Airia Brands v Air Canada, 2015 ONSC 5332 (CanLII)

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Airia Brands Inc., Startech.Com Ltd. and QCS-Quick Cargo Service GMBH Plaintiffs	)	Charles M. Wright and Anthony O'Brien, for the Plaintiffs
- and -	)	
Air Canada, AC Cargo Limited Partnership, Societe Air France, Koninklijke Luchtvaart Maatschappij N.V. dba KLM, Royal Dutch Airlines, Asiana Airlines Inc., British Airways PLC, Cathay Pacific Airways Ltd., Deutsche Lufthansa AG, Lufthansa Cargo AG, Japan Airlines International Co., Ltd., Scandinavian Airlines System, Korean Air Lines Co., Ltd., Cargolux Airlines International, Lan Airlines S.A., Lan Cargo S.A., Atlas Air Worldwide Holdings, Inc., Polar Air Cargo Inc., Singapore Airlines Ltd.,	)	John P. Brown, Brandon Kain and Timothy D. Chapman-Smith, for the Defendant, Cathay Pacific Airways Ltd. Katherine L. Kay and Danielle K. Royal, for the Defendants, Air Canada and AC Cargo Limited Partnership Paul J. Martin and Laura F. Cooper, for the Defendant, Asiana Airlines Inc. A.T. McKinnon and Jon Smithen, for the Defendant, Korean Air Lines Co. Ltd.

Singapore Airlines Cargo PTE Ltd., Swiss International Air Lines Ltd., Quantas Airways Limited, and Martinair Holland N.V.	Zirjan Derwa and Denes Rothschild, for the Defendant, British Airways PLC
Defendants)	
)	**HEARD:** November 18, 19 & 20, 2014.

JURISDICTION MOTION

LEITCH J.

Introduction

[1] As set out more fully below, the issues on this motion can be simply stated: does the court have jurisdiction over putative class members who reside outside Canada and if so should the court exercise that jurisdiction?

[2] The Plaintiffs filed their motion to certify this action as a class proceeding on February 28, 2008. This motion included an affidavit of Ms. DeKay, a partner of the lawyers for the Plaintiffs, sworn February 27, 2008. Since February 2008, Ms. DeKay has sworn four supplemental affidavits on January 27, 2009, October 21, 2010, October 12, 2012 and November 28, 2013.

[3] In addition, since February 2008 the Plaintiffs' certification record has swollen to eight volumes.

[4] The affidavits of Ms. DeKay are contained in volumes 1 to 4 of the Plaintiffs'consolidated certification record.

[5] Volume 5 contains affidavits from a representative of each of the Plaintiffs sworn March 3, 2008, January 26, 2009 and June 25, 2010. In addition there are affidavits from two representatives of Lufthansa Cargo A. G., who entered into the first settlement with the Plaintiffs, sworn June 27, 2011 and August 15, 2011.

[6] Volume 6 contains 11 affidavits from representatives of a number of the Defendants: Air Canada, Asiana, Atlas/Polar, Cathay, Japan Airlines, Lan, S.A.S., Singapore and Air France sworn in December 2008 and August 24, 2011.

[7] Volume 7 contains affidavits from industry and economic experts retained by the Plaintiffs and the Defendants: affidavits of Dr. Russell Lamb retained by the Plaintiffs sworn February 26, 2008 and January 26, 2009; affidavits of Margaret Sanderson retained by the Plaintiffs sworn November 16, 2008 and January 30, 2012; an affidavit of David Rowswell retained by the Defendants sworn December 15, 2008; and an affidavit of Rick Erickson retained by the Defendants sworn December 15, 2008.

[8] Volume 8 contains 26 affidavits of foreign law experts retained by the Defendants sworn from 2008 to 2014 together with two affidavits of Alexander Layton retained by the Plaintiffs sworn March 1, 2010 and October 8, 2014.

[9] In addition to the eight volume consolidated certification record, the parties filed a joint brief of authorities in seven volumes containing 130 cases and secondary authorities such as articles and reports from commissions and committees.

[10] The parties also filed a four volume transcript brief containing the transcripts of the cross-examination on the affidavits filed by each of the representative Plaintiffs; the transcripts of the cross-examination of the representatives of Air Canada and Atlas/Polar; answers to written questions asked of representatives of Asiana, Japan Airlines, Lan, S.A.S. and Air France; and, the transcripts of the examination of certain experts and answers to written questions posed to those experts.

[11] Some of the material filed in the consolidated certification record was referenced on this motion.

[12] The notice of constitutional question was dated October 31, 2014 and received by the court November 4, 2014. Similarly, this notice of motion was dated and received on the same dates.

[13] With respect to this motion, the parties filed an eight-volume joint brief of authorities containing 127 cases and other secondary sources.

[14] The factum filed by the Defendants on this motion was 82 pages. The Plaintiffs'responding factum was 66 pages and the Defendants' reply factum was 35 pages. The Defendants' factum was received November 4, the Plaintiffs' factum November 12 and the Defendants' reply factum November 17.

[15] The Plaintiffs considered the bringing of this jurisdiction motion separate from their certification motion an abuse of process and moved to strike the motion. Pursuant to written reasons released December 11, 2014, I concluded that the bringing of this motion, albeit late in the day, cannot be considered an abuse of process within the meaning of rule 25.11.

[16] The Defendants' contention that the court had no jurisdiction over the global class that the Plaintiffs sought to certify would come as no surprise to the Plaintiffs. Indeed, as set out above, expert evidence had been amassed by both Plaintiffs and Defendants for some time. However, as I indicated to counsel at the hearing of this motion, the late presentation of the motion and the notice of constitutional question together with the extensive volume of materials filed within days of this motion being heard were daunting.

[17] There was an astonishing volume of material presented to the court within a very short time frame prior to when this motion and the certification motion were heard. While compendiums and the excellent factums were most helpful when hearing the submissions on the motions, I question whether the quantity of motion material had appropriate utility and value.

[18] Parenthetically, I note that the Plaintiffs' factum filed on the certification motion was 61 pages, the Defendants' factum was 92 pages and the Plaintiffs'reply factum was 37 pages. The Plaintiffs' factum was dated November 17. The Defendants' factum was dated December 8 and the Plaintiffs' reply factum was dated December 12. These

factums were filed "just in time" for the hearing of the certification motion on December 15-17, 2014.

[19] It is fair to say that there was no stone left unturned in dealing with the issues raised on both this motion and the certification motion (with respect to which separate reasons were prepared).

Who is bringing this motion and what relief is sought?

[20] The Defendants, Cathay Pacific Airways Ltd., Air Canada and AC Cargo Limited Partnership, Asiana Airlines Inc., British Airways PLC and Korean Airlines Co., Ltd. are the Defendants who had not settled this action with the Plaintiffs ("the Defendants") as of the time this motion was heard.

[21] The Defendants move for a declaration that this court does not have jurisdiction over parties who are absent foreign claimants, as more particularly defined further in these reasons.

[22] In addition, the Defendants seek an order: (a) staying or dismissing the proposed class action as it relates to absent foreign claimants on the basis that this court does not have jurisdiction *simpliciter* over them; or alternatively, (b) staying or dismissing the proposed class action as it relates to absent foreign claimants on the basis that Ontario is *forum non conveniens*.

[23] At the hearing of this motion, the Defendants confirmed that they are seeking a stay order and not a dismissal order in relation to the absent foreign claimants. As set out in para. 92 of their factum, the Defendants submit that actions such as this one involving absent foreign claimants in proposed global class actions raise unique problems that require new principles to be developed as contemplated by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda,* 2011 SCC 17 (CanLII), [2012] 1 S.C.R. 572 ("*Van Breda*"), the leading decision on the conflict of laws. Indeed, the Defendants'position is that a "new problem" has arisen in this proposed class action.

[24] The Defendants gave notice to the Attorney General of Ontario and the Attorney General of Canada that they intended to question, under s. 92 of the *Constitution Act, 1867* (the "*Constitution Act"*) the constitutional applicability to absent foreign claimants of both:

> (a) the common law conflict of laws rule known as the real and substantial connection test for adjudicative jurisdiction; and
>
> (b) sections 27(3), 28(1) and 29(3) of the *Class Proceedings Act*, S.O. 1992, c 6 (the "*Class Proceedings Act*").

[25] Prior to the hearing of this motion, Mr. Robin K. Basu, General Counsel in the Constitutional Law Branch of the Ministry of the Attorney General advised the court that the Attorney General of Ontario would not be appearing at the hearing on the constitutional issues set out in the Notice of Constitutional Question noting, however, that her non-intervention should not be taken as any acknowledgment of merit in the constitutional claim.

[26] At the time this motion was heard there had been no response from the Attorney General of Canada. However, subsequent to that time, it was confirmed that the Attorney General of Canada would not take a position on these issues.

Background Facts

[27] The Plaintiffs allege that the Defendants conspired in Canada and throughout the world to fix prices of Airfreight Shipping Services, which is defined to mean airfreight cargo shipping services for shipments to or from Canada (excluding shipments to and from the United States).They emphasize that a global price fixing conspiracy is alleged.

[28] To summarize from the Plaintiffs' factum, Airfreight Shipping Services are shipments of goods by air, which is the preferred shipping method for high-value, time-sensitive and compact goods, the cost of which is made up of the base rate and surcharges or extra fees imposed above and beyond the base rate and, in particular, surcharges for fuel and security which are relevant in this case.

[29] The majority of Airfreight Shipping Services are sold to freight forwarders who are retained by shippers. In other words, freight forwarders serve as intermediaries for Airfreight Shipping Services. If air cargo was purchased through a freight forwarder, the airline may or may not know the identity of the shipper. Lufthansa identified 60,000 indirect purchaser customers for the purposes of providing notice of its settlement with the Plaintiffs described further in this section.

[30] Airlines also sell Airfreight Shipping Services directly to shippers and, for example, the Air Canada Defendants have thousands of direct purchaser shipper customers located throughout the world.

[31] The Defendants, other than the Air Canada Defendants, are foreign companies resident and domiciled outside Canada.

