

Conflicts, Choice of Forum, Coordination and Other Issues

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This paper focuses on the logistics, coordination, recognition and enforcement of cross-border litigation in the context of today's global economy. Cross-border transactions between suppliers and consumers have become commonplace and their cross-border nature has become largely transparent.

A typical example of litigation which is likely to arise in this context is the "hypothetical" that was posited in *Compensating Large Numbers of People for Inflicted Harms*¹ by Senior United States District Judge Weinstein:

"Assume a popular unregulated herbal supplement is being manufactured by companies in many states and countries. Some produce and sell only locally. Others operate nationally and internationally. Distributors use worldwide Internet, television, and other forms of merchandising. Some foreign companies (and their holding companies) sell in very small quantities in each of many states in the United States [and internationally]. Purchases can be made online directly from the manufacturer and in almost any drug store. Brand names are used, but 'The Product' is generic. Telephone, Internet, and credit card orders utilize satellites, and electronic bank transfers settle accounts, mainly through New York, London, Zurich, and Tokyo. Suddenly, there are indications that the product has serious adverse effects."

Disputes are inevitable, yet multilateral international convention or treaties that govern such litigation are rare. The absence of treaties and conventions is further complicated by the frequency of litigation involving multiple corporate (and government) defendants, some of them multinational corporations with subsidiary corporations located in various

¹ 11 Duke J. of Comp. & Int'l L. 165 at 169

countries, and multiple plaintiffs located in different countries, each of them with different rights, protections and litigation options. Where multiple plaintiffs are resident citizens in different nations and they want to combine their litigation efforts, their choice of forum may allow them to gain significant substantive or procedural juridical or personal advantages.

When these complexities are combined with the perspectives emerging from different political, economic, social and religious systems to emerging or new technologies; scientific and medical developments with inherent bio-ethical considerations; and different legal systems and different laws; cross-border litigation is certain to increase in complexity over the next several decades.

There are also new trends emerging which will further change the landscape of cross-border litigation. They include:

1. the use or threat of litigation as an alternative to political action by citizens frustrated by what they perceive as a reluctance of governments to take action to regulate or curtail the effects that huge multinational corporations operating around the globe have on human rights, labour practices, the environment, etc.;
2. the potential of a new Hague Convention to address the issues of assumption of jurisdiction and recognition and enforcement of foreign judgments; and
3. the pre-emptive settlement of claims by defendants who fear the cost and resource drain that large-scale (especially US-originated class action) litigation may have on their enterprise or government.

The balance of this paper is divided into two sections: conflict of laws jurisprudence and large scale litigation, which includes class actions and group litigation. The primary focus will be on the Canadian legal environment, but the nature of the subject dictates that the legal environments of other countries be examined, too, albeit to a lesser degree.

I. CONFLICT OF LAWS JURISPRUDENCE

As this conference's focus is on cross-border disputes, my primary focus in the conflict of laws jurisprudence section will be on issues that arise in international litigation. However, because of the manner in which the law has developed in Canada, I have included a brief review of

interprovincial law² because some academic authorities and courts have opined on the applicability of principles used in interprovincial conflicts to international disputes. Accordingly, my discussion will begin by looking at conflict of laws jurisprudence in interprovincial disputes and will then discuss the uneasy application of these principles to international litigation.

Since Canadian law is only half the equation governing cross-border disputes, I have included a brief overview of the comparable principles that exist in the United States, the United Kingdom, and the European Union (EU).

A. Assuming Jurisdiction—Jurisdiction Simpliciter

The Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (“*Muscutt*”) outlined the development of jurisdiction *simpliciter*. Historically, there were three methods by which jurisdiction *simpliciter* could be asserted against a foreign defendant:

1. consent—this includes the foreign defendant’s voluntary consent to the forum, consent by prior arrangement, *e.g.*, a forum selection clause contained in a contract that requires the parties to submit to a particular jurisdiction, or by attornment to the jurisdiction by appearance and defence;
2. presence, *i.e.*, the foreign defendant is present in the jurisdiction; and
3. assumed jurisdiction, which is initiated by service *ex juris*.

The latter of these, service *ex juris*, codified by most provinces in the Rules of Court, specifies when service outside the jurisdiction may be ordered. It is these codified Rules which are now “subject to the principles articulated in *Morguard* regarding the need for a real and substantial connection and the need for order, fairness and judicial restraint”: *Muscutt* at page 31.

² My focus will be on the common law, not on the provincial legislation that deals with interprovincial litigation.

1. Jurisdiction *Simpliciter* in Interprovincial Litigation

In 1990, the Supreme Court decided *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (“*Morguard*”), an interprovincial mortgage dispute. It signaled the first of a number of developments in the principles governing conflict of laws jurisprudence in Canada. La Forest J.’s judgment reviewed the historical principles that gave rise to a reluctance by one state to exercise jurisdiction over matters that take place in another state’s sovereign territory (and presumably over its subjects). At page 1095 of the decision he states:

“Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. [...] This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory.”

However, he concluded that the true meaning of comity is more than respect and deference. In his view it is a “necessity in a world where legal authority is divided among sovereign states...” [at page 1096]. Specifically at page 1098 he comments:

“The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative.”

In recognition of this reality, the Court concluded that new principles were required. It determined that a “real and substantial connection” with the forum was necessary before a Canadian court could exercise jurisdiction over a foreign matter. The Court also established that order and fairness to the defendant required that the court act with properly restrained jurisdiction [at page 1104]. The corollary of this development was that other Canadian courts were required to recognize and enforce sister provinces’ judgments.

Three years later, in *Hunt v. T & N*, [1993] 4 S.C.R. 289, the Supreme Court gave the principle of real and substantial connection constitutional force by holding that the provinces are required to “respect the minimum standards of order and fairness addressed in *Morguard*” [at page 324].

What that meant, however, was not delineated by the Court beyond its finding that the principle was neither rigidly defined nor meant to be rigidly applied. In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (“*Tolofson*”), the Supreme Court conceded at page 1049 that the term “real and substantial connection” was “a term not yet fully defined”.

The Ontario Court of Appeal has recently provided guidance on what constitutes a real and substantial connection. In *Muscutt* at page 21, the Court summarizes the relevant factors to consider:

1. the connection between the forum and the plaintiff’s claim, because every forum has an interest in protecting the legal rights of its residents;
2. a connection between the forum and the defendant, which may arise where it was reasonably foreseeable that the defendant’s conduct would result in harm within the jurisdiction or where the defendant has done something within the jurisdiction that bears upon the plaintiff’s claim;
3. unfairness to the defendant in assuming jurisdiction;
4. unfairness to the plaintiff in not assuming jurisdiction;
5. the involvement of other parties to the suit, which includes concerns about avoiding a multiplicity of proceedings and the risk of inconsistent results;
6. the Court’s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
7. whether the case is interprovincial or international in nature, the assumption of jurisdiction being more easily justified in interprovincial cases; and
8. comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

As a result of these cases (*Morguard*, *Hunt*, *Tolofson*, *Muscutt*), it seems that there is now a Canadian framework in place for a Canadian court’s assumption of jurisdiction in interprovincial litigation. The *Muscutt* decision was recently cited with approval by Justice Bastarache, writing on behalf of three members of the Court, in his dissenting opinion

in *Unifund Assurance Co. v. Insurance Corp. of British Columbia* [2003] 2 S.C.R. 63, 2003 SCC 40 at paragraphs 125-127.

2. Jurisdiction *Simpliciter* in International Litigation

i. *At Common Law*

Morguard and the cases that followed established the constitutional imperative that there be a real and substantial connection between the matter and the forum as the test for establishing jurisdiction *simpliciter* in an interprovincial matter.

Whether or not the *Morguard* principles should be applied more broadly to questions of jurisdiction *simpliciter* in international matters was, until recently, the subject of some debate. J.-C. Castel notes at page 2-4 in the context of applying the test to the recognition and enforcement of judgments that: “The *constitutional* requirement would not seem to apply to foreign judgments but the new rule has been applied to them.”

Castel also notes at page 14-2 that: “... Canadian courts have extended the application of the *Morguard* principles to foreign judgments and, in so doing, have eliminated much, if not all, practical distinction between the regard shown for foreign judgments with respect to questions of jurisdiction and that shown for Canadian judgments.”

In *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78 (“*Spar*”), the Supreme Court was required, *inter alia*, to consider, in the context of Quebec’s Civil Code and a cause of action that occurred in the United States, whether:

“(a) a ‘real and substantial connection’ between the action and the province of Quebec needed to be established before a Quebec court could assert jurisdiction over international litigation, and

(b) jurisdiction should be declined on the basis of the doctrine of *forum non conveniens*.”

The Supreme Court unanimously confirmed both the lower courts’ decisions confirming the jurisdiction of the Quebec courts. In arriving at its decision, the Supreme Court undertook an extensive analysis of the principles of private international law. At paragraph 20 it held that the objective of comity is order and fairness, and that order is the preeminent of these. It then noted at paragraph 21: “The three principles of comity,

order and fairness serve to guide the determination of the principal private international law issues: jurisdiction *simpliciter*, *forum non conveniens*, choice of law and recognition of foreign judgments.”

