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Judicial Economy or Foreign Interference?
The Pro's and Con's of "International" Class Actions

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Introduction

The world has become a smaller place. It is stating the obvious to say that commerce is conducted on a global scale. Corporations are often-times international operators, and have the potential to cause harm that is not circumscribed by territorial or jurisdictional limits; harm that affects large numbers of people. In Canada, where the class action is still in its relative infancy, our courts are now facing the issue of determining just how far-reaching their powers may be extended to effect justice – or at least to provide the opportunity for a day in court - to the victims of mass wrongdoing. At present, it remains an open question just how far a provincial superior court may go to assume jurisdiction over both foreign resident class members, and foreign defendants. More settled is the question of the circumstances in which a Canadian court will recognize and give effect to a foreign judgment purporting to bind a Canadian class. In typical Canadian fashion we are prepared to accept and give deference to the judgments of most foreign courts so long as the basic principles of justice have been met. I would suggest that it is now time for Canada to flex its judicial muscle, and assume a more proactive role in the adjudication and resolution of international class actions as well.

In this paper, I will explore the current state of international class proceedings commenced in Canada, and attempt to provide some practical advice for those who may find themselves involved in class proceedings that raise cross-boarder issues.

What is “Judicial Economy” in the International Context?

One of the three principal objectives of the class action regime is meant to be the achievement of judicial economy¹. The term has been bandied about liberally, both before and since it was discussed by the Chief Justice in *Western Canadian Shopping Centres*², and it appears in virtually every certification decision since that time. However, it is more often than not given very little serious judicial consideration. The meaning of “judicial economy” should be self-evident – by commencing a class proceeding, one judge is able to determine the complaint of a large number of people within one action. Fewer judicial resources are engaged, and an economy of scales is achieved, not just for the class, but for the court system as well. As the Chief Justice stated, “by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times)”.

As a factor to be weighed in the preferability analysis, judicial economy should, as a general rule, fall in favour of certification. In the vast majority of cases, having one decision that provides mass redress to a class of injured persons will be preferable to individual lawsuits, when there has been a common wrong. In the context of an international class action, the analysis can be more complicated. The underlying assumption of the Chief Justice’s quote, above, presupposes that dispute resolution in one form or another will be proceeding within the jurisdiction. That is, or may not necessarily

¹ The other two goals are “access to justice” and “behaviour modification”.

² *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534, at para. 27

be the case in the context of international class actions. In particular, the court should consider whether economy will, in fact be achieved, if the decision will not be enforceable against a foreign defendant in its own domicile (or wherever its assets are located), or if the matter will have to be re-litigated to enforce the Canadian judgment. Similarly, if another class action is, or has, proceeded in another jurisdiction and purports to include a Canadian subclass, should a Canadian court agree to hear the same matter simply because a different (Canadian) representative seeks to litigate the issue here? In these cases, is judicial economy truly achieved by the court assuming jurisdiction? Seemingly not, if the Canadian judgment is effectively worthless in the foreign jurisdiction and/or would inevitably result in re-litigation of the same issues. While the class proceeding may achieve judicial economy in the context of an all-Canadian proceeding, it will have been a complete waste of judicial resources if the judgment is ultimately meaningless and unenforceable as against a foreign defendant. Class counsel should, therefore, carefully consider the judicial economy factor in the certification test before commencing an action against a foreign defendant. Furthermore, they should be prepared to effectively address the actual judicial economy achieved by the class proceeding, rather than simply giving lip service to this criterion.

Similar considerations also, of course, would apply in respect of the scope of the class on whose behalf the class proceeding is brought. If the class action were to be certified on behalf of an international class of plaintiffs, would the class be able to enforce the judgment in their own domicile? Just as importantly, would the non-resident class members be content to be bound by the decision of a foreign tribunal, in an action about which they may have had no knowledge. Judicial efficiency may well be limited if

the foreign class members are able to reject the binding effect of the foreign court that purports to exercise jurisdiction over them without notice or consent. Clearly, to avoid such an unwelcome outcome, the courts and legislatures in multiple jurisdictions will have to reach a consensus on the scope and enforceability of class action judgments that affect persons in multiple jurisdictions. Agreements on the reciprocal enforcement of class action judgments should be encouraged.

Commencing Class Actions involving Foreign Parties

Given the very significant quantum of damages claimed in most class proceedings, class counsel should reasonably expect that defendants will mount vigorous defences to the claims, and seek to have the actions stayed or dismissed, if possible. Hence, whenever an action is brought against a foreign defendant, counsel should anticipate facing a preliminary motion to have service of the claim set aside or the action stayed on the grounds of *forum non conveniens*, or lack of jurisdiction almost as a matter of course. The tests for a *forum non conveniens* motion, or to set aside service *ex juris* are the same in the class action context as in “regular” litigation, including whether there is a more convenient forum, and whether there is a “real and substantial connection” to the present forum³. Class counsel would be wise to not assume that, simply because a claim is being asserted on behalf of a large number of people, that factor will outweigh the other factors to be assessed by the court in its consideration of the convenience of the chosen forum. However, in practice, it would appear that Canadian courts are reluctant to deny the class the right to pursue their claim on “home turf”. Access to justice, the

³ *Morguard Investments Ltd. v. DeSavoye*, [1990] 3 S.C.R. 1077, at p. 1109,

Vita Pharm Canada Ltd. v. Hoffmann-LaRoche Ltd. et al., [2002] O.J. No. 298 (S.C.J.) at para. 18 - 20

recurring theme of class proceedings, becomes an important and heavily weighted factor in the context of claims brought against foreign defendants.

