

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

Brandon Kain and Byron Shaw*

In the first part of this paper,¹ we reviewed the text and legislative history of Part XXIII.1 of the Securities Act,² together with the constitutional principles that govern the extraterritorial application of provincial legislation in Canada. In addition, we reviewed the securities regulatory cases in which these principles have been considered. In this second part of our paper, we examine the holdings and policy implications of the civil cases addressing the extraterritorial scope of securities legislation, and propose a new framework for the constitutional applicability of Part XXIII.1 claims that builds upon the Supreme Court of Canada's ruling in *Van Breda v. Village Resorts Ltd.*³

I. THE EXTRATERRITORIALITY OF SECURITIES LEGISLATION: CIVIL CASES

The cases which consider the extraterritoriality of statutory causes of action in the securities field may be divided into two groups: (1) cases involving primary market transactions; and (2) cases involving secondary market transactions. The only Canadian decision falling within the second category is the Ontario Court of Appeal's recent decision in *Abdula v. Canadian Solar Inc.*⁴ Before examining that case, however, it is important to consider the leading decision in the first category, which is the British Columbia Court of Appeal's ruling in *Pearson v. Boliden Ltd.*⁵

* Brandon Kain is a partner and Byron Shaw is an associate in the Toronto litigation group of McCarthy Tétrault LLP. The views expressed in this article are the authors' alone, and do not necessarily reflect those of McCarthy Tétrault LLP.

1. The first part of this paper appeared at (2012), 53 C.B.L.J. 63.
2. 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.
3. (2012), 343 D.L.R. (4th) 577, 2012 scc 17 (S.C.C.).
4. 2012 ONCA 211, leave to appeal to S.C.C. refused (November 29, 2012), Doc. 34849, [2012] S.C.C.A. No. 246 (S.C.C.).
5. (2002), 222 D.L.R. (4th) 453, 2002 BCCA 624 (B.C.C.A.), leave to appeal to S.C.C. refused [2003] 2 S.C.R. ix, [2003] S.C.C.A. No. 29 (S.C.C.).

In *Pearson*, the issuer was a Canada Business Corporations Act⁶ company. Its head office and a number of its directors were located in Ontario. The company's shares, which traded on the Toronto and Montréal Stock Exchanges, were offered by prospectus in all of the Canadian provinces and territories, and outside Canada as well, by registered brokers in Canada. Owing to alleged misrepresentations in the prospectus, a global class action was commenced in British Columbia on behalf of primary and secondary market investors. There were significant differences among the different provincial Securities Acts pleaded in the Statement of Claim: (1) the statutes of New Brunswick and the Territories did not create any civil right of action for primary market purchasers; and (2) while the Alberta legislation, like that of the remaining provinces, did create such a right of action, the Alberta limitation period had expired. Nonetheless, the certification judge included within the class definition primary market investors who purchased shares in Alberta, New Brunswick, the Territories and outside Canada, on the theory that the *lex loci delicti* choice of law rule in tort may enable them to rely upon the right of action under the Ontario Securities Act (where the underwriter was situate).

The British Columbia Court of Appeal, while affirming certification of the class action, held that the certification judge was wrong to rely upon the common law *lex loci delicti* rule as a basis for including the foregoing persons within the class definition. Newbury J.A. found that the degree to which an investor could assert an action under provincial securities legislation depended upon the specific provisions of the legislation itself, as well as the principles of constitutional applicability. She thus held that the statutory rights of action for primary market misrepresentations applied only to distributions of securities within the enacting province, regardless of whether the plaintiff or defendant were resident in that province.⁷ Pursuant to the definition of "distribution" and the related definition of "trade" under the relevant statutes, this would generally be the place where the brokers received the order for the purchase of securities by the plaintiff.⁸ Accordingly, the court ordered that primary market investors who sent their buy order to a broker in Alberta, New Brunswick, the Territories or outside Canada should be excluded

6. R.S.C. 1985, c. C-44.

7. *Pearson*, *supra*, footnote 5, at paras. 64-68.

8. *Supra*, at paras. 44, 47, 65, 69 and 75.

from the class definition, regardless of where the investors themselves were resident. Newbury J.A. stated:⁹

[C]ourts when considering the applicability and constitutional validity of securities legislation have focussed on conduct or activity within the province rather than, for example, the *situs* of particular contracts, the location of share registers or the residence of particular parties.

.....

The conduct in the province of issuers, brokers and other market intermediaries, wherever they may reside or carry on business, is regulated in order to protect the public, and the integrity of the market, in that province. . . . In this way, each province protects the investing public from misconduct in its territory, but at the same time, honours the principle of comity by respecting the legislative authority of other provinces to do likewise.

.....

I do not agree that it is open to a plaintiff, or a court of law, to choose to apply the Act of one province that will provide a cause of action in misrepresentation for a plaintiff who was solicited in and purchased his or her shares pursuant to a distribution in another province.

.....

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.

She then observed:¹⁰

There are also practical reasons that support this choice of law. In an industry in which certainty and predictability are important, it avoids the complexity and uncertainty of rules such as the *lex loci delicti* rule applied to torts and the “most substantial connection” rule applied to contracts. . . . As well, it comports with what a reasonable investor would expect — that when he or she purchases shares offered under a distribution taking place in a province, the securities legislation of that province will govern the filing of the prospectus, its contents, and the rights and obligations of the parties thereunder.

9. *Supra*, at paras. 55 and 63-65.

10. *Supra*, at para. 66.

Pearson has been followed in later securities litigation involving primary market misrepresentation claims.¹¹ Despite *Pearson*, several courts have also certified “national” and even “global” secondary market securities class actions which included class members resident outside the province or the country.¹² These decisions were largely concerned with adjudicative jurisdiction over non-resident class members (and, to some degree, the extraterritorial application of class proceedings legislation), and did not address the separate legislative jurisdiction issue of whether the Securities Act applied to their claims.¹³ However, the cases are still instructive on the latter point, since a real and substantial connection between the province and the claim is required before the court may certify the class action. As noted in the first part of this paper, *Van Breda* holds that the constitutional requirement for a real and substantial connection applies to both judicial and legislative jurisdiction.¹⁴

Factors which have been emphasized by certifying courts that have found a real and substantial connection with the province for the purposes of adjudicative jurisdiction include: (1) the place

11. See *Allen v. Aspen Group Resources Corp.* (2009), 67 B.L.R. (4th) 99, 81 C.P.C. (6th) 298 (Ont. S.C.J.), at paras. 89-95; *Coulson v. Citigroup Global Markets Canada Inc.* (2010), 92 C.P.C. (6th) 301, 2010 ONSC 1596 (Ont. S.C.J.) at para. 145, affd 288 O.A.C. 355, 2012 ONCA 108 (Ont. C.A.); and *Schneider v. Royal Crown Gold Reserve Inc.* (2012), 214 A.C.W.S. (3d) 347, 2012 SKQB 111 (Sask. Q.B.) at paras. 33, 51 and 85, leave to appeal to Sask. C.A. refused 2012 SKCA 105 (Sask. C.A.). Some courts have, however, declined to make a determination of this issue at the certification motion: see *McKenna v. Gammon Gold Inc.* (2010), 88 C.P.C. (6th) 27, 2010 ONSC 1591 (Ont. S.C.J.) at para. 117, leave to appeal to Div. Ct. allowed 2010 ONSC 4068 (Ont. S.C.J. (Div. Ct.)), revd on other grounds 87 C.C.L.T. (3d) 123, 2011 ONSC 3782 (Ont. S.C.J. (Div. Ct.)); and *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.). Some courts have also held that in situations where the offering document contains a choice of law provision in favour of a specific province, then the securities legislation of that province may govern the statutory claim: see *Allen, supra*, at paras. 95-105.
12. Contested certification rulings include: *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441, 30 C.P.C. (4th) 133 (Ont. Ct. (Gen. Div.)); *Silver v. IMAX Corp.* (2009), 86 C.P.C. (6th) 273, [2009] O.J. No. 5585 (Ont. S.C.J.), add'l reasons 66 B.L.R. (4th) 222, [2009] O.J. No. 5573, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Ont. S.C.J.); *Dobbie, supra*, footnote 11; and *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 (Ont. S.C.J.). For a review of the case law, see T. Monestier, “Is Canada the New ‘Shangri-La’ of Global Securities Class Actions?” 32 Nw. J. Int’l L. & Bus. (forthcoming in 2012).
13. The distinction between these two issues was noted in *IMAX, supra*, at para. 145.
14. See also *British Columbia v. Imperial Tobacco Canada Ltd.* (2004), 239 D.L.R. (4th) 412, 2004 BCCA 269 (B.C.C.A.) at paras. 23 and 204, affd 257 D.L.R. (4th) 193, [2005] 2 S.C.R. 473 (S.C.C.).

where the issuer is a reporting issuer; (2) the place where the issuer is incorporated; (3) the place where the issuer's head office is located; (4) the place where the issuer carries on business; (5) the place where the issuer's shares are traded or predominantly traded; (6) the place where the class members acquired the issuer's shares; (7) the place from and to which the misrepresentations were made; and (8) the place where the misrepresentation was prepared.¹⁵

