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### Is Canada the New Shangri-La of Global Securities Class Actions?

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# Is Canada the New Shangri-La of Global Securities Class Actions?

*Tanya J. Monestier\**

*Abstract: There has been significant academic buzz about Silver v. Imax, an Ontario case certifying a global class of shareholders alleging statutory and common law misrepresentation in connection with a secondary market distribution of shares. Although global class actions on a more limited scale have been certified in Canada prior to Imax, it can now be said that global classes have “officially” arrived in Canada. Many predict that the Imax decision means that Ontario will become the new center for the resolution of global securities disputes. This is particularly so after the United States largely relinquished this role in Morrison v. National Australia Bank.*

*Whether Imax proves to be a meaningful precedent or simply an aberration will largely depend on whether the court dealt appropriately with the conflict of laws issues at the heart of the case. No author has yet addressed the conflict of laws complications posed by the certification of global class actions in Canada; this Article seeks to fill that void. In particular, I use the Imax case as a lens through which to canvass the conflict of laws issues raised by the certification of global classes. I look at the difficult questions of jurisdiction simpliciter, recognition of judgments, choice of law, parallel proceedings, and notice/procedural rights that need to be addressed now that global classes have come to Canada.*

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*To use Justice Scalia's colorful language in Morrison, courts outside the United States may be setting themselves up to be the 'Shangri-La[s]' of global class action securities litigation.*<sup>1</sup>

## I. INTRODUCTION

While Canadian courts are still grappling with the constitutional and pragmatic intricacies of inter-provincial class actions, a new paradigm appears to be on the horizon—that of the “global” class action. A global class action is one in which some portion of the claimants hail from jurisdictions outside Canada.<sup>2</sup> In December 2009, the Ontario Superior Court of Justice in *Silver v. Imax Corp.*<sup>3</sup> certified a global class of shareholders that alleged statutory and common law misrepresentation claims in connection with a secondary market distribution of the defendant's shares. In early 2011, the Superior Court denied leave to appeal its earlier decision certifying the class to the Divisional Court.<sup>4</sup>

*Imax* is the first court ruling to address the statutory provisions for secondary market liability under Ontario's *Securities Act*.<sup>5</sup> It has been heralded as an “epic”<sup>6</sup> decision and one that “may make Ontario a new haven for secondary market class actions.”<sup>7</sup> Interestingly, just as Ontario

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<sup>1</sup> Linda J. Silberman, *Morrison v. National Australia Bank: Implications for Global Securities Class Actions* 15 (N.Y.U. Sch. of L. Pub. Law. & Legal Theory Research Paper Series, Working Paper No. 11-41, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1864786](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1864786) (alteration in original). Professor Silberman was referring to Justice's Scalia's observation in *Morrison* that “some fear that [the United States] has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.” *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2886 (2010).

<sup>2</sup> They are sometimes referred to as “transnational,” “international,” “trans-border,” “worldwide,” “multinational” or “multi-jurisdictional” class actions to denote the fact that they encompass claimants from outside the forum. In Canada, however, they are customarily referred to as “global” class actions, and this terminology will be used throughout this Article. In addition, the expressions “claimant,” “class member” or “plaintiff” will be used interchangeably.

<sup>3</sup> The court issued two separate decisions: (2009) 66 B.L.R. 4th 222 (Can. Ont. Sup. Ct. J.) (OSA Leave Decision); (2009) 86 C.P.C. 6th 273 (Can. Ont. Sup. Ct. J.) (Certification Decision). Unless otherwise indicated, references are to the Certification Decision.

<sup>4</sup> 2011 ONSC 103 (Can. Ont. Sup. Ct. J.) (Leave to Appeal Decision). Collectively, I refer to the three decisions as *Imax*.

<sup>5</sup> Province of Ontario Securities Act, R.S.O. 1990, c. S.5 (Can.).

<sup>6</sup> Mark Gelowitz, *Court Certifies Class Action Against Imax: Liability May be Coming Soon to a Theatre Near You*, LAWYERS WEEKLY (Feb. 19, 2010), <http://www.lawyersweekly.ca/index.php?section=article&articleid=1103>.

<sup>7</sup> *Id.* Notably, 92% of all issuers in Canadian capital markets are based in Ontario, Alberta, British Columbia, and Québec. A.C. Pritchard & Janis Sarra, *Securities Class Actions Move North: A Doctrinal and Empirical Analysis of Securities Class Actions in Canada*, 47 ALTA L. REV. 881, 884 (2010). Moreover, certification rates in Ontario are

courts are opening their doors to global securities class actions,<sup>8</sup> American courts seem to be closing theirs.<sup>9</sup> In a landmark ruling in June 2010, the U.S. Supreme Court in *Morrison v. National Australia Bank*<sup>10</sup> held that investors who purchase securities on a foreign exchange do not have a claim under U.S. federal securities law. The precedent in *Morrison* means that it will be difficult—if not impossible—for plaintiffs to pursue global securities class actions in U.S. federal courts under circumstances in which the class members did not purchase or sell their shares on a U.S. exchange.

The confluence of the jurisprudential developments in Canada and in the U.S. “has some analysts wondering whether [Ontario] will become a hub for aggrieved foreign investors.”<sup>11</sup> In May 2011, Canada’s *Globe and*

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much higher than those of other provinces. See Adrian Land & Mel Hogg, *Certification Rates in Ontario Versus The Rest of Canada: Why the Disparity?* 6 CAN. CLASS ACTION REV. 433, 433 (2010) (“In Ontario, there has been a consistent trend towards a ‘certify now, ask questions later’ approach in class action jurisprudence. Indeed, certification motions are successful much more often in Ontario than in the rest of Canada.”).

<sup>8</sup> Toronto-based National Economic Research Associates Inc. (NERA) reports that there were fifteen securities class actions filed in 2011, the most ever in a calendar year. The additional filings brought the total number of active securities cases in Canada to forty-five cases, more than twice the number of cases pending at the end of 2007. These cases represent a total of approximately CDN \$24.5 billion in outstanding claims. See Bradley Heys and Mark Berenblut, *Trends In Canadian Securities Class Actions: 2011 Update*, NERA ECONOMIC CONSULTING (Feb. 1, 2012), [http://www.nera.com/67\\_7596.htm](http://www.nera.com/67_7596.htm).

<sup>9</sup> Andrew Jeffries, *Class Actions: A Global Update*, ALLEN & OVERY (Jan. 18, 2011), <http://www.allenoverly.com/AOWEB/Knowledge/Editorial.aspx?contentTypeID=1&itemID=59663&prefLangID=410> (“At the same time as *Morrison*, the courts over the border in Canada were developing their own F-Cubed regime.”).

<sup>10</sup> 130 S. Ct. at 2873 (2010).

<sup>11</sup> Angelina Chapin, *Investor Justice to the Max*, CANADIAN BUS. (Apr. 11, 2011), <http://www.canadianbusiness.com/article/20535—investor-justice-to-the-max>; see also Working Group on U.S.–Canada Cross-Border Class Action Protocols, *Report to the House of Delegates*, 2011 A.B.A. SEC. OF LITIG. 2, available at [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2011\\_hod\\_annual\\_meeting\\_101c.doc](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2011_hod_annual_meeting_101c.doc) (“The U.S. Supreme Court’s recent strong reiteration in *Morrison v. National Australia Bank* of the ‘presumption against extraterritoriality’ . . . will force many class actions out of the U.S. courts (in whole or in part). Given the U.S. courts’ retrenchment and the resulting difficulty of both American and non-American plaintiffs and class members to now seek redress in U.S. courts, those foreign jurisdictions that do have class or ‘mass’ actions can expect increasing caseloads . . . .”); Irwin H. Warren & Matthew E.K. Howatt, *Transnational Securities Litigation in the U.S. Courts After Morrison v. National Australia Bank: An “F-Cubed” Regression Analysis*, 2010 CANADIAN INST. 33 [hereinafter Warren & Howatt], available at <http://www.weil.com/files/Publication/362ff7fb-5049-42e0-a731-a5d457ae7b62/Presentation/PublicationAttachment/e83b53f9-93f0-4334-a164-ada9832feb9b/Canadian%20Institute%20Morrison%20Paper.pdf> (“*Morrison* may help accelerate the pace and increase the scope of Canada as a transnational securities litigation center (or perhaps more aptly, centre).”); Geneviève Saumier, *Securities Class Actions and Extra-territoriality: The View From Canada*, CONFLICT OF LAWS.NET (June 30, 2010), <http://conflictoflaws.net/2010/securities-class-actions-and-extra-territoriality-a-view-from->

*Mail* newspaper reported that prominent American plaintiffs' attorney Michael Spencer was moving his securities litigation practice north of the border.<sup>12</sup> The article explains why Spencer chose to set up shop in Canada:

Mr. Spencer makes no bones about why, at the pinnacle of his career, he is prepared to swap the perks of a privileged life in Manhattan for Toronto. It's because of Ontario's Bill 198, enacted in 2005, which allows shareholders who buy stock on the open market to sue if they feel a company misrepresents its financial situation.

Ordinarily, an amendment to provincial securities law would not attract the attention of someone in Mr. Spencer's ambit, but these are not ordinary times for U.S. class-action lawyers. . . . [Describing U.S. developments]

. . . .

Set that against an Ontario decision last year to take jurisdiction over a global class of shareholders in *Silver v. Imax Corp.*, and Toronto's appeal becomes obvious.

"Simply put, Canada presents a great opportunity," Mr. Spencer says from his Milberg office in New York.<sup>13</sup>

Whether Canada presents "a great opportunity" depends in part on whether the *Imax* court was correct to certify a global class in the first place. Global class action litigation raises myriad conflict of laws complications, many of which were not adequately addressed in the *Imax*

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canada/ ("[T]he ruling in *Morrison* might increase traffic towards Canadian courts given their potentially greater openness to multijurisdictional securities class actions."); Luke Green, *Multi-National Securities Class Actions Go Global*, ISS GOVERNANCE (Jan. 11, 2011 6:26 PM), <http://blog.issgovernance.com/slw/2011/01/multi-national-securities-class-action-go-international.html> (noting that "[i]n the future, Canada and the Netherlands could be poised to replace the U.S. as the most frequent forums for large multi-national securities class actions.").

<sup>12</sup> Sandra Rubin, *Top U.S. Class-Action Lawyer Comes to Canada*, GLOBE AND MAIL (May 10, 2011), <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/top-us-class-action-lawyer-coming-to-canada/article2017397/>. Spencer was most recently lead counsel in the *Vivendi* global class action in the Southern District of New York that left the defendant corporation facing a US \$9.3-billion damage award for misleading investors. *Id.* The damages award was reduced in February, 2011 when a judge significantly narrowed the scope of the class in light of the *Morrison* decision. *Id.*

<sup>13</sup> *Id.* See also Ashby Jones, *Lawyers Looking to Canada for Shareholder Litigation*, WALL ST. J. (Feb. 27, 2012), <http://online.wsj.com/article/SB10001424052970203833004577247211369677658.html> ("Unfavorable court rulings and legislation have helped damp filings of securities class-action lawsuits in the U.S., but these suits are starting to gain traction in Canada, prompting some U.S. lawyers to look for opportunities up north.").

decision—or any other Canadian decision. If Canadian courts are to become the new “Shangri-La” of global securities class action litigation as some are predicting, increased attention needs to be paid to the conflict of laws considerations at the heart of global class actions.<sup>14</sup>

This Article endeavors to use the *Imax* case as a lens through which to canvass the conflict of laws issues raised by the certification of global classes. In particular, I look at the thorny issues of jurisdiction *simpliciter*, recognition of judgments, choice of law, parallel proceedings, and notice/procedural rights in order to tease out the salient issues that Canadian courts face in the years ahead if they continue to entertain the notion of global class actions. Where appropriate, I look at the parallel U.S. jurisprudence in order to present a broader picture of the issues at play. The goal of the paper is not to solve the problems attendant to the certification of global classes in Canada, but rather to provide a critical and fulsome exposition of the issues that are emerging as class litigation goes global.

In Part II, I provide a brief description and overview of *Imax*. In Part III, I situate global class actions in Canada in the broader transnational litigation landscape, discussing both the context in which global classes emerged in Canada and why this seemingly discrete development in Canadian civil procedure is significant to the United States. In Part IV, I discuss the private international law issues raised by the certification of global classes in Canada. Specifically, I examine the following: jurisdiction *simpliciter*, recognition of class judgments, choice of law, parallel proceedings and notice/procedural rights. In Part V, I offer some concluding thoughts about the future of global classes in Canada.

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<sup>14</sup> Those who view the *Imax* decision as signaling that Ontario (or any other Canadian province) will become the new hub of global securities litigation should consider that, aside from the conflict of laws issues, there may be other obstacles to Canada becoming the Shangri-La of global securities class actions. At least two such obstacles come to mind. First, Canada may not be a big enough player in the global securities arena to become the new securities class actions hub. In order to certify a class action in Ontario, the Ontario court must be able to assert jurisdiction over the defendant (and the absent plaintiff class). This will usually require that the defendant be domiciled in Ontario or that the defendant sold securities in Ontario. There may be a limited pool of defendants who fit those criteria. Second, there are cost consequences associated with pursuing securities litigation in Canada that may prevent Canada from becoming the new haven for global securities class actions. *See, e.g.*, *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331 (Can.) (upholding a costs award in excess of CDN \$500,000 against a representative plaintiff and noting that “[t]hose who inflict [litigation] on others in the hope of significant personal gain and fail can generally expect adverse cost consequences.”). *Id.* at para. 63. For a recent description of costs in class litigation, see Celeste Poltak, *Certification: Have the Costs Become Prohibitive In Ontario?*, LAWYER’S WEEKLY (Jan. 28, 2011), <http://www.lawyersweekly.ca/index.php?section=article&articleid=1335>. Thus, the question of whether Canada will become the new Shangri-La of global securities class actions is not answered entirely by reference to the conflict of laws considerations associated with the certification of global classes.

## II. THE *SILVER V. IMAX* DECISION

*Imax* is the quintessential securities fraud case: a class action initiated by aggrieved shareholders who allegedly suffered financial losses after the defendant corporation overstated its revenues. The defendant, *Imax*, is a public company based in Ontario that is in the business of manufacturing, selling and leasing large screen theater systems and their components. It sells its shares on both the Toronto Stock Exchange (TSX) and the NASDAQ. In March 2006, *Imax* released five public statements about its 2005 financial results; these communications contained allegedly false statements that overstated the company's revenues for the previous financial year.<sup>15</sup> *Imax*'s reporting of inflated revenue apparently stemmed from a desire to reach or exceed revenue projections and to present the company as an attractive target for a merger or take-over.<sup>16</sup> Following the public disclosure of its 2005 financial results, *Imax*'s stock price rose significantly.<sup>17</sup> On August 9, 2006, *Imax* made a public announcement that: a) it had not found a buyer or a merger partner; and b) it was responding to an informal inquiry from the U.S. Securities and Exchange Commission (SEC) regarding its 2005 revenue recognition. Subsequent to this announcement, the price of *Imax*'s shares fell sharply.<sup>18</sup> In the fall of 2006, *Imax* acknowledged that its 2005 financial statements had not complied with Generally Accepted Accounting Principles (GAAP) and the company issued restated financial results for 2005.<sup>19</sup>

Based on these facts, plaintiffs sued *Imax* and certain of its officers and directors for securities fraud. The plaintiffs sought to certify a class

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<sup>15</sup> According to the Statement of Facts in the Leave to Appeal Decision:

Revenues were overstated by taking into [account] 2005 revenue payments that had not yet been made to IMAX under contracts IMAX had not yet performed fully. This revenue recognition was justified by IMAX on the basis of accounting principles it purported to apply to contingent receivables[.] There were two problems with this revenue recognition by IMAX: (a) this was a changed approach to recognizing contingent receivables, and this change, itself, was not disclosed in the financial statements. Thus, a reader would not understand that the 2005 financial statements were presented on a different basis than the financial statements for prior years. And thus, year-to-year comparisons could not be made with confidence: to do so would have been, to some extent, comparing "apples to oranges"; and (b) this approach to revenue recognition was not in accordance with GAAP [Generally Accepted Accounting Principles].

*Silver v. Imax Corp.*, 2011 ONSC 103, para. 15 (Can. Ont. Sup. Ct. J.) (Leave to Appeal Decision).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> The next day, *Imax*'s shares fell 40%. See *Silver v. Imax Corp.*, (2009) 86 C.P.C. 6th 273, para. 2 (Can. Ont. Sup. Ct. J.) (Certification Decision).

<sup>19</sup> *Id.* at para. 3.

action consisting of “persons who acquired securities of Imax on the TSX and on NASDAQ on or after February 17, 2006 and held some or all of those securities at the close of trading on August 9, 2006.”<sup>20</sup> The plaintiffs pursued both common law and statutory claims for misrepresentation on the secondary market. *Imax*’s significance stems in part from being the first case in which plaintiffs raised a statutory claim for misrepresentation pursuant to Part XXIII.1 of the Ontario *Securities Act* (the “OSA”).<sup>21</sup> A statutory claim for damages under section 138.3 of Part XXIII.1 of the OSA allows a shareholder to sue a reporting issuer as well as its directors and officers in circumstances where there has been a misrepresentation in the issuer’s secondary market disclosure. Under the statutory cause of action, plaintiffs do not need to establish reliance; liability follows from proof of the misrepresentation itself, subject to certain defenses.<sup>22</sup> However, statutory claims under the OSA are subject to certain limitations—most significantly, a requirement for leave of the court before such an action can be maintained (section 138.8)<sup>23</sup> and a cap on recoverable damages (section 138.7).<sup>24</sup>

In late 2009, the Ontario Superior Court of Justice released two companion decisions in which it granted leave to pursue the statutory cause

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<sup>20</sup> *Id.* at para. 6.

<sup>21</sup> Province of Ontario Securities Act, R.S.O. 1990, c. S.5 (Can.). Part XXIII.1 of the OSA came into force on December 31, 2005. On the new framework for misrepresentation in the secondary market, and in particular, for a comparison with U.S. law, see Pritchard & Sarra, *supra* note 7; see also Mary Condon, *Rethinking Enforcement and Litigation in Ontario’s Securities Regulation*, 32 QUEEN’S L. J. 1 (2006); Andrea Laing & Brian Donnelly, *Silver v. Imax and Ainslie v. CV Technologies: What has Been Left Out of the Leave Requirement*, 5 CAN. CLASS ACTION REV. 180 (2009); LARRY P. LOWENSTEIN & MARY PATERSON, CORPORATIONS, CLAIMANTS AND CROSS-BORDER ATTITUDES: THE DIFFERENT APPROACHES IN ONTARIO AND THE UNITED STATES TO CIVIL LIABILITY FOR MISREPRESENTATIONS IN THE SECONDARY SECURITIES MARKETS (2006), available at <http://www.ila2006.org/lowenstein.pdf>.

<sup>22</sup> *Silver v. Imax Corp.*, (2009) 66 B.L.R. 4th 222, para. 13 (Can. Ont. Sup. Ct. J.) (OSA Leave Decision).

<sup>23</sup> Section 138.8 provides:

No action may be commenced under Section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that: a) the action is being brought in good faith; and b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

Province of Ontario Securities Act, R.S.O. 1990, c. S.5, § 138.8 (Can.).

<sup>24</sup> OSA Leave Decision, 66 B.L.R. (4th) 222, at para. 271 (“Section 138.7 provides for a cap on damages. In the case of the responsible issuer, the cap is the greater of five per cent of its market capitalization and [CDN] \$1 million. For a director or officer of a responsible issuer, the cap is the greater of [CDN] \$25,000 and 50% of the aggregate of the director’s or officer’s compensation from the responsible issuer and its affiliates.”).



of action under the OSA and certified the *Imax* action as a global class proceeding. With respect to the leave requirement under section 138.8 of the OSA, Justice van Rensburg concluded that the OSA sets “a relatively low threshold for a plaintiff seeking leave to proceed with an action.”<sup>25</sup> After canvassing over 30 volumes of evidence, examining the genesis of the statutory cause of action and engaging in extensive statutory interpretation, Justice van Rensburg determined that the plaintiffs had established that the action was brought in good faith and that there was a reasonable possibility of success at trial.<sup>26</sup> In the certification decision, Justice van Rensburg certified both the statutory and the common law causes of action pursuant to section 5(1) of Ontario’s *Class Proceedings Act*.<sup>27</sup> The court focused its analysis primarily on whether the common law claims for misrepresentation should be certified.<sup>28</sup> Justice van Rensburg determined that plaintiffs could maintain their suit despite the fact that they had not pleaded individual

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<sup>25</sup> *Id.* at para. 25.