It is now well established that when a foreign defendant moves to have service outside of the jurisdiction set aside, and the action stayed on the basis of *forum non conveniens*, that the latter question (convenience of the forum) will be resolved first, as it may be determinative of the entire motion⁴. If the jurisdiction chosen by the plaintiff is not a convenient forum, the action will be stayed, regardless of whether there is a good arguable case. The “good arguable case” test must, of necessity, be resolved on a case by case basis, depending upon the particular evidence adduced by the plaintiff in response to the motion. In respect of this second part of the analysis, there has been no indication that the courts are prepared to apply a less onerous standard in the class action context than in respect of any other action commenced against a foreign defendant.

In the *ONHWP* case, Justice Winkler (as he then was) denied the motion to set aside service *ex juris*, or to stay the action that had been brought by General Electric (“GE”). GE neither manufactured the impugned resin in Canada, nor did it sell it to manufacturers in Canada. However, residents in Ontario were end-purchasers of the finished venting product which contained the allegedly defective resins manufactured by GE, and evidence was adduced that established that it was within GE’s knowledge that the finished product containing the resin could end up being purchased by Canadian residents.

⁴ *Frymer v. Brettschneider* (1994), 19 O.R. (3d) 60 (C.A.) at p. 83

Ontario New Home Warranty Program v. General Electric Company. (1998), 36 O.R. (3d) 787 (Gen. Div.) at para. 18 (“*ONHWP*”)

Justice Winkler addressed the stay issue first, and determined that Ontario was a convenient forum, and that the proposed alternative forum (Illinois) was not clearly more appropriate. There was a real and substantial connection to Ontario, as the plaintiff class was resident there, and sustained the alleged losses there. The motions judge was influenced by the fact that there would be a loss of personal or juridical advantage to the class in that staying the GE claim would “force” the plaintiff to litigate in two jurisdictions, since the claim against the manufacturers would be continuing in Ontario. The defendant had led evidence on the motion that Illinois would assume jurisdiction over the plaintiff’s claim, if brought there. It does not appear that GE led any evidence regarding whether the Illinois court would have assumed jurisdiction over the defendants in the companion action, if they were sued in that forum. Justice Winkler concluded that there would be a loss of personal advantage to the class if it had to pursue litigation in two different forums, as there would be the risk of inconsistent results and exorbitant costs (access to justice). Ironically, the very same arguments, when asserted by the defendants, who were already forced to defend other like proceedings in the US was found unpersuasive. Perhaps if GE had been able to establish that the US proceedings would be (or were being, if that was the case) prosecuted in a co-ordinated fashion under the US *Class Action Fairness Act*, and that the Illinois court would assume jurisdiction over the manufacturer/distributor defendants, then the result might have been different. It is doubtful. Having met the relatively low threshold of showing a connection to the forum, and a good arguable case, it is unlikely that a Canadian court would relinquish jurisdiction to another country unless the defendant was able to establish more “prejudice” than the cost of defending the action in Canada, and there was evidence that

the Canadian class members could be assimilated into the existing US litigation without any loss of rights or other prejudice.

As Justice Winkler accepted in *ONHWP*, there can be a significant juridical advantage to the class in prosecuting a class action in Canada versus the United States. In recent years there has been a pronounced trend in the US towards increasing the evidentiary onus upon the plaintiff class in order to meet the test for certification under Federal Rule 23. While in Canada, the Supreme Court has confirmed that the test for certification is “decidedly not a merits based test”, and that it is only necessary to adduce “some basis in fact” for each part of the test (except cause of action)⁵, the US courts have trended in the opposite direction. In the 1982 decision of the US Supreme Court in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (at p. 160, 161), the court directed that on the certification motion, a court must conduct a “rigorous analysis”, in which it may be necessary to conduct a preliminary inquiry into the merits of the action in order to determine if each of the requirements of Rule 23 has been fully met.

Since then, certification motions in the US have tended to look more like a motion for quasi-summary judgment, including the tendering of expert testimony, and extensive pre-motion depositions, with the court conducting a preliminary analysis of the merits. (See, for example, *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672(7th Cir. 2001) and more recently, *In re IPO Securities Litigation*, 471 F3d 24 (2d Cir. 2006).)

