The Bond Between Class Members – The Wedge Between Counsel: Trans-national Class Actions in the Wake of *Parsons v. McDonald's Restaurants*

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> "*Accept the things to which fate binds you, and love the people with whom fate brings you together, but do so with all your heart*." Marcus Aurelius
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> "*Share everything. Don't take things that aren't yours. Put things back where you found them.*" Robert Fulghum, author of All I Really Need to Know I Learned in Kindergarten

Fate, manifesting itself in a recent development in Ontario jurisprudence, *Parsons v. McDonald's Restaurants* [2004] O.J. No. 83 (S.C.J.) ("*Parsons*"), has widened the door for Canadian and American class members to be bound together in a single American action.

As a result of *Parsons*, American counsel may now represent Canadian class members in American class actions against American defendants whose activities have cross-border effects in the comfort that Canadian courts will respect their efforts.

In order to become counsel to Canadian residents, the American attorney simply needs to ensure Canadian putative class members receive adequate notice of their right to opt-in or out of the American class action, as the case may be. Thus, American class counsel may be able to represent larger classes, achieve larger settlements, and enjoy larger fees.

Conversely, Canadian lawyers, who will often be slower off the mark than their American colleagues, might find that all that is left to litigate in Canada may be a residual subset of class members from the massive U.S. trans-national class action. Such small residual classes will often make it uneconomic for any Canadian class action to proceed.

In short, *Parsons* may have brought Canadian and American class members together into a single class action, but effectively driven a wedge between American and Canadian plaintiffs' counsel. Whereas once American and Canadian counsel would cooperate with parallel actions, American counsel may now simply bypass any cooperation and sharing, and instead directly represent Canadians who would otherwise be clients of Canadian lawyers.

I. The American Action

In *Parsons*, the defendants moved to stay or dismiss certain Ontario actions, arguing that the actions had been finally disposed of by a final judgment in a class proceeding in Illinois; and that the Ontario actions were therefore frivolous, vexatious or otherwise an abuse of the court's process.

The Illinois action had been commenced against MacDonald's Restaurant by two Americans, Boland and Kirsch (see *Boland v. McDonalds*, No. 01 CH 13803 (Circuit

Court of Cook County, Illinois). Boland and Kirsch alleged that promotional contests conducted on behalf of McDonald's Restaurant had been rigged by McDonald's Restaurant's co-defendant, Simon Marketing Inc. ("Simon") in both Illinois and Ontario.

The FBI commenced an investigation, and eventually laid charges against a Simon employee and his co-conspirators. The employee admitted to the FBI that he had pulled large prize-winning game pieces from random product insertion, and directed them to specific individuals. The acts of the employee and his co-conspirators were on a large scale: approximately US$22 million to $24 million had been misappropriated.[1] Boland and Kirsch argued that as a result of the contest rigging, McDonald's patrons had been deprived of their opportunities to win those prizes.

The plaintiffs in *Boland* sought class certification in Illinois for all persons, wherever located (*i.e.*, including Canada), who had participated or attempted to participate in McDonald's promotional games. In April 2002, McDonald's and the class representatives entered into a Stipulation of Settlement. McDonald's Restaurant did not admit liability and, subject to court approval, it agreed to sponsor and run a prize give-away consisting of 15 prizes, each valued at US $1 million dollars, which were to be randomly awarded to persons in attendance at selected McDonald's Restaurants over a designated period.[2] In exchange for the settlement McDonald's received a release of all claims relating to its promotional games conducted between January 1, 1979 and December 31, 2001.

In May 2002 a preliminary approval of settlement hearing was held in Illinois. The issue of notice to Canadians was specifically raised by the court during that hearing. The following month, the Illinois court issued an order providing preliminary approval of the settlement incorporated in the Stipulation of Settlement. The Illinois court specifically included in the preliminary class certification membership, Canadians who between January 1, 1979 to December 31, 2001 participated in or obtained or attempted to obtain official game pieces in a McDonald's promotional game. As well, the court approved the proposed notice plan, which called for notice to be provided in Canada by means of two advertisements in Maclean's Magazine and advertisements in each of La Presse, Le Journal de Quebec and Le Journal de Montreal. The Illinois court said this notice was "fair, valid, due and sufficient notice of all persons entitled thereto".