Other courts have declined to certify global securities class actions. In *McCann v. CP Ships Ltd.*,¹⁶ Rady J. held that the class definition in a common law secondary (and primary) market claim against a United Kingdom company and its officers, whose shares were traded on the Toronto Stock Exchange (TSE) and New York Stock Exchange, must exclude persons resident outside Canada. Rady J. noted that the "proposed definition is overly broad" and questioned whether there could be a real and substantial connection between the Ontario court and certain class members residing in other jurisdictions simply because they purchased their shares on the TSE.¹⁷ Similarly, in *McKenna*,¹⁸ Strathy J. declined to certify a common law secondary market claim involving an issuer incorporated in Québec, whose registered and head offices were outside Ontario, but which was a reporting issuer under the Ontario Securities Act with shares that traded on the TSX and the U.S. AMEX Stock Exchange. In *obiter*, Strathy J. alluded to *Pearson*, holding that even if he were to certify the claim, he would have limited the class to those who acquired their shares on the TSX, who "could reasonably contemplate that their rights would be determined by the courts of the jurisdiction where the shares were acquired."¹⁹

The first and only case to substantively consider the issue of extraterritorial *legislative* jurisdiction in secondary market claims is

15. *Carom*, *supra*, footnote 12, at p. 451; *IMAX*, *supra*, footnote 12, at para. 130; *Pysznyj v. Orsu Metals Corp.*, 2010 ONSC 1151 (Ont. S.C.J.), at para. 16; *Ainslie v. Afexa Life Sciences Inc.*, 2010 ONSC 4294, 191 A.C.W.S. (3d) 1053 (Ont. S.C.J.), at para. 24(c); *West Coast Soft Wear Ltd. v. 1000128 Alberta Ltd.*, 2010 ONSC 6388, 7 C.P.C. (7th) 323 (Ont. S.C.J.) at para. 23, add'l reasons 2010 ONSC 6687, 7 C.P.C. (7th) 336; *Green*, *supra*, footnote 12, at paras. 588 and 591. *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees) v. SNC-Lavalin Group Inc.*, 2012 ONSC 5288 (Ont. S.C.J.), at paras. 57-58.

16. (June 3, 2009), Doc. 46098 CP, [2009] O.J. No. 5182 (Ont. S.C.J.).

17. *McCann*, *supra*, footnote 16, at para. 83. *Cf. Pysznyj*, *supra*, footnote 15, at paras. 14-19, Rady J.

18. *Supra*, footnote 11.

19. *Supra*, at para. 118. See also paras. 115-117, where Strathy J. declined to certify primary market claimants who acquired their shares from underwriters situate outside Canada.

Canadian Solar.²⁰ In *Canadian Solar*, an Ontario investor commenced a putative class action against the issuer and two of its officer/directors. The plaintiff alleged overstatements of Canadian Solar's financial results in its continuous disclosure documents and investor conference calls. In addition to claims for negligent misrepresentation and oppression, the plaintiff sought leave to commence an action for secondary market misrepresentation under Part XXIII.1. Canadian Solar brought a motion to strike in advance of the certification and s. 138.8 leave motions, arguing that Ontario lacked jurisdiction.²¹

The factual background in *Canadian Solar* provided fertile ground in support of arguments both for and against the application of the secondary market provisions in the Securities Act. As to the arguments in favour of Part XXIII.1 applying, Canadian Solar was originally incorporated under the Ontario Business Corporations Act (OBCA)²² and had its registered and "principal executive" offices in Toronto and Kitchener, respectively. It had also previously engaged in various business projects in Ontario "directly and through its subsidiaries," and raised capital from Ontario investors through private placements. Further, Canadian Solar held its annual meeting in Ontario in 2009, where it received the impugned audited financial statements, and the impugned press releases indicated that they were issued in Ontario. The plaintiff was also an Ontario resident who purchased his shares from a computer in Ontario, and received confirmation notices of his share purchases by a broker with an office in Ontario. The defendants conceded on appeal (and the court agreed) that Canadian Solar had a "real and substantial connection to Ontario."²³ The defendants even agreed at first instance that "Canadian Solar has Canada written all over it."²⁴

On the other hand, there were also several factors which pointed away from the application of Part XXIII.1 of the Securities Act.

20. *Supra*, footnote 4.

21. At first instance, the motion was erroneously framed as a challenge to the jurisdiction of the Ontario Superior Court. The motion judge appears to have conflated the issues of adjudicative and legislative jurisdiction, holding that Ontario courts had adjudicative jurisdiction over the negligent misrepresentation claims by virtue of Canadian Solar's "presence" in the jurisdiction. He then considered whether the secondary market cause of action in s. 138 of the Securities Act applied to Canadian Solar. At the Court of Appeal, the issue of the adjudicative jurisdiction of the Ontario courts was not addressed.

22. R.S.O. 1990, c. B.16.

23. *Abdula v. Canadian Solar Inc.*, *supra*, footnote 4.

24. *Supra*, at para. 21.

First, Canadian Solar's shares traded exclusively on the NASDAQ, and not any Canadian exchange. Second, Canadian Solar's "principal place of business" was in China, where the majority of its manufacturing operations occurred, and where the majority of its senior executives resided (including the two director/officer defendants). Third, the impugned disclosure documents were filed exclusively with the Securities Exchange Commission (SEC), and the impugned press releases were followed by conference calls in which the director/officer defendants participated from China. Fourth, Canadian Solar was no longer governed by the Ontario Business Corporations Act, but by the federal Canada Business Corporations Act (CBCA).²⁵

Canadian Solar's principal argument for dismissing the claim was that it was not a "responsible issuer" within the meaning of s. 138.1(b) of the Securities Act. As discussed in Part I of this paper, s. 138.1(b) of the Securities Act states that a "responsible issuer" can include a non-reporting issuer like Canadian Solar provided it is still an "issuer with a real and substantial connection to Ontario, any securities of which are publicly traded." Canadian Solar argued that this provision should be read subject to an implied limitation that the issuer's shares must be "publicly traded in Canada." Hoy J.A., writing for a unanimous Court of Appeal, disagreed. Accordingly, since there was no issue that a real and substantial connection existed between Canadian Solar and Ontario, it was clearly a responsible issuer within the meaning of the legislation.

Unfortunately, the Court of Appeal's analysis did not progress very far beyond this point. In particular, Hoy J.A. seemed content to conclude that Part XXIII.1 was applicable merely because Canadian Solar amounted to a responsible issuer within the meaning of the Securities Act, without regard to whether this was also constitutionally sufficient to justify the application of Part XXIII.1 on the facts before the court. Although Hoy J.A. did refer to *Unifund*,²⁶ it is unclear whether she did so in finding that Part XXIII.1 was applicable as a matter of constitutional law, or merely as a matter of statutory interpretation having regard to the interpretive presumption against extraterritoriality (which she referred to in tandem with *Unifund* itself). Indeed, the word "Constitution" does not appear once within the court's reasons.

25. R.S.C. 1985, c. C-44.

26. *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.).

Further, Hoy J.A. did not advert to the principles of “order” and “fairness” or the Supreme Court of Canada’s judgment in *Imperial Tobacco* at all. With respect to *Unifund*, she stated that:²⁷

[H]ere, unlike in *Unifund*, there is a sufficient connection between Ontario and Canadian Solar to support the application of Ontario’s regulatory regime to Canadian Solar. The general principles with respect to extra-territorial regulation do not require that the definition of “responsible issuer” be interpreted as confined to issuers any of whose securities are publicly traded in Canada.

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Unifund is clearly distinguishable from Mr. Abdula’s case. As stated by the motion judge at para. 43 of his reasons, Mr. Abdula’s case deals with an Ontario plaintiff seeking to have Ontario law apply to a defendant carrying on business in Ontario.

Territorial limits of provincial authority are respected by applying Ontario law to Canadian Solar in these circumstances. Canadian Solar is not the “foreigner” averted to in *R. v. Jameson*. It is a CBCA corporation with its registered office, its principal executive office and business operations in Ontario.

The subject matter of Part XXIII.1 is a remedy to investors for misrepresentation in certain issuers’ secondary market disclosure. In this case, at least some of that disclosure emanated from Ontario. That, together with the relationship of Canadian Solar to Ontario, constitutes a sufficient connection between Ontario and Canadian Solar to potentially subject Canadian Solar to a statutory cause of action pursuant to Part XXIII.1 of the *OSA* . . .

Without acknowledging *Unifund*’s concern about multiple and competing regulatory regimes applying to the same event, Hoy J.A. went on to hold that Part XXIII.1 could apply even if it exposed Canadian Solar to conflicting statutory claims in the United States.²⁸

The fact that s. 138.7 does not reduce the cap by damages assessed under s. 10(b) of the Securities Exchange Act of 1934 does not indicate that s. 138.3 is confined to issuers that are reporting issuers in a Canadian jurisdiction or issuers any of whose securities are listed on a Canadian stock exchange. A significant number of Canadian issuers are listed both on the TSX and an American exchange. Counsel for Canadian Solar agrees that such issuers fall within the definition of “responsible issuer”. They are exposed to litigation under both s. 138.3 of the *OSA* and s. 10(b) of the Securities Exchange Act of 1934. Damages assessed against them under s. 10(b) of the Securities

27. *Unifund*, *supra*, at paras. 41 and 47-49.

28. *Supra*, at para. 77.

Exchange Act of 1934 do not statutorily reduce the cap on their liability under s. 138.3 of the *OSA*. Section 138.3 applies even where the issuer may be sued in both Canada and the U.S.

