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MULTI-JURISDICTIONAL CLASS ACTIONS IN CANADA:

PRAGMATISM OVER PRINCIPLE ?

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INTRODUCTION

Over the past eight years a series of decisions, particularly of the Ontario courts, have certified so-called "national classes" in class actions filed under provincial class action statutes. These national classes purport to bring before the court of the forum (for example Ontario) non-resident plaintiffs.

These decisions follow and build on the decision of Brockenshire J. of the Ontario Court General Division in the case of *Nantais* v. *Telectronics Proprietary (Canada) Ltd.* et al. (1995), 127 D.L.R. (4th) 552, confirmed by Zuber J. in denying leave to appeal to the Ontario Divisional Court: (1995), 129 D.L.R. (4th) 110.

In that case Brockenshire J. found it *"eminently sensible"* to have one court decide the question of liability *"once and for all, for all Canadians"* (at p. 567).

There are many in Canada who would argue that the constitutional division of powers in Canada is not *"eminently sensible"*. However this argument is not enough in and of itself to resolve constitutional issues.

Zuber J. in denying leave to appeal to the Divisional Court apparently recognized the potential constitutional issue.

> "At the legal level it may be asked what is the reach of the Ontario Legislature in the Ontario Courts acting under the Ontario Class Proceedings Act and how does this process involve those who do not reside in Ontario". (at p. 113)

Zuber J. does not appear to resolve the constitutional issue but rather to put if off to another day.

> "Whether the result reached in Ontario Court in the class proceeding will bind members of the class in other provinces who remained passive and simply did not opt-out, remains to be seen." (at p. 113)

It may well be that this reserve as to the constitutional issue, expressed in *Nantais*, has been downplayed in subsequent judgements in the enthusiasm to do what is *"eminently sensible"*.

The question of a court's jurisdiction over the parties to litigation traditionally tended to relate to jurisdiction over absent defendants. The question of jurisdiction over absent plaintiffs has usually not arisen because of the assumption, properly taken, that a plaintiff

who chooses to sue before the court of the forum has attorned to the jurisdiction of that court.

In class action litigation, however the court seized of the certification proceeding issues its order requiring all potential plaintiffs, within a delay fixed by the court, to decide whether to be bound or not be bound by the judgement which will eventually be rendered by that court. Such an order, when provided for by the provincial statute (and possibly even in the absence of a statute) has effect as to those potential plaintiffs within the territorial jurisdiction of the court.

But what about potential plaintiffs who are outside the territorial jurisdiction of the court?

The *Class Proceedings Act* of British Columbia, the *Class Proceedings Act* of Newfoundland and the *Act Respecting Class Actions* of Saskatchewan resolve the problem with regard to non-resident potential plaintiffs by permitting them to "*opt-in*" to the class action. In so opting, the potential plaintiffs attorn to the jurisdiction of the court.

But, in virtue of what is the potential plaintiff in, let us say, St. John's Newfoundland, bound to obey the notice under sanction of seeing his or her property and civil rights in Newfoundland affected by the eventual judgement? In virtue of what is he or she even obliged to read the notice?

According to traditional law, the purpose of the class definition in a class action law suit is three fold:

(a) it identifies those persons who have a potential claim for relief against the defendant;

(b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and

(c) it describes who is entitled to notice pursuant to the Act.[1]

Following is a brief review of the evolution of jurisdiction and conflict of law in Canada and of how some courts have responded in assuming jurisdiction over non-resident plaintiffs and certifying so-called "national classes".

MODERN APPROACH TO CONFLICTS OF LAWS AND JURISDICTIONAL ISSUES

Much of the Common Law in Canada with regard to the issues of jurisdiction and recognition of foreign judgments originated in England during the 19th century. Canadian courts often cited the cases of *Singh* v. *Rajah of Faridkote*[2] and *Emanuel* v. *Symon*[3]. In the latter case, Buckley L.J. stated as follows:

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[1] *Bywater* v. *Toronto Transit Commission* [1998] No. 4913 (Ont. Gen. Div.), (Winkler J.) [hereinafter: *Bywater*].

[2] [1894] A.C. K.B. 302 (C.A.).

[3] [1908] 1 K.B. 302 (C.A.).

> "In actions in *personam* there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained."[4]

In *Lung* v. *Lee*[5] the court extended this dicta to the recognition of judgments between the Courts of different provinces which, for the purposes of the rules of private international law, were considered foreign judgments. This was based, to a large part, on that court's interpretation of sections 91 and 92 of the British North America Act and this line of reasoning was followed in many cases thereafter [6].

While the Canadian legal system distanced itself from the binding effect of Privy Council decisions, English Law seemed to slowly break away from the dicta in *Symon*. In *Travers* v. *Holley*[7] the English Court of Appeal had to consider whether the court should recognize the divorce granted to a wife in New South Wales pursuant to a statute giving the New South Wales court jurisdiction to grant a divorce to a wife who was domiciled there at the time she was deserted by her husband, even though her husband had later

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[4] *Ibid.*, p. 309.

[5] [1928] 63 O.L.R. 194 (C.A.).

[6] See for example, the cases listed at pp. 1091 and 1092 of *Morguard Investments Limited* v. *De Savoye* [1990] 3 S.C.R. 1077, [hereinafter: *Morguard*].

[7] [1953] 2 All E.R. 794.

acquired another domicile. The court, noting that a similar statute existed in England, set out the following rule of reciprocity:[8]

> "...where it is found that the municipal law is not peculiar to the forum of one country, but corresponds with a law of a second country, such municipal law cannot be said to trench on the interests of that other country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claim for themselves."[9]

However, Canadian courts did not follow[10], that is, until the Supreme Court of Canada in *Morguard Investments Limited* v. *De Savoye*[11].

Morguard involved the mortgage of land in Alberta and agreements whereby *De Savoye*, as guarantor, took title to the land and assumed the obligations of the mortgagor, while resident in Alberta. *De Savoye* moved to British Columbia, and when the mortgage fell into default, the mortgagees took suit in Alberta, served *De Savoye* in British Columbia where he had been residing for years, and obtained judgments *nisi* in the foreclosure actions, at the expiry of the redemption period, and obtained Rice orders. The

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[8] *Ibid.*, p. 800 (Hodson L.J.).

