CITATION: Badesha v. Cronos Group, Inc., 2023 ONSC 5678
COURT FILE NO.: CV-20-00641990-00CP
DATE: 20231010

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HARPREET BADESHA	)	*Paul Guy, Garth Myers, and Paul Bates*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
CRONOS GROUP, INC., MICHAEL GORENSTEIN, and JERRY BARBATO	)	*James Doris, Michael O'Brien, Alexandria Matic, and Aditi Gupta*, for the Defendants
	)	
Defendants	)	
	)	
	)	
	)	
	)	**HEARD:** September 11, 2023

E.M. MORGAN, J.

[1] The Supreme Court of Canada has observed that, "Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims."[1]

[2] The question here is whether the access to justice that the Court refers to is to Ontario/Canadian justice, or to justice at large. Is one lawsuit on either side of the border enough for any given class member? Or does the *Class Proceedings Act, 1992* ("*CPA*")[2] compel us to

[1] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at para 28.

[2] SO 1992, c. 6.

ensure that members of the proposed class who can bring (and have brought) a parallel lawsuit in the United States also get access to our justice?

I. Background

[3] Plaintiff moves under s. 5(1) of the *CPA* for certification of this proposed securities class action. The claim is brought under s. 138.3 of the Ontario *Securities Act* ("*OSA*").[3] It alleges misrepresentation with respect to the value of shares of the corporate Defendant, Cronos Group Inc. ("Cronos"), in the secondary market.

[4] Cronos shares trade on both the TSX and NASDAQ. The proposed class is comprised of all purchasers of Cronos shares during the relevant class period, regardless of where they reside or on which exchange they traded.

[5] Defendants have responded with a *forum non conveniens* motion seeking to stay the claims of non-Canadian shareholders who, during the relevant class period, purchased their shares of Cronos on the NASDAQ exchange (the "U.S. Shareholders"). As indicated above, those shareholders are already covered in an American class action against Cronos. That litigation is proceeding in the United States District Court for the Eastern District of New York ("E.D.N.Y.").[4] I am advised by counsel that a motion to dismiss that action is currently under reserve.

[6] The present motions follow a ruling by the Court of Appeal in which the Plaintiff was granted leave to proceed with his claim under s. 138.8 of the *OSA*. In that judgment, the Court of Appeal remitted the question of certification to this court.[5]

[7] Cronos is a Toronto-based company whose primary business is the production of cannabis products for both medical and recreational use. The company markets its products in Canada and in other parts of the world where the sale and use of cannabis is legal. Although the production and sale of cannabis is prohibited under United States federal law,[6] it is legal and regulated to various degrees in a number of U.S. states.[7] For investors, the sale and purchase of shares in

---

[3] RSO 1990, c. S.5.

[4] *In re Cronos Group Securities Litigation*, Civil Action No. 2:20-cv-01310-ENV-SIL.

[5] *Badesha v. Cronos Group Inc*., 2022 ONCA 663.

[6] Controlled Substances Act, 21 U.S.C. §801 et seq. (Sched. I).

[7] See Donald Kochan, "The Regulatabilization of Cannabis", 49 Fordham Urban L.J. 519, at 522-24 (2012).

Canadian cannabis companies, although potentially controversial,[8] has not been the target of federal law enforcement in recent years.[9]

[8] The Plaintiff's misrepresentation claim is based on published statements issued by Cronos with respect to its activities and financial results in 2019, along with subsequent corrections to those statements issued in 2020. In its reasons for decision on leave to proceed, the Court of Appeal provided a convenient chronology of relevant events[10]:

> In March 2019, Cronos completed two transactions involving the exchange of cannabis dry flower for cannabis resin with a third party. On May 9, 2019, Cronos released its first quarter results for 2019 in interim unaudited financial statements for the three-month period ending on March 31, 2019 ('2019 Q1 interim financial statements'). At the same time, Cronos released a Management Discussion and Analysis covering the same time period ("2019 Q1 MD&A"). The documents attributed revenue to Cronos for the first quarter of 2019 from the March 2019 dry flower/resin exchange transactions.
>
> On August 8, 2019, Cronos released its 2019 Q2 interim financial statements and 2019 Q2 MD&A. These documents included results for the first quarter of 2019 and again reported revenue for the Q1 dry flower/resin exchange transactions.
>
> In September 2019, Cronos entered another set of transactions exchanging cannabis dry flower for cannabis resin with a third party. On November 12, 2019, Cronos released its 2019 Q3 interim financial statements and 2019 Q3 MD&A. In these documents, Cronos reported revenue for the 2019 Q3 dry flower/resin exchange transactions and again reported revenue for the Q1 dry flower/resin exchange transactions.

---

[8] See generally Cam Wade, "Capitalizing on Missed Opportunities: An Overview of Cannabis Fundraising Disparities", Ohio State Legal Studies Research Paper No. 694, Drug Enforcement and Policy Center, No. 46, March 2022 <http://dx.doi.org/10.2139/ssrn.4063072>; Michael Schuster and Robert Bird, "Legal Strategy During Legal Uncertainty: The Case of Cannabis Regulation", 26 Stanford J. Law, Bus. & Fin. 362 (2021).

[9] Controlled Substances Act, 21 U.S.C. § 801 et seq., Money Laundering Control Act, 18 U.S.C. § 1956; and James M. Cole, Deputy Attorney General, Memorandum for All United States Attorneys (Aug. 29, 2013), at 3; Merrick Garland, Testimony Before the Senate Subcommittee on Appropriations, Apr. 26, 2022 (01:06:35) <https://www.c-span.org/video/?519718-1/department-justice-fiscal-year-2023-budget-request>.