Finally, Hoy J.A. held that *Pearson* and the other cases involving the territorial reach of statutory claims for primary market misrepresentations were “not applicable” to Part XXIII.1.²⁹ She offered little reasoning for this conclusion, other than to observe that the definition of “responsible issuer” in Part XXIII.1 distinguished it from the primary market provision in s. 130.³⁰ Alluding to *Pearson*, she concluded that the proposed representative plaintiff “would reasonably expect that his claim for misrepresentations in documents released or presented in Ontario would be determined by an Ontario court.”³¹

The decision in *Canadian Solar* is a departure from the approach that United States courts have taken with respect to the extraterritoriality of securities legislation in the context of civil claims under the implied right of action for secondary market misrepresentations in SEC Rule 10b-5,³² enacted pursuant to s. 10(b) of the Securities and Exchange Act of 1934.³³ To be sure, the U.S. cases are distinguishable, since American courts do not generally consider the constitutional applicability of securities legislation. Rather, most American courts consider the ambit of the securities legislation as a matter of actual or hypothetical congressional intent, as supplemented by the interpretive presumption against extraterritoriality.³⁴ That said, the U.S. cases are still a fruitful source of analysis concerning the appropriate territorial limits of civil securities claims.³⁵

29. *Supra*, at para. 82. For a contrary view, see P. Anisman and G. Watson, “Some Comparisons Between Class Actions in Canada and the U.S.: Securities Class Actions, Certification and Costs” (2006), 3 *Can. Class Action Rev.* 467, at p. 517; and Monestier, *supra*, footnote 12, at pp. 36-38.

30. *Unifund*, *supra*, footnote 26, at para. 88.

31. *Supra*, at para. 89. *Cf. Currie v. McDonald's Restaurants of Canada Ltd.* (2006), 250 D.L.R. (4th) 224, 74 O.R. (3d) 321 (Ont. C.A.), at para. 18.

32. C.F.R. § 240.10b-5.

33. U.S.C. § 78j(b).

34. See *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), pp. 2877-2878. This may be because securities legislation in the United States is largely federal. Commentators have observed that constitutional arguments are rarely made in relation to the extraterritoriality of federal, as opposed to state, legislation in the United States, though they have also suggested that some restrictions upon federal legislation may exist under the Fifth Amendment to the U.S. Constitution: see L. Brilmayer, “Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal” (1987), 50 *Law & Contemp. Probs.* 11, at pp. 24-26, 31 and 37-38.

Historically, the U.S. federal courts held that s. 10(b) could apply to extraterritorial claims provided that one of two alternative tests were met:³⁶ (1) an “effects test,” which considered “whether the wrongful conduct had a substantial effect in the United States or upon United States citizens”; and (2) a “conduct test,” which considered “whether the wrongful conduct occurred in the United States.”³⁷ However, in 2010, a majority of the U.S. Supreme Court in *Morrison* rejected this approach, opting in favour of a “bright-line” rule that limited s. 10(b) to transactions occurring in the United States.³⁸ According to the majority of the court, s. 10(b) applies only to the “purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”³⁹ In arriving at this result, the court examined the text, context and legislative history surrounding s. 10(b), and found that it did not disclose a sufficient intent that the provision apply abroad to displace the presumption against extraterritoriality.

Importantly, however, the *Morrison* court also addressed several of the same themes raised in the Canadian jurisprudence on the extraterritorial application of provincial legislation, which were

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35. Canadian courts have frequently considered U.S. case law in the field of securities: see *Pacific Coast Coin Exchange of Canada v. Ontario Securities Commission* (1977), 80 D.L.R. (3d) 529, [1978] 2 S.C.R. 112 (S.C.C.), at p. 126.
 36. The two tests are generally traced to *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2nd Cir. 1968), cert. denied 395 U.S. 906 (1969); and *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2nd Cir. 1972). For a review of the historical case law, see G.K. Chamberlin, “Subject Matter Jurisdiction of Securities Fraud Action Based on Foreign Transactions, Under Securities Exchange Act of 1934” (1982), 56 A.L.R. 288 Fed.
 37. *Morrison*, *supra*, footnote 34, at p. 2879 (citations omitted).
 38. See *Quail Cruises Ship Management Ltd. v. Agencia De Viagens cvc Tur Limitada*, 645 F.3d 1307 (11th Cir. 2011), p. 1310. There is an extensive body of literature discussing *Morrison* in the United States. For a detailed review from a Commonwealth perspective, see P. Spender and M. Tarlowski, “Adventures on the Barbary Coast: *Morrison* and Enforcement in a Globalised Securities Market” (2011), 35 *Melb. U.L. Rev.* 280. For a review of the post-*Morrison* jurisprudence, see H.L. Buxbaum, “Remedies for Foreign Investors Under U.S. Federal Securities Law” (2012), 75 *Law & Contemp. Probs.* 161; and United States, Staff of the U.S. Securities and Exchange Commission, “Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934” (Washington, D.C., U.S. Securities and Exchange Commission, 2012).
 39. *Morrison*, *supra*, footnote 34, at p. 2888. In *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2nd Cir. 2012), at p. 69, the court clarified the second branch of the *Morrison* test, holding that “a securities transaction is domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States.”

discussed in Part I of this paper. The court emphasized the uncertainty that had flowed from the “conduct” and “effects” tests, as well as the potential for conflict they created with the laws of other jurisdictions.⁴⁰ The court also rejected the argument that s. 10(b) should apply simply because some part of the deceptive conduct occurred within the United States. Importantly, Scalia J. observed that the subject-matter of the U.S. Exchange Act was not deceptive conduct in the abstract, but rather deceptive conduct tied to the American *capital markets*.⁴¹

II. CRITIQUE AND REFORMULATION

It is clear that the case law has yet to develop a principled approach to the territorial scope of Part XXIII.1 of the Securities Act. To a certain degree, this is to be expected, since Part XXIII.1 was only enacted on December 31, 2005, and there have been surprisingly few cases in which s. 138.3 claims have come before the courts. Nonetheless, it is important that this issue be addressed. The decision in *Canadian Solar* creates the possibility that the only test for the application of s. 138.3 is the “responsible issuer” test, which requires nothing more than a “real and substantial connection” between a public issuer and the province.

From a policy perspective, this long-arm reach of Part XXIII.1 is problematic for several reasons.⁴² First, in an era that is characterized by the increasing internationalization of the securities industry,⁴³ the cause of action creates uncertainty about

40. *Morrison, supra*, footnote 34, at pp. 2879-2880 and 2885.

41. *Supra*, at p. 2884.

42. There is very little treatment of this subject by Canadian commentators, in contrast to those in the United States. However, some discussion is provided by Anisman and Watson, *supra*, footnote 29, at pp. 515-517; T.G. Heintzman and D. Vaillancourt, “Directors and Officers Beyond Canadian Borders: Searching for the Right Venue for the Claim or the Defence” (2010), 6 *Can. Class Action Rev.* 185, at pp. 194-197 and 201; and Monestier, *supra*, footnote 12, at pp. 36-38. See also B.G. Poznanski, *The Extraterritorial Exercise of Jurisdiction in Securities Legislation* (LL.M. Thesis, McGill University Institute of Comparative Law) (Montréal, McGill University Institute of Comparative Law, 1968), for an early review of extraterritoriality issues in securities legislation more generally.

43. See *Reference re: Securities Act (Can.)* (2011), 339 D.L.R. (4th) 577, 2011 scc 66 (S.C.C.), at para. 115. See also D.C. Langevoort, “Schoenbaum Revisited: Limiting the Scope of Antifraud Protection in an Internationalized Securities Marketplace” (1992), 55 *Law & Contemp. Probs.* 241, at p. 244; D.N. White, “Conduct and Effects: Reassessing the Protection of Foreign Investors from International Securities Fraud” (2009-2010), 22 *Regent U.L. Rev.* 81, at p. 113; Spender and Tarlowski, *supra*, footnote 38, at pp. 284-285; and osc Staff Notice 51-719, “Emerging Markets Issuer Review” (Toronto, 2012).

when parties or events with a significant foreign component may become subject to statutory civil liability in Ontario.⁴⁴ This uncertainty is likely to generate conflicting court decisions, and is unfair to defendants. As the Supreme Court of Canada noted in a different context in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*,⁴⁵ the civil rights of action in securities legislation should not subject issuers to an “indeterminate obligation.” Instead, investors’ rights to disclosure must be balanced against the “burden” which securities disclosure obligations place upon issuers.⁴⁶ Further, the uncertainty surrounding Part XXIII.1 is harmful to the global competitiveness of the Canadian economy itself, since it creates disincentives for foreign issuers to raise capital or even carry on business in the province.⁴⁷

Second, the lack of territorial restrictions on the cause of action imposes a heavy burden upon our courts,⁴⁸ which are tasked with resolving complex securities class actions that have a tenuous connection to the province,⁴⁹ while other jurisdictions either hear parallel claims resulting in duplicative litigation, or “free ride” upon Ontario’s heightened level of judicial oversight.⁵⁰ As Scalia J. warned in *Morrison*, extraterritorial application of securities

44. See K.Y. Chang, “Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction” (2003), 9 *Fordham J. Corp. & Fin. L.* 89, at p. 102.

45. (2011), 331 D.L.R. (4th) 1, [2011] 2 S.C.R. 175 (S.C.C.).

