I. Introduction

Canadian class action regimes adjudicate the rights of individuals (i.e. class members) who are not involved in and usually have little knowledge of the actions being advanced on their behalf until after certification. Once a claim is adjudicated in a certified class action, the final order is intended to preclude these class members from commencing their own claims, unless they have opted out of the class proceedings.

This intended preclusive effect of a class action judgment is a hallmark of class action regimes. However, what happens if a judgment is issued in a class action that purports to have preclusive effect against class members living in a foreign jurisdiction and the court in that foreign jurisdiction will not recognize the judgment? Such circumstances give rise to difficult issues that Canadian courts should take

II. Traditional Judgment Recognition Rules Are Inadequate for Enforcing Multi-jurisdictional Class Action Judgments

III. Why The 'Real and Substantial Connection' Test Should Not Be Applied to Absent Foreign Claimants

IV. The Real and Substantial Connection Test—Applied Rigorously

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into account when they are asked to certify multi-jurisdictional classes that include proposed class members from other countries.¹

16.03 Whether a multi-jurisdictional class is certified for settlement purposes or after a contested motion, there is a significant risk that a judgment in the action will not be recognized or enforced in other countries if jurisdiction was asserted improperly by the Canadian court issuing the judgment or if the court failed to ensure the required substantive and procedural rights were met in the course of the class proceedings that resulted in the judgment.

16.04 The result may be that defendants who voluntarily paid for a multi-jurisdictional release of their liability in a settlement or who were ordered to pay damages based on the membership of a certified multi-jurisdictional class after a trial will not achieve the broad protection from future litigation that they expected. They could still be subject to further litigation in the ‘home’ countries of foreign class members.

16.05 The Canadian approach to asserting jurisdiction over ‘foreign’ class members in order to certify international multi-jurisdictional classes is not compatible with generally accepted private international law principles applied by most other countries for asserting international jurisdiction. Adherence to these principles is a prerequisite for judgments that are intended to be enforceable internationally.

16.06 If this jurisdictional issue is not addressed properly by Canadian courts at the outset of an action when considering whether to certify international multi-jurisdictional classes, significant difficulties may arise at the end of the action if a foreign court is asked to recognize and enforce a judgment resulting from the class action. Canadian courts risk issuing class action judgments that have no preclusive effect and are incapable of being enforced outside their national borders. This will result in unfairness and increased uncertainty for all class action litigants.

16.07 These issues are explored in this chapter. The first section outlines why traditional judgment enforcement rules are inadequate for enforcing international multi-jurisdictional class action judgments. The next section contains a discussion of why Canada’s ‘real and substantial connection’ test (ie the test that is used to assert jurisdiction over foreign parties and to enforce foreign judgments in Canada) should not be applied to assert jurisdiction over proposed class members from foreign jurisdictions.

16.08 It will be argued that if Canadian courts nonetheless insist on using the ‘real and substantial’ connection test to decide whether to assert jurisdiction over proposed foreign class members that proper regard be paid to the generally accepted private

¹ This chapter addresses issues relating to multi-jurisdictional classes that include proposed class members from outside of Canada only. Different considerations apply if a multi-jurisdictional class includes proposed class member from other provinces or territories in Canada. A discussion of those considerations is beyond the scope of this chapter.
international law principles of other countries relating to the recognition and enforcement of judgments that are intended to be enforceable internationally. If Canadian courts have due regard for these principles, they should be slow to certify any international multi-jurisdictional classes. This is illustrated by a consideration of a number of Ontario cases in which the court has struggled with these issues.

The objective of this chapter is to demonstrate how Canadian courts determine whether to assert jurisdiction over foreign class members and why the current approach creates serious enforcement problems when international multi-jurisdictional classes are certified. It will be argued that Canadian courts should not assert jurisdiction over absent foreign class members on an opt-out basis and should not use the ‘real and substantial connection’ test to justify doing so.

II. Traditional Judgment Recognition Rules Are Inadequate For Enforcing Multi-jurisdictional Class Action Judgments

Virtually all countries are guided by a set of fundamental principles of private international law, otherwise referred to as the conflict of laws. They apply these principles to decide whether to assert jurisdiction over foreign defendants at the outset of an action and whether they will recognize and enforce a foreign judgment after the conclusion of an action. These principles serve their purpose well in individual actions between named parties. However, they are inadequate to deal with the unique jurisdictional, substantive, and procedural issues created by a class action judgment that purports to bind class members in multiple countries. This is because class actions create a new type of ‘party’, namely an ‘absent’ claimant that did not exist when the traditional jurisdiction, and recognition and enforcement rules for named two-party litigation were developed. Claimants in a Canadian class action can include:

1) the representative claimants named in the action (ie the named plaintiffs);
2) claimants who are permitted to opt into a class action that is commenced by the representative plaintiffs; and
3) absent claimants, that is, claimants who are presumptively included in an action as a result of the governing provincial legislation unless they take active steps to opt-out.

The recognition and enforcement of a Canadian class action judgment in another country will arise most commonly in situations where a defendant will seek to prevent an absent ‘foreign’ claimant from re-litigating a claim in his/her own country that has been resolved by an opt-out class action judgment in Canada. In short, the preclusive effect of the judgment will be at issue.

2 See, eg the Class Proceedings Act, RSBC 1996, c 50, s 16 (Can).
Traditional judgment enforcement rules are relatively easy to apply to (i) named claimants and to (ii) claimants who opt into a class action. These claimants will have attorned (i.e., submitted) to the jurisdiction of the Canadian court that issues the judgment. However, the third type of claimant—absent claimants, in particular absent ‘foreign’ claimants—create difficult jurisdictional, substantive, and procedural issues.

Jurisdictionally and substantively, a foreign court that is being asked to recognize a class action judgment against a party who was an absent foreign claimant in the original Canadian proceeding must decide, using its private international law principles, whether the class action judgment should be recognized after assessing the Canadian court’s jurisdiction (or lack thereof) over the absent foreign claimant.

Procedurally, the foreign court will be concerned about fairness and due process (e.g., what notice and opportunity to be heard was provided to the absent foreign claimant before the judgment issued). Unlike representative claimants or opt-in claimants who take positive steps to submit to the jurisdiction that issues the original judgment, an absent foreign claimant does not do so. Instead, Canadian courts presumptively assert jurisdiction over these absent foreign claimants if they fail to take any steps; i.e., if they fail to opt out of the action. Canadian courts do so based on the principles on which their domestic class action legislation is based. But opt-out class action regimes do not exist either formally or informally in most other countries in the world and so the principles underlying Canadian class action regimes are not accepted or enforced elsewhere (particularly the fundamental class action principle that a party can be bound by a judgment simply by failing to opt out).

