

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-06-000152-021

DATE: July 20, 2005

By: **THE HONOURABLE ROGER E. BAKER, J.S.C.**

MICHEL LÉPINE
Plaintiff

v.

SOCIÉTÉ CANADIENNE DES POSTES
and
CYBERSURF CORP.
Defendants

CORRECTED JUDGMENT
as of August 5, 2005

[1] The Court has heard a *Motion to Recognize and Declare Enforceable an Ontario Decision and to Dismiss or Amend the Present Proceedings on the Basis of Res Judicata*.

[2] This case deals essentially with the law of class actions in the Provinces of Quebec and Ontario, as well as with the notion, recognition and or enforcement of national classes in provinces other than the province certifying the class.

[3] A national class was certified in Ontario on December 22, 2003, by Mr. Justice David Crane of the Ontario Superior Court of Justice against the present Defendants who rendered, inter alia, the following judgment (hereinafter referred to as the Ontario Judgment)

exclusive of applicable taxes, the packaging of which displayed the words "free internet for life", on or after September 27, 2000." (hereinafter the "Ontario Class").¹

[4] It is clear from this certification that by excluding only residents of the Province of British Columbia, having begun the paragraph of certification with "Any person in Canada," necessarily residents of the Province of Quebec who had made the described purchases were included as part of the Ontario Class.

[5] The motion for authorization to institute class proceedings filed by Plaintiff Lépine (the Respondent herein) was argued before Justice Jacques R. Fournier, J.S.C., on November 5, 6 and 7, 2003. On December 23, 2003, Fournier j. rendered a judgment authorizing the bringing of class proceedings in the present case (hereinafter the "Quebec Judgment").

[6] On or about March 18, 2004 that Plaintiff Lépine, for and on behalf of the members of the Quebec Class, and pursuant to Justice Fournier's judgment, issued and served on each of the Defendants herein an application to commence class proceedings in connection with the CD-ROM.

[7] For the purpose of this judgment, the relevant passages of the judgment of Crane j. are the following:

"[...]

ON READING THE Motion Record of the Plaintiff including the Affidavit of Jeffrey C. Teal, sworn November 20, 2003 and Exhibits thereto, the Affidavit of Paul McArthur sworn November 20, 2003 and Exhibits thereto, the Affidavit of Lorraine Klemens, sworn November 24, 2003 and Exhibits thereto, the facts and Briefs of Authorities of the parties filed, and on hearing the submissions of counsel for the Plaintiff and counsel for the Defendants, and upon being advised of the situation in the Province of Quebec and the correspondence forwarded to this Court by Quebec counsel, Francois Lebeau;

[...]

4. **THIS COURT ORDERS AND ADJUDGES** that the claims asserted on behalf of the Class are for breach of contract and misrepresentation and the relief sought is damages, including punitive, aggravated and exemplary damages, interest and costs as set out in the Amended Statement of Claim.

[...]

7. **THIS COURT DECLARES** that the Settlement Agreement is reasonable, fair, adequate and in the best interests of the Ontario Class.

¹ *Paul McArthur v. Canada Post Corporation*, Ontario Superior Court of Justice, n° 02-6522-CP. December 22, 2003, p.2.

8. **THIS COURT ORDERS AND ADJUDGES** that the Settlement Agreement is approved, and the terms of the Settlement Agreement are incorporated into this Order.

9. **THIS COURT ORDERS AND ADJUDGES** that the opt-out period run for a period of 30 days from publication of Notice as provided for in the Settlement Agreement.

10. **THIS COURT ORDERS AND ADJUDGES** that any Class Member who does not opt-out within the time provided and in the manner described in the Settlement Agreement is bound by the Settlement Agreement and this Order and is hereby enjoined from pursuing any claims covered by the Settlement Agreement against the Defendants.”²

THE FACTS

[8] The facts underlying these class actions are the following:

1 - The Defendant Cybersurf Corp. (Cybersurf) undertook to users of its product to provide free Internet access in exchange for constant advertisements on the user's computer screen;

2 - As of September 2000, Canada Post started selling the CD-ROM produced by Cybersurf for \$9.95;

3 - Cybersurf was to provide purchasers of the CD-ROM free access to the Internet;

4 - However, on August 19, 2001 Cybersurf informed those who had purchased the CD-ROM that as of September 15, 2001 free internet access would be discontinued, and furthermore beyond that date its use would incur a monthly fee payable to Cybersurf of \$ 9.95;

5 - These facts are the basis of the damage claims in the various class actions in Quebec, Ontario, and British Columbia.