<sup>26</sup> *Id.* Note that the claims against certain of *Imax*’s officers and directors were dismissed.

<sup>27</sup> S.O. 1992, c. 6 (Can.). Section 5 provides:

5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

*Id.* at § 5.

<sup>28</sup> Apparently, defendants (arguably erroneously) conceded that the statutory cause of action under the OSA was appropriate for class certification. *Silver v. Imax Corp.*, (2009) 86 C.P.C. 6th 273, para. 13 (Can. Ont. Sup. Ct. J.) (Certification Decision) (“[t]he acknowledgement that the statutory claims are suitable for certification is an important concession in this case.”). Plaintiffs likely asserted common law misrepresentation claims in order to avoid the damages cap under section 138.7 of the OSA.

reliance on the defendant's misstatements, indicating that "[i]t should be open to the plaintiffs to attempt to establish in the common issues trial that, as a factual matter, reliance has been established for all members of the class through proof of the common action of purchasing shares."<sup>29</sup> The defendants subsequently sought leave to appeal Justice van Rensburg's certification and statutory leave decisions to the Divisional Court. In a judgment rendered in early 2011, Justice Corbett dismissed the defendant's motion and ruled that the *Imax* case could, in fact, proceed as a global class action.

As one commentator notes, "[m]ost of the attention in the press has been focused on the decision granting leave, as the IMAX case is the first court ruling to address the statutory provisions for secondary market liability."<sup>30</sup> And to be sure, *Imax* is a critical decision establishing the initial parameters of the new statutory cause of action. In particular, the decision is seen as very favorable to the plaintiffs' bar, as it sets a low threshold for the pursuit of the OSA statutory cause of action. Additionally, in endorsing the principle of "inferred reliance,"<sup>31</sup> *Imax* confirms that common law fraud claims remain a viable alternative to the statutory cause of action under the OSA.

However, one aspect of the decision appears to have been somewhat overlooked in much of the commentary: that the court in *Imax* certified a *global* class of shareholders who were allegedly deceived by the defendant's misrepresentations. *Imax* is truly the first case of its kind in this respect—never before has a global class of claimants on such a large scale been certified in a Canadian court. Although the court in *Imax* did attempt to wade through the conflict of laws intricacies associated with the certification of a global class, it left the resolution of the hard questions until later, indicating that "[t]he appropriate approach in this litigation is to 'wait and see' how the conflict of laws issues may develop . . . ."<sup>32</sup>

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<sup>29</sup> *Id.* at para. 190. Justice Corbett, in the Leave to Appeal Decision, was clear to point out that this is not equivalent to the U.S. doctrine of "fraud on the market," whereby reliance is presumed as a matter of law in an efficient market. In describing the difference he stated, "[t]here is a distinction between deemed reliance by operation of law and a factual finding that the 'efficient market' theory applies to the specific statements allegedly made by this public issuer to the market in this case." *Silver v. Imax Corp.*, 2011 ONSC 103, para. 53 (Can. Ont. Sup. Ct. J.) (Leave to Appeal Decision). One commentator, however, argues that "[c]ertifying common law misrepresentation claims on the basis of a rebuttable inference of group reliance on an efficient market is not different in principle from certifying a class action based on fraud on the market, a theory that has been expressly rejected by the courts in Ontario." Andrew Gray, *The IMAX Decisions: Expanding the Scope of Securities Class Actions*, CLASS ACTION DEFENCE Q., Mar. 2010, at 29.

<sup>30</sup> Joseph C. D'Angelo, *Class Actions: Implications of Silver v. Imax*, MCMILLAN (Apr. 2010), <http://www.mcmillan.ca/93478>.

<sup>31</sup> *Silver v. Imax Corp.*, 2011 ONSC 103, para. 58 & n.25 (Leave to Appeal Decision).

<sup>32</sup> *Silver v. Imax Corp.* (2009), 86 C.P.C. 6th 273, para. 164 (Certification Decision).

It is important to reiterate that *Imax* is not the only word on the subject.<sup>33</sup> Other courts have considered (and rejected) the possibility of certifying global class actions on facts similar to those of *Imax*. In *McKenna v. Gammon Gold Inc.*,<sup>34</sup> for instance, plaintiffs sought to certify a global class of investors who had purchased shares of the defendant corporation (a gold and silver producer) on either the primary or the secondary market.<sup>35</sup> In *Gammon Gold*, the defendant was incorporated in Québec, based in Nova Scotia and ran its mining operations out of Mexico. The Ontario court held that it would not be appropriate to certify a global class action in these circumstances, observing that “the acquisition of those securities in a jurisdiction outside Canada would not give rise to a reasonable expectation that the acquiror’s rights would be determined by a court in Canada.”<sup>36</sup> The court in *Gammon Gold* cited an earlier decision in *McCann v. CP Ships*, in which Justice Rady observed:

It is difficult to understand the basis on which an Ontario court could

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<sup>33</sup> *Imax* is not the only case to have certified a global class; however, it is the case that provides the most extensive discussion of the global class issue. In *Dobbie v. Arctic Glacier Income Fund*, Justice Tausendfreund certified a global class of persons who had purchased shares of the defendant corporation during the class period. Citing *Imax*, the court found at para. 202 that “the lack of territorial limitations to the proposed class [was] not a barrier to certification.” 2011 ONSC 25, para. 202 (Can.). Note that the *Arctic Glacier* case settled in early 2012 for CDN \$13.75 million. *Arctic Glacier Settles Canadian Securities Class Action*, ARTIC GLACIER INCOME FUND (Feb. 8, 2012), <http://www.arcticglacierinc.com/pdf/news/2012/NR20120208.pdf>. See also *Ramdath v. George Brown College*, [2010] O.J. No. 1411 (Can. Ont. Sup. Ct. J.) (certifying a global class of students who alleged misrepresentation in connection with the defendant college’s promotional literature). Some courts have certified classes that lack apparent territorial limitations, but without any mention of the conflict of laws issues that such class actions present. See, e.g., *Silver v. Imax Corp.* (2009), 86 C.P.C. 6th 273, at para. 124 (Certification Decision) (noting that “[c]lasses including international members have been certified by Ontario courts without any detailed consideration of the jurisdictional issues in *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. 3d 734 (Ont. Gen. Div.) (breast implant case—no territorial limitation on class members); *Robertson v. Thomson Corp.* (1999), 43 O.R. 3d 161 (Ont. Gen. Div.) (class comprised of creators and/or owners of copyright in and to certain works published in Canada in print media); *Cheung v. Kings Land Development Inc.* (2001), 55 O.R. 3d 747 (Ont. S.C.J.), leave to appeal refused [2002] O.J. No. 336 (Div. Ct.) (class included Hong Kong residents); *Brimner v. Via Rail Canada Inc.* (2000), 50 O.R. 3d 114 (Ont. S.C.J.) (class comprised of all persons traveling on a Windsor-Toronto train). International classes have been certified for settlement purposes in *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (Ont. S.C.J.) and *Mondor [Settlement]*”).

<sup>34</sup> 2010 ONSC 1591 (Can.).

<sup>35</sup> *Id.* at para. 81 (“The description of the Class is broad: All persons, [other than certain excluded persons related to the parties] who acquired securities of [Gammon] during the period from the opening of trading on October 10, 2006 to the close of trading on August 10, 2007 (the ‘Class Period’), whether over a stock exchange, or pursuant to a prospectus, or otherwise”).

<sup>36</sup> *Id.* at para. 116.

or should take jurisdiction over the [foreign] class members as proposed. Where is the real and substantial connection between, for example, the Ontario Court and a French citizen residing in France who purchased securities over the TSE? It strikes me as judicial hubris to conclude that an Ontario court would have jurisdiction in those circumstances.<sup>37</sup>

Whether the *Imax* or the (more conservative) *Gammon Gold* approach to global classes will ultimately prevail remains to be seen. But, for now, the dominant opinion seems to be that *Imax* has ushered in a new era—one in which Ontario's courts are going global.

### III. SITUATING *SILVER V. IMAX* IN THE GLOBAL LITIGATION LANDSCAPE

Prior to deconstructing the conflict of laws issues associated with global classes in Canada, it is important to examine the broader context in which *Imax* was decided. Courts in the United States have been considering whether to certify global class actions (usually referred to as “transnational” class actions) for decades. Although global class actions have been brought in a wide variety of substantive subject areas, including product liability, mass tort, consumer protection, breach of contract and antitrust, the majority of such actions have been in the securities litigation area.<sup>38</sup> American courts have differed on the propriety of certifying global class actions. Some courts have certified global class actions on the basis that they represent a vehicle through which the claims of all aggrieved claimants, both domestic and foreign, can be resolved. Other courts, however, have rejected global class actions, citing concerns about manageability, subject-matter jurisdiction, comity, and the like.<sup>39</sup>

The 1990's and 2000's witnessed a new type of global securities class action: the “foreign-cubed” or “f-cubed” class action. An “f-cubed” class action is an action brought under U.S. securities laws by *foreign* plaintiffs who purchased or sold securities of a *foreign* issuer on a *foreign* stock exchange.<sup>40</sup> After a period of uncertainty about the fate of the f-cubed class action, the U.S. Supreme Court in *Morrison* dealt them a fatal blow. In

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<sup>37</sup> *Id.* at para. 100 (quoting *McCann v. CP Ships*, [2009] O.J. No. 5182, para. 83 (Can.)).

<sup>38</sup> See, e.g., Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 14 (2007); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 465 (2009).

<sup>39</sup> See Buxbaum, *supra* note 38, at 39–41 (chronicling reasons for dismissal in a dataset of forty-five “f-cubed” securities class actions).

<sup>40</sup> The term was originally coined in Stuart M. Grant & Diane Zilka, *The Role of Foreign Investors in Federal Securities Class Actions* Ser. No. B-1442, PLI CORPORATE LAW AND PRACTICE HANDBOOK 91, 96 (2004).

*Morrison*, shareholders sued National Australia Bank (NAB) in federal district court in New York in connection with a write-down of the value of NAB's subsidiary, HomeSide Lending, a company headquartered in Florida that was in the business of servicing mortgages.<sup>41</sup> Even though NAB's ordinary shares were not traded on any exchange in the United States, plaintiffs sought to sue under American securities laws for a violation of sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. While the parties and the courts below had framed the issue as one of subject-matter jurisdiction,<sup>42</sup> the Court considered the extraterritorial reach of section 10(b) to raise instead a "merits question." The Court noted that "[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."<sup>43</sup> Because there was "no affirmative indication" that section 10(b) was intended to apply extraterritorially, the Court refused to apply it to the foreign conduct at issue.<sup>44</sup> Thus, foreign claimants did not have a cause of action under U.S. securities laws to sue foreign issuers in respect of purchases or sales of securities that took place on foreign exchanges. The Supreme Court then enunciated the "transactional test" for the application of the Exchange Act: section 10(b) will only apply when "the purchase or sale is made in the United States, or involves a security listed on a domestic exchange."<sup>45</sup> Since the plaintiffs in *Morrison* were seeking to advance a claim involving a purchase and sale of shares that occurred outside the United States, they failed to satisfy the Court's transactional test and their claims were accordingly dismissed.<sup>46</sup> In the two years since *Morrison* was decided,

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<sup>41</sup> On July 5, 2001, National Australia Bank (NAB) announced that it was writing down the value of HomeSide's assets by \$450 million. On September 3, it announced an additional write-down of \$1.75 billion. HomeSide allegedly used fraudulent assumptions in its models that valued its "mortgage-servicing rights" (MSRs), which were subsequently incorporated into NAB's publicly filed financial statements. *Morrison*, 130 S. Ct. at 2875-76. After the write-downs, NAB's stock price dropped by nearly 13% on the Australian Stock Exchange. *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 169 (2d Cir. 2008), *aff'd* 130 S. Ct. 2869 (2010).

<sup>42</sup> *Morrison*, 130 S. Ct. at 2877. In the case law leading up to *Morrison*, the issue of whether foreign plaintiffs could sue under U.S. securities law was thought to be one of subject-matter jurisdiction. Courts had used the "conduct" and "effects" tests (or some "admixture" of both) to determine whether the foreign fraud was sufficiently related to the United States to justify the assumption of subject-matter jurisdiction over the case.

<sup>43</sup> *Id.* (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (internal quotations omitted)).

<sup>44</sup> *Id.* at 2883.

<sup>45</sup> *Id.* at 2886.

<sup>46</sup> Although *Morrison* involved a private cause of action under section 10(b), its reasoning would also seem to foreclose the possibility of the Securities and Exchange Commission (SEC) bringing an action where the purchases or sales of securities were consummated outside the United States. One month after *Morrison* was decided, Congress

lower courts have interpreted the case strictly to foreclose the claims of foreign purchasers who do not satisfy either the letter or spirit of *Morrison*.<sup>47</sup> Post-*Morrison*, it seems that the United States is no longer the haven for global securities litigation that it had been for decades prior.<sup>48</sup>

Just as the United States was exiting the global securities litigation game, Canada was entering it. A statutory cause of action for misrepresentation in connection with the primary offering of securities has been available in Canada<sup>49</sup> since the 1970's.<sup>50</sup> However given fee-shifting

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enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"). Section 929P(b) of the Dodd-Frank Act amended the Exchange Act to essentially reinstate the "conduct and effects" test as it concerns actions brought by the SEC. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1841-49 (2010); see generally Genevieve Beyea, *Morrison v. National Australia Bank and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO ST. L.J. 537, 538 (2011) (noting that the amendment "seems intended to undo the Court's opinion in *Morrison*, at least as far as actions brought by the Securities and Exchange Commission" but that such amendment "as drafted may be ineffective, due to a procedural aspect of the Supreme Court's holding in *Morrison*."). Further, Section 929Y(a) of the Dodd-Frank Act directed the SEC to solicit public commentary and to conduct a study to determine whether, and to what extent, the Exchange Act should regulate transnational securities fraud cases. For the SEC's report, see SEC, *STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934* (2012).

<sup>47</sup> See, e.g., *In re Royal Bank of Scotland Group PLC Sec. Litig.*, 765 F.Supp.2d 327 (S.D.N.Y. 2011); *Cornwell v. Credit Suisse Group*, 729 F.Supp.2d 620 (S.D.N.Y. 2010); *In re Société Générale Sec. Litig.*, No. 1:08-cv-02495 (RMB), 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010). For discussion of the state of U.S. law post-*Morrison*, see Beyea, *supra* note 46, at 538; George Conway et al., *Harmony and Dissonance in Extraterritorial Regulation*, AM. SOC'Y 105TH ANNUAL MEETINGS PROCEEDINGS (2011); Elizabeth Cosenza, *Paradise Lost: § 10(B) After Morrison v. National Australia Bank*, 11 CHI. J. INT'L L. 343 (2011); Roger W. Kirby, *Access to U.S. Courts By Purchasers of Foreign Listed Securities in the Aftermath of Morrison v. National Australia Bank Ltd.*, 7 HASTINGS BUS. L.J. 223 (2011); Richard Painter et al., *When Courts and Congress Don't Say What they Mean: Initial Reactions to Morrison v. National Australia Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1 (2011); Silberman, *supra* note 1.

<sup>48</sup> The mid-1990's also saw the introduction of heightened pleading requirements in U.S. securities litigation. See CHARLES ALAN WRIGHT ET AL., 5A FEDERAL PRACTICE & PROCEDURE § 1301.1 (3d ed. 1998) ("As a result of the enactment of the [Private Securities Litigation Reform Act of 1995], if a complaint asserts that the defendant made misleading statements or omissions in an action under the securities law, the pleader must specify each statement alleged to have been misleading and the reason or reasons why the statement is misleading. The statute also specifies that if an allegation regarding the statement or omission is made on information and belief, the complaint must state with particularity all facts on which the pleader's belief is formed. Finally, in a securities action in which the plaintiff must establish that the defendant acted with a 'particular state of mind,' which in most instances is a reference to the defendant's having acted with 'scienter,' the plaintiff must 'state with particularity' facts giving 'rise to a strong inference' that the defendant acted with the required state of mind.").

<sup>49</sup> Note that in Canada securities are regulated provincially, not federally (as they

considerations and the absence of a class action mechanism, few actions were initially pursued under these primary market civil liability provisions. Moreover, the primary market liability provisions were seen as inadequate to protect the investing public, given that 95% of capital markets activity in Canada is in the secondary market.<sup>51</sup> After an extended period of legislative debate, Canadian provinces began to modify their securities legislation to provide for statutory secondary market liability. This development, coupled with the enactment of class proceedings legislation in most provinces,<sup>52</sup> “open[ed] the door to the robust involvement of so-called ‘private attorneys general’ in enforcing the norms of securities law.”<sup>53</sup> It is against this backdrop that global securities class actions in Canada came to develop.

This prospective shift in global securities litigation from the United States to alternative forums such as Canada illustrate what Quintanilla and Whytock describe as “the new multipolarity” in transnational litigation.<sup>54</sup> They posit that the era where the U.S. was the epicenter of global litigation has passed and that transnational litigation is entering an era of increasing multipolarity.<sup>55</sup> This increased multipolarity “may be due to changes in the U.S. legal system that make it less attractive to transnational litigants.”<sup>56</sup> Alternatively, it may be attributable to “changes in other countries’ legal

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primarily are in the United States).

<sup>50</sup> The statutory cause of action was designed to overcome some of the issues presented by the common law cause of action for negligent misrepresentation, which requires proof of individual reliance. Canadian courts have not adopted the U.S. doctrine of “fraud on the market.” See *Carom v. Bre-X Minerals Ltd.*, (1998) 41 O.R. 780 (Can. Ont. Ct. J.).

<sup>51</sup> Pritchard & Sarra, *supra* note 7, at 882.

<sup>52</sup> Later, the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton* would hold that all provinces could certify class actions even in the absence of class proceedings legislation under their “inherent power to settle the rules of practice and procedure as to disputes brought before them.” [2001] 2 S.C.R. 534, paras. 31–34 (Can.). Note that Prince Edward Island is the only province not to have comprehensive class proceedings legislation in place.

<sup>53</sup> Condon, *supra* note 21, at 34.

<sup>54</sup> Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments and Foreign Law* 18 Sw. J. INT’L L. 31, 34–35 (2011).

<sup>55</sup> Canada is not the only jurisdiction that is generating a buzz as being a potential alternate forum for the resolution of mass disputes. The 2005 Dutch Act on the Collective Settlement of Mass Claims (known as “WCAM”) has also sparked debates about the Netherlands being a potentially viable forum for the settlement of collective disputes. Note, however, that the WCAM does not permit the adjudication of mass disputes, but rather is a settlement-only vehicle. For a discussion of the Dutch Act, see Tomas Arons & Willem H. Van Boom, *Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from The Netherlands*, 21 EUR. BUS. L. REV. 857 (2010) (examining issues of international jurisdiction, cross-border recognition, res judicata and enforcement of opt-out securities settlements under the WCAM 2005 with a view to answering the question: “Have the Dutch found a new export product with the enactment of the WCAM 2005?”).

<sup>56</sup> Quintanilla & Whytock, *supra* note 54, at 5.

systems that make them more attractive to litigants.”<sup>57</sup> In the case of global securities class actions, it seems to be a little bit of both.

