

MAPPING THE SERBONIAN BOG: THE TERRITORIAL LIMITS OF SECONDARY MARKET SECURITIES ACT CLAIMS UNDER THE CANADIAN CONSTITUTION – PART 1

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I. INTRODUCTION

On December 31, 2005, the Ontario legislature enacted Part XXIII.1 of the Securities Act,¹ granting for the first time a statutory right of action to secondary market investors for improprieties in an issuer's continuous disclosure. Although Part XXIII.1 claims were initially slow to emerge, three such claims have now been granted certification and leave in contested motions,² and several others are currently working their way through the courts.

The cause of action in Part XXIII.1 is virtually unlimited in territorial scope. The only requirement is that the impugned disclosure involve a public issuer "with a real and substantial connection to Ontario." In contrast to the United States, where the Supreme Court has limited the comparable statutory right of action to securities transactions within the country,³ Part XXIII.1 claims may be brought against issuers regardless of where their securities are acquired or disposed of. In *Abdula v. Canadian Solar*

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1. R.S.O. 1990, c. S.5. All of the other Canadian provinces and territories adopted analogous provisions between December 31, 2006 and October 26, 2008.
 2. *Silver v. IMAX Corp.* (2009), 66 B.L.R. (4th) 222, 184 A.C.W.S. (3d) 259 (Ont. S.C.J.), add'l reasons 86 C.P.C. (6th) 273, 184 A.C.W.S. (3d) 28, leave to appeal to Div. Ct. refused 105 O.R. (3d) 212, 80 B.L.R. (4th) 228 (Ont. S.C.J., Div. Ct.); *Dobbie v. Arctic Glacier Income Fund* (2011), 3 C.P.C. (7th) 261, 2011 ONSC 25 (Ont. S.C.J.), leave to appeal to Div. Ct. allowed 109 O.R. (3d) 607, 2012 ONSC 773 (Ont. S.C.J.); *121851 Canada Inc. v. Theratechologies Inc.*, 2012 QCCS 699, 2012 CarswellQue 1636 (Que. S.C.). A fourth case would have been granted leave and certification, but the claim was dismissed based on the limitation period in s. 138.14: *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 2012 CarswellOnt 8382 (Ont. S.C.J.). Secondary market claims were refused leave to proceed in: *Round v. MacDonald, Dettwiler and Associates Ltd.* (2011), 207 A.C.W.S. (3d) 811, 2011 BCSC 1416 (B.C.S.C.) and *Gould v. Western Coal Corp.*, 2012 ONSC 5184 (Ont. S.C.J.).
 3. See *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 177 L.Ed.2d 535 (2010).

Inc.,⁴ the Ontario Court of Appeal recently confirmed that the statutory cause of action applies to issuers whose securities are listed solely on a foreign stock exchange.

In this two-part paper, we argue that the long-arm reach of Part XXIII.1 is problematic, both for policy reasons and as a matter of constitutional principle. On its face, the scope of the legislation creates significant uncertainty for defendants regarding exposure to liability in Ontario. Furthermore, extraterritorial application of Part XXIII.1 is offensive to basic principles of comity, since it exposes foreign issuers who are in perfect compliance with securities legislation abroad to costly civil proceedings here. Left unchecked, the Part XXIII.1 cause of action will become nothing less than a “Serbonian bog,” in which “armies whole” will sink.⁵

However, the doctrine of constitutional applicability imposes restrictions on the extraterritorial application of Part XXIII.1 claims. The provincial legislatures do not possess the constitutional authority to enact legislation with unlimited extraterritorial effect. Rather, the Supreme Court of Canada has held that the territorial limits of provincial legislative authority prevent provincial legislation from applying to matters not sufficiently connected to the province.

In our view, the statutory requirement of a “real and substantial connection” between the issuer and Ontario permits the application of Part XXIII.1 to matters falling outside the constitutional limits of provincial legislative power. Courts will therefore have to develop a framework for determining the constitutional applicability of Part XXIII.1 on a case-by-case basis. However, most of the cases to date have either ignored this issue, or have conflated it with the separate but related question of whether the court itself possesses adjudicative jurisdiction over the action. In *Canadian Solar*, the only appellate decision to consider how Part XXIII.1 applies to extraterritorial claims, these constitutional considerations were left largely unexplored. Further, the Supreme Court of Canada’s jurisprudence on legislative extraterritoriality provides little guidance regarding when provincial legislation will be

4. 2012 ONCA 211, affg 206 A.C.W.S. (3d) 736, 2011 ONSC 5105, leave to appeal to S.C.C. filed (May 29, 2012), File No. 34849, [2012] S.C.C.A. No. 246 (S.C.C.).

5. “A gulf profound as that Serbonian bog betwixt Damiata and Mount Casius old, where armies whole have sunk.” John Milton, *Paradise Lost* (London, Samuel Simmons, 1667), Book II, lines 592-594. See also *Landress v. Phoenix Mutual Life Insurance*, 291 U.S. 491 (1934), at p. 499, Cardozo J., dissenting: “[t]he attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog.”

constitutionally inapplicable. The court has instead focused upon abstract principles such as “order” and “fairness,” giving little indication of how they apply in practice.

While recognizing the distinction between adjudicative and legislative jurisdiction, we argue that the Supreme Court of Canada’s new approach to adjudicative jurisdiction in *Van Breda v. Village Resorts Ltd.*⁶ provides a helpful basis for analyzing the territorial limits of Part XXIII.1 claims. Building upon *Van Breda*, we propose a framework for assessing the extraterritorial application of Part XXIII.1 claims that relies upon presumptive connecting factors between the claim and Ontario. These factors may be rebutted by the circumstances of particular cases, and new factors may be developed by courts in the future. But in the absence of a new or established presumptive connecting factor, we conclude that Part XXIII.1 should be constitutionally inapplicable.

In the first part of this paper, we review the text and legislative history of Part XXIII.1. Thereafter, we outline the constitutional principles that govern the extraterritorial application of provincial legislation in Canada. Finally, we examine the jurisprudence addressing the extraterritoriality of securities legislation in the context of regulatory litigation, which is the primary context where this issue has been ventilated by Canadian courts.

In the second part of this paper, we review the cases involving the extraterritorial scope of securities legislation in civil proceedings. We then examine the policy dimensions of these cases, and examine whether they are consistent with the principles of constitutional applicability. We conclude by proposing a new framework for the extraterritorial applicability of Part XXIII.1 claims.

II. THE STATUTORY RIGHT OF ACTION FOR SECONDARY MARKET MISREPRESENTATIONS

The securities industry is generally divided into two markets: the primary market and the secondary market. The Supreme Court of Canada explained the difference between them in *Reference re: Securities Act (Can.)*:⁷

The securities market channels savings in two basic ways: it allows demanders of investment capital (“issuers”) to receive investment capital from suppliers of capital (“investors”) in exchange for a security; and it

6. (2012), 343 D.L.R. (4th) 577, 2012 scc 17 (S.C.C.).

7. (2011), 339 D.L.R. (4th) 577, [2011] 3 S.C.R. 837 (S.C.C.), at para. 40.

allows investors to trade securities with one another. The first type of transaction occurs through the “primary” market, where issuers trade directly or indirectly with investors, while the second type of transaction is referred to as “secondary” market trading.

Prior to the enactment of Part XXIII.1 of the Securities Act, there were no legislative provisions dealing with civil liability for misrepresentations in the secondary market (*e.g.*, in press releases, annual information forms and other types of continuous disclosure). While such misrepresentations could attract criminal or regulatory censure,⁸ the only statutory civil rights of action in the legislation were with respect to primary market misrepresentations (*e.g.*, in offering documents like prospectuses), takeover bids and insider trading.⁹ Plaintiffs who sought to sue for misrepresentations in the secondary market were limited to their remedies at common law, including representative plaintiffs in class proceedings.

