

## COORDINATING MULTIJURISDICTION CLASS ACTIONS THROUGH EXISTING CERTIFICATION PROCESSES†

### 1. Introduction

Canada now has legislative regimes for class actions in several provinces and common law regimes in the remaining jurisdictions.<sup>1</sup> It is increasingly possible for persons to be included in more than one class action. These persons can become subject to conflicting determinations of their rights. Defendants and class counsel may also be confronted with situations in which they are uncertain of the actual size and composition of plaintiff classes in actions in which they are involved. This can make it difficult for them to plan for the litigation or for the settlement negotiations.

Under the current law it is difficult to anticipate with certainty the impact of competing class actions on the resolutions of the disputes that are reached and to know which plaintiffs will be bound by which decisions.<sup>2</sup> It is important, therefore, to develop a means to regulate the scope of the multijurisdiction class actions that may be commenced in the same or related matters in different Canadian jurisdictions.<sup>3</sup> This comment outlines the means by which this can be achieved through existing certification processes.

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† This comment has been adapted for use in a report by the Uniform Law Conference of Canada National Class Action Reform Project by Rodney Hayley, Geoffrey Aylward, Ward Branch, Chris Dafoe, Dominique D'Allaire, Aldé Frenette, Craig Jones, Steven Lamont, Peter Lown, Q.C., Andrew Roman, Genevieve Saumier, Paul Vickery, Q.C., Janet Walker and Garry Watson, Q.C.

1. Following the decision in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 201 D.L.R. (4th) 385 *sub nom. Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*, [2002] 1 W.W.R. 1.
2. See *Coleman v. Bayer Inc.* (2004), 47 C.P.C. (5th) 346 (Ont. S.C.J.); *Walls v. Bayer Inc.* (2005), 189 Man. R. (2d) 262 (Q.B.).
3. Similar questions arise in multinational classes, such as *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441, 30 C.P.C. (4th) 133 (Gen. Div.); *McNamara v. Bre-X Minerals Ltd.*, 32 F. Supp. 2d 920 at p. 925 (E.D. Tex. 1999); *Mondor v. Fisherman* (2002), 26 B.L.R. (3d) 281 (Ont. S.C.J.); *Paraschos v. YBM Magnex Intern. Inc.*, 130 F. Supp. 2d 642 (E.D. Pa. 2000). Resolving multiplicity in these situations would require mechanisms that are beyond the scope of this comment. For a discussion of these issues, see J. Walker, "Crossborder Class Actions: A View from across the Border" (2004), *Michigan State L. Rev.* 755.

Any proposal to resolve multiplicity in multijurisdiction class actions must address two kinds of questions. First, it must articulate clear standards and criteria for determining the appropriate scope of multijurisdiction classes in view of the potential for multiplicity. This is the substantive question. It will be discussed in the next section. There could be debate about these standards, and there will certainly be further development and refinement of our understanding of the criteria to be applied in individual cases. However, to the extent that the standards and criteria can be articulated in a preliminary way, the discussion of how best to coordinate multijurisdiction class actions can then focus on the separate procedural question.

Second, to address the procedural question, the proposal must identify the institutional mechanisms that exist or need to be developed that will prevent multiplicity in certification rulings. Several approaches might be considered. This comment will not consider mechanisms involving the Federal Court — either as a court that would exercise jurisdiction to decide multijurisdiction class actions, or as a court that would serve as an equivalent to the U.S. Multidistrict Litigation Panel in regulating the definition of the plaintiff classes in actions that would then be assigned to the provincial superior courts. It is far from clear that the Federal Court could exercise jurisdiction in either of these ways. An argument might be made for the exercise of jurisdiction by the Federal Court under the national concerns doctrine of the “peace, order and good government” power,<sup>4</sup> but the determination by the Supreme Court that the Federal Court has neither pendent nor ancillary jurisdiction would seem to preclude it from taking on such a role under its constitutional mandate as presently understood.<sup>5</sup> Accordingly, this comment will consider only the means by which multijurisdiction class actions might be regulated through existing certification processes. Although this comment seeks to develop a workable

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4. Constitution Act, 1867, s. 91.

