

# **Conflict of Laws and National Class Actions**

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### Introduction

The principles and rules of the conflict of laws have generally developed out of legislatures' and courts' needs to fashion appropriate responses in the face of proceedings involving parties resident in, wrongs committed in, or damages occurring in, differing jurisdictions. Given the nature of Canada's federation, for the purpose of the conflict of laws, each of the provinces is constituted as a separate legal unit, each possessing its own rules and each able to individually establish its own principles. In addition, federal principles and rules are interwoven into this fabric and come into play with respect to matters within the jurisdiction of the federal parliament, as set forth in section 91 of the *Constitution Act, 1867*.<sup>1</sup>

The emergence of class proceedings legislation in the common-law provinces of Ontario and British Columbia has tested the limits of these territory-based principles and rules by exposing the plain truth that mass torts do not often respect lines drawn on maps. While the courts in Ontario have stepped in to fill what could be perceived as a legislative gap by their recent creation of the common law national class, their work in this area is far from done.

Sooner or later the Supreme Court of Canada will be presented with an opportunity to reconsider its leading cases of *Morguard Investments Ltd. v. De Savoye*<sup>2</sup> ("*Morguard*"), and *Hunt v. T & N PLC*<sup>3</sup> ("*Hunt*") in the context of the allegations of an interprovincial mass wrong.

### The Constitutional Basis of Territoriality

An analysis of the emergence of national classes in class proceedings must begin with an overview of the constitutional principles which provide the legal foundation of our federal state. Essentially, our federal structure invests the central government with authority over matters of general and common interest. In contrast, the provincial level, at least on a theoretical basis, is vested with authority over matters of local concern. The expression of this division of powers is set forth in sections 91, 92, 92A, and 93 of the *Constitution Act, 1867*. One of the primary roles of the courts is to ensure

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1 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App II, No. 5 ("*Constitution Act, 1867*"). See generally J.G. Castel, *Canadian Conflict of Laws*, 3rd Ed., (Toronto: Butterworths, 1994) at 2.

2 *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077.

3 *Hunt v. T & N PLC*, [1993] 4 S.C.R. 289.

that the Parliament and the provincial legislatures legislate only on matters within their constitutional competence.

While there would not appear to be any doubt that, as a whole, the class proceedings acts in Ontario and British Columbia are presumptively valid, as falling within the heads of “property and civil rights in the province”,<sup>4</sup> or “the administration of justice in the province”,<sup>5</sup> the question remains whether, by the common law creation of national classes, the statutes have been construed to apply to matters outside of the competence of the provincial legislature.

At one time, the courts applied a very restrictive approach to the exercise of the provincial legislative power. This restrictive approach held that the right of the province to legislate in respect of civil rights was confined to persons resident in the province. It remains clear that, as a starting point, the provinces lack the power to legislate extraterritorially.<sup>6</sup> To determine the validity of legislation impugned as extra-territorial, the court is required to characterize both the purpose and the effect of the legislation. Provincial legislation, which is deemed to have principal and purposive interference with extra-provincial civil rights, will necessarily be *ultra vires*. On the other hand, where the legislation in question is in relation to property or civil rights within the province, but it has incidental or consequential effects on extra-provincial rights, it will not necessarily be determined to be invalid.<sup>7</sup> To be valid, the pith and substance of the provincial legislation must relate to matters within provincial legislative powers. Extra-provincial effects are tolerated only where the Court determines they are collateral or incidental.<sup>8</sup>

Since the provinces lack the power to legislate extraterritorially, the territoriality principle enshrined in the division of powers components of the constitution can act to control the application of the provincial conflict of laws rules. Ultimately, the unitary structure of our court system holds the power to reconcile provincial differences:

[S]ince appeals lie from provincial courts to the Supreme Court of Canada over the entire range of legal issues, that court can review the interpretation of local provincial laws by provincial courts although it cannot control the substance of these laws. This power enables the Supreme Court of Canada to unify the common law including the conflict of laws principles and rules of the provinces and territories.<sup>9</sup>

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4 *Constitution Act, 1867*, S. 92(13).

5 *Ibid.* s. 92(14).

6 *Royal Bank v. The King* (1913), 9 D.L.R. 337 (P.C.) (“Royal Bank”).

7 *Ladore v. Bennett*, [1939] 3 D.L.R. 1 (P.C.) (“Ladore”).