[9] In connection with the CD-ROM and the service to be furnished as above described, three proposed class actions were filed:

1-QUEBEC: In February 2002 and pursuant to sections 1002 and following of the *Code of Civil Procedure*³ (hereinafter “C.C.P.”), the Plaintiff in the present instance Michel Lépine (hereinafter “Lépine”) filed a motion for authorization to institute class proceedings against both Defendants, for and on behalf of the following group:

² *Paul McArthur v. Canada Post Corporation*, see note 1 supra, p. 1, 2, 4 (emphasis added).

³ *Code of civil procedure*, L.R.Q., c. C-25.

“Toute personne physique qui, au Québec, a acheté de POSTES CANADA un forfait donnant droit à un accès Internet à vie entièrement gratuit ainsi qu’au courrier électronique, le tout grâce au logiciel 3web.”

2-ONTARIO: On or about March 28, 2002, one Paul McArthur commenced and subsequently served on each of the Defendants (including the Cybersurf related company 3Web Corp.) a Statement of Claim before the Ontario Superior Court of Justice (file No: 02-6522-CP), for and on behalf of the following group:

“Any person in Canada, outside of the Province of Quebec, who purchased from Canada Post, the CD-ROM described above containing installation software for accessing the Service”

3-BRITISH COLUMBIA: On or about May 7, 2002, one John Chen commenced and subsequently served on each of the Defendants (including the Cybersurf related company 3Web Corp.) a Statement of Claim before the Supreme Court of British Columbia (file No. S022535), for and on behalf of the following group:

“Any person in the Province of British Columbia who purchased from Canada Post, lifetime e-mail and unlimited Internet access by means of a CD-ROM containing installation software for accessing those services”

[10] Settlement discussions commenced between the Plaintiffs in the proposed class actions and the Defendants in 2002, 2003; various offers of settlement were made but finally the present Plaintiff Lépine declined.

[11] In July 2003, the parties to the class proceedings in Ontario and British Columbia achieved a settlement (hereinafter referred to as the Settlement Agreement- R-6), and some of its terms are necessary for a complete understanding of the present litigation.

[12] Class Members:

“Any person who purchased a CD-ROM through any Canada Post outlet at a retail price of \$9,95, exclusive of applicable taxes, the packaging of which displayed the words “Free internet for life”, on or after September 27, 2000.”

The Ontario and British Columbia Classes:

“Ontario Class” as “all Class Members who are not members of the British Columbia Class”, and defines “British Columbia Class” as “all Class Members who are resident in British Columbia on the Court Approval Date.”

[13] During the certification process in Ontario, the attorneys for Plaintiff Lépine were in communication with Justice Crane of the Ontario Superior Court of Justice requesting that he decline jurisdiction over the Quebec residents, as well as with counsel to Canada Post who informed them of the date, time and place of the hearing in Ontario for approval of the settlement and the certification of a national class.

[14] The present Plaintiff and counsel were notified by letters of November 13, 24, 25 and 27 2003 of the date of hearings before Justice Crane (R-11).

[15] Counsel to Lépine declined to appear before Mr. Justice Crane in connection with the certification of the Ontario Class which included, at that point, Quebec residents, which latter group had been included in the settlement by way of amendment to its original terms.

[16] On or about April 7, 2004 and in accordance with the Settlement Agreement and the Ontario Judgment approving same, notices were published in newspapers across Canada, including Quebec, notifying Class Members of the settlement and setting out the procedure for making claims, the whole as appears from copies of the notices, communicated herewith *en liasse* as Exhibit R-17;

[17] The notices sent pursuant to the Settlement and the judgment by Crane j. confirming it are a central issue to Plaintiff's position against the granting of the present Petition.