However, in response to the appellants’ arguments that the respondents were required to meet the “real and substantial connection” test, the Supreme Court noted at paragraph 51 that:

“[...] it is important to emphasize that *Morguard* and *Hunt* were decided in the context of interprovincial jurisdictional disputes. In my opinion, the specific findings of these decisions cannot easily be extended beyond this context.”

The Supreme Court also noted at paragraph 53 that it came to a similar conclusion in its earlier decision in *Hunt*, *i.e.*, that interprovincial litigation principles “should [not] necessarily be subject to the same rules as those applying to international commerce”. The Court then specifically stated at paragraph 54: “In my view, there is nothing in these cases that supports the appellants’ contention that the constitutional “real and substantial connection” criterion is required [to be applied in an international context] in addition to the jurisdictional provisions [in the legislation].”

However, in the recent case of *Beals v. Saldanha* [2003] 3 S.C.R. 416, 2003 SCC 72 (“*Beals*”), the Supreme Court seemed to endorse the application of the *Morguard* test to questions of jurisdiction *simpliciter* in the international context. While the parties in that case had conceded that the Florida court had jurisdiction and the Supreme Court was not, therefore, required to make a decision on the point, Major J., speaking for the majority, indicated at paragraph 17 that the parties’ concession of jurisdiction was appropriate: “It was properly conceded by the parties, as explained below, in both the trial court and Court of Appeal, that the Florida court had jurisdiction over the respondents’ action pursuant to the ‘real and substantial connection’ test set out in [*Morguard*].”

This comment, coupled with the readiness of trial and appellate courts to apply the *Morguard* test to international questions of jurisdiction *simpliciter*, seems to have settled the law in Canada in respect of this issue.

ii. *Statutory Authority Pursuant to the Hague Convention*

As mentioned in the introduction to this section, before the development of the *Morguard* principles (real and substantial connection, order and fairness and jurisdictional restraint) the determination of whether jurisdiction could be assumed over a foreign defendant was determined by the provinces' Rules of Court. Under these Rules, service *ex juris* might be ordered when the subject matter of the litigation was property within the jurisdiction, when there had been a breach of contract within the jurisdiction, when damage had been sustained in the jurisdiction, when a tort had been committed in the jurisdiction and in other, less common circumstances.

When the foreign defendant is located outside of Canada, the rules for service *ex juris* are largely derived from the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, to which Canada became a signatory in 1988, and which came into force in 1989. As of June, 2004, there were 52 member states that were parties to that Convention.

As Castel writes in *Canadian Conflict of Laws* at page 11-26.3, the Convention is intended to provide uniform procedures to effect service of legal documents in a timely manner and to improve mutual judicial assistance.

B. Declining Jurisdiction Doctrine of *Forum (Non) Conveniens*

1. *Forum Non Conveniens* in Interprovincial Litigation

Once a Canadian court has assumed jurisdiction, there is the additional and discrete matter of whether it should exercise its discretion to decline jurisdiction on the basis of the doctrine of *forum non conveniens*. A court may decline jurisdiction on the basis that the action may be more appropriately and justly tried elsewhere.

In *Muscutt*, the Court reviewed the list of factors a court must consider when determining whether it is the most clearly appropriate forum [pages 34-35]:

- the location of the majority of the parties;
- the location of key witnesses and evidence;
- contractual provisions that specify applicable law or accord jurisdiction;
- the avoidance of a multiplicity of proceedings;
- the applicable law and its weight in comparison to the factual questions to be decided;
- geographical factors suggesting the natural forum;
- whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.

Although there is some overlap between the factors that a court may consider in its determination of jurisdiction *simpliciter* and in its application of the doctrine of *forum non conveniens*, the two are separate and discrete inquiries. The Supreme Court explained in *Tolofson*, at page 1049: “[The real and substantial connection] test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. [T]hrough the doctrine of *forum non conveniens* a court may refuse to exercise jurisdiction where ... there is a more convenient or appropriate forum elsewhere.”

In summary, there is a two step inquiry for a Canadian court in the context of an inter-provincial matter:

1. Can it assert jurisdiction over a foreign defendant where jurisdiction is assumed and initiated by service *ex juris*? To determine this, the court uses the real and substantial connection test.
2. Should it decline jurisdiction because, as claimed by the defendant, there is a more appropriate forum elsewhere? The Court uses the doctrine of *forum non conveniens* to determine this.

Once the Court takes jurisdiction, there exists a constitutional imperative that the resulting judgment be recognized and enforced by other Canadian jurisdictions.

2. *Forum Non Conveniens* in International Litigation

The doctrine of *forum non conveniens* is widely accepted in most common law countries including Canada (*Spar, Amchem Products Inc. v. British Columbia (Workers Compensation Board)*, [1993] 1 S.C.R. 897 (“*Amchem*”)), the United Kingdom (*Spiliada Maritime Corporation v. Cansulex Ltd.*, [1987] A.C. 460 (“*Spiliada*”), *Lubbe v. Cape*, [2000] 4 All E.R. 268 (“*Lubbe*”)), and in the United States (*Piper Aircraft Co. v. Reynolds*, 454 U.S. 235 (U.S.S.C.)).

The law governing European member states is somewhat different. In *Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, the governing principle is *lis pendens*, not *forum non conveniens*. This means that if the court first seized establishes jurisdiction *simpliciter*, then the matter is at an end. Article 27 specifies:

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.
2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favor of that court.

The following discussion focuses primarily on the Canadian law as it pertains to the issue of when a court should decline jurisdiction in favour of the defendant’s proposed forum in an international matter.

i. Declining Plaintiff’s Choice of Forum Only Done Exceptionally

Although in *Spar* the Supreme Court was specifically considering the application of the *Quebec Civil Code*, it approached the problem by first reviewing the general principles of private international law, including common law and academic commentary. LeBel J. confirmed the Supreme Court’s decision in *Amchem*, that the court should decline jurisdiction only exceptionally; that is, the plaintiff’s choice of forum should be declined in favour of the defendant’s choice of forum in exceptional circumstances. To do otherwise could create uncertainty in private international law. He emphasized at paragraph 81 that “such uncertainty could seriously

compromise the principles of comity, order and fairness, the very principles the rules of private international law are set out to promote.”

This accords with the English law. In *Spiliada*, the House of Lords noted at page 476 that where a plaintiff has founded jurisdiction as of right in England, the “court hesitates to disturb the plaintiff’s choice of forum and will not do so unless the balance of factors is strongly in favour of the defendant.”

Contrasting this with EU law, where the court must decline jurisdiction in favour of the court first seized, Canada, United States and United Kingdom law will not always favour the party who won the race to the courtroom.

ii. Proposed Forum must be “Clearly More Appropriate”

In *Amchem*, which preceded *Spar* by almost 9 years, Sopinka J. identified three variables which often mean that there is no single appropriate forum: the increase in the number of multinational (and multiple) defendants; the corresponding emergence of the potential of a large class of plaintiffs residing in different jurisdictions; and the difficulty of pinpointing the place where the transaction giving rise to the action took place.

He concluded at page 912 by stating that in these circumstances “the best that can be achieved is to select an appropriate forum since no one forum is clearly more appropriate than others.” He also confirmed that the parochial attitude exemplified by older cases is no longer appropriate and that “courts have had to become more tolerant of the systems of other countries.”

He confirms at page 931 that in order to exercise its discretion to decline to hear a matter in the plaintiff’s choice of forum, the Court must find that there is a forum that is clearly more appropriate.

In summary, a defendant’s application for a stay in proceedings should be granted by the court’s exercise of *forum non conveniens* only when the defendant’s proposed forum is “clearly more appropriate” than the plaintiff’s choice of forum. This is a difficult hurdle because in the context of litigation in a globalized business environment, several different fora may be “appropriate,” and the plaintiff’s choice carries great weight. This will be illustrated by the cases in the large-scale litigation section.

iii. Factors to Consider in Assessing Forum Non Conveniens

The rule in Canada is that the party seeking to rely on the doctrine must bring an application for dismissal, *i.e.*, the party that is seeking to have the court which has assumed jurisdiction *simpliciter* exercise its discretion to stay the matter must prove that the proposed jurisdiction is clearly more appropriate. However, it seems that Canadian courts have routinely emphasized that the burden will rarely affect the outcome of their determination as this will usually depend on the Court's assessment of the relevant factors: *Canadian Conflict of Laws* at pages 13-12.

In *Spar*, the Supreme Court quotes with approval from the Quebec Court of Appeal decision in *Lexus Maritime v. Oppenheim Forfait GmbH*, [1998] Q.J. No. 2059, online: QL (QJ), which held that the following ten factors were relevant, but not individually determinant:

1. The parties' residence, that of witnesses and experts;
2. the location of the material evidence;
3. the place where the contract was negotiated and executed;
4. the existence of proceedings pending between the parties in another jurisdiction;
5. the location of Defendant's assets;
6. the applicable law;
7. advantages conferred upon Plaintiff by its choice of forum, if any;
8. the interests of justice;
9. the interests of the parties; and
10. the need to have the judgment recognized in another jurisdiction.