What does this increased multipolarity mean for the United States? More specifically, how does the potential migration of global class actions from the United States to Canada impact the former? There are at least three U.S. “constituents” that may be affected by the emergence of global class actions in Canada: absent U.S. plaintiffs who unwittingly form part of a Canadian global class action; prospective U.S. defendants who may be facing the risk of global class litigation in Canada; and U.S. courts that will need to decide what this recent development in foreign law means for U.S. class action jurisprudence.

First, if Canadian courts continue to certify global classes, U.S. claimants may find themselves increasingly subject to the Canadian class action regime. One commentator notes, “[i]f the Ontario appellate courts . . . embrace the IMAX rationale for certifying a global class, investors *outside* Canada, particularly American investors, may be more likely to pursue (and/or be swept into) Ontario-based class actions.”<sup>58</sup> As a practical matter, this means that U.S. claimants will be foreclosed from initiating suit in Canada in respect of the same claims unless they opt-out of the Canadian class action. It may also mean that U.S. claimants are foreclosed from pursuing similar claims in U.S. courts depending on whether (and to what extent) a U.S. court ascribes *res judicata* effect to a Canadian judgment or settlement.

Second, if *Imax* marks a trend in the certification of global classes, American defendants may find themselves at increased risk of litigation exposure in Canada. While *Imax* itself involved a Canadian defendant, the time will inevitably come when plaintiffs seek to certify global classes against American defendants. At least two current cases foreshadow this development. First, in 2008, plaintiffs initiated a national class action against a large American multinational, American International Group (AIG), arising out of AIG’s credit default swaps and “the crippling decline in AIG’s stock price when the true effect of those credit default swaps became known to the investing public.”<sup>59</sup> While the putative class is limited to Canadian residents, the case is significant as it seeks certification against a foreign issuer in respect of shares purchased on a foreign exchange.<sup>60</sup> The AIG case was adjourned indefinitely pending the Supreme

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<sup>57</sup> *Id.*

<sup>58</sup> Emily Cole, *Recent Developments in Canadian Securities Class-Action Law*, ABA SEC. LITIG. J., Summer 2010, at 13.

<sup>59</sup> *Class Actions: American International Group, Inc., SISKINDS*, <http://www.classaction.ca/actions/Securities/Current-Actions/American-International-Group-Inc--%28A-I-G%29.aspx> (last visited May 14, 2012).

<sup>60</sup> In the parlance of U.S. securities law, the AIG case is a Canadian “f-squared” case: Canadian plaintiffs suing a *foreign* issuer in respect of shares purchased on a *foreign*



Court of Canada's decision in *Club Resorts Ltd. v. Van Breda*.<sup>61</sup> The *Van Breda* decision, which was released by the Supreme Court in April 2012, defined the common law test for jurisdiction over an *ex juris* defendant.<sup>62</sup> Second, in June, 2010, plaintiffs launched a global class action on behalf of "all persons, wherever they may reside" who purchased shares of a Canadian corporation, Canadian Solar, during the class period.<sup>63</sup> Notably, while the defendant corporation is domiciled in Canada, it traded its shares exclusively on a U.S. exchange.<sup>64</sup> These cases telegraph the reality that if the *Imax* holding stands, it is simply a matter of time before American defendants face the prospect of global class actions in Ontario.<sup>65</sup>

Finally, the emergence of global class actions in Canada poses "new managerial issues for U.S. [courts]."<sup>66</sup> Most significantly, U.S. courts will likely need to decide whether to recognize and grant *res judicata* effect to a Canadian judgment purporting to bind absent U.S. class members. This issue will arise when an American class member seemingly bound by the Canadian proceedings seeks to re-litigate the case in a U.S. court and is faced with the defense that the Canadian judgment or settlement precludes the U.S. class member from litigating in the U.S. To date, no U.S. court has had the occasion to consider this issue. In addition, the availability of global class actions in Canada will also impact the Rule 23 certification analysis for U.S. courts. U.S. courts will be increasingly obligated to

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exchange.

<sup>61</sup> 2012 SCC 17 (Can.).

<sup>62</sup> For commentary on the Court of Appeal's decision in *Van Breda*, see Vaughan Black & Mat Brechtel, *Revising Muscutt: The Ontario Court of Appeal Takes Another Look*, 36 *ADVOCATES' Q.* 35 (2009); Joost Blom, *The Challenge of Jurisdiction: Van Breda v. Village Resorts and Black v. Breeden*, 49 *CAN. BUS. L. J.* 400 (2010); Tanya Monestier, *A 'Real and Substantial' Improvement?: Van Breda Reformulates the Law of Jurisdiction in Ontario*, 2010 *ANN. REV. OF CIV. LITIG.* 185; Dwight Newman, *Van Breda, Ontario CA's Clarification on Jurisdiction Creates Confusion*, *LAW. WKLY.*, Mar. 5, 2010, at 5, available at <http://www.lawyersweekly-digital.com/lawyersweekly/2940/#pg4>; Stephen Pitel, *Reformulating a Real and Substantial Connection*, 60 *U.N.B. L. J.* 177, 184 (2009).

<sup>63</sup> *Class Actions: Canadian Solar, Inc., SISKINDS*, <http://www.classaction.ca/actions/Securities/Current-Actions/Canadian-Solar-Inc.aspx> (last visited May 14, 2012).

<sup>64</sup> Mark L. Berenblut et al., *Trends in Canadian Securities Class Actions: 2010 Update Climbing to New Heights—the Number of Active Cases is at its Highest*, NERA ECONOMIC CONSULTING, 2 (Jan. 31, 2011), available at [http://www.nera.com/nera-files/PUB\\_Recent\\_Trends\\_Canada\\_0111.pdf](http://www.nera.com/nera-files/PUB_Recent_Trends_Canada_0111.pdf).

<sup>65</sup> Such a development, however, may actually be a welcome one from the perspective of an American defendant. One commentator observes that "[d]efendants may decide to wager a bet that a Canadian settlement will be lower than an American one. Accordingly, we may see defendants arguing strenuously in favour of a Canadian resolution to a global class action." Cole, *supra* note 58, at 16.

<sup>66</sup> Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 *GEO. WASH. L. REV.* 306, 310 (2011).

determine whether a U.S. action is a “superior”<sup>67</sup> way of proceeding in the face of a global class action in Canada. The development of a global class action regime in Canada will also affect the forum non conveniens inquiry undertaken by U.S. courts. In particular, U.S. courts will now need to incorporate considerations of comity and multiplicity in deciding whether it is appropriate to stay proceedings in favor of another forum—a *foreign* forum, no less. Lastly, the existence of global class actions in Canada will impact the notice given to U.S. class members, as well as the potential settlement of U.S. class claims.<sup>68</sup> Notice to U.S. class members will need to be crafted against the reality that U.S. class members may also receive a Canadian notice. And any settlement of a U.S. class action will likely require coordinating with a Canadian court to avoid gaps and redundancies.

Thus, the United States should not view the certification of global class actions in Canada as merely an “interesting” development abroad. Rather, the emergence of global class actions in Canada has the potential to have a significant impact on class members, defendants, and courts south of the forty-ninth parallel. Of course, all this depends on whether global class actions in Canada are here to stay, which in turn hinges on whether Canadian courts can resolve the complicated conflict of laws questions associated with the certification of global classes. As two U.S. commentators note, “[h]ow [the conflict of laws] issues develop in *IMAX* will be closely watched in the U.S. and elsewhere.”<sup>69</sup>

#### IV. CONFLICT OF LAWS ISSUES RAISED BY GLOBAL CLASSES

The *Imax* decision failed to appreciate the complexity of the conflict of laws issues raised by global classes and their impact on certification. Indeed, while much of the focus in *Imax* has been on what the case means for secondary market misrepresentation actions, the legacy of *Imax* will likely be the precedent it sets for the creation of global classes.<sup>70</sup>

But, how appropriate was it for the court to certify a global class in *Imax*? What are the relevant considerations in certifying a global class generally? How do conflict of laws issues play out when foreign class members are swept into a Canadian class action? These are the issues that have received little academic or judicial attention to date and that this Article seeks to address. While the relevant conflict of laws considerations dovetail with one another (and with the statutory requirements for

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<sup>67</sup> FED. R. CIV. P. 23(b)(3) (Under Rule 23(b)(3), in order to certify a class action, a court must find, *inter alia*, that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”).

<sup>68</sup> See *infra* Part IV.D.

<sup>69</sup> Warren & Howatt, *supra* note 11, at 34.

<sup>70</sup> See *id.* at 33–36 (“The more likely lasting impact of the *IMAX* decision will be the conflict-of-laws issues that will inevitably be raised when non-resident investors, particularly Americans, are unwittingly caught in a Canadian global class.”).

certification), I have attempted to tease them out individually to the extent possible. Consequently, I look separately at the issues of jurisdiction *simpliciter*, recognition of class judgments, choice of law, parallel proceedings, and notice/procedural rights.

#### A. Jurisdiction *Simpliciter*

*Imax* is one of the first cases to consider whether, and under what circumstances, an Ontario court has judicial jurisdiction over a *foreign* class plaintiff, as opposed to a *non-resident* class plaintiff (i.e., a Canadian claimant who resides outside the forum province).<sup>71</sup> Is the analysis any different? Should it be? There is serious academic debate about whether national class actions in Canada are constitutionally permissible—that is, whether courts in one province have the power to adjudicate in class form the claims of non-resident class members.<sup>72</sup> Given the fact that Canadian law is not settled with respect to the creation of a *national* class, it is surprising that Canadian courts would purport to assert jurisdiction over an *international* class. Nonetheless, that is exactly what the *Imax* court did.

The jurisdictional analysis is said to proceed from the Supreme Court of Canada’s seminal decision in *Morguard Investments Ltd. v. De Savoye*.<sup>73</sup> *Morguard* involved an action to enforce a default judgment rendered by an Alberta court in the province of British Columbia. Because the defendant in *Morguard* had not consented to the jurisdiction of the Alberta courts, nor was it served with process in Alberta, the judgment was not enforceable under existing common law standards.<sup>74</sup> The *Morguard* Court viewed this result as illogical: if it was appropriate for an Alberta court to assume

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<sup>71</sup> For the purposes of this Article, I will distinguish between “foreign” class members (those class members who reside outside of Canada) and “non-resident” class members (those Canadian class members who reside in Canada, but outside the forum province). Reference to “absent” class members encompasses both “foreign” and “non-resident” class members.

<sup>72</sup> See, e.g., Jeffrey Haylock, *The National Class as Extraterritorial Legislation*, 32 DALHOUSIE L.J. 253 (2009); Peter W. Hogg & S. Gordon McKee, *Are National Class Actions Constitutional?*, 26 NAT’L J. OF CONST. L. 279 (2010); Colin K. Irving & Mathieu Bouchard, *National Opt Out Class Actions, a Constitutional Assessment*, 26 NAT’L J. OF CONST. L. 111 (2009); Stephen Lamont, *The Problem of the National Class: Extraterritorial Class Definitions and the Jurisdiction of the Court*, 24 ADVOCATES’ Q. 252 (2001) [hereinafter Lamont]; S. Gordon McKee & Jeff Galway, *Constitutional Considerations Concerning National Class Actions*, in LAW SOCIETY OF UPPER CANADA: SPECIAL LECTURES 2001–CONSTITUTIONAL AND ADMINISTRATIVE LAW 27 (2002); F. Paul Morrison et al., *The Rise and Possible Demise of the National Class in Canada*, 1 CAN. CLASS ACTION REV. 67 (2004); Janet Walker, *Are National Class Actions Constitutional? – A Reply to Hogg and McKee*, 48 OSGOODE HALL L.J. 95 (2010).

<sup>73</sup> [1990] 3 S.C.R. 1077 (Can.).

<sup>74</sup> As a predicate to enforcing a judgment at common law, the enforcing court must ensure that the judgment court properly assumed jurisdiction over the defendant.

jurisdiction (because there was a significant factual nexus between the dispute and Alberta), why should the judgment not be enforceable in British Columbia? Although *Morguard* was technically a case about the enforcement of foreign judgments,<sup>75</sup> it is credited with enunciating the “real and substantial connection” test for the assertion of personal jurisdiction over out-of-province defendants.<sup>76</sup> A court properly assumes jurisdiction over an *ex juris* defendant where there is a sufficiently close nexus between the dispute and the provincial forum—in other words, a “real and substantial connection.”<sup>77</sup> So long as a court properly assumes jurisdiction under the real and substantial connection test, any judgment rendered by that court will be enforceable across Canada.

Courts have uniformly assumed that the real and substantial connection test articulated in *Morguard* that governs the question of jurisdiction over an out-of-province defendant applies equally to a separate jurisdictional question: whether a Canadian province has jurisdiction over absent non-resident class *plaintiffs*.<sup>78</sup> The issue of personal jurisdiction over plaintiffs is a unique one that does not arise in traditional two-party litigation. This is because, in a non-class case, personal jurisdiction over the plaintiff is predicated on the plaintiff having selected the forum.<sup>79</sup> In the vernacular of private international law, the plaintiff has “consented” or “submitted” to the jurisdiction of a certain court by initiating proceedings there. The situation is different with a class of absent plaintiffs; by definition, they cannot consent or submit to the jurisdiction of a court. Consequently, a court must consider the separate and distinct question of

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<sup>75</sup> Note that an Alberta judgment is considered “foreign” to a British Columbia court in the same way that an Austrian or Venezuelan judgment would be. *See* *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, para. 19 (Can.) (noting that there is no “principled reason” why foreign judgments should not be treated in the same way as judgments issued by sister provinces).

<sup>76</sup> It is a well-established principle of the Canadian conflict of laws that jurisdiction for enforcement purposes and personal jurisdiction are correlated. In the words of Justice La Forest in *Morguard*, “[t]he taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives.” 3 S.C.R. 1077, at para. 42. Thus, in setting out the real and substantial connection test for judgment enforcement purposes, the Court in *Morguard* also set out the test for the assertion of *in personam* jurisdiction over a defendant.

<sup>77</sup> The real and substantial connection test is Canada’s analogue to the U.S.’s “minimum contacts” test.

<sup>78</sup> *See, e.g.*, *McCutcheon v. The Cash Store*, [2006] 80 O.R. 3d 644 (Can.); *VitaPharm Can. Ltd. v. F. Hoffmann-La Roche Ltd.*, [2002] O.J. No. 298, *aff’d* *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] 74 O.R. 3d 758 (Can.); *Wilson v. Servier*, [2000] 50 O.R. 3d 219 (Can.); *Harrington v. Dow Corning Corp.*, [2000] 193 D.L.R. 4th 67 (Can.).

<sup>79</sup> *See, e.g.*, Geneviève Saumier, *USA-Canada Class Actions: Trading in Procedural Fairness*, 5 GLOBAL JURIST ADVANCES 1, 18 (2005) (“The typical foreign money-judgment does not give rise to [the question of jurisdiction over the plaintiff] because the plaintiff, by choosing the foreign court as the forum for litigation, has necessarily attorned to its jurisdiction in a way that cannot later be disputed at the recognition stage.”).

whether it has personal jurisdiction over the absent plaintiff class, such that it can bind the class to judgment.<sup>80</sup>

In Canada, courts have applied the same real and substantial connection test that was developed in *Morguard* to ground personal jurisdiction over an out-of-province defendant in two-party litigation to the question of jurisdiction over non-resident class plaintiffs. It is not clear, however, that the real and substantial connection test is the appropriate one to govern the question of jurisdiction over non-resident plaintiffs, much less

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<sup>80</sup> The case law has largely failed to define precisely *who* the court is asserting personal jurisdiction over in the class context: the defendant, the defendant in respect of the claims of non-resident plaintiffs, or the non-resident plaintiff class. This absence of clear delineation between the three has muddied the jurisdictional waters and caused additional uncertainty in this area of law. In my article, *Personal Jurisdiction Over Non-Resident Class Members: Have We Gone Down the Wrong Road?*, I highlight this distinction through the following example:

Tire Co., an American manufacturer of allegedly defective tires, is sued in Ontario by a class of plaintiffs who have purchased and used Tire Co.'s tires in Canada. Depending on the scope of the class, Tire Co. may have several jurisdictional arguments:

Scenario One: If the class is limited to Ontario plaintiffs, Tire Co. may argue that the court does not have jurisdiction over Tire Co. because none of the traditional bases of jurisdiction – presence, consent, real and substantial connection – have been satisfied. Scenario One involves a classic challenge by a defendant on jurisdictional grounds.

Scenario Two: If the class purports to cover both Ontario and non-Ontario plaintiffs, Tire Co. may concede that the court has jurisdiction over Tire Co. in respect of the claims of the Ontario plaintiffs, but may argue that the court does not have jurisdiction over Tire Co. in respect of the claims of non-resident plaintiffs. The argument would be that there is no real and substantial connection between the forum (Ontario) and the action as it concerns the non-resident class members.

Scenario Three: If the class purports to cover both Ontario and non-Ontario plaintiffs, Tire Co. may attempt to argue that the Ontario court does not have jurisdiction over the non-resident class members because there is no real and substantial connection between such class members and the forum.

Scenarios Two and Three are functionally very similar, in that they can result in a determination that a court lacks jurisdiction to render a binding judgment; for that reason courts have tended to conflate the two. However, the questions are conceptually distinct in that the former asks whether the court has the power to bind the defendant, whereas the latter addresses whether the court has the ability to bind non-resident class members.

Tanya Monestier, *Personal Jurisdiction Over Non-Resident Class Members: Have We Gone Down the Wrong Road?*, 45 TEX. INT'L L.J. 537, 543–44 (2010).

foreign plaintiffs.<sup>81</sup> The *Morguard* real and substantial connection test developed to fill a perceived void in the common law of jurisdiction as it concerned a defendant in non-class litigation. Thus, Walker argues that “while the *Morguard* principles may provide inspiration for the answers we seek, . . . [the] decision cannot supply the details of the standards and practices” since *Morguard* was fundamentally a case about the preclusive effect of judgments as they affect the interests of named parties.<sup>82</sup> Unfortunately, Canadian courts seemed to have overlooked this fact, and have uncritically accepted that the *Morguard* real and substantial connection test necessarily governs the issue of jurisdiction over non-resident plaintiffs.

Broad support for distinguishing between absent defendants and absent plaintiffs in the jurisdictional analysis can be found in the U.S. Supreme Court’s landmark decision in *Phillips Petroleum v. Shutts*.<sup>83</sup> In *Shutts*, a Kansas state court certified a national class consisting of 33,000 gas company investors who had sued to recover interest on royalty payments that had been delayed by the defendant. Notably, over 99% of the gas leases in question and 97% of the plaintiff class members had “no apparent connection” to Kansas, the forum state. The defendant asserted that the Kansas courts could exercise jurisdiction over out-of-state plaintiffs only if the plaintiffs possessed sufficient “minimum contacts” with Kansas so as to justify the assertion of jurisdiction over them. The U.S. Supreme Court disagreed that the minimum contacts test was apposite in this context,

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<sup>81</sup> Walker argues that “[a] fixed requirement of a real and substantial connection between each claim and the forum in a multi-jurisdictional class action is no more required by the constitutionally mandated rules of the conflict of laws than it is by the text of the Constitution or its interpretation by the Supreme Court of Canada.” Walker, *supra* note 72, at 132.

<sup>82</sup> Janet Walker, *Recognizing Multijurisdiction Class Action Judgments Within Canada: Key Questions—Suggested Answers*, 46 CAN. BUS. L.J. 450, 451 (2008) [hereinafter Walker, *Recognizing Multijurisdiction*]. Walker argues further:

While the *Morguard* decision concerned the “law of jurisdiction” generally, it is important to understand that its reasons were developed primarily to address questions of *indirect* jurisdiction or “jurisdiction in the international sense,” and only by implication, to address questions of *direct* jurisdiction. Thus, it would be a mistake to infer that the *Morguard* decision gave rise to a specific test for direct jurisdiction that governs the courts’ authority to certify multijurisdictional class actions.