[18] The **QUEBEC NOTICE** published pursuant to the judgment of Fournier j. in the present case on February 21, 2004 is the following (a French version was also published in various Quebec publications; as there is no controversy on this subject, the English version will suffice for the purpose of the analysis herein):

**"CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

**SUPERIOR COURT
(CLASS ACTION)**

No : 500-06-000152-021

MICHEL LÉPINE

Plaintiff

-vs-

**SOCIÉTÉ CANADIENNE DES
POSTES**, also known as CANADA
POST

-and-

CYBERSURF CORP.

Defendants

In the matter of the **Lifetime Internet access**
entirely free offered and sold by
CANADA POST

NOTICE TO MEMBERS

1. **TAKE NOTICE** that the bringing of a class action has been authorized on the 23rd day of December 2003 by judgment of the Honourable Mr. Justice Jacques R. Fournier of the Superior Court, for the benefit of the natural persons forming part of the group hereinafter described, namely :

“Any physical person who, in Quebec, bought a CD-ROM from Canada Post giving lifetime internet access as well as electronic mail, entirely free the whole thanks to the 3 Web software.”

2. The Chief Justice has ordered that the class action authorized by the said judgment shall be brought in the district of Montreal.
3. For the purposes of this class action, the Plaintiff elects domicile at his attorneys' office:

1980, Sherbrooke West Street, Suite # 700, Montreal (Quebec) H3H 1E8

The address of the Defendants is as follows :

SOCIÉTÉ CANADIENNE DES POSTES, 1000, rue De La Gauchetière Ouest
Bureau 235, Montréal (Québec) H3B 5B8

CYBERSURF CORP., 300 West Tower, 1144 – 29th Avenue Northeast
Calgary, Alberta T2E 7P1

4. For the purposes of the class action, the status of representative has been ascribed to **MICHEL LÉPINE**.
5. The principal questions of law or fact to be dealt with collectively are as follows :
 - 5.1 *By offering and selling access to “Internet for Life Entirely Free”, is defendant Canada Post obliged to furnish access to “Internet for Life Entirely Free” to each and every member of the group?*
 - 5.2 *Is co-defendant Cybersurf obliged to furnish access to “Internet for Life Entirely Free” to each and every member of the group?*
 - 5.3 *If the answer to the two preceding questions is in the affirmative is the obligation of Canada Post and Cybersurf joint and several?*
 - 5.4 *Considering the law as set out in the Quebec Civil Code, the Consumer Protection Act, the Competition Act and all other applicable legislation and regulations, are the “ General Conditions” which appear partially and for the first time only, and solely, at the moment when the 3 Web software is installed, opposable against the class members regardless of whether these conditions have or have not been accepted by the said members? In the affirmative is the effect of these conditions to allow Canada Post and/or Cybersurf to unilaterally terminate lifetime free access to Internet and electronic mail?*

- 5.5 *Does cutting off lifetime free access to Internet constitute a failure to carry out the contract? In the affirmative should Canada Post or Cybersurf, or both of them, be held to pay damages to the class members and/or be obliged to carry out the contract?*
- 5.6 *Do the class members have the right jointly and/or severally to claim from Canada Post, Cybersurf or both of them :*
- a. *the re-establishment of access to "Internet for Life Entirely Free" or, subsidiarily, the payment to each of the members of an amount equivalent to the value of a lifetime subscription to internet? In the latter case describe the method of calculation and the amount to be adjudged.*
 - b. *the reimbursement of the subscription cost(s) to Internet and to electronic mail for the period commencing September 17, 2001 and terminating on the date the service is re-established or terminating on the date at which defendants shall have paid the value of a lifetime subscription as hereinabove set out?*
 - c. *damages?*
 - d. *punitive damages? In the affirmative establish the amount of the said punitive damages?*
 - e. *interests and additional indemnity on the amount of the condemnation?*
6. *The conclusions sought with relation to such questions are as follows :*

GRANT plaintiff and Class members' class action against the defendants jointly and severally.