8 *Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S. C. R. to 97 at p. 332. This case reconciled the two previously mentioned cases by characterizing the pith and substance of the impugned legislation in the Royal Bank case as involving the interference with extra-provincial rights.

9 Castel, *supra* note 1 at 7.

As the Supreme Court stated in *Hunt*, through this exercise, the Supreme Court can act as a “unifying jurisdiction” over the provincial courts.<sup>10</sup> This is consistent with the mandate provided under the *Supreme Court Act* which establishes the Supreme Court of Canada as “a General Court of Appeal for Canada”, authorized by section 101 of the *Constitution Act, 1867*.

## Jurisdiction of the Courts

In addition to addressing the issue of the validity of the legislation on the basis of territoriality, a court must also ensure that it has jurisdiction to act where its decision may effect the legal rights of extraterritorial parties. Judicial jurisdiction in the context of the conflict of laws has been defined as, “the power and authority of a court to hear and determine an issue upon which its decision is sought in a case involving at least one legally relevant foreign element.”<sup>11</sup>

The seminal cases on the question of jurisdiction in the face of conflict of laws issues are the Supreme Court of Canada cases of *Morguard* and *Hunt*. The *Morguard* case, which analysed the issue of interprovincial judgment recognition and enforcement, established that judicial comity requires that the judgments of the courts of the provinces reflect the principles of “full faith and credit” and due process which are implicit in the Canadian constitution. In the *Morguard* case, the court addressed the prospect of plaintiffs pursuing actions in jurisdictions having little or no connection with the transaction or the parties involved. The solution was to demand a threshold test which merely required that the litigation have a “real and substantial connection” to the jurisdiction proposed:

It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply anachronistic to uphold a “power theory” or a single situs for torts or contracts for the proper exercise of jurisdiction.<sup>12</sup>

In the *Hunt* case, the Supreme Court commented directly on the considerations raised in *Morguard* respecting jurisdiction:

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10 *Hunt*, *supra* note 3 at 318.

11 Castel, *supra* note 1.

12 *Morguard*, *supra* at 1108.

They are constitutional imperatives, and as such apply to the provincial legislatures as well as to the courts...In short, to use the expressions employed in *Morguard* at p.1100, the “integrating character of our constitutional arrangements as they apply to interprovincial mobility” calls for the courts in each province to give “full faith and credit” to the judgments of the courts of sister provinces. This, as also noted in *Morguard*, is inherent in the structure of the Canadian federation, and, as such, is beyond the power of provincial legislatures to override. This does not mean, however, that a province is debarred from enacting any legislation that may have some effect on litigation in other provinces...But it does mean that it must respect the minimum standards of order and fairness addressed in *Morguard*... One must emphasize that the ideas of “comity” are not an end in themselves, but are grounded in notions of order and fairness to participants in litigation with connections to multiple jurisdictions.<sup>13</sup>

In other words, in *Hunt*, the court described the minimum standards of order and fairness required by the *Morguard* case as a constitutional prerequisite for the exercise of jurisdiction in the face of a potential conflict of laws. Accordingly, the application of the associated “real and substantial connection” test is a threshold inquiry which must be satisfied prior to a provincial court exercising its power and authority over a national class in a class proceeding.

### **National Classes by Statute or Common Law**

The establishment of national classes through the mechanism of the Ontario *Class Proceedings Act* (“CPA”) is a judicial creation. Even the draft legislation considered by the Ontario Attorney General’s Advisory Committee on Class Action Reform was silent on this topic. Instead of suggesting a legislative solution, the Committee merely stated the following:

Mass injury does not always honour provincial or national borders. Where potential class members or defendants reside out of province methods will need to be devised to accommodate the resulting logistical problems. Sub-classing of class members, for example, may address the problem in part. Uniform class procedures in all Canadian provinces would minimize concern over such occurrences. If all injured persons had access to such a procedure then uniformity of access to justice would occur regardless of how or where the mass loss occurred.<sup>14</sup>

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13 *Hunt*, *supra* note 3 at 324-325.

14 Ontario, *Report of the Attorney General’s Advisory Committee on Class Action Reform* (Toronto: Ministry of the Attorney General, 1990) at 39.