[32] The Defendants filed affidavits from each of their representatives and as summarized at para. 22 of their factum, they entered into transactions with absent foreign claimants in the countries from which the goods were shipped for Airfreight Shipping Services involving inbound shipments to Canada. They emphasize that such contacts were not entered into in Canada. Rather, such contracts were entered into by the Defendants in the foreign countries from which goods were shipped. They also say that if there is any tortious conduct it did not occur in Canada.

[33] However, the Plaintiffs point out that six of the defendants have entered guilty pleas in Canada for conduct contravening s. 45(1)(c) of the *Competition Act*, R.S.C. 1985, c. C-34*;* 18 airlines, including some of the Defendants have pled guilty in the United States to comparable offences and fines were imposed in Australia and Europe against other airlines, including some of the Defendants.

[34] The Plaintiffs point out that many of the Defendants had offices, facilities, employees and/or general sales agents in Canada and a number operate direct flights to Canada.

[35] The first settlement of this action was with Deutsche Lufthansa AG, Lufthansa Cargo AG, and Swiss International Airlines Ltd. (collectively referred to as "Lufthansa").

[36] In March 2008, this action was certified with the consent of Lufthansa as a class proceeding for settlement purposes. A global class was certified. None of the Defendants opposed the motion. All non-settling Defendants approved the form of order made by the court, one of the terms of which was that the certification for settlement purposes would be "without prejudice to any position a Non-Settling Defendant may take in this or any subsequent proceeding on any issue, including the issue of whether this action should be certified as a class proceeding".

[37] In addition, the order dated March 6, 2008 certifying this action for settlement purposes included the following provision:

> No person may rely, cite or refer to all or any part of this order or any reasons given by the Court in support of the Order as authority against any of the Non-Settling Defendants in this or any other proceeding… and the certification of this action for settlement purposes is not binding on, and shall have no effect on this Court's ruling in this or any other proceeding as against the Non-Settling Defendants.

[38] Further, the order dated February 18, 2009 approving the Lufthansa settlement incorporated by reference, the terms and provisions of the Settlement Agreement with Lufthansa which included a provision that:

> Any action taken to carry out the Settlement Agreement, shall not be referred to, offered in evidence or received in evidence in any pending or future civil, criminal or administrative action or proceeding.

[39] The Garden City Group, Inc. was retained to develop and implement a notice program in the United States, Canada and worldwide informing putative class members of the Canadian and U.S. Lufthansa settlements.

[40] Paragraphs 47-50 of the Plaintiffs' factum described the results of the worldwide notice program and in particular, as set out in para. 48 of the factum that "the notice program resulted in notice in 140 countries worldwide through a combination of direct mail and publication notice." Specifically, as of January 2009, 270 putative class members from 33 different countries had registered to receive further information by mail.

[41] However, the Defendants assert this notice program, an action to carry out the Lufthansa settlement, should not be considered as evidence in this proceeding in the face of the terms and conditions of the February and March 2008 orders described above.

[42] After the Lufthansa settlement, this action was certified on consent for settlement purposes with a number of other Defendants who entered into settlement agreements with the Plaintiffs. The Non-Settling Defendants did not oppose the consent certifications. Again, a global class was certified and the orders made included similar language to that contained in the Lufthansa order.

[43] As a result of the settlements with a number of the Defendants significant money is held in trust for the benefit of the class and distribution has not yet taken place.

The definition of the class proposed by the Plaintiffs

[44] The Representative Plaintiffs seek to certify the following class pursuant to their certification motion:

> All persons (excluding Defendants, their respective parents, employees, subsidiaries, affiliates, officers, directors, persons currently resident in Australia who paid more than AUD$20,000 for the carriage of goods to and from Australia by air during the period January 1, 2000 to January 11, 2007, and persons who commence litigation in a jurisdiction other than Canada prior to the conclusion of the trial of the common issues) who purchased Airfreight Shipping Services* during the period January 1, 2000 to September 11, 2006, including those persons who purchased Airfreight Shipping Services through freight forwarders, from any air cargo carrier, including, without limitation, the Defendants, but not including Integrated Air Cargo Shippers.**
>
> *Airfreight Shipping Services means airfreight cargo shipping services for shipments to or from Canada (excluding shipments to and from the United States).
>
> **Integrated Air Cargo Shipper is defined as an air cargo shipper that manages an integrated system of people, airplanes, trucks and all other resources necessary to move airfreight cargo from a customer's point of origin to the delivery destination, and for greater certainty, includes but is not limited to FedEx, UPS, DHL and TNT.

[45] When the certification motion was heard, the Plaintiffs presented a revised definition but it is sufficient for the purpose of dealing with the issues on this motion to indicate that the Plaintiffs seek to certify a worldwide class.

[46] The Plaintiffs emphasize what they say are two significant exceptions to the international class they seek to certify: persons who commence litigation outside Canada prior to the conclusion of the trial of the common issues and persons and shipments that fall within the scope of the proposed class actions that have been commenced in the United States and Australia.

The contentious inclusion of absent foreign claimants

[47] As the Defendants emphasize on this motion, the class proposed by the Plaintiffs includes claimants from more than 30 different countries in North America, South America, Asia, Australia, Africa and Europe. They say this motion is about countless absent foreign claimants all over the world.

[48] The Defendants state that this jurisdiction motion concerns persons who reside outside Canada, purchased Airfreight Shipping Services outside Canada, suffered any alleged losses outside Canada, and who have not opted in to this action or commenced a

related claim in Canada (the "absent foreign claimants"). This definition of absent foreign claimants is not to include Canadian residents who purchased Airfreight Shipping Services abroad, or foreign residents who purchased Airfreight Shipping Services in Canada.

[49] The Defendants submit that the definition of the class can be readily amended to exclude such persons by adding the words "absent foreign claimants"to the list of persons excluded from the definition of the class and including within the class definition the explanation as to who are absent foreign claimants as set out in the preceding paragraph.

[50] When the certification motion was heard, the Defendants proposed a slightly different, and better, definition of absent foreign claimants. The new and better definition incorporates language used in describing presumptive connecting factors to Canada (as explained below) and allows for persons who have received notice of this action or any other person to expressly consent to the jurisdiction of this court.

[51] The Defendants proposed at the hearing of the certification motion that the following persons be excluded from the class:

> Persons who reside outside Canada, entered into contracts for Airfreight Shipping Services outside Canada and suffered any alleged losses outside Canada except those who expressly consent to the jurisdiction of the Ontario court.

[52] The Plaintiffs assert that this proposed amendment to the definition of the class fails to take into account the practical difficulties in determining class membership given the fact that, to use the words of Magistrate Judge Pohorelsky referenced more fully below, air cargo services are not rendered in a single location but are performed along entire transportation routes, touching both a country of origin and the country of destination.

[53] As a result, the Plaintiffs assert that determining where a purchase of Airfreight Shipping Services occurs is a complex issue of mixed fact and law. Therefore if the proposed class was to include the amendment advanced by the Defendants, members of a class could not self-identify and the proposed class definition would be contrary to the legal requirements for such a definition described in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company,* 2013 SCC 58 (CanLII), [2013] 3 SCR 545 at paras. 54-79.

[54] Further, the Plaintiffs assert that the amendment proposed by the Defendants creates an unnecessary layer of complexity whereas their definition is stated in objective terms allowing putative class members to readily identify themselves.

[55] However, I agree with the Defendants that it seems to me that the Plaintiffs have conflated the "transaction" for Airfreight Shipping Services with the "services"that were provided. Services were what Magistrate Judge Pohorelsky was referencing. I agree with the Defendants that the *situs* of a contract can be identified and in any event, as the Defendants note, it is tortious conduct which grounds the Plaintiffs' claims and the *situs* of the tort is what is important.

[56] Further, as earlier noted, the Defendants emphasize that their unchallenged evidence is that, other than Air Canada, they are resident and domiciled outside of Canada and they entered into contracts for Airfreight Shipping Services of goods into Canada in the foreign countries from which the goods were shipped.

The issues raised on this motion

[57] The Defendants' motion raises the following issues:

1) Does this court have jurisdiction *simpliciter* over absent foreign claimants?

2) If the court does have jurisdiction *simpliciter*, should such jurisdiction be declined based on *forum non conveniens*?

The position of the Defendants

[58] The Defendants note that s. 27(3) of the *Class Proceedings Act* (which provides that a judgment on common issues of a class, binds every class member, who has not opted out of the class proceeding) is not controversial in relation to a plaintiff who has commenced an action in Ontario and any absent foreign claimant who is subject to the court's jurisdiction by virtue of consent or attornment.

[59] In contrast, the Defendants submit, that absent foreign claimants who are not present in Ontario, have not consented to Ontario's jurisdiction and have not attorned to Ontario's jurisdiction by any procedural step are in a unique position.

[60] The Defendants submit that the appropriate jurisdictional test for this unique situation is not the real and substantial test applied in *Van Breda*. The Defendants say that the issue on this motion is a new problem and they also say that their solution to this new problem flows naturally from *Van Breda*and *Currie v. McDonald's Restaurants of Canada Ltd.*, (2005), 2005 CanLII 3360 (ON CA), 74 O.R. (3d) 321 (Ont. C.A.) ("*Currie*").

[61] The essence of the Defendants' submissions is summarized at para. 117 of their factum as follows:

> …order and fairness would not be served by applying a common law real and substantial connection test to absent foreign claimants in a proposed global class action. Instead, within this limited context, the "real and substantial connection" necessary to confer legitimacy in a constitutional sense means that one of the generally accepted principles of private international law traditional for adjudicative jurisdiction must exist, namely, presence, consent or submission.

[62] The Defendants submit that order and fairness prevent the real and substantial connection test from applying. Firstly, they submit that if this court assumes jurisdiction over absent foreign claimants based on the real and substantial connection test the resulting judgment will not be recognized or enforced abroad. They reference the evidence presented on this motion to the effect that, as Professor Briggs summarized in his text A. Briggs, *The Conflict of Laws*, 2d ed. (Oxford: Oxford

University Press, 2008), at 138 to 139, the real and substantial connection test is a radical departure from the laws in other countries. This perspective was outlined further in the affidavit evidence provided by the other foreign law experts retained by the Defendants reviewed below.

