.S. Settlement is not something for this court to assess as part of the question of whether to recognize the U.S. Fairness Decision. In *Currie,* the substance of the settlement was not the issue; the Ontario court focussed on the *process* that was followed in protecting the interests of absent class members. The fact that Ontario residents were to receive a less favourable recovery than U.S. residents was not articulated as the reason for the court's refusal to recognize the settlement in the *Currie* case.[62]

[137] Similarly, in the *Lépine* case, the court considered the procedural safeguards available to Québec residents under an Ontario settlement. The fact that the proposed class representative in parallel proceedings in Québec had rejected the defendants' settlement offer was mentioned (at para. 4), but was not relevant to the question of recognition and enforcement of the Ontario judgment approving the settlement.

[138] Following the authority of *Currie* and *Lépine*, if the U.S. Settlement had been approved without the need for a "carve out" order, this court would have considered only whether the U.S. Fairness Decision should be recognized so as to preclude the further litigation in this jurisdiction. It was the position of defence counsel that once the U.S. Fairness Decision is recognized, there is no residual discretion for the court to refuse the carve-out order. I disagree with this assertion.

[139] The U.S. Settlement is not final, but depends on an order amending the Ontario class. The analysis does not end, therefore, with the recognition of the U.S. Fairness Decision, although that is an essential component. This court must determine whether, having regard to the existence of the U.S. Settlement, which was approved by the U.S. Court in a manner this court has found to have been procedurally fair and with the interests of class members adequately represented, the global class should be amended on the basis that participation in the Ontario Action is no longer the preferable procedure for the determination of the claims of overlapping class members who did not opt out of the U.S. Settlement.

D. Relevant Criteria for the Amendment of the Class: Step Two - "Preferable Procedure"

1. <u>What factors are relevant in determining whether it would be the "preferable procedure" to amend the class?</u>

[140] I turn now to the question whether, having recognized the U.S. Fairness Decision, this court should amend the certification order. The "preferable procedure" inquiry includes a consideration of whether the class action is preferable to other "reasonably available means of resolving the class members' claims": *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 31, and must be conducted through the lens of the three principal objectives of class proceedings, which are judicial economy, access to justice and behaviour modification: *Hollick*, at para. 27.

[141] There is no real question that this court's recognition of the U.S. Settlement and the amendment of the class to exclude the overlapping class members' claims, would serve the objectives of behaviour modification and judicial economy. The issue is whether amendment of the class would further "access to justice", for the overlapping class members and for the members of the class who would remain if the NASDAQ purchasers are "carved out", and whether the order sought would respect the integrity of our class actions regime.

[142] Class counsel's argument about the need to assess the U.S. Settlement under Ontario law assumes that this court would apply Ontario law to the claims of the overlapping class members (which is admitted by the defendants only for the purpose of this motion), and that the plaintiffs would have a significantly better chance of success in litigating their claims under the Ontario legal regime. I have already determined that it is not the function of this court to decide whether to approve the U.S. Settlement, after conducting its own fairness evaluation, and that it was not the role of U.S. counsel to justify the settlement to the U.S. Court under Ontario law. In considering whether the overlapping class members would be afforded access to justice through the U.S. Settlement, and by removing their claims from the certified global class in Ontario, however, a consideration of the adequacy of the settlement under Ontario law may well be engaged.

[143] I am prepared to accept as a working proposition that, if the U.S. Settlement were demonstrated to be improvident when compared with the prospect of litigating the claims of the overlapping class members here in Ontario, it may be the "preferable procedure" to refuse the order (thus defeating the U.S. Settlement) and to continue to include their claims in the Ontario Action. It is in that context that I consider class counsel's arguments that the U.S. Settlement is inadequate, having regard to (a) the alleged advantages of litigating the claims under Ontario law; (b) the discovery evidence which supports the plaintiffs' claims; and (c) their estimate of the maximum value of the class members' claims.

2. Access to Justice for the Overlapping Class Members

(a) Alleged Advantages to Litigating the Claims in Ontario

[144] In finding the U.S. Settlement fair, Buchwald J. identified certain challenges to the plaintiffs in the litigation under Rule 10b-5, including the need to prove that the defendants acted with *scienter* (meaning fraudulent intent). Under the Ontario statutory remedy for secondary market misrepresentation in Part XXIII.1 of the OSA, by contrast, there is no requirement to prove intent where, as here, the misrepresentations were contained in the reporting issuer's "core documents". The defendants will incur liability for a misrepresentation to the secondary market unless they prove that they satisfy the requirements of the due diligence defence or expert reliance defence. The negligence standard and the reverse onus are apparent advantages of the Ontario statutory claim.

[145] A significant disadvantage, however, is that the Ontario statutory claims are subject to damages limits or caps, except with respect to certain individual defendants, who are proven to have authorized, permitted or acquiesced in the making of a misrepresentation while knowing that it was a misrepresentation: OSA, s. 138.7. The damages cap for a reporting issuer is the greater of $1

million and 5% of the average market capitalization of the issuer for the ten trading days prior to the alleged misrepresentation first having been made. According to the plaintiffs' expert, the damages cap for claims against IMAX in this action is CAN$18.4 million.[63] There are no similar limitations on damages for claims under Rule 10b-5.

[146] Under the OSA, the diminution in the market price of the issuer's security is presumed to have been related to the misrepresentation, and the defendants bear the burden of proving that any diminution in the market price of the security is unrelated to the misrepresentation: OSA, s. 138.5(3). Under Rule 10b-5, the plaintiff has the onus of establishing loss causation. This was another challenge of the U.S. Proceedings that was referred to by Buchwald J. in the U.S. Fairness Decision.

[147] The common law causes of action in these proceedings engage many of the same requirements as claims under Rule 10b-5, including the need to prove loss causation. While reliance is presumed for the Ontario statutory cause of action, it remains a necessary element for the tort of negligent misrepresentation. Whether reliance could be proven by the efficient market theory or otherwise on a class basis, as alleged by the plaintiffs in this action, remains an open question.[64] There have been no Canadian cases to date where common law claims for secondary market misrepresentation have proceeded to trial.