The attitude of the US courts contrasts sharply with that of the Canadian courts, particularly the recent trilogy of decisions from the Ontario Court of Appeal in *Cloud*⁶,

⁵ *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 25

⁶ *Cloud et al. v. Attorney General of Canada et al.* (2004), 247 D.L.R. (4th) 667 (C.A.) (leave to appeal to S.C.C. denied: 2005 CarswellOnt 1866)

*Pearson*⁷ and *Markson*⁸, where the court's direction has been strongly in favour of certification, even when there will be substantial issues that remain to be determined on an individual basis. Furthermore, the courts in Canada have been critical of excessive evidence being tendered on the certification motion. In *Caputo*, Winkler J. (as he then was) admonished both parties for delivering merits-based evidence:

[21] In my view, both parties ignored the procedural nature of the certification motion in favour of providing material and evidence going directly to the merits of the case. It cannot be entirely a coincidence that the legislature chose to insert a requirement, in s. 2 of the CPA, that the certification motion be brought within 90 days of the filing of the last statement of defence. Nor can it be ignored that s. 5(5) of the CPA specifically states that an "order certifying a class proceeding is not a determination of the merits of the proceeding". Both of these provisions are indicative that it is not expected that the parties will develop either merits-based records or arguments in support or defence of the certification motion. Any doubt in this regard left by the legislation was removed when the Supreme Court of Canada held in *Hollick v. Toronto (City)* [citation omitted]...⁹

In summary, the lower evidentiary threshold for obtaining a certification order in Canada can be an important and significant juridical advantage to persons who seek to commence a class action in this jurisdiction when the United States might otherwise also be a convenient forum. It is a consideration that should be given significant weight when more than one jurisdiction is available within which to bring a cross-border class action.

Looking farther afield than our southern neighbours, another important consideration in the choice of forum is the fact that there are, in actuality few foreign jurisdictions in which class actions, as we know them are available. The class action procedure is available in Australia, Sweden and Brazil. Other countries, such as England,

⁷ *Pearson v. Inco Ltd.*, [2005] O.J. No. 4918 (C.A.) (leave to appeal to S.C.C. denied [2006] S.C.C.A. No. 1)

⁸ *Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684 (C.A.)

⁹ *Caputo et al. v. Imperial Tobacco Limited et al.* (2006), 74 O.R. (3d) 728 (S.C.J.). at para. 21

have some procedures in place that allow for group or representative proceedings; but they do not have a fully developed procedural mechanism for class actions. In fact, many European civil litigation rules are designed in such a way that a class action is simply not possible.¹⁰

For example, the juridical advantage of the class action procedure was recognized and acknowledged in *Wilson v. Servier*, where the parent company, domiciled in France, moved to have the action stayed against it. The motions judge stated:

The plaintiff class will suffer a very significant loss of juridical advantage if they are forced to proceed with the action at hand through a multiplicity of individual actions in France or other foreign jurisdictions. It is not disputed by the defendants that there is no class action process available in France. The advantages of access to justice and judicial efficiency and economy in the use of resources through a class action would be lost if the action does not proceed in Ontario against all defendants against whom there is a good arguable case.

For any one or more individuals to have to commence individual actions in France would lead to prohibitive expense and effectively deny them access to justice. The causes of action of individual class members from a practical standpoint would no longer be viable.¹¹

The lack of effective class action procedures in most countries has resulted in many class actions being commenced in the United States, even when the US may not otherwise be the most convenient forum. Typically, the American courts have been prepared to assume jurisdiction over foreign defendants, so long as there is some (small) connection to the jurisdiction¹². A very recent example of the long arm the American

¹⁰ R. Mulheron, *The Class Action in Common Law Legal Systems*, (Oxford-Portland Oregon, Hart Publishing, 2004)

¹¹ *Wilson v. Servier Canada Inc. et al.* (2002), 58 O.R. (3d) 753 (S.C.J.), at para. 63

¹² See, for example, *Jeffrey v. Rapid American Corp.*, 448 Mich. 178, 529, N.W.2d 664 (1995)

However, we may start to see more of a trend away from the assumption of jurisdiction in some American courts on the basis of *forum non conveniens* if the US courts can be satisfied that effective justice, including the ability to prosecute an action by way of a class proceeding, is available in other

courts are prepared to extend is the class proceeding commenced in the United States in respect of a price fixing conspiracy between two United Kingdom air carriers, British Airways and Virgin Atlantic¹³. The *Boland v. McDonald's* case¹⁴, discussed further below, is another. There is no reason why Canada could not also start becoming a forum of choice when the case meets our higher “real and substantial connection” test, as well.

While foreign domiciled plaintiffs commencing a class action in Canada is not common, it has occurred. The first such case was *Robertson v. Thomson Corp.*¹⁵ In that case, the court certified an international class over the objections of the defendant. Sharpe J. (as he then was) did not specifically address the issue of *international* judicial economy, simply stating that whether the judgment would be of binding effect on the foreign class members “would be an issue for the foreign court in which the international claimant brought proceedings.”¹⁶ In his view, any foreign class member who might challenge the Canadian court’s decision would be “atypical”. It does not appear that he considered the enforcement of judgment issues that might arise in other jurisdictions,

jurisdictions, such as Canada. Some recent examples where American actions have been stayed in favour of Canadian class action proceedings include:

DiRienzo v. Philip Services Corp., 294 F.3d 21 (2d Cir 2002) (Ontario is an adequate forum to try a securities class action), and

