Canadian Courts Taking A Global Outlook: Jurisdiction Over Foreign Class Members

By Nadia Campion[1] and Brookelyn Kirkham

The last five years have witnessed a proliferation in the number of cross-border class actions, particularly in the securities and competition context. It is becoming increasingly more common for Canadian plaintiffs' counsel to pursue class actions in parallel with those in the United States. Whereas prior to 2010, only 37% of statutory secondary market cases involved parallel US class actions, the period 2010 to 2016 experienced an increase to almost 50%. Indeed, five of the six cross-border class actions filed in 2016 involved issuers with securities cross-listed on the TSX and one of the major US exchanges.[2]

As part of this trend, Canadian plaintiffs are more frequently advancing claims on behalf of global classes, which include claimants that are not resident in Canada and have little or no connection to Canada. Whereas previously Canadian courts were reluctant to exercise jurisdiction over foreign class members,[3] two recent decisions from the Ontario Court of Appeal mark a shift in favour of certifying global classes, namely: *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*[4] and *Airia Brands Inc. v. Air Canada*.[5]

These two decisions suggest a more international outlook by Canadian courts, which are adopting an expansive approach to jurisdiction in class actions involving foreign class claimants. Notwithstanding that some or a significant number of class claimants in both *Excalibur* and *Airia Brands* did not reside in Canada and may not have even known that a class proceeding had been commenced in Canada, the Court of Appeal decided to exercise jurisdiction over such claimants. It mattered not that a Canadian judgment may not be recognized or enforced in a foreign jurisdiction, or that foreign investors may not have a reasonable expectation that their claim would be adjudicated in Canada. As long as a representative plaintiff can meet the *Van Breda*[6] real and substantial connection test, Canadian courts

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[2] BA Heys and R Patton, *Trends in Canadian Securities Class Actions: 2016 Update* (Toronto: National Economic Research Associates, Inc., 2017), online: NERA <http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Recent_Trends_Canada_0217.pdf> at 6.

[3] *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, in which the court refused to include in the class those investors who purchased Gammon shares on a foreign stock exchange, regardless of their place of residence. See also *Kaynes v. BP, PLC*, 2014 ONCA 580, in which the Court of Appeal ruled that Ontario will not take jurisdiction over claims of investors who purchase securities on a foreign stock exchange, even if the investor is resident in Ontario and the defendant is a responsible issuer governed by the Ontario *Securities Act*. By contrast, in the original certification decision of *Silver v. Imax Corporation*, 2009 CanLII 72334, the Court assumed jurisdiction over the claims of foreign investors who bought Imax shares on either the TSX or the NASDAQ.

[4] *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2016 ONCA 916, leave to appeal to SCC refused [*Excalibur* ONCA].

[5] *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792 [*Airia Brands* ONCA].

[6] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.

are now prepared to adjudicate disputes involving foreign investors. This, in turn, will have substantial implications for cross-border businesses with foreign investors.

***Excalibur* – Reasonable Expectations of Foreign Investors Not Determinative**

In *Excalibur*, the Court of Appeal considered a class action against a Canadian auditor involved in a private placement of shares and warrants by the American owners of a Chinese corporation. All but one of the proposed class members were non-residents of Ontario. The motion judge denied certification.[7] Among other things, the motion judge found that Ontario did not have a real and substantial connection with the claims of the American investors in the proposed class action. The motion judge noted that, from the perspective of all of the proposed class members, "it is hard to imagine a case where it would [be] less reasonable to expect that his or her legal claims had a real and substantial connection to Ontario."[8] A majority of the Divisional Court upheld the motion judge's decision.[9]

The Court of Appeal determined that the Divisional Court erred in upholding the motion judge's determination that there was no real and substantial connection. Notwithstanding that the class was composed almost exclusively of foreign members, the majority of the Court of Appeal found a real and substantial connection to Ontario and held that Ontario courts had jurisdiction to decide the proceeding. The majority focused on the fact that the claim centered entirely on an audit report that was prepared in Toronto by an Ontario-based defendant.