[63] The Defendants also point to recent cases in foreign jurisdictions that have specifically rejected the real and substantial connection test referred to further in these reasons.

[64] They also reference legislative developments pursuant to an opt-in rather than an opt-out model as summarized in paras. 131 to 133 of the Defendants' factum.

[65] As a result, the Defendants submit that they will not be protected from future litigation pursuant to a judgment in an Ontario class action that includes absent foreign claimants. They assert in para. 136 of their factum:

> This is directly contrary to the principles of order and fairness that the SCC in *Van Breda*stated should be respected and demonstrates the illegitimacy of asserting jurisdiction here based on the real and substantial connection test. In these circumstances, the territorial limits in s. 92 of the *Constitution Act*, 1867 prohibit the court from assuming jurisdiction over any class members who do not meet the traditional tests of presence or consent recognized abroad, i.e. absent foreign claimants.

[66] The Defendants also submit that comity would be offended if the court asserted jurisdiction over foreign claimants in the face of what they assert is undisputed evidence that its judgment will not be enforceable abroad. Comity was defined in *Morguard Investments Ltd. v. De Savoye*, 1990 SCR 1077 ("*Morguard*") at 1095 as "the deference and respect due by other states to the actions of a state legitimately taken within its territory".

[67] Alternatively, the position of the Defendants is that if the real and substantial test is applicable, this test cannot be met. They emphasize that the jurisdictional analysis must be considered from the perspective of the absent foreign claimants.

[68] In the further alternative, the Defendants submit that if the real and substantial test does apply and is met, the court should decline jurisdiction over absent foreign claimants based on the doctrine of *forum non conveniens*.

[69] The Defendants submit that the Plaintiffs are urging this court to assume the role of the world's policeman on the basis of a jurisdictional test not recognized in other countries. They question why an Ontario court would take on the burden of applying foreign law and assume the role of the world's policeman

The position of the Plaintiffs

[70] The Plaintiffs contend that the Defendants are seeking to diminish their liability by gutting the class. The Plaintiffs submit in para. 8 of their factum that "in challenging this Court's jurisdiction over foreign class members, the Defendants are not concerned about the prospect of re-litigating the claims abroad, but rather are simply trying to avoid liability (and paying damages) to foreign class members."

[71] They emphasize that the real and substantial test is the law of Canada and suggest that the Defendants are seeking to change the law.

[72] The Plaintiffs assert that the position of the Defendants has been rejected in *Ramdath v. George Brown College,* 2010 ONSC 2019 (CanLII), [2010] O.J. No. 1411 ("*Ramdath*").

[73] They note that global cases have been certified in many other cases as summarized in para. 116 of their factum.

[74] Further, the Plaintiffs submit that the real and substantial test to establish jurisdiction is easily satisfied in these circumstances.

[75] They allege that the evidence from foreign law experts is limited and speculative and that the concern of the Defendants regarding the potential for re-litigation in foreign countries is overstated and speculative.

[76] Their position is summarized in para. 6 of their factum as follows:

> The Defendants have filed affidavits regarding the enforcement of an Ontario class action judgment in a limited number of countries. A theoretical risk of a future problem with the enforcement of an Ontario class action judgment is no bar to the certification of a class including foreign class members. The proposed class definition excludes any putative class member who commences litigation outside of Canada prior to the conclusion of the common issues at trial. The theoretical risk of there being prejudice to a Defendant will *only*materialize if all of the following events take place: 1) this case is certified as a class proceeding; 2) this court grants judgment on the common issues; 3) following receipt of a common issues judgment in Ontario, a class member commences an individual proceeding in a foreign jurisdiction; and 4) the foreign court takes jurisdiction and refuses to give preclusive effect to the Ontario judgment. The question of whether the Ontario judgment would be given preclusive effect by the foreign court would need to be decided based on the law that exists *at that time*. As is evident from the record, the law has evolved and will continue to evolve until such time as enforcement becomes an issue, if indeed it ever does become an issue. The Defendants' foreign law affidavits contain speculation about what the law may be in only ten countries. No affiant references a precedent that makes their predicted outcome clear. It cannot be assumed that the law which may or may not exist today in those ten countries is the law that will exist in those countries in the future, or indeed in the remainder of the over 180 countries for which no opinion was provided. The very same argument that the Defendants advance with respect to issues of judgment enforcement was made before Justice Strathy (as he then was) in *Ramdath* and roundly rejected by His Honour.

[77] The Plaintiffs argue that the issues on this motion are not a matter of fairness to the Defendants and the absent foreign claimants. Rather, the Plaintiffs contend that the Defendants' sole motivation is to avoid liability.

Evidence of foreign law experts presented by the Defendants

[78] Each of the Defendants retained foreign law experts from the countries in which they are domiciled and resident. Each of those experts provided affidavits in which they outline their opinion on whether a judgment in this action from this court would be recognized, enforced or given preclusive effect in their respective countries.

[79] In addition, affidavits were filed by foreign law experts retained by other defendants who have entered into settlement agreements with the Plaintiffs.

[80] This affidavit evidence from the experts in the law of Singapore, Luxembourg, Germany, Hong Kong, Japan, France, Chile, Korea, Denmark, England and Wales was summarized in paras. 25 to 44 of the Defendants' factum.

[81] It is fair to say, as summarized at para. 24 of the Defendants' factum:

> That foreign law experts were unanimous in their opinions that an Ontario class action judgment will not be recognized or enforced in the respective countries against an absent foreign claimant; nor will it preclude an absent foreign claimant from commencing and proceeding with an action against the Defendant Airlines in their respective countries with respect to matters dealt with and determined in such an Ontario class action judgment.

[82] The Defendants also retained two professors as experts. Professor Rachael Mulheron, is a professor of law at the Department of Law, Queen Mary University of London and a member of the Civil Justice Council of England and Wales which is a law reform advisory body that advises on changes or enhancements in civil procedure. As an academic she has specialized in class actions, group litigation and other forms of representative proceedings ("Collective Redress Regime") in the United Kingdom and in other jurisdictions around the world. She is familiar with the Collective Redress Regimes in Austria, Belgium, Bulgaria, Cypress, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hong Kong, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. Her evidence is that as of 2014, a judgment in this action would not preclude absent foreign claimants from commencing and pursuing proceedings in these countries and the Ontario class judgment will not be enforceable or recognized between the Defendants and any absent foreign claimants in these countries.

[83] In addition, the Defendants retained Professor Walker, who is a professor of law at Osgoode Hall Law School at York University specializing in the conflict of laws and the author of Castel and Walker: Canadian Conflict of Laws (6th ed.) and the Halsbury's Laws of Canada volume on the conflict of laws. She too has offered the opinion that a judgment of this court certifying a class that includes absent foreign claimants would not be recognized by courts and jurisdictions out of Canada and the United States and absent foreign claimants would not be precluded by such a judgment from commencing and proceeding with an action against the Defendants in other jurisdictions.

[84] As summarized at para. 59 of the Defendants' factum, "the unifying theme of all the Defendants' foreign law experts' opinions is that the foreign jurisdictions will not recognize, enforce or give preclusive effect to a Canadian class action opt-out judgment."

[85] The Defendants' position is that there is no evidence from the Plaintiffs that disputes the conclusion of their foreign law experts and the professors who have expertise in international conflict of law. They emphasize that there is no uncertainty or speculation in their opinions.

[86] They say that they have provided a comprehensive review of private law and prevailing legal norms, which the Court of Appeal and the Supreme Court of Canada has consistently referred to, and relied on, in reaching their conclusions on conflict of law issues.

The Statement of Defence filed by Cathay Pacific Airways Ltd.

[87] One of the Defendants, Cathay Pacific Airways Ltd, has filed a Statement of Defence. In its Statement of Defence, it has pleaded and relied upon the substantive laws of 36 different countries in respect of the claims of absent foreign claimants which must be applied to resolve the disputes in this action if absent foreign claimants are included within the definition of the class.

[88] The Defendants submit that this Statement of Defence clearly illustrates the "extreme complexity" and costs that will be incurred if the court chooses to assert jurisdiction over absent foreign claimants.

Evidence of foreign law experts presented by the Plaintiffs and the Plaintiffs' position with respect to the evidence from the Defendants' foreign law experts

[89] The Plaintiffs note that while the Defendants filed 26 affidavits relating to the enforcement of a judgment in this class action in foreign countries, the experts retained by the Defendants have canvassed the law of only 10 countries. The Plaintiffs observe that there are in excess of 190 countries in existence, 140 of which were included in the Lufthansa notice campaign.

[90] The Plaintiffs take the position that Professor Mulheron and Professor Walker are not qualified to opine on the enforceability of an Ontario class action judgment in what they refer to as "countless foreign jurisdictions".

[91] Furthermore, the Plaintiffs assert that the evidence from the foreign law experts retained by the Defendants is speculative and the law is evolving. Paragraphs 57 to 60 of the Plaintiffs' factum reference these developments.

[92] To summarize those paragraphs, the Plaintiffs point out that in her most recent affidavit, Professor Mulheron reported that the UK parliament recently introduced a consumer rights bill containing a new collective action regime for competition law cases. As at the date of her most recent affidavit in February 2014, this bill had received second reading in the House of Commons and if passed will permit opt-out class actions in competition cases in England.

[93] In addition, Mr. Burkhard Schneider, the expert in German law, reported in his most recent affidavit that courts in Germany have now permitted service of a U.S. costs complaint on a German resident and some commentators in Germany have argued that foreign class action judgments could be recognized and enforced in Germany against such German-resident Defendants.

[94] Further, Mr. Sylvain Bollee opined in his most recent affidavit that class actions will more than likely be introduced in the French legal system in the very near future and there is a move to introduce class actions in European Union law. Whether the ultimate legislation provides for an opt-in or an opt-out regime, there has been, and continues to be, a change in attitude towards class actions in Europe.