[10] *Badesha*, *supra* note 5, at paras 7-14.

> In early 2020, Cronos made a number of public disclosures addressing its reporting on the exchange transactions.
>
> On February 24, 2020, Cronos issued a press release announcing that it was delaying the completion of its 2019 Q4 interim financial statements and its 2019 audited annual financial statements.
>
> On March 2, 2020, Cronos issued a press release announcing that it filed a notice with the United States Securities and Exchange Commission, seeking a 15-day extension for its annual report. The press release stated that Cronos was unable to complete the report on time due to 'several bulk resin purchases and sales of products through the wholesale channel and the appropriateness of revenue from those transactions.'
>
> On March 17, 2020, Cronos issued a press release and a material change report, advising that its 2019 Q1, Q2 and Q3 unaudited financial statements would be reissued and restated. Cronos disclosed that the revenue reported for 2019 Q1 would be reduced by $2.5 million and for 2019 Q3 by $5.1 million. Cronos also disclosed that it anticipated reporting one or more material weaknesses in its internal controls.
>
> On March 30, 2020, Cronos released a series of documents, including restated interim financial statements and MD&As for 2019 Q1, Q2 and Q3, 2019 audited annual financial statements and a 2019 MD&A. In addition, the MD&A described the weaknesses in Cronos's internal controls over financial reporting and the measures it intended to adopt to remediate those weaknesses.

[9] In October 2022, just after the Court of Appeal's decision was issued, Cronos entered into settlements with respect to regulatory proceedings it faced on both sides of the border pertaining to the above events.

[10] In its settlement with the Ontario Securities Commission,[11] Cronos admitted that its 2019 revenue was overstated and that the purported revenue had been based on a transaction that "lacked commercial substance" and that it did not comply with applicable accounting procedures.[12] In its settlement with the U.S. Securities and Exchange Commission,[13] Cronos conceded that it did not

---

[11] *In the Matter of Cronos Group Inc*., OSC Settlement Agreement, October 19, 2022.

[12] *Ibid*., at paras 15-17.

[13] *In the Matter of Cronos Group Inc*., SEC Order Instituting Public Administrative and Cease-and-Desist Proceedings, October 24, 2022.

have adequate internal controls over financial reporting and that its controls suffered from several material weaknesses, despite having issued a certified statement to the contrary.[14]

II. Certification

[11] Defendants have put up little opposition to most of the certification criteria. Their defense is centred on the participation of the U.S. Shareholders.

[12] In analyzing leave to proceed under s. 138.8 of the *OSA*, the Supreme Court has set out a relatively low evidentiary threshold: the moving party must lead "credible evidence" showing that there is a reasonable possibility that the action will succeed: be resolved in the Plaintiff's favour.[15] In the present case, the Court of Appeal found that the record met that standard. In the process, Justice Favreau opined that there is "a reasonable possibility that the action will be resolved in favour of the appellant at trial."[16]

[13] In analyzing certification of a proposed class action, the Supreme Court has set out an evidentiary threshold that, if anything, is even lower: the moving party must demonstrate that there is "some basis in fact" for the claim.[17] In the present case, the Defendants, without exactly saying so, now concede that the record meets that standard; their written and oral arguments focused exclusively on the question of whether the U.S. Shareholders should be in or out of the class.

[14] It has previously been observed that a motion for leave and a motion for certification present the same fundamental question of whether the evidentiary record suffices to permit the action to proceed to the next stage.[18] Having determined that the matter has sufficient evidence for the *OSA*, it follows as a matter of logic that that there is sufficient evidence for the purposes of certification under the *CPA*.

a) Cause of action

---

[14] *Ibid*., at para 38.

[15] *Theratechnologies Inc. v. 121851 Canada Inc*., [2015] 2 SCR 106, at para 39.

[16] *Badesha*, at para 3.

[17] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 SCR 477, at para 118.

[18] *MM Fund v. Americas Gold and Silver Corp*., 2022 ONSC 6515, at para 3.

[15] Turning first to s. 5(1)(a) of the *CPA*, at this point the Plaintiff has no trouble establishing that he has a recognized cause of action. The claim has been revised since it was initially launched, and now advances only a single cause of action: a claim under s. 138.3 of the *OSA* for misrepresentation in the secondary market.

[16] Defendants have not challenged the Plaintiff's claim as containing a known and workable cause of action. It is self-evident that once leave to proceed has been granted, Defendants will not be able to show that it is "plain and obvious" that the claim discloses no viable cause of action.[19]

b) Identifiable class

[17] Plaintiff proposes the following class definition to meet the identifiable class requirement in s. 5(1)(b) of the *CPA*:

> All persons and entities who, during the period from May 9, 2019 at 6:59 a.m. ET to March 30, 2020 at 4:33 p.m. ET (the 'Class Period'), acquired Cronos shares in the secondary market other than Excluded Persons.

[18] Defendants, on the other hand, propose a modification of that definition in line with their challenge to the presence of U.S. Shareholders:

> All persons and entities who, during the period from May 9, 2019 at 6:59 a.m. ET to March 30, 2020 at 4:33 p.m. ET (the 'Class Period'), acquired Cronos shares on the Toronto Stock Exchange other than Excluded Persons.

