Changing Risks for Domestic and Foreign Companies

by Allan Coleman & David Morritt

Goods, services, and money cross borders frequently, often bringing the risk of litigation with them. In 2013, Canadian courts have confirmed their willingness to accept jurisdiction over consumer class actions aimed at foreign corporations, and over securities class actions aimed at foreign issuers.

Meanwhile, an increase in the stringency of the "leave test" for pursuing a securities class action under the civil liability provisions of the *Securities Act* represents a greater likelihood that defendants will be able to avail themselves of the opportunity to defeat unmeritorious claims earlier on.

Osler comments

Allan Coleman *comments on :*

- *A rigorous application of the leave test for Securities Act* claims
- *Indirect purchasers, price-fixing and multijurisdictional claims*
- *The expanding jurisdiction of Canadian courts over Securities Act* claims

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Foreign issuers may now find themselves subject to Ontario securities law

In recent decisions, the Ontario courts have shown that they are prepared to assume jurisdiction over securities class actions with significant foreign elements, posing an increased risk for foreign issuers.

In *Abdula v. Canadian Solar Inc.* the Ontario court held that an Ontario resident who purchased shares of a reporting issuer in the United States over a U.S. exchange could commence a securities class action against the company in Ontario provided the company has a "real and substantial connection" to Ontario. In that case, among other things, the company had its registered office and principal executive office in Ontario, held its annual meeting in Ontario, and the alleged misrepresentations were contained in documents that were released or presented in Ontario.

Most recently, in *Kaynes v. BP, plc*, the Court went even further, holding that all Canadian residents who purchase securities of a foreign defendant over a foreign exchange can sue under Ontario's statutory regime, even where the defendant otherwise has no real connection to Ontario. This is the opposite result than the approach that U.S. and other courts have taken. The court found that Ontario's statutory cause of action had no territorial limits, and that its "deemed reliance" on misrepresentations meant it was similar to a tort having been committed in Ontario. While currently under appeal, if the BP decision is upheld, it would likely have a significant impact on foreign issuers who trade over the TSX or other Canadian exchanges, wherever they are in the world, since the impact of the decision is that those issuers can be sued in Ontario by Canadian investors, even if those investors purchased that issuer's securities over a non-Canadian exchange and the foreign issuer otherwise had no real connection to Canada.

The Ontario approach stands out when compared to the views taken by courts in other jurisdictions, which have not been as willing to assume jurisdiction over foreign issuers for misrepresentations included in their public disclosure. For example, the Superior Court of Québec in *Mouaikel v. Facebook Inc.* recently refused permission for a class proceeding mounted by Québec residents who purchased Facebook stock on the NASDAQ exchange as a result of its IPO on the basis that mere residency in Québec by a purchaser of Facebook shares over a foreign exchange was not sufficient to provide the Québec court with jurisdiction. Similarly, in *Morrison v. National Australia Bank*, the U.S. Supreme Court invoked a well-understood "presumption against extraterritoriality" in deciding that it would only assume jurisdiction over the purchase or sale of securities that occur over a U.S. exchange or are otherwise considered a domestic transaction.

Selected Best Practices

1 **Develop a robust Ontario strategy**

A foreign issuer that has been sued both in Ontario and abroad for misrepresentations in its public disclosure, and the shares of which may have been purchased by Ontario residents, should work with counsel to develop a robust defence strategy that would ensure that the approaches taken in both jurisdictions are complementary to each other and to reduce any possibility of double recovery (any such strategy in Ontario may include contesting jurisdiction and contesting leave in the event that the Ontario court finds that it has jurisdiction – see below).