Paraschos v. YBM Magnex International, Inc., 130 F. Supp. 642 (E.D. Pa. 2002), where the court found “that Canada’s interest in this action have become abundantly clear and that the action is now so overwhelmingly dominated by Canadian interests it should be dismissed in deference to Canadian law and the Canadian courts on the basis of international comity.” (at 647)

¹³ *Gornik v. British Airways PLC, Virgin Atlantic Airways Limited, et al.*, US District Court for the Eastern District of New York, Case 1:06-cv-03139-SLI-VVP, in which the plaintiff seeks to certify a class of “all persons and entities that purchased Passenger Air Transportation, worldwide and within the United States, ...” [emphasis added] based upon the allegation that “there was a continuous and uninterrupted flow of Passenger Air Transportation in interstate and international commerce throughout the United States and the world.”

¹⁴ *Boland et al. v. Simon Marketing Inc. and McDonald's Corporation*, Circuit Court of Cook County, Illinois (No. 01 CH 13801)

¹⁵ (1999), 43 O.R. (3d) 161 (S.C.J.)

¹⁶ *ibid*, at para. 45

presumably since the defendant was present in the jurisdiction, and in most instances, the class members would be seeking to enforce any judgment within this jurisdiction, and not elsewhere.

In *Mandeville v. Manufacturers Life*, the putative class were all residents of Barbados, but brought a class action in Ontario against Manulife, whose headquarters are in Toronto. Nordheimer J. permitted the class action to proceed:

I do not dispute that the courts of Barbados may have jurisdiction to address these issues. But given that Manulife is a Canadian corporation, with its head office in the City of Toronto in the Province of Ontario, and which is governed by Canadian statutes, it appears to me that this court clearly has jurisdiction to hear a claim against the corporation regardless of where the plaintiffs may be located. If the plaintiffs have multiple jurisdictions in which they may advance their claims, then they are generally entitled to choose the jurisdiction in which to institute their proceedings. As Madam Justice Gillese said in *Lemmex v. Bernard* (2001), 55 O.R. (3d) 657 (Div. Ct.) at p. 664:

“This results from the fact that it is quite likely the courts of both Ontario and Grenada have jurisdiction simpliciter in the case at bar. The plaintiffs had the right to choose between the two forums.”

Indeed there may be very important practical reasons for suing a corporate defendant in the jurisdiction where it is headquartered.¹⁷

From these examples it can be seen that the Canadian courts are trending towards accepting jurisdiction in the context of international class actions. If there is a real and substantial connection with the forum, the courts will take jurisdiction, and expect, on the basis of international comity, that foreign jurisdictions will accord our judgments the same deference as we do to theirs.

¹⁷ *Mandeville v. Manufacturers Life Insurance Co.*, [2002] O.J. No. 538

The Application of the *Morguard* “Full Faith and Credit” Principals to Foreign Class Action Judgments and Settlement Approvals

As discussed above, one of the goals of class action litigation is to promote judicial efficiency by consolidating the number of actions arising from a common legal issue into one representative proceeding. In Canada, the concept of judicial economy is also taken to include and encompass the concept of international comity¹⁸. If an issue has been resolved by a foreign judgment that meets the *Morguard* principles, then the Canadian court will give effect to the judgment and will not permit a relitigation of the same issues, even if the plaintiff class did not actively participate in, and may well have known nothing of the foreign proceeding.

A brief review of some recent class actions with cross-border issues confirms that some Canadian courts (Quebec being a notable exception) are more than willing to give effect to judgments binding on Canadian classes in order to give judicial economy its maximum effect. The recognition of foreign judgments advances comity between nations, an end that itself has been increasingly ascendant in Canadian jurisprudence.¹⁹

While judicial efficiency and international comity are both admirable goals, the effect of recognizing and enforcing foreign judgments can appear harsh to domestic litigants, particularly in the class action context, where personal service or other notice of the foreign class proceeding may, and indeed often does, never actually come to a class member’s attention. Litigants may find their claims are dismissed on grounds of *res judicata* as a result of actions commenced in other jurisdictions and decided by foreign

¹⁸ This increased deference to international comity is reflected in *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72

¹⁹ *ibid.*, and, in the class action context, *Wilson v. Servier Canada Inc. et al.* (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392 at paras. 25-36 (S.C.J.) (QL) where Cumming J. challenged a French law that attempts to assert exclusive jurisdiction over all matters involving French citizens.

courts, which may well have applied different laws or standards of proof than those of our domestic courts. If reciprocity is valued too highly, domestic litigants face the very real danger that their rights may already have been decided in another country, even where the harm to them occurred entirely within Canada and was caused by other Canadians. There is a very real risk that judgments from foreign courts will foreclose the legal rights of Canadian residents, without them having received any actual benefits from the foreign proceeding²⁰.

