Personal Jurisdiction over Non-Resident Class Members: Have We Gone Down the Wrong Road?

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Personal Jurisdiction over Non-Resident Class Members: Have We Gone Down the Wrong Road?

TANYA J. MONESTIER*

"It has not been easy to reconcile contemporary class-action practice with traditional adversary procedure."

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* Associate Professor, Roger Williams University School of Law. I would like to sincerely thank Martha Bailey, Barry Glaspell, Patrick Glenn, Bruce Pardy, Antonin Pribetic, and Janet Walker for their insightful comments in the preparation of this article. I would also like to thank Tyler McAuley for his excellent research assistance. Finally, a special thank you to David Coombs for his patience, support, and encouragement.

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I. INTRODUCTION

With class action regimes in Canada in their infancy, at least in relation to those
in the United States, Canadian courts are still filling some critical gaps in class action
jurisprudence. One such gap is in the area of the so-called “national” class action: a
class action in a provincial forum that purports to determine the rights of residents in
all Canadian provinces and territories. In reality, many “national” class actions are
more appropriately termed “multijurisdictional” or “interjurisdictional” since such
classes may not be truly national in scope.

One important matter yet to be resolved with respect to national or
multijurisdictional classes involves the issue of personal jurisdiction over nonresident
class members, that is, litigants who reside outside the province in which the class
action is brought. On what basis does an Ontario court have the power to bind, for
instance, an individual from British Columbia or Québec? Courts and
commentators have struggled to articulate a precise answer to this question. The
loose consensus appears to be that a court in one province has personal jurisdiction
over a class member in another province if there is a “real and substantial
connection” between the plaintiff class and the adjudicating forum. Divergent
approaches have developed with respect to the real and substantial connection test
as it applies to a nonresident plaintiff class. Some courts have merely required that
there be an issue common to all class members, resident and nonresident, to find

2. See, e.g., Janet Walker, Coordinating Multijurisdiction Class Actions Through Existing Certification
   Processes, 42 CAN. BUS. L.J. 112, 112 (2005) [hereinafter Walker, Coordinating Multijurisdiction Class
   Actions] (discussing the need for Canadian courts “to develop a means to regulate the scope of the
   multijurisdiction class actions that may be commenced in the same or related matters in different Canadian
   jurisdictions”); Canada Post Corp. v. Lépine, [2009] 304 D.L.R. 539, 2009 SCC 16 (discussing requirements
   of notice in the context of parallel provincial class actions).
jurisdiction; that commonality, in itself, supplies the real and substantial connection sufficient to assert jurisdiction over nonresident class members. Other courts have insisted that there be an actual link, in the sense of a nexus, between the nonresident plaintiff class and the adjudicating forum in order to ground jurisdiction. This lack of uniformity in the application of the real and substantial connection test is problematic for parties seeking finality in litigation. In particular, defendants cannot be assured that a settlement or judgment rendered in one province will in fact be enforceable in another since the enforcing court may conclude that the adjudicating court did not have jurisdiction over nonresident class members under its view of the real and substantial connection test.3 There is thus the possibility that a defendant who has proceeded on the assumption that a settlement or judgment will be res judicata will nonetheless be required to re-litigate the claim. This hardly promotes the principles of "order and fairness" which are said to lie at the heart of the Canadian conflict of laws.4

This article suggests that it is necessary to re-think whether a real and substantial connection is needed to ground jurisdiction over a nonresident plaintiff class. The real and substantial connection test, initially propounded by the Supreme Court of Canada in the landmark case of Morguard Investments Ltd. v. De Savoye,5 and later given constitutional status in Hunt v. T&N plc,6 was developed to govern the question of when courts can assume jurisdiction over an individual, out-of-province defendant. The test cannot be readily transposed to the separate question of whether a court has jurisdiction over an amorphous class of unnamed plaintiffs. Instead of focusing on the issue of whether there is a real and substantial connection between a nonresident plaintiff class and the adjudicating forum to support the assumption of jurisdiction, courts should re-orient their analysis towards ensuring that procedural safeguards are afforded to nonresident plaintiffs. If a nonresident class member is provided with sufficient notice, an opportunity to opt out, and adequate representation, an adjudicating court should be viewed as jurisdictionally competent and its judgment accorded preclusive effect. Re-conceptualizing jurisdiction in this way eliminates the possibility that an enforcing court will be able to second-guess the adjudicating court's view on whether the real and substantial connection test has been satisfied and gives defendants a measure of control over the ultimate enforceability of the class judgment. If a defendant actively ensures that the plaintiff class receives adequate procedural protections, it can resolve class litigation relatively secure in the knowledge that an enforcing court will not refuse to enforce a judgment or settlement on personal jurisdiction grounds.

This article proceeds as follows: Part I begins by addressing the overall benefits that flow from multijurisdictional classes with reference to the policy objectives underlying class actions. Part II critically examines the law in relation to personal jurisdiction over nonresident class members. It first notes that Canadian courts have generally accepted the principle that a court can assume jurisdiction over

5. Id. para. 47.
nonresidents in cases where there is a real and substantial connection between nonresidents and the adjudicating forum. It then examines and assesses the two main approaches that courts have used in determining whether the real and substantial connection test has been satisfied with respect to nonresident plaintiffs and addresses the problems associated with a lack of uniformity in court approaches to jurisdiction. Part III suggests that while these jurisdictional issues may be addressed either by courts simply adopting a uniform jurisdictional test or by permitting multijurisdictional classes only on an opt-in basis, it may be time to question the necessity for a real and substantial connection to ground jurisdiction. It argues that, as in the United States, jurisdiction over the nonresident plaintiff class should rest on the provision of adequate procedural safeguards: notice, an opportunity to opt out, and adequate representation.

There are several related issues that this article does not purport to tackle. First, it does not comprehensively address the myriad jurisdictional issues that arise in class action litigation. In particular, the article does not address the ongoing debate about whether a real and substantial connection between the adjudicating forum and an out-of-province defendant can ground jurisdiction over co-defendants with no connection to the forum. Second, this article does not discuss how multiple multijurisdictional proceedings are best coordinated—whether such coordination takes place through formal or informal judicial cooperation, the creation of a national class action database, the use of the existing doctrine of forum non conveniens, or some other mechanism. Third, this article considers only the issue of multijurisdictional classes within Canada. The enforcement of class judgments from foreign jurisdictions, in particular from the United States, may raise issues that necessitate special consideration.


8. See generally Janet Walker, Recognizing Multijurisdiction Class Action Judgments Within Canada: Key Questions—Suggested Answers, 46 CAN. BUS. L.J. 450 (2008) [hereinafter Walker, Recognizing Multijurisdiction Class Action Judgments Within Canada] (suggesting the creation of the Canadian equivalent to the U.S. Multi-District Litigation Panel); Ward K. Branch & Christopher Rhone, Solving the National Class Problem, 4th Annual Symposium on Class Actions (Toronto: Osgoode Hall Law School of York University, 2007) (addressing the National Class Action Database); Walker, Coordinating Multijurisdiction Class Actions, supra note 2 (discussing the coordination of multiple multijurisdictional class actions); Fiona Hickman, National Competing Class Proceedings: Carriage Motions, Anti-Suit Injunction, Judicial Co-operation and Other Options, 1 CAN. CLASS ACTION REV. 367, 399 (2004) (concluding that the following policies are most likely to address the national competing class proceedings problem in Canada: "counsel collaboration when possible; national carriage declarations; and judicial cooperation"); Chris Dafoe, A Path Through the Class Action Chaos: Selecting the Most Appropriate Jurisdiction with a National Class Action Panel, 3 CAN. CLASS ACTION REV. 541 (2003) (exploring the possibility of adopting a body similar to the U.S. Federal Court's Judicial Panel on Multi-District Litigation in Canada). For recent cases demonstrating the difficulty in coordinating overlapping national class actions, see Wuttunee v. Merck Frosst Can. Ltd., [2008] 312 Sask. R. 265, 2008 SKQB 229, rev'd [2009] 5 W.W.R. 228, 2009 SKCA 43 (Can.); and Tiboni v. Merck Frosst Can. Ltd., 295 D.L.R. (4th) 32 (Can.), aff'd [2009] 95 O.R. (3d) 269 (Can.), where both a Saskatchewan and an Ontario court certified parallel national classes of Canadian residents who had ingested the prescription drug Vioxx. Note that the Saskatchewan Court of Appeal's recent decision in Wuttunee, [2009] 5 W.W.R. 228, decertifying the class, ultimately rendered moot the issue of overlapping multijurisdictional class actions.

II. THE UTILITY OF NATIONAL CLASSES

Before addressing the problematic features of national or multijurisdictional class actions, it is helpful to examine some of the reasons such classes have been so eagerly embraced on the Canadian class actions landscape. A national or multijurisdictional class action is seen as serving the objectives underlying class actions—judicial economy, access to justice, and behavioral modification—to a greater extent than class actions that are restricted to residents of a single province.

A. Judicial Economy

A national class action provides a unitary forum wherein similarly situated plaintiffs can seek redress. Courts have emphasized that mass wrongs do not respect national boundaries, and that it “accords with requirements of comity, and with the policy underlying the enactment of . . . legislation enabling class actions to determine the liability of defendants for mass injury in one forum to the extent claimants may wish and fairness to the defendants may permit.” Adjudicating similar claims in one forum obviates the need for thirteen separate and duplicative actions that exhaust the resources of the parties and the court.

Moreover, adjudicating the claims of all plaintiffs in a single forum reduces the risk that similarly situated claimants will end up with widely disparate relief—for example, that a claimant in Ontario recovers $5,000 and that a similar claimant in Alberta recovers nominal in-kind relief. A national class thus reduces the possibility of seemingly inconsistent and unfair results.

From the perspective of the plaintiff class, adjudicating claims in a single forum results in what one commentator refers to as “litigative efficiency.” A national or multijurisdictional class action permits plaintiffs to pool their litigation resources and thereby enjoy the economy of scale from which defendants in multiple related actions automatically benefit. Craig Jones argues in this respect:

Any unnecessary subdividing of the single class action into smaller actions will sacrifice some of the litigative efficiency of the whole, even where plaintiffs’ counsel co-operate in bringing multiple provincial actions. In province-by-province certification, per-claim litigation costs will increase for plaintiffs at a greater rate than defendants, settlement incentives upon

11. Craig Jones, The Case For The National Class, CAN. CLASS ACT. REV. 29, 30-31 (emphasizing that a single national class will allow similarly situated plaintiffs to pool litigation resources and fulfill objectives of both class proceedings and tort law (compensation and deterrence) better than will several provincial and territorial classes).
15. Id. at 31-33.
defendants will decrease below the optimal, compensation per claim will decrease, and fewer valid claims will ever be brought. Free rider problems and inter-counsel blackmail will likely increase, further diminishing the efficiency of aggregate resolution.\textsuperscript{16}

According to this view, larger class actions allow plaintiffs to consolidate litigation costs thereby increasing efficiency and expanding the overall benefits to the plaintiff class.

\textbf{B. Access to Justice}

The availability of a national class is thought to promote access to justice because it provides an incentive for class counsel to aggregate claims across provincial boundaries that would be uneconomical to litigate on an individual provincial basis. Ward Branch and Christopher Rhone argue that "a larger action creates a more effective 'carrot' to motivate that counsel" to represent the class on a contingency fee basis.\textsuperscript{17} Conversely, having the same case subdivided into multiple jurisdictions "may water down each potential fee award to the extent that it no longer makes economic sense to pursue the case at all." National or multijurisdictional classes permit claimants in all jurisdictions to participate in vindicating their rights.