[9] This rule was followed in Re *Dulles' Settlement Trusts,* [1951] 2 All E.R. 69 (C.A.); *Harris* v. *Taylor*, [1915] 2 K.B. 580 (C.A.). However, it should be noted that in England several cases limited the value of *Travers* vs. *Holley* to being a judgment *in rem* in a matter affecting marital status: In Re *Trepca Mines Limited*, [1960] 1 W.L.R. 1273 (C.A.); *Schemmer* v. *Property Resources Limited*, [1975] 1 Ch. 273.

[10] This argument was made by Professor Kennedy, by Wilson J. in *Archambault* v. *Solloway,* B.C.S.C., April 18, 1956, and others, as discussed at pp. 1092 and 1093 of the *Morguard* judgment.

mortgagees then commenced an action in British Columbia to enforce the Alberta judgments. After reviewing the English and Canadian approaches to the jurisdictional problem posed, Mr. Justice La Forest stated the following[12]:

> "The common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century; see *Rajah of Faridkote, supra*. This principle reflects the fact, one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside its jurisdiction."

Mr. Justice La Forest then continued:

> "Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem*, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states."[13]
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> [...]
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> "But a state was under no obligation to enforce judgments it deemed to fall outside the jurisdiction of the foreign court."[14]

Mr. Justice La Forest then cited, with approval, the following definition of comity[15]:

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[11] *Morguard*, supra, footnote 6.

[12] *Ibid.,* p. 1095.

[13] *Ibid.*, p. 1095.

[14] *Ibid.*, p. 1096.

> " 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws...".

Clarifying that comity is not a static notion and is grounded in principles of order and fairness, Mr. Justice La Forest distinguished inter-provincial issues of comity from international issues of comity[16]:

> "However that may be, there is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. Indeed, in my view, there never was and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience to which I have already adverted. Whatever nomenclature is used, our courts have not hesitated to cooperate with courts of other provinces where necessary to meet the ends of justice; see *Re Wismer and Javelin International Ltd.* (1982), 136 D.L.R. (3d) 647 (Ont. H.C.), at pp. 654-55; *Re Mulroney and Coates* (1986), 27 D.L.R. (4th) 118 (Ont. H.C.), at pp. 128-29; *Touche Ross Ltd. v. Sorrel Resources Ltd.* (1987), 11 B.C.L.R. (2d) 184 (S.C.), at p. 189; *Roglass Consultants Inc. v. Kennedy, Lock* (1984), 65 B.C.L.R. 393 (C.A.), at p. 394.
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> In any event, the English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility

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[15] *Hilton* v. *Guyot*, 159 U.S. 113 (1895), at p. 163-164 in a passage cited by Estey J. in *Spencer* v. *The Queen*, [1985] 2 S.C.R. 278 at p. 283.

[16] *Morguard,* supra, footnote 6, at pp. 1098-1100.

> of Canadians across provincial lines, a position reinforced today by s. 6 of the *Charter*, see *Black v. Law Society of Alberta*, [1989], 1 S.C.R. 591. In particular, significant steps were taken to foster economic integration. One of the central features of the constitutional arrangements incorporated in the *Constitution Act*, 1867 was the creation of a common market. Barriers to interprovincial trade were removed by s. 121. Generally trade and commerce between the provinces was seen to be a matter of concern to the country as a whole; see *Constitution Act*, 1867, s. 91(2). The Peace, Order and Good Government clause gives the federal Parliament powers to deal with interprovincial activities (see *Interprovincial Co-Operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477; as well as my reasons in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 (dissenting but not on this point); see also *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161). And the combined effect of s. 91(29) and s. 92(10) does the same for interprovincial works and undertakings.
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> These arrangements themselves speak to the strong need for the enforcement throughout the country of judgments given in one province. But that is not all. The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges - who also have superintending control over other provincial courts and tribunals - are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments. Any danger resulting from unfair procedure is further avoided by sub-constitutional factors, such as for example the fact that Canadian lawyers adhere to the same code of ethics throughout Canada. In fact, since *Black v. Law Society of Alberta, supra*, we have seen a proliferation of interprovincial law firms."

The Supreme Court then discussed, but did not answer, whether the principle of comity should be raised to a constitutional standard, and differentiated this concept from the concept of "full faith and credit" entrenched in the United States Constitution. The Court stated that fair process is not an issue within the Canadian federation. As such, the question then became: when has a court exercised its jurisdiction appropriately for the

purposes of recognition by a court in another province? The court noted that in the case of judgments *in personam* where the defendant was within the jurisdiction at the time of the action, when he submitted to judgment whether by agreement or attornment, then there was no issue and the rules prior to *Morguard* should apply so as to permit the judgment to be recognized. However, in other cases, an approach such as that in *Indyka*[17] and that taken in *Moran v. Pyle National Canada Limited*[18], rather than the reciprocity approach is appropriate. The court should look to whether there is a "*real and substantial connection*" to the country or territory exercising jurisdiction. In Morguard, this was the case, and so, the orders of the Alberta Court were enforced in British Columbia.

While *Morguard* was an authoritative statement of the law, it left questions unanswered. It set no limits to *service ex juris*, did not define "*real and substantial connection*", and did not discuss whether it was laying down a new constitutional standard in Canada.

In *Hunt* v. *P & N PLC*[19], the court was faced with the application of the *Quebec Business Records Act*, a *"blocking statute"* , which forbade the removal of documents relating to any business concern in Quebec for the purposes of proceedings outside Quebec . In deciding that the British Columbia Court could rule on the constitutionality of the Quebec statute, and relying on the principle that all Canadian provinces are governed by

[17] [1969] 1 A.C. 33.

[18] [1975] 1 S.C.R. 393, [hereinafter: *Moran*].

[19] [1993] 4 S.C.R. 289, [hereinafter: *Hunt*].

the same federal constitution, and by the decision in *Morguard*, the court in *Hunt* raised *Morguard* to a constitutional standard. The court stated that the rules set out in *Morguard* were "constitutional imperatives"[20], were "inherent in the structure of the Canadian federation"[21] and were "beyond the power of provincial legislatures to override"[22]. Thus, a province could not restrict the recognition of another province's judgment that met the *Morguard* standards of jurisdiction, although it could legislate "respecting modalities for recognition" of such judgments[23].