III. Why The ‘Real and Substantial Connection’ Test Should Not Be Applied to Absent Foreign Claimants

Canadian courts have demonstrated a growing willingness to apply the ‘real and substantial connection’ test to assert jurisdiction over absent foreign claimants. This approach must be re-evaluated for several reasons.

1) The ‘real and substantial connection’ test is comprised of a set of rules that were designed for assessing whether jurisdiction should be asserted over a named foreign defendant in a traditional two-party litigation. The rules were not designed with absent foreign claimants in mind.

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3 See Silver v Imax, 2009 CanLII 72334 (On SC), leave to appeal denied, 2011 ONSC 1035 (CanLII) (Div Ct); McKenna v Gammon Gold, 2010 ONSC 1591 (CanLII), leave to appeal granted in part, 2010 ONSC 4068 (CanLII) (Div Ct), var’d 2011 ONSC 3882 (Div Ct); Ramdath v George Brown College 2010 ONSC 2019 (CanLII).
2) The ‘real and substantial connection’ test was introduced in Canada to address unique judgment enforcement issues posed by a Canadian federation comprised of different provinces and territories, all of which are ultimately subject to rulings from a single central Supreme Court of Canada.

3) The ‘real and substantial connection’ test is applied in Canada not only to assert jurisdiction over named foreign defendants, but also to determine whether foreign judgments should be enforced by a Canadian court. Canada’s willingness to use the ‘real and substantial connection’ test as an acceptable basis for enforcing a foreign judgment sets it apart from other countries in the world.

Although the private international law principles of many other countries include variations of a ‘connections’-based test to assert jurisdiction at the outset of an action over a foreign defendant, the ‘connections’-based test is rarely as broad as the ‘real and substantial connection’ test in Canada. Canadian courts have held that, ‘even in cases where the only connection between a non-resident class member and the jurisdiction is the sharing of common issues with resident class members, jurisdiction may be assumed’.

More critical to this discussion, however, is the fact that most other countries do not accept the ‘real and substantial connection’ test as a proper basis for asserting international jurisdiction over a foreign defendant. This is because the ‘real and substantial connection’ test includes criteria for asserting jurisdiction that are not generally accepted as a proper basis for assuming jurisdiction under private international law for an internationally enforceable judgment. As recently noted by Rachael Mulheron, a leading legal academic commentator, a foreign judgment will not be recognized or given preclusive effect under English law if jurisdiction was asserted over a party by the foreign court using the ‘real and substantial connection’ test:

‘Indeed, the English Court of Appeal recently noted, in passing, the Currie-type test, but showed no inclination to follow the same approach. Indeed, in Flightlease in 2006, the Irish High Court refused to follow the Canadian test, when expressly invited to do so—noting that it had not obtained broad acceptance in the common law world; that ‘[f]or the time being, Canada appears to be an exception’ to the longstanding English common law governing the recognition of foreign judgments; and that ‘a radical change in the common law had the potential, in some cases, to create significant effects (including retroactive effects) on many parties (and not just the parties before the court) and should not, therefore, be lightly engaged in.’


5 Inmax (n 3) at para 123.


7 Rubin v Eurofinance SA [2010] EWCA Civ 895 at para 37, per Ward LJ.

8 [2006] IEHC 193 at paras 5.9, 5.15–5.18, per Clarke J.
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A five-member panel of the Supreme Court of Ireland upheld the above referenced decision in *Flightlease* on appeal, expressly refusing to adopt the ‘real and substantial connection’ test as part of Irish law for the purposes of enforcing foreign judgments. In so holding the Court noted that ‘it was not referred to judgments of any other common law jurisdiction which suggested that the common law courts generally have followed the Canadian lead’ and that ‘there is no consensus in the common law world as to the need for the change identified by the Supreme Court of Canada’.

Adrian Briggs, in his text, *The Conflict of Laws* succinctly summarizes a widely accepted view outside of Canada of the radical departure that the ‘real and substantial connection’ test represents from the law relating to the enforcement of foreign judgments:

As a matter of English law, such a development would require legislation. And it is important to understand how radical the Canadian departure is. For the English common law enquires into whether the party to be bound to the judgment has acted in such a way as to have assumed a personal obligation to obey the judgment: his submission to the jurisdiction of the court is the commonest example, but his presence within the jurisdiction also places him in the way of obedience. The Canadian development, however, does not focus on whether the party to be bound has assumed an obligation, but on whether the Canadian court should impose one for reasons of its own. There is nothing wrong with such a development, but far from being a modernisation of the details, it represents a fundamental reorientation of the law on foreign judgments. It is not clear that the Supreme Court fully appreciated what it was doing.

In short, other countries will not enforce a Canadian judgment if jurisdiction was asserted over a foreign party based on a broad application of a ‘real and substantial connection’ test.

An important reason why other countries will not enforce such a Canadian judgment is that there is a fundamental requirement of the generally accepted private international law principles for the recognition and enforcement of a foreign judgment internationally. The foreign court issuing the judgment must assert jurisdiction properly in the international sense over the affected parties. The enforcing court is not required to assess whether the issuing court properly followed the issuing court’s own rules for assuming jurisdiction over a party. Instead, the enforcing court applies its own rules to determine whether the issuing court was entitled to assert ‘international jurisdiction’ over a foreign party for the purposes of creating

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10 *Flightlease* (n 9) at 30–31.
12 Briggs (n 11) at 138–9, citing *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077.
13 But see the Uniform Foreign-Country Money Judgments Recognition Act, 13 U.L.A. 261 (1986) (UFCMJR Act). Many, but not all states have adopted this Act that permits enforcement of a foreign judgment if the foreign court had subject-matter jurisdiction.
an internationally enforceable judgment. The generally accepted private interna-
tional law principles for asserting jurisdiction in these circumstances are limited
to the ‘presence’ of a defendant in the jurisdiction or to a defendant’s ‘submission’
or ‘consent’ to the jurisdiction. For example, a court in one country is entitled
asserting jurisdiction over a foreign defendant from another country if the defendant
is served with the originating document while ‘present’ in the first country or if
the defendant consents to or voluntarily submits to the court’s jurisdiction in the
first country. A judgment pronounced in one country against a foreign defendant
who was not present in that country or who had not submitted or consented to the
jurisdiction of the courts in that country is considered a nullity and will not be
enforced by other countries.

