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So You Thought You Had a “Global” Settlement in that Class Action?

Beware of Canadian “Natural Justice”!

by [Scott Maidment](#)



The recent decision of the Ontario Superior Court in *Currie v. McDonald’s Restaurants*, [2004] O.J. No. 83 paves the way for U.S. class action settlements to bind a Canadian class, provided the Canadian class receives adequate notice. It is a cautionary tale, however, for U.S. defence counsel who attempt a “global” settlement for their clients.

Currie is believed to be the first Canadian decision to apply the recent ruling of the Supreme Court of Canada in *Beals v. Saldanha* [2003] S.C.J. No. 77 in a class action context. *Beals*, released in December of 2003, established that Canadian courts should enforce a U.S. Court decision where the U.S. court has a “real and substantial connection” with either the subject matter of the suit or the defendant. The ruling in *Currie* suggests *Beals* can be used to bind a Canadian class in a U.S. settlement, but to do so effectively you have to be careful of Canadian principles of “natural justice”.

Currie v. McDonald’s was essentially a “copy cat” Canadian class action, based on certain alleged misrepresentations by McDonald’s to its Canadian customers. In keeping with a pattern common in Canadian class action litigation, the Canadian class action had been commenced after a tentative settlement had been reached in a U.S. class action arising out of the same matters. McDonald’s responded to the Canadian class action by moving to dismiss it on the basis that it was frivolous, vexatious, and an abuse of process. In particular, McDonald’s argued that a judgment approving the settlement of the U.S. class action was binding upon the putative class in the Canadian class action, because the U.S. settlement class included the Canadian customers. In support of its motion, McDonald’s relied upon the fact that an Illinois court had approved the U.S. settlement following a fairness hearing, and that the Illinois court had, in doing so, approved the form of notice to Canadian members of the settlement class. It argued that since the Illinois court had a “real and substantial connection” with the action, the result was binding upon the Canadian customers under the rule in *Beals*. McDonald’s also relied upon the fact that a number of members of the Canadian had appeared at the fairness hearing in Illinois and had unsuccessfully opposed the approval of the Illinois settlement.

The Ontario Court agreed with McDonald’s that the Illinois court had a real and substantial connection with the dispute, and that the Illinois decision could, applying the rule in *Beal*, be enforced in Canada. In finding the necessary connection with Illinois, the Ontario Court relied upon the fact that McDonald’s head office was in Illinois and the events occurred in part in Illinois.

The Ontario Court nevertheless refused to enforce the Illinois judgment against the entire putative Canadian class. In particular, it found that the notice of the proposed settlement that had been given to the Canadian consumers was so inadequate that to bind Canadian consumers on the basis of the notice would result in a denial of natural justice under Canadian law. That finding was made in spite of the fact that

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the Illinois court had approved the form and content of the notice. In so holding, the Ontario Court noted that the rule established in *Beals* contemplates that a foreign judgment will not be enforced, regardless of a “real and substantial connection”, where enforcement would result in a denial of natural justice under Canadian law.

The Ontario court did, however, enforce the Illinois judgment against those Canadian consumers who had personally objected to approval by the Illinois court, on the ground that they had personally attorned to its jurisdiction. The Ontario court held that while the participation of the objectors had no effect on the rights of Canadian class members at large, the objectors were nevertheless bound themselves as a result of their own participation in the Illinois settlement hearing. As a result, a companion action brought by one of the objectors was stayed permanently and the other objectors were excluded from the *Currie* class.

The *Currie* decision has a number of important implications for U.S. defence counsel. Most significantly, *Currie* suggests that a U.S. class action settlement will not effectively bind a Canadian class unless the Canadian class receives reasonable notice in accordance with Canadian principles of natural justice. This will be so regardless of whether the form of notice was satisfactory to the U.S. court, though approval by the foreign court will be a factor taken into account in deciding whether the notice was compliant with Canadian principles. This is an important point for U.S. defence counsel to consider when attempting a “global” settlement that includes a Canadian settlement class. Clearly, if McDonald’s believed they had effectively settled in Illinois with all of their Canadian customers, they were sadly mistaken.

Given the flow of goods and services across the Canada – U.S. border, the inclusion of a Canadian class will make sense in many U.S. class actions. For the defendant who seeks “total peace” in such cases, the inclusion of a Canadian settlement class will be an important part of a settlement strategy. As a result of *Currie*, U.S. counsel who want to ensure that the Canadian class is bound will now have to do more than satisfy the U.S. court as to proper notice for the Canadian class. U.S. defence counsel will need to ensure that the notice requirements will pass the scrutiny of a Canadian court in terms of compliance with Canadian concepts of natural justice.

It is clear from *Currie* that the notice process in that case, which included publication in two issues of a Canadian national magazine, was not adequate to bind the Canadian class. It is less clear what would have been adequate, but the court in *Currie* does suggest that a notice more in line with the practice in Canadian class actions may have produced a very different result. *Currie* is presently under appeal, but unless and until it is reversed it remains a persuasive precedent. In the meantime, U.S. defence counsel who seek to bind a Canadian settlement class will want to consult their colleagues north of the border before formulating the notice arrangements for the Canadian class. Otherwise, they may find their “global” settlement is not really “global” at all.

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