Part XXIII.1 changed this by giving secondary market investors a statutory right of action against issuers, directors, officers, experts and other “influential persons” for misrepresentations in “documents” and “public oral statements,” and for failures to effect “timely disclosure” of material changes as required under the Securities Act. The right of action is subject to an array of defences and limitations, including a “cap” on the damages payable by the defendant (though the cap will be ineffective, in the case of defendants other than the issuer, if they engaged in conduct tantamount to fraud). As well, before any action can be commenced, the plaintiff must obtain leave of the court pursuant to s. 138.8, which requires the plaintiff to establish that the action is brought in good faith and possesses a reasonable possibility of success at trial.¹⁰

Despite the extensive detail of these sections, and their lengthy legislative history, they contain surprisingly little guidance regarding the territorial reach of Part XXIII.1. The right of action contained in s. 138.3 is essentially unlimited in scope. It provides in part as follows:

138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases

8. See s. 122(1)(b) of the Securities Act, *supra*, footnote 1.

9. See Part XXIII of the Securities Act, *ibid*.

10. Until leave is obtained, “a s. 138.3 cause of action cannot be enforced [and] cannot be invoked as a legal right”: *Sharma v. Timminco Ltd.*, 2012 CarswellOnt 6055, 2012 ONCA 107, at para. 18.

a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against

- (a) the responsible issuer;
- (b) each director of the responsible issuer at the time the document was released;
- (c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;
- (d) each influential person, and each director and officer of an influential person . . . ; and
- (e) each expert. . . .

On a plain reading of this provision, there is nothing that restricts the right of action to events having a connection with Ontario or even Canada. The "document that contains a misrepresentation" need not be released in the province; the acquisition or disposition "of the issuer's security" need not occur on an exchange within the province; and neither the plaintiff nor any of the defendants need reside within the province. The only obvious territorial link to be found in the statute arises from the definition of "responsible issuer" in s. 138.1:

138.1

.....
 "responsible issuer" means,

- (a) a reporting issuer, or
- (b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded.

Accordingly, so long as the responsible issuer is either a "reporting issuer,"¹¹ or a publicly traded issuer with a "real and substantial connection" to Ontario, the s. 138.3 right of action may on its face be invoked by a foreign plaintiff, who acquired shares in a foreign jurisdiction, against a foreign defendant, who released a

11. A "reporting issuer" in s. 1(1) of the Securities Act includes: (a) issuers which have filed a prospectus or securities exchange takeover bid circular under the Securities Act or its predecessors since 1967; (b) issuers which have securities which have at any time since 1979 traded on a stock exchange in Ontario recognized by the Ontario Securities Commission (osc); (c) companies to which the Ontario Business Corporations Act, R.S.O. 1990, c. B.16, applies that, for the purposes of that statute, is offering its securities to the public; (d) issuers that have merged or amalgamated with another reporting issuer; or (e) issuers that have been designated as a reporting issuer under the osc's public interest jurisdiction.

misrepresentation outside the country. There is no requirement, for instance, that the plaintiff acquire securities on an Ontario or Canadian stock exchange. This feature of the Ontario legislation is mirrored in the parallel provisions adopted by the other Canadian provinces and territories, except for s. 122 of the Yukon Securities Act¹² (which defines a “responsible issuer” as either a reporting issuer, or one “with a real and substantial connection to Yukon and having issued securities that are publicly traded *in Yukon*”).¹³

In fact, there are several indications that the right of action was intended to apply to matters with territorial connections outside the province. The term “release,” for instance, is defined in s. 138.1 to mean the filing of a document with the Ontario Securities Commission “or any other securities regulatory authority in Canada or exchange.”¹⁴ Additionally, the “damages cap” in s. 138.7(1)(b) requires that any capped award be reduced by the amount assessed against the defendants in actions “under comparable legislation in other provinces or territories in Canada.” Likewise, s. 138.10 provides that, in deciding whether to approve the discontinuance of a s. 138.3 claim, the court should consider whether there are any other actions outstanding “under comparable legislation in other provinces or territories in Canada.” And the limitation periods in s. 138.14(a)(ii), 138.14(b)(ii) and 138.14(c)(ii) run from the earlier of three years of the impugned disclosure, and six months after the issuance of a news release disclosing that leave has been granted to commence an action “under section 138.3 or under comparable legislation in another province or territory of Canada.”

Accordingly, it is clear that the Legislature intended the s. 138.3 right of action to apply in respect of persons and events that have territorial connections to other Canadian provinces or territories. Indeed, the legislation contains safeguards which are designed to

12. S.Y. 2007, c. 16.

13. Emphasis added. Some of the legislation adopted by other provinces, such as Nova Scotia, Prince Edward Island, Yukon, the Northwest Territories and Nunavut, also includes issuers who are reporting issuers under the laws of another province of Canada in part (a) of the “responsible issuer” definition.

14. See also s. 138.4(14)(a), creating a “derivative information” defence to s. 138.3 claims for misrepresentations contained in documents previously filed by another person or company, other than the responsible issuer, “with the Commission or any other securities regulatory authority in Canada or an exchange.” It is noteworthy that these references to an “exchange” in ss. 138.1 and 138.4(14)(a) do not require that the exchange be a “recognized exchange,” defined in s. 1(1) to mean an exchange recognized by the osc, and hence, one necessarily connected to Ontario.

minimize the regulatory conflicts that might otherwise arise in the case of overlapping Canadian proceedings.

Yet there are also indications that Part XXIII.1 was intended to apply to matters having a territorial connection with other *countries*. Thus, the definition of “document” in s. 138.1 includes written communications that are not filed or required to be filed with the OSC, but rather “with a government or an agency of a government.” Nothing in s. 138.1 suggests that a “government” must be Canadian. Similarly, the term “principal market,” which is used in calculating damages under s. 138.5, is defined in s. 250 of the Securities Act General Regulation¹⁵ to mean either a “published market in Canada,” or *any* “published market” if the issuer’s securities were not traded on a “published market in Canada” at the relevant time. It is also noteworthy that the term “published market” (which again appears in s. 138.5 of the Securities Act itself), is defined in s. 89(1) of the Securities Act to mean “a market in Canada or *outside of Canada*.” It is true that this s. 89(1) definition is for the purposes of Part XX of the Securities Act, dealing with takeover bids. Nonetheless, in the absence of any definition of the term specific to Part XXIII.1 itself, it is reasonable to conclude that the Legislature intended the word to have the same meaning there and in the General regulation.¹⁶

Further guidance is found when one compares the Part XXIII.1 provisions with those in the other parts of the Securities Act. Pursuant to s. 89(1), for instance, the definition of “take-over bid” and “issuer bid” are limited to offers made to persons or companies “in Ontario or whose last address as shown on the books of the offeree issuer is in Ontario.” This territorial limit on the takeover bid regime in Part XX stands in contrast to the open-ended scope of Part XXIII.1. Additionally, s. 134(7) of the Securities Act, which creates a civil right of action for insider trading, defines “reporting issuer” to include “an issuer that has a real and substantial connection to Ontario and whose securities are listed and posted for trading *on the TSX Venture Exchange*.”¹⁷ As this definition is inclusive, it does not exhaust the possibility that issuers may fall within it when their shares trade on

15. R.R.O. 1990, Reg. 1015.

16. See s. 86 of the Legislation Act, 2006, S.O. 2006, c. 21, Sch. F: “Terms used in regulations have the same meaning as in the Act under whose authority they are made.”

17. A similar definition of “reporting issuer” is found in s. 76(5), which creates a regulatory prohibition upon insider trading.

exchanges other than the TSX Venture Exchange. Nonetheless, it is different than the definition of “responsible issuer” in s. 138.1, which is the operative definition for the purpose of the Part XXIII.1 right of action for secondary market misrepresentations. As noted, that s. 138.1 definition merely requires that the issuer be a reporting issuer or one “with a real and substantial connection to Ontario, any securities of which are publicly traded.” There is no requirement that the issuer’s shares be publicly traded on an Ontario exchange like the TSX Venture Exchange.

Finally the legislative history surrounding the enactment of Part XXIII.1 is telling. The provisions can be traced to a 1995 Interim Report¹⁸ and a 1997 Final Report¹⁹ by a Toronto Stock Exchange committee known as the “Allen Committee.”²⁰ The Interim Allen Report recommended that the right of action be available in respect of misrepresentations on behalf of a “reporting issuer,” and the Committee suggested that this term, which was already defined in s. 1(1) of the statute, only be expanded “to include every issuer any of the securities of which are publicly traded *in the jurisdiction in question.*”²¹ The Interim Allen Report also contained the interesting suggestion that the right of action should not apply to “foreign issuers, except for disclosure made to Canadians.”²² In the Final Allen Report, the proposed legislation was again restricted to claims involving a “reporting issuer,” which it again recommended include only “every issuer any of the securities of which are publicly traded *in the jurisdiction in question.*”²³ Accordingly, at its inception, Part XXIII.1 was not intended to apply to issuers whose securities were traded only outside the province.