The issue of recognition of foreign class action judgments in Canada had received little judicial consideration prior to the class action commenced by Mr. Currie against the international behemoth, McDonald's Corporation²¹. Mr. Currie's action was brought on behalf of a Canadian national class subsequent to the commencement of a (similar) class proceeding that was commenced in Illinois purportedly on behalf of an international class, including Canadian patrons of McDonald's restaurants. The US class action was settled, and the settlement was approved by the Illinois court. The judgment approving the settlement and the terms of the minutes of settlement purported to bind not only US residents, but also class members from an array of other countries, including Canada²².

After the US action was settled, the defendants in the Canadian action brought a motion in which they sought to have the *Currie* action dismissed on the grounds of *res judicata*, relying upon the Illinois judgment approving the *Boland* settlement, and the

²⁰ Millions of dollars in class action settlements (particularly in the US) go unclaimed by class members every year. It must be assumed that this is in large measure a result of the fact that notice is, in the vast majority of cases, less than perfect, and many individuals never know that they are members of a class or entitled to the proceeds of a settlement.

²¹ *Currie v. McDonald's Restaurants of Canada Ltd. et al.*, [2004] O.J. No. 83 (S.C.J.), aff'd on appeal, (2005) 74 O.R. (3d) 321 (C.A.)

²² *Boland*, *supra*, fn. #14

broadly worded release contained therein. The defendants' motion was dismissed by Justice Cullity, and the dismissal was upheld on appeal to the Ontario Court of Appeal.

On the motion, the parties agreed that if the Illinois judgment was to be recognized in Ontario, it should be upon the application of the standard conflict of law principles enunciated by the Supreme Court in *Morguard* and *Beals*.²³ The "twin principals" for consideration by the court are the "real and substantial connection" test, and the principal of "order and fairness".²⁴

As held by Major J. in *Beals*:

The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.²⁵

To control the assertion of jurisdiction, there must be a connection between the subject matter of the action and the territory where the action is brought; but the test is applied with considerable flexibility.

In *Currie*, the court was faced with the unique circumstances of the application of the real and substantial connection test in the context where the Canadian plaintiff class had not chosen the foreign court, and had not attorned to its jurisdiction. *Currie* and the proposed class had no personal connection to Illinois and no knowledge that his rights, and those of the Canadian class, were being decided in their absence. The Court of

²³ *Currie, supra* fn. #21, at para. 9.

²⁴ *Morguard, supra*, fn. #3
Beals v. Saldanha, supra, fn. #18

²⁵ *ibid*, at para. 32.

Appeal recognized that the position of a class member is different than that of “ordinary” litigants, and that the court has a higher duty to ensure that the class members are adequately represented and protected.

The court found that there was a real and substantial connection with Illinois: the wrongs (i.e. the embezzling of high-level contest prizes, and manipulation of the “random” selection of winners) occurred in the United States and Illinois is the site of McDonald’s head office. It then went on to consider the “order and fairness” branch of the test for recognition of the foreign judgment. It is here that the rights of the Canadian class members are meant to be protected.

Sharpe J.A. focused on the procedural rights afforded to the unnamed, non-resident class members,

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. Given the substantial connection between the alleged wrong and Illinois, and given the small stake of each individual class member, it seems to me that the principles of order and fairness could be satisfied if the interests of the non-resident class members were adequately represented and if it were clearly brought home to them that their rights could be affected in the foreign proceedings if they failed to take appropriate steps to be removed from those proceedings.²⁶

The motion was lost by the defendants on the second procedural right identified by Sharpe J.A. - adequate notice. Absent sufficient notice to all members of the class, the right to opt-out of a class action proceeding is rendered meaningless. Sharpe J.A. cited the reasons of McLachlin C.J.C. in *Western Canadian Shopping Centres* as identifying

²⁶ *Currie, supra* fn. #21, at para. 25

the general principle in Canadian class action law that “a judgment is binding on a class member only if the class member is notified of the suit and given an opportunity to exclude himself or herself from the proceeding.”²⁷ Sharpe J.A. held that in most cases an opt-out clause coupled with sufficient notice will be enough to protect the non-resident from any unfairness arising from the enforcement of a foreign judgment in Canada.²⁸ However, in this case, the notice program was “woefully inadequate”, and the notice itself was found by the motions judge to be of “eye-glazing opaqueness”.

The direction to be taken from this decision for the foreign litigant who seeks to bind a Canadian class is that in order to effectively bind the non-resident, non-attorning class members the notice program must be sufficient and meaningful, so as not to offend the rules of natural justice. If the notice program is adequate and demonstrably effective and the other branches of the *Morguard/Beals* test are met, then our courts will have no difficulty in effecting international comity, and will enforce foreign class action judgments against a non-attorning Canadian class. In summary, the pre-conditions to effective enforcement of a foreign class action judgment in Canada are:

- (a) 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 protected; and

²⁷ *Currie, supra* fn. #21, at para. 28.

²⁸ *Currie, supra* fn. #21, at para. 29.

- (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.²⁹

If litigants in a class action brought in a foreign jurisdiction want their judgment to “stick” against a Canadian class, they would be well advised to ensure that the notice is comprehensive, and drafted in plain language, and that the publication program is demonstrably able to reach at least approximately 70% of the class (the “reach” achieved by the *Boland* notice program within the United States).

