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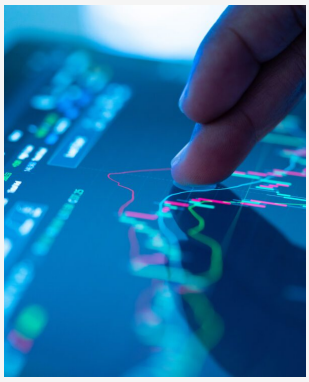
Ontario court refuses to exclude U.S. shareholders from class: the 'day of reckoning' had not yet dawned



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In *Badesha v. Cronos Group, Inc.*, the Ontario Superior Court recently certified a global class in a securities class action against Toronto-based Cronos Group Inc.,[1] even though U.S. shareholders who purchased their shares on the NASDAQ are also potential class members in a parallel U.S. securities class action. The decision addresses when an Ontario court should contend with the inclusion of U.S. shareholders in an Ontario securities class action.

Background

Cronos shares are cross-listed on the TSX and NASDAQ. The plaintiff in the Ontario action asked the Ontario court to certify a global class, regardless of whether the shareholders purchased their shares on the TSX or NASDAQ.

Cronos objected on various grounds, including that a parallel class action against Cronos is already underway in the U.S.[2] That U.S. action includes a potential class of U.S. shareholders who, during the relevant class period, purchased shares over the NASDAQ.

Cronos conceded that an Ontario court had jurisdiction over the claims of those shareholders, but sought to stay those claims under the doctrine of *forum non conveniens* and the principle of comity, arguing that the U.S. court was the more appropriate forum to resolve the claims of U.S. shareholders who purchased shares over the NASDAQ.

Justice Morgan dismissed Cronos's motion and certified a global class of all purchasers, wherever they reside and wherever they purchased their shares.

When will the 'day of reckoning' arrive?

Justice Morgan recognized that U.S. shareholders in cross-border securities cases will inevitably face a "day of reckoning" in which one court will be asked to recognize the judgment or settlement of the other. Justice Morgan warned that "it will be for this Court in the event of a future settlement or judgment to keep in mind that "no class member should get 'two bites at the apple' against any defendant".

Justice Morgan's reasons review a line of Ontario cases addressing jurisdiction and forum issues in cross-border securities class actions, including:

- *Abdula v. Canadian Solar*: The Court of Appeal held that a class action asserting claims under Part XXIII.1 of the Ontario *Securities Act* could include claims of investors who purchased their shares of an Ontario-based "responsible issuer" over a foreign exchange.[3]
- *Silver v. Imax Corp.*: In the initial *Imax* certification decision, the Ontario Superior Court found that any concerns over conflict of laws issues were premature and that it was more appropriate to "wait and see" how the issues, if any, developed in the parallel Ontario and U.S. class actions.[4] In a subsequent decision — after "waiting and seeing" — the Court granted the defendants' motion to amend the Ontario class to exclude those who were part of the class in the U.S. action.[5]

Like the *Imax* decision, the *Cronos* decision defers any decision about the "right" court until one of the actions reaches its "day of reckoning" in the form of a settlement or judgment.

This "day of reckoning" analysis may work better in an action like this one against Cronos, in which claims are asserted only under Part XXIII.1 of the Ontario *Securities Act*, not under common law torts. Because this class action did not plead other common law or statutory causes of action, issues that would have otherwise arisen — for instance, the location of the alleged tort — were not at issue in the *Cronos* case.

Comity: a 'dismal swamp'?

Although Cronos argued that the "imperatives of international comity" favour a U.S. court deciding the claims of U.S. shareholders, Justice Morgan was not prepared to stay the claims of U.S. shareholders on this basis, either. He found that, unlike other elements of the *forum non conveniens* analysis, comity "cannot be understood as a set of well-defined rules" and has therefore been colourfully characterized as a "dismal swamp". Justice Morgan noted that some courts and commentators have expressed a frustration with comity because it includes contradictory meanings, each of which can be used in the service of whoever deploys it.

Justice Morgan recognized that Canada and the U.S. approach the issues differently. U.S. actions under §10(b)-5 of the *Securities Exchange Act of 1934* are generally restricted to shares that were traded on an American exchange. By contrast, section 138.3 of the Ontario *Securities Act* has been interpreted as being broad enough to provide access to justice for a global class against an Ontario-based responsible issuer, regardless of where the shareholders purchased their shares. According to Justice Morgan, "the U.S. wants to stop 'stepping on another nation's toes', while Ontario wants to hold foreign nationals' hand. American law expresses a need to decolonize and contract, Canadian law exudes a need to expand and embrace".

Considerations

Although the contradictory approaches in Ontario and the U.S. remain unresolved, Justice Morgan's remarks in *Cronos* encourage further analysis about how courts on both sides of the border should respect comity and address the challenges that may continue to arise from these seemingly "double-edged view[s] of the legal world".

The bottom line for securities class actions appears to be that, for the foreseeable future, a

cross-listed responsible issuer that is headquartered in Ontario will often face a proposed *global* class in an Ontario action — even if the issuer is already defending against a U.S. class in a parallel U.S. case. However, the analysis and outcome may differ from the *Cronos* case if the plaintiff seeks to certify common law or other statutory causes of action alongside claims under Part XXIII.1 of the Ontario *Securities Act*.

We will continue to monitor and report on developments in this area. Given the fundamental inconsistency between the Canadian and American approaches, and the Ontario court's restrictive interpretation of the principles of comity, we may receive appellate guidance in this or future cases.

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[1] 2023 ONSC 5678.

[2] *In re Cronos Group Securities Litigation*, Civil Action No. 2:20-cv-01310-ENV-SIL.

[3] 2012 ONCA 211, leave to appeal to the Supreme Court of Canada ref'd [2012] S.C.C.A. No. 246.

[4] *Silver v. Imax Corporation*, 2009 CanLII 72334 (ON SC).

[5] *Silver v. IMAX,* 2013 ONSC 1667.