The final fairness hearing in Illinois was scheduled for September, 2002. Before the final hearing, a group of Canadian objectors, including Parsons, moved to intervene in the Illinois proceedings to object to the settlement. Parsons objected on the basis that the Canadian class members had a claim which lacked commonality with other members of the class. He alleged that in the course of criminal proceedings in Florida, the Simon employee who was convicted of rigging operations, alleged that he had been told that McDonald's had instructed that there should be no high value winners in Canada, and that winning game pieces should not be seeded in Canada.

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[1] Of this amount, approximately US$12 to $14 million in prizes were allocated to both the Canadian and American markets. The remaining amount was allocated exclusively to the American market.

[2] This give-away was to be in addition to a "Labour Day Giveaway", which was implemented by McDonald's after the FBI investigation. The Labour Day Giveaway consisted of US $10 million in prizes.

In addition to their unique claims, Parsons argued before the Illinois court that notice to Canadians was inadequate. He argued that Macleans had a circulation limited to less than 5% of the Canadian population; and the notice failed to mention any possible cause of action particular to the Canadian customers of McDonald's Canada (i.e., the deliberate redirection by McDonald's of the advertised high-value prizes away from Canada). Parsons thus argued that the notice was insufficient to permit putative class members from Canada to properly select an option to participate, refuse to participate, or object to the class certification or settlement.

In approving the settlement, the Illinois court rejected the Canadian objectors submissions. The court concluded that the settlement provided "a fair and adequate recovery to class members". It also found that the notice to potential class members was adequate. The Illinois court's Final Judgement and Order was entered. It ordered, in part, that McDonald's release applied "in any forum". Parsons and other Canadian objectors sought an appeal, which appeal was dismissed on jurisdictional grounds in July 2003.

The result of all this was an Illinois action, certified for settlement purposes, which purported to include and bind Canadian residents. The Illinois court's order did allow members, including Canadians, to opt-out. Thus, inclusion of the Canadians was automatic, subject to the exercise of opt-out rights.

II. The Canadian Action

Background

Against the American background discussed above, we now turn to consider the Ontario reasons for judgment in *Parsons*, and the implications of same on the ability of American attorneys to scoop up Canadian residents as class members.

In the Ontario Superior Court, the defendant brought motions to address the following issues:

> (1) Was the decision in *Boland* made by a court of competent jurisdiction in accordance with the principles in *Morguard* and *Beals*?
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> (2) If the court in *Boland* had jurisdiction, are there grounds on which recognition in this court should be denied?
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> (3) If the judgment in *Boland* is to be recognized, does the decision require the dismissal of the Ontario actions on the ground of *res judicata*, issue estoppel or abuse of process?

In order to consider the issues, Cullity J. turned to international private law sources, specifically conflicts of laws. As such, his decision necessarily grounded itself, in part, in the recent Supreme Court of Canada decision in *Beals v. Saldanha*, 2003 SCC 72, [2003] S.C.J. No. 77, which followed upon and expanded the principles set out in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077.

Beals v. Saldanha

In *Beals*, default judgment was entered in Florida against two Canadians in relation to an action which had been commenced against them in Florida in the mid-1980's. The action related to a purchase and sale agreement entered into between the plaintiffs and defendants in relation to Florida property, called "Lot 2". The plaintiffs had purchased Lot 2 for $4,000. Three years later they sold it to the defendants for $8,000. The defendants purchased Lot 2 in order to build a model home; and they began constructing the home. Unfortunately, rather than constructing on Lot 2, the defendants started construction on "Lot 1", which they did not own.

In 1985 the plaintiffs commenced what was the first action in Florida, for "damages which exceeds $5,000". The defendants, representing themselves, filed a defence. That action was dismissed without costs as it had been filed in the wrong county; and in 1986 the plaintiffs commenced a second action, the complaint was served on the defendants in Ontario. The complaint sought to rescind the contract of purchase and sale, and claimed damages in excess of US $5,000, treble damages and other relief authorized by statute in Florida. A series of amended complaints were then served on the defendants. At first the defendants provided a statement of defence; but they did not file a defence in relation to further amendments. Under Florida law, the appellants were required to file a defence to each new amended complaint; otherwise, they risked being noted in default. In fact, a Florida court subsequently entered default against the appellants, the effect of which, under Florida law, was that they were deemed to have admitted the allegations contained in the complaint.