Approval of Cooperative Global Settlements

As discussed above, it is generally to be expected that, despite the potential for serious legal consequences for Canadians, the advantages of recognizing and enforcing foreign class action judgments will, generally, outweigh the loss of some legal rights that is suffered by the domestic litigant. So long as sufficient procedural safeguards are in place, the values of judicial economy and international comity will support adjudicative finality through the domestic recognition of foreign judgments. Similarly, the court's recognition of cooperative global settlement agreements achieves the same goals.

As with any litigation, settlement is encouraged in class actions. Settlements typically use litigants' and courts' resources more economically than does conventional litigation.³⁰ These are ends that the class action itself is intended to promote. However, since large numbers of individuals are affected by class action settlements – individuals who, for the most part, do not have any real control over the litigation process – Canadian

²⁹ *Currie, supra* fn. #21, at para. 30.

³⁰ *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 at para. 8 (S.C.J.)

courts act cautiously when approving class action settlements, keeping in mind their obligation to protect the interests of the absent class members.³¹ Still, a broad discretion is granted to courts to determine whether a particular settlement is fair in all the circumstances of a particular case. A class action settlement must be “fair, reasonable and in the best interests of the class as a whole” to be approved.³² What is uncalled for, according to the courts, is an overly legalistic interpretation that risks unnecessary litigation for the sake of legal formality. Settlement should not be thwarted by legal technicalities, especially where a satisfactory agreement can be reached between all of the interested parties.

Winkler J. (as he then was) confronted these issues in *Frohlinger v. Nortel Networks Corporation*. In *Frohlinger*, the court was asked to approve the settlement of two class actions – the Frohlinger and Gallardi class actions. These two actions were settled in conjunction with two similar actions begun in the United States at the same time – the Nortel I and Nortel II actions. The facts behind all of these class actions were similar, although their timelines were not. All of the actions alleged that Nortel, through its officers, had issued a series of materially false and misleading press releases and financial statements relating to Nortel’s financial performance. As a result, Nortel share prices were alleged to have been artificially inflated during the periods of October 24, 2000 to February 15, 2001 (the “Frohlinger action” in Ontario and “Nortel I” in the United States) and from April 23, 2003 to April 27, 2004 (the “Gallardi action” in Ontario and “Nortel II” in the United States).³³ Actions were also commenced with

³¹ *Class Proceedings Act*, S.O. 1992, c. 6, s. 29.

³² *supra* note 30.

³³ *supra* note 30 at paras. 3-5.

respect to both of these causes of action in British Columbia and Quebec.³⁴ The American actions were brought on behalf of global classes, while the Ontario actions sought certification of national classes, excepting British Columbia and Quebec.³⁵ Interestingly, Ontario-based pension funds acted as lead plaintiffs in the actions commenced in the United States, thus demonstrating the truly international scope of these actions from their very inception.³⁶

Typically, the American litigation progressed more quickly than did litigation in Ontario. Mediation there resulted in a conditional settlement of these claims, which was announced in a Nortel press release on February 8, 2006.³⁷ While the American classes were framed as global classes, the plaintiffs in the Canadian actions did not participate in the settlement negotiations in the United States. However, the parties to the American settlement preferred a cooperative resolution of all the outstanding class action litigation, with a view to ensuring finality to all the litigation, and the security that the settlement would not be challenged. Further discussions were therefore entered into with the Canadian class counsel. The result was a global settlement agreement dated June 20, 2006 that was accepted by all of the parties.³⁸

The parties then sought approval of the settlement in each of the jurisdictions where proceedings had been commenced.³⁹ [Court approval of settlements is required for all class actions.] The global settlement was approved without incident in Ontario.

³⁴ *ibid.* at para. 3.

³⁵ *ibid.* at para. 1.

³⁶ *ibid.* at para. 6.

³⁷ *ibid.*

³⁸ *supra*, fn# 30 at para. 7.

³⁹ *ibid.*

When determining whether the Nortel settlement was fair, reasonable and in the best interests of the class as a whole, Winkler J. applied the standard analysis for the approval of class action settlements. However, the global nature of these class actions presented the court with unique problems, namely the issue of the distinct class definitions adopted in the different legal jurisdictions where these actions were commenced. While the timelines for the cause of action for both actions were the same, the definition of the affected class was dependent on the prevailing law and limitation periods in each jurisdiction.⁴⁰

This discrepancy between class definitions risked upsetting the global settlement process of the Nortel claims. However, the difference between the American and Canadian classes was held to be a legal distinction without a difference. Rather than becoming distracted by technicalities, Winkler J. considered instead whether there was ultimately any practical difference between the classes. He concluded that there was not.⁴¹ Winkler J. concluded his judgment on this issue by applauding the judicial trend towards *ad hoc* solutions to these types of issues on both sides of the border.⁴²

There is no doubt that as the class action bar in Canada continues to mature, the amount of cross-border litigation will increase and it will take creative solutions, like that in *Nortel*, to ensure that fair resolutions are reached that will be enforceable and effective

⁴⁰ *ibid*, at para. 5.