\textbf{C. Behavior Modification}

Finally, the availability of national class actions may inhibit defendant behavior that produces diffuse, but harmful, effects. In \textit{Western Canadian Shopping Centres v. Dutton}, McLachlin C.J., spoke of the behavioral modification objective of class actions, noting that "without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery." McLachlin C.J., further observed that "[c]ost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation."\textsuperscript{19} It stands to reason that the more aggregation possible, the greater the deterrent effect of class actions.\textsuperscript{20} National classes are thus seen as serving the regulatory function of ensuring that defendants who cause widespread but minimal harm are called to account for their conduct.

\begin{itemize}
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Branch & Rhone, \textit{supra} note 8, at 4.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Western Canadian Shopping Centres v. Dutton, [2001] 2 S.C.R. 534, para. 29, 2001 SCC 46 (Can.).
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Developments in the Law: The Paths of Civil Litigation, \textit{supra} note 13, at 1809–10.
\end{itemize}
III. PERSONAL JURISDICTION OVER NONRESIDENT PLAINTIFFS IN MULTIJURISDICTIONAL CLASS ACTIONS

A. Defining the Issue

Prior to examining the issue of jurisdiction over nonresident class members, it should be noted that there is a lack of clarity in the case law concerning the issue of precisely who the court is asserting personal jurisdiction over in the class context: the defendant, the defendant in respect of the claims of out-of-province plaintiffs, or the nonresident plaintiff class. This absence of a clear delineation between the three has muddied the jurisdictional waters and caused additional uncertainty.

The distinction is best highlighted through a concrete example. Tire Co., an American manufacturer of allegedly defective tires, is sued in Ontario by a class of plaintiffs who have purchased and used Tire Co.'s tires in Canada. Depending on the scope of the class, Tire Co. may have several jurisdictional arguments:

Scenario One: If the class is limited to Ontario plaintiffs, Tire Co. may argue that the court does not have jurisdiction over Tire Co. because none of the traditional bases of jurisdiction—presence, consent, real and substantial connection—have been satisfied. Scenario One involves a classic challenge by a defendant on jurisdictional grounds.

Scenario Two: If the class purports to cover both Ontario and non-Ontario plaintiffs, Tire Co. may concede that the court has jurisdiction over Tire Co. in respect of the claims of the Ontario plaintiffs, but may argue that the court does not have jurisdiction over Tire Co. in respect of the claims of nonresident plaintiffs. The argument would be that there is no real and substantial connection between the forum (Ontario) and the action as it concerns the nonresident class members.
Scenario Three: If the class purports to cover both Ontario and non-Ontario plaintiffs, Tire Co. may attempt to argue that the Ontario court does not have jurisdiction over the nonresident class members because there is no real and substantial connection between such class members and the forum.25

Scenarios Two and Three are functionally very similar, in that they can result in a determination that a court lacks jurisdiction to render a binding judgment; for that reason, courts have tended to conflate the two. However, the questions are conceptually distinct in that the former asks whether the court has the power to bind the defendant, whereas the latter addresses whether the court has the ability to bind nonresident class members.

The issue of personal jurisdiction over a plaintiff is a unique one that does not typically arise in the context of traditional two-party litigation. In a non-class case, personal jurisdiction over the plaintiff is premised on the fact that the plaintiff has selected the forum.26 In the language of private international law, the plaintiff consents to the jurisdiction of a certain court by launching suit there.

To understand the issue of jurisdiction over nonresident plaintiffs in the class context, it is first necessary to examine briefly the law of personal jurisdiction as it concerns defendants, particularly defendants served ex juris.27 The law of personal jurisdiction in Canada has undergone significant changes in recent years, due principally to the Supreme Court of Canada’s landmark decision in Morguard. The Morguard case concerned the enforcement of an Alberta default judgment in British Columbia where the defendant had neither consented to the jurisdiction of the Alberta courts, nor been served with process there.28 By then-prevailing standards, the judgment was not enforceable.29 The result seemed counterintuitive: if the Alberta court appropriately exercised jurisdiction under its service ex juris rules, why should the judgment not be enforceable in the province next door? The Supreme Court of Canada agreed. La Forest J., writing for a unanimous court, reasoned that “[i]f it is fair and reasonable for the courts of one province to exercise jurisdiction over a subject matter, it should as a general principle be reasonable for the courts of another province to enforce the resultant judgment.”30 Otherwise stated, Canadian courts should give “full faith and credit” to the judgments of another province, so long as the adjudicating court properly exercised jurisdiction.31
Morguard established the proposition that a court properly exercises jurisdiction over a defendant where there is a "real and substantial connection" between the forum and the action.\textsuperscript{30} The implications of Morguard and the real and substantial connection test clearly extend beyond the judgment enforcement context. Since jurisdiction and enforcement are regarded as correlative\textsuperscript{s},\textsuperscript{33} in setting out the real and substantial connection standard for assessing whether an originating court has jurisdiction for enforcement purposes, the Supreme Court in Morguard also set out the test for the assertion of in personam jurisdiction over a defendant.\textsuperscript{34}

This same real and substantial connection test that was developed to ground jurisdiction over an out-of-province defendant in traditional two-party litigation has since been applied to ground jurisdiction over nonresident plaintiffs in the class setting.\textsuperscript{35} Canadian courts appear to have accepted that a provincial court will have jurisdiction over nonresident class members in cases where there is a real and substantial connection between the nonresident class and the adjudicating forum.\textsuperscript{36}

\begin{itemize}
\item[32.] The Supreme Court of Canada in Beals v. Saldanha, [2003] 3 S.C.R. 416, paras. 28, 32, 2003 SCC 72 (Can.), accepted what commentators had in the post-Morguard era referred to as the "broad view" of Morguard, i.e., that in order to found jurisdiction over a defendant "the 'real and substantial connection' test requires that a significant connection exist between the cause of action and the foreign court." See also Beals, [2003] 3 S.C.R. 416, para. 181 (LeBel J. dissenting, but not on this point) ("A broad interpretation of the 'real and substantial connection' test, whereby the test may be satisfied even in the absence of a connection to the defendant, seems appropriate given both our constitutional arrangements and the ultimate objective of facilitating the flow of goods and services across borders.").
\item[33.] See Morguard Inv. Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, para. 42 (Can.) ("[T]he taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlative.").
\item[34.] It is unclear from Morguard whether the Supreme Court of Canada intended to replace the traditional bases of jurisdiction (consent and presence) with the real and substantial connection test. Major J. in Beals suggested that "[a] real and substantial connection is the overriding factor in the determination of jurisdiction" and that "[t]he presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties." Beals, [2003] 3 S.C.R. 416, para. 37. However, he proceeded to state, "[a]lthough such a connection is an important factor, parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court." Id.; see also Pro Swing Inc. v. Elta Golf Inc., [2006] 2 S.C.R. 612, para. 21 (Can.) (referring to "the passage, for the purpose of establishing jurisdiction over a defendant, from the service or attornment of the defendant requirement to the real and substantial connection test"). On the issue of the propriety of abandoning the traditional grounds of jurisdiction in favor of a real and substantial connection test, see Stephen G.A. Pitel and Cheryl D. Dustien, Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction, 85 CAN. BAR REV. 61 (2006).
\item[35.] In this article, I have distinguished between resident and nonresident class members. The cases seem to have assumed that class members' residence in the forum automatically constitutes a real and substantial connection sufficient to support the assumption of jurisdiction over them. As such, the concern is focused on establishing a real and substantial connection between the forum and nonresidents. Whether resident class members necessarily have a real and substantial connection with the forum simply by virtue of their residence is questionable. Walker notes that "using residency to determine whether or not a class action will bind a member of a plaintiff class who takes no step to join or to be excluded from the class is inconsistent with the general law of jurisdiction" and that "residency is not ordinarily relevant to the jurisdiction of a court over a claim." Walker, Coordinating Multi Jurisdiction Class Actions, supra note 2, at 115. For convenience, however, I will continue to distinguish between the two, though the analysis advanced with respect to nonresident plaintiffs applies equally with respect to resident plaintiffs.
\end{itemize}
Beyond the general assertion of the principle, however, the law is conflicting and confused.

B. Applying the Real and Substantial Connection Test in the Multijurisdictional Class Action Context

The principle that a provincial court will have jurisdiction over nonresident class members where there is a real and substantial connection between those class members and the adjudicating court is easy to state, but as the case law bears out, difficult to apply. Canadian courts have struggled to define the content of the real and substantial connection that provides the jurisdictional "hook" to enable the adjudicating forum to render a judgment binding on nonresident class members. As discussed below, it is possible to identify two main approaches\(^7\) to the real and substantial connection test in the nonresident plaintiff class context.

1. The Expansive Approach: “Commonality” Between Resident and Nonresident Class Members

Several courts, in particular the courts of Ontario and British Columbia, have endorsed an approach to the real and substantial connection test in the context of class litigation that focuses on the commonality of interest between the claims of resident and nonresident class members. According to these courts, the real and substantial connection required to ground jurisdiction over nonresident class members is found in the identity or confluence of interest that such nonresident class members share with resident class members in the resolution of the common issues.

\(^7\) Some courts have also used a third approach, employing the criteria outlined in the Ontario Court of Appeal's decision in Muscutt v. Courcelles, [2002] 60 O.R. (3d) 20 (Can.) in analyzing whether a court has personal jurisdiction over nonresident class members. In Muscutt, the Court of Appeal enumerated eight non-exhaustive factors for courts to consider in assessing whether the real and substantial connection test, as applied to an out-of-province defendant, was satisfied: (a) “[t]he connection between the forum and the plaintiff’s claim;” (b) “[t]he connection between the forum and the defendant;” (c) “[u]nfairness to the defendant in assuming jurisdiction;” (d) “[u]nfairness to the plaintiff in not assuming jurisdiction;” (e) “[t]he involvement of other parties to the suit;” (f) “[t]he court’s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;” (g) “[w]hether the case is interprovincial or international in nature;” and (h) “[c]omity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.” \(\text{Id.}\) In Punit v. Wawanesa Mutual Insurance Co., [2005] O.J. No. 1928, para. 22 (Can.), the Ontario Superior Court of Justice attempted to apply the Muscutt factors “as they need to be modified to suit the situation of an out-of-province plaintiff” to determine whether the court had jurisdiction over nonresident plaintiffs. See also McNaughton Automotive Ltd. v. Co-Operators General Insurance Co., [2003] 66 O.R. (3d) 466, para. 38 (Can.) (“Therefore, having due regard for the relevant factors listed in Muscutt, I find there is a demonstrated absence of any real connection between potential out-of-province class members and this forum and conclude that order and fairness would not be served by assuming jurisdiction over the claims of persons in those provinces and territories where the relevant statutory provisions are materially different from those in Ontario.”), overruled on other grounds, McNaughton Auto. Ltd. v. Co-operators Gen. Ins. Co., [2006] 221 O.A.C. 102 (Can.). Note that the Ontario Court of Appeal in Van Breda v. Village Resorts Ltd., [2010] ONCA 84, para. 84 (Can.), very recently reformulated the Muscutt test, such that now “the core of the real and substantial connection test is the connection that the plaintiff’s claim has to the forum and the connection of the defendant to the forum, respectively. The remaining considerations or principles serve as analytic tools to assist the court in assessing the significance of the connections between the forum, the claim and the defendant.” The implications of the Van Breda decision for both class and non-class jurisdictional determinations remain to be seen.
The issue of whether a prospectus is misleading or a product is fit for its intended purpose, for instance, is what supplies the requisite real and substantial connection between the nonresident class members and the adjudicating forum.