[148] Although the defendants' motion for summary dismissal of this action, invoking the three year limitation period for asserting a statutory claim, was dismissed,[65] this decision is under appeal. The law respecting the limitation period for asserting secondary market misrepresentation claims is unsettled, and could as yet defeat the statutory claim.[66]

[149] From this brief review, there are challenges to litigating the plaintiffs' claims in both jurisdictions, and there is no compelling reason to conclude that the

Ontario legal regime, if applicable, would be more favourable to the determination of the claims of NASDAQ members of the class. The evidence does not support the contention of class counsel in these proceedings that the NASDAQ class members would be assured of a better outcome in litigation in this jurisdiction, which is not surprising since these are early days for secondary market misrepresentation claims in Canada.

(b) Evidence Supporting the Claims

[150] In their factum, class counsel reviewed at length certain aspects of the documentary discovery from this action, obtained during the past several months, to suggest that their case is stronger than it appeared to be at the time that leave was granted to pursue the statutory claim. They identified additional evidence of efforts by IMAX to pressure and induce customers to accept installations of theatre systems, in order to have associated revenue recognized in the relevant quarter for accounting purposes, as well as evidence in support of the contention that IMAX's failure to complete a sale transaction resulted from concerns about its accounting practices and the SEC investigation.[67]

[151] All of this evidence was presumably available to the plaintiffs' counsel in the U.S. Action, as Buchwald J. made reference to the extensive discovery respecting both certification and the merits of the case that had taken place in the U.S. Proceedings. It would be wrong to infer that the evidence that has been identified by class counsel in Ontario was ignored or discounted by U.S. class counsel in their negotiations.

[152] In any event, at this stage of the litigation, there has been no determination of the merits of the plaintiffs' claims, or the available defences, in either jurisdiction. In the context of the leave motion, this court found only that the plaintiffs have a "reasonable possibility of success at trial" with respect to the statutory claims, on the evidence that was before the court at that time. As

defence counsel pointed out, there is evidence to support the statutory defences; class counsel have not filed any evidence from a business or accounting expert; they have not reviewed the working papers of PriceWaterhouseCoopers LLP (whose advice was sought with respect to the accounting practices at issue in this case); and the court has heard no evidence from fact witnesses or relevant experts.

(c) Maximum Damages and the Value of the U.S. Settlement

[153] Counsel for both parties submitted expert reports. Class counsel relied on the Torchio Report as evidence of the maximum value of the plaintiffs' claims and the value of the U.S. Settlement, while defence counsel relied on the expert of Dr. Denise Neumann Martin (the "Martin Report"),[68] to suggest that the U.S. Settlement was within the range of expected outcomes for comparable securities class actions. At this point, and at the risk of over-simplification, I will comment only briefly on the two expert reports. In view of the analytical approach I have adopted, the reports are of only marginal relevance to the issues to be decided in this motion.[69]

[154] According to Mr. Torchio's calculations,[70] the maximum aggregate damages under Part XXIII.1 of the OSA in the Ontario Action would be as high as US$90.4 million. Of that amount, US$79.8 million would be attributable to purchasers of IMAX shares over the NASDAQ (the overlapping class members).

[155] Mr. Torchio estimated the aggregate damages for NASDAQ and TSX purchasers under applicable U.S. law at US$101.4 million during the applicable U.S. class period (February 27, 2003 to July 20, 2007),[71] and US$93.7 million during the Ontario class period, of which US$80.5 million would be attributable to the overlapping class members.[72]

[156] By comparison, in the settlement approval materials before the U.S. Court, U.S. class counsel and their economic consultants estimated damages as high as US$91 million, assuming that the proper measure of recoverable damages included the majority of IMAX's stock price drop, and that a court and jury would make every factual finding in the favour of the class.[73]

[157] It is worth noting that Mr. Torchio's calculations of the maximum recoveries available under U.S. law and under the Ontario statutory scheme (without applying the damages cap) are roughly the same, with the maximum recovery under U.S. law exceeding that recoverable under the Ontario statutory scheme (without regard to the damages cap or pre-judgment interest).

[158] Of the U.S. Settlement of US$12 million, assuming constant claims rates, Mr. Torchio calculated that approximately US$3.1 million of the US$12 million would be allocable to the NASDAQ purchasers who are not included in the current Ontario class, while the remaining US$8.9 million would be allocable to the overlapping class members. Mr. Torchio concluded therefore that the U.S. Settlement would provide a recovery of 11% of the maximum available damages for overlapping class members.

[159] By comparison, the U.S. Court observed that the settlement would represent 13% of recoverable damages if the plaintiffs were entirely successful in the U.S. Action.[74]

[160] The defendants relied on the Martin Report as support for their contention that the U.S. Settlement was fair and adequate. Dr. Martin is an economist and officer of National Economic Research Associates, Inc. ("NERA").

[161] Dr. Martin did not join issue with Mr. Torchio's calculations, his estimate of the number of damaged shares, or his conclusion that the U.S. Settlement reflected approximately 11% of the estimated maximum damages, as she

questioned his working assumption that 100% of the share price drop was due to the alleged misrepresentations.[75]

[162] Using a statistical model developed by NERA (comprised of data since the mid-1990s on more than 1,000 court-approved federal U.S. securities class action settlements), Dr. Martin predicted a settlement of US$11.4 million for investors who purchased IMAX shares on the NASDAQ during the U.S. class period. Including the TSX shares, the NERA model would result in a predicted settlement of US$11.5 million. The U.S. Settlement of US$12 million (plus the offer to settle the Ontario proceedings for US$1.33 million) is accordingly greater than the predicted settlement of US$11.5 million using the NERA model.