⁴¹ In *Gould v. BMO Nesbitt Burns Inc.*, 2007 CanLII 6914 (S.C.J.), Cullity J, initially refused to approve the settlement of a class action that depended upon the release of the defendants from claims in Michigan over which he had no control and inadequate information. Cullity J. invited further submissions from the parties on this issue before ultimately approving the settlement in *Gould v. BMO Nesbitt Burns Inc.*, 2007 CanLII 9239 (S.C.J.). Although the litigation risks were not identical for the class in the two jurisdictions, he was satisfied that “no material distinction should be drawn between the two actions” for the purposes of certification and approval of the negotiated global settlement.

⁴² *Supra*, fn# 30 at para. 30.

in multiple jurisdictions. Otherwise, inevitable differences between domestic and foreign law run the risk of undermining the important policy objectives of class action litigation.

Canadian Actions against Multinationals' Subsidiaries

Procedural pre-conditions must be satisfied where Canadian classes intend to pursue claims against the non-resident parent companies of Canadian subsidiaries. In Ontario, for example, leave may be required from the court before service of the claim can be made outside of the jurisdiction. The Rules of Civil Procedure (Rules of Court) provide broad exceptions to the requirement of seeking leave from the court to serve a claim outside of Ontario. The Rules effectively codify the generally accepted bases upon which a Canadian court would assume jurisdiction over a foreign defendant.⁴³ However, absent an action which is based upon one or more of the enumerated exceptions, leave must be sought under Rule 17.03. These Rules apply with equal measure in the class action context. Given the real possibility of a motion to stay being brought by the foreign defendant if it is served without leave of the court, it may be wise for class counsel to seek a court order granting leave to serve *ex juris* even if the case apparently falls within one of the enumerated exceptions. The foreign defendant will then face a much greater challenge in attempting to establish that the forum is not convenient, if a judge of that jurisdiction has already determined that it is.

Oftentimes, multinational corporations are set up in such a way that significant portions of the revenues generated by a subsidiary are payable to the parent either through loans, dividends or other inter-corporate arrangements. When a class action is commenced, the plaintiff may well wish to be able to attack the foreign parent as well as

⁴³ In Ontario, the relevant rule is R. 17.02 of the *Rules of Civil Procedure*

the resident subsidiary – particularly if the companies’ affairs have been arranged in such a way that the subsidiary is effectively judgment proof or has inadequate assets to fully satisfy the damages claim. Whether the parent can be brought into the action will depend on a number of factors, such as whether it has any actual presence in the jurisdiction, whether the corporate veil can be pierced, or whether it is otherwise a necessary party to the litigation.

In *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, the Court of Appeal for Ontario adopted the following test for piercing the corporate veil:

[T]he courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The first element, ‘complete control’, requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently. ...

The second element relates to the nature of the conduct: is there “conduct akin to fraud that would otherwise unjustly deprive the claimants of their rights”?⁴⁴

The test is no different in the class action context. Something more than the normal relationship between parent and subsidiary is necessary for the court to pierce the corporate veil and place the parent company in jeopardy for the independent actions of its subsidiary. The test requires both a great degree of control as well as conduct by the parent that, were the claim pursued against the subsidiary alone, could deprive the class of its rights. If these special conditions are demonstrated, and the court is satisfied that there is a real and substantial connection between the claim and Ontario, then the claim against the parent company may proceed.

⁴⁴ *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff’d [1997] O.J. No. 3754 (C.A.).

This same wording was endorsed in the context of a class action by the Court of Appeal in *Smith v. National Money Mart Company et al.* (2006), 80 O.R. (3d) 81 (C.A.) at para. 16

An example of the court finding that service ex juris should not be set aside against a non-resident parent company is *Smith v. National Money Mart Company et al.*⁴⁵ In *Money Mart*, the plaintiffs had brought a proposed class action against the Canadian subsidiary, as well as its publicly traded American parent, Dollar Financial Group Inc. Dollar Financial sought to have service of the claim set aside, and an order dismissing or staying the action on the basis that the Ontario court lacked jurisdiction over it. The motion was dismissed, and the dismissal upheld on appeal to the Court of Appeal, with leave to the S.C.C. denied. The court concluded that there was a real and substantial connection between Dollar Financial and the jurisdiction in the context of the claims asserted. The action was based upon unjust enrichment and conspiracy arising from the defendants' breach of the usury provisions of the Criminal Code.