[19] The dispute over class definition is in essence identical to the dispute over the choice of forum for U.S Shareholders. It will therefore be discussed below under the *forum non convenience* heading.

c) Common issues

[20] S. 5(1)(c) of the *CP*A requires the court to approve a set of common issues for the trial judge to answer. The three common issues proposed by the Plaintiff are:

> 1. Did the Misleading Documents contain misrepresentations within the meaning of the *OSA* and the Securities Legislation? If so, who made these representations, when, and how?

---

[19] *Cloud v. Attorney General of Canada*, [2001] OJ No 4163, at para 10 (SCJ).

> 2. Do the misrepresentations in the Misleading Documents give rise to liability on behalf of the Class for damages against the Defendants pursuant to s. 138.3 of Part XXIII.1 of the *OSA* and the Securities Legislation? If so, for which Defendants?
>
> 3. What is the method of calculating the damages payable to the Class Members in respect of Part XXIII.1 of the *OSA* and the Securities Legislation?

[21] Defendants do not object to these common issues, and for good reason. Each of the proposed issues addresses acts of the Defendants; they do not tun on any conduct or characteristics of the class members.[20]

[22] I conclude that the questions proposed by the Plaintiff are "a substantial and necessary factual link in the chain of proof leading to liability for every member of the class."[21]

d) Preferable procedure

[23] As with the class definition, the Defendants do oppose, or partly oppose, certification under s. 5(1)(d) of the *CPA*. They argue that a class action – i.e. a class action in Ontario – is not the preferable procedure for the putative class members who are U.S. Shareholders.

[24] Defendants' counsel put the argument succinctly in their written submissions on certification:

> …the U.S. courts offer a preferable procedure to resolve the claims of U.S. venue purchasers and will: (i) provide an effective resolution to the same class of claims available to U.S. venue purchasers in the Ontario action, and (ii) better serve the judicial economy and access to justice objectives of class actions.

[25] While I understand why Defendants' counsel would seek to reiterate their challenge to the forum under the s. 5(1)(d) "preferable procedure" heading, it seems to me that the two objectives which the Defendants say are served well in the ongoing U.S. litigation are better addressed in the stay motion. The choice of forum argument is an awkward fit for the purposes of the *CPA* criteria. In the first place, while it is true that the class action in the E.D.N.Y. may provide effective

---

[20] *Dugal v. Manulife Financial*, 2013 ONSC 4083, leave ref'd 2014 ONSC 1347 (Div Ct); *Abdula v. Canadian Solar*, 2015 ONSC 53, leave ref'd 2015 ONSC 4322 (Div Ct).

[21] *Jones v. Zimmer GmbH*, 2013 BCCA 21, at para 36.

resolution of the U.S. Shareholder' claims against Cronos, that resolution will occur whether or not the U.S. class members are shut out of the Ontario action.

[26] Defendants' argument in this respect proceeds as if the U.S. class members' choice of jurisdiction is either/or. In fact, the choice presented to them in the *forum non conveniens* motion is between participating in both jurisdictions or in the U.S. proceedings alone. Whether or not they remain part of the Ontario class, they will have access to whatever effective resolution the shareholder class in the E.D.N.Y. action receives.

[27] Indeed, as in previous cross-border securities cases,[22] what the U.S. shareholders want is to litigate in both jurisdictions and to ultimately choose whichever resolution is most to their benefit. They concede that at some point there will be what has been called a "day of reckoning" in which one court will be asked to recognize the judgment or settlement in the other,[23] but they wish to put off that day until it actually dawns.

[28] That choice will presumably be presented to the U.S. Shareholders somewhere down the road when one or the other of the actions reaches its conclusion. In the meantime, they perceive their inclusion in both actions as maximizing "the vindication of the rights of plaintiffs, fair process for the defendants and plaintiffs, and respect for the autonomous jurisdictions involved."[24]

[29] Thus, while Defendants' counsel may be correct that the U.S. litigation provides effective rights protection for the U.S. Shareholders, it is hard to argue under s. 5(1)(d) that their exclusion from the Ontario litigation provides them with even more effective rights protection. In fact, it is fair to say that "since protective policies serve the interests of those who are protected, it should be left to [the putative class members] to invoke their protection."[25] The class members have chosen the Ontario forum because in their view it meets their legal needs.

[30] Counsel for the Defendants argues that the selection of forum has little to do with the class members' choice in this type of litigation. Professor Merritt Fox, Defendants' expert witness on U.S. securities law, makes the point that the U.S. Shareholders did not directly choose the Ontario forum;

---

[22] See, e.g., *Silver v. Imax Corp*., 2012 ONSC 1047, at para 32 (settlement notice motion).

[23] *Silver v. Imax Corp*., 2013 ONSC 1667, at para 12 (class reduction motion).

[24] *Ibid*., at para 10.

[25] Valerie Scott, "Access to Justice and Choice of Law Issues in Multi-jurisdictional Class Actions in Canada", (2012) 43 Ottawa Law Rev. 235, at 261, citing Th. M. de Boer, "Facultative Choice of Law: The Procedural Status of Choice of Law Rules and Foreign Law", in: *Recueil des cours: Collected Courses of the Hague Academy of International Law* (The Hague: Martinus Nijhoff Publishers, 1996), at 368-71.

rather, it was chosen for them by the representative Plaintiff when he included them in the Ontario class definition. While that is not inaccurate given the way that class actions are commenced, I must take seriously the position put forward here by the Plaintiff and his counsel. The resistance to the Defendants' attempt to exclude the U.S. portion of the class is advanced by Plaintiff's counsel on behalf of the entire class – TSX purchasers and U.S. Shareholders alike. I have no reason to doubt that in doing so, counsel are properly instructed.