A further principle adhered to by most other countries is that one can only become
a claimant (i.e. a plaintiff) in a court proceeding by expressly asking to bring (or
join) a claim. Pursuant to this principle, parties have the right to participate fully
in proceedings brought on their behalf, the right to know the nature and extent of
the claims and the exclusive right either to compromise their claims or to have their
entitlement to relief determined individually.

Prior to 1990, Canadian provinces and territories applied these generally accepted
private international law principles. Therefore, it was likely that the resulting
judgments would be enforceable internationally. Then in 1990, the Supreme Court
of Canada released its decision in *Morguard Investments Ltd v De Savoye*. The
Court held that based on the principles of ‘order and fairness’ the courts in each
province in Canada should be obligated to enforce a judgment from another prov-
ince, even a default judgment, if the first province assumed jurisdiction over a
‘foreign’ defendant from another province on a reasonable basis. The Court held it
was reasonable for the first province to assert jurisdiction over a ‘foreign’ defendant
from a second province if the matter in dispute had a ‘real and substantial connec-
tion’ to the first province. This ‘real and substantial connection’ could include cir-
cumstances where a foreign defendant was not present in the province when served
or had not consented or submitted to the jurisdiction of the province. Thus, the
‘real and substantial connection’ test is broader than (but in some circumstances
may overlap with) the existing private international law principles of ‘presence’ and
‘submission’ for enforcing foreign judgments.

In *Club Resorts Ltd v Van Breda* the Supreme Court of Canada explained how
*Morguard* was the genesis of the ‘real and substantial connection’ test in Canada:

[25] …La Forest J., writing for a unanimous Court, called for a re-evaluation of
relationships between the courts of the provinces within the Canadian federation.

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14 See, e.g., Reciprocal Enforcement of Judgments (UK) Act, RSO 1990, c R.6 which expressly
requires the jurisdiction test of ‘presence’, ‘consent’, or ‘submission’ of a defendant to be met before
a judgment is eligible for recognition and enforcement.
15 [1990] 3 S.C.R. 1077 (*Morguard*).
16 2012 SCC 17 (CanLII) (*Van Breda*).
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The creation of the Canadian federation established an internal space within which exchanges should occur more freely than between independent states. The principle of comity and the principles of fairness and order applicable within a federal space required that the rules of private international law be adjusted (Morguard, at pp. 1095-96).

[26] In Morguard, the Court held that the courts of a province must recognize and enforce a judgment of a court of another province if a real and substantial connection exists between that court and the subject matter of the litigation. Another purpose of the test was to prevent improper assumptions of jurisdiction by the courts of a province. Thus, the test was designed to ensure that claims are not prosecuted in a jurisdiction that has little or no connection with either the transactions or the parties, and it requires that a judgment rendered by a court which has properly assumed jurisdiction in a given case be recognized and enforced.17

16.23 The Court expressly acknowledged that ‘[i]n retrospect, it can be seen that in Morguard, the Court initiated a major shift in the framework governing the conflict of laws in Canada by accepting the validity of the real and substantial connection test as a principle governing the rules applicable to conflicts’.18

16.24 In 2003, in Beals v Saldanha,19 the Supreme Court of Canada extended the application of the ‘real and substantial connection’ test to the enforcement in Canada of foreign judgments from outside of Canada. As a result, Canadian courts apply this test to assert jurisdiction over defendants from other countries at the outset of an action in circumstances where a defendant is not present in Canada when served or has not voluntarily submitted or consented to the jurisdiction of any Canadian court. Similarly, Canadian courts apply this test to enforce foreign judgments in Canada in circumstances where a defendant was not present in the foreign country when served and did not voluntarily submit or consent to the foreign jurisdiction.

16.25 This has created two significant problems in relation to the question of ‘international jurisdiction’ generally and in the context of class actions specifically. As already noted earlier, other countries do not consider a ‘real and substantial connection’ to be one of the generally accepted principles for assuming jurisdiction under private international law for the purposes of an internationally enforceable judgment. The test is not confined to ‘presence’ and ‘submission/consent’. Therefore, Canadian courts are asserting jurisdiction over foreign defendants in circumstances that most other countries consider invalid when it comes to enforcing any resulting judgment. In addition, the ‘real and substantial’ connection test was originally introduced to deal with interprovincial cross-border cases in a federation with a single federal Supreme Court to decide whether it was appropriate for one province to assert jurisdiction over, or enforce a subsequent judgment against, a foreign defendant from another province who is expressly named in the

17 Van Breda (n 16) at paras 25–6.
18 Van Breda (n 16) at para 25.
proceedings, is served personally with the claim and is given full opportunity to contest jurisdiction.

Attempting to apply this defendant-based ‘real and substantial connection’ test to determine whether to assert jurisdiction over an absent foreign claimant on an opt-out basis is fraught with obvious difficulties. This is the case not only because ‘presence’ or ‘submission/consent’ is not necessarily required to satisfy the test, but also because most countries still abide by the fundamental principle that one can only become a claimant in a court proceeding by expressly asking to bring (or join) a claim and not by remaining silent (ie by failing to opt out).

For these reasons, in the case of absent foreign claimants Canadian courts should return to the generally accepted principles of private international law for asserting jurisdiction over a foreign party—presence or consent/submission—in order that any resulting judgment might be enforceable internationally. The requirement of consent/submission can be satisfied by an absent foreign claimant electing to opt in to a class action. If an absent foreign claimant took this step it would address the other fundamental principle adhered to by most other countries—one can only become a claimant in a court proceeding by expressly asking to bring (or join) a claim.

IV. The Real and Substantial Connection Test—Applied Rigorously

If Canadian courts reject a return to generally accepted principles of private international law for asserting jurisdiction when dealing with an absent foreign claimant and instead insist on applying the ‘real and substantial connection’ test, they should apply the test rigorously. If they do so, the result should be same—jurisdiction should be refused. Applying the ‘real and substantial connection’ test to absent foreign claimants is not the approach advocated by the author but this analysis helps to inform the wisdom and simplicity of a return to the more traditional tests for asserting jurisdiction in the unique case of such claimants.