On the motion, Dollar Financial argued that there was no real arguable case against it, and that there was no real and substantial connection between it and the action upon which the court could ground jurisdiction. Feldman J.A. held that the parent company exerted control over its Canadian subsidiary and was aware of the usury provisions in the Criminal Code. She concluded that the facts were sufficient to make out a good arguable case that Dollar Financial could be held responsible for the acts of its subsidiary on an alter ego theory. Additionally, there was a real and substantial connection between Dollar Financial and the claim that was sufficient for the court to assume jurisdiction. All eight of the factors for a real and substantial connection enumerated in the *Muscatt* case were met.⁴⁶

⁴⁵ *ibid*

⁴⁶ for ease of reference, the 8 factors are:

1. connection between the forum and the claim;

Suggestions for Future Development of the Law in Canada

At the conclusion of his reasons in *Frohlinger*, Winkler J. applauded the willingness of courts in Canada and the United States to achieve *ad hoc* solutions to the many practical difficulties that arise in the context of international class actions. However, Winkler J. also warned of the need for more formal protocols to govern the resolution of cross-border class actions:

The differences in the jurisprudence between the two countries highlight some of the potential difficulties that may arise in cross-border litigation, particularly in respect of class actions. Courts in both countries have thus far been adept and adaptable in developing *ad hoc* procedures to deal with these types of issues. Given the increasing trends toward globalization, it is likely that cross-border litigation will increase. The instant case is an example of this. Here the settlement is global in scope crossing provincial and international boundaries and the jurisdictions in which the underlying proceedings have been commenced include two countries and several provinces. It would be useful if more formal protocols were developed to facilitate the courts and the parties in dealing with these types of cases.⁴⁷

The Uniform Law Conference of Canada (the “ULCC”) is working to generate just such protocols, as well as protocols for regulating the procedures for class actions that are national in scope, where actions have been commenced in more than one province or territory. Although the ULCC’s emphasis is on promoting the uniformity of laws between provinces through the creation of model legislation which the provinces are

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2. connection between the forum and the defendant;
 3. unfairness to the defendant if the forum takes jurisdiction;
 4. unfairness to the plaintiff if the forum does not assume jurisdiction;
 5. involvement of other parties in the lawsuit and concerns about multiplicity of proceedings and potentially inconsistent verdicts (convenience);
 6. whether the forum would recognize a judgment from the alternative forum rendered on the same jurisdictional basis;
 7. interprovincial cases more likely to result in assumption of jurisdiction; and,
 8. international comity, and the enforceability of the judgment in the foreign jurisdiction.

⁴⁷ *supra* fn# 30, at para. 30.

encouraged to enact uniformly; it has also undertaken to make recommendations on the effect of harmonization of class action procedures on a global scale. In the 2005 Report of the Committee on the National Class and Related Interjurisdictional Issues, the Committee made recommendations for changes to be introduced into the Uniform Act on Class Proceedings (which the ULCC had originally drafted in 1996).

While continuing to focus their efforts on the Canadian context, the Committee also considered the impact that their recommendations may have on furthering comity and harmonization on an international scale. The Committee recommended that “a system ensuring transparency and fairness in court-to-court communications” be adopted across Canada, similar to one adopted for insolvency cases in British Columbia and Ontario.⁴⁸ The goal would be “to assist the proper coordination of such actions,” ensuring, for example, that counsel “will receive notice of communications between courts in which they may choose to participate.” Because of the increasing likelihood that class actions in one jurisdiction will have factual and legal parallels with those commenced in other jurisdictions, the Committee recommended that the Chief Justices of each province issue practice directions adopting guidelines for use in cross-border class action litigation. These would assist in developing a more uniform Canadian approach to class action litigation. Such uniformity would also facilitate cross-border class actions.

Guidelines that encourage transparency and communication between Canadian and foreign courts would certainly help to harmonize class action litigation globally. Courts in Canada and the United States have demonstrated a willingness to adopt pragmatic solutions when faced with the unique issues generated by the global class

⁴⁸ Uniform Law Conference of Canada: Civil Law Section, “Report of the Uniform Law Conference of Canada’s Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations” (Vancouver, B.C.: March 9, 2005) [unpublished] at para. 62.

action. Currently, the problems that arise are not clearly attributable to differences between legal systems. Rather, they frequently arise because of insufficient communication between interested parties, and the (justifiable) self-interest of all of the different parties in the actions.

However, the failure of the parties in the various legal systems to communicate and act co-operatively across jurisdictions means that the very goal of judicial economy is often lost in the interlocutory squabbling and jostling for position among different plaintiff groups and with defendants who are either seeking to “divide and conquer”, or to unite and litigate in only one jurisdiction. The proposed protocols see to encourage co-operative working relationships, better communications, and a reduction in multijurisdictional versions of the same litigation.

In my view, just as national class actions are to be encouraged, so too should we embrace the concept of the international class action. The fundamental objectives of the class action are best served by limiting a multiplicity of actions, and maximizing the aggregation of claims within the ambit of one proceeding. So long as the forum that (properly) assumes jurisdiction meets the Canadian requirements for procedural fairness, as set out in the *Morguard*, *Beals* and *McDonald's* cases, then it should matter not where the dispute is resolved. Justice will be best served by maximizing judicial economy, and in the same way, behaviour modification can be achieved perhaps more effectively through the threat of one very large award, rather than litigation resolved in smaller bites on a piece-meal basis. In the interconnected world of globalization and international trade, it is necessary to accept that litigation can no longer remain insular, and restricted by artificial political boundaries. Our courts have paved the way, and it is up to the bar to

become leaders in the globalization of class actions as well, relying on the fundamental tenets of international comity and access to justice.