The Ontario Attorney General's Committee did not get its wish for "uniformity of access to justice". Not only did class proceedings legislation not quickly appear in any province or territory save British Columbia, but the one statute that was enacted shortly after the Ontario CPA contained a provision that was a material departure from the Ontario CPA on the subject of participation by non-resident class members.

The B.C. *Class Proceedings Act*, enacted three years after the Ontario CPA, allows B.C. residents to participate on the same "opt out" basis that the Ontario CPA envisions. This mode of participation relies on the provision of an effective court approved notice to absent class members. After the provision of such a notice, class members are deemed to have knowledge of the proceeding, and are required to opt-out of the action. If class members do not take a positive step to opt-out of the action, they are effectively deemed to have agreed to be bound by the results of the ultimate judgment in the action.

In B.C., however, non-residents also have a statutory basis for participation:

- 16(2) Subject to subsection (4), a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.<sup>15</sup>

The drafters of the B.C. *Class Proceedings Act* directly turned their minds to inter-jurisdictional issues. The Consultation Document, prepared for the B.C. Ministry of the Attorney General prior to the enactment of the legislation envisioned the possibility of a national class being certified in Ontario on an "opt-out" basis:

A class defined in a class action brought under the Ontario Act may purport to include individuals whose cause of action arose in B.C.. If such an individual did not opt out of the Ontario class action and attempted to sue the defendants in B.C., he or she would likely be met by the argument that he or she was bound by the Ontario judgment and was barred from bringing an individual action. The response of the B.C. litigant would be that the legislation in Ontario did not bind him or her. The availability of an expanded class action procedure in a number of provinces could result in several class actions involving the same defendant and the same issues being commenced in each jurisdiction. In some cases, this could undermine the goals of judicial economy which underlie class actions. These issues have not been resolved by the

Ontario legislation. In the U.S. national class actions, referred to as “multidistrict litigation”, are conducted under special rules and have been legitimized in court decisions.<sup>16</sup>

Court proceedings and academic commentary in Ontario had already suggested the emergence of an Ontario based national class. In fact, Professor Garry Watson indicated the possible emergence of a national class in the first certified class proceeding in Ontario, *Bendall v. McGhan Medical Corp.* (“*Bendall*”).<sup>17</sup>

This issue seems clearly to be present in the *Bendall* case. Mr. Justice Montgomery stated in his reasons that the plaintiffs submitted that the class be defined as “all persons who have had silicone gel implants”. His reasons do not address directly the question of class definition. Later in his reasons [at p. 168 C.P.C.] he stated, without elaboration, that “[t]here is an identifiable class of two or more persons that would be represented by the plaintiffs...”<sup>18</sup>

### **The Nantais Decision - the First National Class in Canada**

Although the *Bendall* case was not actually envisioned as a “national class” designed to allow participation by non-residents of Ontario who had received implants outside of Ontario, Professor Watson’s article and the *Bendall* case were cited with approval by Brockenshire J., the case management justice assigned to manage the case of *Nantais v. Telectronics Proprietary (Canada) Ltd.*<sup>19</sup> (“*Nantais*”), the first “true” national class certified in Ontario. *Nantais* sought certification of a class of approximately 1,125 Canadians (700 of whom resided in Ontario), who had been implanted with allegedly defective pacemaker leads manufactured by the Defendants. Two representative plaintiffs were proposed. There was no discussion of whether the proposed extra-provincial class members would be represented through the establishment of a subclass.

At the certification motion, one of the Defendants objected to the inclusion of the non-resident class members in the proceeding. In so doing, it argued that an Ontario court could not “take jurisdiction by default, by binding extra-provincial class members who have not opted out, and presuming to do so puts the defence in a double jeopardy

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16 British Columbia, *Class Action Legislation for British Columbia* (Victoria: Ministry of the Attorney General, 1994) at 22. The Report of the Proceedings of the 1995 Meeting of the Uniform Law Conference of Canada titled “A Uniform Class Actions Statute” contains exactly the same language as the B.C. Consultation Document (see paragraph 16). The recommendation follows: “Extra-provincial class members should be treated as a subclass and be required to opt in in order to be part of the class.”

17 *Bendall v. McGhan Medical Corp.* (1993), 16 C.P.C. (3d) 156 (Ont. Gen. Div.).

18 Garry D. Watson, *Initial Interpretations of Ontario’s Class Proceedings Act - The Anaheim and the Breast Implant Actions*, 18 C.P.C. (3d) 344 at 358.