5. *Roberts v. Canada*, [1989] 1 S.C.R. 322, 57 D.L.R. (4th) 197, [1989] 3 W.W.R. 117; *Quebec Ready Mix Inc. v. Rocois Construction Inc.*, [1989] 1 S.C.R. 695, 60 D.L.R. (4th) 124, 48 C.C.C. (3d) 501; but see *ITO International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641, 34 B.L.R. 251 *sub nom. Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*; *R. v. Thomas Fuller Construction Co. (1958) Ltd.*, [1980] 1 S.C.R. 695, 106 D.L.R. (3d) 193, 12 C.P.C. 248, and see P. Hogg, *Constitutional Law of Canada* (Scarborough, Carswell, 2004), ch. 7.2 and J. Walker, *The Constitution of Canada and the Conflict of Laws* (Oxford University, D. Phil. Thesis, 2001).

proposal that is minimally disruptive of existing institutional structures and court processes, its implementation could benefit from certain administrative innovations and informal initiatives for cooperation between courts. Some of these initiatives are immediately apparent, such as those involving informal cooperation between counsel in different provinces permitting a matter to go forward as a lead case in one province with the outcome being tendered for court approval in other provinces. Other innovations would become more apparent as experience is gained with the process of regulating multi-jurisdictional class actions.

## 2. The Substantive Question: Standards for Avoiding Multiplicity in Multijurisdiction Class Proceedings

The standards for resolving multiplicity in multijurisdiction class proceedings have not yet been articulated with precision. However, their basis may be discerned in the law of jurisdiction in Canada more generally. The Supreme Court of Canada has determined that the law of jurisdiction is subject to the constitutional requirements of the principles of order and fairness.<sup>6</sup> The Supreme Court has also said that these principles are vaguely defined, serving primarily to inspire the interpretation of various private international law rules.<sup>7</sup> Careful reflection on the fundamental principles of our civil justice system suggests that in the context of multijurisdiction class actions these principles may be described as a concern for *access to justice* (fairness) and for the *avoidance of multiplicity* (order).<sup>8</sup>

### (a) Access to Justice

One complication in coordinating multijurisdiction class actions arises from the fact that the law with respect to the certification of multijurisdiction plaintiff classes varies from province to province. In some provinces, such as Ontario,<sup>9</sup> there are no special requirements

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6. *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, [1991] 2 W.W.R. 217, 76 D.L.R. (4th) 256. Although the *Morguard* case was not argued in constitutional terms, the principles of order and fairness were held to be constitutional imperatives in *Hunt v. T & N plc.*, [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16, [1994] 1 W.W.R. 129.
  7. *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 220 D.L.R. (4th) 54, 28 C.P.C. (5th) 201.
  8. J. Walker, "Beyond Real and Substantial Connection: The *Muscott* Quintet" in T. Archibald and M. Cochrane, eds., *Annual Review of Civil Litigation, 2002* (Toronto, Carswell, 2003).
  9. Class Proceedings Act, 1992, S.O. 1992, c. 6.

for membership in plaintiff classes based on residency. In other provinces, such as British Columbia,<sup>10</sup> the legislation requires non-residents to take steps to join a plaintiff class.<sup>11</sup> This hybrid, opt-out/opt-in approach is intended to ensure that determinations of the claims of persons who might seek relief in other courts are recognized by those courts as binding on those persons.

A person who takes active steps to participate in a proceeding will generally be regarded by other courts as bound by the result. However, using residency to determine whether or not a class action will bind a member of a plaintiff class who takes no step to join or to be excluded from the class is inconsistent with the general law of jurisdiction. For example, pursuant to the principles of order and fairness, persons whose claims have no other connection to the forum but who happen to move to the forum at some critical moment could probably argue that there was no real and substantial connection between their matters and the forum and, therefore, they are not bound by the decision in the class action. In a similar way, it would be odd to suggest that persons who happened to move away from the forum province would thereby become obliged to opt in to a subclass in order to participate in a class claim. Admittedly, neither of these propositions is likely to be tested because there is rarely sufficient incentive to sue separately on a class claim. However, these anomalies highlight the fact that residence is not ordinarily relevant to determining court jurisdiction. Residency is, therefore, a poor indicator of whether a class claim will likely include or bind a person otherwise falling within the class definition. Indeed, the regulatory function of class actions, particularly in consumer claims, suggests that identifying the forum in which a claim might reasonably be expected to be determined could provide better guidance as to whether a person might be regarded as included in the class and bound by the result.<sup>12</sup>

If residency is not ordinarily relevant to the jurisdiction of a court over the claim, it may be wondered how class actions regimes have

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10. Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 6, 16. The Class Proceedings Act, C.C.S.M., c. C130, s. 6(3) provides that "A class that comprises persons resident in Manitoba and persons not resident in Manitoba may be divided into resident and non-resident subclasses."