[163] I agree with class counsel that evidence respecting other securities class action settlements is of limited value. The Martin Report may provide some evidence that the U.S. Settlement is not improvident when compared to the resolution of other U.S. securities actions,[76] but it does not address the argument of class counsel that the settlement is improvident when compared to what might be achieved through litigation or resolution in this jurisdiction.

[164] Whether the U.S. Settlement was 11% (as suggested by Mr. Torchio) or 13% (the estimate of U.S. class counsel) of the maximum value of the plaintiffs' damages, is not the issue, when considering whether the U.S. Settlement was improvident, compared with the outcome that might be expected in the Ontario Action. Settlements are premised on a number of factors, and the question is whether the settlement is reasonable in all the circumstances. As Buchwald J. noted:

> The adequacy of the amount achieved in settlement may not be judged 'in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case". Instead, we must examine whether the settlement amount lies within a "range of reasonableness", which range reflects "the uncertainties of law and fact in any

> particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion. [citations omitted].[77]

[165] Similarly, in *Dabbs v. Sun Life Assurance Co. of Canada*, Sharpe J.A. observed, at p. 440:

> ...[All] settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interest of those affected by it when compared to the alternative of the risks and costs of litigation.

[166] In this case, where the Ontario legal regime is not demonstrably more advantageous to the overlapping class members' claims, and where there has been no determination in this court that would guarantee a better outcome, what is missing in class counsel's argument that the U.S. Settlement is improvident is their own evidence about the true settlement value of the case. Class counsel could have put to the court, on a confidential basis, and with the defendants' consent, the value of the settlement offers exchanged at the mediations and negotiations in which they participated. According to defence counsel, such offers would "represent the plaintiffs' actual position as to the possible compromise value of this case, taking into account their assessment of the strengths and weaknesses of their case, and the risks, costs and time to take it through trial".[78] There was certainly no obligation to do so, however, in the absence of such information and in the face of the substantial uncertainty as to the outcome of the litigation in both jurisdictions, it is impossible to accept their contention that the U.S. Settlement is unfair and inadequate.

[167] While Ontario class counsel believe the U.S. Settlement to be inadequate, the evidence does not establish that the settlement is improvident when compared to what is available through litigation in this jurisdiction. As such, I have concluded that remaining in the global class for the determination or settlement of their claims in these proceedings would afford no clear advantage

to the overlapping class members who have not opted out of the U.S. Settlement. To refuse the order sought by the defendants would deny them the benefit of the U.S. Settlement, which has been found to be fair by the U.S. Court. Participation in the U.S. Settlement would meet the objective of providing access to justice for the overlapping class members.

3. Access to Justice for the TSX Purchasers

[168] Next I consider the effect of carving out the overlapping class members on access to justice for the TSX purchasers of IMAX shares. Many of the costs involved in prosecuting a class action, including expert fees, are fixed, irrespective of the size of the class. The reduction of the class by 85% means that fixed costs will be spread across a population that is only 15% as large as the current class. As such, class counsel contend that the economic viability of the claims of the remaining class members, the TSX purchasers, will be reduced if the order requested is granted.

[169] This argument would be more compelling if the effect of the U.S. Settlement was to leave the TSX purchasers stranded without the option of resolving their claims on a similar basis. This is not the case. The same offer, proportionally, was made available to Ontario class counsel for resolution of the TSX traders' claims, except that the offer is exclusive of costs, which would be subject to negotiation. There was no intent in this case (as in *Currie*) to treat one part of the class more favourably than another, and no indication that the U.S. Settlement was intended to undermine the viability of the TSX purchasers' claims.

[170] The fact that there are overlapping class actions means that there was always the possibility that the claims of overlapping class members might be determined first by the U.S. Court, and even if the relief requested in this motion were refused, that risk would continue. Class counsel sought certification of a

global class in this case, knowing that a parallel proceeding was pending in the U.S. In this case, while I found at the certification stage that "the prospect that a similar proceeding might be certified in another jurisdiction [was] not sufficient to prevent the court from certifying a global class in Ontario" (at para. 134), and with respect to the argument that the laws of other jurisdictions might be applicable to the claims of NASDAQ traders, I endorsed a "wait and see" approach to potential conflict of laws concerns (at para. 164).

[171] There is always a risk for class counsel that costs, time and effort invested in a class proceeding may not be recovered at the end of the day. In the present case, substantial costs have been awarded to class counsel at various stages of the litigation. They received costs in respect of the leave and certification motions, and in their defence of the summary judgment motion. Going forward, the prosecution of the action may be less cost-effective or efficient; however, that is a risk that counsel assumes in any class proceeding, particularly in the context of parallel cross-border actions.

[172] Accordingly, I am unable to conclude that access to justice for the TSX traders would require that the order sought be refused, and that the U.S. Settlement should be defeated in favour of continued litigation in this jurisdiction. The TSX traders have the opportunity to participate in a proportionally equivalent recovery, and to the extent that it is considered inadequate by their representatives, their claims can continue to be asserted in the reconstituted class.

4. "Access to Justice" Generally

[173] A further consideration, that extends beyond the interests of the particular class members in this case, is whether amending a class that has already been certified as a global class to remove the overlapping class members, would

adversely affect in some fundamental way the class actions regime in our jurisdiction, and inhibit access to justice in future cases.

[174] Class counsel argue that granting the relief sought in this case would set a dangerous precedent, encouraging reverse auctions and a "race to the bottom" in other cases. They assert that a defendant in parallel and overlapping class proceedings should have incentives to settle both actions, rather than to bargain with competing class counsel to sell out the claims for the lowest amount possible in order to earn counsel fees. What class counsel appear to endorse is an approach that would require overlapping inter-jurisdictional class proceedings to be settled globally or not at all.