19 *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Gen. Div.). Application for leave to appeal refused (1995), 25 O.R. (3d) 347, leave to appeal denied (1996), 7 C.P.C. (4th) 206 (Ont. C.A.).

situation, with non-resident class members being free to sue in their own jurisdiction despite a supposed resolution in a class action.”<sup>20</sup> In their opposition to the proposed class, the Defendant pointed to the provisions of the B.C. CPA which required non-resident class members to opt-in to the proceeding, thereby specifically acknowledging and accepting the jurisdiction of the B.C. court.

Brockenshire J. certified the case as a national class, relying on the Supreme Court’s decision in *Hunt*, and, in particular, upon that portion of the *Hunt* decision which stated, “...I see no reason why the provinces should not be able to legislate in the area, subject however, to the principles in *Morguard* and to the demands of territoriality ...”<sup>21</sup>.

The court in *Nantais* also relied heavily upon the U.S. Supreme Court’s decision in *Phillips Petroleum Coal v. Shutts*<sup>22</sup> (“Phillips Petroleum”). In *Phillips Petroleum*, and the cases that follow it, the U.S. approach to “multi-district litigation” has focussed on whether the parties have been afforded “due process” as opposed to analyzing the limitations on the legislative jurisdiction of the federations member states.

With respect to the rights of non-resident class members, the *Phillips Petroleum* court determined that three requirements be satisfied in order to effect the binding effect of a judgment: (1) non-resident class members must be adequately represented, (2) they must receive appropriate notice of the suit, and (3) they must be granted the right to opt out of the proceeding. The additional requirement of “minimum contacts” which was required to grant jurisdiction over defendants was not seen to be necessary in the case of non-resident plaintiffs because while an adverse judgment could extinguish their right to recovery, it would not subject them to the burden of “monetary or coercive obligations”. In addition to expressly rejecting the requirement of “minimum contacts” with respect to non-resident plaintiffs, the Supreme Court in *Phillips Petroleum* also rejected the suggestion that non-resident plaintiffs should be required to express consent to jurisdiction through an opt-in mechanism. Instead, the court relied on the fiction of deemed or implied consent by non-resident class members following the publication of notice and the running of an appropriate opt out period.<sup>23</sup>

The *Nantais* court also directed itself to the suggestion that, notwithstanding the certification of a national class, non-resident class members could bring proceedings in their home provinces:

...I do not see how this potential problem can prejudice the defendants. If, indeed, class members outside of Ontario are free to sue despite a class judgment here, how are the defendants any worse off than if the class was limited to residents of Ontario? Would the defendants, being

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20 *Ibid.* at 339.

21 *Ibid.* at 346, citing with approval *Hunt* at 326-327.

22 *Phillips Petroleum Coal v. Shutts*, 105 S.Ct. 2965 (1985).

23 Watson, *supra* note 18 at 35.

aware of the potentially possible problem, be any worse off if non-resident class members should later argue they were not bound by a decision, than if those persons simply opted out now?

Further, is this potentially possible problem really relevant to this action? It seems to me to be something to be resolved in another action (by a non-resident class member) before another court in another jurisdiction.

What the Defendant may have been driving at was the possibility that individual plaintiffs could be given two “kicks at the can”. Arguably, it would be possible for individual plaintiffs to ride along on the back of the Ontario class proceeding until they were dissatisfied by it (either because of a perceived inadequate settlement with the Defendants, or because of an unsuccessful result), and then commence proceedings in their home province.<sup>24</sup>

The defendant in *Nantais* appealed the certification decision of Brockenshire J. to the Divisional Court. In dismissing the application for leave to appeal, the Divisional Court addressed the argument that the Ontario legislature and courts had overreached their jurisdiction:

It is clear that the Ontario legislature and the Ontario courts are not simply imposing jurisdiction on non-residents. Those outside the jurisdiction who are included in the class are free to opt out in the same manner as those inside Ontario may do. Whether the result reached in Ontario court in a class proceeding will bind members of the class in other provinces who remained passive and simply did not opt out, remains to be seen. The law of *res judicata* may have to adapt itself to the class proceeding concept. In my respectful view the order of Brockenshire J. setting out a national class, finds powerful support in the judgment of La Forest J. in

*De Savoye v. Morguard Industries Ltd.*(1990), 76 D.L.R.(4th) 256, [1990] 3 S.C.R. 1077, 46 C.P.C. (2d) 1.<sup>25</sup>

The thrust of the Divisional Court’s decision adopts the same “wait and see” approach to the jurisdictional issues which was employed by Brockenshire J. in the court below. Whether the Divisional Court was correct, however, in suggesting that the opt out mechanism approved by Brockenshire J. did not impose jurisdiction is subject to some debate. While it is true that by affording non-resident class members the right to

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24 On the other hand, this would be a risky strategy which would involve the individual plaintiff in the subsequent action arguing against (and the Defendant arguing for) the extra-territorial application of the Ontario CPA.