*McCutcheon v. The Cash Store*⁴⁸ is illustrative of the expansive approach to the real and substantial connection test. In *McCutcheon*, the Ontario Superior Court of Justice considered whether to certify a national class (excluding residents of British Columbia) of persons who had borrowed money as a “payday loan” from the defendant and who repaid the loan and standard broker fee on or after the due date of the loan.⁴⁹ The defendant argued that the court had no jurisdiction to bind persons who obtained loans from the defendant in the other provinces or territories in which they were residing because there was not a real and substantial connection between the nonresident class members and Ontario.⁵⁰ After reviewing the relevant (and conflicting) case law, the court ultimately settled on an expansive view of jurisdiction over nonresident class members which “accepts as a sufficiently real and substantial connection a commonality of interest between non-resident class members and those who are resident in the forum and whose causes of action have sufficiently real and substantial connections to it to ground jurisdiction over their claims against the defendants.”⁵¹ Cullity J. held that the Ontario court had jurisdiction over nonresident class members despite the fact that “all the material facts that [gave] rise to a non-resident class member’s cause of action . . . occurred outside Ontario and their only other connection to Ontario consisted of a commonality of interest with the proposed representative plaintiff and the resident class members . . .”⁵²

British Columbia courts have also accepted the idea that a common issue can supply the real and substantial connection required to found personal jurisdiction over nonresident class members.⁵³ In *Harrington v. Dow Corning Corp.*, the British Columbia Court of Appeal affirmed Mackenzie J.’s certification of a class of both resident and nonresident women who had been implanted with the defendant’s silicone gel breast implants.⁵⁴ The defendant manufacturer argued that the British Columbia court did not have jurisdiction over the nonresident class members under the real and substantial connection test.⁵⁵ In his jurisdiction analysis, Mackenzie J. posed the following question: “The common issue in this case has already been defined: ‘Are silicone gel breast implants reasonably fit for their intended purpose?’ Does that common liability issue establish a ‘real and substantial connection’ sufficient to found jurisdiction over claims otherwise beyond this court’s jurisdiction?”⁵⁶ He answered that question in the affirmative: “It is that common issue which establishes the real and substantial connection necessary for

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39. *Id.*, paras. 27–29.
40. *Id.* paras. 30, 57.
41. *Id.* para. 49.
42. *Id.* para. 53.
43. See Harrington v. Dow Corning Corp., [2000] 193 D.L.R. (4th) 67, paras. 98–100 (Can.) (noting that the lower court was correct “to find that the existence of a common issue of fact constituted sufficient connection to found jurisdiction in this case”).
44. *Id.* paras. 1, 100.
45. *Id.* para. 6.
juryisdiction.” The British Columbia Court of Appeal endorsed Mackenzie J.’s “common issue” approach to jurisdiction. 47

McCutcheon and Harrington are typical of the expansive approach to the real and substantial connection in the class setting. In fact, most cases that have specifically considered the issue have relied on some variation of this “commonality” approach to found jurisdiction over nonresident class members.

2. The Restrictive Approach: Actual Connection Between Nonresident Class Members and the Adjudicating Forum

The commonality of interest approach can be contrasted with a more restrictive approach to the real and substantial connection which requires that there be a substantive connection, beyond a mere commonality of interest, between the nonresident class members and the adjudicating forum. The Québec Court of Appeal has recently endorsed this view of the real and substantial connection in the national class context. 48 In HSBC v. Hocking, 49 an Ontario court certified a settlement class of all Canadian customers of HSBC who had incurred penalties when they made early payouts of their mortgages. HSBC, the defendant, thereafter sought to have the settlement recognized in Québec. 50 The Québec Superior Court dismissed the motion to recognize the Ontario judgment approving of the settlement on the basis that the Ontario court could not assert jurisdiction over class members residing in Québec. 51 The trial court rejected HSBC's argument that “there is a real and substantial connection between the members or the cause of action and Ontario since a large number of the members are Ontario residents.” 52 In dismissing this argument, the trial court stated:

[The representative plaintiff in the Québec action] claims that a court that does not have jurisdiction to hear the dispute of a single member cannot obtain jurisdiction by reason of the collective exercise of rights. The members residing in Québec carried on business with HSBC in Québec; the contractual obligations were supposed to be performed there; and the alleged fault and prejudice suffered occurred in Québec. The action of the members residing in Québec therefore had no connection with Ontario.

A careful study of the authorities submitted by the parties shows that, in most cases where the courts found a real and substantial

48. For the most recent decision on multijurisdictional classes in Québec, see Brito v. Pfizer Can. Inc., [2008] R.J.Q. 1420, 2008 QCCS 2231 (Can.). In Brito a Québec court certified a national class of women who had used the defendant's contraceptive product. Although the court did not discuss the real and substantial jurisdictional issue in detail, it seemed to suggest that the Québec court's jurisdictional competence over nonresidents rested mainly on the fact that the defendant had its head office in Québec and that the fault was alleged to have been committed there. Id. paras. 113–16.
50. Id. para. 21.
51. Id. paras. 87–95.
52. Id. para. 40.
connection in class actions involving members residing in various provinces, such connection existed between the forum, the action, and *each* of the class members.\(^5\)

The trial court further held that the "collective exercise of rights did not extend the connection factors that must necessarily exist between the reviewing forum and each member’s application to establish the jurisdiction of the court."\(^5\) The Québec Court of Appeal agreed with the trial judge’s understanding of the jurisdictional test, noting that the existence of common issues had no bearing on whether or not there was a real and substantial connection between Ontario and Québec residents:

[T]he element of the "similarity or commonality of facts and issues raised", although relevant to the question of whether the case lends itself to a class action, seems alien to the question of whether there is a substantial and real connection with the jurisdiction of the forum for the purpose of applying the constitutional principle of territoriality.\(^5\)

According to the restrictive view, a shared interest in the common issues will not be sufficient to create a real and substantial connection where such a connection does not otherwise exist.\(^5\) Instead, a real and substantial connection, in the sense of a link or nexus, must be made out between the adjudicating forum and the nonresident class in order for a court to be regarded as jurisdictionally competent.\(^7\)

**C. Assessing the Expansive and Restrictive Approaches to the Real and Substantial Connection Test**

Both the "expansive" and the "restrictive" approach to the real and substantial connection test as it applies to nonresident plaintiffs suffer from serious shortcomings. Each of these will be discussed in turn:

1. The Expansive Approach: "Commonality" Between Resident and Nonresident Class Members

The major drawback of the "commonality" approach to the real and substantial connection with respect to jurisdiction over nonresident class members lies in its

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53. Id. paras. 43-45 (emphasis in original).
54. HSBC Bank Can. v. Hocking, [2006] R.J.Q. 804, para. 54, 2006 QCCS 330 (Can.). Presumably the court was referring to the adjudicating forum (Ontario) and not the reviewing forum (Québec).
56. Id.
57. See id. para. 220 (reiterating the requirement of a “real and significant link[] between the dispute from the standpoint of the Québec plaintiffs and the Ontario forum” as a basis for jurisdiction over nonresident class members).
artificiality. To say that there is a real and substantial connection to ground jurisdiction over an out-of-province class member because such an individual has an interest similar to class members who actually do have a real and substantial connection to the forum stretches the limits of this jurisdictional test. It is hard to imagine a case where the real and substantial connection test, thus understood, would not be satisfied: provided that a court properly assumed jurisdiction over resident class members, nonresident class members with a similar claim would, by definition, have a shared interest in the resolution of the common issues.

Aside from its artificiality, the commonality of interest approach to the real and substantial connection test is inextricably intertwined with the certification of the case, and in particular, with the definition of the common issues. Commentators have noted that:

The main criticism to which this [commonality] argument is susceptible is that it conflates the test for certification with the test for jurisdiction simpliciter. The issue of jurisdiction precedes and is distinct from the issue of an action's amenability to class proceedings. If a court does not have jurisdiction, it does not have the authority to consider the issue of certification. Assuming a court has jurisdiction to certify a national class, the presence or absence of a common issue then becomes relevant to the action's suitability to be certified as a class proceeding. The backwards ordering of the issues therefore tends to compromise issues of jurisdiction.

Therefore, the commonality approach essentially substitutes the "common issues" inquiry for the jurisdictional one. Once a common issue is defined, it follows that a real and substantial connection is present. Given that the jurisdictional determination hinges upon the certification of at least one common issue, it becomes impossible to decide the jurisdictional question without reference to the merits of a case.

58. See Walker, Recognizing Multijurisdiction Class Action Judgments Within Canada, supra note 8, at 459 ("Several courts have recognized the merits of having common issues decided in a single proceeding despite the fact that these might involve the claims of persons arising in different provinces. While it stretches the logic of a 'real and substantial connection' to say that the real and substantial connection test supports jurisdiction over those claims, some Canadian courts have felt obliged to base their conclusion on that test.").

59. F. Paul Morrison, Eric Gertner & Hovsep Afarian, The Rise and Possible Demise of the National Class in Canada, 1 CAN. CLASS ACTION REV. 67, 83 (2004); see also Baxter v. Canada, [2005] O.T.C. 391, para. 12 (Can.) ("In several recent cases it has been held that the certified common issues in a class action can serve as a basis for the proper assumption of jurisdiction by the court over extra-provincial parties. The thrust of [these cases], in relation to the jurisdiction determination, is that where a class action involving intra-provincial plaintiffs could be certified, and the common issues forming the basis for the certification are shared by both the resident class and extra-provincial non-residents against the defendant, the existence of such common issues provides a 'real and substantial connection' of the non-residents to the forum in relation to the action. Thus, the underpinnings of a successful certification motion could have a direct bearing on the jurisdictional analysis. On the other hand, if the certification motion fails, the jurisdictional motion will in all likelihood be rendered moot.") (citations omitted).
2. The Restrictive Approach: Actual Connection Between Nonresident Class Members and the Adjudicating Forum

While the commonality approach to the real and substantial connection test would seem to extend personal jurisdiction over nonresident class members in nearly every case, the restrictive approach suffers from the opposite problem: it is almost impossible for a court to assert jurisdiction over an out-of-province class member owing to a lack of actual connection between such a class member and the adjudicating forum. In *HSBC v. Hocking*, for instance, the Québec trial court held that there was a lack of demonstrable connection between Ontario and the claims of the Québec class members:

Members took out hypothecary loans with HSBC in Québec. The contractual obligations had to be performed there. The alleged fault was committed in Québec, and the alleged prejudice was suffered there.⁶⁰

In most multijurisdictional class actions, it will be the case that all the material facts that give rise to a nonresident class member’s cause of action will have occurred outside the adjudicating forum.⁶¹ There would appear to be only a few examples⁶² where a meaningful connection could plausibly be made out between the adjudicating province and the nonresident class member. In a typical products liability, consumer protection, or securities fraud case one would be hard pressed to find an actual connection between the adjudicating forum and nonresident class members.⁶³ The fundamental problem with a restrictive approach to the real and

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⁶¹. See, for example, *McCutcheon v. Cash Store Inc.*, [2006] 80 O.R. (3d) 644 (Can.), for a case where nonresident plaintiffs who obtained payday loan advances from defendants were improperly charged interest in their home jurisdictions and *Harrington v. Dow Corning Corp.*, [2000] 193 D.L.R. (4th) 67, para. 99, 2000 BCA 605 (Can.), in which nonresident plaintiffs were implanted with the defendants’ breast implants and subsequently suffered injury in their home jurisdictions. See also Debra Lyn Basset, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41, 59 (2003) (noting that a requirement for minimum contacts, the U.S. analogue to the real and substantial connection test, “would effectively . . . eliminate[] nationwide class actions.”).