[95] Also, Mr. Nicolas Luco, the expert in Chilean law, in his answers to questions on written cross-examination stated that an opt-out class action was commenced in Chile on the basis of alleged price-fixing. The law had been broadened to allow for the inclusion of micro and small businesses in class actions whereas under earlier law those entities were precluded from participating in opt-out class actions.

[96] The Plaintiffs also refer to the affidavit evidence from the expert they have retained, Mr. Alexander Layton, an English lawyer. Counsel for the Plaintiffs observed in argument that the Plaintiffs chose not to engage in a "battle of experts", emphasizing their submissions that the enforceability of a judgment abroad is not a significant factor in the analysis of the court's jurisdiction, the opinions of the Defendants' foreign law experts are speculative and they cover only a fraction of the landscape applying to all class members.

[97] The Plaintiffs emphasize Mr. Layton's statement in para. 3 of his affidavit sworn March 1, 2010 in which he stated the following:

> When it comes to considering the laws by which, and the circumstances in which, European legal systems – both at EU and national level – will in future recognize judgments given in other legal systems arising from alleged unlawful cartel behaviour, there is considerable uncertainty. The present state of the law is likely to be a less sure pointer to the future state of the law in this area than in most others. So while it is possible to state with a fair degree of confidence what the law and public policy are now, it is not possible to state with any degree of certainty what the law and public policy will be in a few years' time.

[98] Mr. Layton reached the same conclusion 4 ½ years later. In his affidavit sworn October 8, 2014, he indicated that "a wave of reforms" is being undertaken across Europe and that "because the European legislators have not at this stage taken a firm legislative grasp of these developments, it is impossible to say what form the developments will take over the short to medium term. But what is clear is that one cannot plausibly say that judgments delivered by courts in foreign countries under their own collective relief procedures, or settlements approved by such courts, will be deprived of recognition or enforcement in Europe in the short and medium term".

[99] Further, the Plaintiffs submit that the risk of re-litigation abroad is negligible. In particular they note that none of the Defendants' foreign law experts addressed the

likelihood that absent foreign class members will actually seek redress abroad or the barriers to commencing anti-trust litigation in the absence of an opt-out class action regime with contingent fees. They also note at para. 64 of their factum that the "lack of litigation to date speaks volumes in terms of the likelihood of actions being commenced several years from now, after the conclusion of the common issues trial".

[100] They note also at para. 64 of their factum that other than the class proceedings pending in the United States and Australia there have been only two other actions commenced in relation to the alleged conspiracy, one in England and one in the Netherlands and "there is no evidence in the record of a single case having been filed anywhere else in the world".

[101] Further, the Plaintiff's submit that even if an action was commenced in a foreign jurisdiction after the conclusion of a common issues trial it is quite possible that the claim would be barred because of the expiry of limitation periods noting that the Defendant Cathay Pacific Airways Ltd. has pled such a defence in its Statement of Defence. As the Plaintiffs note, none of the foreign law experts retained by the Defendants provided any information with respect to relevant limitation periods and on her cross-examination Professor Mulheron admitted that she did not consider limitation periods.

[102] The Plaintiffs also point out that the U.S. class action has recently been certified. An assertion by the U.S. Defendants that Plaintiffs who purchased air cargo shipping services from abroad into the United States lacked antitrust standing was rejected. It was held in a report by U.S. Magistrate Judge Pohorelsky that foreign Plaintiffs' claims are not excluded from the court's subject matter jurisdiction and the foreign Plaintiffs have standing to advance their claim. As the Plaintiffs emphasized, he noted that air cargo services were not rendered in a single location but were "performed along entire transportation routes, touching both the country of origin and the country of destination".

[103] Subsequent to the hearing of this motion, I was advised by Plaintiffs' counsel that Judge Gleeson, a United States District Judge, had adopted Judge Pohorelsky's report and recommendations in its entirety and certified the U.S. class action.

What conclusions can be drawn from the foreign law evidence presented on this motion?

[104] As previously noted, the Plaintiffs' position is that the opinions of the Defendants' experts are speculative and cover only a fraction of the landscape applying to all class members. They assert that the most "robust" authority is Professor Briggs and the Ireland case which followed his thinking and the Hong Kong case which adopted the English system, however that is only, as the Plaintiffs put it, a "slice of the world". Beyond the opinion of Professor Briggs, the opinions are more general and less definitive.

[105] As previously noted, the Plaintiffs contest Professor Mulheron's qualifications to give opinions beyond Canada. As a result, they submit that the court is left with the opinions of experts in ten countries and two professors.

[106] However, I am satisfied that Professors Mulheron and Walker are qualified to offer their opinions on "generally accepted principles of private international law and prevailing international legal norms" As Professor Mulheron deposed, she is familiar with Collective Redress Regimes in the jurisdictions she referenced in her affidavit.

[107] The Plaintiffs rely on developments discussed by certain foreign law experts, as referenced above, to support their contention that the evidence from foreign law experts is speculative. However, notwithstanding these developments, each of the experts maintained their opinion that an Ontario class action judgment would not be recognized or enforced by a foreign court.

[108] I agree with the Defendants that Mr. Layton does not contradict the evidence from the Defendants' foreign law experts.

[109] In three recent cases, the real and substantial connection test utilized in Canada has been rejected (*Flightlease (Ireland) Ltd.*, [2012] IESC 12; *Rubin v. Eurofinance CA*, [2013] 1 A. C. 236 (H.L.); and *Islamic Republic of Iran Shipping Lines v. Phiniqia International Shipping LLC*, [2014] HKCFI 1280)

[110] I note also that the opinion of Professor Briggs, the expert in the law of England and Wales and the author of a leading text on conflict of laws earlier referred to, is stronger in 2014 because of the recent House of Lords' decision in *Rubin v. Eurofinance CA*, [2013] 1 A. C. 236 (H.L.) and an amendment to the British Rule 43.

[111] I conclude that the Defendants have provided a comprehensive review of private law and prevailing legal norms and there is no uncertainty or speculation in the opinions offered by the foreign law experts.

[112] Put simply, based on the affidavit evidence presented on this motion, I am prepared to find that the prevailing law outside of Canada is that jurisdiction is based on presence, consent or submission – that is, parties can only become a plaintiff in a proceeding if they actually bring the claim themselves or join in an existing claim.

[113] I agree with the Defendants that the real and substantial connection test is a radical departure from the norms adhered to by other countries and the Ontario opt-out regime set out in s. 27(3) of the *Class Proceedings Act* cannot be applied outside of Ontario.

[114] I accept the proposition put forward by the Defendants in paragraph 134 of their factum that "the court cannot reasonably expect that an Ontario class action judgment involving absent foreign claimants will be recognized and enforced abroad. Instead, absent foreign claimants will be able to bring further litigation against the Defendants in their 'home' countries, where the preclusive effect of the Ontario judgment will be ignored".

[115] I conclude based on the evidentiary record before me that a judgment of this court will not be enforced outside of Canada and the Defendants will be exposed to the potential for double recovery of absent foreign claimants. Even if an aggregate damage award is made, a Canadian court cannot resolve or prevent the potential for double recovery.

Does this court have jurisdiction *simpliciter* over absent foreign claimants?

[116] The first point to be made in relation to this issue, at the risk of stating the obvious, is that Ontario's *Class Proceeding Act,* 1992, S.O. 1992 c.6, *a*procedural statute relied on by the Plaintiffs in relation to absent foreign claimants, cannot create jurisdiction for this court where there is none. As the Supreme Court of Canada made clear in *Bisaillon v. Concordia University,*2006 SCC 19 (CanLII), [2006] 1 S.C.R. 66 ("*Bisaillon*") at para. 22, a class action procedure does not alter the jurisdictions of courts and tribunals nor does it create new substantive rights. While as the Defendants noted, *Bisaillon*dealt with subject matter jurisdiction, it is clear from the Court of Appeal's decision in *Muscutt v. Courcelles*, 2002 CanLII 44957 (ON CA), 2002 60 O.R. (3d) 20 (Ont. C.A.) that procedural legislation cannot establish jurisdiction over foreign parties.

[117] Although the Plaintiffs have argued that the significant notice given pursuant to the Lufthansa settlement cannot be ignored and there are absent foreign claimants that have received notice, I agree with the Defendants that the fact that Lufthansa and the Plaintiffs entered into a private agreement pursuant to which they agreed to certify a worldwide class cannot resolve the issue of jurisdiction before the court on this motion.

[118] I agree with the Defendants that as non-settling Defendants, they start with a"clean slate" on certification notwithstanding what was certified on consent in relation to the numerous settlements the Plaintiffs have entered into. I will address this point further in these reasons as it relates specifically to the Plaintiffs'argument that the notice program has created expectations of absent foreign claimants and there is an issue of fairness relating to them.

(i) The jurisprudence respecting the unique circumstances of class actions

[119] The Defendants emphasize that it is clear from the Supreme Court of Canada decision in *Morguard* that every province is to enforce the judgments of every other province with a real and substantial connection to the dispute regardless of whether the traditional presence and consent tests are met. Further the Defendants note that a majority of the class action statutes in each of the provinces include opt-out provisions for either foreign residents or their own residents.

[120] As a result, according to the Defendants, and as expanded upon at para. 100 of their factum, within Canada the intended preclusive effect of an Ontario class action judgment is regularly recognized by other courts, even with respect to absent foreign claimants.

[121] However as previously noted, according to the Defendants, parties who are not present in Ontario, have not consented to Ontario's jurisdiction and have not attorned to Ontario's jurisdiction are in a unique position in a class proceeding commenced in Ontario. I agree with the Defendants' submission that this unique position was recognized by Sharpe J.A. in *Currie.*

[122] In*Currie,* Sharpe J. A. outlined at para. 13; "the novel point" of "the application of the real and substantial connection test and the principles of order and fairness to unnamed, non-resident Plaintiffs in international class actions." Therefore, the jurisdictional issue in *Currie* related to order and fairness to absent foreign claimants.

