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Ontario law prevails for secondary market class actions under the *Securities Act*

Partner and co-head of both the Securities Defense practice and White Collar Defence and Investigations practice John Fabello, and associate Colette Koopman, have co-authored an article for the *Class Actions Defence Quarterly* titled, "Ontario law reigns supreme for secondary market *Securities Act* class actions".

As the proposed global classes in Canadian class actions have continued to rise, so too have considerations and questions regarding Canadian courts' jurisdiction over foreign class members, as well as events that occur outside of Canada. In particular, when it comes to proposed *Securities Act* class actions, issuers are questioning whether non-Canadian class members have the rights to sue under Canadian provincial securities legislation.

"The question of what law the Court should apply to secondary market misrepresentation claims under the *Securities Act* has received limited judicial attention to date," John and Colette explain. In reviewing the choice of law principles, John and Colette outline four questions that can arise when considering whether domestic legislation should apply to claims made by non-Ontarians:

1. Whether the legislation itself is constitutional (that is, if its pith and substance have a sufficient connection to the enacting province).
2. Whether the legislation has an extraterritorial application (which would be constitutionally inapplicable).
3. Whether superior courts have jurisdiction to deal with the dispute.
4. What law the court should apply when adjudicating claims made by non-Ontarians.

In the article, John and Colette review a number of cases that have grappled with the choice of law question for the primary market cause of action and the secondary market cause of action under the provincial securities legislation, including *Pearson v. Boliden Ltd.*, *Securities Act: Paniccia v. MDC Partners Inc.*, *Longair v. Akumin Inc. et al*, and *Abdula v. Canadian Solar Inc.*

"As the law regarding Canadian statutory secondary market claims currently sits, issuers who choose to list their shares on multiple exchanges face the risk of secondary market misrepresentation claims in multiple jurisdictions applying different laws," John and Colette explain.

This also gives rise to uncertainty not only for the issuers, but also for the shareholders, as the same individual shareholder would be part of class actions in multiple jurisdictions where claims are adjudicated to be governed by different laws.

"It is open to the legislature to amend the securities legislation to stipulate a more limited scope to the secondary market cause of action under the *Securities Act*," John and Colette say. "However, that is unlikely to occur. Generally, legislatures seek to expand rather than narrow the reach of their authority, whether in statutes or otherwise."

You can access the full article here.

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