However, this limitation on the territorial scope of Part XXIII.1 was deliberately eliminated in *CSA Notice 53-302*,²⁴ where the

18. Toronto Stock Exchange Committee on Corporate Disclosure, *Toward Improved Disclosure: A Search for Balance in Corporate Disclosure*, Vol. I (Toronto, Toronto Stock Exchange, 1995) (“Interim Allen Report”).

19. Toronto Stock Exchange Committee on Corporate Disclosure, *Responsible Corporate Disclosure: A Search for Balance: Final Report* (Toronto, Toronto Stock Exchange, 1997) (“Final Allen Report”).

20. Additional proposals for statutory civil liability in respect of secondary market disclosure had been made before the Allen Committee, but were not taken up: see M.R. Gillen, *Securities Regulation in Canada*, 3rd ed. (Toronto, Carswell, 2007), at p. 225; and A.C. Pritchard and J.P. Sarra, “Securities Class Actions Move North: A Doctrinal and Empirical Analysis of Securities Class Actions in Canada” (2010), 47 *Alta. L. Rev.* 881, at note 40.

21. Interim Allen Report, *supra*, footnote 18, at p. 74, note 18 (emphasis added).

22. *Ibid.*, at p. 62, note 3.

23. Final Allen Report, *supra*, footnote 19, at p. 63, note 99 (emphasis added).

Canadian Securities Administrators (CSA) proposed its own civil secondary market legislation that built upon the proposals of the Allen Committee. The proposed CSA legislation contained, for the first time, the definition of a “responsible issuer” as either a reporting issuer, or an issuer “with a substantial connection to Ontario any securities of which are publicly traded.”²⁵ Thus, in contrast to the legislation proposed by the Allen Committee, the CSA’s proposed legislation did not require that the issuer’s securities be traded “in the jurisdiction in question.” Rather, it only required that the issuer’s securities be publicly traded, and that the issuer *itself* — quite apart from its *securities* — possess a substantial connection to Ontario. The CSA gave no indication of why it chose to abandon the Allen Committee’s territorial limitation in its proposal, but suggested cryptically that its “responsible issuer” definition sought “to reflect the general approach in the original Allen Committee recommendation.”²⁶

The CSA’s proposed legislation was ultimately enacted, with minor revisions, as Part XXIII.1 of the Securities Act.²⁷ The only change from a territorial perspective was that the definition of “responsible issuer” required non-reporting issuers to have a “real and substantial” connection rather than a “substantial” one to Ontario. However, there was no reference to the territoriality issue in the debates of the Ontario Legislature when Part XXIII.1 was enacted.

It is apparent from this review that Part XXIII.1 was intended to apply to matters having territorial connections outside Ontario and even Canada. Although there is a well-established presumption of statutory interpretation that legislation is not designed to apply extraterritorially,²⁸ the text, context and legislative history of Part XXIII.1 all suggest that the legislature intended to extend the right of action to extraterritorial persons and events.

24. *CSA Notice 53-302 – Proposals for a Statutory Civil Remedy for Investors in the Secondary Market and Responses to the Proposed Changes to the Definitions of “Material Fact” and “Material Change”* (2000), 23 O.S.C.B. 7383. Prior to the *CSA Notice*, the CSA had proposed draft legislation in 1998 which was based upon the model legislation proposed by the Allen Committee: see (1998), 21 O.S.C.B. 3367.

25. *Ibid.*, at p. 7433.

26. *Ibid.*, at p. 7406.

27. The legislation was first introduced in the Ontario Legislature as Bill 198, in 2002. Bill 198 simply incorporated the definition of “responsible issuer” in the CSA’s 2000 proposed legislation. However, the relevant parts of Bill 198 were never proclaimed, and the legislation was reintroduced in 2004 as Bill 149, which was ultimately enacted as Part XXIII.1.

28. See footnote 36 below.

In *Canadian Solar*, the Ontario Court of Appeal considered many of the foregoing provisions and materials, and confirmed that, as a matter of statutory interpretation, the right of action in s. 138.3 can be asserted in respect of misrepresentations involving a non-reporting issuer whose securities are traded solely on a non-Canadian exchange. Hoy J.A. specifically rejected the submission that the second part of the definition of “responsible issuer” in s. 138.1 should be read subject to an implied limitation that the issuer’s securities be publicly traded in Canada.²⁹ At the same time, she declined to provide any further guidance about the type of territorial connection required in order for s. 138.3 to apply.

Accordingly, at least as a matter of statutory interpretation, it seems clear that a real and substantial connection between the province and the public issuer is all that is required for s. 138.3 to apply extraterritorially. As noted by the authors of *Securities Law and Practice*, this means it “could catch foreign public companies with significant operations in the applicable province, even though they have done nothing to access Canadian capital markets.”³⁰ The real question is whether this test is constitutionally sufficient.

III. CONSTITUTIONAL LIMITS ON THE EXTRATERRITORIALITY OF PROVINCIAL LEGISLATION

Legislative extraterritoriality may be defined as the “operation of laws upon persons or rights existing beyond the territorial limits of the state enacting such laws.”³¹ Legislation cannot ordinarily be “extraterritorial” in the sense that it is unilaterally enforceable by the enacting state within the territorial limits of another state.³² However, legislation can be “extraterritorial” in the sense that it unilaterally attaches intraterritorial consequences to extraterritorial events, which may then be enforced by the enacting state within its own boundaries.³³ In Canada, the power to enact this latter

29. *Canadian Solar*, *supra*, footnote 4, at paras. 1-2, 10-11 and 39.

30. P.G. Findlay *et al.*, eds., *Securities Law and Practice*, 3rd ed. (Toronto, Carswell) (looseleaf), at p. 23A-11, para. 23.A.2.13.

31. *R. v. Cook* (1998), 164 D.L.R. (4th) 1, [1998] 2 S.C.R. 597 (S.C.C.), at para. 27.

32. See *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256, [1990] 3 S.C.R. 1077 at p. 1095 (S.C.C.); and *R. v. Hape* (2007), 280 D.L.R. (4th) 385, [2007] 2 S.C.R. 292 (S.C.C.), at paras. 60, 65 and 68-69.

33. See *British Columbia Electric Railway v. The King*, [1946] 4 D.L.R. 81, [1946] A.C. 527 at p. 542 (P.C.); *Hape*, *supra*, footnote 32, at paras. 59-60 and 63-65; and P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto, Carswell) (looseleaf), Vol. 1, at p. 13-1, para. 13.1.

form of legislation is subject to a range of constitutional constraints.

To begin, it is clear that the federal Parliament is constitutionally capable of enacting statutes with extraterritorial effect. Parliament's power to legislate extraterritorially is recognized in s. 3 of the Statute of Westminster, 1931,³⁴ which expressly states that "the Parliament of a Dominion has full power to make laws having extra-territorial operation." The Statute of Westminster has been incorporated directly into the Constitution of Canada.³⁵ Accordingly, while there exists a presumption of statutory interpretation that Parliament does not intend to legislate extraterritorially,³⁶ it is open to Parliament to do so where its statutory intent is clear.

The situation with respect to the provincial legislatures is different; they are constitutionally incapable of enacting extra-territorial legislation. This limitation flows from at least two sources.³⁷ The first are the opening words of s. 92 of the Constitution Act, 1867,³⁸ which only enable the provincial legislatures to make laws in relation to their enumerated s. 92 heads of power "In each Province."³⁹ By virtue of this language, each province lacks the ability to legislate in relation to matters arising outside its territorial boundaries. The second limitation is associated with the Statute of Westminster, which, as noted, vests Parliament — but only Parliament — with the jurisdiction to enact extraterritorial jurisdiction. By contrast, most of the provinces, like the old colonies of the British Empire, never achieved external sovereignty or personhood on the international stage.⁴⁰ They are

34. 1931, 22 Geo. V, c. 26 (U.K.). See also *Hape*, *supra*, footnote 32, at paras. 66 and 68.

35. See s. 52(2)(b) of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11, and item 17 of the Schedule thereto.

36. *SOCAN v. Canadian Assn. of Internet Providers* (2004), 240 D.L.R. (4th) 193, [2004] 2 S.C.R. 427 (S.C.C.), at paras. 54-55 and 60; *Hape*, *supra*, footnote 32, at paras. 34-69.