[175] Professor Coffee explains the problem with this approach in his expert report at paras. 33 and 41:

> Although global settlements are desirable, if defendants in such a two front war involving highly overlapping class actions need to settle on a global basis or not at all, the result is to increase the leverage of an intransigent plaintiff's counsel who may wish to hold out for an otherwise unrealistic higher recovery. Inherently, holdouts have power, and in this context a plaintiff's counsel in one action can effectively block settlement in the other action because defendants will fear that they will have to pay a double recover. Unless the two actions can be separated with the overlap being minimized, defendants effectively have only two unsatisfactory choices: (1) to settle globally with both plaintiffs' counsel (possibly at an unreasonable price because of the greatly enhanced leverage given to plaintiff's counsel, or (2) to settle the U.S. Action and seek to plead it as a defense to the Ontario Action. This latter course is, however, fraught with some risk and legal uncertainty...
>
> ...
>
> Global settlements do occur, but if only global settlements can occur that gives undue leverage to holdouts. That is undesirable, both in terms of fairness to defendants and even class members (whose eventual recovery may be delayed). The incentive for plaintiff's attorneys in one of two parallel class actions to hold out in order to exploit their leverage also injures international comity because it deprives the first court of the opportunity to resolve its litigation through settlement.

[176] The procedure in this case, according to Professor Coffee, "steers a middle course that avoids any race to judgment and gives the overlapping class

members the choice as to which action they will remain in, but it also denies any veto power over all settlements to a counsel unwilling to settle",[79] and is a "sensible middle course that neither holds one action hostage to the other nor allows the first settlement to block other actions".[80]

[177] I emphasize that there was no evidence that Ontario class counsel were intransigent and unreasonably exercising a veto power over settlement in this case, or for that matter that U.S. class counsel and the defendants were engaged in a "race to the bottom". Rather, the final round of negotiations leading to the U.S. Settlement proceeded between U.S. class counsel and the defendants, without inviting the participation of Ontario class counsel, and without their knowledge, after the Ontario Action had been certified, and while the U.S. Action was progressing more slowly. Ontario class counsel might reasonably have expected to have been involved in the negotiations, however, they were excluded.

[178] While the ideal may be a global settlement of cross-border class proceedings, the existing litigation framework for cross-border class actions is that parallel proceedings may occur in two separate and independent courts. In the absence of a binding protocol, or the co-operation of counsel on both sides of the border, the objective of "sensitive integration" of cross-border class proceedings is aspirational only. There is no mechanism for the courts of one jurisdiction to impose an integrative procedure on the parties and their counsel within the other jurisdiction. As a result, a decision may be made in one of the courts, including court approval of a settlement, that may well affect the rights and interests of persons whose claims are pending in the second court.

[179] It is not the function of this court to seek to jealously guard its own jurisdiction over a class proceeding that has been certified here. Such an approach is inconsistent with the principles of comity. It is also not the function of

the court to favour or protect the interests of class counsel within this jurisdiction, knowing that they have invested time and resources into the litigation, and that their compensation will depend on the size of the judgment or settlement they are able to achieve.[81] As I have already noted, class action counsel assume significant risks, including the potential that the court may certify a smaller class than that requested. In pursuing an action when there are existing parallel proceedings in another jurisdiction, class counsel are aware that the other action might move more quickly or reach a determination before their own case is decided or resolved.

[180] The court must of course be vigilant to ensure that by granting the relief requested it does not become complicit in any abuse or manipulation of the class proceedings regime. If the U.S. Settlement were demonstrated to have been the product of a reverse auction, then the relief sought here would have been refused. Such relief would also be refused if it were apparent that the settlement and this motion was an attempt to circumvent an order of this court made on the merits, or substantially affecting the proceedings in this jurisdiction, or was in some other way in disregard of this court's jurisdiction.

[181] I do not find in this case that the relief sought would challenge the jurisdictional integrity of our court, or alter the typical approach to the resolution of cross-border class actions. Attempts to settle one proceeding without the other carries the risk that the settlement will not be recognized by the second court, or as here, where the settlement requires an order from this court, that the certification order might not be amended to reduce the size and substance of the certified class. Granting the relief sought in this case does not mean that it would be granted in every case.

5. Other Relevant Factors

[182] There are other circumstances specific to this case that support the exercise of the court's discretion to amend the class in this case, that I will mention briefly.

[183] First, there is the fact that the U.S. Court has a strong jurisdictional connection with the matters at issue. In *Abdula* and *Currie,* the courts referred to the "reasonable expectations" of the class members as to where their claims might be litigated as relevant to the question of a court's jurisdiction.[82] It would be consistent with the reasonable expectations of the overlapping class members, who acquired their shares on the NASDAQ, and in circumstances where IMAX was subject to both U.S. and Ontario securities laws, that their rights could be determined by the U.S. Court in the context of applicable U.S. law. This is a factor that, while not determinative, weighs in favour of the order sought.

[184] Second, the procedure followed in the U.S. Court was robust, resulting in a settlement that was assessed as fair by a judge who had case managed the action for several years, and was unquestionably familiar with the issues in the proceedings. There was no argument before Buchwald J. as to the inadequacy of the settlement, except for one objector who relied on the Torchio Report, and this was given proper consideration in the U.S. Fairness Decision.

[185] The U.S. Settlement and the U.S. Court's approval recognized the fact that there were parallel proceedings in Ontario in which claims are being asserted on behalf of persons who would be covered by the settlement. While Ontario class counsel were not involved in the negotiations leading to the U.S. Settlement, they were not prevented from putting their position before the U.S. Court. As I have already noted, they had input into the content of the notices, which included extensive reference to the Ontario Action, and provided contact information for Ontario class counsel. At the time Ontario class counsel learned that they had

been excluded from the settlement negotiations, they wrote to Buchwald J. to express their concern, and indicated that they were considering the steps that ought to be taken to protect their clients' interests;[83] however, no steps were taken with a view to their direct participation in the U.S. Proceedings.

