

Class Actions

A Summary of Class
Action Decisions

Jurisdiction simpliciter: Not so simple

Airia Brands Inc. v. Air Canada, 2017 ONCA 792, is the latest class action decision to consider jurisdiction *simpliciter* in situations involving foreign class members.

The case involved a claim of conspiracy to fix prices of air freight shipping services to and from Canada. On the matter of jurisdiction, the motion judge excluded absent foreign claimants who had shipped goods into and out of Canada from the class. In reaching this conclusion, the motion judge abstained from applying the customary “real and substantial connection” test for the jurisdiction *simpliciter* analysis. Instead, she anchored her analysis in a negation of the traditional bases for jurisdiction; namely, presence in the jurisdiction or consent to the jurisdiction. The appellants, Airia Brands Inc., appealed from the motion judge’s jurisdiction order.

The Ontario Court of Appeal held that the motion judge erred in her rejection of the real and substantial connection test for global class actions. In a unanimous decision, the Court of Appeal reversed the lower court decision and held that the foreign plaintiffs were eligible class members. The court confirmed that in the absence of traditional grounds for jurisdiction, the jurisdiction analysis must begin with the real and substantial connection test. However, the analysis does not end there.

The Court of Appeal set out a three-part test for a court taking to establish jurisdiction over absent foreign claimants in class proceedings:

1. There is a real and substantial connection between the subject matter of the action and Ontario, and jurisdiction exists over the representative plaintiff and the defendants;
2. There are common issues between the claims of the representative plaintiff and foreign proposed class members; and
3. The procedural safeguards of adequacy of representation, adequacy of notice, and the right to opt out, as described in *Currie v. McDonald’s Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.), are provided, serving to enhance the real and substantial connection between the foreign proposed

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class members and Ontario.

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