[31] Secondly, it is difficult to see how excluding the U.S. Shareholders from the Ontario class will advance judicial economy. The Ontario class action will proceed on its course with or without the U.S. class members. As an early Ontario study of class actions expressed it, the "litigation would arise in any event."[26] The entire point of judicial economy in class actions is that regardless of how many people are in the class, economies of scale are achieved: "[a] single suit can decide many claims."[27]

[32] As for access to justice, that is the central policy consideration at play in the *forum non conveniens* argument. Defendants' counsel in effect conflates the s. 5(1)(d) argument with the argument of their motion. The policy of access will therefore be discussed under that heading below.

[33] Having said that, the question is whether access to the U.S. forum suffices for the U.S. Shareholders. As a matter of logic, excluding those shareholders from the Ontario class would not increase their access; it would, if anything, decrease it. It might or might not do so appropriately on a *forum non convenience* rationale (which, as indicated, remains to be seen), but the Defendants' position is not one that advocates for more access. It argues for less.

[34] It is therefore hard for the Defendants to logically argue that an Ontario class action is not preferable on the basis that an alternative proceeding – the E.D.N.Y. action – will increase access to justice. Access to two actions for the U.S Shareholders in issue is certainly more access than access to just one.

e) Representative plaintiff

[35] Finally, the Defendants submit that the Plaintiff has not satisfied the requirement in s. 5(1)(e) of the *CPA* that he be an appropriate representative of the class. Defendants' counsel make no argument about the Plaintiff's litigation plan (which appears typical and workable) or about the

---

[26] Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982), at 119.

[27] Federal Court of Canada, Rules Committee, *Class Proceedings in the Federal Court of Canada: A Discussion Paper* (Ottawa: Federal Court of Canada, 2000), at 13.

Plaintiff's personal knowledge and ability to instruct counsel (which appear to be perfectly acceptable). But they contend that as an Ontario shareholder he is not in a position to steer the case for the U.S. shareholders.

[36] In particular, counsel for the Defendants focus on the dilemma the Plaintiff may face if a settlement is proposed at some future time. As Plaintiff's counsel point out, a settlement of the E.D.N.Y. action may be harder to achieve, but ultimately more generous, than a settlement of the Ontario action. One can with some confidence predict that proposed settlements may take different shapes on each side of the border, perhaps reflecting certain features of the two justice systems that distinguish the two actions.

[37] As an example, U.S. securities law requires the claimants to prove *scienter* – i.e. "intent to deceive, manipulate, or defraud on the defendant's part"[28] – which is a requirement that is absent in Canadian securities law.[29] On the other hand, Ontario securities law imposes a cap on calculating damages applicable to the Plaintiff's cause of action.[30] Expert evidence in the record establishes that there are no such caps in U.S. securities law and that court and settlement proposals might be considerably higher in U.S. ligation than in Ontario.

[38] That combination of features – greater obstacles in establishing liability and greater potential for a high damages award – presents the U.S. Shareholders in the Ontario action with a potentially different set of considerations in accepting or rejecting a settlement offer than those faced by the Canada-based class members. By definition, the representative Plaintiff, who is not a U.S. Shareholder, would personally be in a different position than a portion of his class.

[39] Defendants' counsel submit that the Plaintiff's inability to navigate the U.S.-Canada divide among the class disqualifies him as a proper representative Plaintiff. Although there is no requirement under s. 5(1)(e) of the *CPA* that there be more than one representative plaintiff, it is the Defendants' view that the Plaintiff cannot go it alone. In fact, it is the Defendants' view that since he (and anyone else in his shoes) will inevitably be in conflict with the U.S. class members, the class is unworkable as it cannot have adequate representation in its current form.

[40] Plaintiff's counsel reply to this challenge first by reiterating the well-established proposition that "a representative plaintiff's claim need not be identical to, or even typical of, those

---

[28] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).

[29] *Siver v. Imax Corporation*, [2009] OJ No. 5585, at para 238 (SCJ), aff'd 2013 ONSC 6751 (Div Ct).

[30] *OSA*, s. 138.7.

of other members of the class."[31] In fact, he need not even be the "'best' possible representative" in the class.[32] The representative Plaintiff merely has to be competent to accomplish the task of instructing counsel through the litigation.

[41] More to the point, Plaintiff's counsel also lean on the procedural requirement that in any prospective settlement, the court will make the final determination of fairness. Not only is settlement approval by the court a requirement under s. 29 of the *CPA*, it must be done on the basis of a determination that the proposed settlement is "fair, reasonable, and in the best interests of the class."[33]

[42] I am confident that in the circumstances of this case, the representative Plaintiff will make his recommendation as representative plaintiffs always do, taking into account the advice of counsel and the interests of the class as a whole. The court will then decide whether those interests are best served by the proposed settlement.

[43] The court approval mechanism is, of course, not flawless, and it cannot make a good settlement into a perfect one. But that is because, as Justice Sharpe pointed out in an early class settlement under the *CPA*, no settlement is perfect;[34] they all entail a balance of risk and litigation cost.[35] The statute places the court in the role of determining ultimate fairness to the class as a whole, taking sole responsibility off of the representative Plaintiff.

[44] In those circumstances, the Plaintiff is able to play the representative role despite the possibility of two groups of class members not seeing eye-to-eye on a proposed settlement. I find no reason to disqualify the Plaintiff from playing that role. A future proposed settlement will possibly not be perfectly suitable for every potential class member, but no settlement is.

