Interjurisdictional Class Actions in Canada: Reconciling Rules Governing the Assumption of Jurisdiction and the Recognition of Foreign Judgments

Robin P. Roddey, Fasken Martineau DuMoulin LLP, Toronto[*]

When class proceedings legislation was first introduced in Canada, relatively little consideration was given to the interjurisdictional issues raised by this new form of proceeding.[1] As might be expected, interprovincial and international questions first arose in the context of applications by plaintiffs to certify classes that included members resident outside the province in which the action was brought. In these cases, Canadian courts, particularly in Ontario, have shown little hesitation in certifying classes that include persons outside of the province, and even outside of Canada, with relatively little concern about how a judgment rendered in such a proceeding would be treated by the courts of the territories were these class members reside. In several recent cases, however, and most significantly, in the decision of the Ontario Court of Appeal in *Currie v. McDonald's Restaurants of Canada Ltd.*,[2] Canadian courts have been forced to grapple with the other side of the equation. If a court in another province or in the United States has assumed jurisdiction over, and purported to determine the legal rights of, local residents, in what circumstances should the domestic court give effect to that determination? These decisions suggest that Canadian provincial courts may not have the same enthusiasm for recognizing and enforcing class action judgments from other jurisdictions that they have exhibited for assuming jurisdiction over extra-territorial class members.

Facts Giving Rise to the *Currie* Decision

The proceedings in *Currie* and the companion case, *Parsons v. McDonald's Restaurants of Canada Ltd.*,[3] arose out of a number of promotional games and contests sponsored by McDonald's Corporation and McDonald's Restaurants of Canada Ltd. between 1995 and 2001. Participation in these contests was, predictably, tied to the purchase of food products in McDonald's restaurants. McDonald's had retained Simon Marketing Inc., a California firm, to design and administer these contests. An investigation by the Federal Bureau of Investigation revealed that senior employees of Simon Marketing had manipulated the games with the result that some $24 million in prizes was diverted to these individuals or persons with whom they were associated.

On August 22, 2001 (the day following the indictment of the Simon Marketing employees), Karryn Boland and Jamie Kirsch filed a class action complaint in the Circuit Court of Cook County, Illinois. The *Boland* action was brought on behalf of the plaintiffs and "all others similarly situated", a class which the complaint described as "hundreds of thousands of McDonalds customers who paid for food in order to obtain a game ticket". Dozens of similar actions were launched in respect of the same matters in various American Federal and State courts.

Settlement discussions in the *Boland* action began in October 2001, and by April 2002, an agreement was reached. It was agreed that the parties would apply to the Circuit Court of Cook County for certification, for approval of the settlement, and approval of the proposed program of notice to class members. On June 6, 2002, the Illinois court rendered a decision granting the relief sought by the parties with some modifications to the notice to be given to class members. The order specifically addressed the notice to be given to Canadian class members, providing that an approved form of notice was to be published once in each of three French language newspapers in Quebec, twice in Maclean's magazine, and in two US periodicals with circulation in Canada. The court found this degree of notice to be adequate to allow Canadian claimants to exercise their right to opt out of the class.

On September 13, 2002, Preston Parsons commenced an action in the Ontario Superior Court of Justice seeking relief in respect of the same contests that had given rise to the *Boland* action. The claim was brought on behalf of a class comprising Canadian customers of McDonald's. On September 16, Parsons sought leave to intervene and make submissions in the *Boland* action to object to any settlement that included the claims of Canadian class members. The principal grounds for Parsons' objection were a lack of commonality because of unique claims available to these customers[4] and the inadequacy of the notice program. A hearing was held before the Illinois court on October 10 to hear the parties' submissions. The court released its decisions dismissing Parsons' objections on January 3, 2003, and on April 8, 2003 the court made its final order certifying the action, approving the settlement and releasing all claims against McDonald's and its subsidiaries.

In addition to the *Parsons* action, another similar action had been launched in Ontario by Greg Currie on October 28, 2002. Although represented by the same solicitors as Parsons, Currie did not participate in the Parsons intervention in the *Boland* action in Illinois.

[*]Mr. Roddey is partner with a practice specializing in legal research and analysis and complex commercial litigation. Fasken Martineau DuMoulin, LLP is a leading national business and litigation law firm in Canada with offices in Toronto, Montreal, Quebec City, Vancouver and Calgary, and international offices in New York, London and Johannesburg. The firm has a pre-eminent practice in large class action proceedings, and is regularly retained in the defence of the leading class action cases in Canada.

In November 2003, McDonald's brought a motion seeking to have the *Parsons* and *Currie* actions dismissed on the grounds of *res judicata*, issue estoppel or abuse of process. The question of whether the orders made in the *Boland* action gave rise to such an estoppel required the court to consider the status of those orders on private international law principles. Although the Ontario court was not being asked to give recognition and enforcement to the Illinois orders *per se*, the defensive relief sought raised the same question of whether the Illinois court was a "court of competent jurisdiction" such that its pronouncements in the matter should, as a matter of comity, be respected by the Ontario court and treated as affecting the rights of litigants before the Ontario court.