11. Although there may be some flexibility in this requirement developing in the jurisprudence. See *Knight v. Imperial Tobacco Canada Ltd.* (2005), 136 A.C.W.S. (3d) 1004, 2005 BCSC 172 (S.C.).

12. See *Currie v. McDonald's Restaurants of Canada Ltd.*, [2005] O.J. No. 506 (QL), 137 A.C.W.S. (3d) 250 (C.A.).

functioned *within* their respective provinces. The answer is that the operative feature of a class action regime is not, in fact, the provision that authorizes a court to exercise jurisdiction over a claim in which one person represents other persons who are residents with similar claims. Rather, the operative feature is the provision that obliges *other courts* in the province to treat the determinations made in the class claim as binding on those who fall within the definition of the class.<sup>13</sup> Provincial class action legislation cannot create this obligation for the courts of other Canadian provinces. However, an obligation to accord preclusive effect to the judgments of other Canadian courts arises from the principles of order and fairness where there is a real and substantial connection between the matter and the forum. The suggestion that courts other than the court deciding the class claim must treat only forum *residents* who fall within the definition of a class as precluded from litigating the claim separately is an arbitrary stipulation that does not comport well with the principles of order and fairness in crossborder contexts.

Parties resisting the certification of multijurisdictional classes have focused on the question of whether a provincial superior court can exercise jurisdiction over non-residents. However, this is not the real question. The real question is whether other Canadian courts are obliged to grant preclusive effect to the judgment in respect of the claims described in the notice of certification. To the extent that the criteria used to define multijurisdiction classes for certification purposes are consistent with the constitutional principles of order and fairness, Canadian courts are obliged to treat the claims of members of classes defined in this way as finally decided in the class action, whether or not those class members reside in the forum. Accordingly, opt-in requirements for non-residents are not necessary to ensure that a decision in a class action binds non-resident plaintiffs. Further, opt-in requirements reduce access to justice for non-residents in multijurisdiction classes in the same way that opt-in requirements reduce access to justice for residents of the province in single-jurisdiction classes.<sup>14</sup> Provided that a plaintiff class is defined in a certification order in a way that ensures that

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13. For a more extensive discussion of this point, see J. Walker, "Crossborder Class Actions", *supra*, footnote 3.

14. Under Civil Procedure Rules, Part 19, III, multi-party litigation in England proceeds on the basis of a Group Litigation Order that consolidates claims for the purpose of efficient case management, but that does not designate one claimant as the representative of the others. See C. Hodges, *Multi-Party Actions* (Oxford, OUP, 2001).

there is a real and substantial connection between the claim and the forum, the many reasons for adopting an *opt-out* regime for residents of a province in single-jurisdiction class actions apply equally to multijurisdiction class actions.

In sum, opt-in requirements for non-residents are based on unfounded concerns about the recognition by other courts of judgments in class actions. They create unnecessary restrictions on the ordinary scope of plaintiff classes — restrictions that impair the capacity of multijurisdiction class actions to serve the objectives of class actions generally. All three main objectives of class actions — access to justice, judicial economy and behaviour modification<sup>15</sup> — are best served by ensuring that as many claimants as possible who might be entitled to recovery in a given claim are included in the plaintiff class regardless of their residence. This is a simple extension to the multijurisdiction setting of the principles on which class actions are based. Increased certainty in the definition of the plaintiff class could be achieved by adding the proviso to the basic definition of the class as certified that persons falling within the definition of any class previously certified in another court and those who take steps to be included in classes certified elsewhere are presumptively excluded from the class. Harmonized legislation that omits reference to residency could further clarify the situation, but it may not be necessary to facilitate opt-out multijurisdiction class actions if the courts regard their authority to certify them as a product of the constitutional requirements of order and fairness.

#### (b) Avoidance of Multiplicity

The Canadian jurisprudence on appropriate forum is among the most even-handed in the world. Canadian courts have demonstrated a strong commitment to ensuring that cases are determined in the forum that is most suitable based on the interests of all the parties and the ends of justice.<sup>16</sup> In particular, Canadian courts have regularly given priority to factors affecting litigation convenience, taking into account the relative abilities of the parties to undertake the challenges of litigating in distant fora. They have also shown great confidence in the ability of other Canadian courts in alternative fora to take a balanced approach to resolving multiplicity

15. Ontario Law Reform Commission, *Report on Class Actions* (1982) at p. 117.

16. *Amchem Products Inc v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96, [1993] 3 W.W.R. 441.

and accordingly to be entitled to their deference in making determinations of appropriate forum in related cases.<sup>17</sup>