ORDER the defendants Canada Post and Cybersurf Corp to re-establish the service of access to "Internet for Life Entirely Free", including electronic mail, and to furnish the said unlimited access free to plaintiff and to all the members of the group, the whole within 30 days of judgment on the merits in the present case or;

SUBSIDIARILY condemn the defendants, jointly and severally to pay to plaintiff and to each of the class members an amount equal to the cost of an unlimited subscription to Internet and electronic mail, to wit an amount of approximately \$ 23.00 per month, per person, plus applicable taxes;

CONDEMN the defendants, jointly and severally, to reimburse to plaintiff and to each class member, the subscription cost(s) of unlimited Internet access and electronic mail for the period commencing September 17, 2001 and terminating on the date at which defendants shall have submitted to the Order hereinabove described or terminating on the date when defendants shall have paid the amount of the condemnation and

ORDER the collective recovery thereof insofar as the proof thereof shall permit;

CONDEMN the defendants, jointly and severally, to pay to plaintiff and to each of the class members punitive damages in the sum of \$ 250.00;

CONDEMN the defendants, jointly and severally, to pay the interest and the additional indemnity as foreseen by law on the totality of the above sums;

CONDEMN the defendants, jointly and severally, to indemnify the plaintiff and all class members for any other damage(s) which they may have suffered pursuant to and as a direct result of the interruption of access to the Internet and to electronic mail;

THE WHOLE with costs against the defendants including the costs of notice and, should there be any, the costs of experts.

7. The class action to be brought by the representative for the benefit of the group will be an action based on the defendants' failure to abide to their contractual undertakings.
8. Any member of the group who has not requested his exclusion in the manner hereinafter indicated, will be bound by any judgment to be rendered on the class action.
9. The date after which a member can no longer request his exclusion without special permission, has been set at April 21, 2004.
10. A member who has not already brought a suit in his own name, may request his exclusion from the group by advising the clerk of the Superior Court of the district of Montreal by registered or certified mail, before the expiry of the delay for exclusion.
11. Any member of the group who has brought a suit which the final judgment on the class action would decide, is deemed to have requested his exclusion from the group if he does not, before the expiry of the delay for exclusion, discontinue such suit.
12. A member of the group other than the representative or an intervenant cannot be condemned to pay the costs of the class action.
13. The Court may permit a member to intervene in the class action if it considers such intervention useful to the group. An intervening member may be bound to submit to examination on discovery or a medical examination, or both, at the request of the defendant. A member who does not intervene in the class action can only be required to submit to an examination on discovery or a medical examination if the Court considers it useful."

[19] The **ONTARIO NOTICE** published pursuant to the Ontario Judgment throughout Canada on April 7, 2004 is the following:

**NOTICE
TO ALL PURCHASERS
OF "FREE INTERNET FOR LIFE"
CD-ROMS THROUGH CANADA POST CORPORATION**

BETWEEN SEPTEMBER 2000 AND JULY 2001

A class action settlement has been reached between Canada Post Corporation and Cybersurf Corp. and the Plaintiffs in Ontario and British Columbia. If you purchased a CD-ROM containing installation software, that provided access to Internet, from any Canada Post retail outlet between September 2000 and July 2001, you may be eligible for a refund of the original purchase price, together with applicable taxes, as well as 3 months of free Internet service.

In order to obtain a refund of the original purchase price as well as the 3-month free Internet offer, you must return the CD-ROM to any Canada Post retail outlet, on or before May 24, 2004.

In order to claim a CD-ROM which will provide 3 months of free Internet service, you must fax a signed copy of the CD-ROM return form to (403) 777-2003, on or before June 8, 2004.