Foreign Judgments and Canadian Conflict of Laws Rules

Interestingly, this question was under consideration in the *Parsons/Currie* proceedings at the very point in time that the Supreme Court of Canada released its decision in *Beals v. Saldanha*.[5] That decision confirmed that questions relating to a court's assumption of jurisdiction over proceedings with interjurisdictional elements in the international context were governed by the "real and substantial connection" test. The decision in *Beals*, in some respects, completed a process of modernization in Canada's conflict of laws rules that began with the court's decision in *Morguard Investments Ltd. v. De Savoye*[6] in 1990. In *Morguard*, the Supreme Court recognized that the traditional rules relating to the recognition and enforcement of foreign judgments that Canadian law had adopted from the law of England, a unitary state, did not adequately accommodate the commercial and economic realities of a federal state such a Canada, where judgments rendered by the courts of other provinces are, as a formal matter, regarded as "foreign" judgments. The court held that a "full faith and credit" doctrine similar to that in the United States was implicit in the Canadian Constitution. Consequently, a court being asked to recognize and enforce a decision rendered in a sister province should not apply the former technical and restrictive rules to test the domestic enforceability of such a judgment, but should enforce the judgment so long as the extra-provincial court's assumption of jurisdiction was appropriate in the circumstances; generally, the assumption of jurisdiction would be appropriate where there existed a "real and substantial connection" between the subject matter of the action and the foreign jurisdiction.[7]

One issue left unresolved in *Morguard* was whether the new and more liberal "real and substantial connection" test would apply to the enforcement of international judgments as well as inter-provincial judgments. While the constitutional underpinnings of the *Morguard* decision would be inapplicable in this context, the court's concerns about facilitating interjurisdictional mobility, trade and commerce were equally relevant. In *Beals v. Saldanha*, the Supreme Court finally confirmed the generally held view that it was appropriate to apply the real and substantial connection test to truly foreign judgments as well as to extra-provincial Canadian judgments.[8] In the intervening thirteen years, the *Morguard* approach had repeatedly been applied to the enforcement of judgments rendered outside of Canada, and particularly—given the similarity of the two countries' legal systems—to American judgments.[9]

However, in both *Morguard* and *Beals*, the Supreme Court acknowledged that even where the real and substantial connection test is satisfied, it remains open to a party *prima facie* bound by the foreign judgment to resist its enforcement by raising the traditional defences of fraud, public policy or a breach of natural justice. That is, even if the foreign court's assumption of jurisdiction was appropriate in light of the foreign jurisdiction's connection to, and interest in, the subject matter of the action, enforcement in a Canadian court could be refused if the defendant is able to demonstrate that the judgment was procured by a fraud on the court, that the enforcement of the judgment would be "contrary to essential justice or morality, or the most basic and fundamental values of the [enforcing] jurisdiction", or that the procedure followed by the foreign court was so flawed and unfair as to fail to satisfy the basic requirements of natural justice.

The Decision of the Motions Judge in *Currie/Parsons*

Of course, *Morguard* and *Beals* did not apply directly to the relief sought in the *Currie* and *Parsons* actions. McDonald's was not seeking to have the *Boland* orders "enforced" in Ontario. That is, because McDonald's was a defendant rather than a plaintiff, it was not seeking an Ontario judgment founded upon the orders of the Illinois court that could be enforced against the plaintiffs and other class members. Rather, McDonald's was seeking, under the doctrines of *res judicata* and issue estoppel, to raise the *Boland* orders defensively to preclude the "re-litigation" by the Canadian class members of matters decided in Illinois. Despite this difference in form, Mr. Justice Cullity, the motions judge, did not hesitate to find that the *Morguard/Beals* principles applied. Whether raised offensively or defensively, the effect of foreign decisions on the rights of the Canadian litigants was to be determined on the basis of the principles confirmed in these Supreme Court decisions.[10]

The first question, therefore, was whether or not there was a "real and substantial connection" between the Illinois court and the claims of Canadian class members. In considering this question it was immediately apparent that the special nature of class proceedings required some modification of the rules governing the assumption of jurisdiction. Cullity J. noted that, in the usual case, if the defendant is resident in the jurisdiction in which the plaintiff chooses to commence its action, the conclusion that the court had jurisdiction over the matter and over the parties is unavoidable. This was not necessarily the case for a class action that purports to bind class members who may be unaware that their rights are being determined in a foreign jurisdiction. Nevertheless, Cullity J. concluded that the necessary real and substantial connection existed:

> ... I believe counsel for the defendants were correct in their submission that the court in *Boland* must be considered to have had jurisdiction in the international sense pursuant to the *Morguard* principles. There was, in my opinion, a real and substantial connection

> between the state of Illinois and the defendants, as well as with the subject matter of the action. The Head Office of McDonald's was located in Illinois. The Complaint of the plaintiffs alleged that the court in Illinois had jurisdiction - in the internal or domestic sense - "as the claims involved herein occurred in part in Illinois". It alleged further that the Illinois court was an appropriate venue as the defendants were present and did business in Illinois and Simon Marketing had offices there in which work on the promotional games was performed.

However, Cullity J. rejected the defendants' argument that the Illinois court's jurisdiction could be founded on the alternative basis of attornment by the putative members of the Canadian class. McDonald's argued that because the *Parsons* action was brought as a proposed class action, Parsons' intervention and participation in the *Boland* proceedings constituted attornment on behalf of all members of the intended class. The court held that whatever might have been the result had the *Parsons* action been certified as a class proceeding, at the time of Parsons' intervention he represented only himself and was without any authority or ability to affect the rights of the putative class members.