[186] It is unknown whether the involvement of Ontario counsel, directly by seeking to intervene, or in some other manner, would have been accepted by the U.S. Court or opposed by local class counsel. There is no precedent for dealing with the situation that they confronted, and as such, they cannot be faulted for failing to put their position more directly before the U.S. Court.[84]

[187] Some commentators advocate a greater role for non-resident objectors in the original fairness proceedings.[85] It is beyond the scope of this decision to determine whether Ontario class counsel would or should have been able to participate in some manner in the U.S. Fairness Hearing. I simply observe that the U.S. Court gave due attention to the existence of the Ontario Action, on the materials that were before her in the form of an objection. This weighs in favour of the order sought.

[188] The defendants' position on this motion was that this court's amendment of the class should be automatic, provided that the U.S. Court that approved the fairness of the settlement of the claims of overlapping class members had jurisdiction. It should be obvious from my decision that I do not agree with this contention. Once a global class was certified in this jurisdiction, the claims of overlapping class members came within the protection of this court. While this is not a motion to approve a settlement, the defendants nevertheless had to persuade the court that the certification order originally made should be amended, with the effect of removing from the certified class the overlapping class members who had not opted out of the U.S. Settlement. This required the recognition of the U.S. judgment approving the settlement (under a *Currie*

analysis), and then, the consideration of other factors relevant in particular to the objective of access to justice, in order to determine whether it was the "preferable procedure" to amend the class.

[189] I have concluded that the U.S. Court, in making the U.S. Fairness Decision which approved the U.S. Settlement subject to an order of this court, had jurisdiction and followed a procedure that was fair to absent class members and adequately represented their interests. Having recognized the U.S. Settlement, and considered whether the settlement furthers the objectives of class proceedings, and in particular access to justice, I have determined that it is the preferable procedure to remove such claims from this action, in favour of an order that will permit the U.S. Settlement to be concluded.

VIII. Conclusion

[190] Accordingly, the certification order dated December 14, 2009 shall be amended to define the certified class as follows:

> All persons, other than Excluded Persons, who acquired securities of Imax during the Class Period on the TSX and on NASDAQ, and held some or all of those securities at the close of trading on August 9, 2006 (the "Class Members").
>
> "Excluded Persons" means Imax's subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns, and any member of the defendants' families and any entity in which any of them has or had during the Class Period a legal or de facto controlling interest and all NASDAQ purchasers during the Class Period who did not deliver an opt out notice in the U.S. class action *In re IMAX securities Litigation*, Civil Action No. 1:06-cv-06128 (S.D.N.Y.).

[191] Counsel shall consult with one another with respect to the further directions that will be required as a result of this order, with respect to such matters as notice, amendment to the litigation plan, and amendment of pleadings, and shall provide me with the proposed additional directions on consent or otherwise within 30 days.

[192] If counsel are unable to agree on costs of this motion, I will receive written submissions as follows: the defendants' submissions within 30 days, responding submissions on behalf of plaintiffs within 20 days of receipt of the defendants' submissions, and reply submissions, if any, within ten days of receipt of the responding submissions.

K. van Rensburg J.

DATE: March 19, 2013.

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[1] *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) (the "Certification Decision"), at endnote 4.

[2] *Silver v. Imax Corp.*, ONSC 1047, [2012] O.J. No. 1352 (the "Notice Decision"), at paras. 19-28.

[3] The U.S. Settlement will require a final order from the U.S. Court. Buchwald J., the presiding judge, noted, however, that while the settlement that she considered before issuing her order of June 20, 2012, was subject to the condition that the order sought by the defendants in this court be granted, the settlement should be considered "on the assumption that the negotiated resolution of [the] litigation will not be further disturbed should [she] approve it...": Memorandum and Order in the U.S. Action for Final Approval of the Settlement, IMAX Fourth Motion Record, Tab 13, reported at *In re IMAX Securities Litigation*, 283 F.R.D. 178, 2012 U.S. Dist. LEXIS 86513 ("U.S. Fairness Decision").

[4] *Silver v. Imax Corp.*, [2009] O.J. No. 5573 (S.C.J.) (the "Leave Decision").

[5] *Silver v. Imax Corp.*, 2011 ONSC 1035, 105 O.R. (3d) 212 (Div. Ct.), at paras. 64 and 65.

[6] Notice Decision, at para. 23 and at endnote 15.

[7] The only guidelines, which are "best practices", are protocols developed and endorsed by the American and Canadian Bar Associations. See Notice Decision, at paras. 71 and 72 and at endnotes 31 and 32. The protocols do not go so far as to require the integration of cross-border class proceedings, but deal with notice and communications between counsel and the court where there is a joint settlement of inter-jurisdictional actions.

[8] Affidavit of Patrick J. Borchers, sworn May 31, 2011, at para. 24 (originally filed by the plaintiffs as responding parties to The Merger Fund's motion to intervene).

[9] Expert Report of Professor John C. Coffee Jr., ("Coffee Report"), Affidavit of John C. Coffee, Jr. sworn March 12, 2012, Exh. B, at paras. 5 and 32, IMAX Revised Motion Record, Tab 3.

[10] Of course, if the U.S. Settlement is defeated, and the U.S. Action proceeds, there is always the possibility that the U.S. Action will reach judgment before this action, so that the question of preclusion may yet arise, even if the order sought is not granted.

[11] All persons, other than Excluded Persons, who acquired securities of Imax during the Class Period on the TSX and on NASDAQ, and held some or all of those securities at the close of trading on August 9, 2006 (the "Class Members").

> "Excluded Persons" means Imax's subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns, and any member of the defendants' families and any entity in which any of them has or had during the Class Period a legal or de facto controlling interest and all NASDAQ purchasers during the Class Period who did not deliver an opt out notice in the U.S. class action *In re IMAX securities Litigation*, Civil Action No. 1:06-cv-06128 (S.D.N.Y.).

[12] The "Excluded Persons" are IMAX's subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns, and any member of the defendants' families and any entity in which any of them has or had during the Class Period any legal or *de facto* controlling interest.