In addition, the majority determined that the expectations of foreign class members regarding where their rights will be determined should *not* be an independent consideration when deciding jurisdiction in a global class proceeding.[10] The Court of Appeal certified the class action, determining that courts can exercise jurisdiction over claims against Ontario-based defendants that have allegedly harmed a class consisting primarily of out-of-province class members.

Excalibur sends a strong message that Canadian courts need not exercise restraint when deciding to take jurisdiction over class actions involving global classes.[11]

***Airia Brands* – The Expansive Approach to Jurisdiction**

In *Airia Brands*, the plaintiffs alleged that a group of global airlines conspired to fix prices of air freight shipping services by limiting supply and unreasonably imposing surcharges. The proposed class included residents of at least 30 countries who purchased airfreight cargo shipping services to or from Canada between 2000 and 2006. Many class members resided outside of Canada, suffered losses outside of

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[7] *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2014 ONSC 4118 [*Excalibur* motion]

[8] *Excalibur* motion at para. 128.

[9] *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2015 ONSC 1634.

[10] *Excalibur* ONCA at para. 30.

[11] There was a strong dissent by the Honourable Justice Blair who argued that while there was no question that Ontario courts *could* take jurisdiction, the question was whether Ontario courts *should* take jurisdiction, or alternatively exercise restraint and decline jurisdiction.

Canada, and had little to no connection to Canada. These class members became known as AFCs or "absent foreign claimants".

The defendants brought a motion for a declaration that the Ontario court could not exercise jurisdiction over the AFCs and sought a stay order. The motion judge granted the motion, certifying the action as a class proceeding excluding the AFCs from the class definition.[12] The motion judge concluded that principles of fairness, order, and comity should guide her jurisdictional analysis and declined to apply the real and substantial connection test. The motion judge determined that jurisdiction existed only if the claimants were present in Ontario or had consented to Ontario's jurisdiction. [13]

The Court of Appeal overturned the motion judge and held that jurisdiction over the AFCs may be established where: [14]

(1) there is a real and substantial connection between the subject matter of the action and Ontario, and jurisdiction exists over the representative plaintiff and the defendants;

(2) there are common issues between the claims of the representative plaintiff and the AFCs; and

(3) the procedural safeguards of adequacy of representation, adequacy of notice and the right to opt out of the class are provided.

The last requirement is the reciprocal analysis of that found in *Currie v. McDonald's Restaurants of Canada Ltd.*[15] where the Ontario Court of Appeal declined to recognize and enforce an Illinois class action order approving a settlement. The Court in that case was concerned that Canadian plaintiffs did not have sufficient procedural safeguards including inadequate notice regarding the Illinois action. It observed that the guiding principles of order, fairness, and comity are not independent sources of jurisdiction but are subsumed within the real and substantial connection test.

Applying the three-part test in *Airia Brands*, the Court of Appeal concluded that it had jurisdiction over the AFCs. It held that there was a real and substantial connection between the subject matter of the action and Ontario in that all of the defendants carried on business in Ontario. In addition, the Court had presence-based jurisdiction over both the defendants and the representative plaintiff. It quoted from the Supreme Court decision in *Chevron Corp. v. Yaiguaje* in which Gascon J. stated, "if a defendant maintains a place of business in Ontario, it is reasonable to say that the Ontario courts have an interest in the defendant and the disputes in which it becomes involved."[16]

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[12] *Airia Brands v. Air Canada*, 2015 ONSC 5332 [*Airia Brands* motion].

[13] *Airia Brands* motion at paras. 201-02.

[14] *Airia Brands* ONCA at para. 107.

[15] *Currie v. McDonald's Restaurants of Canada Ltd.*, (2005) 250 D.L.R. (4th) 224.

[16] *Chevron Corp. v. Yaiguaje*, 2015 SCC 42 at para. 89.