A jury trial was subsequently held to establish quantum of damages. The defendants did not appear and the jury awarded the plaintiffs US$260,000. Upon learning about the judgment, the defendants sought legal advice in their home province of Ontario. Their lawyer advised them that the judgment could not be enforced in Ontario. As such, the defendants did not pay the judgment, nor did they appeal or seek to have the judgment set aside.

The plaintiffs commenced an action in Ontario to enforce their judgment. By the time of the hearing of the Ontario action, the Florida judgment, together with interest, had ballooned to C$800,000. At trial in Ontario the court dismissed the action on the ground that there had been fraud in relation to assessment of damages. On appeal, the Supreme Court of Canada decided that the Florida judgment ought to be enforced against the defendants.

Major J., relied on the decision in *Morguard*, as follows (at para. 23):

> *Morguard* established that the courts of one province or territory should recognize and enforce the judgments of another province or territory, if that court had properly exercised jurisdiction in the action, namely that it had a real and substantial connection with either the subject matter of the action or the defendant. A substantial connection with the subject matter of the action will satisfy the real and substantial connection test even in the absence of such a connection with the defendant to the action.

Major J. then queried whether the real and substantial connection test enunciated in *Morguard*, which applied to interprovincial judgments, ought to apply also to the recognition and enforcement of foreign judgments. In finding that the test applies to foreign judgments, Major J. noted that "[26] . . . the need to accommodate 'the flow of wealth, skills and people across state lines' is as much an imperative internationally as it is interprovincially."

Concerning the application of the real and substantial connection test, Major J. said (at para. 32):

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

Major J. held that on the facts, there existed a real and substantial connection between the Florida jurisdiction, the subject matter of the action, and the defendants. The defendants had "purchased land in Florida, an act that represents a significant engagement with the foreign jurisdiction's legal order."[3] Furthermore, they had at least initially entered a defence in Florida, which meant they "attorned to the jurisdiction of the Florida court . . ."[4] None of the defences existed which could have allowed the court to avoid the foreign judgment (i.e., fraud, public policy and lack of natural justice).

Parsons – Application of the Beals/Morgaurd Principles

The decision in *Beals* is not directly applicable to a class action such as *Parsons*. Of note, the court in *Beals* spoke of the Canadian defendants having engaged in certain activities in Florida (purchasing property). Those defendants were held to have attorned to Florida jurisdiction, and their actions triggered the ability of the Ontario court to enforce the Florida court's judgment. In contrast, in *Parson*, the Illinois court purported to extend jurisdiction to Canadian resident putative plaintiff class members, who were entirely passive. They had engaged in no activities in the United States, and they had not attorned to Illinois jurisdiction.

Cullity J. noted various complications in the application of *Morguard* principles to a class action (at para. 19):

> An application of the *Morguard* principles to the facts of this case is complicated by special features of class proceedings. These include the fact that judgments made at a trial of common issues, and orders approving settlements, routinely bind members of a class who have not participated in the proceedings, have not been served and - despite statutory requirements of notice - may have no knowledge of the proceedings. There is also the feature that, before certification, no formal notice

[3] At para. 36
[4] At para. 34

> will ordinarily have been given to members of the putative class and the court will have no authority to make orders binding on them. In addition, and of fundamental importance, the jurisdiction to bind class members by an order certifying the proceedings will be subject to their rights to opt out of the proceedings. Although courts have insisted that, pending certification, the interests of members of the putative class are not to be disregarded, I do not believe the named plaintiff, or the court, can abrogate the rights of - or impose duties on - such members at that stage. This will be so whether the legislation governing class proceedings requires members to opt in or, as in Ontario and Illinois, they will be bound by an order certifying the proceeding unless they opt out.

Continuing, Cullity J. identified the key differences between the traditional situation, and that in *Parsons*. In particular, as noted above, in *Parsons* the court had to consider the effect of a foreign order to bind *plaintiffs*, not defendants. The Canadian class members had not been present in the foreign jurisdiction during the material period; and, further, they had not instituted an action against the foreign defendant in that defendant's jurisdiction of residence. At paras. 21 to 22, Cullity J. said:

> The traditional rule referred only to the defendant's - and not the plaintiff's - presence in the jurisdiction because, in cases other than class proceedings, the foreign court would have jurisdiction over the plaintiff by virtue of the submission effected by the institution of the action in such court. In the absence of any submission - or agreement to submit - the presence of the defendant has been considered to be sufficient to justify the court's claim to exercise jurisdiction to bind the defendant on the ground that such a person has an "obligation for the time being to abide by its laws and accept the jurisdiction of its court while present in its territory": *Adams v. Cape Industries plc*, [1990] Ch. 433 (C.A.), at page 519. Where, however, as here, the question is whether members of a class who were not present in the foreign country are to be bound by the foreign judgment, the application of the obligation theory to bind a defendant present in the foreign country would not be sufficient to justify an exercise of jurisdiction over such absent members.
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> Similarly, while a defendant's residence in a foreign jurisdiction might ordinarily be sufficient to establish the real and substantial connection required by the *Morguard* principles, I do not believe the enquiry can stop there when the effect of a foreign judgment on a class proceeding is under consideration. Whether the question of notice to putative class members is to be considered to relate to the jurisdiction of the foreign court in the international sense or - as I believe would be more consistent with the approach of the majority in *Beals* - to requirements of natural justice as a ground for impeaching a decision of a foreign court of competent jurisdiction, does not appear to me to be important. On either analysis, the question of notice to putative class members cannot, I think, be ignored. Accordingly, I do not accept that the effect of the decision of the court in Illinois on Canadian resident members of the putative class in *Boland* would be conclusively determined by the residence in that jurisdiction of either, or even each, of the defendants to the action.

Attornment

Cullity J. then considered separately, the issue of attornment from the perspective of the Canadian class. Cullity J. found that there was attornment by certain individuals. Parsons and other named Canadian objectors had voluntarily attorned to the jurisdiction of the Illinois court because they attended before that court to intervene and provide submissions in relation to the Illinois final fairness hearing. The objections were directed fundamentally at the merits of the issues to be decided by the Illinois court; and, as such, Parsons and other objectors had attorned to the Illinois court's jurisdiction.

The next question was whether Parson's attornment bound putative class members. Cullity J. found that it could not be said that all proposed class members had attorned. Of note, he left open whether the question would have been answered differently were he dealing with class members after the case had been certified (at para. 32).

> Whatever might have been the position if this motion had been brought after the Parsons action had been certified, I do not believe that, prior to certification, Mr. Parsons had authority or power to bind class members by a submission to the jurisdiction of a foreign court. The submission was effective as far as his action was concerned but it does not follow that the members of the Parsons putative class - as a class or as individuals - must be considered to have submitted to the jurisdiction of the Illinois court. At the time of his submission to the jurisdiction of the court in Illinois - as at the present time - it was unknown whether the Parsons action would be certified as a class proceeding. In the absence of statutory authority, I do not believe he had power to submit the rights of putative class members to the jurisdiction of a foreign court before his action had been certified and before they had been provided with an opportunity to opt out of that proceeding. Nor, I might add, did he purport to do so. On the contrary, it was stated in the written material filed by the Canadian objectors in the court in Illinois that they did not, and could not, waive any jurisdictional arguments on behalf of other Canadians

Real and Substantial Connection and the Natural Justice Defence

Despite finding lack of attornment by proposed class members, Cullity J. held that these class members "might still be vulnerable to the defendants' reliance on res judicata, issue estoppel or abuse of process on the ground that the decision in Boland should be recognized in this court as it was made by a court of competent jurisdiction in accordance with the 'real and substantial connection' test and it purported to bind them."[5]

Applying the *Morguard* principles, Cullity J. found (at para. 23) that there existed a real and substantial connection between the state of Illinois and the defendants, as well as with the subject matter of the action. This was a necessary starting point.

The question then was "whether, notwithstanding the existence of a real and substantial connection with the state of Illinois, grounds exist for denying recognition of the judgment that was, prima facie, made by a court of competent jurisdiction."[6]

[5] At para. 35
[6] At para. 36

In *Beals*, Major J. had considered the question of natural justice as a defence once the real and substantial connection test had been fulfilled. He held that "This Court has to consider whether those defences [including the defence of natural justice], when applied internationally, are able to strike the balance required by comity, the balance between order and fairness as well as the real and substantial connection, in respect of enforcing default judgments obtained in foreign courts."[7] The defence of natural justice is a procedural defence: "[It] . . . is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. . . ."[8]

Major J. held that in considering whether procedural fairness has been granted, the court must be mindful to the fact that a "[f]air process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system. . . ."[9] He then focussed on adequacy of notice as a hallmark of procedural fairness and natural justice: "In Canada, natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend. . . ."[10]