25 *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 347.

opt out of the proceeding, they can effectively remove themselves from the jurisdiction of the Ontario court, the essence of such a mechanism is that participation is assumed. It would perhaps be more accurate to say that jurisdiction was imposed, but easily avoided. Setting aside the semantics, in the absence of taking the positive (and, in our experience, somewhat exceptional) step of opting out to avoid having one's rights determined by the judgment in the class action, there can be no doubt that the judgment has an extra-territorial effect based on the deemed knowledge created by the court-approved notice.

### **British Columbia's Rejecting of the "Minimum Contacts" Theory**

Ontario is not the only province to have considered the constitutional and jurisdictional implications of national classes. In the early 1997 case of *Harrington v. Dow Corning Corp.*<sup>26</sup> ("Harrington"), the British Columbia Supreme Court had the opportunity to consider these issues. The Harrington defendants advanced the position that, notwithstanding the express non-resident opt-in provisions contained in the B.C. legislation, only non-resident plaintiffs with a "connection" to British Columbia could be included in the class. In essence, they attempted to advance the "minimum contacts" argument which was rejected by the U.S. Supreme Court in the *Phillips Petroleum* case. In so doing, they put before the court the suggestion that prudence was demanded, lest British Columbia become "Texas north", with national class proceedings consuming the scarce resources of the courts at the expense of domestic litigation.<sup>27</sup>

Before dealing with the issue of the jurisdiction of the court, the court very briefly commented on the constitutional implications:

I am satisfied that the legislation is sufficiently open-ended that it can be read as confined by necessary implication to the limits of provincial jurisdiction, whatever those limits are, and no question of the constitutionality of the statute therefore arises.<sup>28</sup>

Later, referring to the argument of Plaintiffs' counsel, the court noted:

Counsel for the plaintiff respond that the extension of B.C. class proceedings to non-residents was a conscious policy decision of the B.C. legislature and that it is not for the courts to second-guess the legislature's decision, providing constitutional limits of jurisdiction are respected. I have already stated above that I am satisfied that the

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26 *Harrington v. Dow Corning Corp.*, 29 B.C.L.R. (3d) 88 (S.C.).

27 *Ibid.* at para 11.

28 *Ibid.* at para 10.

legislation does not attempt to exceed constitutional limits, but neither does it attempt to define those limits.<sup>29</sup>

In rendering its decision, the B.C. court in *Harrington* relied on the Ontario decision in *Nantais*. The *Harrington* court noted that in *Nantais*, the issue of greatest concern to the court was the problem of “passive non residents” who would be included in the litigation unless they opted out. In response, the B.C. court observed:

That issue does not arise under the B.C. statute which requires non-residents to opt in. *Nantais*, supra, is a considered decision on a similar but more far-reaching statute.<sup>30</sup>

Ultimately, as in *Nantais*, the *Harrington* court rejected the defendants’ argument that the participation of the non-resident plaintiffs should be disallowed on the basis of the “minimum contacts” theory:

The demands of multi-claimant manufacturers’ liability litigation require recognition of concurrent jurisdiction of courts within Canada. In such cases there is no utility in having the same factual issue litigated in several jurisdictions if the claims can be consolidated. . . It is that common issue which establishes the real and substantial connection necessary for jurisdiction. *Nantais* is a considered decision on the question which is otherwise largely a matter of first impression. I am not persuaded that *Nantais* is clearly wrong or inapplicable and accordingly I intend to follow it.<sup>31</sup>

Although the B.C. court’s decision in *Harrington* was built on a different statutory foundation than the *Nantais* decision, there are similarities. In both cases, the courts did not exhaustively address the constitutional issue of the extra-territorial effect of the legislation, but focussed on the *Morguard* principles as the basis for assuming jurisdiction. It was not until the 1999 case of *Carom v. Bre-X Minerals Ltd.*<sup>32</sup> (“Bre-X”) that the courts again had the opportunity to deal with the national class issue.