Having determined that the Illinois court's assumption of jurisdiction was appropriate in light of its real and substantial connection with the claims, and that the *Boland* decision was therefore *prima facie* binding on the plaintiffs and all class members, Cullity J. turned to the ability of the plaintiffs to successfully raise the defence of breach of natural justice.[12] Specifically, the issue was whether the notice program approved by the Illinois court was sufficient to bring the *Boland* decision to the attention of class members and provide them with a meaningful opportunity to exercise their right to opt out. The motions judge's conclusion that the notice to Canadian class members was inadequate and that the rules of natural justice had not been observed appears to have been informed by the following key facts:

- In submissions to the Illinois court seeking approval and directions with respect to the Canadian notice program, the court had been told that the circulation of Maclean's magazine was approximately 2,112,000; more than four times the correct figure of 502,031; this error, although known to counsel, was not brought to the court's attention at the final fairness hearing.
- In the fairness hearing before the Illinois court, after the notice programs had been carried out, the court made no assessment of effectiveness of the program in bringing the action to the attention of Canadian class members. Indeed, in the Canadian proceedings, the defendants' expert witness acknowledged that it was an established practice not to do a "reach and frequency" analysis for markets outside the United States; apparently, this was true even for class actions extending to foreign jurisdictions.
- Evidence presented by the plaintiff in the motion before Mr. Justice Cullity demonstrated that while the notice program approved for the United States would have reached 72% of adult fast food customers, the Canadian program would have reached less than 30%.
- The text of the published notices was described as "wall to wall legalese", using language that was so opaque that class members would not have been meaningfully informed of their right to opt out and the manner in which to do so.

In light of this evidence, Cullity J. concluded:

> I am satisfied that it would be substantially unjust to find that the Canadian members of the putative class in *Boland* had received adequate notice of the proceedings and of their right to opt out. Quite apart from the form and contents of the notice ... I believe that its dissemination in Canada was so woefully inadequate that the decision should be held to offend the rules of natural justice recognized in this court and, on that ground, to be not binding on the Canadian members of the putative class in *Boland*[.][12]

Parsons, however, along with six individuals who had joined him in intervening in the *Boland* proceedings, were not entitled to rely upon this natural justice defence. Regardless of the deficiencies of the notice program, these individuals had attorned to the jurisdiction of the Illinois court and were bound by its decisions. Furthermore, these individuals had full knowledge of the *Boland* action and its potential to affect their rights. It could not reasonably be argued that these individuals had been denied a meaningful opportunity to opt out of the *Boland* proceedings.

The Appeal Decision in *Currie*

On appeal, the Ontario Court of Appeal affirmed the result reached by Cullity J., but did so on a somewhat different analytical basis. Mr. Justice Sharpe, writing for a unanimous court, was of the view that the collective nature of a class action and its ability to affect the rights of claimants who may have no knowledge of a proceeding in a foreign jurisdiction that may affect their legal rights, necessitated certain modifications to the "real and substantial connection" test. Specifically, rather than limiting procedural considerations to the possibility of a breach of natural justice asserted as a defence after a determination that the foreign court's assumption of jurisdiction was appropriate, the fairness and adequacy of the foreign court's procedures should be examined to determine whether or not the assumption of jurisdiction should be respected on the grounds of international comity in the first place.[13] Sharpe J.A. explained:

> The locus of the alleged wrong indicates a real and substantial connection with Illinois, but recognizing Illinois jurisdiction could be unfair to the ordinary McDonald's customer who would have no reason to suspect that his or her rights are at stake in a foreign lawsuit and who has no link to or nexus with the *Boland* action.
>
> To address the concern for fairness, it is helpful to consider the adequacy of the procedural rights afforded the unnamed non-resident class members in the *Boland* action. Before concluding that Ontario law should recognize the jurisdiction of the Illinois court to determine their legal rights, we should be satisfied that the procedures adopted in the *Boland* action were sufficiently attentive to the rights and interests of the unnamed non-resident class members. Respect for procedural rights, including the adequacy of representation, the adequacy of notice and the right to opt out, could fortify the connection with Illinois jurisdiction and alleviate concerns regarding unfairness.

Sharpe J.A., however, rejected the suggestion that fairness could only be achieved by adopting an "opt in" procedure in respect foreign class actions; this, in the judge's view, would effectively negate the benefits of adopting a class procedure. Thus, Sharpe J.A. concluded:

> In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out.

Mr. Justice Sharpe acknowledged that the court's freedom to scrutinize and evaluate the adequacy of the foreign court's procedures would probably mean that "it may be easier to justify the assumption of jurisdiction in interprovincial cases than in international cases". Not only would the Ontario court be less deferential to the procedures adopted by courts outside Canada, it might even be appropriate to impose higher standards than those required of a domestic or extra-provincial court. On appeal, McDonald's argued that Cullity J. had tested the sufficiency of the notice to class members against a standard higher than would have been applied to a domestic class action. Sharpe J.A. accepted that the motions judge may have done so, but this did not necessarily constitute an error:

> I agree that the motion judge appears not to have assessed the adequacy of the Canadian notice against the standard mandated by Ontario law for Ontario class actions. I disagree, however, that he erred is so doing. [...] The adequacy of the notice had to be assessed in terms of what is required in an international class action involving the assertion of jurisdiction against non-residents. While Ontario's domestic standard may have some bearing upon that issue, I do not agree that it is conclusive, particularly in light of the importance of notice to the jurisdictional issues discussed above.

Jurisprudence on the Propriety of National Classes

The proceedings in *Currie* and *Parsons* represented the first instance in which any Canadian court was called upon to decide whether or not to give effect to the decision rendered in a class proceeding in another jurisdiction. Interestingly, the issue had not, by the time of these proceedings, arisen in any interprovincial case. However, it had been touched on in the debate about the propriety of certifying class actions with classes defined so as to include claimants outside the territory of the court where the action was brought. In these so-called "national class" cases, the matter of the eventual extra-provincial enforcement and recognition of any judgment to be rendered in such a case was treated somewhat cavalierly.