⁶². The obvious example that comes to mind is where a mass tort occurs wholly within a certain jurisdiction (e.g., a train crash). In such a case, it is clear that there would be an actual connection between the forum and the nonresident class members. The jurisprudence also seems to suggest that an actual connection exists where the defendant is incorporated in the adjudicating forum and the wrong can be construed as having been committed there. See, e.g., *Currie v. McDonald's Restaurants of Can.*, [2005] 250 D.L.R. (4th) 224, para. 22 (Can.) (noting that “the alleged wrong occurred in the United States and Illinois is the site of [the defendant’s] head office”). Note, however, that the idea of “the place of the wrong” is highly malleable. In *Currie*, for instance, an equally plausible interpretation would be that the “wrong” was committed where the plaintiffs suffered injury. See *Moran v. Pyle*, [1975] 1 S.C.R. 393 (holding that Saskatchewan, the location where the plaintiff suffered injury, was where the tort was deemed to occur for jurisdictional purposes).

⁶³. See, for example, *Moelis v. Berkshire Life Ins. Co.*, 887 N.E. 2d 214, 219 (Mass. 2008), for a typical consumer protection case that pitted insurance policy holders against an insurer on deceptive practices allegations. *Id.* at 216–17. The court held that minimum contacts did not exist to ground jurisdiction over the nonresident plaintiff class: “Here, the only contacts the nonresident policyholders have with Massachusetts is their purchase of an insurance policy from Berkshire, a Massachusetts company, through agents located in their home States, and their mailing of annual premium payments to Berkshire in Massachusetts. We conclude that these facts are not sufficient to warrant the assertion of personal jurisdiction.” *Id.* at 219. Many class actions in Canada will involve a similar factual posture, where
substantial connection test is that it essentially undercuts the ability of the class action to act as a vehicle for the resolution of issues that transcend provincial borders and are perhaps best suited to being addressed in class form.

D. Defining the Problem: What Is the Harm with a Lack of Uniform Approach to Jurisdiction?

Aside from the individual shortcomings of either a restrictive or expansive approach to jurisdiction, there is a more fundamental problem associated with a lack of uniformity in the application of the real and substantial connection test. Inconsistent approaches to the real and substantial connection test may lead to a scenario where a judgment or settlement is held to be binding on class members in some provinces but not binding on class members in other provinces. This is because prior to enforcing a judgment of another province, a provincial court in Canada must be satisfied that the adjudicating forum possessed jurisdiction over the parties to the dispute.\textsuperscript{64} If the enforcing court does not regard the adjudicating forum as possessing jurisdiction over the nonresident class members, the judgment will not be enforceable and a nonresident class member will be permitted to proceed with his or her claim in the enforcing forum.\textsuperscript{65}

This problem, sometimes referred to as the “back-end” jurisdictional problem,\textsuperscript{66} is aptly illustrated through the following example. Assume that an Ontario court (F1) certifies a national class encompassing residents from all Canadian provinces and territories and renders a judgment favorable to the defendants. A Manitoba plaintiff who falls within the class definition, but who did not opt out of the proceeding, later seeks to bring an action against the defendant in Manitoba (F2). Whether this is permitted will turn on whether the Ontario judgment is binding on the Manitoba class member. A judgment will not be enforceable in Manitoba—i.e., will not be accorded res judicata effect—unless a Manitoba court concludes that Ontario, as the adjudicating forum, properly asserted jurisdiction over the Manitoba plaintiff under the real and substantial connection test. If a Manitoba court concludes that Ontario did not properly assert jurisdiction, the Manitoba plaintiff will be able to “re”-litigate the claim. However, if a plaintiff in Saskatchewan similarly attempts to commence an action against the defendant in Saskatchewan, and a Saskatchewan court determines that the Ontario court properly assumed jurisdiction under the real and substantial connection test, the Saskatchewan plaintiff will be barred from re-litigating because the Ontario judgment will be given

\textsuperscript{64} See \textsc{Janet Walker} & \textsc{Jean-Gabriel Castel}, \textsc{Castel} \& \textsc{Walker: Canadian Conflict of Laws §14.4 (6th ed., LexisNexis Can. 2005)} (loose-leaf) [hereinafter \textsc{Castel} \& \textsc{Walker}].

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} The “back-end” jurisdictional problem refers to the possibility that an enforcing court will not grant preclusive effect to a judgment because it does not regard the adjudicating court as possessing jurisdiction over the nonresident plaintiff. Craig Jones \& Angela Baxter, \textit{Fumbling Towards Efficacy: Interjurisdictional Class Actions After Currie v. McDonald’s}, 3 \textsc{Can. Class Action Rev.} 405, 405; see also Walker, \textit{Coordinating Multijurisdiction Class Actions}, supra note 2, at 116 (“Parties resisting the certification of multijurisdictional classes have focused on the question of whether a provincial superior court can exercise jurisdiction over non-residents. However, this is not the real question. The real question is whether other Canadian courts are obliged to grant preclusive effect to the judgment in respect of the claims described in the notice of certification.”).
It is quite possible for the judgment to be regarded as enforceable in some provinces but not in others. Thus, a defendant who has successfully defended a purportedly national class action in F1 may nonetheless have to re-litigate the claim if F2 determines that F1 did not possess jurisdiction over the nonresident class members under the real and substantial connection test.68

The back-end jurisdictional problem raises an obvious concern about fairness to the defendant, who should not be exposed to the risk of re-litigation simply because the enforcing forum takes a contrary view on the adjudicating court’s jurisdictional competence under the real and substantial connection test. This concern is particularly pronounced in the settlement context. One author notes that, “[a] party should be entitled to know what they are litigating when they embark upon a claim. In particular it is very difficult to arrange a settlement in a class action where the defendant cannot be given the certainty of resolution.”69 The price that a given defendant is willing to pay to resolve class action litigation is generally dependent on the “peace” that the defendant expects to buy.70 Thus, if a defendant attempts to

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67. I am concerned here with the pure jurisdictional question. There may be other grounds on which either the Manitoba or the Saskatchewan courts may refuse to enforce the judgment.

68. Some authors have expressed particular apprehension about “wait and see” plaintiffs given the unresolved issues of jurisdiction in the national class context. See, e.g., Stephen Lamont, The Problem of the National Class: Extra-Territorial Class Definitions and the Jurisdiction of the Court, 24 ADVOCATES’ Q. 252, 292 (2001) (“[A] significant problem for the fairness of the justice system is the non-resident class member’s opportunity to simply observe the proceedings from the sidelines, and once judgment or settlement is achieved, to consider a favourable judgment binding on the defendant and an unfavorable judgment not binding on themselves as class members. ... This sort of ‘wait and see’ opportunity is antithetical to the basic structure of the [Class Proceedings Act] and is generally inimical to the fundamental principle that a judgment in a proceeding is binding on the parties to it.”); see also Chris Dafoe, A Path Through the Class Action Chaos: Selecting the Most Appropriate Jurisdiction with a National Class Action Panel, 3 CAN. CLASS ACTION REV. 541, 550 (2003) (noting that critics of the national class have argued that “out-of-province plaintiffs could play ‘wait and see,’ thus denying the defendant certainty and finality”). The concern is that some nonresident class members may deliberately refrain from taking steps to exclude themselves from a class proceeding and then seek to have an eventual judgment or settlement enforced if it benefits them, or seek to re-litigate if they are not satisfied with the result. It is suggested, however, that the problem is not limited to those nonresident class members who consciously play “wait and see.” In fact, actual “wait and see” plaintiffs would likely be few and far between. More likely is the scenario where a nonresident class member who has not received actual notice of the proceeding, or who received the notice and did not fully comprehend the significance of it, seeks to litigate a claim, only to be met with the defense that the claim has already been fully adjudicated.

69. Lamont, supra note 68, at 297; see id. at 291 (“Defendants have the right to expect certainty in litigation, particularly when settling.”); Ward Branch & Christopher Rhone, Chaos or Consistency: The National Class Action Dilemma, 1 CAN. CLASS ACTION REV. 3, 9 (2004) (“Where a defendant wishes to settle a class action, the calculus is different. The defendant then wishes to ensure that the case has maximum res judicata effect. Through various procedural routes, the Defendant will want to ensure that the action or actions cover ... as much of the country as possible.”); Stephen B. Burbank, Interjurisdictional Preclusion Full Faith and Credit and Federal Common Law: A General Approach, 71 CORNELL L. REV. 733, 767 (1985) (“Preclusion rules affect litigation strategy. It is therefore important that litigants know what the rules are ... the plaintiff should be able to predict with considerable assurance the rules of claim preclusion that will govern a judgment.”).

buy national peace for $1 million, but additional claims are then filed and permitted to proceed, the defendant will have overpaid to settle a claim.\footnote{1}

Defendants may attempt to guard themselves from this possibility in several ways. First, prudent defendants may decrease their original settlement offer to account for the possibility of additional litigation engendered by a lack of consistency in the courts' approach to jurisdiction. Thus, defendants may build into their settlement calculus the uncertainty associated with the enforceability of national or multijurisdictional class actions. Second, defendants may insert a clause into a settlement agreement purporting to void the settlement if a court determines that the settlement is not binding on certain nonresident class members.\footnote{2} Finally, defendants may take steps to have each provincial court "bless" a national settlement prior to the settlement taking effect.\footnote{3} In the \textit{Indian Residential Schools} cases, for instance, settlement proceeded by way of an application for certification and settlement approval before nine provincial and territorial courts.\footnote{4} The defendants pursued this strategy in part because at the time of the settlement "[i]t was not at all clear that courts in certain jurisdictions (particularly Qu\text{\texté}bec and Saskatchewan), would respect and enforce a settlement approved issued [sic] by only one jurisdiction."\footnote{5}

Whichever of these options, if any, defendants adopt to protect themselves from the possibility of a non-binding class settlement, one thing is clear: uncertainty surrounding the jurisdictional issues with national classes has the potential to unravel months or years of delicate settlement negotiations and may seriously undercut the efficiency gains associated with class actions. Within the Canadian federation, defendants should be able to engage in meaningful efforts to settle class litigation secure in the knowledge that all covered claims have been finally put to rest.

\section*{IV. WHERE DO WE GO FROM HERE?}

There are several options for addressing the question of jurisdiction over nonresident plaintiffs in the class context. One approach would be for the Supreme Court to provide guidance on the content of the real and substantial connection test in the class setting. A second approach involves certifying multijurisdictional classes only on an opt-in basis, thereby eliminating the need for recourse to the real and substantial connection test. A third, and arguably more radical, approach lies in questioning whether the real and substantial connection test is necessary to found jurisdiction over nonresident plaintiffs in class actions.