[123] The issue for the court in *Currie* was whether a judgment in the Court of Illinois barred the plaintiff pursuing an action in Ontario. The judgment of the Illinois court approved a settlement of a class action brought on behalf of an American and an international class of customers of McDonald's Restaurants, including customers of McDonald's Canada Inc. As the court observed at para. 16:

> In a traditional non-class action suit there is no question as to the jurisdiction of the foreign court to bind the plaintiff. As the party initiating proceedings, the plaintiff will have invoked the jurisdiction of the court and thereby will have attorned to the foreign court's jurisdiction. The issue relating to recognition and enforcement that typically arises is whether the foreign judgment can be enforced against the defendant.
>
> Here the tables are turned. It is the defendant who is seeking to enforce the judgment against the unnamed, non-resident plaintiffs.

[124] As further noted at para. 17:

> Before enforcing a foreign class action judgment against Ontario residents, we should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected.

[125] The question addressed by the court was described at para. 18 as follows:

> 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.

[126] Sharpe J.A. offered the following helpful summary at para. 30.

> In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. I would add two qualifications: First, as stated by La Forest J. in *Hunt v. T&N plc, supra* at p. 325 S.C.R., "the exact limits of what constitutes a reasonable assumption of jurisdiction" cannot be rigidly defined and "no test can perhaps ever be rigidly applied as no court has ever been able to anticipate" all possibilities. Second, it may be easier to justify the assumption of jurisdiction in interprovincial cases than in international cases: see *Muscutt v. Courcelles* (2002), 2002 CanLII 44957 (ON CA), 60 O.R. (3d) 20, [2002] O.J. No. 2128 (C.A.), at paras. 95-100.

[127] Ultimately, the Court of Appeal held that the judgment of the Illinois court did not preclude the plaintiff from pursuing a proposed class action in Ontario.

[128] Van Rensburg J. (as she then was) also commented on the unique aspect of conflict of laws in class proceedings in *Silver v. IMAX Corp.*, [2009] O.J. No. 5585 (Ontario SCJ), leave to appeal refused 2011 ONSC 1035 (CanLII), 105 O.R. (3d) 212 (Div. Ct.). In that case, the plaintiffs were seeking to certify a global class composed of individuals who acquired securities of IMAX on the TSX and the NASDAQ. Van Rensburg J. applied the three factors from *Currie* to determine whether or not a global class should be certified. The three factors were summarized by van Rensburg J. referencing*Currie* at para. 127:

> Sharpe J.A. went on to recognize three pre-conditions for the recognition of a judgment binding an unnamed plaintiff who has not opted out of an international class: (a) the existence of a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) adequate representation of the rights of non-resident class members, and (c) procedural fairness to nonresident class members, including adequate notice (at para. 30).

[129] The Plaintiffs placed considerable emphasis on the decision of the court in *Currie*and assert that while it was decided in the context of enforcement of a foreign class action judgment, the principles enunciated a broader application as was made clear in *IMAX, Ramdath*, *McKenna* and *Excalibur* referenced below.

(ii) Has the position of the Defendants on this motion been rejected in *Ramdath* and is it the controlling authority as the Plaintiffs assert*?*

[130] The Plaintiffs' assert that the Defendants' position on this motion was "roundly rejected"in *Ramdath.*

[131] In*Ramdath,* Strathy J. as he then was, considered a certification motion for a proposed class that included international students. Specifically, 78 of the 119 students enrolled in the particular program in issue, were international students who came from 11 different countries with the largest numbers coming from India (22) and China (11).

[132] The defendants in *Ramdath* objected to the inclusion of the international students in the proposed class because there was evidence that the international students would not be foreclosed from proceeding with an identical cause of action in their own countries. They presented evidence from a lawyer practising in India who opined on the effect of an Ontario judgment in that country.

[133] The Plaintiffs argued that the Defendants' proposed framework, under which judgment enforcement/recognition drives the question of jurisdiction, has no support in the jurisprudence. Indeed, their position is that the notion that "jurisdiction follows recognition" was specifically rejected by Justice Strathy in *Ramdath*at para. 65 as follows:

> 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 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.

[134] Strathy J. concluded that the court should take jurisdiction over the non-resident class members. However, it is important to bear in mind the particular circumstances before the court in *Ramdath* that were succinctly described at para. 71 as follows:

> In this case, looked at from the perspective of both the international students and George Brown, there would be every reason for both to expect that claims arising from their relationship would be litigated in Ontario. Given that George Brown is based in Ontario, the students came to college in Ontario and lived in Ontario, and the contract was performed in Ontario, it is hard to imagine that either party would have contemplated that George Brown would be sued in China, India or any one of the other foreign jurisdictions if the relationship broke down. There is, in any event, a real and substantial connection with Ontario and there is no such connection with any other single jurisdiction. The second factor, respect for procedural rights, including adequate representation of non-resident Class Members, is an issue that must be addressed and I will deal with it under the question of the representative Plaintiffs and the litigation plan. The notice aspect of procedural fairness can also be addressed in dealing with the litigation plan.

[135] Strathy J. addressed the evidence from the foreign expert in para. 72 by observing:

> …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: see the observations of Cumming J. in *Wilson v. Servier Canada Inc.* (2000), 2000 CanLII 22407 (ON SC), 50 O.R. (3d) 219, [2000] O.J. No. 3392 at para. 28, leave to appeal refused (2000), 2000 CanLII 29052 (ON SC), 52 O.R. (3d) 20 (Div. Ct.), app. For leave to appeal dismissed, [2001] S.C.C.A. No. 88; see also *Wilson v. Servier Canada Inc.* (2003), 119 A.C.W.S. (3d) 915, [2003] O.J. No. 157 (S.C.J.) at para. 22. Nor should another state's views of the requirements of natural justice (particularly in the context of what appears to be a "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.

[136] He also noted at para. 73 that in the circumstances of that case it was highly unlikely that a "disgruntled class member" would take action in India and there was a further "unanswered question" as to "whether an Indian (or Chinese) court would even take

jurisdiction over the plaintiff's claim given the factual nexus between that claim and Ontario."

[137] Specifically, with respect to the defendants' argument that courts in India and China would be unlikely to recognize an Ontario judgment, he commented at para. 84 as follows:

> …To echo the observations of Cumming J. in *Wilson v. Servier Canada Inc.* (2000), 2000 CanLII 22407 (ON SC), 50 O.R. (3d) 219, [2000] O.J. No. 3392, referred to above, at para. 28, if this court properly has jurisdiction over absent Plaintiffs and the Defendants, why should it decline to hear the case because another jurisdiction refuses to accede to the accepted norms of international law and, in particular, the principle of comity?

[138] The Plaintiffs asserted that the Defendants' arguments on this motion were considered by Strathy J. in *Ramdath* and "roundly rejected". However, I cannot accept that submission.

[139] In the particular facts in *Ramdath*, as Strathy J. noted and as earlier referred to, "there would be every reason" for both the international students and the defendant to expect that claims arising from their relationship would be litigated in Ontario. Consequently, there was a real and substantial connection with Ontario and it was hard to imagine that either party would have contemplated that the defendant would be sued in one of the jurisdictions in which the international students lived. Indeed I note that it had been conceded by the defendants in *Ramdath* that there was a real and substantial connection between Ontario and the claims of the international students.

[140] To my mind the decision in *Ramdath* is not surprising. I agree with the Defendants that the order and fairness problem they advance on this motion did not exist in *Ramdath.*

[141] I note also that there was a finite group of international students (78 of the 119 students) from specifically identified countries, which makes the circumstances in *Ramdath* far different from the facts here. There are countless numbers of absent foreign claimants from all the countries in the world.

[142] Further, there was limited evidence from foreign law experts presented to Strathy J. He found that the "hypothetical failure" of another state to recognize an Ontario judgment 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.

[143] I disagree with the Plaintiffs' contention that the foreign law evidence on this motion is just as speculative as the evidence presented in *Ramdath*. I think it is fair to say, as the Defendants assert, that no court has had the benefit of the foreign law evidence that is before me on this motion.

[144] I note parenthetically that the Plaintiffs did not challenge the assertion of the Defendants in para. 160 of their factum and reiterated during the argument that"in virtually all of the cases where global class actions were certified, there was no

evidence before the court as to the non-enforceability of the judgment in the absent foreign claimants countries of residence".

[145] Further it is correct to note, as the Defendants do, that while Strathy J. considered the real and substantial connection test met generally accepted principles of private international law and concluded that an Ontario court could reasonably expect other courts to give effect to its judgment such a conclusion might not have been stated had the evidence on this motion been presented and there had been decisions of foreign courts such as the Irish, U.K. and Hong Kong courts that concluded to the contrary.

[146] Also, the order and fairness problem which exists on the facts of this action where the only link that the absent foreign claimants have to Canada is that they purchased Airfreight Shipping Services from somewhere out of Canada into Canada did not exist in *Ramdath*.

[147] I note also that after *Ramdath,* Strathy J. came to a different conclusion in *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591 (CanLII), var'd on other grounds, 2011 ONSC 3782 (Div. Ct.). He applied the principles in *Currie*in considering whether the assumption of jurisdiction would satisfy the real and substantial connection test and the principles of order and fairness. His statements at paras., 108 and 109 are significant:

> 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 *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.

[148] In*McKenna*, Strathy J. ultimately found that a cause of action for prospectus misrepresentation in a public offering in Ontario had a real and substantial connection to Ontario and the principles of order and fairness supported the extension of the court's jurisdiction to non-residents who made purchases from the underwriters in Canada and under the prospectus. However, he did not include within the class definition, persons who acquired securities outside Canada as they would not have a reasonable expectation that their rights would be determined by a Canadian court (see paras. 114, 115 and 116).

[149] Therefore it seems to me that *Ramdath* should be considered a product of its facts because Strathy J. reached a different conclusion on different facts in *McKenna* and those facts are more similar to the facts here.