The requirements for obtaining leave to commence a securities class action based on misrepresentations in an issuer's public disclosure have been applied meaningfully, creating new opportunities for the defence

In an effort to encourage improved disclosure practices, Ontario and other Canadian jurisdictions have made it easier for investors to commence class actions in respect of misrepresentations in an issuer's continuous disclosure documents. Similar to the American "fraud on the market" doctrine (as it presently stands), the Ontario *Securities Act* does not require proof of individual reliance by shareholders on the alleged misrepresentation before an action is permitted by a court to proceed. While the intent of the civil liability provisions in the *Securities Act* is to assist in keeping capital markets transparent and healthy, issuers and their shareholders could face additional burdens in responding to unmeritorious claims. This was addressed in the legislation through the requirement for the Court to grant leave before a *Securities Act* proceeding was commenced. Early cases, however, appeared to indicate that the "leave test" – which requires that plaintiffs show that their claim is made in good faith and has a reasonable possibility of success – represented little more than "a bump in the road" for plaintiffs, and suggested that defendants may have little to gain, and perhaps much to lose, by filing extensive evidence in opposition to a leave motion. For example, filing evidence in response to a leave motion could result in early documentary discovery, exposure of key witnesses to cross-examination and the early revelation of litigation strategy. However, more recent cases have given defendants some hope that the leave test will provide a meaningful opportunity to defeat unmeritorious claims, as the courts have been demonstrating a willingness to apply the test for leave as a genuine screening mechanism which requires the court to assess and weigh the evidence and to decide whether the plaintiff's claim truly has a reasonable possibility of success.

These decisions, including *Gould v. Western Coal Corporation*, show that a strong defence at the leave stage can yield big returns and provide defendants with extra incentive to mount an early and robust defence, as the result may be the complete dismissal of the action. A further and longer-term benefit of these changes, of course, lies in the deterrence of future unmeritorious claims and of "strike suits" meant to extract settlements as a way of avoiding protracted and expensive litigation.

Selected Best Practices

1. **Mount an early defence**
   Consider vigorously contesting a leave motion using competing evidence and by testing the plaintiff's expert evidence.

Foreign corporations selling goods to Canadians – even through distributors or other links in the supply chain – may be as exposed to locally brought actions as anyone else

Consumer class actions have been on the rise in Canada and in the United States, with a frequent focus on anti-competitive behaviour and price-fixing. In 2013, the landscape for consumer class actions in Canada was clarified by a long-awaited trilogy of Supreme Court of Canada decisions on class certification. Resolving competing approaches that had emerged in the B.C. and Québec courts, the Supreme Court held that companies may be subject to litigation by indirect purchasers in Canada for damages suffered as a result of price-fixing effectuated at the top of the distribution chain, even if that conspiracy is alleged to have been formed in a foreign jurisdiction, on the theory that the overcharge has ultimately been passed on to them through the chain of distribution. Nonetheless, defendants in antitrust and other class actions are prevented from raising the passing-on defence under restitutionary law in response to claims by direct purchasers, i.e. that direct purchasers have not suffered any loss because they have passed on the overcharge to their customers (the indirect purchasers). The Supreme Court found that although there is a risk of double or multiple recovery where actions by direct and indirect purchasers are pending at the same time or where parallel suits are pending in other jurisdictions, this is a risk that can be managed by the court, and defendants may submit evidence so as to prevent overlapping recovery.

The Court also reaffirmed the low bar to class certification established by previous Canadian cases, which only requires "some basis in fact" that the certification requirements have been met, including a "credible or plausible" methodology to demonstrate that losses have been experienced across a proposed class. In Québec, meanwhile, a court's role in the authorization stage is to do no more than filter out frivolous cases.

The willingness of Canadian courts to permit indirect purchaser claims exposes foreign corporations to an increased risk of consumer class actions in Canada. Indeed, foreign companies with no direct presence in Canada may be required to defend competition class actions in Québec, and possibly other provinces, brought by persons who have allegedly suffered losses in those jurisdictions caused by a price-fixing scheme entered into in a foreign jurisdiction.

Selected Best Practices

1. **Prevent anti-competitive conduct before it happens**
   Develop a comprehensive competition compliance policy and have it regularly reviewed. Train employees involved in pricing decisions and conduct annual audits to ensure compliance.

2. **If litigation commences, defend in multiple jurisdictions**
   Coordinate your defence in all relevant jurisdictions to ensure complementary defence strategies and minimize the risk of double recovery and of overcompensating plaintiffs.

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