Nantais v. Telectronics Proprietary (Canada) Ltd.[14] was the first case to address whether an Ontario court had the legal and constitutional authority to certify a class including members resident outside of Ontario. In granting certification for such a class, Mr. Justice Brockenshire gave little weight to the defendant's argument that the Ontario court should not assume jurisdiction over the residents of other provinces because the courts of those provinces might not give effect to an Ontario decision:

> However, I do not see how this potential problem can prejudice the defendants. If, indeed, class members outside of Ontario are free to sue despite a class judgment here, how are the defendants any worse off than if the class was limited to residents of Ontario? Would the defendants, being aware of the potential possible problem, be any worse off if non-resident class members should later argue they were not bound by a decision, than if those persons simply opted out now?
>
> Further, is this potentially possible problem really relevant to this action? It seems to me to be something to be resolved in another action (by a non-resident class member) before another court in another jurisdiction.
>
> ...
>
> Any questions of the treatment of non-members of the class either through opting out or through some future successful jurisdictional argument, would be dealt with separately. I do not see the possibility of a future adverse finding on jurisdiction as a present bar to certification of all affected Canadian residents.

The defendant, challenging the correctness of this determination, applied for leave to appeal. In reasons denying leave to appeal, the court expressed much the same view:[15]

> Whether the result reached in [an] Ontario court in a class proceeding will bind members of the class in other provinces who remained passive and simply did not opt out, remains to be seen.

In other words, the question of whether the decision ultimately rendered in the Ontario action would be enforced—or given preclusive effect through the doctrine of *res judicata*—outside of Ontario, was of little or no concern to the court certifying a national class. Similar views were expressed in two subsequent decisions. *Robertson v. Thomson Corp.*[16] involved a claim that the defendant publisher had infringed the copyrights held by freelance journalists when it republished their works in electronic form. There was no territorial restriction in the definition of the proposed class, and the defendant argued that, while a pan-Canadian class might be appropriate, the court should not certify a class that might include, for example, an Australian freelance writer because the judgment would likely not be enforced by an Australian court. Sharpe J. (who was later appointed to the Court of Appeal and who wrote the *Currie* appeal decision) was of the view that this was not his concern:

> That would be an issue for the foreign court in which the Australian freelancer brought proceedings. In my view, the possibility that such question might arise elsewhere with respect to an atypical class member cannot be sufficient to defeat this claim from proceeding in Ontario.

Similarly, in *Webb v. K-Mart Canada Ltd.*,[17] Brockenshire J. expressed his agreement with this passage in *Robertson*, and essentially reiterated the position he had earlier expressed in *Nantais*:

> If a concern should arise relating to someone who has not actively participated in the class proceedings, and yet has not opted out, then the province in which such person resides could deal with the applicability of the Ontario *Class Proceedings Act* as it relates to that person in that province.

As a practical matter, the approach in the foregoing cases is open to criticism: surely, the court should not routinely assume jurisdiction over the determination of rights of residents of another territory if there is reason to doubt that the courts of that territory will recognize and give effect to the determinations made. First, this risks a waste of judicial resources. Although this may not be a significant issue where the foreign class members' rights are decided under the same legal principles as those of domestic class members, it may be a relevant consideration where the court is required to apply the substantive law of the other jurisdiction. Second, and more importantly, making legal determinations that may or may not be enforced elsewhere results in unfairness to the defendant. The uncertainty with respect to recognition and enforcement encourages 'wait-and-see' behaviour on the part of the foreign class member. If the result in the Ontario class action is an attractive one from the plaintiffs' perspective, the foreign class member can claim the benefits of the court's decision; there would be no question that the defendant was bound by the result. If, however, the result is unfavourable to the plaintiffs, the foreign class member may have a good chance of persuading the foreign court that he or she is not bound because the Ontario court did not have, and ought not to have assumed, jurisdiction. He or she can then re-litigate the issue and seek a better outcome. The uncertainty with respect to foreign recognition of any Ontario judgment also complicates the settlement process. The defendant, in agreeing to a settlement figure, must have a reasonable assurance that the settlement will be regarded as final and binding in other jurisdictions. The possibility of further litigation in other jurisdictions, and exposure to further liability may compel the defendant to offer a lower settlement amount or may discourage settlement altogether.[18]

In addition to these practical problems, as a matter of legal principle, the foregoing approach is inconsistent with the pronouncements of the Supreme Court in *Morguard*, where the court noted:

> ... the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives, and ... recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction.[19]

This passage was quoted in connection with the issue of the propriety of certifying a national class in *Carom v. Bre-X Minerals Ltd.*[20] Again, it was argued that the Ontario court should not assume jurisdiction over a national class because its determinations would be regarded as binding outside of Ontario. While not expressly questioning the approach in *Nantais*, Mr. Justice Winkler appeared to be more cognizant of the fact that recognition and enforcement outside of Ontario was a relevant consideration in deciding whether or not to assume jurisdiction over the claims of non-Ontario residents. Ultimately, however, he rejected the defendants' argument on the grounds that it "overlooks the fact that Ontario has a 'real and substantial connection' to the actions", and that consequently, any similar litigation in another province would "undoubtedly be met with an argument based upon the principles in *Morguard*". While Winkler J. did not presume to decide the recognition question for such foreign courts, he was clearly of the view that those courts should enforce the Ontario judgment so long as the Ontario court assumed jurisdiction in a properly restrained manner in accordance with the principles set out in *Morguard*. Similarly, in *Wilson v. Servier Canada Inc.*,[21] the court viewed the likely enforceability of any judgment rendered in the Ontario action as relevant to the court's decision to assume jurisdiction over the claims of non-Ontario class members:

> *Morguard* and *Hunt* stand for the proposition that if there is a real and substantial connection between the subject-matter of the action and Ontario, then the Ontario court has jurisdiction with respect to the litigation and can apply Ontario's procedural law. Ontario may not necessarily apply its substantive law since there must be a determination of the choice of law that applies. In cases where Ontario has properly assumed jurisdiction, other jurisdictions on the basis of the principle of comity should recognize the Ontario judgment.