Walker, *supra* note 72, at 115. See also Celeste Poltak, *Ontario and Her Sisters: Should Full Faith and Credit Apply to the National Class?*, 3 CAN. CLASS ACTION REV. 437, 451 (2000) (“Given the significant differences between a traditional two-party lawsuit and multi-jurisdictional class proceedings, a slavish adherence to the analogy of a foreign defendant cannot adequately capture the legal dynamics and complexities of situations involving an unnamed plaintiff in modern cross-border class action litigation.”).

<sup>83</sup> 472 U.S. 797 (1985).

noting the significant differences that exist between absent class members and absent defendants. The Court emphasized that the burdens placed upon an absent plaintiff are “not of the same order and magnitude” as those placed on an *ex juris* defendant—a defendant must hire counsel, participate in discovery, and face the prospect of liability for damages.<sup>84</sup> Accordingly, due process mandated that there be minimum contacts between the defendant and the forum state. By contrast, an absent plaintiff is “not haled anywhere to defend [himself] upon pain of a default judgment.”<sup>85</sup> Rather, the litigation is for the benefit of the absent plaintiff, with the court and class representative there to protect his interests. Although grounded in constitutional principles which differ from those in Canada, the *Shutts* decision recognizes that an *ex juris* named defendant and an absent class member are not similarly situated so as to warrant identical jurisdictional treatment. It would be fitting for Canadian courts to recognize the important distinctions between jurisdiction over an *ex juris* defendant and jurisdiction over an absent plaintiff class rather than trying to shoehorn the real and substantial connection test into a scenario for which it was not designed.<sup>86</sup>

Assuming, for the moment, that the real and substantial connection test *should* govern the question of jurisdiction over absent class members, courts in Canada have not yet resolved what it means for there to be a “real and substantial connection” between the provincial forum and a non-resident plaintiff class. In other words, Canadian courts are still straining to define the substance of the real and substantial connection test in the intra-provincial class setting.<sup>87</sup> Some provincial courts (in particular, those in Ontario and British Columbia) have adopted an approach to the real and substantial connection test that focuses on the commonality of interest between the claims of resident and non-resident class members.<sup>88</sup> Under this view of the jurisdictional test, the real and substantial connection is to be found in the identity of interest that non-resident class members share with resident class members in resolving common issues.<sup>89</sup> Other provincial courts (such as those in Saskatchewan and Québec) have

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<sup>84</sup> *Id.* at 808.

<sup>85</sup> *Id.* at 809.

<sup>86</sup> See Joost Blom & Elizabeth Edinger, *The Chimera of the Real and Substantial Connection Test*, 38 U.B.C. L. REV. 373 (2005).

<sup>87</sup> This is hardly surprising considering there is still major uncertainty surrounding the application of the real and substantial connection test in its traditional setting. See *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (Can.).

<sup>88</sup> Strangely, courts in British Columbia need not resort to this logic, as the B.C. legislation prescribes an “opt-in” regime for non-resident class plaintiffs. Under an opt-in regime, jurisdiction over the non-resident plaintiff class is founded on consent—i.e., the non-resident class members have consented to the jurisdiction of the B.C. court through the act of opting-in.

<sup>89</sup> See, e.g., *McCutcheon v. Cash Store Inc.*, [2006] 80 O.R. 3d 644 (Can.).

endorsed a more restrictive view of the real and substantial connection test, whereby an *actual* connection—in the sense of a link or nexus—is required to ground jurisdiction.<sup>90</sup> These courts eschew an approach to the real and substantial connection that requires “creating” a connection between the forum and the non-resident class members through the conduit of the common issues shared by resident class members.

Given that Canadian courts have not yet worked out the content of the real and substantial connection test as it applies domestically (i.e. to non-resident class members), it is difficult to know how to apply the test internationally. What does it mean for there to be a real and substantial connection between foreign claimants and a provincial forum? Is a commonality of interest between resident class members and foreign class members sufficient to ground jurisdiction? Should the real and substantial connection test account for the fact that a provincial court is purporting to extend its reach to individuals outside the country? Should the threshold “connection” for foreign claimants be higher than that for non-resident claimants?

The court in *Imax* proceeded for jurisdictional purposes as if there were no appreciable difference between a provincial court adjudicating the claims of non-resident class members and a provincial court adjudicating the claims of foreign class members.<sup>91</sup> In finding that there was a real and substantial connection between the forum and the absent class members (both non-resident and foreign), Justice van Rensburg stated:

IMAX is a CBCA [Canadian Business Corporations Act] corporation with its head office in Ontario. It is a reporting issuer under the OSA and its shares are traded on the TSX. The alleged Representation was made in Ontario through the issuance of the Company’s Form 10-K and press releases from IMAX’s Mississauga head office (although arguably it may have been made in IMAX’s offices in New York as well). The alleged wrongful actions of the Individual Defendants in connection with the preparation and reporting of IMAX’s financial statements are alleged to have taken place in Ontario as well as New York. The proposed common issues respecting liability that concern the conduct of the defendants accordingly have a substantial connection to this jurisdiction.<sup>92</sup>

Such a recitation of the relevant connections seems to be primarily

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<sup>90</sup> See, e.g., *Hocking v. Haziza*, [2008] R.J.Q. 1189 (Can.).

<sup>91</sup> Justice van Rensburg lumped non-resident and foreign claimants together under the heading: “The Court’s Authority to Certify National and International Classes.” *Silver v. Imax Corp.*, (2009) 86 C.P.C. 6th 273, para. 116 (Can. Ont. Sup. Ct. J.) (Certification Decision).

<sup>92</sup> *Id.* at para. 130.



focused on the defendant: Imax is incorporated in Ontario; Imax sells shares in Ontario on the TSX; Imax allegedly made misrepresentations in Ontario, etc. Indeed, if the issue were one of jurisdiction over the defendant, it would be clear that there exists a real and substantial connection between Imax and Ontario. How relevant, however, are these defendant-centric connections to the court's jurisdiction over an absent (non-resident or foreign) plaintiff class? Surely, it cannot be the case that the same connections which ground jurisdiction over the defendant automatically ground jurisdiction over an absent plaintiff class, however large in scope. In other words, just because a court has jurisdiction over a defendant does not *de facto* mean that the court also has jurisdiction over an absent plaintiff class. However, the *Imax* court's reasoning would appear to imply just that—because Imax was properly before the court, so too were the absent class plaintiffs (whether non-resident or foreign).<sup>93</sup>

The point is perhaps made more clearly through an examination of certain facts in *Imax*. According to the Certification Decision, approximately 85–90% of the class members in *Imax* are foreign.<sup>94</sup> While some of these foreign class members may have purchased their shares of the defendant company on the TSX, undoubtedly many purchased their shares on the NASDAQ.<sup>95</sup> A typical class member in this case, then, was likely an American resident who purchased her shares of Imax on the NASDAQ.<sup>96</sup> She likely never left home to do so; she probably purchased the shares through an intermediary; and more than likely, she did not even realize that Imax was a Canadian company.<sup>97</sup> It would certainly come as a surprise to her that she was part of a “global” class action in Canada—when she had never been to Canada, did not make any purchases on a Canadian stock

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<sup>93</sup> The mistake of conflating jurisdiction over defendants with jurisdiction over absent claimants has been made in numerous cases. For instance, in *Canada Post Corp. v. Lépine*, an action in Québec to recognize a class judgment rendered by an Ontario court, the Supreme Court of Canada concluded that “[t]here is no doubt that the Ontario Superior Court of Justice had jurisdiction pursuant to art. 3168 *C.C.Q.*, since the Corporation, the defendant to the action, had its head office in Ontario.” [2009] 304 D.L.R. 539, para. 38 (Can.).

<sup>94</sup> *Silver v. Imax Corp.*, (2009) 86 C.P.C. 6th 273, para. 110 (Can. Ont. Sup. Ct. J.) (Certification Decision).

<sup>95</sup> While the number is not known precisely, one can surmise that it is a significant percentage of class members who purchased their shares on the NASDAQ based on the fact that investors sought to certify a parallel class action in a New York court.

<sup>96</sup> Note that Canadian class proceedings legislation does not have a requirement that the class representative's claims be “typical” of those of the class. By contrast, in the United States, Rule 23(a)(3) provides: “One or more members of a class may sue or be sued as representative parties on behalf of all members only if: . . . (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class . . .” FED. R. CIV. P. 23(a)(3).

<sup>97</sup> The profile of Imax on the NASDAQ website does not include any indication that Imax is a Canadian company. Rather, an investor would need to link to Imax's Form 10-K filed with the SEC to discover that the company is incorporated in Canada.

market, and did not know that the shares she was purchasing were those of a Canadian company.

The foreseeability of suit proceeding in a certain forum appears to be a relevant concern in assessing whether a court has jurisdiction over absent claimants. In *Currie v. McDonald's Restaurants of Canada*,<sup>98</sup> the Ontario Court of Appeal considered the circumstances under which it would enforce a foreign class judgment purporting to bind Ontario residents. In assessing whether the foreign court had jurisdiction over the Ontario class members (a pre-condition to recognizing the judgment), the court indicated that the reasonable expectations of the non-resident (Ontario) class members needed to be considered. The court emphasized that the plaintiffs “did nothing that could provide a basis for the assertion of [U.S.] jurisdiction” given that the “transactions giving rise to the claims took place entirely within Ontario.”<sup>99</sup> Thus, the court recognized that the foreign court’s assertion of jurisdiction might be unfair because an Ontario class member would have “no reason to suspect that his or her rights are at stake in a foreign lawsuit.”<sup>100</sup> While the *Imax* case is certainly distinguishable from *Currie*, the overarching point is that caution should be exercised when purporting to adjudicate the claims of foreign class members who would have no reason to suspect that they would be subject to the jurisdiction of a court in a different country. The connections which appeared “real” and “substantial” when viewed from the perspective of the defendant appear less so when assessed from the vantage point of the absent claimant class.

One may still argue, however, that the connections between the forum and the foreign claimant class are less important than the fact that the foreign claimant class share a commonality of interest with the claimants who are properly before the court. That is, the preceding discussion largely assumes that the real and substantial connection test requires an *actual* connection between the forum and the foreign absent plaintiff class. However, as the Ontario jurisprudence has evolved, the requirement is simply that non-resident/foreign claimants share an identity of interest with resident class members in the resolution of the common issues. Such a basis of jurisdictional reasoning is dangerously expansive, particularly in relation to assertion of jurisdiction over foreign claimants. It would allow a very small tail (resident claimants properly before the court) to wag a very large dog (non-resident and foreign claimants who share a commonality of interest). It would be odd indeed if 10% of the claimants over whom the Ontario court properly exercised jurisdiction could, in turn, control the jurisdictional fate of the other 90% of absent class members. Whatever the limits of the “commonality of interest” approach *within* Canada, these limits

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<sup>98</sup> [2005] 250 D.L.R. 4th 224 (Can.).

<sup>99</sup> *Id.* at para. 23; *see also* *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, para. 108 (Can.).

<sup>100</sup> *Currie v. McDonald's Restaurants of Canada*, 250 D.L.R. 4th 224, para. 24.

are greatly magnified when writ globally.

This section was intended to illustrate the complexity of the jurisdictional analysis and the issues that the court simply glossed over in *Imax*. The jurisdictional issues are numerous: What is the appropriate test to apply in determining jurisdiction over absent class members? Should the jurisdictional test be that which is applied to absent defendants—i.e., the real and substantial connection test? Is there a jurisdictional distinction between absent non-resident class members and absent foreign class members? How does the real and substantial connection test work when applied to the claims of foreign class members? What are the limitations of the “commonality of interest” approach that has developed to ground jurisdiction over non-resident class members? As long as these crucial questions remain unanswered, the foundations of global class actions in Canada will remain unstable.

#### B. Recognition of Global Class Judgments

While the court in *Imax* focused its discussion primarily on jurisdictional and choice of law issues, enforcement/recognition issues are also highly relevant in the certification of a global class action. These enforcement/recognition issues manifest themselves differently in the class context than they do in the traditional two-party adjudication setting. In the latter scenario, the question of enforcement is focused on the foreign defendant: would a foreign court enforce a judgment rendered by a Canadian provincial court against a foreign defendant? For instance, if an Ontario court rendered a \$10 million judgment against a defendant domiciled in Delaware, the question would be whether a Delaware court would enforce that money judgment.<sup>101</sup>

The question of enforcement—or, more appropriately recognition<sup>102</sup>—is more complicated in class litigation. In the class scenario, a Canadian court is purporting to bind not only a defendant to judgment, but also a group of absent plaintiffs. The nature of an opt-out class action is such that all class plaintiffs are bound to the result (whether a judgment or a

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<sup>101</sup> This presupposes that the defendant does not have assets in Ontario to satisfy the judgment. The question of judgment enforcement will depend on the private international law rules of the enforcing state. In Delaware, for instance, the question would be governed by the Uniform Foreign-Country Money Judgments Recognition Act. *See* Uniform Foreign-Country Money Judgments Recognition Act, DEL. CODE ANN. tit. 10, §§ 4801–12 (2011), available at <http://delcode.delaware.gov/title10/c048/>.

<sup>102</sup> “Enforcement” generally refers to the enforcement against the defendant of a monetary sum (e.g., F2 enforcing an award by F1 of \$1 million against the defendant). “Recognition” refers instead to the recognition of a judgment as binding against the defendant and/or plaintiff. (e.g., F2 recognizing a determination by F1 of non-liability on the part of the defendant). In the class action context, the term “recognition” is generally more appropriate.

settlement)<sup>103</sup> in the event that they fail to exclude themselves from the proceeding. Thus, when an Ontario court certifies a national class consisting of, say, all shareholders in Canada who purchased shares of ABC Corp. within the class period, the goal is that the claims of all those class members will be adjudicated or settled in the Ontario proceeding.<sup>104</sup> However, the determination of whether those absent plaintiffs are, in fact, bound does not rest in the purview of the certifying court. Rather, *another* court in *another* jurisdiction will determine whether class members are bound to the result of the Ontario action. The issue will typically arise when a non-Ontario absent class member seeks to bring an action outside Ontario and is met with the defense that his claims have already been adjudicated.<sup>105</sup>

The recent Supreme Court of Canada case of *Canada Post v. Lépine*<sup>106</sup> illustrates the complexity surrounding the inter-provincial enforcement of class judgments. In *Lépine*, the basic question was whether a Québec court was obligated to enforce an Ontario order certifying and approving the settlement of a class action that included Québec residents. If so, the matter would be res judicata against the representative plaintiff and any other Québec resident who had not opted out of the Ontario proceeding within the

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<sup>103</sup> All references to “judgment” herein also refer to a settlement that has been granted judicial approval.

<sup>104</sup> With the exception, of course, of those claimants who choose to exclude themselves through the act of opting out.

<sup>105</sup> The issue is best illustrated in concrete terms: assume that the national class action against ABC Corp. in Ontario purported to include the claims of Québec residents. That is, Québec claimants had purchased shares of ABC Corp. in the class period and consequently, those Québec claimants fell within the Ontario court’s class definition. Assume further that the Ontario action proceeds to judgment and that an Ontario court renders a judgment for ABC Corp. on the merits. A Québec plaintiff who falls within the class definition and who did not opt-out of the Ontario proceeding (perhaps because he did not know that the action was ongoing in Ontario) seeks to bring an action against ABC Corp. in Québec. Whether this is permitted will turn on whether the Ontario judgment is binding on the Québec class member. A judgment will not be enforceable in Québec—i.e., will not be accorded res judicata effect—unless, *inter alia*, a Québec court concludes that Ontario properly asserted jurisdiction over the Québec plaintiff (sometimes referred to as the “back-end” jurisdictional problem). If a Québec court concludes that Ontario did not properly assert jurisdiction, the Québec plaintiff will be able to “re”-litigate the claim. Aside from jurisdiction, there might be other grounds upon which the enforcing forum refuses to recognize and grant preclusive effect to the forum court’s judgment. For instance, the enforcing court may conclude that the non-resident class member was not adequately represented or that the notice provided to the non-resident class member was insufficient to apprise him of his rights.

<sup>106</sup> 2009 SCC 16, [2009] 1 S.C.R. 549 (Can.). For commentary on the decision, see Geneviève Saumier, *Competing Class Actions Across Canada: Still at the Starting Gate After Canada Post v. Lépine*, 48 CAN. BUS. L.J. 462 (2010) and Tanya Monestier, *Lépine v. Canada Post: Ironing Out the Wrinkles in the Inter-provincial Enforcement of Class Judgments*, 34 ADVOCATES’ Q. 499 (2008).

relevant period.<sup>107</sup> While the Supreme Court did not find jurisdiction to be an impediment to enforcement,<sup>108</sup> it did find that the notice provided contravened “fundamental principles of procedure” within the meaning of article 3155(3) of the Québec Civil Code. In particular, the Court was concerned that Québec class members were not fully able to understand their rights given the existence of a parallel class proceeding certified in Québec. The Supreme Court thus refused to grant preclusive effect in Québec to the Ontario class judgment. It also noted in *obiter* that the certification of multi-jurisdictional classes within Canada “may sometimes cause friction between courts in different provinces” and that “the provincial legislatures should pay more attention to the framework for national class actions and the problems they present.”<sup>109</sup>

As *Lépine* illustrates, it is far from certain that a class judgment rendered in one Canadian province will be enforceable against non-resident class members in another province.<sup>110</sup> It is important to understand why this is highly problematic as a practical matter. Enforceability and preclusion issues are paramount in any litigation, but especially in high-stakes class litigation. In particular, uncertainty as to the eventual preclusive effect of a class judgment raises serious concerns about fairness to the defendant.<sup>111</sup> It is a fundamental principle of procedure that a

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<sup>107</sup> The case raised several interesting private international law issues. Among them was the question of whether the analysis of jurisdiction at the enforcement stage should take into account the discretionary doctrine of *forum non conveniens*, and whether the notion of *lis pendens* could preclude enforcement of the class judgment in Québec. Note, however, that these issues were governed by the detailed provisions of the Québec Civil Code.

<sup>108</sup> Arguably, the Court’s analysis here was in error. The Court concluded that the Ontario court had jurisdiction over the non-resident Québec class members because “the Corporation, the defendant to the action, had its head office in Ontario. This connecting factor in itself justified finding that the Ontario court had jurisdiction.” *Canada Post v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, para. 38 (Can.). With respect, this reasoning fails to appreciate the distinction between the issue of whether the Ontario court properly assumed jurisdiction *over the defendant* (which it clearly did), and whether it properly assumed jurisdiction *over non-Ontario absent class members*. A finding of jurisdiction over the defendant on the basis, for instance, that the defendant was domiciled in the forum cannot *ipso facto* justify a finding of jurisdiction over the non-resident plaintiff class. However, the Court appeared constrained by the strictures of the Québec Civil Code which was not designed with class proceedings in mind, and which provides generally that “[i]n personal actions of a patrimonial nature, the jurisdiction of a foreign authority is recognized only in the following cases: (1) the defendant was domiciled in the country where the decision was rendered . . . .” Civil Code of Québec, S.Q. 1991, c. 64, art. 3168 (Can.).

<sup>109</sup> *Canada Post v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, para. 57 (Can.).

<sup>110</sup> This is particularly so given that courts within Canada take different views on how to apply the real and substantial connection test.

<sup>111</sup> See Stephen B. Burbank, *Interjurisdictional Preclusion Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 767 (1986) (“Preclusion rules affect litigation strategy. It is therefore important that litigants know what the rules are . . . [T]he plaintiff should be able to predict with considerable assurance the

defendant not be “twice-vexed” on the same cause.<sup>112</sup> Where a provincial court refuses to grant preclusive effect to a class judgment rendered in favor of a defendant, the defendant will indeed be twice-vexed (and, potentially thrice-vexed, and so on). The defendant will not benefit from a favorable outcome on the merits where there is uncertainty surrounding the preclusive effect of class judgments. There will always be the possibility that an absent class member in another province will be permitted to re-litigate the claim anew.