46. *Supra*, at paras. 1, 40 and 118.

47. See Langevoort, *supra*, footnote 43, at p. 250; and E. Reuveni, “Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws” (2010), 43 *U.C. Davis L. Rev.* 1071, at pp. 1075-1076. Some commentators have suggested that the rise of London as one of the world’s leading financial centres is partly attributable to the growth of U.S. securities class actions: K. Baquizal, “The Extraterritorial Reach of Section 10(B): Revisiting *Morrison* In Light of Dodd-Frank” (2011), 34 *Fordham Int’l L.J.* 1544, at pp. 1554-1555.

48. G. Beyea, “*Morrison v. National Australia Bank* and the Future of Extraterritorial Application of the U.S. Securities Laws” (2011), 72 *Ohio St. L.J.* 537, at pp. 554-555.

49. See M.L. Berenblut, B.A. Heys, and S. Starykh, “Trends in Canadian Securities Class Actions: 1997-2008: Canada Strikes Its Own Course: Class Action Filings on the Rise” (2009), 2 *J. Bus. Val.* 1, at p. 12, where the authors note that of the 21 then-pending secondary market class actions in Canada, eight involved parallel class actions in the United States. Some commentators have raised the possibility that Ontario is poised to become the new “hub” of global securities class actions: see Monestier, *supra*, footnote 12, at pp. 2-4.

50. Langevoort, *supra*, footnote 43, at pp. 249-250; J.D. Kelly, “Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence With Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts” (1996), 28 *Law & Pol. Int’l Bus.* 477, at p. 506.

legislation may result in a jurisdiction becoming “the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.”⁵¹ Paradoxically, such litigation may even be futile, since Ontario class actions judgments can be unenforceable against defendants abroad.⁵² It also seems unnecessary to achieve the deterrence purposes of Part XXIII.1 given the overlapping regulatory functions exercised by the OSC and the gaps filled by the securities regimes of other countries.⁵³

Third, the extraterritoriality of Part XXIII.1 is offensive to basic principles of comity,⁵⁴ which is particularly troublesome in the securities area, where international regulatory co-operation is often required.⁵⁵ Indeed, there are no mechanisms in the legislation to mediate the regulatory conflicts that may occur where a different country provides a statutory civil remedy for the same misconduct. Instead, Part XXIII.1 creates the possibility that a defendant with a greater connection to a foreign country, whose continuous disclosure is in perfect compliance with that country’s laws, will become subject to liability under the Ontario regime. Such jurisdictional overreach creates regulatory inefficiencies,⁵⁶ and would be problematic even if carried out by Parliament alone. But it is especially problematic when attributable to a province, which is interfering with Canada’s foreign relations despite lacking external sovereignty under international law.⁵⁷

Aside from policy concerns, the extraterritorial scope of Part XXIII.1 may also be contrary to Canadian constitutional law. If the interpretation of Part XXIII.1 advanced in Part I of this paper and adopted in *Canadian Solar* is correct, then the cause of action

51. *Morrison*, *supra*, footnote 34, at p. 2886. See also Monestier, *supra*, footnote 12.

52. Chang, *supra*, footnote 44, at p. 101. See also J.P. Brown, “The Perils of Certifying International Class Actions in Canada,” in D. Fairgrieve and E. Levin, eds., *Extraterritoriality and Collective Redress* (Oxford, Oxford University Press, 2012), ch. 16. Cf. *Ramdath v. George Brown College of Applied Arts and Technology* (2010), 93 C.P.C. (6th) 106, 2010 ONSC 2019 (Ont. S.C.J.), at paras. 52-87.

53. See Baquizal, *supra*, footnote 47, at pp. 1559-1560.

54. Chang, *supra*, footnote 44, at pp. 100-101; Beyea, *supra*, footnote 48, at p. 555; A. Rocks, “Whoops! The Imminent Reconciliation of U.S. Securities Laws With International Comity After *Morrison v. National Australia Bank* and the Drafting Error in the Dodd-Frank Act” (2011), 56 Vill. L. Rev. 163, at pp. 171-173.

55. 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 para. 27. See also Langevoort, *supra*, footnote 43, at p. 250; and Reuveni, *supra*, footnote 47, at pp. 1075-1077.

56. Chang, *supra*, footnote 44, at p. 102; Beyea, *supra*, footnote 48, at p. 554.

57. See footnote 41 in Part I of this paper.

can apply in circumstances where there is no meaningful connection among Ontario, the subject matter of Part XXIII.1 and the parties, and in a manner which pays no respect to the legislative sovereignty of other jurisdictions. Several features of the s. 138.3 right of action may combine to create such a result.

First, the "responsible issuer" definition requires only that there be a real and substantial connection between Ontario and the issuer. It does not require that there be a real and substantial connection between Ontario and the actual *parties* to the litigation. There is no requirement, for instance, that the plaintiff sue the issuer — as opposed only to an officer, director, influential person, expert or public oral speaker — under s. 138.3. But it is entirely conceivable that the actual parties to the litigation will not possess a real and substantial connection to Ontario, even though the responsible issuer may. For example, an Australian plaintiff could seek to sue an Australian defendant who is an outside director of multiple Australian issuers, which include an Australian company that itself has no real and substantial connection to Ontario, but which owns a controlling interest in another Australian company that does possess a real and substantial connection to Ontario. The Australian director need not have visited nor ever had any kind of business or personal connection to Ontario, other than meeting twice a year in Australia to discuss the Australian parent company's affairs. And yet such a director could be sued as an "influential person" of the Australian subsidiary under s. 138.3(1)(d) of the Securities Act. Nor is the possibility of such a claim fanciful; these facts are broadly similar to those before the U.S. Supreme Court in *Morrison*.

Second, the responsible issuer definition does not require that there be any real and substantial connection between Ontario and the *cause of action* itself. As a result, the conduct at the heart of the claim, *i.e.*, the release of the document containing a misrepresentation and the subsequent acquisition or disposition of securities, need not have occurred within Ontario. To continue the foregoing example, the Australian director could be sued under s. 138.3(1)(d) if he influenced Australian employees of the Australian subsidiary to release an annual report from its offices in Australia which it filed solely with the Australian Securities and Investment Commission. The misrepresentations in the annual report could relate solely to the financial results of the subsidiary's Australian operations. The Australian plaintiff could then purchase shares in the subsidiary through an Australian broker on the Australian

Securities Exchange, and then sell those shares on the Australian Securities Exchange at a loss after the subsidiary issues a corrective filing with the Australian Securities and Investment Commission. Despite all this, the s. 138.3 cause of action would apply. Remarkably, that is so even though the test for adjudicative jurisdiction under *Van Breda* requires a real and substantial connection between the forum and the subject-matter of the litigation, not simply between the forum and the defendant.⁵⁸ Thus, the Securities Act could require the application of Part XXIII.1 even in circumstances where an Ontario court would not itself take jurisdiction over the dispute. This is contrary to *Unifund*, where the Supreme Court held that a real and substantial connection sufficient to ground a provincial court's adjudicative jurisdiction will, if anything, be less stringent than the connection required to ground the application of the province's legislation.

Third, the responsible issuer definition only requires that the issuer have a real and substantial connection to Ontario, not to the Ontario *capital markets*. It is therefore irrelevant whether the issuer has ever been regulated as a reporting issuer by the OSC, or has otherwise sought to access capital through distributions or stock exchanges in Ontario. In the case of the Australian subsidiary, it could have raised all of its capital through distributions to the public in Australia, be regulated solely by the Australian Securities and Investment Commission, and be listed solely on the Australian Securities Exchange. Its real and substantial connection to the province may take the form of nothing other than its ownership of a large mine in northern Ontario. This mine would not create any link between the issuer and the Ontario markets, and Ontario could have no legitimate interest in applying its securities laws to the dispute.⁵⁹ Yet it would serve as the territorial lynchpin of the plaintiff's entire claim.

Fourth, Part XXIII.1 is ill-equipped to respond to *competing statutory regimes*. It is true that there are provisions in ss. 138.7(1)(b), 138.10, 138.14(a)(ii), 138.14(b)(ii) and 138.14(c)(ii) of the Securities Act which could help mediate conflicts with overlapping statutory regimes in other provinces (*e.g.*, by reducing a capped damages award to reflect the amounts received in parallel statutory claims elsewhere in Canada). But as the Ontario Court of Appeal recognized in *Canadian Solar*, these provisions may have no application where the defendant is subject to liability under the

58. See *Van Breda*, *supra*, footnote 3, at para. 99.

59. See Heintzman and Vaillancourt, *supra*, footnote 42, at pp. 195-196.

laws of different countries,⁶⁰ which can vary significantly in their civil and regulatory responses to securities fraud.⁶¹ Further, Canadian securities laws are generally co-ordinated, as evidenced by the proliferation of National Instruments and Policies adopted by each of the provincial securities commissions (some of which relate directly to the adequacy of continuous disclosure, and thus to the “misrepresentation” element of s. 138.3(1)).⁶² Therefore, it is unlikely that a document would give rise to liability under the laws of one Canadian province but not another. But there is little to no such co-ordination in the international sphere. The Australian plaintiff could thus recover under the Ontario Securities Act even if all of the director’s actions were designed to accord with Australian securities laws, and were carried out in perfect compliance with them so as to exclude his liability in Australia itself. Indeed, the Australian director could even be liable if the Australian securities laws required him to act in a way that attracted liability under Part XXIII.1. Alternatively, the Australian laws could recognize the director’s liability, but provide dramatically different remedies than those available in Ontario. In addition to being unfair to the defendant, and contrary to comity,⁶³ applying Part XXIII.1 in circumstances like these would invite forum shopping.⁶⁴