Each of these factors has been the subject of extensive commentary and case law. It will be apparent that the factors to consider in an international matter are very similar to those considered in an interprovincial matter.

iv. Forum Shopping

As the House of Lords in *Spiliada* (still the leading English decision on *forum non conveniens*) stated at 465: “Any dispute over the appropriate forum is complicated by the fact that each party is seeking an advantage and may be influenced by considerations which are not apparent to the judge or considerations which are not relevant for his purpose.”

One forum may give one party a personal or substantive and procedural juridical advantage, and will generally cause its opponent an offsetting disadvantage. Advantages of a certain forum for the plaintiff may include: more favorable limitations periods or time bars; the availability of legal aid or contingency-type fee arrangements; the likelihood of a higher quantum of damages; the possibility of punitive damages; the court’s power to award interest; the availability and extent of discovery procedures; and, the availability of class or group litigation actions.

The Supreme Court in *Amchem* discouraged forum shopping and concluded that a defendant or potential defendant has two remedies for countering a plaintiff’s attempt to forum shop:

1. The defendant may seek an application for a stay of proceedings, which, as discussed above, will be determined by a court’s exercise of its discretion using the doctrine of *forum non conveniens*. Procedurally, the defendant will raise this in the forum where the plaintiff brought its cause of action.
2. Alternatively, the defendant may apply for an anti-suit injunction which may be granted by a domestic court in a foreign suit. Procedurally, the defendant will seek the injunction in the jurisdiction where it claims the action should be heard. If granted, it enjoins the plaintiff from bringing its action in the court of its choice. Although the injunction is an *in personam* remedy, it has the effect of restraining the foreign court, and “therefore raises serious issues of comity” [at page 913]

v. Anti-Suit Injunctions

Justice Sopinka in *Amchem* outlined the circumstances under which a domestic court might grant an anti-suit injunction. He noted that these occasions would be rare, because such an action would be necessary only when the foreign court did not stay the proceedings in its application of

the doctrine of *forum non conveniens* as pleaded by the defendant to the suit. As mentioned earlier, the courts in the United States and the United Kingdom also follow the doctrine, albeit with different results, as will become apparent in the large-scale litigation section of this paper.

After he reviewed *forum non conveniens*, Sopinka J. then set out the law in Canada with respect to anti-suit injunctions. At page 932 he indicates that to maintain comity, a domestic court should consider granting an anti-suit injunction only if:

- “1. the applicant (the defendant in the action) has failed in its attempt to obtain a stay of proceedings, *i.e.*, the foreign court has not declined to hear the matter by its exercise of discretion to stay or dismiss the action there; and
2. the domestic court is alleged to be the most appropriate forum.”

If these conditions are met, then a domestic court must consider whether it is either clearly the most appropriate forum, or, if no single forum is clearly more appropriate, whether it is the natural forum (*i.e.*, it has the closest real and substantial connection with the action and the parties), in which case it would “win out by default.”

As part of this analysis, the Court must, as a matter of comity, take into consideration that the foreign court has itself determined that it is the *forum conveniens*, *i.e.* it has turned its mind to the doctrine of *forum non conveniens* and has not declined jurisdiction. If the domestic court applies the Canadian *forum non conveniens* factors and finds that the foreign court could reasonably have concluded that there was no clearly more appropriate forum, then that decision should be respected, and the application for injunction should be dismissed.

Where the foreign court’s assumption of jurisdiction is contrary to Canadian principles of private international law as embodied in the doctrine of *forum non conveniens*, then the domestic court must consider whether the party whose suit would be enjoined would suffer an injustice if it were deprived of the personal or juridical advantages associated with its choice of foreign court. In other words, would the plaintiff suffer an injustice if the domestic court ordered the anti-suit injunction? The court makes this determination in the context of all the factors, including those previously outlined in *forum non conveniens* and in “real and substantial connection.”

The following process can be extracted from Sopinka J.'s summary comments on page 933:

1. having considered the advantages of the foreign jurisdiction to the plaintiff bringing the action and any inherent injustice that would arise if it were deprived of that jurisdiction;
2. and the corresponding disadvantage and injustice (if any) to the defendant of that foreign jurisdiction, then
3. if the jurisdiction of the foreign court would constitute an injustice, then the assumption of jurisdiction by the foreign court will be inequitable, and the party invoking the foreign jurisdiction can be restrained.

Granting an injunction to prevent such an injustice would not disregard the rules of comity, because “the foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the grounds of comity” [page 934].

vi. Coordination Between Two Fora

In *Amchem*, the Supreme Court discusses the possibility that both jurisdictions refuse to decline jurisdiction as neither is clearly more appropriate than the other and parallel proceedings result. In that case: “... the consequences would not be disastrous. If the parties chose to litigate in both places rather than settle on one jurisdiction, there would be parallel proceedings, but since it is unlikely that they could be tried concurrently, the judgment of the first court to resolve the matter would no doubt be accepted as binding by the other jurisdiction in most cases. [at page 914].”

C. Recognition and Enforcement of Foreign Judgments

To ensure that there is no confusion between what is meant by a foreign judgment, I will use the term “Canadian judgment” for judgments rendered by Canadian courts and “foreign judgment” for judgments rendered by courts outside of Canada.

1. At Common Law

i. Canadian Judgments

As noted previously, jurisdiction *simpliciter* and the recognition and enforcement of judgments are correlatives. This means that a Canadian court must recognize and enforce a judgment rendered by a federal court or by a court in a sister province. This is a constitutional imperative.

ii. Foreign Judgments

As mentioned earlier, the Supreme Court of Canada in *Beals* indicated, albeit in *obiter*, that the real and substantial connection test applies to questions of jurisdiction *simpliciter* in international matters. However, the primary issue in that case was whether the same test governs questions of the recognition and enforcement of judgments in the international context. In this respect, too, *Beals* represents the culmination of a line of Supreme Court of Canada case law.

The Supreme Court noted in *Spar* at paragraph 64 that assuming jurisdiction and recognition and enforcement were separate issues. As the issue before the Court was the former, it declined to rule on the latter: “As this case concerns the initial assumption of jurisdiction by a court, it would be premature to enter into any discussion of the application of the “real and substantial connection test” in respect of the recognition and enforcement...”

In *Canadian Conflict of Laws*, Castel notes at pages 2-4, 2-5: “If the Supreme Court confirms the application of the real and substantial connection test to foreign judgments, thereby permitting the enforcement of foreign default judgments, it would seem appropriate to revise the defences to enforcement in order to safeguard defendants from the particular kinds of unfairness that can arise in crossborder litigation.”

The kinds of “unfairness” referred to are well illustrated by *Beals*, where the defendants appealed a judgment awarded against them in a Florida court. The Beals, who were Florida residents, purchased a lot in Florida owned by the defendants for \$8,000. They commenced an action in Florida alleging that they were induced by fraudulent misrepresentations to purchase the wrong lot. The Saldanhas and the Thivys, all of whom were Ontario residents, chose not to defend the action

in Florida and, ultimately, a default judgment of USD260,000 was awarded against them.

The Canadian trial judge dismissed the Beals' action to enforce the Florida Court's judgment, holding that the Florida judgment had been obtained by fraud and that public policy precluded its enforcement in Ontario. The Ontario Court of Appeal held that the defences of fraud or public policy did not have any application in this case and that the correctness of the decision was irrelevant to the enforcement of the judgment. There were no newly discovered facts that could not have been discovered prior to the foreign judgment and presented by the defendants had they chosen to appear and defend the action. The defendants were not entitled to relitigate the claim under the guise of an allegation of fraud. There was no public policy reason not to enforce the judgment. Florida was the appropriate court for the determination of the issues.

Among the issues heard on appeal to the Supreme Court were:

- whether Canadian courts should, as a matter of public policy, refuse recognition of a foreign judgment where, on the facts, the judgment does not conform to Canadian views of fundamental justice;
- whether section 7 of the Charter applies to shield a Canadian resident from the enforcement of a foreign judgment;
- whether Canadian courts should give a broader interpretation to the defences of fraud, public policy and natural justice, as raised in *Morguard*, which referred to "fairness to the defendant through fair process" and remedies being available to foreign default judgments in certain cases where public policy issues are raised; and
- whether the failure of the defendants to appear in foreign proceedings stops them from seeking redress for failings in the processes of the foreign court, which ultimately results in a denial of fundamental justice.

The majority of the Supreme Court held at paragraph 19 that the *Morguard* "real and substantial connection" test, which is applied to interprovincial judgments, should apply equally to the recognition of foreign judgments. In coming to that conclusion, Major J., writing for the

majority, discussed the importance of comity and held at paragraph 27 that the doctrine "... must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility." The Supreme Court referred to the judgments in *Morguard* and *Hunt* as follows at paragraph 28:

"International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The principles set out in [*Morguard*] and further discussed in [*Hunt*] can and should be extended beyond the recognition of interprovincial judgments, even though their application may give rise to different considerations internationally. Subject to the legislatures adopting a different approach by statute, the 'real and substantial connection' test should apply to the law with respect to the enforcement and recognition of foreign judgments."