These concerns about preclusion are particularly pronounced in the settlement context. The price that a defendant is willing to pay to resolve class action litigation is generally correlated with the peace that the defendant expects to buy.<sup>113</sup> Where there is uncertainty surrounding whether a class settlement will “stick” outside of the forum province, the settlement calculus is very difficult for the defendant. In the words of one author,

The nature and quantum of the award . . . will be based on an estimate of the size of the plaintiff class. In the case of a multi-jurisdictional class, this is possible only if there is a clear indication of whether the courts in other fora will regard the claims as preclusively determined by the decision in the multi-jurisdictional class action. In the absence of a clear indication of who will be bound, a defendant will be wary of entering into negotiations to settle the matter and a court would find it difficult to quantify an award.<sup>114</sup>

If, for instance, the defendant pays \$100 million to settle the claims of all class members in a national class action, but additional claims are subsequently filed in other provinces and permitted to proceed, the defendant will have over-paid to settle the case. The defendant might then pay another \$20 million to settle the additional claims, or might be subject to a judgment for an amount even greater than the original settlement amount.<sup>115</sup> The point is that the inability of the defendant to have any

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rules of claim preclusion that will govern a judgment.”).

<sup>112</sup> *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, para. 50 (Can.) (“A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue”).

<sup>113</sup> See generally Steven Shavell, *Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982) (discussing the calculus involved in choosing a settlement figure based on assessment of risk and cost of proceeding to trial).

<sup>114</sup> Walker, *supra* note 72, at 130.

<sup>115</sup> One commentator makes the point as follows:

Whether a worldwide class is certified for settlement purposes or after a contested

assurance of finality raises important concerns about fairness in the inter-provincial class settlement context.<sup>116</sup>

These concerns are magnified when Canadian courts certify global (as opposed to national) classes. As unsettled as the rules are within Canada, they are even more unpredictable outside of Canada. Will a court in the United States enforce a Canadian class judgment purporting to bind a U.S. resident? Will a court in the United Kingdom or France enforce such a judgment? If not, what is the point of a court in Canada including foreign claimants in the global class to begin with? Not only does certifying a global class in these circumstances add undue complexity to the litigation, but it also carries the great risk of the defendant being “twice-vexed” on the same cause. A defendant may proceed through years of protracted litigation or settlement initiatives, only to have such efforts end up being for naught when a foreign court refuses to accord *res judicata* effect to a Canadian court’s judgment.<sup>117</sup>

The issue of the propriety of domestic courts including foreign claimants in class actions has been considered in some detail by U.S. courts since as early as the 1970’s.<sup>118</sup> Defendants typically resist inclusion of foreign claimants in U.S. class actions on the basis that such an action provides no assurance of finality in respect of the claims of foreign class

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motion, there is a significant risk that a Canadian judgment approving such a class will not be recognized or enforced [abroad]. The result will be that defendants who voluntarily paid for a worldwide release of their liability (in a settlement) or who were ordered to pay damages on the basis of a “worldwide” class (after a contested certification motion and trial) will not achieve the “global” protection from future litigation that they expected because they could still be subject to further litigation by “foreign” class members in foreign jurisdictions.

John Brown, *Seeking Recognition of Canadian Class Action Judgments Abroad: Perils and Pitfalls*, 4 CAN. CLASS ACTION REV. 220, 220 (2008).

<sup>116</sup> One author notes that, “[a] party should be entitled to know what they are litigating when they embark upon a claim. In particular it is very difficult to arrange a settlement in a class action where the defendant cannot be given the certainty of resolution.” Lamont, *supra* note 72, at 291; *see also id.* (“Defendants have the right to expect certainty in litigation, particularly when settling.”); Ward Branch & Christopher Rhone, *Chaos or Consistency: The National Class Action Dilemma* 10 (2002) (unpublished article), *available at* [http://www.branchmacmaster.com/storage/articles/chaos\\_consistency.pdf](http://www.branchmacmaster.com/storage/articles/chaos_consistency.pdf) (“Where a defendant wishes to settle a class action, the calculus is different. The defendant then wishes to ensure that the case has maximum *res judicata* effect. Through various procedural routes, the Defendant will want to ensure that the action or actions cover as much of the country as possible.”).

<sup>117</sup> Arguably, certifying a global class is not beneficial for Canadian claimants either, who may find the settlement value of their legitimate claims watered-down by uncertainty engendered by the presence of foreign claimants in the case. The winners in the equation are entrepreneurial plaintiffs’ attorneys who will eventually earn their fee based upon the global settlement/judgment amount.

<sup>118</sup> *See Bersch v. Drexel Firestone*, 519 F.2d 974 (2d Cir. 1975).

members.<sup>119</sup> In particular, a foreign class member who is displeased at the result of a U.S. proceeding (or, for that matter, who took no part in the U.S. proceeding) will always be able to initiate subsequent proceedings in his “home” court. If the foreign court refuses to recognize the U.S. class action as binding on the foreign claimant and thereby allows the action to proceed, the foreign claimant will get a “second bite at the apple.” The omnipresent prospect of this “second bite” action in a foreign court deprives the defendant of the potential for closure on a global scale. Whether a judgment or settlement will be binding on foreign claimants is left to the mercy of a foreign court.<sup>120</sup>

American courts have been attuned to the fairness arguments raised by defendants resisting the certification of global classes. As a result, prior to certifying a class containing foreign claimants, many U.S. courts will attempt to ascertain whether, in the view of the U.S. court, a foreign court would accord *res judicata* or preclusive effect to an eventual U.S. class judgment.<sup>121</sup> The more likely it is that the foreign court would grant *res judicata* effect to a U.S. class judgment binding foreign citizens, the more likely the U.S. court will include such claimants in the class definition.<sup>122</sup> Typically, the *res judicata* analysis takes place under Rule 23’s “superiority” criterion,<sup>123</sup> which requires that a plaintiff seeking to have a

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<sup>119</sup> However, where defendants are seeking to settle an action, they will typically argue strenuously in favor of certifying a global class action so as to resolve the maximum number of claims.

<sup>120</sup> See Daniel P. Shapiro & Gail H. Kim, *US Class Actions with Non-US Citizens as Class Members: Fairness Issues Considered*, 11 BUS. L. INT’L 39, 41 (2010) (“The possibility of a second action in a US court *after* a final determination in a class action is not significant. Once there has been a final determination, the doctrine of *res judicata* bars subsequent actions in US courts. With non-US class members in a US class action, however, even after a final determination, it is possible that a non-US citizen could return to his home jurisdiction to commence a redundant lawsuit because that home jurisdiction may not recognise the validity and binding effect of the final determination in a US class action.”).

<sup>121</sup> Rhonda Wasserman argues that U.S. courts are not going *far enough* in the analysis because they fail to appreciate the distinction between recognition and preclusion. As such, she submits that “[i]t is not enough for American courts entertaining motions to certify transnational class actions to determine whether an American judgment will be recognized abroad. They also need to determine the preclusive effects, if any, that the judgment will have *if* it is recognized abroad.” Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 379 (2011) (emphasis added).

<sup>122</sup> There is some international support for this approach. See, e.g., INT’L BAR ASS’N LEGAL PRACTICE DIV., GUIDELINES FOR RECOGNISING AND ENFORCING FOREIGN JUDGMENTS FOR COLLECTIVE REDRESS § 1.01 (2008) (“It is appropriate for a court to assume jurisdiction over foreign class members if the court has subject matter jurisdiction over the claim and it is reasonable for the court to expect that its judgment will be given preclusive effect by the jurisdictions in which the foreign class members not specifically named in the proceedings would ordinarily seek redress.”).

<sup>123</sup> Sometimes the issue is raised as part of *forum non conveniens* or as an aspect of comity. See, e.g., *In re Air Cargo Shipping Services Antitrust Litig.*, No. MD 06-1775



class action certified under Rule 23(b)(3) establish “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>124</sup> Where an American court determines that a foreign court is unlikely to recognize a U.S. class judgment, it generally follows that a U.S. class action is not a “superior” means of proceeding in respect of the claims of those foreign plaintiffs.<sup>125</sup> Critiques of the *res judicata*

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(JG)(VVP), 2008 WL 5958061 (E.D.N.Y. Sept. 26, 2008) (granting defendants’ motion to dismiss on forum non conveniens and international comity grounds for European law claims in an antitrust action brought by largely foreign plaintiffs, against largely foreign defendants, arising out of events occurring abroad).

<sup>124</sup> FED. R. CIV. P. 23(b)(3). The rule states that “[t]he matters pertinent to these findings include:

- (A) the class members’ interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

*Id.* With global classes, factors (C) and (D) are the most pertinent to the analysis.

<sup>125</sup> At least one Canadian court has also considered the *res judicata* issue in the context of certifying global class proceedings. In *Ramdath v. George Brown College*, the Superior Court of Justice was faced with the question of whether to certify a class action in Ontario where 65% of the class members were foreign. [2010] O.J. No. 1411 (Ont. Sup. Ct. J.) (Can.). Defendants argued that the court should not certify the class because any proposed judgment or settlement would not be entitled to preclusive effect in the countries where the foreign class members reside. In particular, evidence was adduced that courts in India and China (the countries with the largest number of class members) would refuse to recognize a Canadian class judgment. Rather than regard the evidence as relevant to the certification issue, the court appeared offended at the idea that a foreign court would refuse to accord *res judicata* effect to a Canadian class judgment:

Nor do I accept the proposition that the court should not exercise jurisdiction over non-resident class members where there is evidence that a particular foreign jurisdiction might not recognize a class action judgment either altogether (as is said to be the case in China) or in the absence of actual notice (as is said to be the case in India). The hypothetical failure of another state to observe the generally accepted principles of private international law in connection with the assumption of jurisdiction and the recognition of foreign judgments should not preclude an Ontario court from taking jurisdiction in a class action involving its residents . . .

*Id.* at para. 72. Ultimately, the *res judicata* issue probably did not matter a great deal in the *Ramdath* case itself. As the court correctly pointed out, it is unlikely that an Indian or a Chinese court would even take jurisdiction over a plaintiff’s claim given the factual connection between the claim and Ontario: “If an Indian court would not accept jurisdiction,

analysis conducted by U.S. courts are emerging in the academic literature.<sup>126</sup> The goal here is not to endorse a U.S.-style *res judicata* analysis as a predicate to the certification of global classes in Canada.<sup>127</sup> Rather, the objective is to underscore that awareness of the implications of the *res judicata* issues at play is pivotal to crafting class actions that are substantively fair to both plaintiffs and defendants.<sup>128</sup>

In the *Imax* case, the Ontario court certified a global class of plaintiffs, of whom the overwhelming majority (85–90%) were foreign. If *Imax* were to settle the litigation in Ontario, the most it could be assured would be that 10–15% of all potential claims were resolved.<sup>129</sup> Such a settlement would be nonsensical from the vantage point of *Imax*; it would pay to settle 100% of claims, but would only be granted assurances that 10–15% of claims were settled.<sup>130</sup> Whether the foreign claims are, in fact, resolved will turn on whether a court in the U.S. would grant an Ontario class judgment *res judicata* effect. In other words, the success of a global class turns on

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then it matters not whether India would recognize the binding effect of an Ontario judgment on an Indian class member.” *Id.* at para. 73. The claim in *Ramdath* (negligent misrepresentation in connection with an Ontario college’s promotional materials) is likely one which could only be asserted in Ontario. In other cases, the dispute will be more “global” such that multiple forums could (and would) assert jurisdiction over the defendant. In this case, the *res judicata* issue will be important.

<sup>126</sup> See Matthew Jasilli, *A Rat Res? Questioning the Value of Res Judicata In Rule 23(B)(3) Superiority Inquiries for Foreign Cubed Class Action Securities Litigations*, 48 COLUM. J. TRANSNAT’L L. 114, 129 (2009); Tanya Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 TULANE L. REV. 1 (2011) [hereinafter Monestier, *Transnational Class Actions*]; Michael P. Murtagh, *The Rule 23(B)(3) Superiority Requirement and Transnational Class Actions: Excluding Foreign Class Members in Favor of European Remedies*, 34 HASTINGS INT’L & COMP. L. REV. 1 (2011); Linda Sandstrom Simard & Jay Tidmarsh, *Foreign Citizens and Transnational Class Actions*, 97 CORNELL L. REV. 87 (2012); Wasserman, *supra* note 121, at 379.

<sup>127</sup> In fact, I argue strenuously against such a *res judicata* analysis in *Transnational Class Actions and the Illusory Search for Res Judicata*. See Monestier, *Transnational Class Actions*, *supra* note 126. In particular, I argue that the litigation and structural dynamics of class litigation combine to render the *res judicata* effect of a U.S. class judgment inherently unknowable to a U.S. court *ex ante*. See *id.*

<sup>128</sup> Brown, *supra* note 115, at 235 (“Canadian courts should be slow to certify worldwide classes. Jurisdiction should take into account recognition. Purporting to assume jurisdiction over proposed foreign class members, without considering whether the resulting judgment will be recognized for the benefit of, or against, a foreign class member outside of Canada will lead to uncertainty and conflicting decisions.”). I agree that broadly speaking, jurisdiction should take into account recognition—though I disagree that an involved *res judicata* analysis is the way to accomplish this.

<sup>129</sup> Here, I am assuming that the settlement in Ontario would proceed without any cooperation or coordination of proceedings in the United States. In other words, I am assuming that there would be an Ontario judgment rendered without the “blessing” of a court in the United States.

<sup>130</sup> Presumably, *Imax* would take this factor into account in its settlement calculus.

whether courts outside the forum would recognize the Canadian judgment as binding on its residents. Notably, U.S. courts have never had occasion to consider whether, or under what circumstances, foreign class judgments are binding on absent U.S. class members. Likewise, jurisprudence concerning the preclusive effect of foreign class judgments in countries outside the U.S. is virtually non-existent.<sup>131</sup> In fact, the Ontario Court of Appeal's decision in *Currie* is the only sustained judicial discussion concerning the enforceability of foreign class judgments against absent class members.<sup>132</sup> Given that Canadian courts have no way of knowing what the fate of a global class judgment or settlement will be outside of Canada, it appears senseless to include foreign claimants in a global class. First, the presence of foreign claimants (particularly when such claimants comprise the overwhelming majority of the class) skews the settlement and litigation dynamics of the class action. Second, the inclusion of foreign claimants

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<sup>131</sup> See Brown, *supra* note 115, at 230 ("There are not, as far as this author is aware, any reported decisions dealing with the enforcement of a Canadian class action judgment in a foreign jurisdiction."). For foreign jurisprudence on the enforceability of U.S. class judgments, see *Stichting Onderzoek Bedrijfs Informatie Sobi/Deloitte Accountants B.V.*, [Amsterdam District Court], 23 June 2010, No. 398833/HA ZA 08-1465, para. 6.5.6 (Neth.), where the Dutch court recognized a U.S. class judgment in the *Ahold* securities fraud case and barred any Dutch class members who did not opt out from bringing a subsequent action. The court recognized the U.S. judgment for three reasons: (1) the U.S. District Court entering the class judgment had an "internationally accepted basis" for jurisdiction over the matter; (2) the U.S. proceedings satisfied the requirements of Dutch due process; and (3) the class judgment "survive[d] the test against Dutch public order[.]" *Id.* at paras. 6.5.1–6.5.5; see also *Campos v. Kentucky & Indiana Terminal Railroad Co.*, 2 Lloyd's Rep. 459, 473 (1962), where an English court expressed uneasiness with the notion that an absent member of a U.S. class action could be bound by a class action judgment:

[T]here is great force in [the] contention that in accordance with English private international law a foreign judgment could not give rise to a plea of *res judicata* in the English Courts unless the party alleged to be bound had been served with the process that led to the foreign judgment.

*Id.*

<sup>132</sup> Although there is very little case law on point, there is some academic commentary on the *res judicata* effect of U.S. class judgments in foreign countries. See John C.L. Dixon, *The "Res Judicata" Effect in England of a US Class Action Settlement*, 46 INT'L & COMP. L. Q. 134 (1997); Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 TUL. J. INT'L & COMP. L. 5 (2002); Jonathan Harris, *The Recognition and Enforcement of US Class Action Judgments in England*, CONTRATTO E IMPRESA 617 (2006); Marina Matousekova, *Would French Courts Enforce U.S. Class Action Judgments?*, CONTRATTO E IMPRESA 651 (2006); Rachael Mulheron, *The Recognition, and Res Judicata Effect, of a United States Class Actions Judgment in England: A Rebuttal of Vivendi*, 75 MODERN L. REV. 180 (2012); Andrea Pinna, *Recognition and Res Judicata of US Class Action Judgments in European Legal Systems*, 1 ERASMUS L. REV. 31, 39 (2008); Mark Stiggelbout, *The Recognition in England and Wales of United States Judgments in Class Actions*, 52 HARV. INT'L L. J. 433, 435 (2011).

increases the cost and complexity of the action without even a modicum of assurance that any eventual judgment or settlement will be binding.

One solution that has been proposed in the United States as a response to the *res judicata* concerns that plague global class actions is the creation of an opt-in mechanism for foreign claimants.<sup>133</sup> Under an opt-in regime, a class member affirmatively chooses to be part of the class proceedings or settlement through the act of “opting-in.” Thus, unlike an opt-out regime, an opt-in regime relies on the foreign class members’ active consent for its legitimacy. An opt-in mechanism for foreign claimants avoids the difficult *res judicata* problems associated with the recognition of foreign class judgments. This is because a foreign claimant who has consented to the jurisdiction of the forum through the act of opting-in cannot later challenge the authority of the court to render judgment against him. Most foreign jurisdictions would regard the foreign claimant’s consent to the class proceedings abroad as sufficient to preclude any subsequent action by him in the courts of his home country.<sup>134</sup>

The American Law Institute (ALI), in its latest draft of the Principles of Aggregate Litigation, recognizes that foreign claimants may warrant differential treatment under domestic class proceedings legislation.<sup>135</sup> As such, the ALI proposes a discretionary opt-in mechanism for foreign claimants under section 2.10:

**Aggregation by Consent.** When justice so requires, a court may authorize aggregate treatment of related claims or of a common issue by affirmative consent of each affected claimant.<sup>136</sup>

The Comment to section 2.10 recognizes that the section is intended to create, “in the parlance of class action law, an ‘opt-in’ proceeding” in certain “exceptional” circumstances.<sup>137</sup> The Comment further notes that such an exceptional situation might arise “when litigation takes place in the United States but primarily involves claimants located in foreign countries.”<sup>138</sup>

A template for the creation of a hybrid regime can be found in British Columbia’s class proceedings legislation.<sup>139</sup> Under the *Class Proceedings*

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<sup>133</sup> See, e.g., Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 *FORDHAM L. REV.* 41, 85 (2003); Monestier, *Transnational Class Actions*, *supra* note 126, at 46.

<sup>134</sup> In an exceptional case, a plaintiff might still be able to argue that the class proceedings to which he consented nonetheless violated natural justice or public policy.

<sup>135</sup> *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 2.10 (2010).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at cmt. a.

<sup>138</sup> *Id.*

<sup>139</sup> *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s.4 (Can.) (B.C. Act). Note that Newfoundland and New Brunswick also have hybrid opt-in/opt-out regimes. See *Class*

*Act*, residents of British Columbia are subject to an opt-out regime, while non-residents are subject to an opt-in regime. Section 16(2) of the B.C. Act provides, “a person who is not a resident of British Columbia may . . . opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.”<sup>140</sup> Thus, the B.C. Act distinguishes between “resident” and “non-resident” class members, requiring the latter to take steps to opt-into the litigation in order to be bound to judgment. This hybrid regime can easily be applied to global class actions, so as to require foreign claimants to affirmatively opt-into the Canadian proceedings. This would go a long way toward alleviating some of the *res judicata* problems posed by the existence of global class actions.<sup>141</sup>

Justice Corbett in *Imax* recognized the desirability of allowing foreign claimants to participate in Canadian class proceedings, without mandating that they do so:

It would be wrong, of course, to compel foreign investors to be bound by Canadian proceedings if they prefer to have their claims adjudicated elsewhere. But similarly, it would be wrong to preclude them from participating in Canadian proceedings if they wish their claims to be pursued in Ontario.<sup>142</sup>

Justice Corbett’s endorsement of a global *opt-out* class fails to appreciate that, in essence, the Ontario court is “compel[ling] foreign investors to be bound by Canadian proceedings” rather than letting them “participat[e] in Canadian proceedings if they [so] wish.”<sup>143</sup> This is because an opt-out global class presumptively includes foreign claimants in the class and places the onus on the class members to remove themselves. It is well-established as an empirical matter that very few claimants actually opt-out of class actions. In a study of class action data from four geographical districts in the U.S., Professor Willging found that the median percentage of members who opted out of a settlement was either 0.1% or 0.2% of the total

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Proceedings Act, S.N.B. 2006, c. C-5.15 (Can.); Class Actions Act, S.N.L. 2001, c. C-18.1 (Can.).