\footnote{1}{The total cost of litigating each claim if the case goes to trial factors into settlement calculations, so it follows that those total costs would be underestimated by the defendant if additional claims were later filed. \textit{See id.} at 63–64 (explaining how estimated legal costs weigh in the value of settlement).}

\footnote{2}{The problem with this approach is that the full settlement amount may have been paid and distributed before a challenge is levelled at the settlement agreement, thereby rendering such a clause meaningless.}

\footnote{3}{Branch & Rhone, \textit{supra} note 8, at 1.}


\footnote{5}{Branch & Rhone, \textit{supra} note 8, at 1.}
A. Keeping the Real and Substantial Connection Test: The Need for Appellate Guidance

The obvious and perhaps simplest solution to the jurisdictional chasm in the class setting would be for the Supreme Court of Canada to provide definitive guidance on the real and substantial connection test as it applies to nonresident class members. A national and uniform standard for courts to apply across Canada would solve, to the extent possible, the “back end” jurisdictional problem.\footnote{76} If the Court were to continue to conceptualize jurisdiction over nonresident class members in terms of the real and substantial connection test, what would the test look like? More than likely, the Court would be required to choose between the expansive and restrictive approaches described above. Of the two, and with all its artificiality, the expansive approach is to be preferred. The test, however, should be re-articulated to better reflect the different dynamics at play in asserting jurisdiction over a nonresident plaintiff class. The test would examine whether there is a real and substantial connection between the nonresident class members as a whole and the litigation already before the adjudicating court.\footnote{77} In other words, the approach would not look for a “connection” per se between the nonresident class members and Ontario, but between the nonresident class members and the litigation that is properly before the Ontario court.\footnote{78} In practice, the test would resemble the commonality of interest approach that has found favor in Ontario and British Columbia.\footnote{79} However, the analysis would not be cast in terms of common issues and thus would avoid the doctrinal artificiality of finding a connection between the nonresident plaintiff class and the adjudicating forum through the conduit of the resident plaintiff class. It should be noted, however, that re-stating the test in this manner in order to preserve the verbiage of the “real and substantial connection” does not change the fact that, in most cases, a genuine nexus between the adjudicating forum and the nonresident plaintiff class will not exist.

One would caution the Court against adopting an approach to the real and substantial connection in the class context that sets out various criteria in order to assess the nonresident plaintiff class’ connection to the forum. First, an approach which involves examining and weighing various factors in assessing jurisdictional

\footnote{76} The Supreme Court of Canada missed an opportunity to address thorny issues of jurisdiction over class members in multijurisdictional class actions in the recent case of \textit{Société Canadienne des Postes v. Lépine}, [2009] 304 D.L.R. 539, 2009 SCC 16 (Can.). Lépine involved the enforceability of an Ontario settlement against a class member resident in Quebec. While the Quebec Court of Appeal rested its decision to refuse enforcement of the settlement primarily on the inadequacy of the Ontario notice, the case also raised issues of jurisdiction over nonresident class members. The Supreme Court of Canada cursorily brushed over the issue of jurisdiction over class members, noting that “[t]here is no doubt that the Ontario Superior Court of Justice had jurisdiction pursuant to [the Québec Civil Code] since the ... defendant to the action, had its head office in Ontario. This connecting factor in itself justified finding that the Ontario court had jurisdiction.” \textit{Id.} para. 38. The Court seemed to be confusing the issue of jurisdiction over the defendant (which the Ontario court clearly possessed) and jurisdiction over the plaintiff class members, which was far less clear. For further discussion and critique of the Lépine decision, see Tanya J. Monestier, Lépine v. Canada Post: \textit{Ironing Out the Wrinkles in the Inter-provincial Enforcement of Class Judgments}, \textit{34 ADVOCATES’ Q.} 499 (2008).

\footnote{77} Note that this was the test that was proposed and rejected by the British Columbia Court of Appeal in \textit{Harrington v. Dow Corning Corp.}, [2000] 193 D.L.R. (4th) 67, paras. 70–71 (Can.).

\footnote{78} \textit{Id.} para. 71.

\footnote{79} See supra notes 40, 45.
competence (e.g., the domicile of the defendant, the applicable governing law, the location of the alleged wrongdoing, the percentage of class members resident in the forum, etc.) means that parties are unable to predict whether a prospective enforcing court will regard the adjudicating forum as jurisdictionally competent. Where, for instance, the defendant is domiciled in X, the impugned contract is governed by Y law, and 20% of the class members reside in Ontario, will a Québec court enforce a judgment rendered by an Ontario court? Litigants need to be in a position to predict with considerable certainty whether a judgment or settlement will be granted preclusive effect. A real and substantial connection test which examines all the potential factors linking the nonresident plaintiff class to the forum in order to found jurisdiction has the potential to create chaos in class litigation.

Second, aside from its lack of predictability, a multi-factored approach may lead to seemingly unsatisfactory results. For instance, based on the current case law, it is clear that the domicile of the defendant is a significant part of the real and substantial connection factor-based calculus. If a defendant is domiciled in the forum, courts have been prepared to conclude that there exists a real and substantial connection between nonresident class members and the forum.80 Consider, however, the following scenarios:

Scenario 1: A French defendant with no presence in Canada distributes products in Canada, causing injury to Canadians in all provinces and territories.

Scenario 2: An Ontario defendant distributes products in Canada, causing injury to Canadians in all provinces and territories.

If the domicile of the defendant were relevant to the question of whether there is a real and substantial connection between the plaintiff class and the adjudicating forum, a national class is more likely permissible in Scenario 2 (domestic defendant) than in Scenario 1 (foreign defendant). Under this reasoning, foreign defendants may fare better in Canadian courts (by not facing the risk of nationwide classes) than Canadian defendants. A factor such as the happenstance of a defendant being incorporated in a Canadian jurisdiction should not determine the availability of national classes. Accordingly, to ensure consistency and predictability, a multi-factor test should be avoided.

B. Permitting Multijurisdictional Classes on an Opt-In Basis

Certain provincial class proceedings legislation in Canada allows for the creation of multijurisdictional classes only where nonresident plaintiff class members affirmatively opt into a given class proceeding. In particular, class proceedings statutes in British Columbia, Alberta, Newfoundland and Labrador, and New
Brunswick provide that a court may certify classes that include nonresident plaintiffs only on an opt-in basis. In other provinces, specifically Ontario and Québec, legislation is silent on the issue of whether a provincial class action can include nonresident plaintiffs. However, case law has established that classes can be certified in these jurisdictions on an opt-out basis, such that a class member will be bound unless he opts out of the class action. Finally, in Manitoba and Saskatchewan, legislation explicitly contemplates the certification of multijurisdictional classes on an opt-out basis.

Irrespective of the statutory regime at play, courts considering the issue of jurisdiction have required that there be a real and substantial connection between the nonresident plaintiff class and the adjudicating province. Courts appear to have missed a critical distinction between opt-in and opt-out regimes as they concern jurisdiction over nonresident class members. In an opt-in regime, a nonresident class member demonstrates an intention to be bound by the result of the proceeding through the very act of opting in. The legitimacy of the court’s power over the plaintiff stems from the fact that the plaintiff has consented to the jurisdiction of the court. This is true regardless of whether there is a real and substantial connection between the plaintiff and the forum. Properly understood, opt-in regimes avoid the jurisdictional infirmities associated with the real and substantial connection test. This is because a nonresident class member can hardly complain about a provincial court adjudicating upon his rights in cases where the class member has opted in to the proceeding.

However, opt-in regimes arguably result in an under-inclusive class, with the core of the class being comprised of resident class members and the remainder consisting of a handful of nonresidents who have taken affirmative steps to opt into the proceeding. Walker identifies three ways that the under-inclusiveness of the

88. Class Proceedings Act, C.C.S.M., c. C-130, § 6(3) (2002) (“A class that comprises persons resident in Manitoba and persons not resident in Manitoba may be divided into resident and non-resident subclasses.”).
91. Lamont, supra note 68, at 285.
92. Id.
93. See, e.g., Morrison et al., supra note 59, at 83 (“A national class regulated by an opt-in feature provides the surest and most legitimate means of binding all members.”). Certain commentators are thus supportive of national class actions only on an opt-in basis. See, e.g., Lamont, supra note 68, at 299 (suggesting that the adoption of an opt-in regime “would alleviate a great deal of the future uncertainty with a judgment binding non-residents”).
94. Lamont, supra note 68, at 285.
class in an opt-in jurisdiction may ultimately undermine the goals sought to be achieved by multijurisdictional classes:

First, to the extent that class actions are intended to have a regulatory effect by requiring market actors to internalize the costs of wrongful conduct, under-inclusive plaintiff classes mean that the costs internalized are less than the costs generated by the wrongful conduct. . . . Second, to the extent that class actions are intended to facilitate compensation for wrongs suffered, under-inclusive plaintiff classes result in the failure of members of the plaintiff class to receive compensation. . . . Finally, to the extent that class actions are intended to also bring closure to matters for defendants, the under-inclusiveness of plaintiff classes means that defendants will be left with unresolved claims that might be brought in other actions or in other fora.  

Requiring affirmative consent by nonresident class members in order to bind them to judgment is certainly the most doctrinally sound of the various approaches to jurisdiction. Where a plaintiff evidences an intention to submit to the jurisdiction of a court by opting into a class proceeding, he can no longer challenge the ability of the court to render a judgment binding against him. However, by producing classes that are under-inclusive, opt-in regimes thwart the policy objectives of class actions, such that they are no longer able to achieve the very goals for which they were designed.

C. Re-Thinking Jurisdiction over Nonresident Class Members

A third possibility lies not in fine-tuning the real and substantial connection test in the unique context of class litigation, but rather in abandoning it. This may seem to be a radical solution, as the real and substantial connection requirement for jurisdiction has become part of orthodox class actions discourse in Canada. In fact, it seems to be a foregone conclusion that a real and substantial connection, however conceived, is required to found jurisdiction over a nonresident plaintiff class member. However, given the problems inherent in the real and substantial connection approach, it may be time to reconsider the issue of personal jurisdiction over nonresident plaintiffs in class litigation from first principles.

1. The Real and Substantial Connection Test Was Developed To Govern the Issue of Jurisdiction Over Ex Juris Defendants in Non-Class Cases

The Morguard real and substantial connection test was the common law's response to the issue of whether a court could assume jurisdiction over an ex juris defendant who had neither consented to the jurisdiction of a certain court, nor been served with process there. Morguard itself was a case about jurisdiction over a

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96. Lamont, supra note 68, at 285.
defendant in non-class litigation. Walker observes that "while the Morguard principles may provide inspiration for the answers we seek, . . . [the] decision cannot supply the details of the standards and practices" since Morguard was fundamentally a case about the preclusive effect of judgments as they affect the interests of named parties. Unfortunately, this point seems to have been lost on most Canadian courts, which have unquestioningly assumed that the same real and substantial connection test that governs the issue of jurisdiction over out-of-province defendants must automatically govern the issue of jurisdiction over nonresident plaintiffs.

The U.S. Supreme Court's seminal decision in Phillips Petroleum v. Shutts explicitly distinguished between a nonresident class member and a nonresident class defendant. Accordingly, the Court held that the minimum contacts test which is required to ground jurisdiction over nonresident defendants did not apply in the class context. In Shutts, a Kansas state court certified a national class consisting of 33,000 gas company investors who had sued to recover interest on royalty payments that had been delayed by the defendant. Class members were provided with notice by mail informing them of their rights, including their right to opt out of the class. The final class consisted of 28,000 members who resided in all 50 States, the District of Columbia, and several foreign countries. Notably, over 99 percent of the gas leases in question and 97 percent of the plaintiff class members had "no apparent connection to Kansas." The defendant asserted that the "Kansas courts may exercise jurisdiction over these [out-of-state] plaintiffs only if the plaintiffs possess the sufficient 'minimum contacts' with Kansas as the term is used in cases involving personal jurisdiction over out-of-state defendants." The U.S. Supreme Court disagreed, noting the significant differences that exist between absent class members and absent defendants:

The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant. An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment against it. The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff's claim, or suffer a default judgment. The defendant may be forced to participate in extended and often costly discovery, and will be forced to respond in damages or to comply with

99. Id. paras. 1-4.
100. Walker, Recognizing Multijurisdiction Class Action Judgments Within Canada, supra note 8, at 451; see also Celeste Poltak, Ontario and Her Sisters: Should Full Faith and Credit Apply to the National Class?, 3 CAN. CLASS ACTION REV. 437, 451 (2000) ("Given the significant differences between a traditional two-party lawsuit and multi-jurisdictional class proceedings, a slavish adherence to the analogy of a foreign defendant cannot adequately capture the legal dynamics and complexities of situations involving an unnamed plaintiff in modern cross-border class action litigation.").
101. Walker, Recognizing Multijurisdiction Class Action Judgments Within Canada, supra note 8, at 459.
103. Id. at 811.
104. Id. at 801.
105. Id.
106. Id. at 797.
107. Id.
108. Shutts, 472 U.S. at 806.
some other form of remedy imposed by the court should it lose the suit. The defendant may also face liability for court costs and attorney's fees. These burdens are substantial, and the minimum contacts requirement of the Due Process Clause prevents the forum State from unfairly imposing them upon the defendant.