The Supreme Court then went on to discuss the application of various defences, commenting as follows at paragraphs 40-41:

"The defences of fraud, public policy and lack of natural justice were developed before *Morguard*, *supra* and still pertain. This Court has to consider whether those defences, when applied internationally, are able to strike the balance required by comity, the balance between order and fairness as well as the real and substantial connection, in respect of enforcing default judgments obtained in foreign courts.

These defences were developed by the common law courts to guard against potential unfairness unforeseen in the drafting of the test for the recognition and enforcement of judgments. The existing defences are narrow in application. They are the most recognizable situations in which an injustice may arise but are not exhaustive."

With respect to the defence of fraud, Major J. noted at paragraph 43 that "as a general but qualified statement, neither foreign nor domestic judgments will be enforced if obtained by fraud". He went on at paragraph 51 to draw a distinction between fraud going to jurisdiction and fraud going to the merits of the foreign judgment:

“... fraud going to jurisdiction can always be raised before a domestic court to challenge the judgment. On the other hand, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment.”

With respect to the defence of natural justice, Major J. stated the following at paragraph 59:

“As previously stated, the denial of natural justice can be the basis of a challenge to a foreign judgment and, if proven, will allow the domestic court to refuse enforcement. A condition precedent to that defence is that the party seeking to impugn the judgment prove, to the civil standard, that the foreign proceedings were contrary to Canadian notions of fundamental justice.”

Finally, with respect to the defence of public policy, the majority of the Supreme Court noted that “this defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice.” The Supreme Court then noted at paragraphs 75-76 that this defence is narrow in application:

“The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application.

The award of damages by the Florida jury does not violate our principles of morality. The sums involved, although they have grown large, are not by themselves a basis to refuse enforcement of the foreign judgment in Canada. Even if it could be argued in another case that the arbitrariness of the award can properly fit into a public policy argument, the record here does not provide any basis allowing the Canadian court to re-evaluate the amount of the award. The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason

that the claim in that foreign jurisdiction would not yield comparable damages in Canada.”

Lastly, at paragraph 78, the Supreme Court considered and rejected the argument that enforcement of the foreign judgment in question in *Beals* violated of section 7 of the *Charter*:

“The appellants submitted that the Florida judgment cannot be enforced because its enforcement would force them into bankruptcy. It was argued that the recognition and enforcement of that judgment by a Canadian court would constitute a violation of section 7 of the *Charter*. The appellants submitted that a *Charter* remedy should be recognized to the effect that, before a domestic court enforces a foreign judgment which would result in the defendant’s bankruptcy, the court must be satisfied that the foreign judgment has been rendered in accordance with the principles of fundamental justice. No authority is offered for that proposition with which I disagree but, in any event, the Florida proceedings were conducted in conformity with fundamental justice. The obligation of a domestic court to recognize and enforce a foreign judgment cannot depend on the financial ability of the defendant to pay that judgment. As section 7 of the *Charter* does not shield a Canadian resident from the financial effects of the enforcement of a judgment rendered by a Canadian court, I have difficulty accepting that section 7 should shield a Canadian defendant from the enforcement of a foreign judgment.”

2. Unilateral Legislation for Recognition and Enforcement of Foreign Judgments

The Uniform Law Conference of Canada (U.L.C.C.), at its annual meeting on August 12, 2003, adopted the draft *Uniform Enforcement of Foreign Judgments Act* (UEFJA) as a Uniform Act and resolved that it be recommended to the jurisdictions for enactment³. The UEFJA was

³ See <http://www.ulcc.ca/en/poam> – Proceedings of Annual Meetings, 2003, Fredericton, N.B. Civil Section Documents, Working Group on Enforcement of Foreign Judgments—Report and Revised Final Draft and Commentary as at July 22, 2004.

presented to the U.L.C.C. by the coordinator of the 1999-2000 Working Group, Kathryn Sabo⁴.

The following policy choices with respect to foreign judgments are embodied in the UEFJA⁵:

- A specific uniform Act should apply to the enforcement of foreign judgments rendered in countries with which Canada has not concluded a treaty or convention on recognition and enforcement of judgments.
- The proposed uniform Act applies to money judgments as well as to those ordering something to be done or not to be done.
- The proposed uniform Act applies to provisional orders as well as to final judgments.
- The proposed uniform Act rejects the “full faith and credit” policy applicable to Canadian judgments under the *Uniform Enforcement of Canadian Judgments* (UECJA).
- The proposed uniform Act identifies the conditions for the recognition and enforcement of foreign judgments in Canada. These conditions are largely based on well-accepted and long-established defences or exceptions to the recognition and enforcement of foreign judgments in Canada.
- Following on the heels of *Morguard*, the proposed uniform Act adopts as a condition for recognition and enforcement of a foreign judgment that the jurisdiction of the foreign court which has rendered the judgment was based on a real and substantial connection between the country of origin and the action against the defendant.

⁴ General Counsel, Private International Law Team, Department of Justice, GOC.

⁵ <http://www.ulcc.ca/en/cls/> – Commercial Law Strategy, Enforcement Law Projects as of June 24, 2003.

3. Multilateral Recognition and Enforcement of Foreign Judgments

Canada currently has two multilateral treaties in place that govern recognition and enforcement of judgments between Canada and the United Kingdom and Canada and France. Most provinces have embodied these and multilateral and uniform legislation now exist between the provinces and France and the UK. For example, in Alberta, the *International Conventions Implementation Act, Part 3*, adopts the *Convention Between Canada and the United Kingdom of Great Britain*.

However, there are interesting developments under way. In accordance with the Decision of Commission I of the 19th Session of the Hague Conference, an informal working group was set up to prepare a text on jurisdiction and on recognition and enforcement of foreign judgments in civil and commercial matters to be submitted to a special commission. Subsequently, the informal working group proposed that the objective be scaled down to a convention on choice of court agreements in business-to-business cases and prepared a draft which was discussed by the Special Commission at a meeting in December, 2003. This meeting was a multi-day negotiating session of member states at which each member state's formal position on each of the proposed articles of the draft convention was put forward, the purpose of the session being to further refine the draft text. The result of this meeting was a preliminary draft convention put forward in March, 2004 followed by a more recent draft in May, 2004⁶. A diplomatic conference will be held at some future date to put the draft text to a vote and possibly produce a final text, which would then form a treaty or convention open for signature and ratification. If Canada ratifies the final convention, the U.L.C.C. likely will recommend that uniform legislation be adopted by the provinces.

II. LARGE-SCALE LITIGATION

A. Different Types of Large-scale Litigation

Large-scale litigation (many like claims by similarly situated plaintiffs arising from a similar or common cause of action) is often erroneously thought to be synonymous with class action litigation. However, there are

⁶ See http://www.hcch.net/doc/jdgm_wd110_e.pdf.

three methods (with slight variations on a jurisdiction-by-jurisdiction basis) by which such large-scale litigation can originate:

1. **individual actions** whereby multiple plaintiff litigants file claims severally or jointly in either single or multiple jurisdictions, which are then consolidated either by the Court pursuant to their respective procedural rules or by agreement of the parties;
2. **representative actions** including those where a non-profit organization is formed, named as plaintiff, and then brings the action on behalf of the members of the non-profit. Membership to the organization is usually by subscription, which is often solicited by advertisement; and
3. **class actions** where a representative plaintiff is appointed by the Court to represent members of a defined class.

All of these methods tend to avoid a multiplicity of actions (post-consolidation), they streamline discovery, they generally allow a single court to hear, acquire the necessary expertise, and adjudicate a matter, and they frequently result in settlements. Unless the details of a case are reviewed, it is often difficult to distinguish between the methods that were originally used to bring the matter before the courts.

There are clearly differences between the three methods: the first requires that all plaintiffs be both known and named as parties to the action; the second allows potential “plaintiffs” with a common cause to join the named group plaintiff once the action is underway; whereas the third requires a class or subclass with common issues to be certified and very specifically defined, and not every plaintiff in a class action needs to be known or named. In other words, under the first two options, plaintiffs must take proactive steps to join the cause, whereas under a class action, once a plaintiff is by definition part of the certified class, they must take proactive steps to opt out of the class if they do not wish to be bound by the decision or the settlement.

A second major difference is the flexibility with which settlements may be made and how damages may be awarded. The first option allows the parties to settle pursuant to their agreement and individual plaintiffs to be awarded damages specific to their circumstances. Class actions generally result in a fixed amount of damages for each class or subclass of plaintiff, and the court must approve any settlement. Of course, there are exceptions to these generalities.