<sup>140</sup> Class Proceedings Act, R.S.B.C. 1996, c. 50, s.4 (Can.).

<sup>141</sup> There are certainly critiques that may be directed at opt-in regimes. See, e.g., Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come To Europe?*, 62 VAND. L. REV. 179, 206 (2009) (“But opt-in procedures also pose problems [including] problems with incentivizing a named plaintiff under an opt-in regime, difficulties in attracting adequate participation rates, and the challenge of offering defendants the opportunity to achieve global peace through the class procedure.”).

<sup>142</sup> *Silver v. Imax Corp.*, 2011 ONSC 103, para. 62 (Can. Ont. Sup. Ct. J.) (Leave to Appeal Decision).

<sup>143</sup> *Id.*

membership of the class.<sup>144</sup> Moreover, in three quarters of cases, only 1.2% of class members or fewer opted out of the settlement.<sup>145</sup> This demonstrates that the practical effect of certifying a global opt-out class is that foreign claimants are bound by Canadian proceedings—at least from the perspective of a Canadian court.<sup>146</sup> If the goal is to allow foreign claimants to participate in Canadian proceedings “if they wish,” then clearly an opt-in class action more effectively achieves that objective.

The purpose of this section was to illustrate the role that the recognition of a class judgment plays (or should play) in the global certification calculus. Unfortunately, the *Imax* court, while cognizant of the “front-end” jurisdictional and other issues, was not as concerned with the far more important “back-end” issues.<sup>147</sup> Without a meaningful appreciation of the “back-end” issues, the global class action in Canada is balanced on a very precarious fulcrum.

### C. Choice of Law

In addition to the problems of jurisdiction and recognition, global classes also present serious choice of law issues.<sup>148</sup> Justice van Rensburg

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<sup>144</sup> THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 10 (1996); see also Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (finding that “on average, less than 1 percent of class members opt-out” of class settlements). On why so few class members choose to opt out, one author observes:

One reason for this may be the lack of a better alternative for litigating claims. There is little incentive for a claimant to opt out of a class action lawsuit when the claimant’s damages are too small to justify an independent suit. Another potential explanation is human psychology. Research suggests that people are much more likely to consent to a procedure when consent is measured passively, by failure to file an objection, rather than actively, by explicitly registering agreement to participate. This lack of incentive to opt out is increased by the fact that absent class members have no responsibilities while the action is pending, so the burdens of remaining in the lawsuit are relatively low.

Ilana T. Buschkin, Note, *The Viability of Class Actions in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1575 (2005) (citations omitted).

<sup>145</sup> WILLGING, *supra* note 144, at 10.

<sup>146</sup> As discussed, whether such claimants are, in fact, bound will turn on whether a foreign court recognizes and grants res judicata effect to the Canadian judgment.

<sup>147</sup> See, e.g., Brown, *supra* note 115, at 226 (“Failing to take into account whether an Ontario judgment would be recognized by a court in a foreign class member’s country ignores a fundamental aspect of jurisdiction. Unfortunately, this is not an uncommon approach by courts when dealing with potential foreign class members.”).

<sup>148</sup> On the choice of law issues in securities litigation from a European perspective, see

identified the plethora of choice of law concerns raised by the certification of a global class in *Imax*:

[I]s the statutory cause of action restricted to Ontario shareholders? Does it apply to non-resident shareholders who purchased their shares on the TSX? Does it apply to Ontario shareholders who purchased their shares on NASDAQ? As for the common law claims, what law would apply to the misrepresentation claims of class members residing outside of Ontario, or Canada? Would this depend on where they purchased their shares, reside or suffered damages? What particular defences would the defendants rely upon that would not be available to them under Ontario law? Are there in fact substantial differences between the common law principles and defences applicable in the other jurisdictions?<sup>149</sup>

Although Justice van Rensburg in *Imax* was aware of the choice of law hurdles in certifying a global class, she concluded that although “[t]he prospect that the claims of nonresident class members may be subject to different laws adds complexity to the litigation . . . [it] does not weigh against certification.”<sup>150</sup> She added that a court could deal with any choice of law issues that arise by “adjusting the common issues or recognizing subclasses as appropriate.”<sup>151</sup> With respect, this view fails to account for the fact that the choice of law issues bear not only on the manageability of the litigation but also on the proper geographical scope of the class.

The parties in *Imax* apparently believed that the statutory cause of action for misrepresentation under the OSA was available to resident, non-resident and foreign claimants alike, and thus focused their submissions on the choice of law complexities posed by the certification of the common law misrepresentation claims.<sup>152</sup> However, it is far from clear that the cause of action under the OSA is available to foreign claimants. In Canada, no court has had occasion to consider the availability of a cause of action for misrepresentation in the secondary market under provincial securities statutes to foreign claimants and, in particular, to foreign claimants who purchased shares of the defendant corporation on a foreign exchange. However, based on the tenor of current case law, it would appear that a statutory cause of action under the OSA would be available only to

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Wolf-Georg Ring & Alexander Hellgardt, *The International Dimension of Issuer Liability and Choice of Law from a Transatlantic Perspective*, 31 OXFORD J. LEGAL STUDIES 23 (2011); see also Emmanuel Gaillard, *After Morrison: The Case for a New Hague Convention on the Law Applicable to Securities Frauds*, 5 DISPUTE RESOLUTION INT’L 35 (2011).

<sup>149</sup> *Silver v. Imax Corp.*, (2009) 86 C.P.C. 6th 273, para. 154 (Can. Ont. Sup. Ct. J.) (Certification Decision).

<sup>150</sup> *Id.* at para. 164.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at paras. 136, 146.

investors who traded on the TSX. Authority for this view can be found in the British Columbia Court of Appeal's decision in *Pearson v. Boliden*,<sup>153</sup> an action brought under British Columbia's *Securities Act* ("B.C. *Securities Act*")<sup>154</sup> for alleged misrepresentations contained in a prospectus filed in connection with a distribution of shares made across Canada. Although *Pearson* dealt with an action for primary market misrepresentation, its reasoning would seem to apply equally to an action for secondary market misrepresentation under provincial securities statutes. The British Columbia Court of Appeal found that the B.C. *Securities Act* did not provide a cause of action to those class members who purchased their shares pursuant to a distribution outside of British Columbia. It articulated the relevant choice of law rule as follows:

But in respect of a misrepresentation contained in a prospectus circulated in a province and deemed to be relied on by a person in purchasing securities offered thereby, a court would in making a choice of law be bound to follow the constitutional principle that *it is the province in whose territory the securities are distributed which has the jurisdiction (in the constitutional sense) to regulate the manner in which the distribution is carried out and to attach civil consequences to non-compliance.*<sup>155</sup>

Thus, while the B.C. *Securities Act* could govern the statutory claims of British Columbia purchasers of the defendant's shares, it could not govern the claims of non-British Columbia purchasers.<sup>156</sup> Those class members who purchased their shares outside of British Columbia would be subject to the securities legislation of those jurisdictions in which they purchased their shares. The court observed that this result comported with the reasonable expectations of investors; that is, an investor would anticipate when he purchased shares under a distribution taking place in a certain province that the securities legislation of that province would govern the obligations of the parties.<sup>157</sup>

A similar result was reached in the recent case of *Coulson v. Citigroup Global Markets Inc.*<sup>158</sup> In *Coulson*, the plaintiff asserted a cause of action under section 130 of the OSA on behalf of a national class of shareholders.

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<sup>153</sup> 2002 BCCA 624, (2002) 7 B.C.L.R. 4th 245 (Can.).

<sup>154</sup> R.S.B.C. 1996, c. 418 (Can.).

<sup>155</sup> *Pearson v. Boliden*, 7 2002 BCCA 624, (2002) 7 B.C.L.R. 4th 245, para. 65 (Can.) (emphasis added).

<sup>156</sup> The court was careful to point out that "British Columbia purchasers" referred to persons who acquired their shares as a result of a "distribution" in British Columbia, regardless of their place of residence. Thus, "British Columbia purchasers" may not be exactly co-extensive with the class of persons who *reside* in the province. See *id.* at para. 48.

<sup>157</sup> See *id.* at para. 66.

<sup>158</sup> 2010 ONSC 1596 (Can.).



The defendants resisted certification, in part on the basis that the statutory cause of action under the OSA was not available to non-resident class members. The Superior Court of Justice agreed:

The Defendants' objection is that [the plaintiff] in his proposed definition of class membership has characterized all Canadian purchasers of [defendant's] common shares as purchasers who have remedies under s.130 of the Ontario *Securities Act*. However, only some of the Canadian purchasers of [defendant's] shares have remedies under s.130, while others may have had remedies under another province's comparable legislation and other Canadian purchasers of [defendant's] shares might have had no entitlements under any provincial legislation. The legislature of the Province of Ontario does not have the constitutional authority to regulate securities transactions that take place outside of Ontario, . . . [I]n the absence of the parties agreeing to be bound by Ontario law, Ontario does not have the jurisdiction to make Ontario law apply extraterritorially.<sup>159</sup>

The court accepted the defendant's proposed definition of the class, which was to include all purchasers who acquired common shares of the defendant corporation "as a result of a distribution in Ontario within the meaning of the Ontario *Securities Act*."<sup>160</sup> In practical terms, this class definition would have the effect of excluding those class members who purchased their shares pursuant to a distribution under another provincial securities regime.

The court in *Imax* did not engage with the pivotal question of whether the OSA provided a statutory cause of action to class claimants in respect of purchases that did not occur in Ontario.<sup>161</sup> This is probably owing to the defendant's concession that the statutory remedy under the OSA would be available to all aggrieved purchasers, and not simply to those class members who purchased their shares in Ontario. However, the question of whether or not claimants who purchased their shares on the NASDAQ have a statutory cause of action is a critical one, and one which has (or at least should have) a significant impact on the certification equation.<sup>162</sup>

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<sup>159</sup> *Id.* at para. 145.

<sup>160</sup> *Id.* at para. 136.

<sup>161</sup> It is likely, following the reasoning in *Pearson* and *Coulson*, that a court would find that a non-resident or foreign class member did have a cause of action in respect of purchases that took place on the TSX. Note that under the *Morrison* decision in the United States, foreign claimants still have a cause of action under federal securities laws provided that the transactional test is satisfied—i.e. such class members purchased or sold shares on a U.S. exchange.

<sup>162</sup> Again, the objective here is not to provide an answer to the question of whether foreign claimants have a cause of action under Ontario's securities legislation but to highlight the importance of the answer to that question in the global class certification

If those plaintiffs who purchased shares of Imax on the NASDAQ are unable to assert a statutory claim for misrepresentation under Ontario law, it is doubtful that they will be able to assert statutory claims under foreign securities laws—which, in turn, means that they lack a claim altogether. Normally, a Canadian court will apply foreign law in domestic proceedings provided that such foreign law is adequately pleaded and proven.<sup>163</sup> So, for instance, an Ontario court might apply New York’s common law of fraud to the tort claims of New York class members. However, there is a notable limitation on the application of foreign law: Canadian courts will not apply foreign public law in domestic proceedings.<sup>164</sup> The limitation is a longstanding one in private international law and stems from the notion that since a Canadian court will not enforce a public law judgment, neither should it purport to adjudicate a claim arising under the public laws of another country.<sup>165</sup> It is arguable that foreign securities laws fall within the purview of public law claims that Canadian courts will not entertain. Silberman suggests that “a private cause of action for securities fraud [may be] so intertwined with the public regulatory regime that it cannot be separated out, and thus the public law taboo is justified.”<sup>166</sup> In fact, following the U.S. Supreme Court decision in *Morrison*, foreign shareholders in *In re Toyota Motor Corporation Securities Litigation*<sup>167</sup> who had been foreclosed from asserting claims under U.S. securities laws attempted to argue that a U.S. court should apply Japanese securities law to the claims of foreign shareholders.<sup>168</sup> The district court of California declined to apply Japanese securities law in an American action.<sup>169</sup> While

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decision.

<sup>163</sup> See *Caglar v. Moore*, [2005] O.J. No. 4606, para. 15 (Can.) (“The approach of the courts to foreign law is well established. The existence of foreign law is treated as a fact and the party seeking to rely upon it must both plead it and prove it. If the foreign law is not pleaded or not properly proven, the court will apply the *lex fori* as ‘it is the only law available.’”).

<sup>164</sup> JANET WALKER & JEAN-GABRIEL CASTEL, *CANADIAN CONFLICT OF LAWS* § 8.5, (6th ed. 2005) (“Canadian courts generally refuse to give effect to foreign laws that assert sovereign power, such as antitrust or regulation of competition law, securities legislation . . .”).

<sup>165</sup> For a history and critique of the rule, see William S. Dodge, *Breaking the Public Law Taboo*, 43 *HARV. INT’L L.J.* 161 (2002).

<sup>166</sup> Silberman, *supra* note 1, at 13.

<sup>167</sup> No. CV 10-922 DSF (AJWx), 2011 WL 2675395 (C.D. Cal. Filed Oct. 4, 2010).

<sup>168</sup> Justice Ginsberg raised this possibility in oral argument in *Morrison*. See Transcript of Oral Argument at 7–8, *Morrison v. Nat’l Australia Bank*, 130 S. Ct. 2869, 2886 (2010) (No. 08-1191), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-1191.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1191.pdf) (“I mean, this case is Australian plaintiff, Australian defendant, shares purchased in Australia. It has ‘Australia’ written all over it. . . . And taking that, why not – of the applicable laws to this transaction, to this alleged fraud, isn’t the most appropriate choice the law of Australia rather than the law of the United States?”).

<sup>169</sup> *Toyota Motor Corp.*, 2011 WL 2675395, at \*6–7.

the court did not refuse to apply Japanese law strictly on the basis that it represented “foreign public law,” the court was sensitive to the comity concerns<sup>170</sup> presented by the potential application of foreign law in this context.<sup>171</sup>

If the statutory remedy under the OSA is not available to the class members in *Imax* who purchased their shares on a foreign exchange, this leaves a very small percentage of claimants (10–15%) who can actually assert an OSA claim. That 85–90% of the class has been foreclosed from pursuing the statutory remedy, and is instead relegated to common law claims, undoubtedly has an impact on the settlement value of the class action. The absence of a statutory OSA remedy for claimants who purchased shares on a foreign exchange (coupled with the complexity of the choice of law analysis for the common law claims) strongly militates against certification of a global class.

Rather than focusing on the statutory cause of action, the court in *Imax* emphasized the choice of law concerns posed by the common law misrepresentation claims. The court noted that the issue is governed by the Supreme Court of Canada’s decision in *Tolofson v. Jensen*,<sup>172</sup> where the Court endorsed a fairly strict *lex loci delicti* test for choice of law in tort.<sup>173</sup> The issue in *Imax*, as in many complex tort cases, is locating exactly *where* the tort occurred: Did the tort occur where the defendant made the misrepresentation? Or, did the tort occur instead where the misrepresentation was relied upon and harm was suffered? The court in *Imax* did not engage with this difficult question. Rather, it observed that “[i]t is not obvious . . . that the applicable law will be that of the place

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<sup>170</sup> *Id.* at \*7 (“The exceptional circumstance of comity to the Japanese courts also strongly argues against the exercise of supplemental jurisdiction. The clear underlying rationale of the Supreme Court’s decision in *Morrison* is that foreign governments have the right to decide how to regulate their own securities markets. This respect for foreign law would be completely subverted if foreign claims were allowed to be piggybacked into virtually every American securities fraud case, imposing American procedures, requirements, and interpretations likely never contemplated by the drafters of the foreign law. While there may be instances where it is appropriate to exercise supplemental jurisdiction over foreign securities fraud claims, any reasonable reading of *Morrison* suggests that those instances will be rare.”)(citations omitted).

<sup>171</sup> The court also expressed concerns about manageability. *See id.* at \*6 (“The Japanese law claims substantially predominate over the American law claims. The vast majority of the members of the currently pleaded class are common stock holders who purchased their stock on foreign exchanges and, therefore, have only a Japanese law claim. It follows that the damages analysis would focus overwhelmingly on these claims. In addition, even the few aspects of the claims that are admitted by both sides to differ from the American law claims are extraordinarily significant in the context of this particular litigation. Under these circumstances, the Japanese law claims unquestionably would dominate the litigation.”).

<sup>172</sup> [1994] 3 S.C.R. 1022 (Can.).

<sup>173</sup> *Lex loci delicti* refers to the law of the place where the tort occurred.

where each individual class member sustained damage.”<sup>174</sup> It further noted that even if the laws of different jurisdictions were to apply to the common law claims, it was not clear that the applicable common law principles and defenses would vary from place to place, such that a court would need to deal with the potential application of multiple laws. Tellingly, the *Imax* court referred to class actions such as *Cloud v. Canada (Attorney General)*,<sup>175</sup> *Rumley v. British Columbia*<sup>176</sup> and *Nantais v. Teletronics Proprietary (Canada) Ltd.*<sup>177</sup> where courts found that choice of law issues were not a bar to the certification of a national classes—all of which considered the potential applicability of the laws of another *Canadian* province but not the multiple laws of a *foreign country*.

The *Imax* court was likely too hasty in dismissing the choice of law objections as “premature.”<sup>178</sup> The choice of law issue, both in terms of the statutory and common law causes of action, is intrinsically intertwined with the propriety of certifying a global class under section 5 of the *Class Proceedings Act*. In particular, where the statutory remedy under the OSA is not available to the overwhelming majority of the class and the remaining claims are subject to the differing laws of potentially sixty different jurisdictions,<sup>179</sup> it is doubtful that a class proceeding in Ontario would be “the preferable procedure” for the resolution of the common issues.<sup>180</sup> Moreover, where the laws of so many jurisdictions are involved, it would be difficult for the representative plaintiff to set out under section 5(e)(2) of

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<sup>174</sup> *Silver v. Imax Corp.*, (2009) 86 C.P.C. 6th 273, para. 152 (Can. Ont. Sup. Ct. J.) (Certification Decision). The court proceeded to note that “[s]uch an approach would ignore the fact that a class proceeding is an aggregate action and not a collection of individual claims.” *Id.* It is not clear that Canadian courts generally subscribe to this view. The Supreme Court of Canada has recently emphasized that “the class action, while having an important social dimension, is only a ‘procedural vehicle whose use neither modifies nor creates substantive rights.’” *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, para. 226 (Can.). This statement appears to be more consistent with the view that the class action is in fact a “collection of individual claims” rather than an “aggregate action.”

<sup>175</sup> (2004) 73 O.R. 3d 401 (C.A.), *leave to appeal to the S.C.C. refused*, [2005] S.C.C.A. No. 50 (Can.).

<sup>176</sup> 2001 SCC 69, [2001], 3 S.C.R. 184 (Can.).

<sup>177</sup> (1995), 25 O.R. 3d 331 (Can. Gen. Div.).

<sup>178</sup> *Silver v. Imax Corp.*, (2009) 86 C.P.C. 6th 273, para. 153 (Can. Ont. Sup. Ct. J.) (Certification Decision).

<sup>179</sup> I have assumed that there are claimants in all Canadian provinces and all American states. Note that in the American context, choice of law issues often prove insurmountable in certifying class actions. See, e.g., Genevieve G. York-Erwin, Note, *The Choice-of Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1794 (2009) (“Choice of law has proven to be one of the most consistent obstacles to damage class certification in recent years. Federal precedent has developed such that when multiple state laws would apply to a class, federal judges usually deny certification.”).