For inquiries, contact:

David Thompson / Jeffrey Teal
Scarfone Hawkins LLP, Hamilton, ON
Telephone: 905 523-1333 / Fax: 905 523-5878 / www.classactionlaw.ca

or

James Poyner / Kenneth Baxter
Poyner Baxter, North Vancouver, BC
Telephone: (604) 988-6321 / Fax: (604) 988-3632 / www.poynerbaxter.com

You may choose to opt out and exclude yourself from the settlement.
If you opt out, you will not be entitled to receive any settlement benefits.
You will not be able to pursue a lawsuit or make any other claim relating to the matters covered by the settlement unless you opt out. If you wish to opt out, you must deliver written notice of your intention to do so to class counsel as indicated above, on or before May 9, 2004.

Publication of this notice has been authorized by the Ontario Superior Court of Justice and the Supreme Court of British Columbia.

THE ISSUES

[20] It is useful to recall here that the present proceeding is a request to the Quebec Superior Court to enforce a foreign judgment and consequently to dismiss or amend a Quebec class action on the basis of *res judicata*.

[21] On the subject of the applicability of foreign judgments in this province, and the rules in this province in connection with jurisdiction and the exceptions to these rules, the relevant articles of the *Civil Code of Quebec*⁴ are:

CHAPTER I

GENERAL PROVISIONS

3134. In the absence of any special provision, the Québec authorities have jurisdiction when the defendant is domiciled in Québec.

3135. Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

3136. Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.

3137. On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

PERSONAL ACTIONS OF A PATRIMONIAL NATURE

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

- (1) the defendant has his domicile or his residence in Québec;
- (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
- (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
- (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
- (5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an

⁴ *Civil Code of Quebec*, L.Q. 1991, c. 64.

arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

CHAPTER I

RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS

3155. A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:

(1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;

(2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;

(3) the decision was rendered in contravention of the fundamental principles of procedure;

(4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec;

(5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;

(6) the decision enforces obligations arising from the taxation laws of a foreign country.

[22] Subsequent to hearing, counsel for both Plaintiff and the Defendant Canada Post asked the Court to defer rendering judgment as the Ontario Court of Appeal would in the near future issue a judgment a case dealing with the subject of matter of the present case, but on an international basis, as opposed to inter-provincial which is the case here.

[23] In the case of Greg Currie and McDonald's Restaurants of Canada Limited et al⁵ (hereinafter McDonald's), the Court of Appeal for Ontario dealt with the applicability of a class action settlement certified in the State of Illinois to members of a Canadian class in a class action brought against the Canadian subsidiary of the American parent for the same cause of action.

[24] The judgment in McDonald's described the Illinois judgment as the Boland judgment as will the undersigned.

⁵ *Currie v. McDonald's Restaurants of Canada Limited*, Court of Appeal for Ontario, C41264/C41289/41361, February 16, 2005.

[25] Two applications were brought in Ontario for certification, referred to here as the Parsons⁶ and Currie actions. McDonalds attempted to dismiss both actions on the grounds that the Boland judgment had disposed of the claims in both cases.

[26] The proceeding and finding by the motion judge which was the subject of the appeal was framed by Sharpe j. a. in McDonald's as follows:

"[6] The motion judge refused to stay or dismiss the Currie action. He found that Currie was not bound by the *Boland* judgment or by Parsons' attornment despite the fact that the claims were identical and that Parsons and Currie were both represented by the same law firm. The motion judge found that under the applicable conflict of law rules, the Illinois court had jurisdiction over the non-resident, non-attorning plaintiff class members. However, he further found that the notice given in that action to the Canadian members of the plaintiff class was so inadequate as to violate the rules of natural justice. The motion judge concluded, accordingly, that the *Boland* judgment should not be recognized and enforced so as to bind Currie and those he sought to represent in his proposed class action."⁷

[27] As will be seen below, the issue of notice was ultimately central and critical to the judgment of the Ontario Court of Appeal, but as other issues were raised, as they have been in the case before me, it will be useful to consider in detail some of the other findings in McDonald's.