Major J. provided a broad interpretation of the components of a natural justice defence. The defendant is presumed to know the niceties of the foreign legal system; and the onus is upon him to prove a reasonable apprehension of unfairness. The plaintiff has adhered to the rules of natural justice if he has fully informed the defendant about the foreign action which has been commenced. Major J. said, at para 69:

> My interpretation of the Florida legal system differs from that of LeBel J. in that I am of the opinion that the appellants were fully informed about the Florida action. They were advised of the case to meet and were granted a fair opportunity to do so. They did not defend the action. Once they received notice of the amount of the judgment, the appellants obviously had precise notice of the extent of their financial exposure. Their failure to act when confronted with the size of the award of damages was not due to a lack of notice but due to relying on the mistaken advice of their lawyer.

In applying these principles to the class action context, Cullity J. focussed on the adequacy of notice to the proposed Canadian class members. Cullity J. indicated that it did not matter practically whether the requirement for adequate notice fell within the initial determination of jurisdiction, or whether it should be considered as a defence to jurisdiction (although he suggested the latter was the correct approach).

Cullity J. explained (at para. 43) that

> The court in *Beals* was not, of course, dealing with a class action and it may well be that the special features of class proceedings require some modification of the manner in which rules of natural justice have traditionally been applied. At the very

[7] At para. 41
[8] At para. 64
[9] At para. 62
[10] At para. 65

> least, they must be adapted to deal with the position of putative class members who will be bound by orders made in the proceedings if, and after, certification is granted. Nor, I think, can the court ignore the unique possibilities of abuse that may arise when settlements of class proceedings have been negotiated

Applying the majority reasons in *Beals*, Cullity J. held as follows (at para. 45):

> . . . I do not think there is any question that there would be a denial of natural justice if, in such a case, members of the putative class who had not received formal notice of the proceedings and had not participated in them were not given an opportunity to opt out. The injustice would be particularly evident if the judgment of the foreign court approved a settlement that contained releases as extensive as those approved in Boland. In their terms, these releases would provide the defendants with a defence to claims relating to McDonald's promotional games that were based on causes of action, or material facts, that were not relied on in the action in Boland.

Cullity J. explained that in fact the plaintiffs were merely asking "whether the suggested inadequacies were sufficient to give rise to a denial of natural justice under the laws of this jurisdiction . . ."[11] This was therefore not an attack on the Illinois court's decision as it pertained to Illinois law; but an argument that the Illinois law did not apply in Ontario. In the words of Cullity J (at para. 48):

> . . . just as a defence of a breach of natural justice could be raised in this court if the foreign court whose judgment was in question had decided that notice was unnecessary, the plaintiffs here were entitled to challenge the adequacy of the notice that was ordered. This does not mean that a finding of a foreign court should not be given respect - and even a large degree of deference - but it does raise the possibility that notice that, in the judgment of this court, was egregiously inadequate might be found to have constituted a breach of natural justice.

Cullity J. then proceeded to note deficiencies in the notice program provided to Canadians, including the fact that Illinois class counsel provided the court with expert evidence which erroneously overestimated the circulation of Maclean's Magazine. Cullity J. noted evidence filed before him which opined that the Boland notice efforts in Canada were inefficient and ineffective. Thus, Cullity J. held (at para. 58):

> . . . I am satisfied that it would be substantially unjust to find that the Canadian members of the putative class in Boland had received adequate notice of the proceedings and of their right to opt out. Quite apart from the form and contents of the notice – [the expert's] reference to "wall to wall legalese" conveys no more than a hint of its eye-glazing opaqueness - I believe that its dissemination in Canada was so woefully inadequate that the decision should be held to offend the rules of natural justice recognized in this court and, on that ground, to be not binding on the Canadian members of the putative class in Boland, other than those whom I have found to have submitted to the jurisdiction of the court in Illinois.

[11] At para. 47

The decision concerning lack of natural justice did not apply to Parsons himself, or to other Canadian objectors, because "Their submission to the jurisdiction of the court in Illinois . . . was . . . as voluntary a submission to the jurisdiction as that of any defendant who, having received notice of pending proceedings in a foreign court, chooses to appear and, in consequence, is taken to have attorned to its jurisdiction."[12] While the objectors may have been denied the right to adequate notice concerning their right to opt-out of the Illinois action, they waived an available defence of natural justice: ". . . when faced with the choice between resting on their right to resist recognition of the judgment in Canada and contesting the merits of the certification and settlement approval proceedings in Boland, they chose the latter course of action. . . ."[13]

Thus, Cullity J. held that the Parsons action was stayed permanently on the ground of res judicata and issue estoppel. Another Ontario action commenced by representative plaintiff Currie, who had not appeared and objected in the Illinois action, was allowed to continue; but Parsons and the other five objectors were excluded from the class in the Currie action.