A class-action plaintiff, however, is in quite a different posture. . . .

In sharp contrast to the predicament of a defendant haled into an out-of-state forum, the plaintiffs in this suit were not haled anywhere to defend themselves upon pain of a default judgment. . . .

A plaintiff class in Kansas and numerous other jurisdictions cannot first be certified unless the judge, with the aid of the named plaintiffs and defendant, conducts an inquiry into the common nature of the named plaintiffs' and the absent plaintiffs' claims, the adequacy of representation, the jurisdiction possessed over the class, and any other matters that will bear upon proper representation of the absent plaintiffs' interest. Unlike a defendant in a civil suit, a class-action plaintiff is not required to fend for himself. The court and named plaintiffs protect his interests.109

Including a nonresident plaintiff within a multijurisdictional class with the goal of allowing him to participate in litigation under the auspices of a court is not equivalent to "haling" a foreign defendant before the courts of a distant and inhospitable forum.110 If one starts from this premise, then it is clear that nonresident plaintiffs do not necessarily warrant similar jurisdictional treatment to nonresident defendants.

2. "Order and Fairness" as the Overarching Principles

The real and substantial connection test was developed to place reasonable limits on the assumption of jurisdiction by protecting an out-of-province defendant against being pursued in a forum in which he had little interest or connection.111 It was thought that if there is a sufficiently close nexus between the adjudicating forum and the out-of-province defendant, then it would be fair and reasonable to require the defendant to face suit there.112 The real and substantial connection was thus the mechanism for ensuring that jurisdiction over an out-of-province defendant comported with the principles of order and fairness that animate the Canadian conflict of laws.113 Or, in the words of Castel, the real and substantial connection test was "designed to give substance to order and fairness."114

109. Id. at 808–09 (citations omitted) (emphasis in original).
110. Id. at 803–15.
112. Id.
113. Id. Note in this respect that personal jurisdiction in Canada is not founded on notions of due process, as it is in the United States. See, e.g., Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding that a court does not have personal jurisdiction over a defendant unless the defendant has minimum contacts with the forum).
Requiring a real and substantial connection between nonresident plaintiffs and the forum in a class setting does not necessarily further the goals of order or fairness. As discussed, it hardly promotes order or fairness to require the defendant to embark on litigation or pursue settlement initiatives where, owing to the uncertainty of the jurisdictional test, the defendant cannot be reasonably assured some measure of finality due to circumstances entirely beyond his control. Similarly, fairness to the nonresident plaintiff class is not necessarily served by insistence on a real and substantial connection between the class and the forum. Often, even in the absence of a real and substantial connection, multijurisdictional classes promote the objectives of class actions (in particular, access to justice) better than individual provincial class actions. This is particularly true in cases where the claims of class members are not individually viable, such as typical consumer protection actions.

It is suggested that rather than focusing on the connection between the nonresident plaintiff class and the adjudicating forum, courts should focus on ensuring that the nonresident plaintiff class is provided with adequate procedural safeguards, namely notice, an opportunity to opt out, and adequate representation. These procedural safeguards are more directly relevant to ensuring order and fairness, the underlying tenets of the conflict of laws, than any sort of real and substantial connection.

Why does it make sense to ground personal jurisdiction over nonresident plaintiffs in procedural safeguards, rather than in a requirement for a real and substantial connection? First, it appears that the courts’ true concern when they refuse to enforce a class judgment rendered by a court in a different province is not the degree of connection between nonresidents and the forum, but rather procedural unfairness—the idea that a court in one province improperly bargained away the rights of a class member resident in another province. In Hocking, for instance, even though the Québec Court of Appeal refused to enforce the judgment on the basis that there was no real and substantial connection between the Ontario forum and the Québec class members, the judgment is infused with concerns about the fairness of a settlement where class members received no monetary compensation. Would a Québec court be as concerned about an Ontario court adjudicating upon
the rights of Québec residents with no connection to Ontario, where such residents had in fact received an adequate recovery?

Second, from the perspective of the nonresident plaintiff class, it is safe to assume that their concern is simply that their interests are adequately represented, rather than represented in a forum with which they necessarily have a real and substantial connection.119 According to one prominent class actions attorney, the primary concern of a “class member on the street” is to have “the best lawyer who is bringing the case in the best jurisdiction that will achieve the cheapest and quickest result.”120 In a similar vein, Wolfman and Morrison note that “[t]he location of the class action forum or the geographical confines of the jurisdiction where the class action was filed will almost certainly not be a factor in making [the] decision [to opt out or stay in the class].”121 If this is true, it is hard to justify the current jurisdictional focus on the question of where, when it appears that the question of how is much more compelling.

Third, even in cases involving ex juris defendants, courts have recently focused their attention more on the apparent fairness of assuming jurisdiction and less on the degree of connection between the defendant and the forum.122 While this approach has been criticized for producing unpredictable results, it is odd to look at connections between the forum and the nonresident plaintiff class when there is a move away from focusing on connections between the forum and the ex juris defendant in non-class jurisdiction cases.123

Fourth, while the plaintiffs’ interest is in having their claims adjudicated in a manner so their rights are sufficiently protected, the defendants’ interest is generally in being able to ensure some degree of finality to the litigation. This may be virtually impossible with a real and substantial connection test124 since the enforcing court will always be able to second-guess the jurisdictional competence of the adjudicating court. Defendants are left at the mercy of whatever the enforcing court deems to be real and substantial in the class setting. By eliminating the real and substantial connection requirement and focusing instead on procedural safeguards as a means to establishing jurisdiction, defendants at least have a measure of control over the ultimate enforceability of a judgment and a vested interest in ensuring that plaintiffs receive the best possible procedural safeguards. A defendant who actively ensures

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119. Alternatively, even if it were important that plaintiffs be represented in their “home” courts, Jones notes that “[m]ost of this problem can be abated through subclassing of non-residents by jurisdiction; in a British Columbia action, for instance, there could be a subclass for Albertans, Manitobans, and so on, with the subclass’s counsel familiar with the applicable law of the foreign province.” Jones, supra note 11, at 38.

120. Branch & Rhone, supra note 8, at 4.


123. Note, however, that the recent decision of the Ontario Court of Appeal in Van Breda v. Village Resorts Ltd., [2010] ONCA 84 (Can.), suggests a move away from fairness consideration and towards connection-based considerations. In Van Breda, the court noted that “consideration of fairness should not be seen as a separate inquiry unrelated to the core of the test, the connection between the forum, the plaintiff’s claim and the defendant. Consideration of fairness should rather serve as an analytic tool to assess the relevance, quality and strength of those connections, whether they amount to a real and substantial connection, and whether jurisdiction accords with the principles of order and fairness.” Van Breda, [2010] ONCA 84, para. 98.

124. Unless, of course, courts continue to ascribe an artificially broad meaning to a real and substantial connection.
that the rights of nonresident class members are protected will have some assurance that an eventual settlement or judgment will be granted preclusive effect throughout Canada. With a real and substantial connection test, a defendant can simply hope that a prospective enforcing court takes a view similar to that of the adjudicating court on the relevant connections necessary to establish jurisdiction.

At least one appellate Canadian court, guided by the U.S. Supreme Court decision in *Shutts*, has recognized that procedural safeguards are relevant to the issue of jurisdiction over a nonresident plaintiff class. In *Currie v. McDonald's Restaurants of Canada*, the Ontario Court of Appeal was asked to enforce an Illinois settlement of a class action that included Canadian class members. The court commented that "[t]he novel point raised ... is the application of the real and substantial connection test and the principles of order and fairness to unnamed, nonresident plaintiffs in international class actions."

Sharpe J.A., for the Ontario Court of Appeal observed that, although there was a real and substantial connection between the nonresident plaintiff class and Illinois because the defendant had its head office in Illinois and the alleged wrong had been committed there, this did not end the inquiry. The Court of Appeal emphasized that the principles of order and fairness required that careful consideration be paid to the rights of nonresident class members, who would have no reason to expect that any legal claim arising from a consumer transaction that took place entirely within Ontario and that gave rise to damages in Ontario would be litigated in the United States. In order to address the concern for fairness, the Court of Appeal noted that it was "helpful to consider the adequacy of the procedural rights afforded [to] the unnamed non-resident class members in the [Illinois] action." In particular, "respect for procedural rights, including the adequacy of representation, the adequacy of notice and the right to opt out, could fortify the connection with Illinois jurisdiction and alleviate concerns regarding unfairness." In other words, the procedural rights afforded to nonresident class members were relevant to assessing whether the assertion of jurisdiction was appropriate such that the nonresident class members should be bound to a class judgment.

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126. *Id.* paras. 1–2. For commentary on the *Currie* decision, see Saumier, *supra* note 9.
127. *Id.* para. 13.
128. *Id.* paras. 24–25.
129. *Id.* para. 25.
130. *Id.*
132. Sharpe J.A., summed up the approach to jurisdiction over nonresident class members in the enforcement of truly foreign class judgments:

> Provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court.

*Id.* para. 30; see also Saumier, *supra* note 9, at 19 ("Currie must stand for the view that the adequacy of notice in class actions goes to jurisdiction by way of the fairness principle under *Morguard.*"); Ellen Snow, *Protecting Canadian Plaintiffs in International Class Actions: The Need for a Principled Approach in Light of Currie v. McDonald's Restaurants of Canada Ltd.*, 2 CAN. CLASS ACTION REV. 217, 238 (2005) ("The
Courts and commentators have criticized Sharpe’s J.A., judgment in Currie as blurring the distinction between jurisdiction and recognition. However, Sharpe J.A., may have been on the right track by conceptualizing jurisdiction in terms of procedural rights. Focusing on procedural rights, rather than on the real and substantial connection, clears up much confusion in the application of the jurisdictional test and re-orients the analysis to what should matter most: ensuring that absent class members are given adequate procedural rights.

3. Addressing Potential Objections

a. The Practical Concern: What Will Stop a Canadian Court with Little Interest in the Litigation from Certifying a National Class?

One potential concern with abandoning the real and substantial connection requirement is that Canadian courts with little interest in, or connection to, the litigation would improperly certify national classes. What is to stop a Manitoba court, for instance, from certifying a nationwide class action where only a small percentage of class members reside in the forum and all the facts giving rise to the cause of action occurred outside the forum?

This concern is adequately addressed by both existing certification requirements as well as the doctrine of forum non conveniens. Prior to certifying a class action, a provincial court must be assured, inter alia, that there are common issues, that the class action is the preferable procedure for the resolution of the Currie decision in turn imports these procedural rights into applying the real and substantial connection test and thus changes the law in this area. Post-Currie it appears that the real and substantial connection test has a new dimension to it; the test is no longer limited to assessing whether there is a sufficient nexus between the forum and the action, but will now also assess the fairness of the proceedings to determine whether or not the assumption of jurisdiction is justified.