[28] Sharpe j.a. stated the issue thusly:

"1. *Should the Ontario courts recognize and enforce the Boland judgment against Currie and the non-attorning Canadian class members he seeks to represent?*

[9] It is common ground on this appeal that if the *Boland* judgment should be recognized in Ontario under the applicable conflict of laws principles, Currie and the members of the class he seeks to represent are bound by it and that Currie's proposed class action would be precluded. It is also common ground that the issue of whether the Ontario courts should recognize and enforce the Illinois judgment approving the settlement turns upon the application of the principles enunciated by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*....

[10] In *Morguard*, the Supreme Court of Canada identified the twin principles of "order and fairness" and "real and substantial connection" for the assessment of the propriety of conflict of laws jurisdiction. As La Forest J. explained at p. 1102, "order and justice militate in favour of the security of transactions", an interest fostered in the modern world of increased trans-border activity by freer recognition and enforcement of judgments from other jurisdictions. But embedded in the principles of order and fairness is also the

⁶ *Parsons c. McDonald's Restaurant of Canada Limited*, [2004-01-13] Ontario Superior Court of Justice, 02-CV-235958 CP.

⁷ *Currie v. McDonald's Restaurants of Canada Limited*, see note 5 supra, p. 5.(emphasis added)

notion of jurisdictional restraint. The interest of security of transactions gained by the party seeking enforcement must be balanced with the need for fairness to the party against whom enforcement is sought. As La Forest J. put it at 1103: "it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit...Thus, fairness to the [party against whom enforcement is sought] requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction."

[11] The "real and substantial connection" test serves to control the assertion of jurisdiction. It is described variously in *Morguard*, at pp. 1104-9, as a connection "between the subject-matter of the action and the territory where the action is brought", "between the jurisdiction and the wrongdoing", "between the damages suffered and the jurisdiction", "between the defendant and the forum province", "with the transaction or the parties", and "with the action". The real and substantial connection test is a flexible one, "a term not yet fully defined"

[12] *Morguard* dealt with the recognition and enforcement of inter-provincial judgments. In *Beals*, those same principles were adapted and applied to international judgments. Writing for the majority, at para. 37, Major J. described real and substantial connection as "the overriding factor in the determination of jurisdiction." He stated at para. 32:

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

[13] The novel point raised on this appeal is 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."⁸

[29] This present case will necessarily turn on the laws of this province and particularly our laws on the subject of recognition of foreign judgments and the enforcement thereof; this said however, it is useful to read the analysis by Sharpe j.a. as he stated generally the laws of Ontario on this subject, as an important if not key element in the present judgment will have to determine whether the residents of Quebec have been fairly treated by the Ontario Judgment, and whether the laws of this province essentially accord with Ontario in the context of representation and protection of members of the class in actions of this nature:

"Class action regimes typically impose upon the court a duty to ensure that the interests of the plaintiff class members are adequately represented and

⁸ *Currie v. McDonald's Restaurants of Canada Limited*, see note 5 supra, p. 6-7.

protected. This is a factor favouring recognition and enforcement against unnamed class members [...]"⁹

[30] How the Province of Ontario deals with the issue of national class actions and comity was stated by Sharpe j.a. as follows:

"Ontario courts have certified national class actions "if there is a real and substantial connection between the subject-matter of the action and Ontario" in the expectation that "other jurisdictions on the basis of comity should recognize the Ontario judgment."¹⁰

[31] Having found that there was a real and substantial connection between the Ontario case and Illinois in the *Boland* proceedings, Sharpe j.a. nevertheless placed the issue of fairness to Ontario residents before simply recognizing Illinois jurisdiction, and he analyzed the adequacy of procedural rights as a determining factor in the context of fairness.