[150] The reasoning of Strathy J. in *Ramdath* was applied recently by Perell J. in *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2014 ONSC 4118 (CanLII). At para. 107, Perell J. states, as the Defendants on this motion readily acknowledge:

> There is jurisdiction under the *Class Proceedings Act, 1992* to certify in Ontario national and global class actions where the Class Members will include persons and corporations from across Canada or from across the world.

[151] Perell J. summarized, at para. 111, the factors relevant to whether or not a national or global class should be certified consistent with the principles in *Currie*as follows:

> A review of the case law reveals that the factors relevant to whether or not to certify a national or global class include: (a) whether the Ontario court has jurisdiction *simpliciter*over the defendant; (b) whether the Ontario court can assume jurisdiction over a non-resident Class Member, which assumption of jurisdiction largely depends upon whether Ontario has a real and substantial connection with the subject matter of the jurisdiction and on principles of order and fairness and comity between courts; (c) whether it would be reasonable for the non-resident Class Member to expect that his or her rights would be determined by what to him or her would be a foreign court; and (d) whether the non-resident plaintiff can be accorded procedural fairness including adequate notice and a meaningful opportunity to opt-out.

[152] Perell J. considered the significance to be given to the likelihood that a foreign court would recognize an Ontario judgment and expressed his view at paras. 117-120 that:

> …this discussion misses the point because the issue about whether there should be a global class is not so much whether a class proceeding procedure would be unfair to the defendant but more about whether including the foreigners in the Ontario proceeding would be fair to the foreigners. In that regard, the question of whether a foreign court would enforce the unfavourable foreign judgment begs the question because as noted by Justice Strathy in *Ramdath v. George Brown College of Applied Arts and Technology, supra,* it generally can be assumed that the foreign court will enforce the Ontario judgment if it was fair for the Ontario court to extend its jurisdiction to the foreign Class Members.
>
> Thus, determining the likelihood of the enforceability of the Ontario judgment in a foreign court begs the question of whether the Ontario court should extend its jurisdiction to a foreigner represented by the Representative Plaintiff. I think, however, the discussion of the likely enforceability of the Ontario judgment is useful because it focuses attention on the issue of when would it be fair for an Ontario court to assume jurisdiction and bind a foreigner to its judgment.

> The case law identifies one such circumstance when it would be fair to join foreign Plaintiffs to an Ontario action; namely, when the foreigner would expect that his or her rights would be determined by what to him or her would be a foreign court.
>
> This fairness factor in assuming jurisdiction was discussed by Justice Sharpe in *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 2005 CanLII 3360 (ON CA), 74 O.R. (3d) 321 (C.A.)…

[153] However, it is important to note that in *Excalibur* (as in *Ramdath)* the evidence of foreign law and the issues put forward on this motion were not before the court and in my view *Excalibur* can be similarly distinguished. In any event, Perell J. ultimately concluded that Ontario did not have a real and substantial connection to the matter in issue where 98% of the class (who were investors) were non-residents, the proposed defendant was a resident of Ontario but the investment transactions were governed by American corporate and securities law.

[154] I agree with the Defendants that it is significant that Perell J. did take into account the principles from *Currie* that if absent foreign claimants are going to be included, there has to be fairness towards them, which was similarly considered in *Ramdath*.

[155] It is of course obvious to point out as well that *Ramdath* was decided by Strathy J. prior to the Supreme Court of Canada's judgment in *Van Breda* (and there was no reference to *Van Breda* in *Excalibur)*. It is fair to say, as the Defendants do here, that there was no constitutional challenge to the real and substantial connection test in *Ramdath, McKenna* and*Excalibur*. That argument was also not made in *Van Breda* as the court expressly noted.

[156] I note that the Plaintiffs take the position that *Van Breda* merely affirmed the real and substantial connection test and provided greater direction respecting its application by establishing presumptive connecting factors.

[157] The Plaintiffs emphasize that *Van Breda* did not consider a class action. They say *Van Breda* does not represent a sea change in the law and was simply a reorientation. The real and substantial test continues to be the law applicable in Canada.

[158] According to the Plaintiffs, the main plank in the "reorientation" in *Van Breda*was the identification of the presumptive connecting factors. In other words, the Plaintiffs position is that the *Currie* framework was tweaked by *Van Breda* and *Meeking v. Cash Store Inc.*, 2013 MBCA 81 (CanLII), 299 Man. R. (2d) 109 leave to appeal granted, 2013 SCCA 443, discussed below.

[159] In any event, to determine the appropriate jurisdictional test to apply in addressing the first issue on this motion, the court must turn to the principles in *Van Breda*, which I will next outline.

(iii) The Van Breda principles

[160] In*Van Breda*, the Supreme Court of Canada considered the question of whether the Ontario court was right to assume jurisdiction of an action by Plaintiffs injured at the

defendant's resort in Cuba, and whether the Ontario court was right to exercise that jurisdiction and dismiss an application for a stay based on *forum non conveniens*.

[161] The court noted at paras. 21 and 31 that the application of private international law raises constitutional issues; that the powers assigned to provincial courts must be exercised in a manner consistent with territorial limits, the purpose of which is to ensure a relationship or connection exists to confer legitimacy.

[162] In addition, the Supreme Court of Canada held that the appropriate test to determine if a court has jurisdiction is the real and substantial connection test. However, the court noted in para. 79 that jurisdiction may also be based on traditional grounds and the real and substantial connection test does not oust the traditional private international law basis for court jurisdiction. The court went on to indicate that if the plaintiff demonstrates that one or more presumptive connecting factors exist, they succeed in demonstrating jurisdiction. The defendant can rebut the presumption by demonstrating that the given connection is inappropriate in the circumstances. In those circumstances, the defendant carries the burden of negating the presumptive effect.

[163] In relation to a tort, the court established the following presumptive connecting factors at para. 90 as follows:

> To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute;
>
> (a) the defendant is domiciled or resident in the province'
>
> (b) the defendant carries on business in the province;
>
> (c) the tort was committed in the province; and
>
> (d) a contract connected with the dispute was made in the province.

[164] The Supreme Court of Canada was clear that the list of presumptive factors is not exhaustive. If a new factor is to be identified, the relevant considerations should be the following as described at para. 91:

> Over time, courts may identify new factors that also presumptively entitle a court to assume jurisdiction. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones that result from the listed factors. Relevant considerations include:
>
> (a) Similarity of the connecting factor with the recognized presumptive connecting factors;
>
> (b) Treatment of the connecting factor in the case law;
>
> (c) Treatment of the connecting factor in statute law; and

> (d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

[165] The court observed at para. 99 that the purpose of the conflicts rules is to "establish whatever a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant…"

[166] The court summarized its guidance with respect to the jurisdiction issue at para. 100 as follows:

> To recap, to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. In these reasons, I have listed some presumptive connecting factors for tort claims. This list is not exhaustive, however, and courts may, over time, identify additional presumptive factors. The presumption of jurisdiction that arises where a recognized presumptive connecting factor – whether listed or new– exists is not irrebuttable. The burden of rebutting it rests on the party challenging the assumption of jurisdiction. If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, subject to the possible application of the forum of necessity doctrine, which I need not address in these reasons. If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*.

(iv) The application of the real and substantial connection test

[167] In*Meeking*, as set out in para. 1, the appeal concerned: "whether a court in Ontario had jurisdiction to certify a class action and approve a corresponding settlement that purported to be binding on Manitoba residents where the transactions giving rise to the claims occurred wholly within Manitoba and if so the conditions which must be met before the settlement is recognized and enforced in Manitoba".

[168] After reviewing the jurisprudence, including *Van Breda* and *Currie*, Cameron J.A. concluded at para. 97 that "in circumstances where the court has territorial jurisdiction over both the defendant and the representative plaintiff in the class action proceeding, common issues between the claim of the representative plaintiff and that of non-resident plaintiffs is a presumptive connecting factor, sufficient to give the court jurisdiction over non-resident plaintiffs."

[169] She went on to note at para. 98 that "when a court has properly assumed jurisdiction over a class action involving non-residents, jurisprudence has confirmed that recognition and enforcement of the resulting judgment in another province or country involves a consideration of the procedures leading up to and giving effect to that judgment".

[170] Further at para. 106 she stated:

> In *Currie*, the court noted that, when determining whether a real and substantial connection exists for the purpose of jurisdiction, a court should consider the perspective of the non-resident plaintiff who has done nothing to invoke or submit to the jurisdiction of the foreign court. In this case, I have determined, consistent with the principles set out in *Van Breda*, that in circumstances where there is jurisdiction in a traditional sense over the defendant and the resident representative plaintiff in the class action proceeding, the factor of common issues between the claim of the resident representative plaintiff and the non-resident plaintiff is a presumptive connecting factor in the application of the real and substantial connection test regarding the court's jurisdiction over the non-resident plaintiffs. Having found that the defendants have established that there are sufficient common issues between the claims of the representative plaintiff and those of the non-resident plaintiffs in Manitoba, I would conclude that the Ontario court properly assumed jurisdiction over the Manitoba plaintiff, despite the fact that he did not attorn to the jurisdiction of the Ontario court.

[171] She ultimately concluded at para. 107 that recognition of common issues as a presumptive connecter in these circumstances does not constitute an unconstitutional expansion of the real and substantial connection test.

[172] She noted further at para. 108 that the connecting factor is a presumption, which like other presumptions created in *Van Breda,* is not absolute and can be rebutted in appropriate circumstances.

[173] In considering the persuasiveness and significance of *Meeking,* it is important to bear in mind that it related to a national class action. Thus, there was no issue that the reasonable and substantial connection test was to be applied and a Canadian court can expect other Canadian courts will enforce judgments based on that test. In other words, the real and substantial connection test was consistent with the principles of order and fairness. For that reason, *Meeking* has limited significance on this motion. I do not find it necessary to determine if *Meeking* was wrongly decided and contrary to *Van Breda*, as the Defendants suggest, because the assertion of jurisdiction based on the sharing of a common issue is equivalent to asserting jurisdiction based on a party being a necessary or proper party, a notion rejected in *Van Breda.*

(v) What is the appropriate jurisdictional test to apply in addressing whether the court has jurisdiction *simpliciter*over absent foreign claimants?