37. See R.E. Sullivan, "Interpreting the Territorial Limitations on The Provinces" (1985), 7 S.C.L.R. 511, at p. 529.

38. (U.K.) 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

39. *Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General)* (1984), 8 D.L.R. (4th) 1, [1984] 1 S.C.R. 297 at p. 328 (S.C.C.); *Unifund Assurance Co. of Canada v. Insurance Corp. of British Columbia* (2003), 227 D.L.R. (4th) 402, [2003] 2 S.C.R. 63 (S.C.C.), at paras. 50-51; *British Columbia v. Imperial Tobacco Canada Ltd.* (2005), 257 D.L.R. (4th) 193, [2005] 2 S.C.R. 473 (S.C.C.), at para. 26.

40. See *Reference re: Ownership of Offshore Mineral Rights* (1967), 65 D.L.R. (2d) 353, [1967] S.C.R. 792 (S.C.C.), at pp. 816-817 and 821; *Reference re: Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* (1984), 5 D.L.R. (4th) 385, [1984] 1 S.C.R. 86 (S.C.C.), at pp. 99-105. The exception here is

therefore precluded from enacting extranational legislation, which could adversely affect Canada's international relations,⁴¹ and arguably impinge upon Parliament's exclusive jurisdiction under the Statute of Westminster.⁴²

As a result of these limitations, the Supreme Court of Canada has recognized that provincial legislation having extraterritorial effects may either be constitutionally *invalid* or constitutionally *inapplicable*. The distinction between these two concepts is underdeveloped, and is sometimes conflated by the courts. As a general matter, however, the following may be stated:

- (1) Extraterritorial provincial legislation will be constitutionally invalid where its pith and substance (*i.e.*, its dominant, non-incidental characteristic) does not possess a sufficient territorial connection to the enacting province. This issue is largely determined on a general basis, without reference to the impact of the legislation upon specific extraterritorial persons, rights or events.
- (2) Extraterritorial provincial legislation will be constitutionally inapplicable where, although its pith and substance does possess a sufficient territorial connection to the enacting province, it nevertheless has incidental extraterritorial effects upon individual persons, rights or events that are not themselves sufficiently connected to the enacting province. This issue is largely determined on a contextual basis, where otherwise valid legislation is by its general terms inapplicable under specific facts.⁴³

Newfoundland, which may have possessed external sovereignty between from 1926-1934: *Continental Shelf*, *supra*, at pp. 103-109 and 112.

41. *Offshore Mineral Rights*, *supra*, at p. 821; *Continental Shelf*, *supra*, at p. 101. See also R.E. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ontario, LexisNexis Canada Inc., 2008), at pp. 737 and 740.
42. See *Ordon Estate v. Grail* (1998), 166 D.L.R. (4th) 193, [1998] 3 S.C.R. 437 (S.C.C.), at para. 88, where the court suggested that the exclusivity of Parliament's constitutional jurisdiction over navigation and shipping stemmed in part from its international dimensions and the corresponding requirement for uniformity in maritime law principles, including because of the effect provincial maritime legislation could have upon Canada's international treaty obligations. These comments would seem to apply with equal force to Parliament's constitutional jurisdiction over extranational legislation.
43. See *Québec (Sa Majesté du Chef) v. Ontario Securities Commission* (1992), 10 O.R. (3d) 577 at pp. 585-586, 97 D.L.R. (4th) 144 (Ont. C.A.), leave to appeal to S.C.C. refused 101 D.L.R. (4th) viii, [1993] 2 S.C.R. x (S.C.C.); *Hunt v. T&N plc* (1993), 109 D.L.R. (4th) 16, [1993] 4 S.C.R. 289 at p. 331 (S.C.C.); *Unifund*, *supra*, footnote 39, at para. 67.

In addition to the distinction between constitutional invalidity and inapplicability, each of which centers around legislative jurisdiction, courts have also observed that extraterritoriality may raise issues regarding adjudicative jurisdiction and choice of law. As Lambert J.A. summarized in *British Columbia v. Imperial Tobacco Canada Ltd.*:

There are at least four different questions which may arise in relation to issues of Extra-territoriality. The first is whether legislation that is said to have an extra-territorial purpose or effect has constitutional validity. The second is whether legislation that is constitutional has an incidental extra-territorial application which makes that application of the legislation unconstitutional. The third is whether the courts of the Province have jurisdiction to deal with an issue or an aspect of an issue which has extra-territorial roots or connections. And the fourth is what should be the choice of law to be applied by the courts of a Province in dealing with a case where an issue or an aspect of an issue has extra-territorial roots or connections. These are separate questions, each of which must be resolved by the analysis appropriate for that question. That is not to deny that the answer to one of the questions may have an impact on finding an answer to another of the questions.⁴⁴

It is important to keep these different concepts distinct, though as Lambert J.A. notes, the principles applicable to each may “have an impact” in relation to those developed under the others.

It is the concept of constitutional “inapplicability” that is most relevant when determining the territorial limits of Part XXIII.1. While it could be argued that Part XXIII.1 is constitutionally invalid by reason of its extraterritoriality,⁴⁵ this argument is unlikely to be seriously entertained by a Canadian court. Further, even if a court were to find that Part XXIII.1 is *prima facie* invalid, it may still be able to save the legislation under the ancillary doctrine.⁴⁶

44. *British Columbia v. Imperial Tobacco Canada Ltd.* (2004), 239 D.L.R. (4th) 412, [2004] 9 W.W.R. 230 (B.C.C.A.) at para. 23, affd 257 D.L.R. (4th) 193, [2005] 2 S.C.R. 473 (S.C.C.) (“*Imperial Tobacco* (BCCA 2004)”).

45. In order to make the constitutional invalidity argument, one would have to focus upon the extraterritorial effects of Part XXIII.1 rather than its ostensible purpose, and assert that those effects disclose a pith and substance which prevents Part XXIII.1 from having a meaningful connection to Ontario and which fails to respect the legislative sovereignty of other territories: see *Imperial Tobacco*, *supra*, footnote 39, discussed below. However, these extraterritorial effects would likely be dismissed on the basis that they are incidental to the true pith and substance of Part XXIII.1: see *Global Securities Corp. v. British Columbia (Securities Commission)* (2000), 185 D.L.R. (4th) 439, [2000] 1 S.C.R. 494 (S.C.C.), at paras. 24 and 38.

46. See *General Motors of Canada Ltd. v. City National Leasing* (1989), 58 D.L.R.

The modern starting point for the doctrine of constitutional applicability of provincial legislation is the decision of the Supreme Court of Canada in *Unifund Assurance Co. of Canada v. Insurance Corp. of British Columbia*.⁴⁷ The ruling in *Unifund* is of particular interest in determining the extraterritorial reach of s. 138.3 of the Securities Act, since it concerned the constitutional applicability of a statutory cause of action in the context of private litigation.⁴⁸

In *Unifund*, Binnie J., for the majority, held that questions of constitutional applicability can be “organized around the following propositions”:⁴⁹

1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;
2. What constitutes a “sufficient” connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;
3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;
4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.

In addition, the following principles can be drawn from Binnie J.’s judgment:

- (1) The territorial restrictions upon provincial legislative power are intimately connected to the principles of Canadian federalism, by which each province must respect the legislative sovereignty of other provinces, and can expect the same in return. In light of these principles, courts must consider not only the view of the enacting province, but also the collective interest of the federation as a whole in order and fairness.⁵⁰

(4th) 255, [1989] 1 S.C.R. 641 at pp. 683-693 (S.C.C.); and *Global Securities, supra*, at para. 45.

47. *Supra*, footnote 39.

48. As with s. 138.3 of the Securities Act, the cause of action in *Unifund* was embedded within a regulatory statute — the Insurance Act, R.S.O. 1990, c. I.8 — so the issue before the court was also phrased as involving the application of the Ontario “regulatory scheme” to the B.C. insurer: see *Unifund, supra*, footnote 39, at paras. 55 and 106. Nonetheless, the court repeatedly emphasized elsewhere that: “[t]he question before us is quite specific: Does the respondent have a *statutory cause of action* against the appellant given the constitutional limitations on the reach of the Ontario Insurance Act” (*Unifund, supra*, at para. 81 (emphasis added)).

49. *Unifund, supra*, footnote 39, at para. 56.