In Canada the issue of jurisdiction simpliciter—ie whether a Canadian court should assert jurisdiction over a foreign defendant—is addressed in a traditional two-party litigation on a motion brought at the outset of the action by a foreign defendant to contest jurisdiction. For example, in *Muscutt v Courcelles* and in four companion cases heard at the same time, the Ontario Court of Appeal considered

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five different sets of circumstances involving foreign defendants. In each case the foreign defendant had not been served in Ontario and had not consented to submitting to the jurisdiction. Each of these cases dealt with assumed jurisdiction in circumstances where the only link to Ontario was ‘damages sustained within the jurisdiction’ by the plaintiffs who returned home after suffering injuries elsewhere, allegedly at the hands of the foreign defendants. After considering the principles set out in Morguard the Court set out eight factors that should be considered to determine if the matter has a ‘real and substantial connection’ to Ontario that would justify assuming jurisdiction over a foreign defendant:

1) the connection between the forum and the plaintiff’s claim;
2) the connection between the forum and the defendant;
3) unfairness to the defendant in assuming jurisdiction;
4) unfairness to the plaintiff in not assuming jurisdiction;
5) the involvement of other parties to the suit;
6) the court’s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
7) whether the case is interprovincial or international; and
8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

16.30 In two of the companion cases to Muscutt, the Ontario Court of Appeal relied heavily on the eighth factor in Muscutt, as grounds for refusing jurisdiction over foreign defendants. In Sinclair v Cracker Barrel Old Country Store Inc\(^\text{22}\) the Ontario Court of Appeal held as follows:

Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere...As explained in Muscutt, under international standards, it is only in certain limited circumstances that damages sustained within the jurisdiction are accepted as a basis for assumed jurisdiction. Of particular relevance to the present appeal is the minimum contacts doctrine that governs jurisdiction in the United States. Under that doctrine, there must be an act or conduct by the defendant amounting to personal subjection to the jurisdiction. In cases concerning jurisdiction over claims in negligence for damages resulting from injuries sustained in out-of-state hotels or restaurants, courts of the plaintiff’s home state have refused jurisdiction...If an Ontario judgment would not be enforceable in New York, there would be little or no advantage in allowing the Ontario plaintiffs to litigate their claims here. Further, the generally prevailing international standards explained in Muscutt also militate against assuming jurisdiction in this case. Since assumed jurisdiction would accord neither with the law of the foreign jurisdiction implicated nor with international standards, this factor weighs against assuming jurisdiction.\(^\text{23}\)

The Court came to the same conclusion in Gajraj v DeBernardo.\(^\text{24}\)

\(^{22}\) 2002 CanLII 44955 (On CA) (Cracker Barrel).

\(^{23}\) Cracker Barrel (n 22) at paras 8 and 23.

\(^{24}\) 2002 CanLII 44959 (On CA) at para 24.
16. The Perils of Certifying International Class Actions in Canada

In 2012 the Supreme Court of Canada reformulated the ‘real and substantial connection’ test in Van Breda and a companion case, Charron Estate v Village Resorts Ltd. These were traditional two-party actions with named parties, not class actions. In each case the central issue was whether the Ontario Court could assert jurisdiction over a foreign defendant where the injuries suffered by the plaintiffs who lived in Ontario occurred while they were vacationing outside of Canada. The Court began its analysis by commenting first on the concept of private international law:

[16] Three categories of issues—jurisdiction, forum non conveniens and the recognition of foreign judgments—are intertwined in this branch of the law. Thus, the framework established for the purpose of determining whether a court has jurisdiction may have an impact on the choice of law and on the recognition of judgments, and vice versa. Judicial decisions on choice of law and the recognition of judgments have played a central role in the evolution of the rules related to jurisdiction. None of the divisions of private international law can be safely analysed and applied in isolation from the others. This said, the central focus of these appeals is on jurisdiction and the appropriate forum.

Although the Court acknowledged the important interrelationship between the issue of asserting jurisdiction and the issue of the recognition of judgments in this passage there was little attention paid to the latter issue in the balance of the judgment. Rather, the Court focused on the rules for asserting jurisdiction and concluded that ‘stability and predictability in this branch of the law of conflicts should turn primarily on the identification of objective factors that might link a legal situation or the subject matter of litigation to the court that is seized of it’. Notably, the Court held that the relevant objective factors should relate to ‘the legal situation or the subject matter of the litigation’. In doing so, it acknowledged these criteria were much broader than the traditional criteria for assuming jurisdiction in these circumstances:

However, jurisdiction may also be based on traditional grounds, like the defendant’s presence in the jurisdiction or consent to submit to the court’s jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.

The Court replaced the eight factors set out in Muscutt with a list of four ‘presumptive connecting factors’ and held that ‘[i]f the plaintiff succeeds in establishing this, the court might presume, absent indications to the contrary, that the claim is properly before it under the conflicts rules and that it is acting within the limits

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25 2012 SCC 17 (CanLII)
26 Van Breda (n 16) at para 16.
27 Van Breda (n 16) at para 75 (emphasis added).
28 Van Breda (n 16) at para 79.
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of its constitutional jurisdiction. The Court held that the following factors are presumptive connecting factors in respect of a case involving a tort:

1) the defendant is domiciled or resident in the province;
2) the defendant carries on business in the province;
3) the tort was committed in the province; and
4) a contract connected with the dispute was made in the province. It is important to note that the test formulated by the Court was a test to determine whether a Canadian court should assert jurisdiction over a foreign defendant who is served personally with the claim and has the right to attend and contest the court’s jurisdiction. The test does not address how and when to assert jurisdiction over an absent foreign claimant who has never asked to bring a claim in the Canadian court.

Moreover, the Court created a test in which only the first two presumptive connecting factors (ie being resident in the province or carrying on business in the province) satisfy the generally accepted private international law principles for asserting jurisdiction in respect of a judgment that is intended to be enforceable internationally. The third and fourth factors do not meet those criteria.

Notably, the Court did not include on the list of presumptive connecting factors the presence of other parties in the action who are subject to the court’s jurisdiction. The exclusion of this factor that was previously on the list set out by the Court of Appeal in Muscutt is important in the context of absent foreign claimants. It means that suffi cing court should decide the jurisdictional question on an individual party basis.

In this context, although the Van Breda test is aimed at assessing whether jurisdiction should be asserted over a foreign defendant, the principle that a court should decide the jurisdictional question on an individual party basis should be equally applicable in assessing whether jurisdiction should be asserted over an absent foreign claimant. This principle reinforces the need in a class action to engage in any ‘connection’ analysis separately for absent foreign claimants in a proposed class regardless of any connection that may exist for resident claimants in the same action.