Thus, by the time the Court of Appeal was called upon to decide the issue of recognition of foreign class proceedings in *Currie*, it was reasonably well established that the certification of interjurisdictional class actions was generally appropriate and was to be encouraged. Because class proceedings legislation is merely procedural, the assumption of jurisdiction over non-residents does not engage constitutional concerns and does not constitute an extraterritorial application of Ontario law. Indeed, the certification of interprovincial and international classes is regarded as furthering the policy objectives of the legislation: if it is regarded as salutary to aggregate the individual claims of all Ontarians affected by a particular wrong, *a fortiori* it must be consistent with the policy animating the legislation to aggregate the claims of all Canadians or, indeed, all affected persons anywhere in the world.

Does *Currie* Represent a Change of Course?

It would appear that in rendering its decision in *Currie*, the Court of Appeal realized that it might be accused of creating an inconsistency in the law of Ontario. While courts had repeatedly certified interjurisdictional classes confident that the decisions rendered in Ontario would be respected by the courts of other jurisdictions, in the first case where an Ontario court was being asked to respect a foreign class action decision, the request was being denied. Did this mean that the courts had taken too liberal an approach to the national class issue in the earlier cases?

Interestingly, the problem could have been most easily avoided by simply endorsing the reasoning of Cullity J. As discussed above, the motions judge had accepted that the Illinois court had properly assumed jurisdiction over the Ontario class members because there was a "real and substantial connection" between Illinois, the defendants and the subject matter of the action. Therefore, the Illinois orders in *Boland* did, *prima facie*, give rise to an issue estoppel in the Ontario court. However, this did not prevent the Ontario class members from raising the traditional common law defence of a breach of natural justice. Since this defence—like the other defences of fraud and public policy—is generally narrowly construed and rarely successfully invoked,[22] dismissing the defendants' motion on this basis effectively

marked *Currie* as a case involving exceptional facts. Therefore, consistent with the earlier national class decisions, if a real and substantial connection with the foreign jurisdiction was shown, the foreign judgment will generally be treated as binding in Ontario.

However, as discussed above, the Court of Appeal preferred to incorporate the assessment of the foreign court's procedures into the initial determination of the propriety of that court's assumption of jurisdiction. This is not merely a matter of semantics. Rather than a narrowly defined defence of denial of natural justice, which the Ontario class member bears the burden of proving, the onus is upon the defendant to prove that the procedures followed adequately protected the rights of Ontario class members. Treating the foreign court's procedures as relevant to the propriety of the court's assumption of jurisdiction arguably required a different gloss on the decision in *Morguard*. In *Morguard*, the Supreme Court held that, rather than technical rules, the assumption of jurisdiction should be guided by the overarching objective of achieving "order and fairness". It was in this objective that was to be served by limiting a court's assumption of jurisdiction to those circumstances in which there was a "real and substantial connection" between the territory in which the court sits and the subject matter of the action. In *Morguard*, the court wrote:

> It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject-matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit. Thus, fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction.
>
> [citation omitted]

Notwithstanding the use of the word "may", *Morguard* had frequently been interpreted as holding that the demands of order and fairness *are* met where a real and substantial connection is shown. For example, in *Wilson v. Servier Canada Ltd.*, the court wrote:

> In a dispute involving persons outside the province where the dispute is being heard, the power of the presiding court to assume jurisdiction is limited by the principles of order and fairness. These principles are satisfied when there is a "real and substantial connection" between the province assuming jurisdiction and the defendants or the subject-matter of the litigation.

However, in *Currie*, the requirement for a "real and substantial connection" was not regarded as a mechanism by which to achieve "order and fairness"; rather:

> In *Morguard*, the Supreme Court of Canada identified the twin principles of "order and fairness" and "real and substantial connection" for the assessment of the propriety of conflict of laws jurisdiction.

Sharpe J.A. appeared to recognize that treating "order and fairness" as an additional jurisdictional requirement—one of two "twin principles"—represented something of a departure from the approach taken in the national class cases:[23]

> While constitutional arrangements may put interprovincial suits on something of a different plain, as noted by Cumming J. in *Wilson v. Servier Canada Inc.*, Ontario courts have certified national class actions "if there is a real and substantial connection between the subject-matter of the action and Ontario" in the expectation that "other jurisdictions on the basis of comity should recognize the Ontario judgment."
>
> On the other hand, the principles of "order and fairness" require that careful attention be paid to the situation of ordinary McDonald's customers whose rights are at stake. These non-resident class members would have no reason to expect that any legal claim they may wish to assert against McDonald's Canada as result of visiting the restaurant in Ontario would be adjudicated in the United States. The consumer transactions giving rise to the claims took place entirely within Ontario. The consumers are residents of Canada and McDonald's Canada is a corporation that conducts its business in Canada. Damages from the alleged wrong were suffered in Ontario. The Currie plaintiffs themselves did nothing that could provide a basis for the assertion of Illinois jurisdiction, while McDonald's Canada invited the jurisdiction of the courts of Ontario by carrying on business here.