While *Morguard* laid out that the test for jurisdiction was one of "*real and substantial connection*", *Amchem Products Inc.* v. *British Columbia Workers' Compensation Board*[24] dealt with the issue of *forum non conveniens* as being a search for the "natural forum". In the words of Watson and Au[25]:

> "..., whereas the *Morguard* jurisdictional test requires only a 'real and substantial connection' (a minimal standard), the *Amchem* test for a stay on the grounds of *forum non conveniens* depends on a much higher degree of 'real and substantial connection' (a forum *clearly more appropriate* for the pursuit of the action and for securing the ends of justice.".

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[20] *Ibid.*, p. 324.

[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.*

[24] [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96, [hereinafter: *Amchem*].

[25] *Watson, Gary D., Q.C.* and *Frank Au*. "Constitutional limits on *service ex juris*: unanswered questions from *Morguard",* Advocates' Quarterly Vol. 23, 167 at 213, [hereinafter: Watson].

The "*real and substantial connection*" test in *Morguard* is not one which should necessarily give the result that one jurisdiction, and one jurisdiction alone, must *have proper jurisdiction*. Rather, several jurisdictions may pass the *"real and substantial connection*" test in *Morguard*, and only then be subjected to the *forum non conveniens* test. However, as the *Amchem* decision makes clear, the fact that a court in another jurisdiction has taken jurisdiction over a case, is a factor that must be considered under the *forum non conveniens* test.

Unfortunately, there has yet to be a precise definition of what constitutes a "*real and substantial connection*". Watson and Au[26] state:

> "Specifically, there is considerable confusion as to what the "real and substantial connection" is supposed to be with. Different formulations of the 'real and substantial connection' test appeared in several crucial passages of *Morguard*. The Supreme Court of Canada referred, variously, to a connection 'between the *subject-matter of the action* and the territory where the action is bought', a 'connection between the *damages suffered* and the jurisdiction', a 'connection the relevant *transaction* [has] with [the] province', a 'connection with the *transaction* or the *parties'* and 'a substantial connection between the *defendant* and the forum province.' "

Consequently, there are two divergent lines of cases that purport to follow *Morguard*. The first started with the case of *MacDonald* v. *Lasnier*[27], where the emphasis was on the "*real and substantial connection"* between Ontario and the action[28]. The cases either

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[26] *Ibid.*, p. 183.

[27] (1994), 21 O.R. (3d) 177 (Gen. Div.).

[28] Such as *Jean-Jacques* v. *Jarjoura*, [1996] O.J. No. 5174 (Q.L.) (Ont. Ct. (Gen. Div.)); *Long* v.*Citi Club* (1995), 55 A.C.W.S. (3d) 513, [1995] O.J. No. 1411 (Q.L.) (Ont. Ct. (Gen. Div.));

chose the "*real and substantial connection*" between the *forum* and the defendant or between the *forum* and the subject matter.

The second line of authorities is represented by *Oakley* v. *Barry*[29] where the court recognized that the "*real and substantial connection*" test in *Morguard* was unclear. The court first noted that the principles of order and fairness in *Morguard* should balance the competing interests of the plaintiff and the defendant. Second, the court stated that the assumption of jurisdiction did not necessarily require a connection between the defendant and the *forum*. Third, the court in *Oakley* pointed out that *Morguard* and *Hunt* envision a co-operative spirit as to *service ex juris* amongst sister provinces .

Once a court has properly taken jurisdiction over the matter, there remains the question as to which law it will apply. In *Jensen* v. *Tolofson*[30] the Supreme Court of Canada, citing *Chaplin* v. *Boys*[31], stated "obviously the court must follow its own rules of procedure; it could not function otherwise"[32]. The court then dealt with the substantive law that should be applied, relying on constitutional principles and *Morguard*. With respect to torts, the law that should be applied is the law of the place where the tort

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Brookville Transport Limited v. *Maine (State) Department of Transportation* (1997), 189 N.B.R. (2d) 142, [1997] N.B.J. No. 229 (Q.L.) (Q.B.); *Negrych* v. *Campbell's Cabins (1987) Ltd.* [1997], 119 Man. R. (2d) 216, [1997] 8 W.W.R. 270, [1997] M.J. No. 284 (Q.L.) (Q.B.).

[29] (1998), 158 D.L.R. (4th) 679, 166 N.S.R. (2d) 282, 25 C.P.C. (4th) 286 (C.A.), Leave to Appeal to S.C.C. refused, 175 N.S.R. (2d) 400, [1998] S.C.C.A. No. 282 (Q.L.), [hereinafter: *Oakley*].

[30] [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289 at 304, [hereinafter: *Tolofson*].

[31] [1969] 2 All E.R. 1085; affg [1968] 1 All E.R. 283.

[32] *Tolofson*, supra, footnote 30, at p. 304.

occurred, *i.e.*, the *lex loci delicti.* The court also left room for exceptions, such as where the parties are nationals or residents of the forum, or for issues relating to public policy[33]. Nevertheless, the court made it clear that any exceptions to the rule would affect the certainty, ease of application and predictability that the rule of *lex loci delicti* provides[34]. Although the court recognized that the legal system in Quebec was different from that in Common Law provinces, it noted that the law in Quebec is often not so different as to cause a true problem, and that the relative benefit to the parties will often overshadow this consideration.

CLASS PROCEEDINGS THAT HAVE CERTIFIED A NATIONAL CLASS

Class proceedings have existed in Quebec[35], Ontario[36] and British Columbia[37] for some time. Saskatchewan[38], Manitoba[39] and Newfoundland[40] have followed only very recently[41].

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[33] *Tolofson*, supra, footnote 30, at p. 310. Though the court was unconvinced of the application of the "public policy" exception.

[34] In fact, Mr. Justice Laforest states at page 314 of *Tolofson*: "On the whole, I think that there is little to be gained and much to lose in creating an exception to the *lex loci delicti* in relation to domestic litigation.

[35] Introduced by amendment in 1978 Code of Civil Procedure of Quebec.

[36] The Class Proceedings Act in Ontario came into force in 1993.

[37] The Class Proceedings Act in British Columbia came into force in 1996.