- (2) The flexible nature of the extraterritoriality principle in modern jurisprudence means that constitutional applicability is no longer determined solely by whether the defendant has a physical presence within the enacting province, as had previously been the case. Instead, a more malleable “sufficient connection” test is applied, in which the degree of connection required will vary depending upon the subject matter of the dispute, the type of jurisdiction being asserted, and the relationship between the enacting province and the person or entity sought to be regulated by it having regard to the subject matter of the legislation.⁵¹
- (3) A “real and substantial connection” between the province and the defendant, such as may justify the assertion of adjudicative jurisdiction over the dispute by a superior court, will not necessarily be enough to justify the application of provincial legislation to the dispute.⁵²
- (4) The principles of order and fairness which guide the sufficient connection test have been adopted as a mechanism to regulate the potential for conflict among the provinces arising out of the flexibility inherent in the modern approach to extraterritoriality. The use of the order and fairness principles in this respect distinguishes the Canadian constitutional approach to extraterritoriality from those of other federal countries, such as the United States and Australia.⁵³
- (5) The main policy objective behind the order and fairness principles is to prevent the chaos and confusion that would occur if multiple states applied their own laws to events occurring outside their territorial boundaries.⁵⁴ Among other things, the principles prohibit legislation from applying where the consequences of this could undermine order in the Canadian federation, or result in an unfairness to the defendant. Significantly, one situation in which this will occur is where the application of the legislation could expose defendants to multiple and competing provincial regulatory regimes in respect of the same event.⁵⁵

50. *Unifund, supra*, footnote 39, at paras. 51, 68, 74 and 79.

51. *Unifund, supra*, footnote 39, at paras. 62-66 and 80.

52. *Unifund, supra*, footnote 39, at paras. 58 and 80.

53. *Unifund, supra*, footnote 39, at paras. 68 and 73-75.

54. *Unifund, supra*, footnote 39, at paras. 28 and 68-69.

55. *Unifund, supra*, footnote 39, at paras. 71-72 (“‘competing exercises’ of regulatory

Subsequent to *Unifund*, the Supreme Court of Canada returned to the constitutional issue of extraterritoriality in *British Columbia v. Imperial Tobacco Canada Ltd.*⁵⁶ *Imperial Tobacco* is unlike *Unifund* in that it concerned a dispute over the constitutional validity of a statutory provision. Nonetheless, it is still important in assessing the constitutional applicability of s. 138.3, since it, too, concerned the extraterritorial limits of a statutory cause of action.

In unanimous reasons written by Major J., the Supreme Court of Canada in *Imperial Tobacco* articulated the following propositions:

- (1) The territorial limitations on provincial legislative competence in s. 92 of the Constitution Act, 1867 reflect the requirements of order and fairness underlying Canadian federal arrangements. They serve two main purposes: (a) to ensure that provincial legislation has a meaningful connection to the province enacting it; and (b) to ensure that provincial legislation pays respect to the sovereignty of the other provinces within their respective legislative spheres.⁵⁷
- (2) In assessing the constitutional validity question of whether provincial legislation, in pith and substance, respects the territorial limits in s. 92, the courts should apply a nuanced approach where the pith and substance is an intangible, such as the creation of a civil cause of action. In such cases, the court must look to the relationships among: (a) the enacting territory; (b) the subject matter of the legislation; and (c) the persons made subject to it. These relationships are to be examined with a view to determining whether the legislation respects the two purposes of the territorial limits in s. 92 described above, *i.e.*: (a) ensuring that provincial legislation has a meaningful connection to the enacting province; and (b) ensuring it respects the legislative sovereignty of other territories. If it does, the legislation will be allowed to stand.⁵⁸

regimes 'must be avoided'. The cost of such regulatory uncertainties undermines economic efficiency").

56. *Imperial Tobacco*, *supra*, footnote 39. At issue in *Imperial Tobacco* was the validity of the Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30.

57. *Imperial Tobacco*, *supra*, footnote 39, at paras. 26-27.

58. *Imperial Tobacco*, *supra*, footnote 39, at paras. 32 and 35-36. See also M. Hall, "The *Imperial Tobacco* Approach to Territorial Limitations on Provincial Legislative Jurisdiction" (2007), 20 N.J.C.L. 47, at p. 53.

- (3) As to the first purpose, a statutory cause of action will possess a “meaningful connection” to the enacting province where *inter alia* it creates a right of compensation for losses sustained within the province.⁵⁹
- (4) As to the second purpose, a statutory cause of action will “respect the legislative sovereignty of other territories” where *inter alia* no territory could possibly assert a stronger relationship to it than the enacting province. This will occur if there exists a critical connecting factor between that province and the cause of action exclusively.⁶⁰
- (5) In determining whether a statutory cause of action satisfies the two purposes of the s. 92 territorial limitations, some connecting factors will be more relevant than others. In particular, connecting factors that are not central to the *purpose* of the statutory cause of action will have little bearing upon the strength of its relationship to the enacting province, even if they are conditions precedent to successfully asserting the cause of action.⁶¹ Thus, in *Imperial Tobacco*, for instance, even if the relevant statute allowed the B.C. government to recover for breaches of duty occurring outside British Columbia, that was irrelevant to its constitutional validity, since the purpose of the statute was to compensate the government for B.C. health care costs, not to remedy the defendant tobacco producers’ breaches of duty that led to them.

As noted, *Imperial Tobacco* concerned the constitutional validity rather than applicability of a statutory cause of action. However, the court drew its two-part test from the same territorial limitations upon provincial legislative power, and the same principles of order and fairness, which informed the constitutional applicability analysis in *Unifund* (which latter judgment itself drew upon constitutional validity cases). It thus seems preferable to view *Imperial Tobacco* as having also refined the *Unifund* applicability

59. *Imperial Tobacco*, *supra*, footnote 39, at para. 37. As with the “sufficient connection” test proposed in *Unifund*, the “meaningful connection” test proposed in *Imperial Tobacco* has been distinguished from the “real and substantial” connection test for adjudicative jurisdiction: see E. Edinger, “*British Columbia v. Imperial Tobacco Canada Ltd.: Extraterritoriality and Fundamental Principles*” (2006), 43 C.B.L.J. 301, at p. 306; and Hall, *ibid.*, at pp. 56-58. See also footnote 66 below.

60. *Imperial Tobacco*, *supra*, footnote 39, at para. 38.

61. *Imperial Tobacco*, *supra*, footnote 39, at paras. 40 and 42.

framework as well, rather than as merely positing a different framework for validity.⁶² If, as *Imperial Tobacco* suggests, the requirements for a meaningful connection to the enacting province and respect for the legislative sovereignty of other provinces are in fact the very purposes behind the territorial limits in s. 92 of the Constitution Act, 1867, then they should logically be reflected in the constitutional applicability test as well. The difference is that, in the applicability context, the court should ask whether these purposes are satisfied by particular *applications* of a statutory cause of action to extraterritorial matters, and not the more general validity question of whether they are satisfied by the *pith and substance* of the statute itself.

Accordingly, in the wake of *Imperial Tobacco*, the constitutional applicability of a statutory cause of action should not turn simply upon whether the enacting province possesses a “sufficient connection” to the extraterritorial matters to which the statute is sought to be applied, as *Unifund* suggests. Rather, the inquiry should ask whether the enacting province possesses a “meaningful connection” to those extraterritorial matters, and whether the application of the statutory cause of action to them would “respect the legislative sovereignty of other territories,” having regard to: (a) the relationship between the enacting province, the plaintiff and defendant, and the subject matter of the statutory provision; and (b) whether applying the statutory provision would undermine order in the Canadian federation, or result in an unfairness to the defendant.

The final decision that will be considered here is the Supreme Court of Canada’s recent ruling in *Van Breda*.⁶³ Although *Van Breda* was concerned with extraterritorial adjudicative rather than legislative jurisdiction,⁶⁴ the court made several statements suggesting that the real and substantial connection test, in its

62. See *Imperial Tobacco* (BCCA 2004), *supra*, footnote 44, at para. 168; and *British Columbia v. Imperial Tobacco Canada Ltd.* (2006), 273 D.L.R. (4th) 711, 2006 BCCA 398 (B.C.C.A.), leave to appeal to S.C.C. refused 276 D.L.R. (4th) vii, [2007] 1 S.C.R. xiii (S.C.C.) (“*Imperial Tobacco* (BCCA 2006),” at paras. 97-100.

63. See also the companion decisions: *Banro Corp. v. Éditions Écosociété Inc.* (2012), 343 D.L.R. (4th) 647, 2012 scc 18 (S.C.C.); and *Black v. Breeden* (2012), 343 D.L.R. (4th) 629, 2012 scc 19 (S.C.C.).