III. *Forum non conveniens*

[45] In a separate motion heard simultaneously with the certification motion, the Defendants have sought a number of alternative remedies, all of which amount to removing the U.S.

---

[31] *Sankar v. Bell Mobility*, 2013 ONSC 5916, at para 61.

[32] *Western Canadian Shopping Centres*, *supra* note 1, at para 41.

[33] *Bancroft-Snell v. Visa Canada Corporation* (2019), 148 OR (3d) 139, at para 19 (CA).

[34] *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] OJ No 2811, at para 30 (Gen. Div.).

[35] *Grann v. Ontario*, 2021 ONSC 3817, at para 9.

Shareholders from the class. Defendants' counsel set this out in the first sentence of their written submissions, followed by a supplementary footnote:

> On grounds of *forum non conveniens* and under the principle of comity with the U.S. court, this Court should exercise restraint and decline jurisdiction over the claims of those who purchased shares on U.S. trading venues (none of whom are named plaintiffs in this action).1
>
> 1 In the alternative, Cronos moves to stay or dismiss the claims brought on behalf of non-Canadian proposed class members who purchased Cronos shares on a U.S. trading venue.

[46] In bringing this motion, the Defendants have a high bar to meet. The Supreme Court has emphasized that, "The basis of the *forum non conveniens* analysis is the 'clearly more appropriate' test."[36] As the Court has elsewhere explained it, a motion of this sort demands a departure from the norm, and runs contrary to the ordinarily applicable jurisdictional rules:

> [T]he normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules.[37]

[47] Defendants therefore concede that the starting point for their motion is that the Ontario courts have jurisdiction *simpliciter* over the Plaintiff's claims. The connection to Ontario is well established, there are common issues to be adjudicated under Ontario law, and all class members will ultimately have the right to opt out of the Ontario claim if they so desire.[38] As indicated, leave to proceed for the sole cause of action – secondary market misrepresentation under s. 138.3 of the *OSA* – has already been granted by the Court of Appeal.[39] Ontario jurisdiction over the claim is at this point a given.

---

[36] *Haaretz.com v. Goldhar*, [2018] 2 SCR 3, at para 83.

[37] *Club Resorts Ltd. v. Van Breda*, [2012] 1 SCR 572, at para109.

[38] *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792, at para. 107.

[39] *Badesha*, *supr*a note 5.

[48] In fact, it is undeniable that the Defendants, and Cronos in particular, have a real and substantial connection to Ontario. The company is incorporated under the Ontario *Business Corporations Act*,[40] and has its head office in Toronto. Its primary business and major customers are located in Ontario and the rest of Canada; indeed, as pointed out earlier in these reasons, its business of cannabis cultivation and sales is for the most part illegal in the United States.[41]

[49] Even more germane to the issues here, Cronos began trading on the TSX in July 2014, some three years before its shares began trading on the NASDAQ. The financial statements and public disclosure documents at issue in the Plaintiff's claim were created in Toronto, were required under the *OSA*, and were filed with the Ontario Securities Commission. The parallel filings in the Securities Exchange Commission in the United States replicated the original Ontario filings.

[50] Moreover, the record establishes that the revenue that Cronos improperly recognized and latter corrected was in respect of transactions for the sale of cannabis in Ontario to two Ontario companies, Medipharm Labs Corp. and Heritage Cannabis Holdings Corp. The auditors who reviewed the financial disclosure and who were responsible for the correction were KPMG LLP, operating out of Vaughan, Ontario.

[51] Likewise, the typical comparative convenience and expense factors at play in *forum non conveniens* motions point to preserving the Ontario forum. Plaintiff's counsel emphasize that this has to be the case here, since the Defendants' motion only seeks a partial stay of the Ontario proceedings – i.e. they only seek to stay the Ontario claims of the U.S. Shareholders. Accordingly, the Ontario action will continue whether or not the Defendants obtain the stay that they seek. It will never be inconvenient to try the U.S. Shareholders' claims in Ontario when the TSX purchasers' claims are already being tried here.

[52] That said, Defendants' counsel point out that there are a number of factors that weigh in favour of the E.D.N.Y. forum. The record establishes that on March 8, 2019 (two months prior to the start of the proposed class period), Cronos announced an approximately US$1.8 billion investment by Altria Group Inc., representing the acquisition of a 45% ownership interest in Cronos and making the majority of its shares American owned. Following that, a majority of its executive officers and members of its board of directors were U.S. citizens or residents.

[53] The evidence also demonstrates that after the Altria investment, Cronos expanded its product list and began offering hemp-derived cannabidiol products to U.S. consumers. At the same time, Cronos ceased to qualify as a foreign private issuer in the U.S., resulting in a change in its

---

[40] RSO 1990, c. B.16.

[41] *Supra* notes 6, 7.

reporting status to that of a U.S. "domestic issuer" in accordance with SEC Rule 3b-4(c). In short, were this a true competition between the Ontario lawsuit and the E.D.N.Y. lawsuit, the connecting factors could be a toss-up.