[174] The Plaintiffs emphasize that the court in *Currie* applied the real and substantial connection test and considered the rights of, and procedural fairness to, non-resident class members, including notice. The Plaintiffs'claim that the facts on this motion satisfy the real and substantial connection test. This will be discussed further in these reasons.

[175] I agree with the proposition advanced by the Defendants that *Currie* is relevant as it establishes that the question of jurisdiction over absent foreign claimants must be answered separately from the question of jurisdiction over the Defendants themselves, noting that the Defendants take no issue that this court has jurisdiction over them.

[176] I also agree with the assertion of the Defendants that the circumstances in *Currie*are quite different from the circumstances before the court on this motion. In*Currie*, it was entirely appropriate for the court to apply Ontario's conflict of laws rule in determining whether or not to enforce a foreign judgment. As the Defendants assert, the circumstances here raise a question of whether the court should assume jurisdiction where foreign conflict of law principles preclude other countries from recognizing an Ontario judgment. This raises a different set of issues with respect to order and fairness than were before the court in *Currie*.

[177] The Defendants submit as set out at paras. 108 and 109 of their factum that the issue for this court is:

> Whether the common law real and substantial connection test is an appropriate solution to meet the constitutional requirements and the objectives of efficiency and fairness in the proposed global class action involving absent foreign claimants. In other words, the court must ask itself if applying the two part test from *Van Breda* in these circumstances would represent a legitimate exercise of the state's power of adjudication. If it does not, then the two part test must be rejected, since it will contravene the territorial limits on adjudicative power in s. 92 of the *Constitution Act*, 1867.
>
> To determine if the two part real and substantial connection test satisfies the constitutional requirement, the court must consider whether its application here is consistent with the principles of order and fairness. (Which the Supreme Court of Canada has held underlie the territorial limits in s. 92 of the *Constitution Act*, 1867. (See *British Columbia v. Imperial Tobacco Canada Ltd.* 2005 SCC 49 (CanLII), 2005 2 SCR 473 ("*Imperial Tobacco")* at para. 27.)

[178] The Defendants note that the Supreme Court of Canada made similar comments in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 (CanLII) [2003] 2 S.C.R. 63 ("*Unifund*") and that while both *Unifund* and *Imperial Tobacco* dealt with territorial limits on the legislative jurisdiction of provinces the commentary applies equally to territorial limits on adjudicative jurisdiction as the court made clear in *Van Breda* at para. 31.

[179] It is important to note that in *Van Breda* at paras. 31,32 and 33, the court made clear that there is a distinction between the 'real and substantial connection test' applied as a conflict of laws rule and such test applied as a constitutional principle:

> [31] Thus, in the course of this review, we should remain mindful of the distinction between the real and substantial connection test as a constitutional principle and the same test as the organizing principle of the law of conflicts. With respect to the constitutional principle, the territorial limits on provincial legislative competence and on the authority of the courts of the provinces derive from the text of s. 92 of the *Constitution Act, 1867*. These limits are, in essence, concerned with the legitimate exercise of state power, be it legislative or adjudicative. The legitimate exercise of power rests, *inter alia*, upon the existence of an appropriate relationship or connection between the state and the persons who are brought under its authority. The purpose of

> constitutionally imposed territorial limits is to ensure the existence of the relationship or connection needed to confer legitimacy.
>
> [32] As can be observed from the jurisprudence, in Canadian constitutional law, the real and substantial connection test has given expression to the constitutionally imposed territorial limits that underlie the requirement of legitimacy in the exercise of the state's power of adjudication. This test suggests that the connection between a state and a dispute cannot be weak or hypothetical. A weak or hypothetical connection would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute.
>
> [33] The constitutionally imposed territorial limits on adjudicative jurisdiction are related to, but distinct from, the real and substantial connection test as expressed in conflicts rules. Conflicts rules include the rules that have been chosen for deciding when jurisdiction can be assumed over a given dispute, what law will govern a dispute or how an adjudicative decision from another jurisdiction will be recognized and enforced. The constitutional territorial limits, on the other hand, are concerned with setting the outer boundaries within which a variety of appropriate conflicts rules can be elaborated and applied. The purpose of the constitutional principle is to ensure that specific conflicts rules remain within these boundaries and, as a result, that they authorize the assumption of jurisdiction only in circumstances representing a legitimate exercise of the state's power of adjudication.

[180] Put simply, it is clear from *Van* Breda that a distinction must be drawn between private international law and constitutional principles. The court specifically stated at para. 34 that the case concerned "the elaboration of the'real and substantial connection test' as an appropriate common law conflicts rule for the assumption of jurisdiction".

[181] The further statement in *Van Breda* at para. 34 that it was leaving "further elaboration of the content of the constitutional test for adjudicative jurisdiction for a case in which a conflicts rule is challenged on the basis of inconsistency with constitutionally imposed territorial limits" is significant. Equally significant is the further statement at para. 34 that courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system.

[182] As the Defendants point out, the court in *Van Breda*, at para. 92 instructed that the assumption of jurisdiction by virtue of a new connecting factor must be consistent with the principles of order, fairness and comity:

> When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. 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.

[183] Therefore the Supreme Court of Canada in *Van Breda* invited and directed courts to develop an appropriate approach to jurisdiction that recognizes order and fairness. I agree with the Defendant's position that the jurisdictional analysis on this motion should be guided by principles of order and fairness and the related concept of comity.

[184] The Supreme Court of Canada in *Unifund* reiterated at para. 28:

> 28. The general policy objectives of order and fairness that underlie territorial limits were discussed by La Forest J. in *Tolofson* as follows:
>
> > ….If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected.

[185] Further, as the Defendants also noted, in *Unifund* at paras 70 and 71, the court held that it was not necessary that there be an existing action elsewhere for the court to take cognizance of the potential for re-litigation and conflicting judgments, rather courts may consider potential scenarios when determining whether the application of provincial legislation to a given extraterritorial fact pattern would violate the constitutional principles of order and fairness.

[186] The Defendants draw an analogy between these circumstances and those before the court in *Unifund* asserting that order would be undermined if this court assumed jurisdiction and ultimately issued a judgment that could be relitigated in every absent foreign claimants' home country. While the Plaintiff contended that such relitigation is not a reality, the Defendants emphasized that litigation is ongoing in the United Kingdom, Netherlands and Australia and it has been necessary to state that residents of those countries (and any other person who commenced litigation) would not form part of the global class.

[187] Fairness to all parties, the Defendants say, requires that there not be re-litigation.

[188] As the Defendants reference in paragraph 146 of their factum, the unfairness involved in relitigation by absent foreign claimants has been emphasized by class action commentators who suggest that to permit plaintiffs to "wait and see" whether to raise a jurisdictional challenge after a judgment has been obtained is "antithetical to the basic structures of the *Class Proceedings Act"*.

[189] I agree with the position of the Defendants that the potential for the multiplicity of further actions by absent foreign claimants is inconsistent with the objectives of class

proceedings and contrary to the principles of order and fairness which the Supreme Court of Canada in *Van Breda* has directed should be respected.

[190] I also find that asserting jurisdiction over absent foreign claimants in these circumstances where I have concluded that the court cannot reasonably expect that its judgment will be recognized in foreign countries would offend comity.

[191] It is appropriate to note here again, the Plaintiffs' assertion that the absent class members have been afforded procedural fairness by the receipt of notice and the right to opt out and as a consequence the reasonable expectations of these putative class members that their claims will be resolved by this court must be considered. Indeed, the Plaintiffs submit that excluding them from the class at this stage of the proceeding would be contrary to their expectations.

[192] The Plaintiffs assert that the wording of *Lufthansa* orders was "relatively standard fare". They do not contest that the Defendants can argue the court's jurisdiction, as they have on this motion, and the order relating to the *Lufthansa*settlement is not binding on the court or the Defendants. Nevertheless, the Plaintiffs take the position that the notice program cannot be ignored and it impacts on the fairness and the expectations of the absent foreign claimants.

[193] Whether or not the Plaintiffs can reference the notice program following the Lufthansa settlement on this motion given the language in the related orders, I agree with the Defendants that the consent certification for *Lufthansa*settlement purposes cannot have an effect on the determination of the issues raised on this jurisdiction motion. I further agree with the Defendants that the approval of the *Lufthansa* settlement and its notice program is irrelevant to the reasonable expectations of the absent foreign claimants, *vis -à-vi*s the Defendants and cannot prejudice the Defendants.

[194] I note, as the Defendants observed, that there is no evidence of any such expectation in the mind of any absent foreign claimant on the record before me notwithstanding the completion of the notice program following the *Lufthansa*settlement.

[195] The expectations of absent foreign claimants, in my view, are more likely in accordance with the laws of their own countries and they would not expect that their rights would be determined in this proceeding.

[196] In any event, I agree with the Defendants that the fact of adequate representation of rights and procedural fairness become relevant only after a court concludes that it has jurisdiction.

[197] The Plaintiffs emphasize that a number of years have passed since this action was commenced and there have been related proceedings in Europe, Korea and the United States, but no actions have commenced except in Holland, England, United States and Australia. Therefore, the Plaintiffs say that parties cannot or will not bring claims in other jurisdictions. In addition, the Plaintiffs note that given the expiry of limitation periods as pleaded by Cathay Pacific, the absent foreign claimants could be precluded from obtaining recovery elsewhere.

[198] While the Plaintiffs have argued that the existence of limitation periods is a factor that I should consider as supporting the inclusion of the absent foreign claimants in the class, the foreign limitation periods will apply to the common issues trial in Ontario according to the Statement of Defence filed by *Pacific Airways Ltd.*. In other words, including the absent foreign claimants within the definition of this class will not allow them to access justice in Ontario more than they could access justice in their own home countries.

[199] Whether or not foreign litigation can, or will, take place cannot be a consideration for this court in determining whether or not it has a jurisdiction over the absent foreign claimants. I agree with the Defendants that this court is bound by the constitutional limits on its jurisdiction articulated in *Van Breda*.