In other words, when determining whether to assert jurisdiction over an absent foreign claimant, a Canadian court should ask itself whether it is appropriate to do so if there is no connection between the absent foreign claimant and the Canadian province or territory in which the class action has been commenced. It is not enough to say that because there are resident class members over whom a Canadian court has unquestioned jurisdiction that an absent foreign claimant should also be included in a class in order to resolve all matters in dispute in the action in one

29 Van Breda (n 16) at para 80.
jurisdiction. Nor is it enough to justify asserting jurisdiction to say that if an absent foreign claimant chose to bring an action in Canada, the Canadian court would have jurisdiction over that claimant. A Canadian court should not ‘compel’ an absent foreign claimant who does not actively seek to bring a claim in Canada to have his/her claim litigated in Canada by purporting to apply provincial opt-out legislation to the claimant.

The Court held that the remaining Muscutt factors, such as order, fairness, and comity were general principles or objectives of the conflicts system that should not be included among the presumptive connecting factors. Instead, the values of order, fairness, and comity should serve as ‘useful analytical tools for assessing the strength of the relationship with a forum to which the factor points’.

The Court summarized this new approach to the assertion of jurisdiction in the following manner:

All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness. (emphasis added)

There are two matters of note in the above passage that are important to the issue of the recognition and enforcement of a Canadian class action judgment in a foreign country.

The Court confirms that it is describing principles for asserting jurisdiction over a defendant, not over an absent foreign claimant.

The Court also holds that jurisdiction should be based on a relationship between the subject matter of the litigation and the forum. Such criteria are not limited to the generally accepted principles of private international law for a judgment that is intended to be enforced internationally: presence, consent, or submission.

In light of the above, the Court falls into error when it concludes that foreign courts could be expected to recognize and enforce a Canadian judgment that was granted on the basis of any of the four presumptive connecting factors. Foreign courts will not do so in respect of two of the third and fourth presumptive connecting factors.

The Ontario Court of Appeal in Muscutt and in Cracker Barrel confirmed that comity, order, and fairness require a proper consideration of judgment recognition.

30 Van Breda (n 16) at para 84.
31 Van Breda (n 16) at para 92.
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and enforcement principles. If there is evidence that a Canadian judgment against absent foreign claimants will not be enforced against them in their ‘home’ countries the Supreme Court of Canada has said in Van Breda that this should serve as an important analytical tool for assessing whether there is a sufficient connection between the Canadian court and the absent foreign claimant.

16.44 In respect of the issue of ‘fairness’, the fact that the defendant might have a ‘connection’ to Canada based on the application of the ‘real and substantial connection’ test in relation to a resident claimant’s claim is not sufficient for a court to assert jurisdiction over an absent foreign claimant if the absent foreign claimant’s claim has no other connection to Canada and has not voluntarily submitted or consented to the jurisdiction. It is not fair for a Canadian court to presume that an absent foreign claimant desires that his/her rights be determined by a court in Canada. Nor is it fair to a defendant to proceed on that presumptive basis because any resulting judgment will likely not be recognized by the court in the jurisdiction where the absent foreign claimant resides. The defendant will be faced with a claim in Canada purportedly brought on behalf of the absent foreign claimant and yet will not be able to preclude the absent foreign claimant from relitigating the claim in his/her own country if not satisfied with the outcome of the original litigation in Canada.

16.45 As will be seen from the review of the cases that follow, Canadian courts have struggled to use the ‘real and substantial connection’ test to assert jurisdiction over absent foreign claimants. Insufficient regard is paid to the important factors of comity, order, and fairness, including the standards of jurisdiction, recognition and enforcement prevailing elsewhere. The result is that in most cases jurisdiction has been asserted improperly over absent foreign claimants and these judgments will be unenforceable outside Canada.

16.46 Canadian courts should not use the ‘real and substantial connection’ test to justify asserting jurisdiction over absent foreign claimants, particularly if they are not prepared to apply it rigorously. Instead, when they are dealing with absent foreign claimants they should have regard, at the very least, the internationally accepted principles that apply in respect of asserting jurisdiction over a foreign party if a judgment is to be enforced internationally, namely, presence, submission or consent.

V. Canadian Courts Should Not Certify Multi-jurisdictional Opt-out Classes

16.47 In 2009 and 2010, Ontario courts in a number of actions were asked to determine the legitimacy of certifying international multi-jurisdictional classes. In each case the defendants opposed certification. As a result, the courts were required to
undertake a careful analysis of the issues involved in certifying multi-jurisdictional
classes.

McCann v CP Ships Ltd\(^2\) (June 2009)

This litigation arose from restatements by CP Ships of its annual audited financial
statements for the years 2002 and 2003 and of its interim unaudited financial
statements for the first quarter of 2004. Following the restatements, class proceed-
ings were filed in the United States as well as in British Columbia, Québec, and
Ontario.

The plaintiffs alleged that the financial statements and other relevant disclosures issued
by CP Ships during the class period materially overstated its net income. The plain-
tiffs argued that as a result, CP Ships securities traded at artificially inflated prices.
The plaintiffs asserted causes of action in negligence, reckless and negligent misrep-
resentation, common law conspiracy, and statutory causes of action for a misrepre-
sentation in a prospectus, for insider trading, and for misleading business practices.

At the time of the certification motion, the certification hearing in British Columbia
was still pending. The Québec court had already certified a national class (that did
not include class members such as OMERS, one of the proposed representative
plaintiffs in the Ontario action) and the US action had been settled. (The US
plaintiffs originally sought to certify a world-wide class, but ultimately the class
definition was amended and Canadian citizens who acquired CP Ships securities
over the Toronto Stock Exchange were excluded.) The plaintiffs sought certification
of a class that included all persons and entities wherever situated who acquired
securities of CP Ships during the class period.\(^3\)

In rejecting the plaintiffs’ request for this broad multi-jurisdictional class Rady J
held as follows:

It is difficult to understand the basis on which an Ontario court could or should take
jurisdiction over the class members as proposed. Where is the real and substantial
connection between, for example, the Ontario Court and a French citizen residing
in France who purchased securities over the TSE? It strikes me as judicial hubris to
conclude that an Ontario court would have jurisdiction in those circumstances. In
my view, the proposed class should be amended to include only residents of Canada
or Canadians who purchased securities over the TSE or the NYSE.\(^4\)

Unfortunately, as will become apparent in the analyses of the cases that follow, this
was the high water mark in Ontario for limiting the scope of international multi-
jurisdictional classes.