64. The distinction between these two forms of jurisdiction (together with a third form of extraterritorial jurisdiction, concerning the extraterritorial enforcement of domestic laws) is well-established: see, e.g., *Hape*, *supra*, footnote 32, at para. 58; and American Law Institute, *Restatement (Third) of Foreign Relations Law of the United States* (St. Paul, Minnesota, American Law Institute, 1987), §401. See also E. Edinger and V. Black, “A New Approach to Extraterritoriality: *Unifund Assurance Co. v. I.C.B.C.*” (2004), 40 C.B.L.J. 161, at pp. 165-166.

capacity as a constitutional principle, conditions both forms of state power.⁶⁵ While this equation of adjudicative and legislative jurisdiction is open to criticism (particularly given the court's earlier rejection in *Unifund* of the "real and substantial connection" test for extraterritorial adjudicative jurisdiction as a proxy for legislative jurisdiction),⁶⁶ *Van Breda* suggests that the Supreme Court no longer views the two concepts as watertight compartments. Therefore, the approach taken in *Van Breda* would seem relevant to the constitutional applicability test for extraterritorial provincial legislation as well. In this regard, *Van Breda* established the following important principles:

- (1) The purpose of the territorial limits in s. 92 of the Constitution Act, 1867 is to ensure the existence of a relationship or connection with the province sufficient to confer legitimacy upon the exercise of state power. This is reflected in the "real and substantial connection" test, which has a dual character as both a constitutional principle, and a conflict of laws rule. A weak or hypothetical connection, rather than a real and substantial one, will cast doubt upon the legitimacy of the exercise of state power over a dispute.⁶⁷
- (2) As a constitutional principle, the real and substantial connection test merely sets the outer boundaries within which a variety of appropriate conflicts rules can be applied. It does not mean that the rules which are adopted by legislatures across Canada to ensure territorial legitimacy must be uniform. Rather, legislatures may adopt various solutions to meet the constitutional requirement.⁶⁸
- (3) The constitutional real and substantial connection requirement does not mandate that the connections with a province be the strongest ones possible, or that they all point in the same direction.⁶⁹

65. See *Van Breda*, *supra*, footnote 6, at paras. 23 and 28 ("the real and substantial connection test . . . reflects the limits of provincial legislative and judicial powers").

66. See also *Castillo v. Castillo* (2005), 260 D.L.R. (4th) 439, [2005] 3 S.C.R. 870 (S.C.C.), at paras. 41 and 44. Bastarache J., concurring in the result, stated that the real and substantial connection for adjudicative jurisdiction constitutes a "lower threshold" than the meaningful connection for legislative jurisdiction.

67. *Van Breda*, *supra*, footnote 6, at paras. 22-24 and 31-32.

68. *Van Breda*, *supra*, footnote 6, at para. 33.

69. *Van Breda*, *supra*, footnote 6, at para. 34.

- (4) However, courts should not attempt to satisfy the constitutional principle through *ad hoc* exercises of their own discretion on a case-by-case basis, in an attempt to achieve fairness and justice for individual litigants. While the tension between the principles of order (or predictability) and fairness (or flexibility) has been a constant theme in Canadian jurisprudence, order is ultimately anterior to fairness, and requires that courts adopt rules which will promote certainty, stability and predictability in the law.⁷⁰
- (5) In order to achieve stability and predictability, the modern approach, at least in relation to the test for adjudicative jurisdiction, has been to apply a system of presumptive objective connecting factors, rather than to rely upon a pure and individualized judicial discretion. Abstract principles like fairness, efficiency and comity should not be used as a substitute for objective connecting factors that give rise to a real and substantial connection.⁷¹
- (6) The purpose of conflicts rules is to ensure a real and substantial connection between the forum, the subject-matter of the litigation and the defendant. In the context of adjudicative jurisdiction over tort claims, the presumptive connecting factors used to identify this are whether: (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province; or (d) a contract connected with the dispute was made in the province. Additional presumptive connecting factors may be recognized in future cases in accordance with the values of order, fairness and comity, and having regard to considerations such as: (a) the similarity of the proposed connecting factor with the recognized factors; and (b) the treatment of the proposed factor in our case law and statute law, or the private international law of other legal systems with commitment to order, fairness and comity.⁷²
- (7) Absent a presumptive connecting factor, a court may not take jurisdiction over a dispute (unless the traditional "presence" or "attornment" bases for jurisdiction can be made out, or, perhaps, unless the forum of necessity doctrine

70. *Van Breda, supra*, footnote 6, at paras. 35, 37-38, 66-67, 70, 73-75, 82 and 93.

71. *Van Breda, supra*, footnote 6, at paras. 35, 75, 78-80, 82 and 84.

72. *Van Breda, supra*, footnote 6, at paras. 78-79, 84-92 and 99.

applies). Further, even where a presumptive factor exists, the defendant may rebut it through facts which demonstrate that the factor does not point to a real relationship between the subject matter of the litigation and the forum.⁷³ Finally, the defendant may argue the court should exercise its discretion to stay the proceedings based on *forum non conveniens*, where another forum is clearly more appropriate.⁷⁴

In light of *Van Breda*, the approach to the constitutional applicability of extraterritorial provincial legislation suggested by *Unifund* and *Imperial Tobacco* should be refined if it is to meet the objectives of order and fairness which inform the territorial limits in s. 92 of the Constitution Act, 1867. Merely asking whether a province possesses a “sufficient” or “meaningful” connection to extraterritorial matters, and whether the application of provincial legislation would “respect the legislative sovereignty of other territories,” leaves considerable room for *ad hoc* exercises of judicial discretion, and does not provide the requisite level of guidance to ensure certainty, stability and predictability in the law.⁷⁵ Instead, *Van Breda* suggests that courts should adopt a more focused approach, which predicates extraterritorial legislative applicability upon the existence of one or more presumptive objective connecting factors that will ensure a real and substantial (or “meaningful” or “sufficient”) connection between the province, the subject-matter of the legislation and the parties. We shall return to this theme in the second part of this paper, after considering the cases that have addressed the extraterritorial scope of Canadian securities legislation to date.

IV. THE EXTRATERRITORIALITY OF SECURITIES LEGISLATION: REGULATORY CASES

Canadian cases involving the extraterritoriality of provincial securities legislation may be grouped into two main categories: (1) regulatory cases; and (2) civil cases. While it is the latter category that is of greatest interest here, by far the majority of decisions in

73. In this respect, the *Van Breda* test is similar to that proposed by the American Law Institute, *supra*, footnote 64, §§ 402 and 403, where a state’s ability to exercise jurisdiction in relation to matters falling within one of five specified categories may be rebutted if the exercise of jurisdiction would not be reasonable.

74. *Van Breda*, *supra*, footnote 6, at paras. 79, 81, 93 and 95-100.

75. A similar point has been noted by some commentators: see, Hall, *supra*, footnote 58, at p. 66.

this area fall within the first. Accordingly, it is appropriate to begin with an examination of the regulatory jurisprudence.

The regulatory cases are usually traced to the Supreme Court of Canada's decision in *Gregory & Co. v. Québec (Securities Commission)*.⁷⁶ In *Gregory*, the court held that the Québec Securities Commission could order sanctions against a company whose head office and place of business was in Québec, but which dealt with and mailed promotion bulletins exclusively to persons resident in other provinces and countries.⁷⁷ Fauteux J., for the majority, found that the company's actions still amounted to "trading" within the meaning of the Québec Securities Act.⁷⁸ He noted that the "paramount object of the Act" was "to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business."⁷⁹ However, no notice of constitutional question was given in *Gregory*, and the Supreme Court did not reach any decision concerning the constitutionality of the Québec securities legislation.⁸⁰

*R. v. W. McKenzie Securities Ltd.*⁸¹ involved facts that were, in many respects, the "mirror image" of those in *Gregory*.⁸² The three accused were resident in Ontario, and were only registered as broker-dealers under the Ontario Securities Act, not the Manitoba Securities Act.⁸³ Nonetheless, they mailed promotional materials to Manitoba residents, who acquired securities from them by

76. (1961), 28 D.L.R. (2d) 721, [1961] S.C.R. 584 (S.C.C.).

77. The company had had previously been registered as a Québec broker until its registration was cancelled by the Commission's order. After the cancellation of its registration, the company continued to carry on business and create the promotional bulletins within Québec, which it mailed to non-Québec residents.

78. S.Q. 1954-55, c. 11.

79. *Gregory*, *supra*, footnote 76, at p. 588 (S.C.R.). At p. 590, Fauteux J. went on to suggest that the legislation could apply even if the contracts which the company entered into with investors were made outside the province. Fauteux J.'s remarks have been cited with approval in subsequent Supreme Court cases involving securities legislation: see *Pezim v. British Columbia (Superintendent of Brokers)* (1994), 114 D.L.R. (4th) 385, [1994] 2 S.C.R. 557 at pp. 592-593 (S.C.C.).