133. See, e.g., Snow, supra note 132, at 242 (stating that "the better and more principled approach to protecting plaintiffs comes from distinguishing between questions of jurisdiction and the defense of natural justice"); Jones & Baxter, supra note 66, at 425–26; McCutcheon v. Cash Store Inc., [2006] 80 O.R. (3d) 644, para. 56 (Can.) ("By incorporating fairness considerations into the rules for jurisdiction, the reasoning in Currie abandons some of the traditional distinctions between jurisdiction and recognition.").

134. Although the Currie decision should be welcomed for re-orienting to jurisdictional focus to procedural rights for nonresident plaintiffs, there are two flaws in Sharpe J.A.’s, reasoning which arise from his conflation of the U.S. and the Canadian approaches to jurisdiction over nonresident class members. First, contrary to what Sharpe J.A., suggests, the provision of adequate procedural safeguards to nonresident plaintiffs does nothing to bolster the connection between the forum and the nonresident plaintiff class. The Ontario class members in Currie would be no more “connected” to Illinois upon receipt of notice and an opt-out form than they were prior to such receipt. Thus, affording procedural safeguards to nonresident plaintiffs cannot create a connection where such a connection is not otherwise present. Second, Sharpe J.A., blends two distinct conceptual bases for jurisdiction in his analysis—real and substantial connection and implied consent. These bases of jurisdiction are alternative, not cumulative. On the current Canadian understanding of jurisdiction over nonresident class members, a court has jurisdiction where there is a real and substantial connection between the forum and the plaintiff class. Under the American approach, a court has jurisdiction over nonresident plaintiffs where such plaintiffs have been provided with notice and an opportunity to opt out of the proceeding, thereby permitting the inference that such class members have consented to the jurisdiction of the court. The Currie court layers the two, relying both on the notion of a real and substantial connection and that of implied consent. Either is sufficient, standing alone, for the assertion of jurisdiction over a nonresident plaintiff class.
common issues, and that the litigation plan is workable.\textsuperscript{135} Given these requirements, it is likely that a class action brought in a jurisdiction with little interest in the case would decline to certify a case. Alternatively, the doctrine of forum non conveniens remains available as a basis upon which a court that otherwise would have jurisdiction, could decline to exercise that jurisdiction on the basis that there is a more appropriate forum somewhere else.\textsuperscript{136} Moreover, it should be recalled that the court must also have personal jurisdiction over the defendant under the traditional bases of jurisdiction. Ordinarily, this would mean that there is some measure of connection between the adjudicating forum and the litigation, even if there is not necessarily a connection between the nonresident plaintiff class and the forum.

Even if a Canadian province without a real and substantial connection to the plaintiff class did certify a multijurisdictional class action, such a result would hardly be catastrophic. The \textit{Shutts} decision was criticized in part because it created the potential for certain jurisdictions to act as "magnet forums."\textsuperscript{137} Without a requirement for minimum contacts between the plaintiff class and the forum, a court with little connection to the litigation could end up deciding cases of national reach. This was particularly troubling given the well-documented disparities in the quality and perception of justice among American courts.\textsuperscript{138} However, it cannot be said that Ontario or Alberta are magnet forums in the same way that Alabama, West Virginia, or Louisiana may be. In fact, the Supreme Court has repeatedly emphasized that "fair process is not an issue within the Canadian federation."\textsuperscript{139} Speaking specifically of fair process with respect to class actions, Jones and Baxter observe:

Canadian courts facing the "full faith and credit" conundrum in class actions ought . . . to consider whether there really is a Canadian equivalent to Alabama in its "abuse of the justice system [through] drive-by class certification," or whether LaForest J.'s optimistic view that "fair process is not an issue within the Canadian federation" should instead be the guiding principle.\textsuperscript{140}

\textsuperscript{135} See, e.g., Class Proceedings Act, S.O., ch. 6.5(1) (1992).

\textsuperscript{136} In this respect, the law of forum non conveniens must be adapted to the unique challenges posed by multiple multijurisdictional class proceedings.

\textsuperscript{137} See, e.g., Arthur R. Miller & David Crump, \textit{Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts}, 96 \textit{YALE L.J.} 1, 59 (1986) (noting that the \textit{Shutts} decision created the potential for "magnet states . . . [to] resolve controversial issues on a nationwide basis").


\textsuperscript{139} Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, para. 43; \textit{see also} para. 37 ("The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges—who also have superintending control over other provincial courts and tribunals—are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada . . . . Any danger resulting from unfair procedure is further avoided by sub-constitutional factors, such as for example the fact that Canadian lawyers adhere to the same code of ethics throughout Canada.").

\textsuperscript{140} Jones & Baxter, \textit{supra} note 66, at 429 (footnote omitted); \textit{see also} Brito v. Pfizer Can. Inc., [2008]
As there can be few legitimate concerns about the ability of provincial courts in Canada to adequately protect the interests of their residents alongside the interests of the residents of other provinces, this critique of multijurisdictional class actions in Canada would appear unfounded.

b. The Theoretical Concern: The Notion of Implied Consent

The U.S. Supreme Court’s decision in *Shutts* attempted to align jurisdiction over nonresident, class action plaintiffs with jurisdiction over plaintiffs in traditional litigation. In non-class litigation, jurisdiction over the plaintiff is predicated on the plaintiff having selected the forum, thereby consenting to the jurisdiction of the court. Since absent class members do not “consent” in any meaningful sense of the term, it is commonly thought that under the *Shutts* approach, jurisdiction is grounded in the idea of implied consent. Where a class plaintiff does not opt out of a class proceeding despite the opportunity to do so, he has implicitly consented to be bound by the jurisdiction of the court. Numerous commentators have criticized the notion of implied consent as being largely fictitious. According to this view, it is disingenuous to view a plaintiff’s failure to opt out of a proceeding, of which he may or may not have had notice, as consenting to be bound by the court’s jurisdiction.

It is true that failure to opt out of a class action cannot genuinely be regarded as a form of consent. However, it is worth noting that the approach to the real and substantial connection test which focuses on the commonality of interest between resident and nonresident class members is no less a fiction than implied consent.

More importantly, however, it may not be necessary to conceive of jurisdiction over the plaintiff class as founded on either consent, presence, or a real and substantial connection. These three traditional defendant-centric bases for jurisdiction are an uncomfortable fit with the idea of assuming jurisdiction over a nonresident plaintiff class. Rather than stretching either the concept of consent or real and substantial connection to the point of fiction, it is suggested that jurisdiction over nonresident class members may rest on the twin pillars of order and fairness. Order and fairness are given practical effect through the procedural safeguards of notice, opportunity to opt out, and adequate representation. These safeguards are, in effect, proxies for the order and fairness that lie at the heart of the traditional jurisdictional tests. In fact, one U.S. commentator suggests that the *Shutts* decision itself may be read not as a case about implied consent, but as a case about...
“fundamental fairness.” According to this view, “a fundamental fairness standard might not invariably require either prelitigation contact or consent in order to establish in personam jurisdiction over nonresident class members.”

Class actions are a procedural innovation that cannot be readily reconciled with orthodox notions of jurisdiction. Accordingly, it may be time to reassess the conventional understanding of jurisdiction in the class action context, drawing inspiration from the overarching goals of order and fairness that are thought to inform jurisdictional analysis, without necessarily being wedded to the idea of a real and substantial connection that usually supplies the content of order and fairness.

c. The Constitutional Concern: The Issue of Extra-Territoriality

This article has presented the possibility that Morguard does not necessarily require there to be a real and substantial connection between the forum and the nonresident plaintiff class in order to found personal jurisdiction. Rather, the question of judicial jurisdiction over nonresident plaintiffs may be answered by reference to the overarching principles of order and fairness, as effectuated through the provision of adequate procedural safeguards to the nonresident plaintiff class. How does conceptualizing jurisdiction in this way implicate the issue of the extra-territorial reach of provincial legislation? What, in other words, is the relationship between judicial jurisdiction and legislative jurisdiction in the class context?

Early in Canadian class action jurisprudence, defendants resisting certification of a national or multijurisdictional class tended to argue that provincial legislation governing class actions could not, as a constitutional matter, be applied extraterritorially so as to affect the rights of purported nonresident class members. The argument was that section 92(16) of the Constitution Act permits provinces to legislate with respect to civil rights “within the province” and that the extension of class proceedings legislation to nonresident plaintiffs results in the impermissible extraterritorial application of provincial law.

However, Walker notes that “the objection relating to extraterritoriality appears to be misconceived” and that “there is simply no credible challenge to be made to the basic jurisdiction of Canadian courts to certify multijurisdiction class actions.” This is because section 92 of the Constitution Act, which defines the scope of provincial legislative competence, does not define the scope of a provincial court’s judicial jurisdiction:

146. See, e.g., Wilson v. Servier, [2000] 50 O.R. (3d) 219, para. 59 (Can.) (“Thus, two issues are raised by the defendants. First, is the CPA ultra vires the Legislative authority of the Province of Ontario to the extent it may purport to allow for a national class?”); Carom v. Bre-X Minerals Ltd., [1999] 43 O.R. (3d) 441, para. 17 (Can.) (“[Certain defendants] object to the proposed class on the grounds that . . . it affects civil rights outside the province and, therefore, is unconstitutional and contrary to the presumption under the principle of territoriality that legislation does not operate extra-territorially.”).
148. CASTEL & WALKER, supra note 64, § 11.4, at 11–23.
149. Walker, Recognizing Multijurisdiction Class Action Judgments Within Canada, supra note 8, at 459.
It is to be noted that s. 129 of the 1867 [Constitution] Act provides that the court retains its pre-Confederation jurisdiction except as altered by Parliament or the 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 [Constitution] Act. Thus, the referenced provisions of s. 92 have no relevance in limiting the court’s jurisdiction. The CPA recognizes and affirms the court’s jurisdiction to include non-resident claimants within an Ontario action.

If a court starts from the predicate question of whether it has personal jurisdiction over the parties to the action (unconstrained by the limitations of section 92), then the court may apply its procedural law, including its class proceedings legislation, without running afoul of constitutional limitations on territorial competence. Courts have continually emphasized that class proceedings statutes are procedural in character. Indeed, the Supreme Court recently noted that “the class action, while having an important social dimension, is only a ‘procedural vehicle whose use neither modifies nor creates substantive rights.’”