\(^3\) Other than persons and entities included within the class certified by the Québec Superior
Court and persons and entities resident in countries other than Canada, and who acquired
their CP Ships securities over the New York Stock Exchange, and who did not opt out of the settlement
in the US action.

\(^4\) CP Ships (n 32) at para 83.
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Silver v IMAX\(^{35}\) (December 2009)

16.52 The plaintiffs alleged the defendants made misrepresentations which affected the value of IMAX securities in the secondary market. They claimed damages at common law for negligence and conspiracy and also advanced a statutory claim under the Ontario Securities Act\(^{36}\) (the OSA). The plaintiffs sought certification of an international multi-jurisdictional class. The defendants opposed certification of such a class. The court held it had clear jurisdiction over the subject matter of the litigation—namely the claims for misrepresentation. On the issue of a multi-jurisdictional class the judge framed the questions to be considered in the following manner:

1) Does an Ontario court have jurisdiction over non-resident class members?
2) Should an Ontario court, as a matter of discretion, exercise jurisdiction over non-resident class members?\(^{37}\)

16.53 The defendants opposed certification of a multi-jurisdictional class in the context of the preferable procedure analysis set out in the Ontario class action legislation. In approaching the issue in this manner, the defendants, in effect, invited van Rensburg J to consider the question of a multi-jurisdictional class as part of the certification test. As a result, rather than being treated as a matter of *jurisdiction simpliciter*, the question of jurisdiction was conflated with the question of whether the action was amenable to a class proceeding. The defendants argued that 85 per cent of proposed class members were non-residents (ie from the US) and the class should be limited to persons who purchased IMAX shares on the Toronto Stock Exchange.

16.54 In deciding whether the court had jurisdiction over absent foreign claimants van Rensburg J assessed whether there was a ‘real and substantial connection’ between the absent foreign claimants and their claims in the Ontario action. Madam Justice van Rensburg observed that jurisdiction had been asserted by Canadian courts in the past even in cases where the only connection between an absent foreign claimant and the jurisdiction is that the absent foreign claimants share common issues with resident class members.\(^{38}\) She concluded that ‘There is accordingly no doubt that this court has the authority to certify an international class if there is a real and substantial connection between the claims asserted on behalf of the foreign class members and this jurisdiction.’\(^{39}\) In doing so she did not take into account (because there was no evidence led on this point) that virtually no other country accepts a ‘real and substantial connection’ as a proper basis for assuming jurisdiction in respect of a judgment that is to be enforced internationally.

\(^{35}\) *Imax* (n 3).
\(^{37}\) *Imax* (n 3) at para 108.
\(^{38}\) *Imax* (n 3) at para 126.
\(^{39}\) *Imax* (n 3) at para 129.
Next, van Rensburg J applied the ‘order and fairness’ test. Contrary to the decision in Muscutt, Madam Justice van Rensburg rejected the proposition that the recognition and enforcement outside of Canada of any resulting Ontario judgment against an absent foreign claimant was to be taken into account in deciding the question of jurisdiction. Therefore, the learned judge did not address the unfairness of certifying a class in an Ontario action that could lead to a judgment which would likely not be enforced against absent foreign claimants outside of Canada. This will expose the defendants to the risk of a new action by the absent foreign claimants in their own countries for the same relief that is already the subject of and will be dealt with in the Ontario proceeding. In the result, a multi-jurisdictional class was certified that included absent foreign claimants who were not resident in Canada and who did not purchase IMAX securities on the TSX. Leave to appeal her decision was denied. The matter is now proceeding to trial.

**McKenna v Gammon Gold** (March 2010)

This decision contains the most detailed analysis of the international multi-jurisdictional class issue to date. This was a motion for certification of a proposed class action based on alleged misrepresentations in connection with the sale of Gammon Gold shares. The plaintiffs brought a proposed class action against Gammon Gold on behalf of primary market purchasers under section 130 of the OSA, and for negligence, reckless misrepresentation and conspiracy at common law. The plaintiffs also advanced claims against Gammon Gold on behalf of secondary market purchasers for negligence, reckless misrepresentation, and conspiracy and against the underwriters on behalf of primary market purchasers under section 130 of the OSA, and for negligence, negligent misrepresentation, unjust enrichment, and waiver of tort.

The first important issue was whether it was appropriate to certify a ‘global’ class that would include all purchasers of Gammon Gold securities, wherever they may be situated. The purchasers of Gammon Gold securities were widely dispersed around the world. Strathy J observed that this issue raised important questions concerning the court’s jurisdiction and the recognition and enforceability of the court’s judgment which would purport to bind all members of the proposed class wherever they resided. He is the first Ontario judge to consider in a comprehensive manner, the importance of both these criteria at the certification stage of an action.

The defendants’ primary argument against a class that included absent foreign claimants related to the ‘real and substantial connection’ test. They argued that although the proper test was whether there was a ‘real and substantial connection’
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between Ontario and the matters in dispute in the action, the test for the exercise of the court’s jurisdiction should be modified where the issue is the court’s jurisdiction over an absent foreign claimant. The defendants submitted that in such cases, the court must consider separately the connection between the forum and the absent foreign claimants. The defendants led evidence to demonstrate there was no connection between Ontario and the proposed absent foreign claimants, especially the shareholders outside of Canada. Gammon Gold was incorporated in Québec, based in Nova Scotia and had its mining operations in Mexico. Thus, the only connections between the claims in the action and Ontario were the filing of the prospectus with the Ontario Securities Commission and the distribution of various public statements of Gammon Gold in accordance with Ontario securities law.

16.59 The defendants relied on the comments of Rady J in CP Ships (page xxx) (‘Where is the real and substantial connection between, for example, the Ontario Court and a French citizen residing in France who purchased securities over the TSE?’) and submitted that the court should not assert jurisdiction over absent foreign claimants. The defendants argued that the court should consider whether its judgment would be recognized and enforced in courts outside Ontario and specifically whether its judgment would be considered binding against absent foreign claimants and given preclusive effect in their ‘home’ jurisdictions.

16.60 Strathy J reviewed the Court of Appeal decision in Currie v MacDonald’s Restaurants. In Currie the Court considered whether the ‘real and substantial connection’ test was met for the purposes of enforcing a foreign class action judgment in Ontario. In doing so the Court observed as follows:

1) Before enforcing a foreign class action judgment, it is necessary to consider whether the foreign court had an appropriate basis for assuming jurisdiction.