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29 *Ibid.* at para. 11. In fact, quite the opposite may be true. Often, a defendant’s objective when faced with an allegation of a wide scale mass wrong is to obtain “global peace”. The opt-in mechanism is not supportive of this objective because the defendant could continue to face litigation in various provinces across Canada. In contrast, a national class certified on an opt-out basis could provide global certainty, providing that the defendant ensures that the class notice is as broad and extensive as possible.

30 *Ibid.* at para. 12.

31 *Ibid.* at para 18.

32 *Carom v. Bre-X Minerals Ltd.* 43 O.R. (3d) 441 (Gen. Div.). In fact, both before and after the Bre-X decision, a number of national classes have been certified by the courts of Ontario and B.C. Certification in most of these cases, however, was granted on consent. See *McKrow v. Manufacturers Life* [1998] O.J. No. 4692 (Gen. Div.); *Macrae v. Mutual of Omaha Insurance Co.* (unreported, July 14, 2000, Court File No. 24257/96, Ont. S.C.J.); *Chada v. Bayer Inc.* (1998), 82 C.P.R. (3d) 202; *Webb v. K-Mart Canada Ltd.* (1999), 45

## Carom v. Bre-X Minerals Ltd.

In Bre-X, the plaintiffs brought a motion before Winkler J. on behalf of a number of proposed classes of persons across Canada who purchased Bre-X shares and suffered losses. The issue before the court was whether the Ontario CPA legislation applied to plaintiffs outside Ontario, and whether an opt out mechanism was appropriate for non-resident plaintiffs.

Several of the defendants advanced the position that because the Act was silent with respect to non-resident plaintiffs, such a class was inappropriate. Further, they argued that the proposed class definition affected civil rights outside the province and that it offended the principle of territoriality, and was, therefore, unconstitutional.

With respect to the first argument, the court found that the absence of a provision limiting the application of the Act to Ontario residents, “permits the inclusion of any person with a right of action, regardless of the location of his or her residence”, subject to constitutional considerations.<sup>33</sup> In coming to this conclusion, Winkler J. adopted the *dicta* of Mackenzie J. in the *Harrington* case which stated that the Ontario Act was a “similar but more far reaching statute” than the B.C. Act, as a result of the existence of the express opt in provision in that Act. In fact, Winkler J. noted that the existence of an opt in provision for non-residents in the Ontario CPA would, “limit rather than expand its current application”.<sup>34</sup>

In addressing the constitutional question, Winkler J. noted the defendants’ objected to the certification of a national class on the basis that because the Ontario legislature has no constitutional authority to affect civil rights outside of the province, the legislature could not confer power on an Ontario court to do so.<sup>35</sup> They relied on the interpretive presumption against extra- territorial application, and argued that the Act should be construed to conform with the constitution.

In response, Winkler J. noted that in the *Morguard* case, the Supreme Court found that the nature of interprovincial relationships was a basis for modifying the principle of territoriality in the context of the Canadian federal system. He further cited the *Hunt* decision for the proposition that the provinces were not barred from enacting legislation with some effect on litigation in other provinces, providing that the minimum

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O.R. (3d) 638; *Harrington v. Dow Corning Corp* (2000), unreported, November 8, 2000, [2000 BCCA 605]; *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (Gen. Div.).

33 *Ibid.* at 447. One court has taken this even further. In *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 at 404, the court suggests that, “[t]he lack of comparable class action legislation elsewhere in Canada, except for British Columbia and Quebec, is a telling argument for extending the reach of the Ontario legislation.” From a constitutional viewpoint, based on the division of powers, the exact opposite could be said to be true.