[54] But under the circumstances, this is not a true competition between two jurisdictions. The Ontario claims of the TSX purchasers – which are in substance identical to the Ontario claims of the U.S. Shareholders in terms of law, evidence and litigation expense – will proceed on course regardless of what happens in the U.S. litigation.[42] Despite the increased connections of Cronos to the United States at the time of the impugned financial representations, nothing changed to disconnect the company from Ontario. Cronos continued to be a reporting issuer under the OSA and Ontario jurisdiction over the matters in issue remains unchallenged in its own right.[43] The U.S. Shareholders, suing in both jurisdictions, must and do accept that.[44]

[55] Plaintiff's counsel point out that this fact distinguishes the Defendants' motion from the more typical *forum non conveniens* scenario. In the usual case, the foreign court could potentially adjudicate claims based on Ontario law, and the question is whether it is clearly more appropriate for the Ontario or the foreign court to be the one to do so.[45] In this instance, this Court is the only forum able to adjudicate the *OSA* claims; as stated above in the discussion of preferable procedure, the *forum non conveniens* choice is not an 'either/or' choice.

[56] As matters stand, the U.S. Shareholders of Cronos' securities have the option of litigating in the E.D.N.Y. and do not need the Ontario court as a forum. The Canada-based purchasers on the TSX, by contrast, have no such option. United States law bars a court from asserting jurisdiction over trading on foreign exchanges such as the TSX.[46] Since the claims made in the Ontario proceeding are, for the entire class, based on the statutory cause of action created under s. 139.3 of the *OSA*, litigating those claims for the TSX purchasers and the U.S. Shareholders will entail the same arguments and consume the same time and resources.

[57] I pause here to note that Professor Merritt Fox, a full professor at Columbia Law School in New York and co-director of Columbia's programs in Law and Economics and the Law and Economics of Capital Markets, has deposed on behalf of the Defendants that the U.S.

---

[42] *Abdula v. Canadian Solar*, 2015 ONSC 53, at para 57.

[43] See *Kaynes v. BP, PLC* (2014), 122 OR (3d) 162 (CA).

[44] *Paniccia v. MDC Partners Inc.*, 2017 ONSC 7298, para. 49.

[45] See, e.g., *Yip v. HSBC Holdings plc*, 2018 ONCA 626. *Leon v. Volkswagen AG*, 2018 ONSC 5693.

[46] *Morrison v. Nat'l Australia Bank Ltd*., 130 S.Ct. 2869 (2010).

Shareholders' claims originate with U.S. filings that contain the misrepresentations on which the action is based. He also seems to suggest that U.S. courts have exclusive jurisdiction over the claims made in this case, and that this is where a fair and efficient adjudication of the claims can take place.

[58] Plaintiff's counsel see each of these statements as contentious. The record shows that Cronos' filings with the U.S. Securities and Exchange Commission were copies of filings that originated in Ontario and were filed with the Ontario Securities Commission. Furthermore, the discussion in this motion is with respect to the claim under the *OSA*, not the claim before the E.D.N.Y. Cronos' filings in the United States are not relevant to the present claim.

[59] Also, in cross-examination Professor Fox clarified that the U.S. federal courts have exclusive jurisdiction over this type of securities action inside the United States – i.e. vis-à-vis state courts. As he stated, accurately, Ontario is sovereign within its realm and can fashion its own court jurisdiction without reference to U.S. or any other country's law.

[60] Professor Fox also confirmed in cross-examination that he has no expertise in, and cannot accurately say, what jurisdiction the Superior Court of Justice in Ontario possesses. He also conceded in cross-examination that he has no expertise in Ontario procedure, and that he did not mean to say that the *OSA* claims cannot be handled fairly or efficiently by an Ontario court.

[61] Plaintiff's counsel submit that these misstatements are so patently wrong that they signal a lack of objectivity on Professor Fox's part. Counsel argue that he has stepped outside the role of expert and into the role of partisan advocate, and that his evidence is therefore inadmissible.

[62] I agree that the statements were initially unqualified and therefore wrong, but they were either clarified or corrected in cross-examination and, in any case, are minor in the scheme of the issues before me. I do not think that they are a sign of bias. Rather, they evidence an American legal perspective – the only perspective from which Professor Fox is qualified to opine. This perspective can sometimes be seen to ignore the Canadian part of the equation, and in general is only sometimes useful for a Canadian court.

[63] All of the U.S. legal experts in this case have excellent credentials, but their expertise, and their evidence, is of only limited relevance here. They mostly address the workings of litigation in the United States, and show that the American legal system, while not identical to the Canadian, provides due and efficient process on its own terms – and that applies regardless of which side wins the pending certification motion in the E.D.N.Y. To the extent that the expert evidence informs any given issue in this motion, I will admit it but give it the weight it deserves under the circumstances.

[64] In their *forum non conveniens* motion, the Defendants concede that what they seek is a partial *forum non conveniens* ruling, staying the U.S. Shareholders' claims but keeping the rest of the claims alive. They go on to argue that, in any case, the circumstances "here meet the high

threshold required to displace the forum chosen by the plaintiff [on behalf of the U.S. Shareholders]."[47]

[65] It does so, they contend, due to the imperatives of international comity. That principle, they submit, is applicable to all conflicts of law cases, whether they deal with enforcement of judgments across borders[48] or, as here, with choice of forum.[49]

[66] Comity, of course, is a venerable international legal doctrine. It is, as the Court of Appeal has said, a necessary ingredient in "the maintenance of an orderly and predictable regime for the resolution of claims" spanning jurisdictions.[50] The only question is: what does it mean?

[67] On one hand, comity has been said to signify "the deference and respect due by other states to the actions of a state legitimately taken within its territory."[51] On the other hand, it has been found to stand for "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience".[52]

[68] In other words, while no one doubts the importance of comity, it can be taken as an adjunct to, and a means of furthering, the sovereignty of nations, or as a restriction on, or caveat to, the sovereignty of nations. Sometimes it supports the enforcement of unilateral enactments by different jurisdictions, and at other times it supports the need for cooperation among different jurisdictions.