III. What does this mean for the future of class actions in Canada?

There are a number of important implications arising in the wake of the *Parsons* decision.

1. American Attorneys will include Canadians in multi-national actions

Parsons has extended the reach of the American class action plaintiff's attorney. With a carefully crafted and effective notice program, coupled with an opt-out American jurisdiction, the American class counsel can easily expand the size of his class, and, potentially, the quantum of any settlement or judgment.

2. Settling American Defendants may encourage the American Lawyer to go multi-national

If a class action defendant is already prepared to settle in the U.S., they may well be interested in settling the entire North American class, rather than deal with the cost and expense of a follow-on Canadian action. They may encourage U.S. counsel to broaden the class in return for a slightly larger fee.

3. Canadians will be practically bound by US law and US litigation efforts

The effects of *Parsons* may also deprive Canadians from seeking recourse in their home province against an American defendant which committed a tort, breached a contract, or committed some other wrong in the plaintiff's home province. While the Canadian putative class member may be able to opt-out of an American class action which seeks to bind him, the Canadian may find that he is alone or in a group of opt-outs so small that no Canadian lawyer will accept the retainer.

[12] At para. 60
[13] At para. 61

4. Canadians who do not want to be part of the American class action should stay home and ignore the U.S. action

If individual Canadians appear in the U.S. action, they will be found to have attorned even if the notice program is faulty. If a class is certified in Canada, and the Canadian lawyer then appears in the U.S. action, there is a risk that the entire Canadian class will have attorned. Again, this minimizes the ability to engage in cross-border cooperation.

5. Canadian Plaintiff's Counsel will lose opportunities to bring parallel or copycat action

Canadian lawyers can no longer hang onto the coattails of American class lawyers, and follow their lead against a common defendant. Indeed, while the class members may have been bound together, a wedge has been driven between American and Canadian counsel. While in the past American lawyers may have cooperated with Canadian lawyers in the pursuit of a transborder defendant, the *Parsons* decision clears the way for American attorneys to act alone. Why share the pot with Canadian counsel when the entire fee can be taken by a single American attorney?

6. Canadian Class Counsel will have to pull the class action trigger more quickly

Previously, Canadian class counsel would often adopt a "wait and see" approach to see if the American counsel had any success at certification, in individual trials, or in encourage the defendant to settle. After *Parsons* however, if Canadian plaintiffs lawyers hope to remain "in the game", they must act quickly to certify an action in their home province before a transborder action is certified in the U.S.

7. Notice companies will get more business

American plaintiffs and defendants will need to ensure that their notice to Canadians is fair and adequate in order to ensure that it will be given binding effect in Canada. Expert notice companies will need to be retained to assess this issue. Similarly Canadians seeking to challenge the binding effect of the U.S. action will need to retain notice companies to challenge adequacy of notice.

8. Canadian Class Counsel will become private international law experts

Jurisdiction still matters. If there is no jurisdiction over the Canadians in the first instance, then there is no place for an American class action, and the Canadian action can proceed in the usual manner. *Class* counsel will need to be in a position to argue the private law objections to the Canadian courts.[14]

[14] For example, in *McNamara v. Bre-X[0], 32 F. Supp. 2d 920, 925 (E.D. Tex. 1999)*, the Texas court declined to accept jurisdiction over the Canadian class members. Most recently, in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 159 L. Ed. 2d 226, 72 U.S.L. W. 4501 a price fixing case, the U.S. Supreme Court described the limits of a foreign purchaser's right to sue an American company in a U.S. court for foreign injuries.

IV. Conclusion

Canadian class counsel already face numerous challenges: assessing cases to ensure that they have sufficient merit, withstanding ethical attacks from defence counsel, coordinating cases across the country. *Parsons* adds a new element of risk and uncertainty. Whether Canadian counsel will simply abandon the multinational class action field to U.S. counsel and retreat to matters of local concern remains to be seen.