[38] *An Act respecting Class Actions,* chapter C-12-01 of the Statutes of Saskatchewan came into force January 1, 2002.

[39] *The Class Proceedings Act*, Bill 16, came into force July 2002.

[40] *An Act to permit an action by one person on behalf of a class of persons*, Chapter C-18.1, came into force April 1, 2002.

[41] Nova Scotia, Alberta and New Brunswick have not yet enacted a class action proceedings act. However, Nova Scotia Rule 5.09 of the *Rules of Court of Nova Scotia*, Alberta Rule 42 of the *Rules of Court of Alberta* Reg. 390/68 and New-Brunswick Rule 14 of the *Rules of Court of New Brunswick* provide class action procedure.

Non-resident plaintiffs are dealt with in the *Class Proceedings* Act of British Columbia, where it is explicitly stated that they must opt into British Columbia proceedings and be members of a separate subclass. Similarly, in *An Act respecting Class Actions* of Saskatchewan and in the *Newfoundland Class Proceedings Act*, non-residents must opt into the proceedings while residents wishing to exclude themselves from the proceedings must opt out[42]. The *Manitoba Class Proceedings Act*, adopts the opting out process for all members of a class without referring specifically to non-residents[43]. However, the Ontario and Quebec legislation remain silent on this issue. Interestingly, The Uniform Law Conference of Canada drafted a Class Proceedings bill[44] similar to the Saskatchewan and Newfoundland Act, based on an opt out model of class proceedings for residents and an opt in model for non-residents of the jurisdiction[45].

While statutes have provided some guidance in British Columbia, Saskatchewan and Newfoundland with respect to non-resident plaintiffs, the silence of the class action legislation in Ontario and Quebec has been interpreted to allow for national class actions in these provinces.

ONTARIO

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[42] Section 18 ; a subclass may also be created.

[43] Section 16; Pursuant to section 6(3) of that Act:: "a class that comprises persons resident in Manitoba and non-residents may be divided into subclasses".

[44] *Class Proceedings Act*, first adopted and recommended in 1996.

[45] Section 16; a subclass may be created.

In *Bendall* v. *Mcghan Medical Corp.*[46], Justice Montgomery did not address directly the issue of territorial jurisdiction in a class including non-resident plaintiffs , but did refer to an estimate of 150,000 Canadian women that have received breast implants. He referred to the American case *Dante* v. *Dow Corning Corp.*[47] in which a national class was certified pursuant to Rule 23 of the *U.S. Federal rules of Civil Procedure*, which are, according to the court, more restrictive than the *Ontario Class Proceedings Act*[48]. Finally, relying on the principle that certification is fluid and flexible and always subject to decertification, Justice Montgomery granted the certification notwithstanding the few existing claims in Ontario.

In *Nantais* v. *Telectronics Proprietary (Canada) Ltd*[49], a class of plaintiffs defined as all persons implanted with leads for pacemakers in Canada was certified by Justice Brockenshire of the Ontario Court. The application for leave to appeal, was dismissed by Justice Zuber, noting that any problem that might arise from the inclusion in the class of non-residents of Ontario could be resolved later, if necessary, by adjusting the size of the

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[46] *In Bendall* v. *Mcghan Medical Corp.*, 14 O.R. (3d) 734; 1993 Carswell Ont 394; 16 C.P.C. (3d) 156 *(Ontario Court of Justice) General Division,* [hereinafter: *Bendall*].

[47] Civil No. C-1-92-057 (S.D. Ohio, April 3, 1922), [hereinafter: *Dante*].

[48] Justice Montgomery states at p.14 that "[w]hile the American cases are helpful as a reflection of a 30 year history of class actions one must not lose sight of vital differences. Predominant issue is not a factor in our Act. It is critical under Federal Rule 23. [...] Ontario chose to emphasize the common issues".

[49] *Nantais* v. *Telectronics Proprietary (Canada) Ltd. et al. (1995)*, 127 D.L.R. (4th) 552, [hereinafter: *Nantais* - certification].

class[50]. The defendants had argued that unlike the *British Columbia Class Proceeding Act*[51], the *Ontario Class Proceeding Act* ("OCPA") is silent as to non-resident plaintiffs and the court could therefore not take jurisdiction over them[52]. The defendant further contended that "Ontario courts cannot take jurisdiction by default by binding extra-provincial class members who have not opted out, and presuming to do so puts the defense in a double jeopardy situation with non-resident class members being free to sue in their own jurisdiction despite a supposed resolution in a class action"[53]. Justice Zuber, observed that the opting-out provision would avoid any doubt as to jurisdiction.

> "It is clear that the Ontario legislature and the Ontario courts are not simply imposing jurisdiction on non-residents. Those outside the jurisdiction who are included in the class are free to opt out in the same manner as those inside Ontario may do."[54]

The court cited *De Savoye* v. *Morguard Industries Ltd*.[55] to support the certifying of a national class[56]. Justice Brockenshire referred to the words of Justice La Forest

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[50] *Nantais* v. *Telectronics Proprietary (Canada) Ltd*. (1995), 129 D.L.R. (4th) 110, at p. 114, [hereinafter: *Nantais* - appeal], this reasoning was adopted in *Carom* v. *Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441, at 448, [hereinafter: *Carom*].

[51] *British Columbia Class Proceeding Act*, S.B.C. 1995, c. 21, section 16(2) of this act requires non-residents to opt in, and thus specifically acknowledge and accept the jurisdiction of the British Columbia court.

[52] *Nantais* - certification, supra, footnote 49, at p. 559, This argument was also raised in *Carom,* supra, footnote 50; Wilson v. Servier Canada Inc. et al., (2000), 50 O.R. (3d) 219 (S.C.J.), at p. 236, [hereinafter: *Wilson*];

[53] *Nantais* - certification, supra, footnote 49, at p. 559.

[54] *Nantais* - appeal, supra, footnote 50, at p. 113, this reasoning was adopted in *Carom*, supra, footnote 50, at p. 448.

[55] *Morguard,* supra, footnote 6.

[56] *Nantais* - appeal, supra, footnote 50, at p. 113.

regarding the modern need to deal nationally with problems and the necessity for courts to give "full faith and credit" to the judgments given by a court in another province or territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action. The Court also referred to the Ontario decision in *Bendall* v. *McGhan* and the decision of the U.S. Supreme Court in *Phillips Petroleum v. Shutts* in which national classes were certified[57]. However, the court did not decide on whether the Ontario judgment would bind passive class member who did not opt out[58] noting that the law of *res judicata* may have to adapt to the class proceeding concept.