<sup>180</sup> See Province of Ontario Class Proceedings Act, R.S.O. 1992, c. 6, §5 (Can.).

the Ontario *Class Proceedings Act* a “workable method of advancing the proceeding on behalf of the class”<sup>181</sup> Clearly, a proceeding that involved the application of laws from ten different provinces and fifty different states would present serious manageability issues which would be difficult to overcome.<sup>182</sup> This would still be true even if a Canadian court were to somehow craft sub-classes that corresponded to groups of different laws.

The *Imax* court failed to grasp that choice of law concerns should not be downgraded to a secondary consideration, only to be dealt with post-certification. At that point, the certification decision is a “done deal”—one which frames the defendant’s assessment of risk and the plaintiff’s view of the prospect of litigation success.<sup>183</sup> Thus, deferring the hard questions until some point post-certification skews both the litigation and settlement dynamics. Sorting out the choice of law issues is not merely an academic exercise, but rather one which must logically precede the section 5 certification inquiry.

#### D. Parallel Class Proceedings

An additional source of complexity in the *Imax* case arose from the fact that a parallel class proceeding had been filed against *Imax* in the United States. The defendant in the Ontario *Imax* proceedings had argued that given the existence of a competing class action in New York, it “would be better to certify the Canadian class only, with leave to the plaintiffs to return to the court, depending on what may occur in the U.S. Proceedings.”<sup>184</sup> Justice van Rensburg paid short shrift to this argument, pointing to the defendant’s contradictory assertions in the U.S. proceedings. In the United States, *Imax* attempted to defeat certification by arguing that it would be preferable to litigate the issues in dispute in the pending Ontario

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<sup>181</sup> *Id.* at §5(e).

<sup>182</sup> One author notes that “[a]ctions with a transnational reach may, in fact, undermine the judicial efficiency being sought by certifying as a transnational class.” Joel Rochon, *The Transnational Class: A Canadian Perspective on Cross-Border Class Actions*, 1 ATLA ANN. CONVENTION REFERENCE MATERIALS ¶ 453 (2006).

<sup>183</sup> There is, of course, the possibility that the court will decertify the class or part thereof. However, in reality, the possibility of decertification is largely illusory. See Larry Kramer, *Class Actions and Jurisdictional Boundaries: Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 565 (1996) (“The stated premise of provisional certification is that the court can always decertify later if the choice-of-law issues complicate matters too much. But later never comes, and never will, because the cases always settle first—as judges know better than anyone. The provisional certification ploy thus enables the court to create a class without letting pesky choice-of-law problems get in the way. The applicable law is left undecided—though the fact that a class has been certified, together with the threat that one law may be applied and uncertainty as to what the law will be, undoubtedly plays an important role in settlement.”).

<sup>184</sup> *Silver v. Imax Corp.*, (2009) 86 C.P.C. 6th 273, para. 111 (Can. Ont. Sup. Ct. J.) (Certification Decision).

proceedings.<sup>185</sup> Notably, Imax asserted, “only the Canadian court is in a position to grant full relief to all purchasers of IMAX stock.”<sup>186</sup> The Ontario court found the defendant’s about-face “revealing,” observing that the inconsistency in the defendant’s submissions in the two proceedings suggested that its opposition to class certification in Ontario was not based on bona fide concerns about the propriety of adjudicating the claims of a worldwide class, but rather was an attempt to limit potential damages exposure.<sup>187</sup> Justice van Rensburg thus concluded that a pending application for certification in another jurisdiction was not a barrier to the certification of a global class in Ontario.<sup>188</sup>

After Justice van Rensburg rendered her decision in *Imax*, the Southern District of New York in *In re IMAX Securities Litigation* considered whether to certify a class of Imax shareholders who purchased their shares on the NASDAQ.<sup>189</sup> While the court held that most of Rule 23’s requirements were satisfied, it found the proposed class representative inadequate and thus denied the motion for class certification.<sup>190</sup> In its decision, the court addressed the propriety of certifying a class proceeding in a U.S. district court when a parallel proceeding was underway in Canada. The court noted that the proceedings in Ontario were not a bar to class certification in the United States because, *inter alia*, an additional defendant was named in the U.S. action, the complaint in the United States alleged a longer class period, the class as defined included only shareholders who purchased Imax stock on the NASDAQ, and the Ontario decision was under

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<sup>185</sup> See *In re IMAX Sec. Litig.*, 272 F.R.D. 138, 158–59 (S.D.N.Y. 2010).

<sup>186</sup> *Silver v. Imax Corp.*, (2009) 86 C.P.C. 6th 273, para. 114 (Can. Ont. Sup. Ct. J.) (Certification Decision). The court noted the logical consequence of Imax’s argument: “If IMAX is successful in the position in the U.S. proceedings, the U.S. court may decide not to certify a global class or may decline certification altogether on the basis that a more effective remedy is available to the class in the Ontario proceedings.” *Id.* at para. 116.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at para. 133.

<sup>189</sup> *In re IMAX*, 272 F.R.D. at 146–60.

<sup>190</sup> In *In re Imax Securities Litigation*, No. 06 Civ. 6128(NRB), 2011 WL 1487090 (S.D.N.Y. Apr. 15, 2011), the U.S. District Court approved the plaintiff’s motion to appoint a new class representative and new class counsel. On January 26, 2012, the parties to the United States *Imax* proceeding entered into a Stipulation and Agreement of Settlement. The proposed settlement involved a payment of \$12 million in cash to resolve the U.S. class members’ claims. See *Abbey Spanier Rodd & Abrams, LLP Announces Proposed Settlement in Imax Corp. Securities Class Action Litigation*, ABBEY SPANIER RODD & ABRAMS, LLP, <http://www.abbeyspanier.com/press-releases/400-settlement-between-settlement-class-members-and-imax-corporation> (last accessed Mar. 30, 2012). An order preliminarily approving the final settlement and providing for notice was signed by Judge Buchwald in the U.S. proceedings on January 31, 2012. The order preliminarily certifies a class for settlement purposes only and preliminarily approves the settlement as “fair, just, reasonable and adequate as to the settlement class members, and in the best interests of the class, subject to notice to the settlement class and further consideration at a fairness hearing.” *Silver v. Imax*, 2012 ONSC 1047, para. 26.

appeal. Fundamentally, though, the New York district court was of the view that a parallel class action in a foreign jurisdiction that purported to resolve the claims of U.S. residents was not “superior” within the meaning of Rule 23:

At bottom, a class action in a foreign jurisdiction, applying that jurisdiction’s securities laws, to which a named defendant in the United States action is not a party, in which the first complaint in the foreign jurisdiction was filed after the first complaint in this case, is not a ‘superior’ way of adjudicating plaintiffs’ claims against that party for alleged violations of U.S. securities laws . . . <sup>191</sup>

Approximately two months after the Southern District of New York released its decision, the Ontario Superior Court of Justice refused leave to appeal Justice van Rensburg’s certification order, thereby permitting the *Imax* litigation in Ontario to proceed as a global class action. Justice Corbett agreed with Justice van Rensburg that the defendants’ submissions concerning parallel proceedings were “significantly undermined” by their opposition to class certification in the United States.<sup>192</sup> Surprisingly, though, Justice Corbett’s reasons made no mention of the December 2010 decision in *In re IMAX Securities Litigation*. In fact, Justice Corbett appears to take a rather sanguine view of the parallel proceedings in the U.S., remarking that the proceedings should be viewed as “complementary” and not “competing.”<sup>193</sup>

In asserting jurisdiction over the claims of foreign class members, the *Imax* court did not adequately account for the existence of overlapping class proceedings in the United States. The law governing parallel proceedings in traditional two-party litigation is well established in Canada. Generally, a defendant will move under the doctrine of forum non conveniens to stay the forum proceedings in favor of proceedings in another jurisdiction. A court will grant the stay provided the defendant can establish that there is “another forum that is clearly more appropriate” than the domestic forum for the resolution of the action.<sup>194</sup> Factors relevant to this determination include: the comparative convenience and expense for the parties to the proceeding

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<sup>191</sup> *In re IMAX*, 272 F.R.D. at 159.

<sup>192</sup> *Silver v. Imax Corp.*, 2011 ONSC 103, para. 57 (Can. Ont. Sup. Ct. J.) (Leave to Appeal Decision).

<sup>193</sup> *Id.* at para. 65 (“Perhaps the lawyers view the proceedings as ‘competing.’ The courts do not. The proceedings 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.”).

<sup>194</sup> *Amchem Prod. Inc. v. British Columbia (Workers’ Comp. Bd.)*, [1993] 1 S.C.R. 897 (Can.).

and for their witnesses in litigating in the court or in any alternative forum; the law to be applied to issues in the proceeding; the desirability of avoiding a multiplicity of legal proceedings; the desirability of avoiding conflicting decisions in different courts; the enforcement of an eventual judgment; and the fair and efficient working of the Canadian legal system as a whole.<sup>195</sup>

The forum non conveniens analysis is rendered significantly more complicated in the class context, in which a court is deciding whether to stay an action on the basis that a parallel class proceeding has been filed and/or certified in another jurisdiction. A classic example of this forum non conveniens “battle” can be found in the recent decisions of the Ontario and Saskatchewan courts in the *Vioxx* litigation.<sup>196</sup> In *Vioxx*, courts in Ontario and Saskatchewan certified overlapping classes of plaintiffs who had ingested the defendant pharmaceutical company’s drug, *Vioxx*. The Ontario court (the second to certify a multi-jurisdictional class action) refused to stay its proceedings in favor of those commenced in Saskatchewan. On appeal, the Ontario court noted that although the existence of two parallel multi-jurisdictional class proceedings added “another layer of complication to already complex litigation,” the problems were “not insurmountable.”<sup>197</sup> Ultimately, the issue was “resolved” when the Saskatchewan court decertified the class proceeding in that jurisdiction.<sup>198</sup>

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<sup>195</sup> These are the factors codified in section 11 of the Court Jurisdiction and Proceedings Transfer Act (CJPTA). In *Teck Cominco Metals Ltd. v. Lloyd’s Underwriters*, the Supreme Court of Canada noted that “Section 11 of the *CJPTA* was intended to codify the forum non conveniens test . . .” [2009] 1 S.C.R. 321, para. 22 (Can.). For other iterations of the test, see *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, para. 71 (Can.); *Muscutt v. Courcelles*, (2002) 60 O.R. (3d) 20, para. 41 (Can.). Case law seems to suggest that the prior assertion of jurisdiction by another court is an *important* factor to consider in the forum non conveniens analysis. See, e.g., *Molson Coors Brewing Co. v. Miller Brewing Co.*, (2006) 83 O.R. 3d 331 (Can.); *Westec Aerospace, Inc. v. Raytheon Aircraft Co.*, 1999 BCCA 134, (1999) 67 B.C.L.R. 3d 278 (Can.); 472900 B.C. Ltd. v. Thrifty Canada, Ltd., (1998) 168 D.L.R. 4th 602 (Can. B.C.C.A.).

<sup>196</sup> For the series of decisions in Ontario and Saskatchewan, see *Merck Frosst Can. Ltd. v. Wuttunee*, 2009 SKCA 43 (Can.) (leave to appeal and leave to cross-appeal to S.C.C. dismissed.); *Merck Frosst Can. Ltd. v. Wuttunee*, 2009 SKCA 43 (Can.) (certification of Saskatchewan action overturned on class definition issues); *Wuttunee v. Merck Frosst Can. Ltd.*, 2008 SKQB 229 (Can.) (Saskatchewan class action converted to a multijurisdictional class action include extra-provincial classes, following changes to the Saskatchewan legislation); *Wuttunee v. Merck Frosst Can. Ltd.*, 2008 SKQB 78 (Can.) (certification of Saskatchewan class action); *Tiboni v. Merck Frosst Can. Ltd.*, (2008) 295 D.L.R. 4th 32 (Can. Ont. Sup. Ct. J.) (certification of Ontario multijurisdictional class action); *Settlington v. Merck Frosst Can. Ltd.*, [2006] O.J. No. 376 (Can. Ont. Sup. Ct. J.) (Ontario carriage motion).

<sup>197</sup> *Mignacacca v. Merck Forst Can. Ltd.*, (2009) 95 O.R. 3d 269, para. 86 (Can.).

<sup>198</sup> *Merck Frosst Can. Ltd. v. Wuttunee*, 2009 SKCA 43 (Can.). Note that the decision to decertify the class was not related to the Ontario court’s decision to retain jurisdiction over the parallel multi-jurisdictional class.



Both Justice van Rensburg and Justice Corbett referred to the parallel multi-jurisdictional class proceedings that had been certified in the *Vioxx* litigation to support the view that the potential existence of overlapping multi-jurisdictional classes is “not an obstacle” to the certification of a global class in Ontario.<sup>199</sup> The *Vioxx* case—rather than signaling that parallel proceedings are acceptable—should sound a cautionary note about the certification of overlapping classes. Commentators have repeatedly pointed to the *Vioxx* litigation as illustrative of the problems associated with a lack of coherent framework for resolving clashes between multi-jurisdictional class actions.<sup>200</sup> A substantial body of literature has developed to address how to coordinate multiple multi-jurisdictional class proceedings within Canada.<sup>201</sup> Moreover, the Canadian Bar Association has recently released the Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions, which addresses how to use “existing class action legislation and the Rules of Court/Rules of Civil Procedure in various provincial jurisdictions to facilitate the management of multijurisdictional class actions.”<sup>202</sup> The objective here is not to canvass the various possibilities for coordinating multi-jurisdictional class proceedings in Canada, but rather to illustrate just how difficult it has been to resolve the problems associated with the certification of parallel class actions *within* Canada.

Since Canadian courts as-of-yet have been unable to resolve clashes

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<sup>199</sup> See *Silver v. Imax Corp.*, 2009) 86 C.P.C. 6th 273, para. 133 (Can. Ont. Sup. Ct. J.) (Certification Decision).

<sup>200</sup> See Walker, *Recognizing Multijurisdiction*, *supra* note 82, at 465–69; see also Can. Bar Ass’n, *Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions*, 2011 CAN. BAR ASS’N 4 (“The need for a workable mechanism to deal with parallel and competing multijurisdictional class actions was underlined by events surrounding *Vioxx*”).

<sup>201</sup> See, e.g., Ward K. Branch & Christopher Rhone, *Solving the National Class Problem*, 4TH ANNUAL SYMPOSIUM ON CLASS ACTIONS (2007) (addressing the National Class Action Database); Chris Dafoe, *A Path Through the Class Action Chaos: Selecting the Most Appropriate Jurisdiction with a National Class Action Panel*, 3 CAN. CLASS ACTION REV. 541 (2003) (exploring the possibility of adopting a body similar to the U.S. Federal Court’s Judicial Panel on Multi-District Litigation in Canada); Fiona Hickman, *National Competing Class Proceedings: Carriage Motions, Anti-Suit Injunction, Judicial Co-operation and Other Options*, 1 CAN. CLASS ACTION REV. 367, 399 (2004) (concluding that the following policies are most likely to address the national competing class proceedings problem in Canada: “counsel collaboration when possible; national carriage declarations; and judicial cooperation”); Saumier, *supra* note 106, at 481 (suggesting that a *lis pendens* rule may present “the key element for competing class actions in Canada”); Janet Walker, *Coordinating Multijurisdiction Class Actions Through Existing Certification Processes*, 42 CAN. BUS. L. J. 112 (2005) (discussing the coordination of multiple multijurisdictional class actions); Walker, *Recognizing Multijurisdiction*, *supra* note 82 (suggesting the creation of the Canadian equivalent to the U.S. Multi-District Litigation Panel).

<sup>202</sup> Can. Bar Ass’n, *supra* note 200, at pmb1. 11.

between inter-provincial class actions, it is surprising that they would purport to assume jurisdiction over foreign class members, thereby creating an international class conflict.<sup>203</sup> Had the *Imax* court conducted a proper forum non conveniens analysis—one that appropriately accounted for the issues of multiplicity—it would have undoubtedly come to the conclusion that it should not have assumed jurisdiction over the claims of foreign class plaintiffs.

As a matter of logic, it would appear the courts of a foreign country are better suited to hearing a case involving foreign claimants who purchased or sold securities on a foreign exchange.<sup>204</sup> The parties and witnesses will be located in foreign country; the defendant will be subject to the jurisdiction of the foreign court (because it listed its securities on a foreign stock market); and the law to be applied will be foreign securities law. Even ignoring specific concerns about multiplicity of proceedings, a foreign forum is clearly more appropriate than a Canadian one to adjudicate claims of this nature.

When concerns unique to parallel proceedings are grafted onto the forum non conveniens inquiry, it becomes even more apparent that Canadian courts should not be asserting jurisdiction over global class actions in these circumstances. Parallel class proceedings are seen as problematic because they create the potential for inconsistent judgments and result in a waste of both litigant and judicial resources. One author asserts:

Duplicative litigation is patently wasteful. It imposes a heavy financial burden on the parties by forcing them to litigate the same case simultaneously in two places, and sometimes in piecemeal fashion. It also needlessly consumes scarce court resources, as two judges work on the same legal problem. The waste is magnified if the ultimate judgment in one action renders the other action meaningless.<sup>205</sup>

If a U.S. and a Canadian court were to render inconsistent judgments

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<sup>203</sup> This international class conflict is further evidenced by the recent settlement of *Imax* claims in the U.S. litigation. Dimitri Lascaris, counsel for the class members in the Canadian litigation, argued that the U.S. settlement requires a sign-off by a Canadian court and that “[n]obody . . . has any business settling claims of our class members without our court’s approval.” Michael D. Goldhaber, *The Global Lawyer: Global Class Actions After Morrison*, THE AM. L. DAILY (Feb. 10, 2012, 4:03 PM), <http://amlawdaily.typepad.com/amlawdaily/2012/02/the-global-lawyer-global-class-actions-after-morrison.html>. Goldhaber notes that the *Imax* case illustrates the potential for “jurisdictional friction.” *Id.*

<sup>204</sup> This is particularly so where the foreign forum has a robust institutional and regulatory framework to properly address the securities fraud.

<sup>205</sup> Austen Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237, 244–45 (2010).

in respect of the claims of U.S. plaintiffs in *Imax*, it would be doubtful that a U.S. court would recognize a Canadian judgment over a U.S. one. If this is the case, why include those foreign claimants in the Canadian class action in the first place? This only complicates the class action and squanders judicial resources in Canada.

Perhaps most importantly, comity concerns dictate that Canadian courts exhibit restraint in certifying global class actions containing foreign claimants, particularly where the interests of such claimants are already being accommodated in foreign proceedings. In Canadian forum non conveniens jurisprudence (including class jurisprudence), the notion of comity is paramount.<sup>206</sup> At its basic level, comity connotes the idea that courts in one country owe due respect and deference for the courts of another.<sup>207</sup> Austen Parrish describes the role of comity in parallel proceedings as follows:

Continuing a case, when the same case between the same parties was already filed in a foreign forum, can implicate foreign relations and breed resentment. As one scholar notes, “[n]ot only are foreign relations apt to be more fragile than” state-to-state and federal-to-state relations, “but they are also more apt to be disturbed—specifically by the apparent interference of one state’s courts in the judicial business of another’s.” In high-profile suits, duplicative litigation can potentially interfere with the executive’s management of foreign affairs. And when duplicative litigation proceeds simultaneously in two countries, courts are aware of the key role they play. “One court may be asked to accelerate (or delay) its adjudication to thwart (or enhance) the potentially preclusive effect of a result in the other court, a strategy that squarely pits docket against docket, if not court against court.”<sup>208</sup>

By proceeding with domestic litigation in the face of identical (or nearly identical) litigation elsewhere, courts in one country risk offending those in another by implying that the latter are not as well-equipped to

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<sup>206</sup> See, e.g., *Ingenium Technologies Corp. v. McGraw-Hill Co.*, 2005, BCCA 358, [2005] 255 D.L.R. 4th 499, para. 26 (Can. B.C.C.A.) (comity required that B.C. action be stayed in favor of action proceeding in New York; court indicated that to allow action to proceed in B.C. “would raise the real potential for conflicting decisions in the resolution of the dispute and markedly increase the cost of the litigation, all to no avail.”).