2) To determine whether the assumption of jurisdiction by the foreign court satisfies the real and substantial connection test and the principles of order and fairness, it is necessary to consider the situation from the perspective of the party against whom enforcement is sought. That is, the question of jurisdiction should be viewed from the perspective of the party (ie the absent foreign claimant in the original proceeding) who has done nothing to invoke or submit to the jurisdiction of the foreign court.

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42 CP Ships (n 32) at para 83.
43 Gammon Gold (n 41) at para 98.
44 2005 CanLII 3360 (On CA) (Currie).
45 Currie (n 44) at para 17.
46 Currie (n 44) at para 18.
47 Currie (n 44) at para 21.
3) One aspect of this analysis is to examine whether it would be reasonable for that party to expect that its rights would be determined by the foreign court.\textsuperscript{48}

Strathy J acknowledged the important connection between the above criteria in \textit{Currie} for enforcing a foreign judgment \textit{at the end of an action} and the ‘real and substantial connection’ test for asserting jurisdiction \textit{at the outset of an action}:

Although \textit{Currie} involved the enforcement in Ontario of a judgment in a foreign class action, the mirror image of the principles stated by the Court of Appeal are applicable to the exercise of jurisdiction by this court in a class action that seeks to include class members outside the jurisdiction. It must be asked whether the assumption of jurisdiction would satisfy the real and substantial connection test and the principles of order and fairness. This is an issue of whether it is appropriate to assume jurisdiction over the legal rights of an individual who has neither attorned nor agreed to this Court’s jurisdiction. In considering this issue from the perspective of the non-resident class member, it is appropriate to ask, as did Sharpe J.A., whether the non-resident has done something that would give rise to a reasonable expectation that legal claims arising out of the activity could be litigated in the jurisdiction. The court should also ask whether it would be reasonable from the perspective of the defendant that class action litigation in the jurisdiction should finally dispose of claims of non-resident class members… This will not be the end of the analysis, as Sharpe J.A. pointed out at paras. 23-25 of \textit{Currie}. The principles of order and fairness require that, even if there is a substantial connection between the wrong and the jurisdiction and the plaintiff might have expected that his or her legal rights would be resolved in the jurisdiction, the procedures adopted must ensure that the rights of absent class members are adequately protected. This calls for consideration of appropriate representation for such class members, appropriate notice and an informed and meaningful opportunity to opt out.\textsuperscript{49}

Dealing first with the claims under section 130 of the OSA which were made against all defendants, Strathy J held that there was clearly a presumption of a real and substantial connection in respect of the subject matter of the litigation and Ontario. He also held there was clearly a connection between Ontario and the resident plaintiff’s claim and between Ontario and the claims of a number of the purchasers under the Prospectus who were also residents of Ontario and acquired their shares in a similar fashion.

Strathy J then had to consider whether the principles of order and fairness supported the extension of the court’s jurisdiction over absent foreign claimants. On this point he concluded as follows:

Following the example given by Sharpe J.A. in \textit{Currie}, where non-resident class members have engaged in a cross-border transaction, acquiring securities of a Canadian company, in Canada, through a Canadian underwriter, they can

\textsuperscript{48} \textit{Currie} (n 44) at para 18.

\textsuperscript{49} \textit{Gammon Gold} (n 41) at para 108.
reasonably expect that their legal rights in relation to that acquisition would be subject to Canadian jurisdiction and, in this case, a jurisdiction with a real and substantial connection to the defendants and the issues. The same could reasonably be said of Class Members in other provinces. For this reason, subject to appropriate safeguards with respect to representation and notice, it is appropriate to certify a class that would include non-residents who made purchases from the underwriters in Canada and under the Prospectus.  

16.64 In certifying a class that included absent foreign claimants who purchased ‘securities of a Canadian company, in Canada, through a Canadian underwriter’ Strathy J applied the ‘real and substantial connection’ test endorsed by the Ontario Court of Appeal in Currie. However, he went too far. As already noted, it is unlikely that other countries will enforce an Ontario judgment against this group of absent foreign claimants because the ‘real and substantial connection’ test is not a generally accepted basis for assuming jurisdiction over a foreign party for the purposes of an internationally enforceable judgment. The principles of ‘order and fairness’ would have been better served if he had adopted the reasoning of Rady J in CP Ships in similar circumstances: ‘It strikes me as judicial hubris to conclude that an Ontario court would have jurisdiction in those circumstances.’  

16.65 Strathy J did refuse to include in the class absent foreign claimants who purchased the shares of Gammon Gold from underwriters or agents outside Canada. He held (properly) that the acquisition of those securities in a jurisdiction outside Canada would not give rise to a reasonable expectation on the part of those absent foreign claimants that their rights would be determined by a court in Canada.  

Ramdath v George Brown College  

16.66 This is another decision by Strathy J in which he continues his analysis regarding the assumption of jurisdiction over absent foreign claimants which he began one month earlier in Gammon Gold. The plaintiffs were former students in the International Business Management Program (the Program) at The George Brown College of Applied Arts and Technology (George Brown). They claimed that the course calendar misrepresented the benefits of the Program and falsely stated that it would enable them to obtain three industry designations in addition to a college certificate.  

16.67 The proposed class consisted of 119 students, 78 of whom came from outside of Canada to attend the Program at George Brown. George Brown opposed certification, primarily in respect of the 78 international students on the basis that the expert evidence it presented demonstrated that a judgment in the proposed class action would not have preclusive effect in the countries where former international  

50 Gammon Gold (n 41) at para 115.  
51 CP Ships (n 32) at para 83.  
52 Ramdath v George Brown College 2010 ONSC 2019 (CanLII) (George Brown).
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students reside. George Brown argued that this would result in procedural unfairness because international students who were not happy with the outcome in the action would have the ability to take a ‘second bite’ at George Brown in their home countries.53

This is the first case in Ontario where a defendant tendered expert evidence, in this instance from legal experts in India and China, to the effect that a class action judgment from Ontario would not be recognized or given preclusive effect in those two countries. The difficulty faced by George Brown was that it could not and did not dispute that a ‘real and substantial connection’ would exist between Ontario and the claims of the international students if the claims were brought individually in Ontario. As Strathy J observed:

It could hardly do so. George Brown has a real presence here, it is based here and it carries on business here. It engaged agents in the foreign jurisdictions to solicit international students to come to Ontario to go to school at George Brown. The students came to Ontario to study, resided here during their eight month course and their contracts with George Brown were performed in Ontario. There is no question that an Ontario court would have jurisdiction over a claim by an international student if the claims were brought individually in Ontario.54

Although it is correct to say that, ‘there is no question that an Ontario court would have jurisdiction over a claim by an international student if brought against George Brown as an ordinary civil action,’55 this does not address the real issue. If an ordinary civil action was brought by one of the international students in Ontario, that student would be voluntarily submitting to the jurisdiction of the Ontario court by the act of bringing the action in Ontario. This is not what happens in a class action with absent foreign claimants. Absent foreign claimants do not bring their own individual actions in Ontario. How does an Ontario court justify asserting jurisdiction over an absent foreign claimant who does not ask that its claim be decided in Ontario?