34 Bre-X, *supra* note 31 at 447.

35 i.e. Ontario, and the Ontario courts, cannot do indirectly that which they cannot do directly.

standards of order and fairness addressed in *Morguard* were respected.<sup>36</sup> Winkler J. summarized the constitutional implications as follows:

*Morguard* and *Hunt* permit the extra-territorial application of legislation where the enacting province has a real and substantial connection with the subject matter of the action and it accords with order and fairness to assume jurisdiction.<sup>37</sup>

After some analysis, the court concluded that the “real and substantial connection” was satisfied as a result of a variety of factors, including the existence of the head offices, subsidiaries, or business concerns of several of the defendants in Ontario, and the fact that the Bre-X shares were listed on the Toronto Stock Exchange.<sup>38</sup>

With respect to the proposed second consideration of “order and fairness”, the court rejected the defendants’ contention that both they, and the non-resident plaintiffs, would be prejudiced by an Ontario based national class action:

These arguments do not withstand scrutiny. The CPA is a procedural statute replete with provisions guaranteeing order and fairness.<sup>39</sup>

The court then reviewed the provisions of sections 9 (opt out), 10 (subsequent amendment/termination of certification order), 12 (power to make any order to ensure fair and expeditious determination of the proceeding), 13 (stay power to other proceeding), 14 (individual class member participation), 15 (power to order class member to attend discovery), 17 (notice, including identification of opt out time/method), and 19 (additional notice if required). In answer to the defendants’ concerns that non-resident plaintiffs could adopt a “wait and see” approach, the court noted that any attempted exercise of concurrent jurisdiction by a court outside of Ontario would be met with an argument based on the *Morguard/Hunt* principles which emphasized that the

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36 Bre-X, *supra* note 31 at 450.

37 *Ibid.*

38 *Ibid.* at 451. Winkler J. also commented on the defendants argument that the *Nantais* case did not address the constitutional implications of the national class which was certified: “Brockenshire J. adverted to the constitutional considerations and applied the principles set out in *Morguard* and *Hunt*...”, *Bre-X, ibid.* at 448.

39 *Ibid.*

taking of jurisdiction in one court, and the recognition of that judgment in another are correlatives. In other words, the court implied that judicial comity would require a court outside of Ontario to recognize and give effect to any Ontario judgment, presumably including the effect of that judgment on non-residents.<sup>40</sup>

### **A Further Analysis: the *Servier* Case**

In the recent case of *Wilson v. Servier Canada Inc.*<sup>41</sup> ("*Servier*"), the courts in Ontario had another chance to analyse the propriety of certifying a national class under the Ontario CPA. In this case, the plaintiffs proposed a national class consisting of all persons resident in Canada who were prescribed and ingested diet drugs marketed under the brand name Ponderal and/or Redux. Once again, the defendants objected to the certification of a national class. These objections were made on the basis that (1) the CPA was *ultra vires* the legislative authority of the Province of Ontario to the extent that it allowed the creation of a national class; and (2) the court lacked jurisdiction with respect to the claims of the non-resident class members.

Mr. Justice Cumming dealt first with the contention that the creation of a national class was *ultra vires* the provincial legislature. After setting forth the three applicable sections of s.92 of the *Constitution Act, 1867*, Mr. Justice Cumming set out the territoriality test:

The pith and substance of provincial legislation must relate to matters within provincial legislative powers, while extra-provincial effect must be merely collateral or incidental...Any Ontario statute must, of course, be construed to apply only to matters in relation to which the provincial legislature has the constitutional power to legislate.<sup>42</sup>

The court then opined that the CPA was not unconstitutional on the basis that the Province was legislating extraterritorially. Furthermore, Cumming J. went on to indicate that the provisions of s.92 of the *Constitution Act, 1867* do not limit the court's jurisdiction:

It is to be noted that s.129 of the 1867 Act provides that the court retains its pre-Confederation jurisdiction except as altered by Parliament or the

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40 This element of the decision, of course, presumes that the court in the other province would agree that the taking of jurisdiction was a proper application of the *Morguard/Hunt* principles.

41 *Wilson v. Servier Canada Inc.*, 50 O.R. (2000), (3d) 219 (S.C.J.)