60. It could be argued that the territorial restrictions in s. 92 of the Constitution Act, 1867, 30 & 31 Vict., c. 3, apply with less force where the alleged extraterritoriality relates to another country rather than another province: W.L. Reese, “Limitations on the Extraterritorial Application of Law” (1978), 4 Dalhousie L.J. 589, at pp. 595-596. However, the Supreme Court has also released several decisions involving extranational legislation which address whether extraterritorial provincial legislation is constitutionally inapplicable or invalid, without suggesting that the principles in the extranational context are any different than in the extraprovincial context: see, e.g., *British Columbia v. Imperial Tobacco Canada Ltd.* (2005), 257 D.L.R. (4th) 193, [2005] 2 S.C.R. 473 (S.C.C.). Further, in the extranational context there is the added feature that extraterritorial provincial legislation is interfering with Canada’s international relations and trenching upon Parliament’s potentially exclusive jurisdiction under the Statute of Westminster. See *Gore Mutual Insurance Co. v. John Deere Insurance Co.* (2008), 65 C.C.L.I. (4th) 100, 168 A.C.W.S. (3d) 389 (Ont. S.C.J.), at paras. 16-17, Hoy J. (as she then was).

61. See Baquizal, *supra*, footnote 47, at pp. 1556-1558; and E. Cosenza, “Paradise Lost: § 10(b) after *Morrison v. National Australia Bank*” (2011), 11 Chi. J. Int’l L. 343, at pp. 368-371.

62. See, e.g., National Instrument No. 51-102, “Continuous Disclosure Obligations”; and National Policy 51-201, “Disclosure Standards.” See also *McKenna*, *supra*, footnote 11, at paras. 50-51.

63. It is noteworthy that Canadian courts have found that foreign laws which condone a breach of domestic securities legislation may be unenforceable on account of domestic public policy: *Society of Lloyd’s v. Saunders* (2001), 210

Accordingly, there is a considerable potential for jurisdictional overreach on the face of the legislation. At the same time, it must be acknowledged that the concepts which *Unifund* and *Imperial Tobacco* use to assess constitutional questions of extraterritoriality are themselves highly vague and abstract. What does it mean to require that there be a “meaningful” or “sufficient” connection between the parties, the subject-matter of the legislation and the enacting province? When is it permissible for there to be “competing exercises of regulatory regimes”? At what point does provincial legislation fail to “respect the legislative sovereignty of other territories”? And how do the principles of “order and fairness” work in practice?

It is clear that a major theme with respect to the territorial limits on civil Securities Act claims is clarity and predictability. This was an important factor in the U.S. Supreme Court’s decision to adopt a bright-line transactional test to the application of Rule 10b-5 in *Morrison*. The same concern is evident in *Pearson*, where the B.C. Court of Appeal adopted a transactional test for the statutory cause of action involving primary market misrepresentations. The approach taken in both of these cases echoes the Supreme Court’s treatment of adjudicative jurisdiction in *Van Breda*, where it held that the principles of “order” and “fairness” require rules that promote greater certainty, stability and predictability.

Accordingly, it seems insufficient to predicate the constitutional applicability of Part XXIII.1 solely on the basis of the *Unifund* and *Imperial Tobacco* framework. There is need for a more concrete approach.

One possibility is to adopt a transactional test, similar to that in *Morrison* and *Pearson*. For instance, a bright-line rule could be adopted limiting claims under Part XXIII.1 to issuers whose shares trade on a Canadian exchange (the argument that the court in *Canadian Solar* rejected). This may bring a significant amount of clarity to the circumstances in which Part XXIII.1 applies.⁶⁵ If

D.L.R. (4th) 519, 55 O.R. (3d) 688 *sub nom. Society of Lloyd's v. Meinzer* (Ont. C.A.) at paras. 65 and 70, leave to appeal to S.C.C. refused 212 D.L.R. (4th) vii, [2001] S.C.C.A. No. 527 (S.C.C.). This principle should also have resonance insofar as Part XXIII.1 condones a breach of foreign securities legislation to avoid liability under s. 138.3. See also *McIntyre Porcupine Mines Ltd. v. Hammond* (1975), 119 D.L.R. (3d) 139, 31 O.R. (2d) 452 (Ont. H.C.J.), where the court declined to give U.S. securities laws extraterritorial effect in Ontario.

64. *Tolofson v. Jensen* (1994), 120 D.L.R. (4th) 289, [1994] 3 S.C.R. 1022 at pp. 1052 and 1055 (S.C.C.). See also *Beyea*, *supra*, footnote 48, at p. 556.

65. See S.J. Choi and L.J. Silberman, “Transnational Litigation and Global Securities Class-Action Lawsuits” (2009), 2 *Wis. L. Rev.* 465.

defendants could only be sued in respect of issuers whose shares are traded on a Canadian exchange, or otherwise acquired in Canada, many actions with a tenuous connection to the province would be excluded. And there is some support for a transactional test in the cases concerning the certification of global securities class actions, where decisions like *McKenna* have excluded persons who acquired their shares on foreign exchanges from the class definition.

On the other hand, there are also cogent arguments against a bright-line transactional test under Part XXIII.1. For one, the test was rejected by the Ontario Court of Appeal in *Canadian Solar*. Further, it seems at odds with the approach that Canadian courts have taken when assessing the extraterritorial scope of securities legislation in the regulatory context.⁶⁶ The regulatory cases discussed in Part I of this paper suggest that Canadian securities legislation is not focused solely upon the purchase and sale of securities, which the U.S. Supreme Court held was the lodestar of the U.S. Securities Exchange Act in *Morrison*. Additionally, the Canadian Securities Administrators (CSA) distinguished Rule 10b-5 from Part XXIII.1 when it proposed the model legislation, stating that the latter was intended to achieve a deterrent purpose rather than provide a compensation right to investors.⁶⁷

It is also significant that the court in *Morrison* adopted a transactional test in relation to *federal* U.S. securities legislation. As a result of the Supreme Court of Canada's decision in the *Securities Reference*, there may never be federal securities legislation in Canada. The absence of federal Canadian securities legislation suggests that courts may be reluctant to impose constraints upon the territoriality of the provincial cause of

66. It is also noteworthy that, in considering constitutional questions of extraterritoriality, Canadian courts have usually referred to several different connecting factors, instead of limiting their analysis to only one: see *British Columbia v. Imperial Tobacco Canada Ltd.* (2004), 239 D.L.R. (4th) 412 (B.C.C.A.) at para. 211 *per* Prowse J.A., *affd* [2005] 2 S.C.R. 473 (S.C.C.).

67. See *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, at p. 7410, response to Davies, Ward & Beck (28/08/98):

The U.S. provision is an anti-fraud measure that has been developed through jurisprudence into a compensatory scheme. The Proposal, by contrast, is designed as an incentive to good corporate disclosure practices, rather than a fully compensatory scheme.

See also pp. 7391-7393.

action.⁶⁸ Further, the relevance of the U.S. approach to the extraterritoriality of federal securities legislation is questionable when assessing the constitutional applicability of provincial legislation in Canada. In *Unifund*, the Supreme Court held that the Canadian and American approaches to extraterritoriality are distinct, given the unique relevance of the order and fairness principles to Canadian constitutional law.

Finally, many U.S. commentators have criticized *Morrison*.⁶⁹ Some commentators have observed that the allegedly “bright-line” transactional test is not really “bright-line” at all, and has proven difficult to apply in practice.⁷⁰ Others have suggested that a transactional test could encourage an undesirable “race to the bottom,” in which issuers seek to list their securities in jurisdictions with the weakest liability regimes.⁷¹ And Congress itself responded to *Morrison* by enacting the Dodd-Frank Act,⁷² which allows the Securities Exchange Commission (SEC) and the United States to bring s. 10(b) claims for certain types of extraterritorial securities frauds that would have met the “conduct” or “effects” tests, and required the SEC to study the wisdom of the *Morrison* rule in the context of claims by private litigants.⁷³

68. See *Multiple Access Ltd. v. McCutcheon* (1982), 138 D.L.R. (3d) 1, [1982] 2 S.C.R. 161 at pp. 183-184 (S.C.C.).

69. See, e.g., J.H. Knox, “The Unpredictable Presumption Against Extraterritoriality” (2011), 40 Sw. L. Rev. 635; E. Cosenza, *supra*, footnote 61; Beyea, *supra*, footnote 48, at p. 537; L. Macias, “The ‘Transactional Test’ Replaces the ‘Conduct and Effects Test’ When Determining the Extraterritorial Reach of Private Rights of Action Pursuant to Section 10(B) of the Securities Exchange Act of 1934: *Robert Morrison, et al. v. National Australia Bank Ltd.*” (2011), 13 Duq. Bus. L.J. 75; J. Wu, “*Morrison v. Dodd-Frank*: Deciphering the Congressional Rebuttal to the Supreme Court’s Ruling” (2011), 14 U. Pa. J. Bus. L. 317; and M. Ventrizzo, “Like Moths to a Flame? International Securities Litigation After *Morrison*: Correcting the Supreme Court’s ‘Transactional Test’” (2011), 52 Va. J. Int’l L. 405.