[13] Certification Decision, at endnote 4; Notice Decision, at paras. 14-17 and 19-27.

[14] Two earlier motions for certification were dismissed, in June 2009, without prejudice, after finding that Westchester Capital Management, Inc., as an investment adviser that did not actually purchase the securities at issue lacked standing to bring the claim on behalf of its clients, and in December 2010, concluding that Investment Partners, LP was not an appropriate class representative because it could not prove loss causation, having purchased its IMAX shares before the alleged misrepresentation and sold such shares before the curative disclosure: Declaration of Arthur N. Abbey in Support of Lead Plaintiff's Motion for Final Approval of the Settlement with Defendants, Third Motion Record (Filings in the U.S. Action), Tab 7.

[15] Notice Decision, at paras. 22 to 30.

[16] Amended Stipulation and Agreement of Settlement, which received court approval on March 28, 2012.

[17] Defence counsel had suggested, and class counsel declined, to put the parties' settlement positions in the Ontario proceedings before the court in this motion: Reply Factum of the Defendants, at para. 89.

[18] At that time the status of the U.S. lead plaintiff was in question. Westchester Capital was replaced shortly thereafter by Snow Capital, who had moved for a reconsideration of the 2007 order appointing Westchester Capital: Affidavit of Carolyn Piovesan sworn May 30, 2012, at para. 9 and footnote 2, Reply Motion Record, Tab 4.

[19] Factum of the Defendants, at para. 19.

[20] Affidavit of Carolyn Piovesan sworn May 7, 2012 ("First Piovesan Affidavit"), at paras. 18 and 29, and Exh. "N", IMAX Revised Motion Record, Tab 2.

[21] Affidavit of Frank C. Torchio, sworn May 9, 2012 ("Torchio Report"), at para. 47, Plaintiffs' Responding Motion Record, Vol. 3, Tab 2.

[22] First Piovesan Affidavit, at paras. 22 and 23, and Exhs. "I" and "J".

[23]Notice Decision, at paras. 83 and 95-97.

[24] Affidavit of Michael G. Robb sworn May 9, 2012 ("Robb Affidavit"), at paras. 57 and 58, Plaintiffs' Responding Motion Record, Vol. 1, Tab 1.

[25] U.S. Fairness Decision, IMAX Fourth Record, Tab 13, reported at *In re IMAX Securities Litigation,* 283 F.R.D. 178, 2012 U.S. Dist. LEXIS 86513.

[26] Affidavit of Carolyn Piovesan sworn June 12, 2012 ("Third Piovesan Affidavit"), Exh. "B", IMAX Third Record (Filings in the U.S. Action), Tab 11.

[27] Third Piovesan Affidavit, para. 13, Exh. "C".

[28] Third Piovesan Affidavit, at para. 11; Affidavit of Carolyn Piovesan ("Fourth Piovesan Affidavit"), at para. 4, Third Motion Record (Filings in the U.S. Action), Tab12.

[29] Under Fed. R. Civ. P. 23(b)(3), in order to certify a class action a court must find that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy".

[30] U.S. Fairness Decision, at p. 8.

[31] U.S. Fairness Decision, at p. 12.

[32] U.S. Fairness Decision, at p. 10.

[33] The fee decision was ultimately released August 1, 2012, awarding plaintiffs' counsel 33% of the settlement for costs and expenses, to be allocated between various U.S. counsel who had participated in prosecuting the case: *In re IMAX Securities Litigation*, 2012 U.S. Dist. LEXIS 108516.

[34] Coffee Report, at para. 4.

[35] Class counsel asserted another ground to oppose the motion, based on the proposed definition of the amended class which would require prospective members to exercise legal judgment as to whether they were bound by the U.S. Settlement. The revised definition of the amended class which I have accepted addresses this issue, and would not require class members to exercise legal judgment.

[36] Since that time, the decision of the U.S. Supreme Court in *Morrison v. National Bank of Australia* had the effect of limiting the scope of claimants under the relevant U.S. statute to NASDAQ traders.

[37] *Report on Class Actions,* Ontario Law Reform Commission (1982), at pp. 131 to 133.

[38] *Fischer v. IG Investment Management Ltd.*, 2010 ONSC 296 (S.C.J.), at paras. 235 to 243.

[39] *Fischer v. IG Investment Management Ltd.*, 2011 ONSC 292 (Div. Ct.), at para. 34.

[40] In *Currie*, the court at first instance dealt with notice as an element of natural justice, as a defence to enforcement. Sharpe J.A. concluded that notice is part of the question of jurisdiction (at paras. 31 and 42), but he also characterized the problems with the notice in that case, including the fact that Ontario class members were treated differently from domestic class members by the U.S. court, as a denial of natural justice (at para. 43).

[41] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at para. 31 and *Spencer v. The Queen*, [1985] 2 S.C.R. 278, at p. 283, quoting with approval a passage from *Hilton v. Guyot*, 159 U.S. 113 (1895).

[42] J. Walker, "Recognizing Multi-jurisdiction Class Action Judgments within Canada: Key Questions – Suggested Answers", (2008) 46 Can. Bus. L.J. 450, at p. 451 and footnote 2, at p. 452.

[43] J. Walker, "Cross-Border Class Actions: A View from Across the Border", (2004) Mich. St. L. Rev. 755, at p. 772.

[44] *Securities Exchange Act of 1934*, 15 U.S.C. s. 78a.

[45] Rule 10b-5, 17 C.F.R. s. 240.

[46] U.S. Fairness Decision, at pp. 5 and 6.

[47] *Currie,* at para. 42, citing *Adams v. Cape Industries plc*, [1990] Ch. 433 (U.K.C.A.), at p. 55.

[48] First Piovesan Affidavit, at paras. 22 to 26, Exhs. "I", "J" and "L".