The defendants had also argued that because different substantive law would apply to non-resident plaintiffs, according to their residence, the court would not be focusing on the same issues for each defendant[59]. The court dismissed this argument observing that there is no real difference in the law respecting product liability and negligence between the common law provinces and between the common law provinces and Quebec (an observation which may be open to question). The court added that if at the stage of determination on the merits there were to be a substantial difference so as to make the trial with respect to class members from that province difficult, the class would be

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[57] *Bendall*, supra, footnote 46; *Phillips Petroleum Co*. V. *Shutts*, 105 S. Ct. 2965 (1985) in which Justice Rehnquist of the U.S. Supreme Court held that "in a class action proceeding, reasonable notice plus an opportunity to opt out provides "at a minimum" sufficient due process for the judgment of one state to be given full faith and credit by the courts of other states so that class members in the first state would be prevented from taking action in other states".

[58] This issue was considered in *Carom,* supra, footnote 50, at p. 452.

[59] *Nantais* - appeal*,* supra, footnote 50, at p. 114, this issue was also raised in *Webb* v. *K-Mart Canada Ltd. Et al*., (1999), 45 O.R. (3d) 389 (S.C.J.), at p. 403, [hereinafter: *Webb*]; *Harrington*

redefined[60]. The court also noted the possibility of redefining the class if other class proceedings relating to the same matter were to be certified in other provinces[61]. The court added as a justification to certification of a national class, the comment that there was no real prejudice to the defendant and that it would not be worse off than if the class was limited to Ontario residents only[62].

In *Carom* v. *Bre-X Minerals Ltd.*, the plaintiffs were shareholders or former shareholders of Bre-X Minerals Ltd., an Alberta company that had been developing gold mining properties in Indonesia. They alleged that they had been wronged by the promotion and sale of Bre-X shares in Canada as the value of the shares plunged to nil after it was discovered that the samples in Busang had been fraudulently salted with gold dust by certain operators of Bre-X. The plaintiffs sought to certify a national class. As in *Nantais*, the defendants argued that the OCPA does not specifically deal with non-resident plaintiffs[63]. Justice Winkler of the Ontario Court observed that the OCPA is a procedural statute. Since the Act is silent in respect of non-resident plaintiffs[64], he

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v. *Dow Corning Corp (2000),* unreported, November 8, 2000, [2000 BCCA 605], [hereinafter: *Harrington*].

[60] *Nantais* - appeal, supra, footnote 50, at p. 113; the issue of flexibility of class certification was also raised in *Wilson*, supra, footnote 52, at p. 239; *Bendall*, supra, footnote 46;

[61] *Nantais* - appeal, supra, footnote 50, at p. 113.

[62] *Nantais* - certification, supra, footnote 49, at p. 566.

[63] *Carom*, supra, footnote 50, at p. 446, This was also argued in *Nantais* - certification, supra, footnote 49, at p. 559 ; *Wilson*, supra, footnote 52, at p. 236.

[64] For Justice Winkler, the *Ontario Class Proceeding Act* is "similar but more far-reaching statute" than the British Columbia *Class Proceedings Act*, R.S.B.C., 1996, c. 50, at p. 447.

concluded that non-resident plaintiffs can be included in a class, subject to constitutional considerations[65].

The defendants further argued, that application of the OCPA to non-resident plaintiffs affects property and civil rights outside the province and would be contrary to the presumption that legislation does not operate extra-territorially[66]. The court assumed jurisdiction relying on the decisions in *Morguard*[67] and *Hunt*[68], that permit "the extra-territorial application of legislation where the enacting province has a real and substantial connection with the subject matter of the action and it accords with order and fairness to assume jurisdiction"[69]. The court concluded that there was a "real and substantial connection between the defendants and the subject matter of the actions to Ontario"[70]. It then concluded that considerations of "order and fairness" were met since the Act is replete with provisions guaranteeing order and fairness[71].

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[65] *Carom*, supra, footnote 50, at p. 447.

[66] *Carom*, supra, footnote 50, at p. 446, this argument was also raised *in Wilson*, supra, footnote *52*; *Webb*, supra, footnote 59, at p. 403.

[67] *Morguard*, supra, footnote 6.

[68] *Hunt*, supra, footnote 19.

[69] *Carom*, supra, footnote 50, at p. 450.

[70] *Carom*, supra, footnote 50, at p. 451.

[71] *Carom*, supra, footnote 50, at pp. 451-452; For example section 9 permits any member to opt-out of the class proceeding within the time provided, section 17 requires that proper notice of the certification, in a court approved form, must be provided to all class members and must include the "manner by which and time within which class members may opt out of the proceeding".

The defendant further argued that non-resident plaintiffs could take a "wait and see" approach to the Ontario litigation and if dissatisfied with the result, commence action in another jurisdiction. Justice Winkler dismissed this argument stating that concurrent jurisdiction by a court in another province would undoubtedly be met with an argument based on the principles in *Morguard* and *Hunt*[72]. Finally, defendants argued the unfairness for the unnamed non-resident plaintiff who would be bound by a decision without having had service of the action in the traditional manner or having had a chance to be heard by the court[73]. According to Justice Winkler, the notice requirements, the opt out provision of the Act, the role of the representative plaintiffs to protect the interests of all class members and the possibility for the creation of sub-classes would prevent any prejudice to the non-resident class members[74].

In *Robertson* v. *Thomson Corporation et al.*[75] the Ontario Court certified a Class of all writers (or their assignees or estates) who published in the defendants' publications after a certain date and had neither assigned copyright in writing to the defendant nor licensed in writing the defendants to distribute their work electronically. The Court certified this class on the basis that the defendants did not suggest that Ontario was not an appropriate forum or that Ontario courts lacked of jurisdiction over non-resident plaintiffs. The Court stated that the proposed class must be defined in objective terms that may well include

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[72] *Carom*, supra, footnote 50, at p. 452.

[73] *Carom*, supra, footnote 50, at p. 453.