The defendant argued that ‘jurisdiction follows recognition’ and the court should not assert jurisdiction over the international students because the evidence of the defendant’s experts was that an Ontario judgment would not be recognized in India and China. Strathy J rejected this argument:

I do not read Morguard as stating that ‘jurisdiction follows recognition’. If it were true that ‘jurisdiction follows recognition’, Ontario courts would be deprived of jurisdiction in cases where there is an obvious real and substantial connection to Ontario. The defendant could simply point to another country that would not recognize a potential judgment in order to oust the court’s jurisdiction, regardless of the unreasonableness of that refusal. This is clearly not what the Supreme Court intended. I regard the quoted passage as affirming that if a court exercises

53 George Brown (n 52) at para 52.
54 George Brown (n 52) at para 56.
55 George Brown (n 52).
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jurisdiction over non-residents based on a real and substantial connection, and
does so having regard to order and fairness, its decision ought to be respected and
enforced in other jurisdictions, both as a matter of private international law and,
in the case of the decisions of courts of other provinces, Canadian constitutional
law.\textsuperscript{56}

16.71 The above analysis does not take into account the fact that as a matter of private international law other countries do not accept the ‘real and substantial connection’ test as a proper basis for assuming jurisdiction over a foreign party for an internationally enforceable judgment. As a consequence the resulting Ontario judgment will not ‘be respected and enforced in other jurisdictions.’

16.72 This latter point does not appear to have been addressed by the parties in this case. This is reflected in a later observation by Strathy J where he says:

Applying the approach of Morguard, Wilson v. Servier, and the International Bar Association Guidelines,\textsuperscript{57} as long as this Court follows international norms for taking jurisdiction, and is concerned for order and fairness, it is entitled to expect that other countries will recognize its orders.\textsuperscript{58}

Here again Strathy J assumes that the ‘real and substantial connection’ test is accepted as an ‘international norm’ for asserting jurisdiction over absent foreign claimants for the purposes of an internationally enforceable judgment. However, that is not the case.

16.73 This presumption that the ‘real and substantial connection’ test is an ‘international norm’ for an internationally enforceable judgment relating to absent foreign claimants leads Strathy J to the following conclusion:

Nor do I accept the proposition that the court should not exercise jurisdiction over non-resident class members where there is evidence that a particular foreign jurisdiction might not recognize a class action judgment either altogether (as is said to be the case in China) or in the absence of actual notice (as is said to be the case in India). The hypothetical failure of another state to observe the generally accepted principles of private international law in connection with the assumption of jurisdiction and the recognition of foreign judgments should not preclude an Ontario court from taking jurisdiction in a class action involving its residents, provided the conditions set out in Currie are met: . . . Nor should another state’s views of the requirements of natural justice (particularly in the context of what appears to be a

\textsuperscript{56} George Brown (n 52) at para 65 (emphasis added).

\textsuperscript{57} In October 2006 the Consumer Litigation Committee of the International Bar Association created the IBA Task Force on International Procedures and Protocols for Collective Redress (the Task Force) to study the potential problems associated with judgments rendered in multi-jurisdictional class actions. In particular, the objective of the Task Force was to draft guidelines that could be used to address the recognition and enforcement of a class action judgment in a jurisdiction other than the jurisdiction in which the judgment was granted. The work of the Task Force culminated in the Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress. The Guidelines were adopted on 16 October, 2008 by the Legal Practice Division of the International Bar Association. A copy of the Guidelines is available on the IBA website at: www.ibanet.org/Search/Default.aspx?q=guidelines%20collective%20redress.

\textsuperscript{58} George Brown (n 52) at para 87 (emphasis added).
“representative action” regime as opposed to a true class action regime) be allowed to dictate what is required for procedural fairness in an Ontario class action.\[59\] Strathy J’s rejection of the defendant’s jurisdictional arguments that any resulting judgment would not be enforceable in the ‘home’ countries of the absent foreign claimants is not consistent with the directions of the Court of Appeal in Muscutt or of the Supreme Court of Canada in Van Breda. The ‘real and substantial connection’ test is not one of the ‘generally accepted principles of private international law in connection with the assumption of jurisdiction and the recognition of foreign judgments’. It should not be applied to assert jurisdiction over absent foreign claimants. Determining jurisdiction on an individual basis in this case would still have resulted in ‘an Ontario court…taking jurisdiction in a class action involving its residents’. The class simply would not include absent foreign claimants. In the result, Strathy J certified a class that included all 119 students, including 78 international students.

VI. Conclusion

Canadian courts should not use the ‘real and substantial connection’ test to assert jurisdiction over absent foreign claimants. This will almost invariably result in a judgment that will not be enforceable outside of Canada.

Canadian courts must have regard to two fundamental principles of jurisdiction for internationally enforceable judgments in other countries: first, international jurisdiction can only be asserted on the basis of ‘presence’ and/or ‘consent/submission’ and second, one can only become a claimant by expressly asking to bring a claim and not by remaining silent (ie by failing to opt out).

If Canadian courts continue to insist on using the ‘real and substantial connection’ to determine whether to assert jurisdiction over absent foreign claimants they should be rigorous and vigilant in their application of the test. They must properly take into account comity, the standards of jurisdiction, recognition, and enforcement prevailing elsewhere and fairness to all the parties involved.

These matters must be considered because they bear upon the interpretation and application of the real and substantial connection test and more fundamentally, because generally accepted principles of private international law require it. If Canadian courts fail to be rigorous they will erroneously assume they are achieving the objectives of class actions, namely, access to justice, judicial economy, and behaviour modification by certifying international multi-jurisdictional class actions, when in fact they are not doing so.

\[59\] George Brown (n52) at para 72 (emphasis added).