The Court applied an expansive approach to jurisdiction, concentrating on the commonality of interest between the claims of resident and non-resident class members. It stated, "[t]he respondents' business in Ontario includes the sale of services that are the subject matter of the alleged conspiracy; [...] part of the conduct in furtherance of the alleged conspiracy took place in Ontario, and there are shared common issues between the representative plaintiffs and the AFCs."[17] An important factor in the Court's analysis was that class members were from countries around the world with the result that no single jurisdiction would be clearly more appropriate than Ontario.[18]

One of the most significant aspects of the *Airia Brands* decision is that jurisdiction may be exercised over an AFC even if there is doubt as to whether a judgment of the Ontario court would be given preclusive effect in a foreign jurisdiction. The defendants tendered expert evidence from various foreign countries which questioned whether a foreign court would recognize and enforce a class action judgment rendered in Canada. The Court confirmed that the traditional real and substantial connection test governs, and that foundational principles of that test should not give way to questions of whether Canadian judgments will be recognized and enforced abroad.[19]

The Effects of Asserting Jurisdiction over Foreign Class Members

Although the decisions of the Court of Appeal provide much needed clarity in respect of when courts will exercise jurisdiction over global classes, they also remove an important tool in defending class actions seeking to certify global class definitions. Unlike ever before, plaintiffs are pushing the envelope further and further towards increasing the size and scope of class membership. Canadian defendants should no longer assume that simply because a class action originates beyond Canada's borders it will not be brought home to Canada for determination. The current approach to jurisdiction in global class actions may pose significant risks for defendants. In response, defendants facing global class actions in Canada will have to recalibrate their exposure analysis towards the possibility of global liability.

On the flip side, the assertion of jurisdiction over global class actions may result in increased access to justice for foreign class members, many of whom may reside in jurisdictions where collective redress is not available. Historically, there have only been a limited number of jurisdictions that allow class actions or similar vehicles for collective recovery. While an increasing number of jurisdictions are moving towards class action regimes akin to those that exist in Canada, the development of such regimes may not be as robust. The application of a more expansive approach to the test set out in *Van Breda* can be viewed as a means of promoting the goals of the class action regime, namely judicial economy, access to justice, and behaviour modification.

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[17] *Airia Brands* ONCA at para. 118.

[18] *Airia Brands* ONCA at paras. 121-133.

[19] *Airia Brands* ONCA at para. 106.

Considerations of access to justice certainly formed part of the analysis in *Excalibur* and *Airia Brands*. In *Excalibur* for example, the majority observed that more than half of the investors had claims worth less than $100,000 that would be difficult and uneconomical to litigate as stand-alone claims in foreign jurisdictions. Similarly, in *Airia Brands,* the Court stated, "the motion judge's ruling has the effect of fracturing a single class of AFCs into countless possible actions brought by individual AFCs in their home jurisdictions. This outcome lacks the efficiency and cost-effectiveness provided by the present class proceedings, while creating the potential for a multiplicity of proceedings and increasing the likelihood for conflicting decisions."[20]

Ultimately, the courts will continue to balance the interests of access to justice with that of preserving appropriate procedural and substantive safeguards for businesses, all in an effort to maintain the reputation of Canada's justice system both at home and abroad. This includes considerations of international comity and judicial economy which should be adhered to in all multi-jurisdictional litigation.

Moreover, with the proliferation of cross-border class action litigation, it is essential that courts and counsel recognize the potential for overlapping class membership or conversely the creation of an orphan class. In *Silver v. Imax Corporation*, for example, the Court was influenced by the fact that US proceedings had been commenced in which the defendant contested the jurisdiction of the US court, in favour of Canada. By contrast, the defendant in the Canadian proceeding contested inclusion of foreign class members, including American investors, in the class definition. As a result, the Court was concerned that if the defendants were successful in resisting a global class, certain investors would be left without recourse. The Court, therefore, certified a global class.

The move towards a more global outlook by Canadian courts gives rise to an important lesson and practice point. Defendants facing cross-border litigation will have to be increasingly vigilant in coordinating their defence strategy and ensuring that the arguments advanced in one jurisdiction are consistent and complimentary to those advanced in another jurisdiction. The same can be said for plaintiffs. Coordination and communication across borders are instrumental in implementing a successful approach to multi-jurisdictional litigation.

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[20] *Airia Brands* at para. 128.