[200] I agree with the conclusion expressed by the Defendants in paragraph 136 of their factum that "in these circumstances, the territorial limits in s. 92 of the *Constitution Act, 1867*, prohibit the court from assuming jurisdiction over any class members who do not meet the traditional test of presence or consent recognized abroad, i.e. absent foreign claimants".

[201] The constitutional limits on the court's jurisdiction lead me to the conclusion that the real and substantial connection test ought not to be applied to establish jurisdiction over absent foreign claimants.

[202] Rather, I am satisfied that jurisdiction over class members can only be established if they are present in Ontario or have consented in some way to the jurisdiction of this court.

[203] I therefore, find that this court does not have jurisdiction *simpliciter*over absent foreign claimants.

[204] Having reached this conclusion, I need not address the alternative argument of the Defendants that ss. 27(3), 28(1) and 29(3) of the *Class Proceedings Act*are constitutionally inapplicable to absent foreign claimants.

[205] I find that this action should be stayed in relation to absent foreign claimants. I will therefore only briefly address the alternative positions advanced on this motion. That is, (i) that if the real and substantial test is applicable it is not met and (ii) that if the court has jurisdiction *simpliciter*over absent foreign claimants, the court should decline jurisdiction based on *forum non conveniens.*

The alternative positions argued by the Defendants

(i) If the real and substantial test applies is it satisfied in these circumstances?

[206] The Plaintiffs submit that the real and substantial test is easily met. They say that the presumptive connective factors are that the Defendants do business in Ontario and the fact that their business is connected to Ontario is at the heart of this litigation. There are common issues shared with the absent foreign claimants and some of the alleged wrongful conduct occurred in Ontario. The Plaintiffs note that they have pled that at least one meeting occurred in Ontario in furtherance of the alleged conspiracy.

[207] It is the Plaintiffs' position that there are presumptive connecting factors here, which have not been rebutted by the Defendants. Further, they submit that assumption of jurisdiction is consistent with order and fairness. The rights of the absent foreign claimants are adequately represented and they have been given adequate notice program and the right to opt out.

[208] The Defendants take a contrary position and submit that there are no presumptive connecting factors as described in *Van Breda* which are applicable here –the alleged tortious activity would have been committed against the absent foreign claimants outside Canada; the absent foreign claimants and Defendants were carrying on business outside Canada when the contracts in issue were entered into; the absent foreign claimants have not brought claims in Canada; and the absent foreign claimants all reside outside Canada, as do all but one of the Defendants.

[209] The Defendants emphasize that the new presumptive connecting factor described in *Meeking*was in the context of a national class action where there was no contentious issue of the enforceability of the judgment of the court after assuming jurisdiction over the absent foreign claimants in that case.

[210] I agree that the new presumptive connective factor described in *Meeking*cannot be recognized as an appropriate factor in relation to a global class action because this would be inconsistent with the guidance in *Van Breda*as earlier set out that in identifying new presumptive factors courts should consider, amongst other things, the treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

[211] The Defendants go further and submit that even if a presumptive connecting factor was applicable it would be rebutted by the extensive connections between the absent foreign claimants and the foreign countries. They reference *Van Breda*where the court observed that the party challenging the assumption of jurisdiction must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them; and, if such a weak relationship exists, it would not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction.

[212] The Defendants emphasize the fact that all of the absent foreign claimants reside outside Canada, purchased airfreight services outside Canada, suffered losses outside Canada and thus would have no reasonable expectation that their claims would be adjudicated in Ontario.

[213] It cannot be said here as it was in *Currie*, *Ramdath*, *McKenna*and *Excalibur* for example, that it would come as no surprise to, or it would not be unreasonable from the perspective of, the absent foreign claimants that legal claims arising from their purchase of Airfreight Shipping Services outside Canada would be litigated in an Ontario court.

[214] I am not satisfied that in these circumstances the real and substantial connection test is met.

(ii) If the court does have jurisdiction *simpliciter* over absent foreign claimants should such jurisdiction be declined based on *forum non conveniens*?

[215] In*Van Breda*, the Supreme Court of Canada also provided guidance on the issue of *forum non conveniens*. The principles of *forums non conveniens* were summarized in *Van Breda* at paras. 102 and 103 as follows:

> Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens.* The decision to raise this doctrine rests with the parties...
>
> If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

[216] *Forum non conveniens* was also discussed in *Kaynes v. BP*, 2014 ONCA 580 (CanLII),122 O.R. (3d)162 ("*Kaynes*"). In that case, the proposed class definition included all residents of Canada who purchased securities in Canada and abroad. The issue on appeal was the defendants'contention as set out by Sharpe J.A. in para. 3:

> …that there is no real and substantial connection between Ontario and the claims of Canadian residents who, like the plaintiff, purchased their shares on foreign exchanges. Alternatively, BP argues that even if there is jurisdiction *simpliciter,*Ontario should decline to exercise that jurisdiction on grounds of *forum non conveniens.*

[217] The reasoning in *Kaynes* in relation to whether the court should decline to exercise jurisdiction under the *forum non conveniens* doctrine is relied upon by the Defendants on this motion. At para. 45, Sharpe J.A. concluded the motions judge had erred in law and in principle in failing to take into account the principle of comity in assessing the effect of exercising Ontario jurisdiction over claims arising from foreign traded securities and erred in law with respect to the related issue of avoiding a multiplicity of proceedings.

[218] Sharpe J.A. emphasized at para. 46 that the plaintiff's claim must be considered in the full international context of the securities law regimes of Ontario and the foreign jurisdictions.

[219] He noted that asserting jurisdiction in Ontario over the plaintiff would be inconsistent with the approach taken under both U.S. and U.K. law. He stated at para. 48 that:

> …the principle of comity requires the court to consider the implications of departing from the prevailing international norm or practice, particularly in an area such as the securities market where cross-border transactions are routine and the maintenance of an orderly and predictable regime for the resolution of claims is imperative. Moreover, where, as here, the plaintiff's claim rests to a significant degree on foreign law, the case for assuming jurisdiction is considerably weakened.

[220] He commented further that fairness to the parties must be considered in relation to a decision on *forum non conveniens* where at para. 50 he stated:

> It would surely come as no surprise to purchasers who used foreign exchanges that they should look to the foreign court to litigate their claims. *Van Breda* recognizes fairness to the parties as a relevant factor bearing upon the *forum non conveniens* analysis.

[221] The Plaintiffs are critical of the Defendants for not providing evidence as to where the documentation is, where the conspiracy took place and where key witnesses are and they say it was open to the Defendants to establish a proper forum and they have not done so. They submit that the court lacks the necessary factors to consider the issue of *forum non-conveniens*.

[222] However, as the Defendants point out, there was also no evidence in *Kaynes* with respect to the location of witnesses and documentation. In *Kaynes*, the Court of Appeal indicated that the burden on the Defendants is met if there is evidence of the laws of the foreign jurisdiction and the impact on comity. I agree with the Defendants that the evidence here is to the same effect as *Kaynes.*

[223] I agree with the Defendants submission that the reasoning of Sharpe J. A. in *Kaynes*indicates, as is set out in para. 195 of their factum, that "in a multi-jurisdictional class action the court should pay particular attention to whether its assumption of jurisdiction would be consistent with comity, prevailing international legal norms and the reasonable expectations of the parties".

[224] The Defendants submit that the observations of Sharpe J.A. in *Kaynes* that the claims of purchasers on foreign exchanges should be stayed because they had no reasonable expectation their rights would be adjudicated in Ontario are applicable here. This position is succinctly summarized at para. 201 of their factum, :

> These observations apply with even greater force here. Not only did the absent foreign claimants purchase Airfreight Shipping Services through transactions abroad, they purchased them almost exclusively from foreign resident companies carrying on business abroad, while the absent foreign claimants themselves were resident abroad. The most reasonable expectation they could have is that their claims would be adjudicated in these foreign countries.

[225] I agree with the Defendants' submission that the circumstances of this action are even stronger than those before the court in *Kaynes*. To include absent foreign claimants within the class would require this court to apply the laws of at least 30 different

countries in relation to matters that involve non-Canadians who have entered into transactions outside of Canada. In addition, as I have found, the overwhelming evidence is that a judgment of this court will not be recognized in other jurisdictions and this court cannot resolve the potential for double recovery if the absent foreign claimants pursue an action in their own jurisdictions.

[226] While the Plaintiffs have urged me to accept the proposition that if the absent foreign claimants are not included in this class action, their claims will not be advanced anywhere at any time, there is no basis on which I can reach such a conclusion. In any event, in the circumstances of this case, such a conclusion would not justify including the claims of absent foreign claimants in this action based on the record before me.

[227] As a result, I would stay the proposed class action as it relates to absent foreign claimants on the basis that Ontario is *forum non-conveniens*.

"Justice L. C. Leitch"
Justice L. C. Leitch

Released: August 26, 2015.

CITATION: Airia Brands v. Air Canada, 2015 ONSC 5332
COURT FILE NO.: 50389CP
DATE: 20150826

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Airia Brands Inc., Startech.Com Ltd. and QCS-Quick Cargo Service GMBH
Plaintiffs

- and -

Air Canada, AC Cargo Limited Partnership, Societe Air France, Koninklijke Luchtvaart Maatschappij N.V. dba KLM, Royal Dutch Airlines, Asiana Airlines Inc., British Airways PLC, Cathay Pacific Airways Ltd., Deutsche Lufthansa AG, Lufthansa Cargo AG, Japan Airlines International Co., Ltd., Scandinavian Airlines System, Korean Air Lines Co., Ltd., Cargolux Airline International, Lan

Airlines S.A., Lan Cargo S.A., Atlas Air Worldwide Holdings Inc., Polar Air Cargo Inc., Singapore Airlines Ltd., Singapore Airlines Cargo PTE Ltd., Swiss International Air Lines Ltd., Quantas Airways Limited, and Martinair Holland N.V.

Defendants

REASONS FOR JUDGMENT

LEITCH J.

Released: August 26, 2015