[69] The Supreme Court of Canada has conceded that as an international legal rule, comity is as frequently invoked in deference to foreign law and procedure over local rules as it is in support of local law and procedure over a foreign counterpart.[53] In product liability class actions, the same court in British Columbia has invoked comity to compel the inclusion of non-resident class members on

---

[47] *Dyck v. Tahoe Resources Inc*., 2021 ONSC 5712, at para 31, citing *Paniccia*, at para. 40.

[48] *Currie v. McDonald's Restaurants of Canada Ltd*. (2005), 7 4 OR (3d) 321, at paras 15, 22 (CA).

[49] *Yip*, *supra* note 45, at para 18.

[50] *Kaynes*, *supra* note 43, at para 48.

[51] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077.

[52] *Spencer v. The Queen*, [1985] 2 SCR 278, at para 8, quoting *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

[53] *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897.

the grounds of "fairness and order",[54] and to reject the inclusion of non-resident class members on the grounds that it will increase "management difficulties",[55] all during the same calendar year.

[70] As a doctrinal device, comity is rather difficult, to say the least. The Supreme Court of Canada has observed that, like other elements of *forum non conveniens* analysis, it "cannot be understood as a set of well-defined rules."[56] Prosser, who did not suffer from the Canadian inclination to understatement, described it, like so many conflicts of law doctrines, as a "dismal swamp."[57] The frustration comes from its ability to assume contradictory meanings in the service of whoever deploys it.

[71] As a central doctrine of conflicts, however, it is not entirely meaningless. Rather, its significance is as a vehicle for reflecting on the nature of international legality. Although it is an easily manipulated rule, the swamp, as a leading group of conflicts of law scholars have put it, can become a "productive biosphere…[and used] as a way of thinking through problems of legal, political and cultural relativism…"[58]

[72] What drives the Defendants' argument is the view that only by establishing a two-way deference street between Ontario/Canada and the United States, or between this court and the E.D.N.Y., will "comity and an attitude of respect for the courts and legal systems of other countries" be applied.[59] As matters stand, in the U.S. actions under §10(b)-5 of the Securities Exchange Act of 1934 – the functional equivalent of s. 138.3 of the *OSA* – are restricted to those targeting trades on an American exchange.

[73] According to the Supreme Court of the United States, this is a natural result of interpreting the statute in accordance with the presumption against extra-territorial application in the absence of an express foreign extension of it. As Justice Scalia has put it, "Section 10(b) does not punish

---

[54] *Harrington v. Dow Chemical* Corp., [1997] 29 BCLR (3d) 88, at para 11 (BCSC), aff'd 82 B.C.L.R. (3d) 1 (BCCA).

[55] *Bittner v. Louisiana-Pacific Corp*., [1997] 43 BCLR (3d) 324, at para 59 (BCSC).

[56] *Van Breda*, supra note 37, at para 74.

[57] William L. Prosser, "Interstate Publication", 51 Mich. Law Rev. 959, at 971 (1953).

[58] Karen Knop, Ralf Michaels, Annelise Riles, "International Law in Domestic Courts: A Conflict of Laws Approach", 103 American Soc. Int'l Law Proc. 269-274 (2009).

[59] *Kaynes, supra* note 43, at para 53.

deceptive conduct, but only deceptive conduct "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered."[60]

[74] By contrast, courts in Ontario have to date refrained from embracing that version of statutory interpretation. And this is despite other direct parallels between the domestic and the U.S. law. These parallels include the fact that Canadian law strives to confine itself to the enacting jurisdiction's territory, on the theory that "there must be some limits on the claims to jurisdiction."[61]

[75] For example, the Supreme Court of Canada has declared that, as a general matter, "It is a common law presumption that Parliament does not intend legislation to apply extraterritorially."[62] Section 138.3(1) of the *OSA* provides a right of action to "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", with the "issuer" being defined as a "reporting issuer" under the *OSA* or a company with a real and substantial connection to the province.[63]

[76] Nevertheless, several Ontario courts have pronounced that the statute applies to extraterritorial purchasers as long as "some of a defendant's securities are traded on a Canadian stock market."[64] In fact, the Court of Appeal has gone so far as to opine that "[e]xtra-territorial application [of s. 138.1] is specifically envisaged", and has allowed at least one action to proceed brought by a class who purchased an Ontario issuer's shares entirely on a U.S. exchange.[65]

[77] Those Ontario cases that appear to have excluded share purchasers on a foreign exchange have done so for reasons specific to the case. That is, the evidence showed either that the defendant company had stopped trading on a Canadian stock exchange before the end of the class period,[66]

---

[60] *Morrison*, *supr*a note 46, at 273.

[61] *Hunt v. T&N plc*, [1993] 4 SCR 289.

[62] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 SCR 42, at para 144.

[63] *OS*A, s. 138.1. See also, *Yip*, at para 49.

[64] *Paniccia*, *supra* note 44, at para. 54.

[65] *Abdula*, *supra* note 42, at para 88.

[66] *Kaynes*, *supra* note 43, at para 17.

or that the company had never traded on a Canadian exchange in the first place.[67] Neither of those situations characterizes Cronos, either before or during the class period.