[32] The analysis of fairness and procedural rights is the crux of the McDonald's decision:

"[25] To address the concern for fairness, it is helpful to consider the adequacy of the procedural rights afforded the unnamed non-resident class members in the *Boland* action. Before concluding that Ontario law should recognize the jurisdiction of the Illinois court to determine their legal rights, we should be satisfied that the procedures adopted in the *Boland* action were sufficiently attentive to the rights and interests of the unnamed non-resident class members. Respect for procedural rights, including the adequacy of representation, the adequacy of notice and the right to opt out, could fortify the connection with Illinois jurisdiction and alleviate concerns regarding unfairness. Given the substantial connection between the alleged wrong and Illinois, and given the small stake of each individual class member, it seems to me that the principles of order and fairness could be satisfied if the interests of the non-resident class members were adequately represented and if it were clearly brought home to them that their rights could be affected in the foreign proceedings if they failed to take appropriate steps to be removed from those proceedings."¹¹

[33] The ability to opt out of a class action is a protection obviously not limited to the laws of Quebec and Ontario. As stated by Sharpe j.a:

"[28] The right to opt out is an important procedural protection afforded to unnamed class action plaintiffs. Taking appropriate steps to opt out and remove themselves from the action allows unnamed class action plaintiffs to preserve legal rights that would otherwise be determined or compromised in the class proceeding. Although she was not referring to inter-jurisdictional issues, in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (CanLII),

⁹ *Currie v. McDonald's Restaurants of Canada Limited*, see note 5 supra, p. 9.

¹⁰ *Currie v. McDonald's Restaurants of Canada Limited*, see note 5 supra, p. 10.

¹¹ *Currie v. McDonald's Restaurants of Canada Limited*, see note 5 supra, pp. 10-11, (emphasis added).

[2001] 2 S.C.R. 534 at para. 49, McLachlin C.J.C. identified the importance of notice as it relates to the right to opt out: "A judgment is binding on a class member only if the class member is notified of the suit and given an opportunity to exclude himself or herself from the proceeding." The right afforded to plaintiff class members to opt out has been found to provide some protection to out-of-province claimants who would prefer to litigate their claims elsewhere: *Webb v. K-Mart Canada Ltd.* reflex, (1999), 45 O.R. (3d) 389 at 404 (S.C.J.). It is obvious, however, that if the right to opt out is to be meaningful, the unnamed plaintiff must know about it and that, in turn, implicates the adequacy of the notice afforded to the unnamed plaintiff."¹²

[34] Finally, in McDonald's, Sharpe j.a. considered the adequacy of the notice to non-resident class members, and refused to interfere with the lower court's finding of inadequacy, hence lack of jurisdiction:

"[31] The motion judge determined that the notice given to the non-resident class members was inadequate. He observed that traditional conflict of laws doctrine treats adequacy of notice as an element of natural justice that can be raised as a defence to enforcement, once the jurisdiction of the foreign court has been established. He did not find it necessary to decide, on the facts of this case, whether or not the notice issue had a bearing on jurisdiction. As I have already explained, it is my opinion that the notice issue does bear upon jurisdiction. I consider the motion judge's ruling on the adequacy of notice below and conclude that there is no basis upon which I would interfere with that ruling. I would apply it to the question of jurisdiction and hold that as the unnamed plaintiffs were not afforded adequate notice of the Boland proceedings, the Ontario courts should not recognize and enforce the Boland judgment against Currie and the non-attorning Canadian class members he seeks to represent."¹³

[35] Both counsel to Canada Post and Lépine filed written submissions in connection with the McDonald's judgment, in an effort to apply its findings to the case before me.

[36] In the written submission (April 5, 2005) by Canada Post the following appears:

"...according to Justice Sharpe, should this Court rule that the interests of Quebec class members were adequately represented, and that the notice published and circulated by Canada Post and Cybersurf was adequate, it would be appropriate for this Court to attach legal consequences to an unnamed class member's failure to opt out and homologate the Ontario Judgment."

[37] Canada Post further argues in it's submission of April 5, 2005 the issue of "inadequate dissemination or circulation of the notice is the *ratio decidendi* of the Currie (Sharpe) Judgment".

[38] However, far more important than the issue of dissemination and of the required notices and their publication as required by law, is that the notice itself be clear, adequate and sufficiently informative so as to permit the reader to take the appropriate

¹² *Currie v. McDonald's Restaurants of Canada Limited*, see note 5 supra, p. 11.(emphasis added)

¹³ *Currie v. McDonald's Restaurants of Canada Limited*, see note 5 supra, p. 12 (emphasis added).

steps to, in accordance with the notice itself, opt out which is the ultimate protection for an individual who does not wish to participate in the class.