70. R. Painter, D. Dunham and E. Quackenbos, “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” (2011), 20 Minn. J. Int’l L. 1, at pp. 8-12; J. Chambers, “Extraterritorial Private Rights of Action: Redefining the Transactional Test in *Morrison v. National Australia Bank*” (2011), 31 Rev. Bank. & Fin. L. 411, at pp. 417-428; V.M. Chiappini, “How American are American Depositary Receipts? ADSRs, Rule 10b-5 Suits, and *Morrison v. National Australia Bank*” (2011), 52 B.C. L. Rev. 1795.

71. See, e.g., Beyea, *supra*, footnote 48, at p. 561.

72. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, H.R. 4173.

73. See Chambers, *supra*, footnote 70. The SEC released its study in April, 2012: see U.S., Staff of the U.S. Securities and Exchange Commission, “Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934” (Washington, D.C., U.S. Securities and

In our view, rather than adopting the rule in *Morrison*, Canadian courts should employ a made-in-Canada solution that builds upon the Supreme Court of Canada's judgment in *Van Breda*. The *Van Breda* judgment suggests that the certainty and predictability required by the constitutional principles of order and fairness may be satisfied through a test which relies upon a series of presumptive connecting factors to determine territorial applicability. While *Van Breda* admittedly involved adjudicative rather than legislative jurisdiction, the court indicated that these two concepts are related, and that both proceed from the same constitutional requirement for a real and substantial connection to the province. Further, *Van Breda* concerned the test for adjudicative jurisdiction in tort claims, and Part XXIII.1 is in effect a type of statutory tort. Accordingly, it seems reasonable to consider the *Van Breda* framework as a guide for the constitutional applicability of secondary market claims under the Securities Act. At the very least, the *Van Breda* approach offers a more nuanced framework of analysis for territorial jurisdiction than the exceedingly vague and general statements of principle in *Unifund* and *Imperial Tobacco*.

At the same time, this is not to suggest that the *Unifund* and *Imperial Tobacco* principles are irrelevant. As in *Van Breda*, the concepts of order and fairness emphasized in these two cases should influence whether new presumptive connecting factors are recognized in the future. Similarly, the requirements for a meaningful connection to the province and respect for the legislative sovereignty of other jurisdictions should be relevant in considering whether a presumptive connecting factor can be rebutted in any given case.⁷⁴ And the focus on the relationships among the enacting province, the parties and the subject-matter of the legislation should inform the selection of the presumptive connecting factors themselves. However, the concepts discussed in *Unifund* and *Imperial Tobacco* cannot serve as substitutes for a concrete applicability test. *Van Breda* demonstrates that such a test is necessary if Part XXIII.1 claims are to advance the principles of order and fairness which underlie *Unifund* and *Imperial Tobacco* themselves.⁷⁵

Exchange Commission, 2012). The study seems to support the enactment of a modified conduct and effects test, though it also proposes several other options for legislative reform, some of which involve the *Morrison* test.

74. Compare American Law Institute, *Restatement (Third) of Foreign Relations Law of the United States* (St. Paul, Minnesota, American Law Institute, 1987), § 403.

In considering how this test would work in practice, it is important to begin by identifying the subject-matter of Part XXIII.1. Indeed, both *Unifund* and *Imperial Tobacco* are clear that a constitutionally sufficient connection must be assessed with regard to not simply the enacting province and the parties, but the subject matter of the legislation itself. This principle can also be seen in *Van Breda*, where the Supreme Court emphasized the requirement⁷⁵ for a significant connection between the forum province and the subject-matter of the dispute. In many respects, the problem with the statutory territoriality test in Part XXIII.1 is that it neglects this principle. There is no focus upon the legislation's subject matter in the definition of responsible issuer, but only a requirement for a real and substantial connection between the issuer and "Ontario" writ large. If Part XXIII.1 is to be constitutionally applicable, this omission must be addressed.

The Supreme Court of Canada has recognized that the concerns of securities regulation in general are the "local concerns of protecting investors and ensuring the fairness of the markets through regulation of participants."⁷⁶ As the court observed in *British Columbia Securities Commission v. Branch*, "the primary goal of securities legislation is the protection of the investor, but other goals include capital market efficiency and ensuring public confidence in the system."⁷⁷

The legislative history behind Part XXIII.1 is also instructive.⁷⁸ It suggests a focus upon improving the quality of disclosure in domestic capital markets. The Interim Allen Report states:⁷⁹

75. In some respects, the test proposed herein is similar to that proposed by the American Law Institute, *ibid.*, § 408.

76. *Securities Reference*, *supra*, footnote 43, at para. 128.

77. *British Columbia Securities Commission v. Branch* (1995), 123 D.L.R. (4th) 462, [1995] 2 S.C.R. 3 (S.C.C.), at para. 54. See also s. 1.1 of the Securities Act. Further statements of the purpose of securities legislation can be found in: *Pezim v. British Columbia (Superintendent of Brokers)* (1994), 114 D.L.R. (4th) 385, [1994] 2 S.C.R. 557 at p. 589 (S.C.C.); *Global Securities*, *supra*, footnote 55, at para. 32.

78. See, in addition to the legislative history cited below, the debates of the Ontario Legislature which accompanied the introduction of Part XXIII.1, particularly: Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (November 7, 2002), at pp. 1600-1610 (Minister of Finance); and Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* (November 19, 2002), at pp. 1700-1710 (Mr. Chudleigh). Given that the legislative reports cited below were drafted to consider the wisdom of enacting Part XXIII.1 across Canada, the focus upon "Canada" and "Canadian capital markets" in the passages that follow should be read as references to Ontario and Ontario capital markets when assessing the purpose of s. 138.3 of the Ontario Securities Act itself.

79. Toronto Stock Exchange Committee on Corporate Disclosure, *Toward Improved*

The task was to attempt to analyze whether the integrity of Canada's capital markets would be enhanced and investors would be treated more fairly if the responsibility of a company and its directors and officers, for statements made to secondary market participants, were the same as or similar to the responsibility for statements made to new issue buyers.

Similarly, the Final Allen Report observes:⁸⁰

The Committee believes strongly that it is necessary to add significantly to the deterrence in the marketplace in order to achieve the level of integrity of continuous disclosure that must characterize Canadian securities markets.

And according to *CSA Notice 53-302*:⁸¹

The quality of continuous disclosure in Canada can and should be improved. Institutional investors have characterized the quality of continuous disclosure in Canada as inadequate and inferior to that in the United States. . . .

.

The CSA remain committed to seeking implementation of the Proposal so that investors are empowered with the tools to seek redress when they suffer damages as a result of misrepresentative disclosure, resulting in improved continuous disclosure in Canada.

Thus, the subject-matter of Part XXIII.1 may be summarized as a limited civil cause of action, which is part of a larger regulatory scheme designed to deter inadequate continuous disclosure in Ontario, and thereby enhance the integrity of Ontario's capital markets for the benefit of persons dealing therein and the Ontario economy.⁸² The presumptive connecting factors necessary to ground the application of Part XXIII.1 should be developed with this subject-matter of the legislation in mind. Otherwise, a Part

Disclosure: A Search for Balance in Corporate Disclosure, Vol. I (Toronto, Toronto Stock Exchange, 1995), at p. 4 ("Interim Allen Report").

80. Toronto Stock Exchange Committee on Corporate Disclosure, *Responsible Corporate Disclosure: A Search for Balance: Final Report* (Toronto, Toronto Stock Exchange, 1997), at p. iii ("Final Allen Report").

81. *CSA Notice 53-302*, *supra*, footnote 67, at pp. 7374 and 7388.

82. The primacy of deterrence to the purposes of Part XXIII.1 was emphasized by the CSA. It has also been recognized by the courts: see *Ainslie v. CV Technologies Inc.* (2008), 304 D.L.R. (4th) 713, 93 O.R. (3d) 200 (Ont. S.C.J.), at paras. 8-9, add'l reasons 2008 CarswellOnt 7735, [2008] O.J. No. 4927 (Ont. S.C.J.), leave to appeal to Ont. Div. Ct. granted 174 A.C.W.S. (3d) 1211, [2009] O.J. No. 730 (Ont. S.C.J.); and *Round v. MacDonald, Dettwiler and Associates Ltd.* (2011), 207 A.C.W.S. (3d) 811, 2011 BCSC 1416 (B.C.S.C.) at para. 3, aff'd 2012 BCCA 456 (B.C.C.A.). That said, some courts have suggested that the purpose of Part XXIII.1 is in part compensatory: *IMAX*, *supra*, footnote 12, at paras. 238, 293, 303-304 and 328-329; *Dobbie*, *supra*, footnote 11, at paras. 50-52; *Canadian Solar*, *supra*, footnote 4, at para. 81.

XXIII.1 claim could be brought on the basis that there is a sufficient connection between the issuer and *Ontario* (e.g., the fact that the issuer operates a factory in the province), without regard to whether such a claim would actually advance the purpose of the legislation by improving the integrity of Ontario's *capital markets*. Based on the Part XXIII.1 subject-matter, the presumptive connecting factors we would propose are as follows.