[78] Thus, although Defendants' counsel submits that there is an "international norm of hearing a secondary market securities claim in the place where the securities traded", there is no such international norm. To establish that, the Defendants would have to demonstrate that there is a widespread state practice of following the norm.[68] The most that can be said here is that the place-of-trade rule is an American norm; although other jurisdictions advocated for the United States to adopt it, no other jurisdiction has been cited in the materials as having embraced it for themselves.

[79] As the Supreme Court of the United States has explained it, the rule is founded on a particular American problem: the need to curtail a marked tendency of U.S. legal proceedings to govern foreign persons and transactions. Justice Scalia has expounded on this specific problem:

> Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters. See, e. g., Brief for United Kingdom of Great Britain and Northern Ireland as Amicus Curiae 16-21. The Commonwealth of Australia, the United Kingdom of Great Britain and Northern Ireland, and the Republic of France have filed amicus briefs in this case. So have (separately or jointly) such international and foreign organizations as the International Chamber of Commerce, the Swiss Bankers Association, the Federation of German Industries, the French Business Confederation, the Institute of International Bankers, the European Banking Federation, the Australian Bankers' Association, and the Association Française des Entreprises Privées. They all complain of the interference with foreign securities regulation that application of § 10(b) abroad would produce, and urge the adoption of a clear test that will avoid that consequence.[69]

---

[67] *Yip*, at para 5.

[68] See *International Air Transport Assoc. v. Canadian Transportation Agency*, 2022 FCA 211, at paras 67-68.

[69] *Morrison*, *supra* note 46, at 269.

[80] As indicated above, the conflicts of law doctrine of comity is useful not for the easily manipulated rule that it produces, but for the lens it provides on legal culture. "The strength of conflicts, ironically, is that its starting assumption about overlapping jurisdictions and conflicts between political interests and cultural viewpoints demands that the doctrine face the arbitrariness of its own underlying assumptions head on."[70]

[81] The United States, for its own historic and political reasons, has a tendency toward what the foreign *amicus* parties referenced by Justice Scalia perceive as undue interference;[71] its Supreme Court, in adopting the place-of-trade rule for securities class actions involving foreign companies, has exerted effort to reel its law in. Canada, also for its own historic and political reasons, has a tendency toward openness, dialogue and transnational engagement;[72] its Supreme Court, in adopting a universalist approach to jurisdiction in securities class actions, has exerted effort to have its law reach out.

[82] Both legal systems embrace the idea of comity, either as isolation or as cooperation. The Supreme Court of Canada has insisted that, "The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit."[73] At the same time – indeed, in the same paragraph – it has commented that, "And to promote the same values, they [states] will open their national forums for the resolution of specific legal disputes arising in other jurisdictions…"

[83] This double-edged view of the legal world applies equally in the United States. But where the U.S. wants to stop "stepping on another nation's toes", as Plaintiff's expert witness Professor Patrick Borchers put it in his affidavit, Ontario wants to hold foreign nationals' hand. American law expresses a need to decolonize and contract, Canadian law exudes a need to expand and embrace.

[84] Although the rules on the two sides of the border appear to be asymmetrical, the U.S. and the Canadian courts have both invoked a version of comity in interpreting their governing

---

[70] Knop et al., *supra* note 58, at 273.

[71] Morrison, *supra* note 46, at 269. See generally, Margaret Waddell, "Beware the long arm of the U.S. courts", Canadian Lawyer, December 8, 2014, <https://www.canadianlawyermag.com/news/general/beware-the-long-arm-of-the-us-courts/269618>.

[72] See Adam Dodek, "Canada as Constitutional Exporter: The Rise of the 'Canadian Model' of Constitutionalism" (2007), 36 Sup. Ct. Law Rev., 2d, 309; and Mark Tushnet, "The Charter's Influence Around the World" (2013), 50 Osgoode Hall L.J. 527.

[73] *Tolofson v Jensen; Lucas (Litigation Guardian) v Gagnon*, [1994] 3 SCR 1022, at 1047.

legislation. Section 10(b)-5 of the Securities and Exchange Act respects foreign sovereignty and cooperation by restricting the E.D.N.Y. class to the U.S. Shareholders only. Section 138.3 of the *OSA* respects state sovereignty and international cooperation by allowing access to justice for a class that includes all shareholders regardless of where they purchased their shares.

[85] The upshot of this is that the U.S. Shareholders can remain in the class in the present case, even though they have also brought a parallel U.S. case. It will be for this Court in the event of a future settlement or judgment to keep in mind that "no class member should get 'two bites at the apple' against any defendant".[74]

[86] Ontario is not a *forum non conveniens* for the claims of any of the proposed class members.

IV. Disposition

[87] The action is certified pursuant to s. 5(1) of the *CPA.*

[88] The class is as defined by the Plaintiff in paragraph 17 above. The common issues are as set out by Plaintiff's counsel in paragraph 20 above.

[89] The Defendants' *forum non conveniens* motion is dismissed.

V. Costs

[90] The parties have agreed on costs.

[91] Defendants shall pay the Plaintiff costs of these motions in the all-inclusive amount of $125,000.

Morgan J.

Released: October 10, 2023

[74] *Silver v. Imax Corporation* (2013), 117 OR (3d) 616, at para 31 (leave to appeal motion).

CITATION: Badesha v. Cronos Group, Inc., 2023 ONSC 5678
COURT FILE NO.: CV-20-00641990-00CP
DATE: 20231010

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HARPREET BADESHA

Plaintiff

– and –

CRONOS GROUP, INC., MICHAEL GORENSTEIN, and JERRY BARBATO

Defendants

REASONS FOR JUDGMENT

E.M. Morgan, J.

Released: October 10, 2023