An additional misconception is that class actions are usually mass tort claims. In the United States, where mass tort class action litigation is thought to be rampant, only one of 55 class action litigation cases between 1966 and 1997 before the United States Supreme Court was a mass tort class action (*Amchem v. Windsor*, 521 U.S. 591 (1997) an asbestos-related claim)⁷. The other class action cases were securities and consumer cases related to financial losses as a result of unfair business practices, deceptive advertising, etc., employees' rights violations, other civil rights violations, and actions against the Government⁸.

B. Are Class Actions Necessary?

1. The Canadian Perspective

In 2001, the Supreme Court discussed the history and function of class actions in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 (“*Dutton*”). McLachlin C.J.C. described the general rule in equity that all like persons be joined as parties but concluded that this may not be practical or viable when the number of parties affected is very large. In such cases, the Courts of Equity have long recognized that the right of one or a few persons to sue for themselves and others similarly situated was permitted. She then continues at pages 548-549:

“The class action plays an important role in today’s world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class

⁷ D.R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action*, 11 Duke J. of Comp. & Int’l L. 179 at 180.

⁸ *Ibid.* at 185.

action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.”

2. The American Perspective

In July 2000, the Duke University School of Law and the University of Geneva Faculty of Law held a conference titled: “Debates over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?” (“Duke/Geneva Conference”). About 90 lawyers, academics, judges and law students from over twenty nations participated. Several of the papers given at the conference formed the basis of the Spring/Summer 2001 issue of the *Duke Journal of Comparative and International Law*, volume 11, number 2 (11 Duke J. of Comp. & Int’l L. 157).

In the foreword to that issue, Thomas D. Rowe, Jr.⁹, wrote:

“The sources of injury or threat [to large numbers of people] can vary greatly—a tragedy such as a hotel fire or airplane crash; widespread distribution and use of a drug or other product such as asbestos, tobacco, or Fen-phen; claimed violations of civil or human rights; environmental pollution; and business practices such as alleged price-fixing, misleading statements affecting values of publicly held securities, insurance overcharges, and violation of consumer protection laws.

However parallel the problems, the responses of different legal systems have varied widely among nations, with varying emphases on class actions, group litigation by associations or unions, regulatory enforcement, social compensation schemes, and other approaches. In the United States the class action has for the last third of a century been the most prominent but by no means exclusive mode—and has been a focus of much controversy. Only a few other nations have adopted the class action device even to a limited extent; and in many countries, particularly the civil law systems of continental Europe, resistance to the class action is strong, and responses to widespread-injury problems are sometimes limited. [footnotes omitted]”

⁹ Elvin R. Latty Professor of Law, Duke University School of Law.

In his keynote address to the Duke/Geneva Conference, titled “Compensating Large Numbers of People for Inflicted Harms”¹⁰, Senior United States District Judge Weinstein states that United States courts tend to attract global disputes for four reasons: procedural and jurisdictional rules helpful to plaintiffs, high money judgments, substantive law that favours plaintiffs, and a powerful plaintiffs’ bar capable of financing and prosecuting such cases.

3. The European Perspective

In “Multi-Party Actions: A European Approach”¹¹, Christopher Hodges notes that the usual justifications for the necessity of class actions, *e.g.*, deterring harmful corporate acts, fairly compensating victims for damages, etc., have never been empirically validated in Europe. He claims that European consumer legislation serves a similar purpose and that US-style class actions are simply used to:

“... leverage large sums of money from a corporation to claimant attorneys through contingency fees “earned” in return for settling a large number of claims of speculative value. Such a settlement may be in the corporation’s commercial interests in the United States context as it achieves closure on the potential for multiple individual claims arising over many states for an uncertain period, each with a cost and drain on resources and the risk of maverick jury awards.”

Hodges concludes that there is clear disdain for what “many Europeans view as a grossly overheated litigation market” based on “unpredictable potential for arbitrary variation in liability decisions, the potential for very large (again unpredictable and arbitrary) damages awards, and the disproportionate size of the commercial incentive to the plaintiffs’ lawyers.”

¹⁰ 11 Duke J. of Comp. And Int’l L. 165 at p. 167.

¹¹ 11 Duke J. of Comp. & Int’l L. 321 at 322.

4. The United Kingdom Perspective

As I will discuss later, the United Kingdom has adopted a hybrid approach, called group litigation, which straddles the European and US/Canadian positions. It recognizes the need for improving accessibility to, and efficiency of, claims by a large number of similarly situated plaintiffs, but its processes for dealing with these give the managing court much more latitude, because as Lord Steyn of the House of Lords noted at the Duke/Geneva conference¹², “we do not want a litigation-driven society.”

C. Class Action Legislation in Canada

In *Dutton*, the Supreme Court cited three important advantages that class actions have over a multiplicity of individual suits: judicial economy by avoiding unnecessary duplication of fact-finding and legal analysis which benefits both plaintiffs and defendants; fixed litigation costs which can be divided among a large number of plaintiffs, which means that the doors of justice do not remain closed to plaintiffs; and efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public.

There is currently class action legislation in British Columbia¹³, Saskatchewan¹⁴, Manitoba¹⁵, Newfoundland¹⁶, Ontario¹⁷, Quebec¹⁸ and Alberta¹⁹. Additionally, as the Supreme Court noted in *Dutton*, there is common law authority for class action suits.

¹² *Ibid.* at 344.

¹³ *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

¹⁴ *The Class Actions Act*, S.S. 2001, c. C-12.01.

¹⁵ *Class Proceedings Act*, C.C.S.M., c. C-130.

¹⁶ *Class Actions Act*, S.N. 2001, c. C-18.1.

¹⁷ *Class Proceedings Act*, S.O. 1992, c. 6.

¹⁸ *Code of Civil Procedure*.

¹⁹ *Class Proceedings Act*, S.A. 2003, c. C-16.5m as am. by S.A. 2003, c. 42, s. 4.

Plaintiffs in Canada also have the ability to seek joinder and consolidation of litigation.

1. Class Certification

It seems that the most difficult hurdle (and most litigated) that a potential class in Canada has to overcome is obtaining the court's certification of the class. The specific requirements pertaining to certification of a class vary between the various statutory instruments. There are also significant differences between them. For example:

1. a defendant in an action in Ontario and BC may only apply to have a class of plaintiffs certified if that defendant is involved in two or more actions. In Alberta, the defendant in any proceeding may do so;
2. a plaintiff may apply to have a class of defendants certified in Ontario, but neither BC or AB plaintiffs have the option of doing so. In effect, this means that a potential litigant may have to proceed against multiple defendants by name; and
3. in AB and BC, residents and non-residents are automatically divided into subclasses on the basis of residency. This is not the case in Ontario. As subclasses may opt out or opt in to the class in a different manner than members of a class, this has different ramifications.

For comparative purposes, Appendix 1 outlines the requirements for class certification under the Ontario, British Columbia and Alberta statutes. There are numerous differences between the various Acts as it pertains to how a class action proceeding may commence, who it includes, how residents and non-residents are treated, what the opt-in and opt-out provisions are, etc.

What impact do these differences have? They may create personal or jurisdictional advantages for both plaintiffs and defendants depending on their specific circumstances. This may drive "forum shopping," although it is unlikely that forum shopping within Canada would have the advantages of, for example, different damages quanta.

D. Class/Group Action Legislation Internationally

1. In the United States

The United States has had class action legislation in the form of Rule 23 of the *Federal Rules of Civil Procedure 28 U.S.C.A.* since 1966. However, more than 50 sovereign jurisdictions (federal and state) result in complexities in mass adjudication. There is a constitutional requirement for a jury in class actions²⁰.

Multi-district litigation can be consolidated pursuant to statute (28 U.S.C. §1407) by either party. This allows lawsuits which originated in both federal and state courts to be collected and assigned to a single court and judge where there are similarly situated plaintiffs. However, this only applies to pre-trial activity, which in most cases is enough, as there is a significant chance of pre-trial settlement.

2. In the United Kingdom

The United Kingdom has no class action legislation, but litigants are permitted to undertake group litigation. As the House of Lords noted in *Lubbe, supra* at page 280, “the conduct of group actions is governed by a recently-developed but now tried and established framework of rules, practice directions and subordinate legislation.” Part 19.III of the *Civil Procedure Rules (Amendment No. 2) 2003* (2003 No. 1242 (L.26)) and the two accompanying Practice Directions (19 and 19B) outline the specific requirements associated with the application of the Rule.

A Group Litigation Order (“GLO”) may be made by a court when there is or is likely to be a number of claims giving rise to the GLO issues: Rule 19.11(1). These orders must be approved at the highest level. For example, a Queen’s Bench GLO must be approved by the Lord Chief Justice: Practice Direction 19B s. 3.3(1). A group register is then established on which the claims managed under the GLO will be entered: Rule 19.11(2). A single court and judge will “assume overall responsibility for the management of the claims and will generally hear the GLO issues”: Practice Direction 19B, section 8.

²⁰ 11 Duke J. of Comp. & Int’l L. 165 at 172.