[74] *Carom*, supra, footnote 50, at pp. 453-454, Justice Winkler adds that It cannot be assumed that the notice cannot be effective so as to offer an opportunity to opt out of the class and that the OCPA requires that the form of and manner in which notice is provided to the plaintiffs must receive court approval.

individuals who, in the end, will have no claim. The question of whether foreigners, who did not opt out of the action, would be bound by the result elsewhere would be an issue to be decided by the foreign court in which the proceedings would be brought [76].

In *Webb* v. *K-Mart Canada Ltd. Et al.,* the court certified a national class[77] in an action for damages for wrongful dismissal[78]. The court concluded that although K-Mart was incorporated in Nova Scotia, there was a real and substantial connection with Ontario since the company carried on business as a national chain, with about half of the stores that it closed being in Ontario and more employees dismissed in Ontario than in any other province[79]. Furthermore, the court dealt with the issue of different laws applicable to non-resident plaintiffs[80]. The court considered the differences in provincial law as relatively minor in relation to the broad overreaching common law approach to claims relating to dismissal without cause. The court relied on the fact that persons from the various regions of Canada would serve as mediators and adjudicators in those regions, which would provide assurance that local precedents and statutory requirements would

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[75] 171 D.L.R. (4th) 171 (Ont. Ct. (Gen. Div.)), [hereinafter: *Robertson*].

[76] *Ibid.,* at. p 188.

[77] *Webb*, supra, footnote 59, except in British Columbia and Quebec.

[78] The court in *Webb*, supra, footnote 59, at p. 403 referred to *Nantais* - certification, supra, footnote 49, and *Carom*, supra, footnote 50, for the basic constitutional and other concerns over an Ontario court assuming extraterritorial jurisdiction in a class proceeding.

[79] *Webb,* supra, footnote *59,* at p. 403.

[80] There are some regional differences in human relations practices, and different provincial legislative requirements. This issue was also raised in *Nantais* - appeal, supra, footnote 50, at p. 114; *Harrington*, supra, footnote 59.

be recognized[81]. The court also justified extending the reach of Ontario legislation to non-resident plaintiffs and certifying national classes by the lack of class action legislation elsewhere in Canada[82] and the opt out provisions in the Act which would give adequate protection to anyone who would prefer to press a claim before the courts of his or her own province[83]. Finally, the court dealt with the plaintiff who has not actively participated in the class proceedings , and yet has not opted out, by stating that "the province in which such a person resides could deal with the applicability of the *Ontario Class Proceedings Act* as it relates to that person in that province." [84].

In *Wilson* v. *Servier* Canada Inc. et al.[85] the plaintiff suffered from primary pulmonary hypertension due to the use of the weight loss drug, Ponderal[86]. Justice Cumming of the Ontario Court referred to cases in which national classes have been certified by courts on the principles in *Morguard* and *Hunt* [87]:

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[81] *Webb*, supra, footnote 59, at p. 403.

[82] *Webb* , supra, footnote 59, at p. 404.

[83] *Webb*, supra, footnote 59, at p. 404, this issue was also raised in *Wilson*, supra, footnote 52, at p. 244; *Harrington*, supra, footnote 59.

[84] *Webb*, supra, footnote 59, at p. 404, the issue of the "passive plaintiff" that does not opt out was also raised in *Nantais* - certification, supra, footnote 49, at p. 559.

[85] *Wilson*, supra, footnote 52, leave to appeal to Div. Ct. Denied (2000), 52 O.R. (3d) 20 (Div. Ct.).

[86] The generic form of this drug is "fenfluramine", known in Canada by the brand name "Ponderal". A similar drug, "dexfenfluramine" is known in the United States and Canada as "Redux". These drugs were marketed in Canada.

[87] *Wilson*, supra, footnote 52, at p. 239 refers to *Nantais* - certification, supra, footnote 49; *Carom*, supra, footnote 50; *Harrington*, supra, footnote 59; Webb, supra, footnote 59.

> " [...] they stand for the proposition that if there is a real and substantial connection between the subject-matter of the action and Ontario[88], 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."[89].

As in *Carom* v. *Bre-X Minerals Ltd.*, the defendants[90] objected to certification of a national class on the basis that proposed class members who reside outside Ontario had no connection to Ontario and that under the principles of constitutional law and private international law, the court lacked jurisdiction[91]. Considering that the representative plaintiff resided in Ontario, that Ponderal was prescribed, purchased and consumed in Ontario, that some of the ingredients of the drug were produced in Ontario and that 43% of the class members resided in Ontario, the court concluded that there was a real and substantial connection between the subject-matter of the action, founded in tort, and Ontario[92]. According to the court, once a real and substantial connection exists, the court can assume jurisdiction[93] and the opt out process is always available to the non-resident

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[88] According to *Wilson*, supra, footnote 52, at p. 243 the test is whether there is a real and substantial connection between the subject- matter of the claims and Ontario and not between the defendant and Ontario.

[89] *Wilson*, supra, footnote 52, at p. 241.

[90] The defendant Servier Canada inc. is a Canadian corporation, with its head office in Quebec; the defendant Biofarma S.A. is the parent corporation of Servier and a corporation pursuant to the laws of the Republic of France.

[91] *Wilson*, supra, footnote 52, at p. 236.

[92] *Wilson*, supra, footnote 52, at p. 227.

[93] *Wilson*, supra, footnote 52, at p. 243; Justice Cumming refers to Professor J.-G. Castel in his book Canadian Conflict of Laws, 4th ed. (Toronto: Butterworths, 1997) at p.55 that states that the "test for determining whether a real and substantial connection exists is not demanding or rigid. The court needs to find only a real and substantial connection, not the most real and substantial connection, to assume jurisdiction."

plaintiff who wishes to commence an action in another province[94]. Furthermore, Justice Cumming stated that a class is subject to decertification if defined too broadly[95] and that certified class proceeding in another province would take precedence for residents of that province[96]. Finally, Justice Cumming justified the certification of a national class where the alternative jurisdiction (France) does not have class proceeding legislation[97].

BRITISH COLUMBIA

In *Harrington* v. *Dow Corning Corp*., a national class was defined as "all women who have been implanted...and are resident in Canada, anywhere other than Ontario and Quebec, or were implanted in Canada, anywhere other than Ontario or Quebec"[98]. According to the court, contrary to the concern raised in *Nantais* concerning the problem of "passive non-residents" that did not opt out, the issue does not arise under the British

[94] This issue was also raised in *Webb*, supra, foot note 59, at p. 404.