<sup>207</sup> See *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (“‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it 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 other persons who are under the protection of its laws.”).

<sup>208</sup> Parrish, *supra* note 205, at 246–47 (citations omitted).

adjudicate the case. Although Canadian courts have customarily been sensitive to comity concerns, the *Imax* case appears to be an outlier.

When the dispute at issue is one which, while private, also implicates broader regulatory policy, comity concerns become even more pressing. A Canadian court's assertion of jurisdiction in a case such as *Imax* may interfere with the U.S.'s ability to regulate securities fraud in the manner of its choosing. Silberman argues, for instance, that although a single class action in Canada initially seems "more attractive than fragmentation of the litigation" it may be that "multiple actions ... best approximate the appropriate allocation of enforcement authority."<sup>209</sup> She suggests that "[d]ifferent standards of liability and different methods of private enforcement apply under these different regimes, and it may be sensible to recognize these differences."<sup>210</sup> The U.S. Supreme Court expressed a similar sentiment in *Morrison*:

Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters. [Various countries] have filed amicus briefs in this case . . . They all complain of the interference with foreign securities regulation that application of §10(b) abroad would produce[.]<sup>211</sup>

The reasoning in *Morrison* suggests that Canadian courts should be wary of adjudicating the claims of foreign plaintiffs where to do so would interfere with interests of foreign nations in the regulation of their securities markets.

The court in *Imax* failed to account for the existence of foreign parallel class proceedings in its decision to certify a global class action. Any consideration of the issue would entail analyzing the underlying factual connection of the dispute with a foreign jurisdiction, the possibility for inconsistent results, the potential that a Canadian judgment would not be recognized abroad, inefficiencies associated with multiple proceedings and the role of comity. Had these factors been considered by the *Imax* court, it would have undoubtedly come to the conclusion that Ontario was not the most appropriate forum for the resolution of the claims of foreign shareholders.

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<sup>209</sup> Silberman, *supra* note 1, at 16.

<sup>210</sup> *Id.*

<sup>211</sup> *Morrison*, 130 S. Ct. at 2885–86.

### E. Notice and Procedural Rights

An analysis of global class actions would be incomplete without a discussion of the notice issues presented by the certification of a class action containing foreign claimants. Under an opt-out regime, absent claimants are apprised of the class action proceedings and their right to opt-out through the provision of notice to the class. Class action notices generally describe the proceedings and fee agreements, indicate that a judgment will be binding on all class members, and state the manner by which claimants may opt out of the proceeding.<sup>212</sup> Since absent class members are not actively involved in the class action proceeding, the notice preserves their litigation autonomy by providing them with a practical means to “exit” from the class.<sup>213</sup>

Notice is bound up with the conflict of laws issues at the core of global class actions. In *Currie*, Justice Shape suggested that notice and the right to opt out were relevant to the question of jurisdiction *simpliciter* over foreign class members. In particular, he observed that “before concluding that Ontario law should recognize the jurisdiction of the Illinois court . . . we should be satisfied that the procedures adopted in the [Illinois] action were sufficiently attentive to the rights and interests of the unnamed non-resident class members.”<sup>214</sup> He concluded that “respect for procedural rights,

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<sup>212</sup> See, e.g., Province of Ontario Class Proceedings Act, R.S.O. 1992, c. 6, S.17 (Can.).

<sup>213</sup> On the notion of “exit” from class actions, see, e.g., John Coffee Jr., *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); see also *Canada Post v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, para. 42 (Can.) (“[A]dequate information is necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding. The notice procedure is indispensable in that it informs class members about how the judgment authorizing the class action or certifying the class proceedings affects them, about the rights – in particular, the possibility of opting out of the class action – they have under the judgment.”).

<sup>214</sup> *Currie v. McDonald’s Restaurants of Can. Ltd.*, [2005] 250 D.L.R. 4th 224, para. 25 (Can.); see also *id.* 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.”). For academic commentary on this aspect of the *Currie* case, see Saumier, *supra* note 106, at 19 (“*Currie* must stand for the view that the adequacy of notice in class actions goes to jurisdiction by way of the fairness principle under *Morguard*.”); Ellen 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.*, 2 CAN. CLASS ACTION REV. 217, 238 (2005) (“The *Currie* decision in turn imports these procedural rights into applying the real and substantial connection test and thus changes the law in this area. Post-*Currie* it appears that the real and substantial connection test has a new dimension to it; the test is no longer limited to assessing whether there is a sufficient nexus between the forum and the action, but will now also assess the fairness of the proceedings to determine whether or not the assumption of jurisdiction is justified.”).

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.”<sup>215</sup> It is unclear whether notice and the right to opt-out are appropriately part of the jurisdiction *simpliciter* analysis.<sup>216</sup> What is clear, however, is that these procedural safeguards are relevant to the recognition/enforcement of a class judgment. Canadian courts will refuse to recognize or enforce a foreign judgment, including a class judgment, when it was rendered contrary to principles of natural justice.<sup>217</sup> In *Currie*, the Ontario Court declined to recognize the U.S. class judgment on the basis that it failed to satisfy minimum Canadian standards of natural justice. The court concluded that “the wording of the notice was so technical and obscure that the ordinary class member would have difficulty understanding the implications of the proposed settlement on their legal rights in Canada or that they had the right to opt out.”<sup>218</sup> Thus, notwithstanding whether notice goes to the issue of jurisdiction or to the defense of natural justice (or both), it remains a critical conflict of laws concern associated with global class actions.

The court in *Imax* was attuned to the notice issues presented by the existence of foreign class members, and in fact rejected the litigation plan proposed by the plaintiff because it “fail[ed] to address issues specific to a global class.”<sup>219</sup> In particular, the plan did not identify the steps that needed to be taken to address the interests of non-resident class members and lacked detail with respect to the form, substance and distribution of notice to non-resident class members.<sup>220</sup> The court thus made global class certification contingent upon the plaintiffs’ submission of an acceptable amended litigation plan.<sup>221</sup>

Providing adequate notice to foreign class members complicates already-complex class action litigation. The parties will need to identify the

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<sup>215</sup> *Currie v. McDonald’s Restaurants of Can. Ltd.*, [2005] 250 D.L.R. 4th 224, para. 25 (Can.).

<sup>216</sup> *See, e.g., Snow, supra* note 214, at 242 (“[T]he better and more principled approach to protecting plaintiffs comes from distinguishing between questions of jurisdiction and the defense of natural justice.”).

<sup>217</sup> *CASTEL & WALKER, supra* note 164, at §14.8 (“A foreign judgment can be impeached if the proceedings in which the judgment was obtained were contrary to natural justice. The failure to provide adequate notice of the proceeding and sufficient opportunity to be heard are primary breaches of natural justice . . .”).

<sup>218</sup> *Currie v. McDonald’s Restaurants of Can. Ltd.*, [2005] 250 D.L.R. 4th 224, para. 39 (Can.). The Court of Appeal in *Currie* was also concerned about the reach of the class action notice—and, in particular, that notice reached more class members in the United States than it did in Canada.

<sup>219</sup> *Silver v. Imax Corp.*, (2009) 86 C.P.C. 6th 273, para. 229 (Can. Ont. Sup. Ct. J.) (Certification Decision).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at para. 231.

location of foreign class members, craft a special notice to address foreign class members' interests, identify the means of disseminating the class action notice abroad, potentially set up a foreign claims administration process, etc. Getting notice "noticed" in a foreign country can be a challenging undertaking.

When parallel (foreign and Canadian) class proceedings are underway, there is additional difficulty in providing notice. Putative class members who are included in both classes may receive two separate and contradictory notices. Such was the case in *Lépine*, where class members in Québec received one notice indicating that they were part of an Ontario class settlement and another indicating that they were a member of a Québec class action. In refusing to enforce the Ontario class settlement against Québec class members, the Supreme Court observed that notice was "particularly important" in a case where parallel proceedings were underway.<sup>222</sup> Given that the Ontario notice "made it look like the Ontario proceeding was the only one," absent class members in Québec could not meaningfully understand their rights.<sup>223</sup> As much as the existence of parallel class proceedings is a concern for notice inter-provincially, it is even more so internationally. Should Canadian courts take into account parallel foreign proceedings in crafting class action notices for foreign class members? If so, how exactly can Canadian courts apprise foreign class members through notice that they are part of *two* different class actions—one Canadian, one in their home countries—in a way that the class members can meaningfully understand? Even if the Canadian notice could be carefully tailored to explain the existence of parallel proceedings and their implications, would that fact *in itself* constitute grounds for a foreign court to find the Canadian notice confusing and thereby refuse to recognize a Canadian class judgment?<sup>224</sup> These issues were very recently litigated in the *Imax* case. The plaintiffs maintained that the Canadian notice should not make reference to the U.S. proceedings as any such reference would be "confusing and unnecessary and would not assist class members in making an informed decision."<sup>225</sup> The defendants and the lead plaintiff in the U.S.

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<sup>222</sup> *Canada Post v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, para. 45 (Can.).

<sup>223</sup> *Id.*

<sup>224</sup> *The Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings*, which has been adopted by the ABA Litigation Section Council, suggests that notice should include "a description of any other class action of which counsel or their client(s) are aware involving or arising out of (in whole or in part) the same claims or events as in the case before the Court and in which an alleged or certified class's membership includes some or all of the members of the class in the case that is the subject of the notice." *Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings*, 2011 A.B.A. SEC. LITIG. § 5(b), available at [http://www.americanbar.org/content/dam/aba/events/labor\\_law/am/1106\\_aball\\_int\\_crossborder\\_class\\_action\\_coordination.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/am/1106_aball_int_crossborder_class_action_coordination.authcheckdam.pdf).

<sup>225</sup> *Silver v. Imax*, 2012 ONSC 1047, para. 47.

proceeding argued the opposite—that the notice should provide the plaintiffs with key information they would need to make an informed opt-out decision. As such, “[u]nless a ‘fully descriptive’ notice is provided, there remains a significant risk that a U.S. court would not give full faith and credit to a judgment or settlement . . . in relation to NASDAQ purchasers who had not opted out.”<sup>226</sup> After considering various sources of authority, including the testimony of two U.S. experts, Justice van Rensburg held that a fulsome description of the U.S. proceedings in the Canadian notice was premature. In this respect, she stated:

At this stage the overlapping class members have not received any notice in the U.S. Proceedings, although they may be aware of the existence of such proceedings. Because there is another class proceeding pending, which may in the future affect overlapping class members’ interests, and in which they may receive notices, the notice issued in these proceedings should inform class of the existence of the U.S. Proceedings. In order to ensure that there is no confusion, they should be specifically advised that it is unnecessary for a class member to opt out of the Ontario proceedings in order to participate in the U.S. Proceedings.

The notice should direct class members to a source of information about the other proceedings, but it should not attempt to summarize the status or evaluate the merits of the U.S. Proceedings. Any notice that purported to contain detailed information about the U.S. Proceedings or that compared the two proceedings would be confusing. Even experienced counsel would find it impossible to predict the forum in which the NASDAQ purchasers would likely be more successful. In any event, such information is entirely unnecessary and would not assist overlap class members in making the only decision they need to make at this time – whether to opt out or remain members of both classes.<sup>227</sup>

As the latest decision in the *Imax* saga plainly illustrates, notifying a class of foreign claimants that it is part of a Canadian class action, particularly when there are parallel proceedings ongoing in the foreign claimants’ home country, raises some difficult issues.

A related issue worth considering is the limits on the effectiveness of notice for foreign class members who reside outside of the United States.<sup>228</sup>

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<sup>226</sup> *Id.* at para. 48.

<sup>227</sup> *Id.* at para. 96–97 (Justice van Rensburg’s forty-two-page judgment telegraphs the turf wars that are the likely result of certifying overlapping class actions).

<sup>228</sup> On the ineffectiveness of notice generally in the United States, see Shannon R.



While the court in *Imax* case certified a “global” class, the reality is that the overwhelming majority of the foreign class members were American. Given that most Americans speak English and at least have a passing familiarity with the concept of a “class action,”<sup>229</sup> the idea of crafting notice for American claimants is not so difficult to imagine. However, it becomes considerably more complex to design a notice to be sent to absent class members in a foreign country who do not speak English and have never even heard the term “class action.”<sup>230</sup> One American commentator describes the issue as follows:

Language issues can arise when a non-English speaker receives a class action notice printed in English. Language issues can also arise even when the class action notice is printed in the foreign claimant’s native language. “As anyone who has ever tried to translate a document from a foreign language knows, a literal word-by-word, or even sentence-by-sentence, translation of a foreign document will at best confuse . . . and at worst produce nonsense.”

Unfamiliarity with the legal system generally, and with class actions in particular, can also interfere with the foreign claimant’s comprehension of the class action notice. Class actions exist in few jurisdictions outside the United States, so the class action concept may be unknown to the foreign claimant. Thus, potential language

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Wheatman & Terri R. LeClercq, *Majority of Class Action Publication Notices Fail to Satisfy Rule 23 Requirements*, 30 REV. OF LITIG. 53 (2011).

<sup>229</sup> Anecdotally, the author surmises that most people’s familiarity with class actions comes from the 2000 blockbuster film, *Erin Brockovich*.

<sup>230</sup> Very few countries outside the United States have anything akin to a U.S.-style class action. See Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 16 (2009) (“Because the United States has been the leading model for class action adoption in recent years, its choices with regard to these different class action procedure design features—standing for private actors to represent a class, trans-substantive application of the procedure, availability of money damages, and an opt-out rather than an opt-in procedure for money damage class actions—constitute what has come to be known as a ‘U.S.-style class action.’ Of the eighteen countries that reported some form of class action procedure, only six in addition to the United States have such a class action regime: Australia, Canada, Indonesia, Israel, Portugal, and Norway.”). In fact, many foreign countries are deliberately taking steps to fashion collective redress procedures that do not mimic those in the United States. See Issacharoff & Miller, *supra* note 141, at 180 (“And, yet, one need spend only a few minutes in conversations with European reformers before the proverbial ‘but’ enters the discourse: ‘But, of course, we shall not have American-style class actions.’ At this point, all participants nod sagely, confident that collective actions, representative actions, group actions, and a host of other aggregative arrangements can bring all the benefits of fair and efficient resolution to disputes without the dreaded world of American entrepreneurial lawyering. And no doubt the American entrepreneurial ways must and will be resisted fully, in much the same way that Europe has held off the unwelcome presence of McDonald’s or Starbucks in its elegant piazzas.”).

issues, unfamiliarity with the U.S. legal system, and the natural human tendency to ignore that which we do not understand, all combine to render notice potentially ineffectual for foreign claimants.<sup>231</sup>

Clearly, if Canadian courts continue to entertain the prospect of global class actions, the time will come where legal, cultural, and linguistic considerations will factor into the notice equation.

Finally, in order for a Canadian class judgment to bind foreign plaintiffs, such claimants must be adequately represented.<sup>232</sup> This encompasses both adequate representation by a named class plaintiff as well as adequate representation by class counsel. Due regard for the procedural rights of foreign absent claimants may dictate the creation of foreign subclasses and/or the appointment of foreign class counsel to ensure that the foreign class members' interests are adequately protected.<sup>233</sup> If Canadian courts continue certifying global classes, they will need to determine what the threshold is for "adequate representation" of foreign class plaintiffs, bearing in mind that the standards may be different in the foreign forum. While the creation of foreign subclasses or the appointment of foreign class counsel is clearly not an insurmountable hurdle,<sup>234</sup> it is yet another issue that puts in a wrinkle in the global certification decision.

#### IV. CONCLUSION

Are courts in Canada "setting themselves up to be the Shangri-La's of global class action securities litigation"?<sup>235</sup> Perhaps not quite yet. While the *Imax* decision has opened the door to global securities litigation in

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<sup>231</sup> Bassett, *supra* note 133, at 65–66; *see also* Buschkin, *supra* note 144, at 1582–83 ("When many of the potential class members live outside of the United States, determining what constitutes adequate notice is more complicated. Linguistic and cultural barriers make it more difficult to 'communicate effectively to [foreign] claimants their rights and options.' If the judge is not familiar with the language, customs, literacy levels, or print-media sources of the foreign countries in which the potential class members reside, it is virtually impossible to draft an order identifying the 'best notice practicable under the circumstances.' If the foreign class members do not receive adequate notice, they cannot be bound to the class settlement or final judgment, because binding them without proper notice would violate their due process rights.").

<sup>232</sup> Adequate representation at all times is a jurisdictional predicate in the United States. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

<sup>233</sup> For an American perspective on the ethical issues involved in multi-jurisdictional class litigation practice, *see* Rex R. Perschbacher, *Lawyers and Ethical Issues/Considerations In Cross-Border Class Action Litigation*, 2004 MICH. ST. L. REV. 735, 736 (2004).

<sup>234</sup> *See* Bassett, *supra* note 133, at 85 (noting that "subclasses increase class litigation complexity and may invoke potential manageability issues").

<sup>235</sup> Silberman, *supra* note 1, at 17.

Canada, it is not clear how long that door will remain open.

The certification of global classes in Canada raises a myriad of conflict of laws complications. First, there are unsettled questions regarding the circumstances under which a Canadian court can assume jurisdiction over foreign class members: is the real and substantial connection test, developed to govern the question of jurisdiction over *ex juris* defendants, the appropriate test to govern the unique issue of personal jurisdiction over foreign claimants? If so, how is the real and substantial connection test to be applied in this context? Is the “commonality of interest” approach that has found favor in some courts applicable to foreign (as opposed to non-resident) claimants? Second, the certification of global classes in Canada raises issues related to the recognition of an eventual class judgment: What role should the eventual preclusive effect of a Canadian class judgment play in the certification calculus? If a foreign court would refuse to grant *res judicata* effect to a Canadian judgment containing foreign claimants, why include those claimants in the class definition to begin with? Is an opt-in regime for foreign claimants a viable solution to the *res judicata* problem? Third, global classes in Canada raise intricate choice of law problems: What law governs the statutory claims of claimants who purchase and sell securities on a foreign exchange? Would a Canadian court apply foreign securities laws in a domestic proceeding, or would the foreign public law exception bar the application of foreign law in this context? What law governs the common law claims of shareholders? How do all these choice of law issues impact the certification of a global class action? Fourth, the existence of foreign parallel proceedings adds another twist in the road: How much weight should Canadian courts give overlapping foreign proceedings when deciding whether to certify a global class? How should concerns about multiplicity of proceedings and comity figure into the certification or *forum non conveniens* decision? Finally, the certification of global classes creates additional problems of notice and representation. How do courts ensure that notice gets “noticed” in a foreign country? Are there cultural or linguistic concerns that need to be accounted for? How do Canadian courts craft adequate notice when foreign parallel proceedings are underway? Do separate class representatives or class counsel need to be appointed to represent the interests of foreign claimants?

The *Imax* court provided a disappointing answer to these questions. Its solution to many of these conflict of laws concerns was simply to “wait and see” how they developed and then to deal with the issues “as appropriate.”<sup>236</sup> The court failed to recognize, however, that the conflict of laws considerations are fundamentally connected with the propriety of certifying a global class. To certify a class without accounting for the

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<sup>236</sup> *Silver v. Imax Corp.*, (2009) 86 C.P.C. 6th 273, para. 164 (Can. Ont. Sup. Ct. J.) (Certification Decision).

conflict of laws issues is like spilling a glass of water, only to indicate that it can be “un-spilled” later, if need be. The decision to certify a global class action (as opposed to a national class, or not certifying a class at all) will shape subsequent litigation strategy and settlement dynamics. So it is important to get it right the first time.

To be sure, *Imax* signals that global classes have come to Canada. The question is whether they are here to stay.