United Kingdom group litigation actions differ from class actions in that plaintiffs must affirmatively opt in to the cause (as opposed to opt out in class actions) and in doing so they agree to be bound by the result (although there are provisions for appeal). Joinder can be accomplished in varying ways, including membership in an association named as the representative group plaintiff. Naming an association as plaintiff means that not each and every member of the affected group/class need be known or named, so this circumvents the opt in requirements for individual plaintiffs.

Group actions have been widely used in medical litigation (blood products, intrauterine devices, human growth vaccine, tobacco, etc.), other personal injury cases, financial cases and environmental cases.

3. In Europe

In the rest of Europe (excluding the U.K.), large-scale consumer disputes are settled differently. In “Multi-Party Actions: A European Approach”²¹, Christopher Hodges notes that member states facilitate large-scale consumer disputes by either instituting out-of-court procedures or by creating joint representation action, in which a consumer organization takes action on behalf of consumers who have suffered individual harm caused by the same entity and having a common origin.

Further, *Directive 98/27/EC* permits consumer organizations to apply to courts in fellow member states for an injunction against infringements of consumer trading Directives. Additionally, there are multiple conventions which govern intra-EU issues pertaining to jurisdiction and the enforcement of judgments in civil and commercial matters.

The author concludes at page 327 that:

“European access to justice and dispute resolution mechanisms represent an approach to economic and social policy that rejects an adversarial approach and excessive or unnecessary transactional costs but favors conciliation at proportionate costs. European policy emphasizes social cohesion rather than an approach stressing the individualistic vindication of personal rights.”

²¹ 11 Duke J. of Comp. & Int’l L. 321 at 322.

E. Class Action/Group Litigation and Conflict of Laws Interrelationships

There is a strong interrelationship between class or group litigation and conflict of laws jurisprudence whenever plaintiffs or defendants are located in different jurisdictions. In Canada, the United States and the United Kingdom, case law and legislation supports the availability of a domestic forum for members of the class or group that are non-nationals.

1. In Canada

The three major class action-related cases that have been heard by the Supreme Court are *Dutton*, which involved non-resident foreign investors who suffered damages as a result of debentures purchased to facilitate their immigration application, *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158, 2001 SCC 68, which involved damages to Canadian residents allegedly caused by a waste disposal site and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69, which involved residential schools. All of these cases dealt with issues pertaining to the certification of a class, so the relationship between class actions and conflicts of laws cannot be examined in these cases.

The Ontario and BC courts have had occasion to decide cases where the relationship between class actions and conflict of laws was material, however these were in the context of mostly Canadian resident class members. The defendants have been both Canadian and non-Canadian foreign persons.

In *Carom v. Bre-X Minerals* (2000), 1 C.P.C. (5th) 62 (Ont. C.A.), leave to appeal refused (2001), 283 N.R. 399 (S.C.C.), the Court held that Ontario's real and substantial connection with the subject matter of the action allowed the Court to take jurisdiction over the matter on behalf of non-resident class members. Further, its class action legislation permitted any person with the right of action regardless of residence to be included as a member of a class.

In *Harrington v. Dow Corning Corp* (2000), 193 D.L.R. (4th) 67, 2000 BCCA 605, a case dealing with silicone breast implants, non-resident members formed a subclass. The defendants argued that British Columbia courts could not take jurisdiction over these non-residents because there was no real and substantial connection between them and the forum. For example, they were not resident in British Columbia and they did not receive their implants in British Columbia or from British

Columbia doctors. However, the Court of Appeal concluded that there was a real and substantial connection that allowed the British Columbia court to assume jurisdiction because of the existence of a common issue between the residents and the non-residents.

This was also the finding in *Wilson v. Servier Canada Inc.*, (2000), 50 O.R. (3d) 219 (Ont. Sup. Ct.), leave to appeal refused (2000), 52 O.R. (3d) 20 (Ont. Div. Ct.), leave to appeal refused (2001), 276 N.R. 197 (S.C.C.). That case dealt with the drug fenfluramine, which allegedly caused heart problems in those that used it for dieting. Class action proceedings included Canadian plaintiffs in all provinces and one of the defendants was a French corporation. That defendant argued that French law would not enforce the Canadian judgment because France had “blocking legislation” and because it did not recognize class actions. Despite that argument, the Court held that it was up to the plaintiffs to decide where to bring their action and that it had jurisdiction as long as Ontario had a real and substantial connection to the matter. Further, if French law required a retrial of the action in France, this was not a matter with which the Court need concern itself, because it was up to the plaintiffs to weigh the disadvantages thereof.

The Ontario court stressed that the opt-out provisions in their legislation allowed members of a class to opt out so the Ontario courts would not be imposing its jurisdiction on unwilling plaintiffs, whether they are Canadians or foreign nationals: *Wilson, Cheung v. Kings Land Development Inc.* (2001), 14 C.P.C (5th) 374 (Ont. Sup. Ct.), leave to appeal refused (2002), 156 O.A.C. 73 (Ont. Div. Ct.).

In summary, it seems that in Canada (or at minimum in Ontario and B.C.), once jurisdiction *simpliciter* over the matter has been established (and *forum non conveniens* declined, if it is raised), then non-resident plaintiffs can be included in the class or subclass if they have a common issue with resident members of the certified class. This probably applies to both Canadian residents and to non-Canadian residents. Whether the non-resident class member’s country of residence or citizenship allows class actions seems to be irrelevant.

As discussed earlier, there are two parts to the application of conflicts of law: assuming jurisdiction and recognition and enforcement of judgments. As it pertains to assuming jurisdiction, it seems that the treatment of class actions and individual plaintiffs’ actions do not differ in their application of conflict of laws jurisprudence. Recognition and

enforcement of another jurisdiction's class action judgment would follow the same process outlined in Section II, Part C, above.

2. In the United Kingdom

As noted above, group litigation actions are available in the United Kingdom. In *Lubbe, supra*, over 3,000 claimants participated in an action against Cape Plc., an asbestos mining company, alleging that their exposure to asbestos caused them personal injury, and in some cases, death.

The ability of non-residents to be parties to group litigation is similar to that which exists in class actions in Canada and the United States. *Lubbe* dealt with the issue of whether lower courts were correct in their refusal to decline jurisdiction over the matter on the basis of the defendants' *forum non conveniens* argument. It was the defendant's position that South Africa was clearly the *forum conveniens*. It argued that despite the fact that the initial plaintiff was a British citizen resident in England, all of the other 3000 plaintiffs were South Africans citizens resident in South Africa, South Africa was where all of the alleged asbestos exposure occurred, the wholly owned subsidiary that ran the asbestos facilities was resident there, all of the evidence and the witnesses were located there. It is instructive to follow the case through its various proceedings because it deals with both group and the conflict of laws.

In response to the defendants' application for a stay of proceedings of *Lubbe's*²² claim, the Queen's Bench judge agreed that South Africa was the natural forum for the trial of the action, and the proceedings were stayed pursuant to his exercise of discretion using the doctrine of *forum non conveniens*. An appeal by the plaintiffs was allowed. The Court of Appeal found that the defendants had not shown that South Africa was "clearly and distinctly the more appropriate forum" (also the Canadian test for *forum non conveniens*). Leave to appeal to the House of Lords was refused. Hundreds of new claims by South Africans using British solicitors poured in.

²² A British citizen and resident.

The defendant applied to stay all of the proceedings, including that of the original plaintiff, on the grounds of *forum non conveniens*. The lower court gave direction to consolidate the proceedings into a group litigation action. The stay was heard and the lower court again concluded that South Africa was clearly and distinctly the more appropriate forum. A second appeal was launched and this time the Court of Appeal agreed and described the factors that pointed to South Africa as the appropriate forum as “overwhelming.” It concluded that South Africa had both the real and substantial connection²³ between the claim and the forum and that public interest and group litigation action considerations including expense and convenience also pointed to South Africa. Further, the Court of Appeal noted that despite the fact that legal aid and contingency fee arrangements might not be available as the plaintiffs’ had argued, the South African courts are held in high repute and that legal aid may become available. Leave to appeal to the House of Lords was allowed.

How then did the House of Lords justify its conclusion that the *forum conveniens* was England? The Court held that *Spiliada* applied, *i.e.*, the defendant’s proposed forum be clearly and distinctly more appropriate than England, and that the court must be satisfied that there is another forum of competent jurisdiction and that the case may be tried more suitably for the interests of all the parties and the ends of justice in that jurisdiction.

It also held that the plaintiff’s allegations about the absence of legal aid or other form of financial assistance, including the availability of contingency fee arrangements, was not determinative. The House of Lords concluded that [at pages 286-287]:

“The proper approach therefore is to start from the proposition that a claimant who is able to establish jurisdiction against the defendant as of right is entitled to call upon the courts of this country to exercise that jurisdiction. So, if the plea of *forum non conveniens* cannot be sustained on the ground that the case may be tried more suitably in the other forum ... the jurisdiction must be exercised—however desirable it may be on grounds of public interest or public policy that the litigation be conducted elsewhere and not in the English Courts.”

²³ The Canadian test for jurisdiction *simpliciter*.