[39] IN THE CIRCUMSTANCES, WAS THE NOTICE R-17 DISSEMINATED PURSUANT TO THE ONTARIO JUDGMENT ADEQUATE IN THE FACE OF THE PREVIOUSLY PUBLISHED QUEBEC NOTICES, OR ALTERNATIVELY, DID THE EXISTENCE OF THE QUEBEC NOTICES NECESSARILY CONFUSE OR INDUCE INACTIVITY ON WHOMSOEVER IN QUEBEC SAW THE ONTARIO NOTICES TWO MONTHS AFTER THE QUEBEC NOTICES WERE PUBLISHED?

[40] In argument subsequent to hearing but prior to the publication of the McDonald's judgment, Plaintiff submitted the following in respect of the inadequacy of the Ontario notices R-17:

« 77. Quant aux avis que POSTES CANADA et CYBERSURF ont publiés les 7 et 8 avril 2004 (**Pièce R-17**), nous réitérons nos arguments à l'effet que ceux-ci étaient inadéquats et qu'ils prêtaient à confusion au Québec, le tout pour les motifs suivants :

78. Dans un premier temps, il y a lieu de rappeler que le 21 février 2004, conformément au jugement prononcé en l'instance par l'Honorable juge Jacques R. Fournier, j.c.s., le Demandeur a fait publier un avis aux membres du Groupe du Québec. L'Avis a été produit comme **Pièce I-4**. Il s'agit d'un avis détaillé qui identifie clairement, et sans équivoque, les personnes qui sont visées par le recours collectif ;

79. L'avis faisant état du règlement intervenu en Ontario et en Colombie-Britannique (**R-17**) a été publié les 7 et 8 avril 2004, soit quelques semaines seulement après la publication de l'Avis aux membres du Groupe du Québec ;

80. Cet avis indique :

un règlement est intervenu entre la Société canadienne des Postes, la société Cybersurf et les demandeurs d'un recours collectif en Ontario et en Colombie-Britannique ;

81. L'avis, qui réfère à des procédures intentées en Ontario et en Colombie-Britannique ne précise nullement que les résidents du Québec sont visés par ce règlement. Rappelons que quelques semaines auparavant, un avis d'exercice d'un recours collectif avait été publié pour le compte spécifique du Groupe du Québec (**Pièce I-4**) ;

[41] Considering that the Ontario notice was published on April 7, 2004, and that the Quebec notice was published on February 21, 2004;

[42] Considering that the Ontario notice more than likely caused some confusion for an untrained reader who had previously read the Quebec Notice;

[43] Considering that the Ontario Notice, by referring to a settlement without providing any further information, did not adequately inform those members of the Quebec Class how to distinguish their rights between the two class actions, and accordingly the Ontario Notice, rather than serving as an informative device which is the purpose of these notices, whether under Ontario or Quebec law, prima facie brought confusion to the debate over how the Quebec members would deal with the notices;

[44] Considering that the Quebec Notice published on February 21, 2004 informed the reader that April 21, 2004 was the date beyond which a member could not, without special permission, request exclusion from the class, and that as the Ontario Notice was published on April 7, 2004, still during the opting out period in Quebec, this served to introduce an element of confusion as to which rights the readers were directed to consider;

[45] Considering that this Court cannot, as a matter of law, order an amendment to the Ontario Notice;

[46] Considering therefore that the Ontario Notice cannot serve as a device upon which these Defendants can base a request to recognize and declare enforceable an Ontario judgment;

[47] Considering the Court finds the Ontario Notice inadequate for the purpose of the present proceedings only, for the reasons stated above;

[48] FOR ALL THESE REASONS, DEFENDANT'S MOTION IS DISMISSED, THE WHOLE WITH COSTS.

ROGER E. BAKER, J.S.C.

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Date of hearing: September 10, 2004
Date of written submissions: May 27, 2005