Of course, factors analogous to those enumerated by Sharpe J.A in this passage were present in most, if not all of the national class cases, yet in few of these cases did the courts hesitate to assume jurisdiction over out-of-province class members.[24] The decision in *Currie* now makes it clear that, particularly in the class action context, the fairness of the process must be considered before recognizing the binding force of the foreign decision. Perhaps fearing that this would be interpreted as a deviation from the approach adopted in the national class cases, Sharpe J.A. was clear in expressing the court's support for interjurisdictional class actions:

> There are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation. Conflict of law rules should recognize, in appropriate cases, the importance of having claims finally resolved in one jurisdiction. In some cases, Ontario courts will render judgments affecting the rights of non-residents and in other cases, Ontario residents will be affected by class action proceedings elsewhere. Ontario expects its judgments to be recognized and enforced, provided its courts assert jurisdiction in a proper manner and comity requires that, in appropriate cases, Ontario law should give effect to foreign class action judgments.
>
> [citation omitted]

Implications for Future Interjurisdictional Class Actions in Canada

Arguably, Mr. Justice Sharpe was, in the last quoted passage, suggesting that the court's decision in *Currie* should not be interpreted as discouraging the certification of interjurisdictional classes in future cases. In at least one case, the suggestion appears to have been followed. Recently, in *McCutcheon v. The Cash Store Inc.*,[25] the court once again agreed to certify a class action brought on behalf of residents across Canada. Cullity J. (the motions judge in *Parsons* and *Currie*) addressed the question of whether the Court of Appeal decision in *Currie* had changed the rules for certifying national classes:

> By incorporating fairness considerations into the rules for jurisdiction, the reasoning in *Currie* abandons some of the traditional distinctions between jurisdiction and recognition. [...] It is possible that what I have described as the expansive approach to jurisdiction adopted in some of the previous decisions in this court can co-exist with rules of recognition that give weight to such requirements, as well as with an application of the principle of *forum non conveniens*—modified if necessary—where proceedings have been commenced in more than one jurisdiction. Whether or not this would be an appropriate method of dealing with the problems of national classes in the absence of uniform legislation, I believe I should follow the previous decisions of this court in deciding the jurisdictional question posed by the facts of this case.

Thus, the questions of whether *Currie* had changed the law with respect to the assumption of jurisdiction over interjurisdictional classes, and whether the Ontario courts should move away from the "expansive approach to jurisdiction" developed in the earlier cases, were essentially answered in the negative. Interestingly, however, Cullity J. did not limit his analysis to the question of whether there was a real and substantial connection between the Ontario court and the claims of the residents of other provinces. After determining that there was such a connection, he went on to consider Sharpe J.A.'s two "order and fairness" factors: (1) the adequacy of representation for non-resident class members, and (2) the fairness of the procedure, having particular regard to the adequacy of notice and a meaningful opportunity to opt out. With respect to the first of these, Cullity J. noted that adequacy of the representation—that is, the appropriateness of the proposed representative plaintiff and the sufficiency of the litigation plan—was already a component of the certification test under the governing legislation. Regarding the second, while the details of the notice program are not generally dealt with at the certification stage of the action, there was no reason to doubt that an adequate notice program could be crafted and implemented.

While this may not be a radically different analysis than that found in the earlier national class certification cases, it remains the case that Cullity J. felt that he was required to consider two additional elements that had not formerly been part of the applicable test. Admittedly, to some extent, these considerations were implicit in, or already part of, the test for certification. Nevertheless, there may be future cases in which these factors will be material to the outcome and the court will decline to include non-residents within the class.[26]

While the decision in *Currie* may not have resulted in a fundamental re-evaluation of the "expansive approach to jurisdiction" in the national class cases, such a re-evaluation may yet be called for. Several cases decided since *Currie* further illustrate the unpredictability of recognition of class action decisions in foreign courts. Indeed, some comments in these cases may be read as a direct response by the courts of other provinces to Ontario's "expansive approach".

In the first of these decisions, *Lépine v. Société canadienne des Postes*,[27] class actions had been commenced in Ontario and in Quebec, and the two actions were certified on December 22, 2003 and December 23, 2003, respectively. The former was brought on behalf of class members across Canada with the exception of British Columbia, while the latter embraced only Quebec residents. Co-ordinated settlement discussions took place, but the plaintiff in the Quebec action ultimately declined the settlement offer. Thereafter, notices were published to advise class members of the pending proceeding to be prosecuted on their behalf in Quebec, and their right to opt out. The settlement offer was accepted in Ontario, and pursuant to orders of the Ontario court, notices were published in Quebec advising class members of the settlement and their right to opt out. The Ontario notices were published approximately six weeks after the Quebec notices. Thereafter, the defendants, as in *Parsons* and *Currie*, brought a motion in the Quebec proceedings to stay the action on the grounds of *res judicata*. While not overtly critical of the Ontario court's assumption of jurisdiction, the Quebec court did dismiss the motion. Applying the reasoning in *Currie*, the court found that the Quebec class members had not been afforded a fair process. Specifically, the notices published in respect of the Ontario action did not adequately advise the class members of their rights:

> [T]he Ontario Notice, by referring to a settlement without providing any further information, did not adequately inform those members of the Quebec Class how to distinguish their rights between the two class actions, and accordingly the Ontario Notice, rather than serving as an informative device which is the purpose of these notices, whether under Ontario or Quebec law, *prima facie* brought confusion to the debate over how the Quebec members would deal with the notices