Accordingly, the main challenge in any mechanism for resolving multiplicity in multijurisdiction class actions through existing certification processes is to identify the factors that are relevant to adjudicative efficacy and administrative efficiency in the class actions context. These factors are not new. They have already begun to receive careful consideration in the emerging jurisprudence relating to adequate representation, particularly in the determinations of carriage and venue motions. The analysis in these decisions serves to provide a general framework for the kinds of factors that are relevant to resolving multiplicity.<sup>18</sup>

The evolving jurisprudence will clarify the special considerations that arise in multijurisdiction situations. For example, where a distinct or distant group of persons stands to benefit from representation by local counsel before a court in that province, there may be some benefit to defining a class certified elsewhere so as to exclude that group. This could occur in situations where a widely used product with a common defect causes harm to consumers in several provinces but where consumers in one province have been harmed by a discrete product line from a particular manufacturer. This may also be warranted where the claims of one group of claimants will be resolved in accordance with the law of a forum that is different from the law that will govern the claims of other groups. The extent to which the interests of class members are better served through coordinated proceedings<sup>19</sup> than they would be served through subclasses in a single proceeding is also a question that will be better understood as the jurisprudence develops. Moreover, even where there is no indication that the plaintiff class would be better

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17. See *472900 B.C. Ltd v. Thrifty Canada Ltd.* (1998), 168 D.L.R. (4th) 602, [1999] 6 W.W.R. 416, 190 W.A.C. 233 (B.C.C.A.); *Westec Aerospace Inc. v. Raytheon Aircraft Co.* (1999), 84 A.C.W.S. (3d) 479 (S.C.), leave to appeal granted 86 A.C.W.S. (3d) 697, rev'd 173 D.L.R. (4th) 498, 200 W.A.C. 18, 67 B.C.L.R. (3d) 278 (C.A.), aff'd without reasons 197 D.L.R. (4th) 211, 2001 SCC 26.

18. For example, *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (2000), 4 C.P.C. (5th) 169 (S.C.J.).

19. As it was in the tainted blood litigation in *Honhon v. Canada (Procureur general)*, [1999] J.Q. No. 4370 (QL) (S.C.); *Parsons v. Canadian Red Cross Society* (1999), 49 O.R. (4th) 281, 46 C.P.C. (4th) 236 (S.C.), quashed 140 O.A.C. 348, 11 C.P.C. (5th) 16 (C.A.), leave to appeal to S.C.C. refused 153 O.A.C. 199n; *Endean v. Canadian Red Cross Society* (1999), 68 B.C.L.R. (3d) 350, [2000] 1 W.W.R. 688, 36 C.P.C. (4th) 362 (S.C.).

served if the matter proceeded in two or more different fora, there may be situations in which one forum is clearly more appropriate than another. This would prompt a determination of the appropriate forum along the traditional lines often undertaken in non-class litigation.<sup>20</sup> The courts' considerable discretion to refuse to certify, to de-certify and to amend the definition of the class will continue to play an important cautionary role in encouraging appropriate proposals for the size and scope of plaintiff classes.

### 3. The Procedural Question: Coordinating Multijurisdiction Class Proceedings — Which Court Decides?

#### (a) "Second-Seized Principle"

There seems to be little doubt that Canadian courts are well equipped to adapt the familiar principles of appropriate forum to the context of multijurisdiction class actions. However, there remains the need to establish a mechanism for deciding which of two or more courts seized with similar or related class claims should make such a determination. It might seem unlikely that independently administered courts could establish a workable method of resolving instances of multiplicity in multijurisdiction class actions. Indeed, the U.S. Multidistrict Litigation Panel<sup>21</sup> precedent suggests that this function could be served only by an independent body formed for the purpose. However, the strong core of common appreciation of the principles of order and fairness, and the considerable deference that Canadian courts have shown to one another, suggest otherwise.

Adapting the model used within the European Union,<sup>22</sup> in which the court first seized of a matter has jurisdiction to determine it, Canadian courts could operate in reverse.<sup>23</sup> It could be presumed that the court first seized of a class action would have carriage of it subject to counsel in another Canadian forum persuading the court subsequently seized that some or all members of the plaintiff class

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20. *Wilson v. Servier Canada Inc.* (2001), 11 C.P.C. (5th) 374 (Ont. S.C.); *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (2002), 20 C.P.C. (5th) 351 (Ont. S.C.); F. Hickman, "National Competing Class Proceedings: Carriage Motions, Anti-Suit Injunctions, Judicial Co-operation, and Other Options" (2005), *Canadian Class Action Review* (forthcoming).