[49] U.S. Fairness Decision, at pp. 9-12, where the court considered (a) the complexity, expense, and likely duration of litigation; (b) the class members' reaction to the settlement; (c) the stage of proceedings and amount of discovery completed; (d) the risks of establishing liability; (e) the risks of establishing damages; (f) the risks of maintaining the class action through trial; (g) the defendants' ability to withstand greater judgment; and (h) the settlement's range of reasonableness in light of possible recovery.

[50] *In Re IMAX Securities Litigation*, 2011 U.S. Dist. LEXIS 41709.

[51] Notice Decision, at paras. 42 and 44.

[52] E. Snow, "Protecting Canadian Plaintiffs in International Class Actions: The Need for a Principled Approach in Light of *Currie v. McDonald's Restaurants of Canada Ltd.,* (2005) 2 Can. Class Action Rev. 218, at p. 227.

[53] *Reynolds v. Beneficial National Bank*, 288 F. Ed 277 (7th Circuit), at 282, cited in the Coffee Report at footnote 15.

[54] *Supra,* endnote 52, at p. 228.

[55] R. Slepchik, "Heightening Security at the Border: Addressing the Enforcement of Foreign Class Actions", (2005) 2 Can. Class Action Rev. 308, at p. 311.

[56] Coffee Report, at footnote 15.

[57] Coffee Report, at para. 36.

[58] Class counsel rely on *Abdula v. Canadian Solar*, 2012 ONCA 211, 110 O.R. (3d) 256, leave to appeal to the Supreme Court of Canada ref'd [2012] S.C.C.A. No. 246, a case involving a defendant company domiciled in Canada that traded its shares on the NASDAQ, as authority that the Ontario statutory cause of action is available to anyone who acquired shares of a Canadian defendant on the NASDAQ. In that case however, the only issue before the court was whether the OSA statutory cause of action could be invoked by an Ontario resident who had traded his shares on the NASDAQ. The determination was made prior to the motion for certification and did not consider choice of law questions.

[59] At para. 125 of the Statement of Defence the defendants plead that the statutory cause of action does not apply to share purchases on a foreign exchange.

[60] See endnote 40.

[61] See, for example, Snow, *supra* at pp. 244 and 245, who argues for an expansion of the natural justice defence, and Slepchik, *supra*, at pp. 326-326, who advocates both on expansion of the public policy defence to protect the interests of local class counsel who have invested heavily in an action, as well as the recognition of a "best interests of the class" impeachment defence.

[62] It has been noted that the inadequacy of the settlement may have been an "unarticulated premise" in the *Currie* case: C. Jones and A. Baxter, "Fumbling Toward Efficacy: Interjurisdictional Class Actions After *Currie v. McDonald's*", Can. Class Action Rev., Vol. 3, No. 2 (2006) 405, at p. 423.

[63]Torchio Report, at para. 50.

[64] The Certification Decision left this issue open (at paras. 56-75). See also *Green and Bell v. Canadian Imperial Bank of Commerce* ("*Green and Bell*"), 2012 ONSC 3637, [2012] O.J. No. 3072 (S.C.J.), where Strathy J. determined that the reliance element of common law secondary market misrepresentation claims could not be established on a class wide basis, and without individual proof of reliance (at paras. 599-600), and *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.* ("*Celestica*"), 2012 ONSC 6083, [2012] O.J. No. 5083 (S.C.J.), at paras. 170-173, where Perell J. granted leave to amend the pleading of negligent misrepresentation, after rejecting the fraud on the market and efficient market theories to prove reliance.

[65] *Silver v. IMAX Corp.*, 2012 ONSC 4881, [2012] O.J. No. 4002 (S.C.J.) (the "Limitations Decision").

[66] See *Sharma v. Timminco Ltd.*, 2012 ONCA 107, leave to appeal to the Supreme Court of Canada ref'd [2012] S.C.C.A. No. 157; and *Green and Bell* and *Celestica*, which, together with the Limitations Decision, are under appeal to the Court of Appeal.

[67] Factum of the Responding Plaintiffs, at paras. 99 to 144.

[68] Affidavit of Denise Neumann Martin sworn May 30, 2012, Exh. "D" ("Martin Report"), Reply Motion Record, Tab 5.

[69] A key aspect of the Torchio Report, that was considered by Buchwald J., is its treatment of the rate of artificial inflation of IMAX shares during the U.S. class period (which commenced in 2003). Mr. Torchio is of the opinion that the artificial inflation of the value of IMAX shares was likely far greater following the 2005 misrepresentations than before, and that accordingly those who acquired their shares after the 2005 misrepresentations would have suffered greater losses. As such, the Torchio Report challenged the plan of allocation under the U.S. Settlement that assumed constant inflation throughout the U.S. Class Period. This argument was considered by Buchwald J., who concluded that the point was a difference of opinion between experts and that the approach taken in the U.S. Settlement, which assumed constant inflation throughout the U.S. class period, was reasonable: U.S. Fairness Decision, at p. 8.

[70] In In his report, Mr. Torchio provided an estimate of the number of damaged IMAX shares and aggregate damages during two different time periods – the Ontario class period February 17, 2006 to August 9, 2006 (which he called the "Canadian Damage Period") and the period February 27, 2003 to August 9, 2006 (which he called the "U.S. Damage Period"). The damages calculations were based on Mr. Torchio's estimate of (i) the number of 'damaged shares', or the number of IMAX shares that were purchased during the Class Period and held until the end of the Class Period; and (ii) artificial inflation attributed to the damaged shares. Using a "trading model", Mr. Torchio estimated that 24 million shares were held after the date of the correction of the misrepresentation. Of these damaged shares, 21.2 million were shares purchased on the NASDAQ, and 2.8 million were shares purchased on the

TSX. Mr. Torchio computed aggregate damages and the number of damaged shares based on two alternative assumptions about loss causation (or artificial inflation). His first set of calculations assumed that 100% of the IMAX common stock price decline on August 10, 2006 was due to correction of the misrepresentations, which is the basis for the maximum aggregate damages estimates that are referenced here.