Therefore, the issue is not whether provincial class proceedings legislation operates extraterritorially when nonresident plaintiffs are included within a class, but whether a provincial court has a proper basis for asserting personal jurisdiction over nonresident class members. If a provincial court has properly exercised personal jurisdiction under the principles of order and fairness (given practical effect through procedural safeguards), otherwise valid procedural, provincial class proceedings legislation does not operate extra-territorially when applied to nonresident class members. In other words, once a nonresident plaintiff is properly “before” the court, on whatever understanding of jurisdiction is appropriate, the court may apply its class proceedings statute to the case as a necessary incident of that jurisdiction. Just as an ex juris defendant who is properly within the jurisdictional embrace of the court—owing to his consent, presence, or a real and substantial connection—is

150. Wilson, [2000] 50 O.R. (3d) 219, para. 67; see also Walker, Recognizing Multijurisdiction Class Action Judgments Within Canada, supra note 8, at 459 n.18 (“Although class actions legislation is promulgated pursuant to the constitutional grant to the provinces of exclusive authority to make laws in relation to procedure in civil matters and this grant contains a limit on the extraterritorial operation of that authority, s. 92 provides for legislative authority, not judicial authority. The judicial jurisdiction of the superior courts of Canada is founded on the traditional authority of the courts of England and the provinces as reflected in s. 129 of the Constitution Act, 1867 and it is informed by the principles of order and fairness.”).


subject to a province’s procedural rules, so too is a nonresident plaintiff in class litigation. This does not mean that substantive provincial law may govern this dispute, as that will be determined by relevant choice of law principles.\textsuperscript{154} It simply means that “[a] necessary corollary of [a] court’s assumption of jurisdiction is the application of [its class action] legislation to the proceedings.”\textsuperscript{155}

Further support for this position is found in the Supreme Court of Canada’s decision in \textit{Western Canadian Shopping Centres Inc. v. Dutton}.\textsuperscript{156} In that case, the Supreme Court determined that even in the absence of comprehensive class action legislation, courts could certify and fashion class proceedings under their “inherent power to settle the rules of practice and procedure as to disputes brought before them.”\textsuperscript{157} \textit{Dutton} confirms that the source of the province’s jurisdiction to certify a class action does not derive from underlying provincial class proceedings legislation, but instead rests on the judicial jurisdiction of the superior courts, which is to be exercised in accordance with the principles of order and fairness.\textsuperscript{158}

154. \textit{See Wilson}, [2000] 50 O.R. (3d) 219, para. 83 (“\textit{Morguard} and \textit{Hunt} stand for the proposition that if there is a real and substantial connection between the subject-matter of the action and Ontario, then the Ontario court has jurisdiction with respect to the litigation and can apply Ontario’s procedural law. Ontario may not necessarily apply its substantive law since there must be a determination of the choice of law that applies.”) (emphasis in original). In \textit{Hocking}, the Québec Court of Appeal expressed more concern about the application of Ontario’s substantive law, rather than its procedural law:

\begin{quote}
\[E\text{ne autorisant un recours collectif sans m\^{e}me se poser la question de savoir s’il existe entre tous et chacun des membres du groupe vis\^{e} (en l’espèce, les Canadiens ayant eu certains rapports contractuels avec HSBC) et le for saisi (celui de l’Ontario) un lien réel et substantiel sur le fond, le jugement ontarien qui est au cœur du litige fait apparemment en sorte de rendre applicable à tous les non-résidants de l’Ontario, et notamment aux Québécois, non seulement la procédure de reconnaissance applicable aux recours collectifs en Ontario, mais surtout le droit substantif de cette province: voilà en effet que par ce jugement ontarien dont on demande la reconnaissance au Québec, les droits des justiciables québécois ayant contracté au Québec, avec une succursale québécoise de HSBC, un contrat hypothécaire relatif à une propriété située au Québec se trouveraient déterminés par le droit ontarien, alors qu’aucun lien de quelque sorte ne les rattache à celui-ci. Ne peut-on croire qu’il y a là une atteinte directe au principe constitutionnel de territorialité.

Cette atteinte aurait pu être mitigée, peut-être, si, consciente de l’effet d’une telle autorisation, la juge ontarienne avait, par exemple, en application des règles ontariennes en matière de droit international privé, considéré la possibilité que, sur le fond, les non-résidants de l’Ontario puissent être régis par le droit de leur province respective . . . .
\]

\textit{Dutton}, [2001] 2 S.C.R. 534, paras. 31–34, 2001 SCC 46 (Can.). Note that in \textit{Dutton}, the Court did not even consider the issue of whether it had personal jurisdiction over the plaintiff class of foreign investors. \textit{See id.} paras. 1, 35. However, the Court did hold that procedural safeguards were relevant to whether plaintiffs could be bound: “A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.” \textit{Id.} para. 49.
\textit{Id.} para. 34.
155. \textit{See id.} paras. 31–34 (determining that absent provincial class proceedings legislation, “courts must determine the availability of the class action and the mechanics of class action practice”).
Despite the aforementioned analysis, some courts seem to suggest that it is the real and substantial connection itself that founds both judicial and legislative jurisdiction in the class context. According to this view, even if one could abandon the real and substantial connection for personal jurisdiction, such a connection is still required to found legislative jurisdiction. It is doubtful that both the issue of personal jurisdiction over plaintiffs and legislative jurisdiction are in fact policed by the same standard—i.e., that laid out in Morguard, a case which was fundamentally about the recognition of foreign judgments. In Unifund Assurance Co. of Canada v. Insurance Corp. of British Columbia, the Supreme Court was confronted with a case that raised concerns both about personal jurisdiction over a defendant and the constitutional applicability of a regulatory statute to that defendant. The Court noted:

[W]e are asked to apply the "real and substantial connection test" in the different context of the applicability of a provincial regulatory scheme to an out-of-province defendant. The issue is not just the competence of the Ontario court ... but, as the constitutional question asks, whether the "connection" between Ontario and the respondent is sufficient to support the application to the appellant of Ontario's regulatory regime.

Notably, this was the first time that the Supreme Court's jurisprudence on extra-territorial application of otherwise valid provincial law was cast in terms of a "sufficient" connection. Moreover, the traditional language of "pith and substance" and "incidental effects" which had previously been used in the context

159. See, e.g., Carom, [1999] 43 O.R. (3d) 441, para. 36 (noting that "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").

160. See Edinger & Black, supra note 151, at 165 (arguing that "it has not been true that judicial and prescriptive jurisdiction are circumscribed by a shared standard").


162. Id. para. 55; see Edinger & Black, supra note 151, at 175 (noting that in Unifund "the real and substantial connection test was adapted to a new role of evaluating the territorial applicability of provincial legislation"). In Unifund, the Court articulated the following principles with respect to the constitutional applicability of a provincial regulatory scheme to an out of province defendant:

1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;

2. What constitutes a 'sufficient' connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;

3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;

4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.

163. See, e.g., Edinger & Black, supra note 151, at 174-75 (describing the Court's development of the sufficiency test in Unifund).

164. See Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297 (Can.) (holding that the Newfoundland Upper Churchill Water Rights Reversion Act was ultra vires the legislature of Newfoundland because "the pith and substance of the Reversion Act is to interfere with the rights of
of extra-territoriality, especially in cases of constitutional validity, was largely ignored. While drawing on the language of Morguard and Hunt with respect to a "sufficient' connection" and the "principles of order and fairness," it is far from clear that the Supreme Court intended the Morguard real and substantial connection test to now govern the issue of the constitutional applicability of otherwise intra vires provincial legislation.6

More importantly, however, the sui generis nature of class proceedings legislation may mean that the traditional approaches to extraterritoriality are of limited relevance. First, all of the Canadian Supreme Court jurisprudence on the issue of extra-territorial reach of provincial law deals with its application to a named defendant. How this translates to a group of unnamed plaintiffs is far from clear. Second, cases on extra-territorial reach of provincial legislation have dealt with attempts to regulate defendant conduct and take away from those defendants certain property or contract rights that they would otherwise enjoy. Class proceedings statutes, on the other hand, are designed to confer a benefit upon absent class members; indeed, that is their raison d'être. While a necessary consequence of their design is that civil rights (in particular, the right to sue) may be extinguished, they are not aimed at regulating conduct in the same way that, say, an insurance statute may be. Finally, all class members have the ability to exclude themselves from the reach of class proceedings legislation by exercising the option to opt out of the litigation, and to commence actions in the courts of their choosing. A class member's rights are only potentially affected if an enforcing court in a different province accords res judicata effect to a class judgment. A provincial class

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6. See Unifund, [2003] 2 S.C.R. 63 (nowhere do the phrases "pith and substance" or "incidental effects" appear in the majority opinion). But see id. para. 140 (Bastarache, J., dissenting) (citations omitted) (analyzing the constitutionality issue in more traditional language: "I do not propose to deal at any length with the question of the permissible reach of Ontario's Insurance Act. In Reference re Upper Churchill Water Rights Reversion Act, [1984] 1 S.C.R. 297, the Court opined that valid provincial legislation can affect extra-provincial rights in an 'incidental' manner. I am of the view that valid provincial laws can affect 'matters' which are 'sufficiently connected' to the province. In my view, the respondent has shown that the subject matter which the Insurance Act covers, interinsurer indemnification, falls within provincial jurisdiction and is sufficiently connected to Ontario so as to render the statute applicable to the ICBC.").

165. See Unifund, [2003] 2 S.C.R. 63, para. 58 (alluding to the fact that legislative and judicial jurisdiction are not governed by the same standard, noting that "a 'real and substantial connection' sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome.").

166. See Carom v. Bre-X Minerals Ltd., [1999] 43 O.R. (3d) 441, para. 53 ("The CPA is sui generis legislation. The notion of a class of plaintiffs is conceptual in nature. That is to say a class proceeding may on occasion be initiated where a class of plaintiffs is discrete in that the members are identifiable at the time that the class is certified. More often however, as is the case here, the class is generic. The members will only be known at some later date, perhaps when the individual issues are dealt with. This latter situation is within the contemplation of the statute. The personal attornment of the type demanded by the defendants as a prerequisite runs contrary to the scheme of the CPA and its core concept of a proceeding brought on behalf of a class by a representative plaintiff.").

167. See, e.g., Unifund, [2003] 2 S.C.R. 63, para. 56 (dealing with the applicability of a provincial regulatory scheme, the Ontario Insurance Act, to an out-of-province defendant).

168. Id.
proceedings statute does not prevent a class member from otherwise suing in the province of his choosing. The point is that just as the Morguard personal jurisdiction test does not work particularly well in its application to a class of unnamed plaintiffs, it is also an uncomfortable fit with the issue of extra-territorial applicability of provincial class proceedings law to unnamed plaintiffs.

In any event, it is not necessary to resort to either Unifund or the traditional cases on extraterritoriality because the source of the court's power to certify multijurisdictional classes does not originate from provincial class proceedings legislation, but rather rests on the judicial jurisdiction of the superior courts which, in turn, is "informed by the principles of order and fairness." Once a court properly assumes jurisdiction over a nonresident plaintiff class, otherwise valid provincial class proceedings legislation applies as a necessary corollary of that exercise of judicial jurisdiction.

V. CONCLUSION

As noted at the beginning of this article, it has been difficult to reconcile contemporary class action practice with traditional adversarial procedure. Nowhere has this been truer than in the area of jurisdiction. In non-class litigation, jurisdictional issues are viewed only in reference to the defendant. In class litigation, on the other hand, the jurisdictional issues are manifold: Is there jurisdiction over the defendant?; is there jurisdiction over the defendant in respect of the claims of nonresident class members?; and, is there jurisdiction over the plaintiff class? With respect to this latter question, the analytical approach is still unsettled, with courts extrapolating from the real and substantial connection test that guides jurisdictional determinations concerning nonresident defendants. Because of the divergent approaches to the real and substantial connection in a class context, defendants have encountered the "back-end" jurisdictional problem.

While the problem could be addressed by courts simply adopting a uniform approach to the real and substantial connection test or by legislatures crafting regimes which only permit class actions on an opt-in basis, it is time to probe the question of whether a real and substantial connection is necessary to ground jurisdiction over nonresident plaintiffs. Rather than focusing on the connections between the nonresident plaintiff class and the forum—where such connections are likely to be absent in most cases—it would be more appropriate to regard a court as jurisdictionally competent in circumstances where the nonresident plaintiff class has been provided with adequate procedural safeguards, in particular, notice, an opportunity to opt out, and adequate representation. These procedural safeguards are more conducive to ensuring that jurisdictional determinations are fair and orderly than any sort of real and substantial connection. Regardless of which solution is ultimately adopted, one thing is clear: existing notions of jurisdiction must be carefully reassessed and adapted to this new procedural device.

170. Walker, Recognizing Multijurisdiction Class Action Judgments Within Canada, supra note 8, at 459 n.18.