21. See 28 U.S.C.A. §1407, online at <<http://www.jpml.uscourts.gov>>.

22. Found in Articles 27-30 of Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters OJ L12/1.

23. The second-seized principle was discussed in the context of non-class actions in J. Walker, "Parallel Proceedings — Converging Views: The *Westec* Appeal" (2000), 38 *Can. Y.B. Int'l L.* 155.



would be better served by having the matter determined in the court in the latter jurisdiction. Thus, the court *second*-seized would have the primary responsibility for making this determination. This approach would be unworkable in some federal or regional systems. However, Canadian courts have shown sufficient confidence in one another to suggest that it could work well within Canada. Indeed, in situations of parallel class proceedings Canadian courts have sought counsel's advice on the status of related proceedings in an informal attempt to avoid multiplicity. Further, recognizing the potential for a second seized court to make such a determination would have a cautionary effect on preemptive strikes by counsel seeking to secure their carriage of matters that might better be undertaken by others or in other fora.

(b) Jurisprudential Developments/Institutional Mechanisms

This simple principle would need to be developed significantly in order for it to function well within the Canadian court system. First, procedures would need to be recognized for encouraging submissions in certification motions from counsel in class claims previously commenced in other jurisdictions, perhaps as interveners. This could include mandatory requirements for notice to counsel in related claims previously commenced. It could also include court-to-court communications based on the American Law Institute's *Transnational Insolvency Project Guidelines*, which have been endorsed by the Ontario and British Columbia courts for use in commercial cases.<sup>24</sup> Second, in cases of parallel claims there may be more than two claims commenced, including more than one within a single jurisdiction. Sequencing protocols would need to be established for deciding which court would need to determine itself to be a more appropriate forum than which other court. For example, where actions were commenced in rapid succession, would a third seized court need to be persuaded that it was a better forum than both of the other courts? Third, to the extent that there could arise divergences of opinion from time to time between courts on the appropriate scope of classes certified in the same or similar claims, it would be necessary for the courts to develop standards for disagreeing with the results reached in other courts. Not only would it be helpful for courts to agree on the factors to be considered in determining appropriate forum (such as the similarity of claims and

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24. Superior Court of Justice Commercial List Practice Direction, "Protocol Concerning Court-to-Court Communications in Cross Border Cases", April 4, 2004. Supreme Court of British Columbia, "Notice to the Profession: Re Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases", November 22, 2004.

legal issues, the location of the claimants and the events giving rise to the claim, and the location of the counsel with the most effective litigation plan), it would also be helpful for courts to agree on the level of deference to be accorded to the decisions of other Canadian courts in related claims. None of this is to suggest that these important developments would constitute preconditions to adopting this approach. Rather, it seems likely that these developments would occur as a natural consequence of doing so.

The main institutional innovation required by this approach would be a centralized registry<sup>25</sup> for originating notices and statements of claim issued in class actions that could permit these documents to be accessed promptly upon their issuance. This would enable counsel considering commencing a claim in a matter to know whether other claims in the same or a similar matter had been commenced elsewhere, and to determine the extent to which they might give rise to a multiplicity of actions. Whether such a database would best be established through a cooperative effort of the provincial superior courts, or as a public service of a commercial legal database operator,<sup>26</sup> or as a project of a not-for-profit legal database operator,<sup>27</sup> would need to be decided. The only qualifications for it would be its public accessibility, its reliability, and the formal or informal endorsement of judges relying on it to decide these carriage/forum motions. The incentive for the class actions bar to ensure that it was well maintained would come with the entitlement to secure carriage of a multijurisdiction class presumptively by registering the claim, and to secure entitlement to notice and an opportunity to participate in any motion brought to determine whether other counsel subsequently registering a claim in Canada should be given carriage of the claim on behalf of part or all of the class.

Despite the looming challenges of multiplicity in multijurisdiction class actions, with the addition of a centralized registry for originating notices and statements of claim there appear to be ready means for addressing these challenges in the existing certification processes.

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25. Perhaps styled after the registry maintained by the Québec Bar online at <<http://www.barreau.qc.ca>> or the Ontario government's Environmental Registry found online at <[http://www.ene.gov.on.ca/envision/env\\_reg/ebr/english/index.htm](http://www.ene.gov.on.ca/envision/env_reg/ebr/english/index.htm)>.

26. *E.g.*, Quicklaw, online at <<http://www.quicklaw.com>>.

27. *E.g.*, Canadian Legal Information Institute, online at <<http://www.canlii.org>>.

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