First, the residence of the plaintiff, and hence the place where the plaintiff sustained an injury,⁸³ should not qualify as presumptive connecting factors. This is not to suggest that, if the plaintiff is resident outside the province, then the s. 138.3 cause of action will always be constitutionally inapplicable. Indeed, the Supreme Court of Canada has recognized that the provinces are constitutionally competent to vest non-residents with civil rights,⁸⁴ and the regulatory cases discussed in Part I of this paper suggest that securities legislation may be applied extraterritorially to protect investors resident elsewhere. But as *Unifund* makes clear, the mere fact that a plaintiff *is* situate within the enacting province should not automatically permit them to invoke the statutory cause of action.⁸⁵ This is consistent with the subject-matter of Part XXIII.1, which is not merely to create a cause of action for Ontario residents, but to deter inadequate disclosure in the Ontario capital markets for the benefit of investors therein wherever they may be resident. Accordingly, though *Canadian Solar* placed some emphasis upon the Ontario residence of the plaintiff in finding Part XXIII.1 applicable, we would not include it as a presumptive connecting factor.

Second, the place where the plaintiff acquires or disposes of its securities should qualify as a presumptive connecting factor. If the plaintiff purchases shares of the issuer on an exchange in Ontario,⁸⁶ or even through a non-exchange transaction which

83. As to the conceptual problems with relying upon the place where the plaintiff suffered an injury as a presumptive connecting factor, see *Van Breda, supra*, footnote 3, at para. 89.

84. See *Attorney General for Ontario v. Scott* (1956), 1 D.L.R. (2d) 433, [1956] S.C.R. 137 at pp. 140-141.

85. See also *Van Breda, supra*, footnote 3, at para. 86, holding that the plaintiff's presence within the forum is not a presumptive connecting factor sufficient to establish adjudicative jurisdiction *simpliciter*.

86. In such a case, the issuer would also be a reporting issuer, which, as discussed below, is another presumptive connecting factor we would propose. It should be noted that some U.S. courts have interpreted the "exchange" branch of the *Morrison* transactional test as not applying where the securities are dual-listed in both the United States and abroad, if the plaintiff acquires or disposes of their shares on the foreign exchange: see, e.g., *Alstrom SA Securities Litigation (In re)*,

nonetheless occurred in Ontario,⁸⁷ then the defendant's misrepresentations have affected the integrity of the market for raising capital in the province. Accordingly, there is a meaningful connection among Ontario, the parties and the subject-matter of Part XXIII.1. But in referring to the "plaintiff," it is important to emphasize that the plaintiff means the party with the actual claim against the defendant. Accordingly, since virtually all Part XXIII.1 claims will be brought as class actions, courts should ensure that the individual class members themselves, and not simply the representative plaintiff, acquired or disposed of their securities in Ontario if this is the presumptive connecting factor upon which they seek to rely. Simply being party to a class action in which the representative plaintiff acquired or disposed of their securities in Ontario should not be sufficient.⁸⁸

Third, the residence of the defendant, whether it is the issuer or not, should also qualify as a presumptive connecting factor, though only in relation to that particular defendant themselves (which may be relevant where several defendants are sued).⁸⁹ In cases where the defendant is an artificial person, "residence" should mean its head rather than registered office,⁹⁰ unless perhaps

741 F. Supp. 2d 469 (S.D.N.Y. 2010), pp. 471-473. However, under the model we propose, while acquiring or disposing of a dual-listed issuer's shares abroad would not satisfy the presumptive connecting factor of a domestic acquisition or disposition, it would satisfy the presumptive connecting factor discussed below of there being a reporting issuer.

87. Questions may arise regarding the place where a non-exchange transaction occurs: see *Absolute Activist Value Master Fund v. Ficeto*, 672 F.3d 143 (2d Cir. 2012). While it is beyond the scope of this paper to address these questions, we note that some guidance on this issue may be provided by s. 17 of the Securities Transfer Act, 2006, R.S.O. 1990, c. 8.
88. Otherwise, the class proceedings legislation would be used to generate substantive rights, which the Supreme Court of Canada has repeatedly held cannot be done: see, e.g., *Bou Malhab v. Diffusion Métromédia CMR Inc.* (2011), 328 D.L.R. (4th) 385, [2011] 1 S.C.R. 214 (S.C.C.), at para. 52. A consequence of this is that there may need to be individual inquiries of each class member to determine where they acquired or disposed of their shares.
89. Thus, unlike in *Canadian Solar*, *supra*, footnote 4, where the court analyzed the territoriality question largely without reference to the individual director/officer defendants, we propose that courts conduct a separate territoriality inquiry for each defendant involved. Otherwise, the plaintiff may acquire a substantive cause of action against a defendant merely by "lumping" them together with other defendants to whom Part XXIII.1 is properly applicable.
90. *Canada Life Insurance Co. v. Canadian Imperial Bank of Commerce* (1979), 98 D.L.R. (3d) 670, [1979] 2 S.C.R. 669 at p. 678 (S.C.C.). At common law, a company's registered office determines only its domicile, not its residence: *JTI-Macdonald Corp. v. British Columbia (Attorney General)* (2000), 184 D.L.R. (4th) 335, 2000 BCSC 312 (B.C.S.C.), at para. 174. Interestingly, in *Van Breda*, *supra*,

it can be shown that the defendant's central management and control is situated elsewhere.⁹¹ As with plaintiffs, the fact that the defendant is not a resident of Ontario does not mean that Part XXIII.1 can never apply to them. Such an automatic rule would be implausible,⁹² and the regulatory cases suggest that non-resident defendants may still engage the application of legislation in the securities field.⁹³ But where the defendant *is* resident in the province, it seems appropriate to treat this as a presumptive connecting factor for the purposes of Part XXIII.1. When a resident engages in misconduct abroad, censuring that misconduct may improve continuous disclosure and protect investors in the capital markets where the defendant resides.⁹⁴

At the same time, it is important not to attribute too great a weight to the residence of the defendant, and treat it as an irrebuttable connecting factor. There are situations in which an Ontario resident may have little connection to the subject-matter of Part XXIII.1, *i.e.*, deterring inadequate continuous disclosure in Ontario in order to enhance the integrity of Ontario's capital markets. An Ontario defendant could, for instance, choose to raise all of its capital in a foreign jurisdiction, and avoid any connection between itself and Ontario's continuous disclosure regime. Further, an irrebuttable connecting factor based upon the residency of the defendant would seem contrary to the modern, "flexible" constitutional approach to extraterritoriality heralded in *Unifund*, and represent a retreat to the old approach in which the presence or absence of the defendant in the enacting province was determinative.⁹⁵ Notably, in *Pearson*, the B.C. Court of Appeal

footnote 3, at para. 86, the court stated that the location of a legal person's head office determines where they are both resident and domiciled.

91. See *Garron Family Trust v. Canada* (2012), 343 D.L.R. (4th) 670, 428 N.R. 202 *sub nom. St. Michael Trust Corp. v. M.N.R.*, 212 A.C.W.S. (3d) 881, 2012 scc 14 *sub nom. Fundy Settlement v. Canada* (S.C.C.), at paras. 8-9 and 15, adopting a "central management and control" test for the residency of corporations and trusts in the tax context.
92. This is made clear by *Imperial Tobacco, supra*, footnote 60. See also *British Columbia v. Imperial Tobacco Canada Ltd.* (2006), 273 D.L.R. (4th) 711, 2006 BCCA 398 (B.C.C.A.) at paras. 90 and 100-101, leave to appeal to S.C.C. refused 276 D.L.R. (4th) vii, 368 N.R. 397n (S.C.C.).
93. See *R. v. W. McKenzie Securities Ltd.* (1966), 56 D.L.R. (2d) 56, [1966] 4 C.C.C. 29 (Man. C.A.); and *Torudag v. British Columbia (Securities Commission)* (2011), 343 D.L.R. (4th) 743, 2011 BCCA 458 (B.C.C.A.), leave to appeal to S.C.C. refused 2012 CarswellBC 2605, [2012] S.C.C.A. No. 21 (S.C.C.).
94. *Global Securities, supra*, footnote 55, para. 34. See also, by analogy, *R. v. Libman* (1985), 21 D.L.R. (4th) 174, [1985] 2 S.C.R. 178 at p. 212 (S.C.C.).
95. Similarly, in *Van Breda, supra*, footnote 3, at para. 90, the court held the defendant's residence or domicile within the forum served only as a presumptive

held that class members could not all invoke the right of action for primary market misrepresentations in the Ontario statute, even though the defendant issuer in *Pearson* had its head office in Ontario.⁹⁶

Fourth, however, the fact that the defendant simply carries on business in Ontario without being a resident there should not be a presumptive connecting factor, despite the emphasis placed on this in *Canadian Solar*. A person carrying on business in the province may do so without any involvement in Ontario's capital markets and without engaging in any continuous disclosure in Ontario. As in *Imperial Tobacco*, then, there is little connection between this factor and the subject-matter of Part XXIII.1, which is to deter inadequate continuous disclosure in Ontario. Further, as the Supreme Court of Canada recognized in *Van Breda*, there are conceptual problems in determining the level of activity required before a defendant can even be said to carry on business in a particular jurisdiction (e.g., advertising vs. having an office there).⁹⁷ It is better to avoid this debate altogether, particularly since the focus of Part XXIII.1 is Ontario's capital rather than business markets.