[95] *Wilson*, supra, footnote 52, at p. 239; referring to *Bendall*, supra, footnote 46, in which Justice Montgomery stated, at p. 747, that "Certification is fluid and flexible and always subject to decertification if the class is defined too broadly"; this issue was also discussed in *Harrington*, supra, footnote 59.

[96] *Wilson*, supra, footnote 52, at p. 244.

[97] *Wilson,* supra, footnote 52, at p. 230. In fact, in this case, France did not have class proceedings legislation and the court stated "to require that class members travel to France to present individual claims in protracted, expensive and extremely complex litigation would effectively deny them access to justice. [...] There would be a very significant loss of juridical advantage if they were not permitted to proceed with their action against Biofarma in Canada"; This was also an issue in *Webb*, supra, footnote 59, at p. 404.

[98] A non-resident subclass and a British Columbia resident class, no matter where the plaintiff was implanted were approved.

Columbia statute which requires non-resident plaintiffs to opt-in[99]. In this case the defendants opposed certification on the basis that plaintiffs had received their implants in provinces other than British Columbia and therefore had no real and substantial connection to the province of British Columbia. The court concluded that there was no utility in having the same factual issue litigated in several jurisdictions if the claims could be dealt with in British Columbia. The common issues were therefore found to be sufficient to establish a real and substantial connection to British Columbia. Finally, defendants argued that by certifying a national class, they were deprived of trying factual issues separately in several jurisdictions. According to the court, if this is a prejudice, it "is outweighed by the advantage to the class members of having a single determination of a complex issue that can only be litigated at substantial cost"[100].

UNITED STATES OF AMERICA

In the US Case, *Miner* v. *The Gillette Company*[101], the court ruled that absent plaintiffs in a class action suit are bound by a judgment rendered in a court which had proper jurisdiction over the parties despite fact that they were not personally served and did not appear, since due process was not violated so long as non-resident plaintiffs were

[99] The court at p.7 also refers to *Nantais* - appeal, supra, footnote 50, regarding the flexibility of certification and the application of different legislation.

[100] He also stated that "the choice of law rule laid by the S.C.C. in *Tolofson*, supra, footnote 30, will ensure that the defendant will not lose benefit of any substantive defense, including limitations, available for claims determinable under the law of other jurisdictions", at p.8.

[101] 87 Ill.2d 7; 428 N.E.2d 478, 56 Ill.Dec.886; Justice Ryan dissenting.

adequately represented, adequate notice was given, common questions of fact existed and potential class members had the possibility to opt out. The court, referred to the decision in *Shutts* v. *Phillips Petroleum Co*.[102] where it was held that "[...] while the essential element necessary to establish jurisdiction over non-resident defendants is some 'minimum contacts' between the defendant and the forum state, the element necessary to the exercise of jurisdiction over non-resident plaintiff class members is procedural due process". Similarly to Ontario courts, the US court observed that the class action statute[103] specifically provides for sub-classes and if it is established that the difference between the law in various states makes a single class inappropriate plaintiffs are subject to grouping in a manageable number of subclasses.

PRACTICAL CONSIDERATIONS

The practical and procedural considerations which militate in favour of class actions within a province may be said to argue in favour of national class actions.

These practical considerations have been examined both in studies leading to the adoption of class action legislation (such as the Ontario Report of the Attorney General Advisory Committee on Class Actions, in 1990) and in the case law; a convenient summary of these practical and procedural considerations is found in the decision of the

[102] (1977), 222 Kan. 527, 567 P.2d 1292, 1305.

[103] (Ill.Rev.Stat.1979, ch. 110, par. 57.3(b).)

Supreme Court of Canada in *Western Canadian Shopping Centers Inc*. c. *Dutton* [2001] 2 S.C.R. 534 paragraphs 26 to 29:

1. By aggregating similar individual actions, class actions served judicial economy by avoiding unnecessary duplication in fact finding and legal analysis.
2. By allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually;

3. Class actions serve as a deterrent by insuring that actual and potential wrongdoers do not ignore their obligations to the public.

Few would quarrel with these advantages of class actions over individual suits but that is not dispositive.

THE ARGUMENTS AGAINST A "NATIONAL CLASS" AND RESPONSE OF THE COURTS TO THOSE ARGUMENTS

Courts so far have rejected any argument that would go against national class certification, drawn by the benefit to class action members of having a single determination of a complex issue which could only be litigated at substantial cost[104]. But is judicial economy a sufficient reason for assuming jurisdiction?

In *Nantais* the question of the jurisdiction of the Ontario Court to create a *"national class"* or to include *"extra-provincial plaintiffs"* in the defined class was raised. Brockenshire J. in first instance, cited from *Morguard* and from *Hunt* but deferred the

[104] *Dante*, supra, footnote 47.

question of jurisdiction to be resolved *"in another action before another Court in another jurisdiction"*. He went on to say *"I do not see the possibility of a future adverse findings on jurisdiction as a present bar to certification of all effected Canadian residents"*. Like Brokenshire J., Zuber J, in refusing leave to appeal to the Divisional Court, took the attitude that the jurisdictional validity *"remains to be seen"*.

In *Morguard* and in *Hunt* the Supreme Court emphasised that, for there to be recognition and enforcement of judgements between provinces, the Court rendering the judgement must have *"properly or appropriately exercised jurisdiction"* and *"must have reasonable grounds for assuming jurisdiction"*. Neither dealt with the possibility of a Court assuming jurisdiction over indeterminate extra-provincial plaintiffs. To say as the judgement in *Nantais* suggests that territorial jurisdiction may be left to be dealt with *"before another Court in another jurisdiction*" is open to question.

Courts have maintained as justification to certify national classes the lack of class action legislation elsewhere in Canada[105]. The absence of class action legislation in other provinces is not a convincing argument. The Supreme Court of Canada has ruled that under the Common Law, class actions exist in all provinces; class action statutes merely structure the procedure[106]. At any event, this argument is outdated since class action statutes now exist in 6 provinces. Canada is governed by a constitution which gives

[105] *Wilson*, supra, footnote 52, at p. 230; *Webb*, supra, footnote 59, at p. 404 .