80. *Gregory*, *supra*, at pp. 587 and 591-592 (S.C.R.). See also *R. v. W. McKenzie Securities Ltd.* (1966), 56 D.L.R. (2d) 56 at p. 61, [1966] 4 C.C.C. 29 (Man. C.A.).

81. *R. v. W. McKenzie Securities Ltd.*, *supra*, footnote 80.

82. See *Pearson v. Boliden Ltd.* (2002), 222 D.L.R. (4th) 453, 2002 BCCA 624 (B.C.C.A.) at para. 56, leave to appeal to S.C.C. refused [2003] 2 S.C.R. ix, [2003] S.C.C.A. No. 29 (S.C.C.).

83. R.S.M. 1954, c. 237.

making reciprocal mailings and telephone calls to Ontario. The accused were charged with unlawfully trading securities in Manitoba without being registered. Freedman J.A. rejected their submission that the Manitoba securities legislation was constitutionally invalid or inapplicable in relation to their interprovincial trades. While observing that the Manitoba legislation was “not designed to reach out beyond provincial borders and to restrain conduct carried on in other parts of Canada or elsewhere,” he noted that non-residents of Manitoba could nonetheless become “subject to the controls of the statute” if they carried on trading in Manitoba.⁸⁴

The rulings in *Gregory* and *McKenzie* thus indicate that, at least in relation to regulatory applications of securities laws, “so long as some substantial aspect of the impugned transaction occurred within the territorial jurisdiction of the legislating province, the provincial law will apply.”⁸⁵ An interesting case which illustrates this point is *Québec (Sa Majesté du Chef) v. Ontario Securities Commission*.⁸⁶ *Sa Majesté* raised the issue of whether the OSC could make a public interest order revoking trading exemptions that it had previously granted to the Québec government, where a Québec Crown corporation sought to acquire a Québec asbestos company whose shares traded on the Montreal and Toronto Stock Exchanges through a non-complaint takeover bid. While *Sa Majesté* predated *Unifund*, the court still made clear that the issue before it was the constitutional applicability, and not validity, of the Securities Act.⁸⁷

In dismissing the appeal, McKinlay J.A. for the court made two important points. First, she held that the purpose of the Securities Act was not simply the protection of Ontario residents, but rather the regulation of Ontario’s capital markets for all who use them, wherever resident. Accordingly, the Securities Act could apply

84. *McKenzie*, *supra*, footnote 80, at pp. 62-63 (D.L.R.). See also *R. v. Bell* (1982), 3 D.L.R. (3d) 385, [1983] 2 S.C.R. 471 at pp. 490-491 (S.C.C.).

85. *Bennett v. British Columbia (Securities Commission)* (1991), 82 D.L.R. (4th) 129 at p. 156 (B.C.S.C.), *affd* 94 D.L.R. (4th) 339 (B.C.C.A.), leave to appeal to S.C.C. refused 97 D.L.R. (4th) vii (S.C.C.). In *Bennett*, the court held that the insider trading prohibition in s. 68 of the B.C. Securities Act, S.B.C. 1985, c. 83 was constitutionally valid, even though it applied to trades on the TSX effected through a multinational communications system, for which the sale order and the “tip” were made in British Columbia. See also *Québec (Procureure générale) v. Canada (Procureure générale)* (2011), 201 A.C.W.S. (3d) 683, 2011 OCCA 591 (Que. C.A.), at paras. 319-320 and note 366.

86. *Sa Majesté*, *supra*, footnote 43.

87. *Sa Majesté*, *supra*, footnote 43, at pp. 584-585.

both in favour of and against non-residents.⁸⁸ Second, McKinlay J.A. held that the Securities Act could apply to extraterritorial matters even if Ontario was not the jurisdiction that possessed the most significant connection to them, citing the concern that individuals and corporations could structure their transactions so as to avoid the jurisdiction of the Ontario Securities Commission.⁸⁹

Interestingly, while the Ontario Court of Appeal confirmed the osc's jurisdiction to issue the public interest order in *Sa Majesté*, the osc subsequently declined to do so. One of the reasons it gave for this result was that the impugned transaction lacked a sufficient transactional connection to Ontario. The Supreme Court of Canada unanimously upheld this aspect of the osc's order in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*.⁹⁰ Iacobucci J. ruled that the osc was correct not to view the existence of a sufficient transactional connection with Ontario as a jurisdictional precondition to the exercise of its public interest discretion, but only as one factor among others to be considered in the exercise of that discretion.⁹¹ At the same time, Iacobucci J. found that the osc acted reasonably in relying upon the absence of a sufficient transactional connection in declining to exercise its public interest discretion on the facts before it:⁹²

... [I]t was entitled to do so in order to avoid using the open-ended nature of s. 127 powers as a means to police too broadly out-of-province transactions. Capital markets and securities transactions are becoming increasingly international: see *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 scc 21, at paras. 27-28. There are a myriad of overlapping regulatory jurisdictions governing securities transactions. . . . A transaction that is contrary to the policy of the Ontario Securities Act may be acceptable under another regulatory regime. Thus, the osc's insistence on a more clear and direct connection with Ontario in this case reflects a sound and responsible approach to long-arm regulation and the potential for conflict amongst the different regulatory regimes that govern the capital markets in the global economy.

88. *Sa Majesté*, *supra*, footnote 43, at pp. 590 and 595. See also *Multiple Access Ltd. v. McCutcheon* (1982), 138 D.L.R. (3d) 1, [1982] 2 S.C.R. 161 at p. 184 (S.C.C.).

89. *Sa Majesté*, *supra*, footnote 43, at p. 589.

90. (2001), 199 D.L.R. (4th) 577, [2001] 2 S.C.R. 132 (S.C.C.).

91. *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, *supra*, footnote 90, at paras. 50-56.

92. *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, *supra*, footnote 90, at para. 62.

Another important case in this regard is *Global Securities Corp. v. British Columbia (Securities Legislation)*,⁹³ cited in *Asbestos Committee*. In *Global*, the Supreme Court of Canada considered the constitutional validity of s. 141(1)(b) of the B.C. Securities Act,⁹⁴ which authorizes the B.C. Securities Commission's executive director to order a registrant to produce records to assist in the administration of the securities laws of another jurisdiction. The validity of the provision was questioned in *Global*, after the executive director made a s. 141(1)(b) order against the respondent in aid of a Securities and Exchange Commission (SEC) investigation into violations of U.S. securities laws. Iacobucci J., for a unanimous court, held that s. 141(1)(b) was valid because its pith and substance was the enforcement of B.C. securities law:⁹⁵

The securities market has been an international one for years . . . However, the Internet has greatly increased the ability of securities traders to extend across borders . . . In order to regulate effectively this electronic trading, regulators must equally be able to respond, and surmount borders where legally possible.

.....

Given the Commission's legitimate concern with ensuring that domestic registrants are "honest and of good repute", another obvious purpose of s. 141(1)(b) is uncovering violations of foreign law by domestic registrants. The intervener the Attorney General for Quebec aptly summarized the point in its factum as follows (at p. 7):

. . . the Securities Commission could take into account violations such persons have committed in carrying on that business outside the province, in order to protect the clients of such persons within the province and with respect to transactions taking place there.

.....

. . . it is well established that the provinces' authority over securities regulation is not limited to purely intraprovincial matters.

The decisions in *Gregory*, *McKenzie*, *Sa Majesté* and *Global* were decided prior the Supreme Court's modern restatement of the test for constitutional applicability in *Unifund* and its later refinement in *Imperial Tobacco*. Nonetheless, recent cases have continued to affirm their contemporary relevance. In the *Securities Reference*, the Supreme Court noted that "provincial power over

93. *Global Securities Corp. v. British Columbia (Securities Legislation)*, *supra*, footnote 45.