Fifth, the fact that the issuer in question is a reporting issuer in Ontario should also serve as a presumptive connecting factor. Such an issuer will have voluntarily engaged in one of several acts which bring it within the regulatory oversight of the OSC. In that case, the issuer — and any defendant who acts as a director, officer, influential person, expert or public speaker in relation to it — has chosen to become an active participant in Ontario's capital markets, and can reasonably be held there to account.⁹⁸

connecting factor for the purposes of establishing adjudicative jurisdiction *simpliciter*. See also *Tolofson v. Jensen* (1994), 120 D.L.R. (4th) 289, [1994] 3 S.C.R. 1022 (S.C.C.), at pp. 1050, 1052 and 1065-1066 (S.C.R.).

96. See also *Interprovincial Co-operatives Ltd. v. Manitoba* (1975), 53 D.L.R. (3d) 321, [1976] 1 S.C.R. 477 (S.C.C.), at pp. 507-510, per Pigeon J.

97. *Van Breda, supra*, footnote 3, at paras. 87 and 96.

98. The exception to this is where the issuer becomes a "reporting issuer" because the OSC has deemed it to be such under its public interest jurisdiction. In our view, the fact that the OSC has deemed an issuer to be a reporting issuer should only qualify as a presumptive connecting factor where the OSC's public interest jurisdiction has been validly exercised, including with respect to the extraterritorial limits upon this regulatory power recognized in cases like *Québec v. Ontario (Securities Commission)* (1992), 97 D.L.R. (4th) 144, 10 O.R. (3d) 577 *sub nom. Québec (Sa Majesté du Chef) v. Ontario Securities Commission* (Ont. C.A.), leave to appeal to S.C.C. refused 101 D.L.R. (4th) viii, [1992] S.C.C.A. No. 580 (S.C.C.), and *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* (2001), 199 D.L.R. (4th) 577, [2001] 2 S.C.R. 132

Sixth, where the misrepresentation occurs within a document, the fact that the document was released (though not merely prepared) in Ontario should serve as a presumptive connecting factor, since the defendant in that case has disseminated false information into Ontario's continuous disclosure stream. Based on the definition of "release" in s. 138.1 of the Securities Act, a document will be "released" in Ontario in this sense when it is filed with the OSC or an Ontario exchange, or made available specifically to the public in Ontario. For similar reasons, where the misrepresentation takes the form of a public oral statement, the fact that the statement was made specifically to the public in Ontario should also qualify as a connecting factor. In such cases, the defendant has effectively committed the "statutory tort" of Part XXIII.1 in the province.⁹⁹ However, where defendants are being sued in respect of multiple documents or public oral statements, the court in the absence of any other presumptive connecting factor should ensure that the requirements of this presumptive connecting factor are satisfied by each document or statement to which Part XXIII.1 is applied.¹⁰⁰

III. SUMMARY OF PROPOSED APPROACH

In summary, we propose that courts approach the extraterritorial applicability of s. 138.3 according to the following principles.

First, the courts should require the existence of at least one presumptive connecting factor between Ontario, the subject-matter of Part XXIII.1 and the relevant parties before finding that Part XXIII.1 is applicable. These presumptive connecting factors are as follows:

(S.C.C.), discussed at footnotes 86-92 and the accompanying test of Part I of this page.

99. See in this respect *Van Breda, supra*, footnote 3, at paras. 88 and 96. For a failure to make timely disclosure under s. 138.3(4), there is no operative act, but only an omission. In such cases, however, the issuer's status as a reporting issuer would logically suffice to connect the breach of the disclosure obligation and the Ontario capital markets.

100. *Cf.* s. 138.3(6) of the Securities Act, which gives the court discretion to treat multiple misrepresentations having a common subject-matter or content as a single misrepresentation. In our view, this provision should not enable the court to aggregate multiple documents or public oral statements for the purpose of determining the constitutional applicability of Part XXIII.1 to them, since it applies to the misrepresentations themselves rather than to the documents or public oral statements in which they are contained. Further, since the extraterritorial application of Part XXIII.1 is ultimately a constitutional issue, it cannot be based upon a deeming provision enacted by the legislature.

- (1) the issuer is a "reporting issuer" under s. 1(1) of the Securities Act, in that it:
 - (a) has at any time since 1967 filed a prospectus or a securities exchange take-over bid circular under the Securities Act or its predecessors;
 - (b) has securities which at any time since 1979 trade or have traded on an Ontario stock exchange recognized by the OSC;
 - (c) is a company to which the OBCA applies that has not been deemed to have ceased offering its securities to the public by the OSC, and either:
 - (i) has filed a prospectus or statement of material facts under the Securities Act or its predecessors, or a prospectus under the Ontario Corporations Information Act in respect of outstanding securities; or
 - (ii) has securities which at any time since 1967 trade or have traded on an Ontario stock exchange recognized by the OSC;¹⁰¹
 - (d) has been continued from, merged or amalgamated with another reporting issuer; or
 - (e) has been validly designated as a reporting issuer under the OSC's public interest jurisdiction;
- (2) the particular defendant in question is resident in Ontario, meaning, in the case of an artificial person, that its head office is in Ontario;
- (3) the particular plaintiff in question acquired or disposed of their securities in Ontario (*i.e.*, through an Ontario stock exchange or a transaction that otherwise occurred in Ontario); or
- (4) the particular document containing the misrepresentation in question was released in Ontario (*i.e.*, was filed with the OSC or an Ontario exchange, or made available specifically to the public in Ontario), or the particular public oral statement containing the misrepresentation in question was made specifically to the public in Ontario.

101. Although subsection (d) of the definition of "reporting issuer" in s. 1(1) of the Securities Act extends to any issuer "to which the [OBCA] applies and which, for the purposes of that Act, is offering its securities to the public," s. 1(6) of the OBCA provides that a corporation is only "offering its securities to the public" when it meets one of these two conditions and has not been deemed to have ceased offering its securities to the public by the OSC.

Second, the presumptive connecting factors should be capable of expansion in future cases. In determining whether a new connecting factor should be recognized, the courts should consider whether the factor would create a meaningful connection between Ontario, the subject-matter of Part XXIII.1 and the parties. Relevant considerations include:

- (1) the centrality of the proposed connecting factor to the purposes of Part XXIII.1;
- (2) whether the proposed connecting factor would undermine order in the federation or on the international stage;
- (3) whether the proposed connecting factor would result in an unfairness to the defendant;
- (4) the similarity of the proposed connecting factor with the recognized presumptive connecting factors; and
- (5) treatment of the proposed connecting factor in the case law, the statute law and the securities laws of other legal systems with a commitment to order, fairness and comity.

Third, the conclusion that Part XXIII.1 should apply based on the existence of a presumptive connecting factor should be open to rebuttal by any defendant concerned. This may occur where either:

- (1) the facts of the case preclude the connecting factor from creating a meaningful relationship between Ontario, the subject-matter of Part XXIII.1 and the relevant parties, as for instance where the connecting factor is the fact that a reporting foreign issuer's shares previously traded on an Ontario stock exchange, but the issuer's shares now trade exclusively on a foreign exchange, where they were purchased by the plaintiff and where the documents containing the misrepresentations were released; or
- (2) despite the presumptive connecting factor, the application of Part XXIII.1 would fail to respect the legislative sovereignty of other territories, which may occur where:
 - (a) another territory could clearly assert a stronger relationship to the claim than Ontario (e.g., the presumptive connecting factor is not exclusive to Ontario and the majority of connecting factors point to the other territory); and
 - (b) the Securities Act does not contain any provisions which could minimize the defendant's exposure to multiple and competing regulatory regimes in respect of the same

event, as ss. 138.7(1)(b), 138.10, 138.14(a)(ii), 138.14(b)(ii) and 138.14(c)(ii) do in relation to the other Canadian provinces and territories.

IV. CONCLUSION

As discussed above, it is relatively clear that the legislature intended Part XXIII.1 of the Securities Act to have extraterritorial effect. The only statutory constraint on the extraterritorial scope of the legislation is that there be a "real and substantial connection" between the province and the issuer. *Canadian Solar* rejected a bright-line transactional test such as that adopted by the U.S. Supreme Court in *Morrison*, and held that the legislation extends to foreign issuers whose shares do not trade on any Canadian exchange. However, *Canadian Solar* provided little guidance on the constitutional limits of applying Part XXIII.1 to claims involving a foreign element.

In the modern era of global securities class actions, where defendants can be made subject to crippling damages awards with consequences that reverberate throughout the economy, it cannot be left to the provinces to unilaterally extend their statutory causes of action throughout the world. Both the Constitution and basic notions of fairness require that the courts impose reasonable limits on these claims.

We have proposed a framework for determining when reliance on the Part XXIII.1 cause of action is permissible in cases having a foreign element under the doctrine of constitutional applicability. The framework we have proposed follows the basic structure of the Supreme Court of Canada's approach to extraterritorial adjudicative jurisdiction in *Van Breda*, but is also informed by the court's approach to extraterritorial legislative jurisdiction in *Unifund* and *Imperial Tobacco*. In our view, this approach will provide a necessary check on the scope of the Part XXIII.1 cause of action, and prevent claims from proceeding that have little or no connection to its subject-matter. Furthermore, the rebuttable presumption framework will increase certainty and predictability, which can only be to the benefit of the parties and the province involved.