42 *Ibid.* at 236.

legislature of the respective province under the new Constitution. Section 92 sets forth the exclusive powers of provincial legislatures. Section 92 does not limit the pre-Confederation jurisdictional reach of the courts. The third “whereas” clause in the preamble makes it clear that it is the authority of Parliament and the provincial legislatures, together with the nature of the Executive Government, that is being provided for in the 1867 Act. Thus, the referenced provisions of s.92 have no relevance in limiting the court’s jurisdiction.<sup>43</sup>

Assuming for the moment that the extra-provincial effects associated with the creation of a national class are “merely collateral or incidental” and that such a creation does not violate the constitutional division of powers by allowing an impermissible extension of the province’s restricted ability to have its legislation exert extraterritorial effects, the Ontario courts must also ensure that they have jurisdiction to affect the rights of non-resident plaintiffs. The court in *Servier* addressed the *Bre-X* decision in this regard, and suggested a modification to the application of the principles that were expressed in that case:

I prefer to restate this view of the law as follows. *Morguard* and *Hunt* stand for the proposition that if there is a real and substantial connection between the subject-matter of the action and Ontario, then the Ontario court has jurisdiction with respect to the litigation and can apply Ontario’s procedural law. [Emphasis in original].<sup>44</sup>

Ultimately, the court in *Servier* approved the national class proposed by the plaintiffs and, like the earlier courts in *Nantais* and *Bre-X*, permitted the opt out mechanism to stand for both Ontario residents and non-residents. In the final analysis, the objectives of the Ontario Act provided strong justification to determining a practical and workable solution which implicitly endorsed the “wait and see” approach to potential conflict of laws issues raised by the defendants:

If there are common issues for all Canadian claimants, this approach facilitates access to justice and judicial efficiency, and tends to inhibit potentially wrongful behaviour. This is to the advantage of all Canadians and to Canada as a federal state. This procedural flexibility serves in the nature of oil in the institutional and jurisdictional machinery of Canadian federalism.<sup>45</sup>

The defendant’s leave to appeal motion in *Servier* was brought on five grounds, the first of which was an objection to that aspect of the lower court’s decision which

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43 *Ibid.* at 237.

44 *Servier*, *supra* note 34 at 241. But note the discussion at pages 17-18 above, in which the application of s.28 of the Ontario CPA on non-resident plaintiffs can be seen to impair the substantive rights of the defendant in other provinces.

45 *Servier*, *supra* note 34 at 243.

approved the certification of the national class. The defendant's submissions on the leave to appeal motion did not take apparent issue with Justice Cumming's decision in respect of the territoriality issue but focussed instead on a purported absence of jurisdiction in the courts of Ontario to encompass potential plaintiffs who did not receive or consume the defective diet drugs in Ontario. In response, the court stated the following:

The product was prescribed, distributed and consumed not just in Ontario, but throughout Canada. For procedural convenience, the action was commenced in Ontario. To achieve the objectives of access to justice, judicial economy and behaviour modification, Canadian consumers should have the option of litigation in one action in one jurisdiction, if the consumer so chooses. The choice (which is available through the opt-out provision) should be that of the consumer, particularly when the defendants are not prejudiced by that choice.<sup>46</sup>

Just as in the court below, the Divisional Court appears to have given the objectives of the CPA significant weight in arriving at its decision. While there is no doubt that the court's decision is consistent with the objective of the Act, one cannot help but notice the absence of the type of analysis employed by the higher courts, and by the court in *Bre-X* in arriving at a determination respecting the existence of a "real and substantial connection" to Ontario.<sup>47</sup>

## Conclusion

Class proceedings consisting of national classes certified on an opt out basis provide sensible and practical solutions to complex inter-jurisdictional mass wrongs. The question of whether the extraterritorial impact of a national class has a sufficiently strong constitutional foundation, however, remains to be more fully addressed. On the other hand, it is clear that the courts are developing a considered body of law on the

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46 *Wilson v. Servier Canada Inc.*(2000), 52 O.R. (3d) 20, [2000] O.J. No. 4735 at para. 10, online (QL: ORP).

47 The defendant then applied for leave to appeal to the Supreme Court of Canada from this decision of the Ontario Divisional Court. The Supreme Court dismissed the leave to appeal application, with costs, on September 6, 2001.

issue of jurisdiction justified on the basis of the *Morguard/Hunt* principles including the “real and substantial connection” test.

On balance, assuming that the constitutional basis for national classes is sound, the opt out mechanism based on “deemed knowledge”, coupled with the notice provisions and subclass representation, where necessary, provide sufficient measures of “order and fairness” to protect the rights of non-resident class members. Throughout all of this analysis, however, it is critical to keep in mind that in the absence of uniform class proceedings legislation, national classes provide a mechanism to ensure judicial economy through a centralized determination of common issues. Perhaps, more importantly, national classes provide a means by which access to justice can be assured to those whose claims would otherwise be doomed to extinction by the economics of individual litigation.