In summary, the presence of non-resident plaintiffs in a United Kingdom group litigation action does not alter the conflict of laws rules that exist in England; as long as a single plaintiff is a resident citizen that is entitled to bring an action in England as of right and there is no clearly and distinctly more suitable forum elsewhere (and this seems to be a difficult hurdle to overcome), then a group litigation may be heard in England.

3. In the United States

A well-known United States case that involved non-resident class litigants arose when over 2000 residents of Bhopal, India lost their lives and over 200,000 were injured as a result of a lethal gas leak from a chemical plant operated by Union Carbide Corporation (UCC) and the Union of India (India). There has been individual and class action litigation underway since the 1984 disaster occurred.

The first big wave of class action litigation was consolidated in the United States District Court for the Southern District of New York; there were 145 claims representing about 200,000 plaintiffs. The defendant, UCC, had argued that the United States court should stay the consolidated action on the grounds of *forum non conveniens*.

In a 63 pages opinion, District Judge Keenan's judgment (*Re Union Carbide Corporation Gas Plant Disaster at Bhopal*, 634 F.Supp. 842 (S.D. N.Y., 1986)) agreed with the defendant and dismissed the lawsuits before him on three conditions: that UCC consent to the jurisdiction of the courts in India, that it would satisfy any judgment ordered by those courts provided that they "comport with the minimal requirements of due process, and that the UCC be subject to discovery under United States civil procedure legislation. UCC appealed the conditions attached to the dismissal of the law suit and succeeded: *Re Union Carbide Corporation Gas Plant Disaster at Bhopal*, (1987), 809 F.2d 195 (C.A.) ("*Re Bhopal*"). An action was then brought by India in the District Court of Bhopal and the Supreme Court of India approved the settlement agreement in 1991.

District Judge Keenan's judgment [at page 845] considered the doctrine of *forum conveniens* and the "touchstone" cases of *Gulf Oil v. Gilbert* (330 U.S. 501, a 1947 decision of the United States Supreme Court) and *Piper Aircraft v. Reynolds* (454 U.S. 235, a 1981 decision of the United States Supreme Court). He notes that *Piper* established that the Court is advised to determine first whether the proposed alternative forum

is “adequate,” and it should then consider relevant public and private interest factors. In *Piper*, the court concluded that the presumption that a plaintiff’s choice of forum was entitled to great deference was decreased when the plaintiff was foreign. This was the footing upon which the Court then proceeded. The fact that 9 of approximately 200,000 plaintiffs were United States citizens was determined by the Court to be insignificant.

The adequacy of the alternative forum comprises a number of factors, including the defendant’s amenability to the alternate forum. The relative attractiveness of the United States system to foreign plaintiffs is not a factor unless the alternative forum’s remedy would likely be so “clearly inadequate or unsatisfactory that it is no remedy at all” [page 846]. The Court concluded that the defendant was amenable to the alternate forum and that India’s legal system did not constitute a much less adequate system.

Having met the first part of the test, the Court then turned to the consideration of the private interest considerations, which include sources of proof, access to witnesses, possibility of view. All of these factors weighed heavily in favor of India as the preferred forum. In its consideration of the public interest concerns, the Court considered the administrative burden that would arise if litigation were handled at places other than their place of origin, that jury duty should not be imposed on people in a community that has no relation to the litigation and that there is a public interest in having localized controversies decided at home. Again, the Court held the public interest balance was heavily in favor of India as the proper forum. It considered both the sheer size of the proceedings, which it concluded would unfairly tax the American legal system, and the interests of the Indian government and its citizens were significantly greater than those of the United States.

4. Comparing Canada, the United Kingdom, and the United States

Assuming that there are resident national plaintiffs living in each of Canada, the United States and the United Kingdom, where could or should a class or group litigation action be undertaken? Should there be a single action worldwide or should each country’s plaintiffs bring an action in their own courts?

i. Inclusion of Non-resident Plaintiffs

There is a paucity of Canadian cases that have expressly dealt with the issue of whether to hear a class or representative matter where the majority of the plaintiff class members are non-residents. In *Interclaim Holdings Ltd. v. Down*, [1999] 253 A.R. 119, 1999 ABQB 892, Kent J. of the Alberta Court of Queen's Bench struck the representative portions of a Statement of Claim in a class action decision on the grounds that judgment, if granted, would not be binding on the foreign parties, because all of the named and unnamed plaintiffs were not residents of Alberta. This, she reasoned, would mean that the principle of *res judicata* may not apply and that such a plaintiff could then sue elsewhere. This decision was appealed to the Alberta Court of Appeal, which decided on February 4, 2004, in light of certain factual changes and of the Supreme Court's intervening decision in *Dutton*, that the matter should be reheard by the Court of Queen's Bench²⁴.

It is interesting to compare *Lubbe* and *Re Bhopal*, in which *forum non conveniens* was argued, with differing outcomes. In both cases, virtually all of the plaintiffs were non-resident citizens, the cause of action occurred abroad, the facilities were run by local nationals, and the witnesses, etc. were located abroad. What then accounts for the different outcomes?

The House of Lords declined to follow *Re Bhopal* in *Lubbe* stating at page 287 that determining "where a case ought to be tried on broad grounds of public policy" is not a factor for consideration in the United Kingdom because the court "is not equipped to conduct the kind of inquiry and assessment ... that would be needed if it were to follow that approach" and because these interests are not determinative of whether justice will be better served in one forum over the other. As noted previously, public policy factors figured prominently in the United States Court's decision.

The other determining factor seems to have been that the role of the parent company was much more significant in the view of the English court than in the view of the United States court. In *Re Bhopal*, the United States Court agreed with defendant UCC's submission that their role as the United States parent company was minor, and that in all respects it had distanced itself from the Indian operation. Although this was also the case

²⁴ (2004), 44 C.P.C. (5th) 42, 2004 ABCA 60.

in *Lubbe*, the House of Lords still attached great weight to the parent company's duty vis-à-vis the plaintiffs.

In *Wilson, supra*, the Ontario Supreme Court opined on whether the corporate veil should be pierced and the parent company held directly responsible for the actions of its subsidiary company in a class action suit. The Court held that the usual stringent test of piercing the corporate veil would apply, but that the protection provided by the corporate veil was not absolute [paragraphs 21-22].

ii. Plaintiff Compensation Comparisons

It is very difficult to empirically compare plaintiff compensation across jurisdictions, even where the plaintiffs are seemingly similarly situated. For example, in a mass tort class action, the precise facts that gave rise to the cause of action are often different, the tort systems, while similar, are not identical, there are differences in the plaintiffs' countries delivery and payment for medical services, there are different costs of living which affect the amount of settlement, there are different fee structures for counsel, etc. However, there is one example of very recent class action litigation that may be used for comparison purposes; diet drugs containing fenfluramine.

In the United States, about 4 million potential class members existed, and a court-approved settlement was reached in *Brown v. American Home Products Corporation Diet Drugs*, 2000 U.S. Dist. LEXIS 12275²⁵.

The comparable class action in Canada is *Knowles v. Wyeth-Ayerst Canada Inc.*, (2001) 16 C.P.C. (5th) 330; online: QL (OJ) (Ont. Sup. Ct.). The Court there also approved a proposed settlement. In that decision Cumming J. discussed the settlement agreement in the context of the already agreed upon United States settlement agreement.

He noted at paragraphs 38-39:

“[the United States decision] provides one standard by which to measure the proposed settlement of the Canadian class action at hand... There are, of course, significant differences in the sizes of the class in each country, the delivery of and payment for medical

²⁵ An appeal from that decision was dismissed at 2003 U.S. Dist. LEXIS 23717.

services, and in respect of the two tort systems (for example, there is the potential for adverse cost awards in Canada, there is a cap on general damages in Canada and there is a greater risk of punitive damage awards in the United States).”

Justice Cummings then outlined additional factors which meant that the settlement amounts could not be readily compared. These factors included differences in the costs of notice and administration being handled differently, the different treatments of the settlement trusts, secondary opt-provisions which only exist in the United States, and the respective finality of the settlements. In summary, he concluded at § paragraph 48 that: “Considering the totality of the respective settlements, in my view the Canadian settlement is comparable to the settlement in the United States.”

As these are very recent cases and one of the few instances where the facts are somewhat comparable, it might be possible to conclude from them that settlements which, in the case of class actions must be approved by the Court, will be comparable between Canada and the United States, as the criteria used by both courts is that the settlement must be fair, reasonable and in the best interests of the class.

Despite the fact that these diet drugs were sold worldwide, I was unable to find any litigation underway in other countries, including the United Kingdom.

iii. Global Class Action vs. Country-by-Country Class Action or Group Litigation

Although it seems that truly global class actions are possible (see for example, holocaust victims access to compensation funds established by Germany, Austria, Swiss banks, etc.), most class actions seem to be brought by plaintiffs on a country-by-country basis, even where the plaintiffs are seemingly similarly situated, for example, blood products, silicone breast implants, and fenfluramine drugs.