[106] *Western Canadian Shopping Centres Inc.* v. *Dutton* [2001] 2. S.C.R. at p. 534.

authority to provinces to legislate regarding property and civil rights (section 92(13) and (14)). Applying a provincial statute, such as a *Class Proceedings Act*, to purport to establish jurisdiction for its courts over non-resident plaintiffs is contrary to the presumption that legislation does not operate extra-territorially[107].

In *Nantais*, Brockenshire J. commented, in supporting his decision to take jurisdiction over extra-provincial plaintiffs, that there was nothing in the Ontario *Class Proceedings Act "to prevent it"*.. In *Carom* v. *Bre-X Minerals*, defendants objected to inclusion of non Ontario plaintiffs in the class on the grounds that the *Class Proceedings Act* does not specifically provide for a class which includes extra-provincial plaintiffs and that it would effect civil rights outside the province and would therefore be contrary to the presumption that legislation does not operate extra-territorially. Winkler J., in authorising a National Class, dealt with the first argument, as had Brochenshire J. in *Nantais,* by affirming that the absence of a provision in the statute purporting to give it extra-territorial effect would mean that the act is not restrictive and therefore does have extra-territorial effect. This reasoning seems to ignore the principle that a Provincial legislature is presumed to have intended to legislate within its jurisdiction, territorial or otherwise. If the Ontario *Class Proceedings Act* had stipulated that the Ontario Court is authorised to issue notices to potential plaintiffs in, for example, Newfoundland, there is reason to believe that such a disposition could have been struck down.

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[107] Osgoode Hall Law Journal, [1997], Vol. 35, number 1, "*Interprovincial Sovereign Immunity*

In *Robertson* v. *Thomson*[108], the court recognized the distinction between assuming jurisdiction and choosing an appropriate forum. Through the *forum non conveniens* doctrine a court may refuse to exercise jurisdiction where there is a more convenient or appropriate forum elsewhere[109].

MORAN V. PYLE, MORGUARD AND HUNT

In arriving at the solutions outlined earlier in this paper, the courts invoked the decisions of the Supreme Court of Canada in *Morguard* and *Hunt*; the court in *Morguard* in turn sought inspiration in the language of Dixon J. in *Moran* v. *Pyle*.

In *Moran* v. *Pyle* the defendant was a manufacturer of lights bulbs and Moran was fatally injured in Saskatchewan allegedly due to a defective light bulb. The court noted that the manufacturer was aware that its products entered into the normal channels of trade and that a consumer might be injured where the consumer used the product. However, negligence is not a cause of action unless it causes injury so that the tort is in a sense, completed where the injury is suffered[110]. In this context, the court adopted flexible qualitative and quantitative tests asking the question whether it was *"inherently*

Revisited", 379, at p. 387.

[108] *Robertson*, supra, footnote 75.

[109] Finkle, Peter and Labrecque, Claude, "*Low-Cost Legal Remedies and Market Efficiency: Looking beyond Morguard*", Canadian Business Law journal, [1993], Vol. 22, 58, at p. 76.

[110] *Moran*, supra, footnote 18, at p. 409.

reasonable" for the action to be brought in a particular jurisdiction where there was *"a real and substantial connection with the action".*[111]

The context within which the court in *Moran* v. *Pyle* rendered its decision, a manufacturer distributing its product nationally, addressed the issue of a court taking jurisdiction over a non-resident defendant.

The situation of individual potential plaintiffs scattered throughout the various provinces of Canada is different. While the manufacturer distributing its products nationally may foresee that they could cause harm wherever they may be found, the potential plaintiff in St. John's Newfoundland has no contact with the Court sitting in Toronto.

In *Morguard*, the Supreme Court considered the enforceability of a judgement rendered by default against the defendant on whom the proceedings were served in another province. The case arose out of mortgage agreements on property in Alberta, entered into while the defendant was resident in Alberta. The defendant had subsequently moved to British Columbia.

On this fact pattern, La Forest J. commented that:

[111] *Moran*, supra, footnote 18, at pp. 407-408.

> "There is really no comparison between the inter-provincial relationships of today and those obtaining between foreign countries in the 19th Century..."[112]

He went on to observe *"it seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province."*

Later in the judgement, La Forest J. stated:

> "deficiency actions follow upon foreclosure proceedings, which should obviously take place in Alberta, and the action for the deficiency cries out for consolidation with the foreclosure proceedings in some manner similar to a Rice Order."[113]

Again, this fact pattern and the reasoning it generated is far from the situation of the potential plaintiff in St. John's Newfoundland who has never been to Toronto. The *Morguard* case of course again considered the situation of a non-resident defendant, not a non-resident plaintiff.

Morguard clearly focuses on notions of comity rather than on the actual taking of jurisdiction and, as stated earlier, *Morguard* does not lay down a clear rule as between what and what there must be a "real and substantial" connection.

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[112] *Morguard*, supra, footnote 6, at p. 1098.

[113] *Morguard*, supra, footnote 6, at p. 1108.

In *Hunt* the Supreme Court was faced with the effect of *a "blocking statute"*. The Quebec Business Concerns Records Act prohibited the taking of documents or information from documents in a business concern in Quebec for use in litigation outside Quebec. The Quebec Superior Court pursuant to that statute issued an order prohibiting the forwarding of documents from Quebec to the Court in British Columbia seized of litigation against the Quebec defendant, litigation which was found to have a real and substantial connection with the Court in British Columbia.

The Supreme Court held that the effect of the Business Concerns Records Act was to impede the substantive rights of litigants outside Quebec. Insofar as it would impede the rights of litigants in other provinces of Canada, it was found to be contrary to the concept of the fathers of confederation in creating the Canadian Federation.[114]

The potential plaintiff in St. John's Newfoundland has done nothing *"to impede the substantive rights of litigants"* in Ontario, whether plaintiff or defendant, or to deprive them *"of access to the ordinary courts in their jurisdiction"*.

The question remains open, for the time being at least, as to whether the Ontario courts were justified in divorcing the statements of principle in *Moran*, *Morguard* and *Hunt* from the context in which those decisions were rendered.

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[114] *Hunt*, supra, footnote 19, at p. 327.