While in *Lépine*, the Quebec court relied upon the deficiencies in the Ontario court's procedure, in the subsequent case of *HSBC Bank Canada v. Hocking*,[28] the court went further, implicitly criticizing the Ontario court's approach to the existence of a real and substantial connection. The case involved a claim on behalf of mortgage borrowers who had allegedly been charged excessive prepayment fees and penalties. Again, the Ontario court did not hesitate to certify a class embracing mortgagors resident, and who presumably mortgaged properties situated, outside of Ontario. On a motion seeking to have the settlement reached in Ontario recognized and enforced in Quebec, the court appeared to accept the Quebec plaintiff's argument that the facts did not support a real and substantial connection between the Ontario court and the claims of Quebec class members:

> [The objector] submits that a court which is not competent to hear the case of a class member cannot gain such jurisdiction through the assertion of collective rights. The class members who are residents of Quebec did business with HSBC in Quebec, and as such the contractual obligations had to be enforced in Quebec; the fault alleged took place in, and the injury was suffered in Quebec. The action of class members resident in Quebec thus had no connection with Ontario.[29]

The court in *Hocking* also found that, in addition to the lack of jurisdiction, the Ontario judgment should not be recognized because even if the court had jurisdiction *simpliciter*, it ought to have declined jurisdiction on the grounds of *forum non conveniens*, and because the notice published in Quebec was so deficient as to deny the Quebec class members procedural fairness.

The decision in *Englund v. Pfizer Canada Inc.*[30] perhaps goes the furthest in questioning Ontario's "expansive approach to jurisdiction".[31] This may be because the relief sought was more aggressive than in the earlier cases. Unlike *Currie*, *Lépine* and *Hocking*, where the matter had been resolved in one jurisdiction and the defendant sought to rely on the doctrine of *res judicata*, the relief sought in *Englund* was more preemptive. The defendants argued that the Saskatchewan court should decline jurisdiction over a class action commenced in that province because the matter could more conveniently and appropriately be dealt with in an as yet uncertified class action asserting the same claims in Ontario. While the court did consider the usual *forum non conveniens* factors, such as the residence of the parties, the location of key witnesses and documentary evidence, the substantive law to be applied, etc., particular weight was given to the likely limited legal force in Saskatchewan of any judgment that the Ontario court might ultimately render:

> I reject [the defendant's] submission that the Ontario [*Class Proceedings Act*] allows for the creation of a "national class" that binds non-Ontario residents unless they opt out of a class action certified in Ontario because the laws of Saskatchewan do not recognize legislation enabled by other jurisdictions that intentionally encroaches on the right of its residents to seek judicial recourse for losses they suffered as a consequence of a tort or other breach of the law committed within the Province.
>
> In *Nantais v. Telectronics Proprietary (Canada) Ltd.*, the Ontario Court ... acknowledged that the concept of national class rests solely on the principles of comity, order and fairness. These principles apply equally to all jurisdictions within the Canadian judicial framework and thus the Ontario [*Class Proceedings Act*] must be read having due respect for the rights of all citizens within that framework; especially where a defendant seeks to sell to a resident in a given jurisdiction and then attempts to avoid defending a claim launched in the jurisdiction where the tort or other wrong occurred.

In *McCutcheon v. The Cash Store Inc.*, Cullity J. commented that the reasoning in *Englund* and *Hocking* "does not fit happily" with that in the earlier national class cases such as *Nantais*, *Carom* and *Webb*. Indeed, it may be accurate to say that, more broadly, Canadian law (and particularly that of Ontario) with respect to the assumption of jurisdiction over extra-provincial class members does not fit happily with the law respecting the extra-provincial recognition of decisions resulting from such an assumption of jurisdiction. As the jurisprudence currently stands, requests to certify interjurisdictional classes are rarely denied, while requests to recognize such judgments are rarely granted. While this state of affairs may reflect the natural tendency of courts to jealously guard their own jurisdiction, it fails to give effect to the directive of the Supreme Court of Canada in *Morguard* that "the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives". More than merely a statement of abstract legal principle, the failure to harmonize the rules respecting these two questions has, as discussed above, a number of adverse practical consequences for class actions practice. It seems reasonably clear, therefore, that there remains work to be done by Canadian courts to reconcile the principles governing the assumption and recognition of jurisdiction.

ENDNOTES

1. Canada's earliest class actions legislation, the Quebec Code of Civil Procedure, Book IX (enacted 1978), and Ontario's *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (enacted 1992) are silent on interjurisdictional questions. In the case of Ontario, this is not surprising in light of the fact that the comprehensive three-volume *Report on Class Actions* prepared by the Ontario Law Reform Commission, on which the statute was in large measure based, also made no reference to these issues.

2. (2005), 74 O.R. (3d) 321 (C.A.), aff'g (2004), 45 C.P.C. (5th) 304 (S.C.J.).

3. As will be described below, two class proceedings were commenced in Ontario asserting the same claims against the defendants. Because the plaintiff in one of these actions (Parsons) participated in a related action in Illinois, his status *vis-à-vis* that action differed somewhat from that of the plaintiff in the other Ontario proceeding (Currie). As a consequence, only the *Currie* action proceeded to the Ontario Court of Appeal

4. Evidence in the criminal proceedings against the principals of Simons Marketing disclosed that, in addition to the embezzlement of prizes, McDonald's had also instructed Simons Marketing to ensure that no high value prizes would be won in Canada.

5. [2003] 3 S.C.R. 416.