[71] Mr. Torchio noted that the U.S. Settlement would provide no recovery to IMAX purchasers during the period August 10, 2006 to July 20, 2007, on the basis that the IMAX common stock was not inflated during that period. Accordingly he excluded the claims of such purchasers from the "U.S. Damage Period."

[72] According to Mr. Tochio, these calculations reflect the 90-day price limitation prescribed under s. 10(b) of the *Securities Exchange Act of 1934*, as amended by the *Private Securities Litigation Reform Act of 1995:* Torchio Report, at para. 5.

[73] Memorandum of Law in Support of Lead Plaintiff's Motion for Final Approval of the Settlement, at p. 19, Third Motion Record (Filings in the U.S. Action), Tab 10.

[74] The U.S. notice stated that, "...the proper measure of recoverable damages included the majority of IMAX's stock price drop that occurred when the company disclosed information that corrected alleged prior false and misleading statements.": Torchio Report, at footnote 3.

[75] With respect to Mr. Torchio's calculations, Dr. Martin stated only that, "as there is no reasoned basis for his estimate of alleged damages, there is equally no substantive foundation for his calculation of the ratio of the proposed settlement in the U.S. class action to his estimate of alleged damages". Dr. Martin challenged the assumption that 100% of the loss in share value was due to the alleged misrepresentations, relying on her earlier opinion that the decline in share value was due entirely to other factors: Affidavit of Denise Neumann Martin sworn September 7, 2007, Exh. "D" to the Affidavit of Michael Robb, sworn June 2012 ("Second Robb Affidavit"), Plaintiffs' Supplemental Responding motion Record, Tab 2D. On the issue of loss causation, the plaintiffs had relied on the opinions of Lawrence Kryzanowski and Robert Comment, estimating that 75% (Kryzanowski) or 100% (Comment) of the stock price drop on August 10, 2006 was likely attributable to the announcement that IMAX was being investigated by the SEC with respect to its revenue recognition practices: Second Robb Affidavit, Exhs. "A" and "D". None of this is relevant to Mr. Torchio's function, which was to estimate aggregate damages, using alternative assumptions that 100% and 50% of the stock price drop resulted from the misrepresentations.

[76] Indeed, Buchwald J. referred to the fact that "settlement amounts reflecting similar (or lower) percentages of possible recoveries have been approved in other recent securities class action cases", and a 2011 class action settlement approval that noted that "average settlement amounts in securities fraud class actions where investors sustained losses over the past decade...have ranged from 3% to 7% of the class members' estimated losses", and that "a settlement can be approved even though the benefits amount to a small percentage of the recovery sought": U.S. Fairness Decision, at p. 11.

[77] U.S. Fairness Decision, at p. 11.

[78] Reply Factum of the Defendants, at paras. 88 and 89.

[79] Coffee Report, at para. 7.

[80] Coffee Report, at para. 44.

[81] Ontario class counsel did not claim a share of the fees awarded in the U.S. Settlement, although in argument they indicated that they might have been able to do so, as fees were awarded not only to counsel for the lead plaintiff at

the time of settlement, but also to counsel who had allegedly assisted in the prosecution of the action at earlier stages of the litigation.

[82] *Abdula*, at para. 89; *Currie*, at para. 23.

[83] Fourth Piovesan Affidavit, Exh. "E".

[84]Defence counsel rely on the decision of Rady J. in *McCann v. CP Ships Ltd.*, [2008] O.J. No. 2050 (S.C.J.), as authority that any objection to the substance of a foreign settlement *must* be made by intervention in the foreign court. Rady J., however, only observed in that case that a proposed representative plaintiff in parallel Ontario proceedings was "at liberty" to seek to raise his concerns in the U.S. court, and found that the motion before her (for a declaration in advance that a settlement not yet approved by a U.S. court would not preclude an Ontario action), was premature. Relying on another chapter in the same cross-border litigation, class counsel argued that any attempt to intervene would have been futile. Again, I disagree with the reliance, in this instance, on the decision of the Florida court in *In re: CP Ships Ltd., Securities Litigation*, United States District Court Middle District of Florida, Tampa Division, MDL Case No.: 8:05-MD-1656-T-27TBM. In that case, the representative plaintiff in the B.C. class action against CP Ships was refused the opportunity to object or to intervene, because, having acquired his shares on the TSX, he was not part of the U.S. class the settlement would not preclude his claims elsewhere. The Florida court, however, considered an objection filed by another Canadian citizen who had purchased his shares over the New York Stock Exchange during the class period, and was therefore a member of the U.S. class. (This was noted in *McCann v. CP Ships Ltd.*, [2009] O.J. No. 5182 (S.C.J.), the judgment approving the eventual settlement of the Ontario class action.) What occurred in the CP Ships cross-border litigation does not establish any general principles, and as such is of no precedential value to the issues on this motion.

[85] See, for example, the comments of *Jones and Baxter*, *supra*, at p. 424, where the authors, after noting that the original court will rely on representations from the participants in the settlement, and is unlikely to hear objecting opinions, disagree with a *de novo* merits-based review of the settlement by the second court, suggesting instead fuller participation of non-resident objectors in the original proceedings.

CITATION: Silver v. IMAX, 2013 ONSC 1667
COURT FILE NO.: CV-06-3257-00
DATE: 2013 03 19

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARVIN NEIL SILVER and CLIFF COHEN

Plaintiffs

- and -

IMAX CORPORATION, RICHARD L. GELFOND, BRADLEY J. WECHSLER, FRANCIS T. JOYCE, NEIL S. BRAUN, KENNETH G. COPLAND, GARTH M. GIRVAN, DAVID W. LEEBRON and KATHRYN A. GAMBLE

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: K. van Rensburg J.

COUNSEL: D. Lascaris, S. Kalloghlian and M. Robb, for the Plaintiffs

P. Steep and D. Peebles, for the Defendants

REASONS FOR DECISION ON MOTION

K. van Rensburg J.

DATE: March 19, 2013