94. S.B.C. 1986, c. 418.

95. *Global Securities Corp. v. British Columbia (Securities Legislation)*, *supra*, footnote 45, at paras. 28, 34 and 41.

securities extends to impacts on market intermediaries or investors outside a particular province,” citing *Gregory, McKenzie and Global Securities*.⁹⁶ The court went on to state that the “case law also recognizes provincial jurisdiction where the province’s capital markets are engaged,” and cited *Sa Majesté*.⁹⁷

The approach adopted in these cases can also be seen in the British Columbia Court of Appeal’s 2011 ruling in *Torudag v. British Columbia (Securities Commission)*.⁹⁸ There, the B.C. Securities Commission (BCSC) convened a hearing at which it found the appellant engaged in insider trading, contrary to the B.C. Securities Act. The allegations stemmed from the appellant’s trading in shares of Icon, a B.C. reporting issuer listed on the TSX Venture Exchange, with undisclosed knowledge that Icon had purchased some Québec mineral claims from a Québec prospector. The appellant was not a resident of British Columbia, but was in the process of moving from Alberta to Québec. He acquired his Icon shares through an offshore company he controlled, using an online trading account with a U.S.-based company having an office in Montreal. The trades were processed on the TSX Venture Exchange’s server in Toronto. However, many of the people who sold shares to the appellant were resident in British Columbia. Further, the B.C. Securities Commission (together with the Alberta Securities Commission) holds joint regulatory oversight over the TSX Venture Exchange.

The appellant objected to the BCSC’s hearing on the ground that the Securities Act was constitutionally inapplicable to the impugned conduct by reason of extraterritoriality. Nonetheless, his argument was unanimously rejected by the Court of Appeal. Hall J.A. observed that the fact some of the shares were acquired from B.C. residents provided “at least some connection” to the province, but went on to hold that:⁹⁹

96. *Reference re: Securities Act (Can.)*, *supra*, footnote 7, at para. 45.

97. *Reference re: Securities Act (Can.)*, *supra*, citing *Sa Majesté*, *supra*, footnote 43. The court also cited *Bennett*, *supra*, footnote 85, in this regard.

98. (2011), 343 D.L.R. (4th) 743, 2011 BCCA 458 (B.C.C.A.), leave to appeal to S.C.C. refused (January 16, 2012), Doc. 34620, [2012] S.C.C.A. No. 21 (S.C.C.).

99. *Torudag v. British Columbia (Securities Commission)*, *supra*, footnote 99, at paras. 25-26. See also para. 27. Interestingly, Hall J.A. also rejected the appellant’s submission that there was a distinction between the “meaningful connection” test for the constitutional applicability of provincial legislation (in cases like *Unifund* and *Imperial Tobacco*), and the “real and substantial connection” for adjudicative jurisdiction, finding that the former was no stricter than the latter: *Torudag*, *supra*, at para. 19. However, in arriving at this conclusion, Hall J.A. did not refer to Binnie J.’s comments in *Unifund*, *supra*, footnote 39, at paras. 58 and 80, where he suggested that the real and substantial

the more significant circumstances that constitute a real and substantial connection to this jurisdiction and which permitted the Commission to properly take jurisdiction over the appellant are the regulatory functions of the Commission concerning the Exchange and the fact that Icon was a reporting issuer in British Columbia.

*Crowe v. Ontario Securities Commission*¹⁰⁰ was decided shortly after *Torudag*. In *Crowe*, the appellants were Ontario residents who were the directors of three bankrupt companies incorporated in Ontario, which also had their registered offices there. The companies' shares were quoted only on the "Pink Sheets" (an over-the-counter market based in the United States) and the Xetra Exchange (a worldwide electronic trading system based in Germany and operated by the Deutsche Börse), and were sold only to offshore investors. However, the shares were sold on the basis of directions issued to the treasury agent in Ontario, and the proceeds of sale were deposited in either Ontario bank accounts, or offshore bank accounts from which the funds were frequently wired back to Ontario. The osc found the appellants breached the Securities Act by trading shares without a registration and distributing them without a prospectus.

The appellants appealed on the basis that the trades in question occurred outside Ontario, and alleged the osc lacked constitutional jurisdiction over them. However, this argument was rejected by the Ontario Divisional Court. Swinton J., writing for a unanimous three-member panel, noted that provincial regulation can "also be applied to regulate corporations or individuals within the province in order to protect investors outside the province from unfair, improper or fraudulent activities."¹⁰¹ She went on to state that "[w]here the Commission is regulating trades that have an extraprovincial character, the question is not the location of the investors; rather, it is whether there is a sufficient connection between Ontario and the impugned activities and the entities involved to justify regulatory action by the Commission."¹⁰² Swinton J. then proceeded to find that there was a "sufficient

connection test for adjudicative jurisdiction may not always satisfy the sufficient (or "meaningful") connection test for the constitutional applicability of provincial legislation. See also *Mazarei v. Icon Omega Developments Ltd.*, 2012 BCSC 673, 2012 CarswellBC 1337 (B.C.S.C.), at para. 75, referring to Hall J.A.'s statement in *Torudag* yet still noting "while satisfying the test for territorial competence of a court captures the same concept as a challenge to constitutional applicability, the former does not always determine the latter."

100. (2011), 286 O.A.C. 201, 2011 QNSC 6918 (Ont. S.C.J. (Div. Ct.)).

101. *Crowe*, *supra*, footnote 100, at para. 32.

102. *Crowe*, *supra*, footnote 100, at para. 32.

connection” between Ontario and the appellants’ conduct to satisfy the constitutional applicability test from *Unifund*, since the appellants were Ontario residents who did of number of things from Ontario in furtherance of the share trades, and their activities “were harmful to Ontario’s capital markets.”¹⁰³

Based on these regulatory cases, a number of conclusions can be drawn regarding the extraterritorial application of securities legislation:

- (1) The legislation can apply even if the province does not have the most significant territorial connection to the matter, so long as it is connected to some substantial aspect of it (*Sa Majesté*).
- (2) The legislation can apply to resident respondents who deal exclusively with non-resident investors, or engage in misconduct abroad (*Gregory; Global Securities; Crowe*).
- (3) The legislation can apply to non-resident respondents who deal with resident investors (*McKenzie; Torudag*).
- (4) The legislation can apply to non-resident respondents who deal with non-resident investors if they do so through the capital markets within the province, such as a stock exchange there (*Sa Majesté*).
- (5) The legislation can apply to non-resident respondents who deal with non-resident investors on foreign exchanges, if the respondent or the exchange still falls within the supervisory jurisdiction of the province, such as where the respondent is a reporting issuer there (*Torudag*).
- (6) The regulator should be sensitive to the potential for conflict with overlapping regimes in other jurisdictions (*Asbestos Committee*).

At the same time, it is important to bear in mind that cases involving the extraterritorial authority of regulators are legitimately distinct from those involving the extraterritorial application of civil causes of action.¹⁰⁴ Among other things, the mandate of the

103. *Crowe*, *supra*, footnote 100, at para. 39.

104. See *Mathias Colomb Band of Indians v. Saskatchewan Power Corp.* (1994), 111 D.L.R. (4th) 83 at p. 93, 13 C.E.L.R. (N.S.) 245 (Man. C.A.), leave to appeal to S.C.C. refused 111 D.L.R. (4th) vii, [1994] S.C.C.A. No. 100 (S.C.C.), distinguishing the constitutional extraterritoriality case of *Interprovincial Co-operatives Ltd. v. Manitoba* (1975), 53 D.L.R. (3d) 321, [1976] 1 S.C.R. 477 (S.C.C.), on the basis that it “concerned a private cause of action for damages which had been specifically conferred by a statute of the Manitoba legislature” rather than “the question of Manitoba’s regulatory jurisdiction.” See also E. Edinger, “Territorial Limitations on Provincial Powers” (1982), 14 *Ottawa L.*

regulators to protect the investing public “in the province or elsewhere” requires that they possess expansive territorial powers.¹⁰⁵ The same cannot necessarily be said for private investors seeking to assert a civil claim on their own behalf. Further, private investors are less likely to exercise the degree of self-restraint and respect for comity expected of regulators.¹⁰⁶ Accordingly, in evaluating the constitutional applicability of Part XXIII.1, it is crucial to consider the cases addressing the extraterritoriality of securities legislation in the civil context. We turn to those cases in the second part of this paper.

Rev. 57, at p. 80. It is noteworthy here that, in *Unifund, supra*, footnote 39, at para. 85, Binnie J. dismissed the relevance of *Global Securities, supra*, footnote 45 — a regulatory case — to the applicability of the statutory cause of action before the court.

105. See *Global Securities, supra*, at para. 43 (“provincial regulatory bodies governing professions with a strong interjurisdictional aspect must be able to take into account events occurring abroad”). This may be especially so for securities regulators, who have a “special character” given “the preeminence of securities regulation in our economic system”: *British Columbia Securities Commission v. Branch* (1995), 123 D.L.R. (4th) 462, [1995] 2 S.C.R. 3 (S.C.C.), at para. 34.

106. *Morrison, supra*, footnote 3, at p. 2895, note 12, Stevens J. concurring.