6. [1990] 3 S.C.R. 1077.

7. Commentators have noted that the *Morguard* decision was not entirely clear with respect to the subject of the requisite "real and substantial connection": E. Edinger, "*Morguard v. De Savoye*: Subsequent Developments", 22 Can. Bus. L.J. 29 (1993). Did the foreign court have to be connected to the plaintiff, to the defendant, to the subject matter of the action, to the cause of action asserted, to the injury for which redress is being sought or some combination of these? Subsequent case law confirms that the test is a flexible one allowing for different connecting facts so long as the connections demonstrated, taken together, satisfy the threshold of "real and substantial". This flexibility was also specifically noted in the decision of the Court of Appeal in *Currie*.

8. The *Beals* decision was released after the dismissal motion in *Parsons/Currie* was argued, but before the motions judge released his decision. Although the judge afforded the parties the opportunity to make further submissions in light of *Beals*, both parties found it unnecessary to do so; nor did the motions judge find it necessary to make any material revisions to the draft reasons he had prepared: 45 C.P.C. (5th) 304 at 307-308. This demonstrates that *Beals* did not change the law,

but rather represented the Supreme Court's confirmation of legal principles applied by lower courts since the court's earlier decision in *Morguard*.

9. *Moses v. Shore Boat Builders Ltd.* (1993), 106 D.L.R. (4th) 654 (B.C.C.A.); *United States of America v. Ivey* (1996), 30 O.R. (3d) 370 (C.A.); *Old North State Brewing Co. v. Newlands Services Inc.*, [1999] 4 W.W.R. 573 (B.C.C.A.); *Federal Deposit Insurance Corp. v. Vanstone* (1992), 88 D.L.R. (4th) 448 (B.C.S.C.).

10. This has also recently been confirmed in several non-class action cases: *CLE Owners Inc. v. Wanlass* (2004), 44 C.P.C. (5th) 175 (Man. Q.B.), aff'd [2005] 8 W.W.R. 559 (Man. C.A.); *Pegasus Consulting Ltd. v. OSI Software Inc.* (2005), 9 B.L.R. (4th) 334 (N.B.Q.B.).

11. Cullity J. opined that considerations of natural justice and the fairness of the foreign court's procedures might properly be considered in applying the real and substantial connection test, but ultimately it preferable to analyze any alleged breach as a defence to a prima facie right to recognition of the foreign judgment.

12. Referring to the class in *Boland* as "putative" would appear to be an error. Since the *Boland* class was certified, Canadian McDonald's customers who had participated in the contests were *actual* class members in *Boland*. These same individuals remained putative members of the Canadian classes proposed in the *Parsons* and *Currie* actions.

13. As noted above, Cullity J. considered the possibility of evaluating the foreign procedure at this stage of the analysis, but ultimately preferred to treat any inadequacies in the procedure as a defence.

14. (1995), 25 O.R. (3d) 331 (Gen. Div.).

15. (1995), 25 O.R. (3d) 331 at 347 (Div. Ct.).

16. (1999), 43 O.R. (3d) 161 (Gen. Div.).

17. (1999), 45 O.R. (3d) 389 (Gen. Div.).

18. These uncertainties have also given rise to a practice of settlements made conditional upon recognition by the courts in all, or most, of the jurisdictions in which class members reside.

19. This principle was also more recently and explicitly confirmed by the decision of the Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.).

20. (1999), 43 O.R. (3d) 441 (Gen. Div.).

21. (2000), 50 O.R. (3d) 219 (S.C.J.).

22. This principle, that these defences should be narrowly construed, was reaffirmed in *Beals v. Saldanha, supra*.

23. Admittedly, however, the last sentence in the *Morguard* passage quoted above can be read as prescribing two distinct requirements: a court exercising a "properly restrained jurisdiction" (that is, only where there is a real and substantial connection) *and* a court acting through a "fair process". What was meant by a fair process was not canvassed in *Morguard* because, in the court's view, this was "not an issue within the Canadian federation".

24. One of the few cases in which a Canadian court has refused to certify an interprovincial class is *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2003), 66 O.R. (3d) 112 (S.C.J.). The basis for the court's decision was the absence of any real and substantial connection between the Ontario court and the claims of the non-Ontario class members.

25. [2006] O.J. No. 1860 (S.C.J.).

26. In the other noteworthy post-*Currie* national class case, *Punit v. Wawanesa Mutual Insurance Co.* (2005), 19 C.P.C. (6th) 1 (Ont. S.C.J.) the court, in essence, chose to avoid the issue. The defendants brought a motion for a preliminary determination of a question of law, specifically, that the court did not have, or should not assume, jurisdiction over class members in other provinces. The court declined to decide the question in advance of, and outside the context of, the certification motion.

27. [2005] Q.J. No. 9806 (S.C.).

28. [2006] J.Q. no. 507 (C.S.).

29. This translation from the original French language decision is taken from the decision in *McCutcheon v. The Cash Store Inc., supra*.

30. (2006), 23 C.P.C. (6th) 136 (Sask. Q.B.).

31. This tendency to question Ontario's expansive approach to jurisdiction, which allows the Ontario court to bind non-residents so long as the subject matter of the action has a connection to Ontario and the non-resident does not opt out, also finds support in the more restrained approach reflected in the newer class actions statutes adopted more recently in other provinces. The statutes passed in British Columbia (enacted 1994), Saskatchewan (enacted 2001), Newfoundland (enacted 2002) and Alberta (enacted 2003) all expressly contemplate non-resident class members, but require such persons to opt in before they will be bound by the result in such an action.