Perhaps this is explained by the differences that were outlined above. For example, there is different legislation and common law pertaining to tort actions and environmental legislation varies from country to country as does securities legislation. Damages awards, which are generally awarded to members of a class do not generally account for the differences that would exist in the cost of living, medical care, etc., that plaintiffs residing in different countries would enjoy.

CONCLUSIONS

As borders become less of an impediment to the conduct of business and personal affairs, there is a recognition by governments and courts that there needs to be standardized doctrines for the recognition and enforcement of foreign judgments. The Supreme Court of Canada in *Beals* is the most recent Canadian example. The forward movement of the Hague Conference is another. In the realm of class actions, for some time now there has been a propensity to settle large-scale class actions. While in Canada this does not stem from a concern about the unpredictability of jury awards as it does in the United States, there is a significant cost to massive class action litigation which itself can be daunting. Secondly, class actions are being used as a vehicle to correct or regulate apparently abusive behaviour by multinational corporations or lax regulation of those corporations by government.

There are some concerns that these trends raise. How does large-scale international litigation affect the relationship that each citizen has with the administration of justice in his or her country? Although it is not a subject for discussion every day, people still assume that there will be a strong system of dispute adjudication when it is needed. Indeed, it is the certainty that such a system exists that comforts the business community and the public. One of the biggest problems that most judicial systems are struggling with is the rising costs of taking a case before a judge for adjudication. That problem is magnified in complicated medical malpractice or environmental cases where the technical nature of the evidence and the likely involvement of multinational corporations result in vast pretrial document and oral discovery. For that reason, large, multijurisdictional class actions seem like the answer. However, what effect does that have upon the person who may be a party to such an action? Take a father in a small town in Alberta who was prescribed a drug which has caused him serious and permanent health problems. As a result, his family is suffering significant emotional and financial strain. A class action is commenced in Toronto. For one reason or another, the action is unsuccessful and there is no recovery. The family who has been counting upon the action is not in the courtroom to see how the case is proceeding. They have no realistic contact with their lawyer. All they know is that this is part of the “justice system” and that justice system has done them wrong. Would it not have been preferable to have the trial in Edmonton or Calgary? The connection with the lawsuit would have been real and their understanding of why the action was unsuccessful would have been more informed. Remoteness

may result in a loss in a citizen's connection with the justice system which in turn becomes disdain for the judicial system. Surely, it is necessary for a strong judicial system that people feel that they are a part of that system. I am not suggesting that this is a reason to avoid or abandon multijurisdictional actions. It is a cautionary note that the judges and others must keep in mind in managing and trying such cases.

The second concern is the potential devaluation of the class action. According to the Rand Institute for Civil Justice, a survey of over 1000 class actions in the United States in the late 1990s showed that the average compensation received by members of a class ranged from \$6 to \$1500 in consumer actions and \$6400 to \$100,000 in mass tort actions²⁶. Are big class actions being seen by members of the public as a way to make a few dollars rather than to redress real wrongs?

Finally, to the extent that class actions try to change regulatory policy, is that really the role of the courts? To take an extreme example, an article by Adam Liptak in the New York Times²⁷ talks about recently successful actions and the concern it raised with the Bush administration. One of the examples was an order by a judge in New York that Iraq pay \$1 billion to soldiers captured and tortured in the first Gulf War. The article quotes a State Department lawyer, William H. Taft IV, as saying that such orders are not only costly but potentially damaging to American foreign policy. Who is right or wrong in that case is not the point. It raises the question of whether the courts should be regulating (or, in the example, arguably setting foreign policy) when this is properly the role of city councils, legislatures and parliaments. Or, is the court obliged to do so in the absence of governmental action?

²⁶ "Class Action Dilemmas: Pursuing Public Goals for Private Gain".

²⁷ August 3, 2003.

Appendix 1 – Class Action Summary

Requirement	Ontario <i>Class Proceedings Act, S.O. 1992, c. 6</i>	B.C. <i>Class Proceedings Act, R.S.B.C. 1996, c. 50</i>	Alberta <i>Class Proceedings Act, S.A. 2003, c. C-16.5, as am. by S.A. 2003, c. 42, s. 4</i>
How is a plaintiff's class proceeding commenced?	<p>One member of the class may commence a proceeding on behalf of the members of the class (s. 2(1)).</p> <p>Any party to a proceeding against two or more defendants may make application for a <u>class of defendants</u> (s. 4)</p>	<p>One member of a class <u>resident in BC</u> may commence a proceeding on behalf of a class (s. 2(1)).</p>	<p>One member of a plaintiff's class may commence a proceeding on behalf of the class (s. 2(1)) and request certification of the class (s. 2(2)).</p> <p>A representative plaintiff is appointed by the applicant (s. 2(2)) or by the Court (s. 2(4)) and is certified. That plaintiff may be a non-profit organization (s. 2(6)).</p>
How is a defendant's class proceeding commenced?	<p>A <u>defendant to two or more proceedings</u> may, at any stage of the proceedings, make an application for certification of a class and a representative plaintiff (s. 3)</p>	<p>A <u>defendant to two or more proceedings</u> may, at any stage of the proceedings, make an application for certification of a class and a representative plaintiff (s. 3)</p>	<p>A defendant may, at any stage of the proceedings, make an application for certification of a class and of a representative plaintiff (s. 3(1)).</p>

Requirement	Ontario <i>Class Proceedings Act, S.O. 1992, c. 6</i>	B.C. <i>Class Proceedings Act, R.S.B.C. 1996, c. 50</i>	Alberta <i>Class Proceedings Act, S.A. 2003, c. C-16.5, as am. by S.A. 2003, c. 42, s. 4</i>
Conditions for class certification	The Court <u>shall</u> certify if: the pleadings or notice of application disclose a cause of action; there is an identifiable class of two or more that comprise a class of plaintiffs or defendants; the claims or defences raise common issues; a class procedure is preferable for resolving the common issue and there is a representative plaintiff or defendant who would fairly represent the class (s. 5(1))	The Court <u>must</u> certify the class if the conditions are met: the pleadings must disclose a cause of action; there is an identifiable class of 2+ persons, whose claims raise a common issue; the class proceeding is preferable for the fair and efficient resolution of common issues; a representative plaintiff exists to fairly and adequately represent the class (s. 4(1)).	Before certifying a class, the Court must be satisfied that: the pleadings must disclose a cause of action; there is an identifiable class of 2+ persons, whose claims raise a common issue; the class proceeding is preferable for the fair and efficient resolution of common issues; a representative plaintiff exists to fairly and adequately represent the class (s. 5(1)).
Subclass certification	Where the class includes members have claims or defences that are not shared by all class members and the court determines that these interests should be separately represented, then a representative plaintiff or defendant of that subclass may be certified (s. 5(2)).		Where there are subclasses (class members who, in addition to the common issues shared with all members of the class also have unique common issues with other members), a representative plaintiff of the subclass may also be certified (s. 7(1)).

Requirement	Ontario <i>Class Proceedings Act, S.O. 1992, c. 6</i>	B.C. <i>Class Proceedings Act, R.S.B.C. 1996, c. 50</i>	Alberta <i>Class Proceedings Act, S.A. 2003, c. C-16.5, as am. by S.A. 2003, c. 42, s. 4</i>
Non-residents	N/A	Class comprised of BC residents and non-residents must be divided into subclasses along those lines (s. 6(2)).	Where a class comprises residents and non-residents, they will be divided into subclasses (s. 7(3)).
Opting out and in	Any member of a class may opt out of the proceeding in the manner specified in the certification order: s. 9. [There are no special provisions for foreign residents].	A resident of BC may opt out of the class: s. 16(1) A non-resident of BC may opt into the subclass that exists for non-residents: s. 16(2)	A resident of Alberta may opt out of the class: s. 17(1)(a). A non-AB resident must opt into the subclass that exists for non-residents: s. 17(1)(b), (d) and s. 7(3). Persons that have been granted leave to opt out may conduct their own case: s. 17(4).
When is a class proceeding the preferable procedure for the fair and efficient resolution of common issues?	N/A	Whether the question of law or fact that is common predominates over the questions that affect only individual members of the class; whether class members have a valid interest in individually prosecuting separate actions: whether the	Whether the question of law or fact that is common predominates over the questions that affect only individual members of the class; whether class members have a valid interest in individually prosecuting separate actions: whether the

Requirement	Ontario <i>Class Proceedings Act</i> , S.O. 1992, c. 6	B.C. <i>Class Proceedings Act</i> , R.S.B.C. 1996, c. 50	Alberta <i>Class Proceedings Act</i> , S.A. 2003, c. C-16.5, as am. by S.A. 2003, c. 42, s. 4
		claims have been the subject of other proceedings and whether other means to resolve them are less practical and efficient; and whether there would be greater administrative difficulties in a class than would exist otherwise (s. 4(1)).	claims have been the subject of other proceedings and whether other means to resolve them are less practical and efficient; and whether there would be greater administrative difficulties in a class than would exist otherwise (s. 5(2)).