National Class Actions in Canada: The Benefits (and Limits) of the Protocol and the Recurring Challenges to Managing National Settlements

by Christopher Naudie and Luciana Brasil[1]

I. Overview

While there are many virtues to the Canadian federal constitutional system, the efficient administration of national class actions is not one of them. In this age of global commerce, most alleged legal wrongs will have a diffuse impact across Canada. However, class proceeding litigation in Canada remains largely a provincial affair. Under the *Constitution Act*, the provinces are endowed with jurisdiction over property and civil rights as well as the administration of justice.[2] Pursuant to this jurisdiction, the legislatures of nine of the ten provinces have each adopted a form of modern class proceedings legislation that offers an avenue of collective redress before the provincial superior courts.[3] Moreover, in most provincial jurisdictions, the applicable class proceedings statute will authorize the superior court of that province to exercise jurisdiction over extra-provincial class members either on an opt-in or an opt-out basis. As a result, in the event of a legal wrong, individuals in a particular province may find themselves subject to multiple proposed class proceedings in one or more provincial forums.

As a result of this legislative framework, the potential for multiple and overlapping actions exists with almost each and every new class action that is filed in Canada. In fact, with increasing frequency, the commencement of a new class action is often marked by the simultaneous filing of proposed class actions in various jurisdictions, whether by one or more counsel groups. For example, in the *Menu Foods* class proceedings, the parties witnessed 17 proposed class actions in 9 Canadian provinces, including 4 actions in Ontario.[4] In the *Osmun* class proceedings, the parties witnessed 14 proposed class actions in 9 Canadian provinces, with competing actions in a number of provinces.[5]

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[2] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), ss. 92(13) and 92(14).

[3] There is now a form of modern class proceeding legislation in every province of Canada, with the narrow exception of Prince Edward Island. There is a class proceedings regime that exists before the Federal Court of Canada. In particular, as a result of amendments to the *Federal Court Rules* in 2002, a party may seek to certify a national class proceeding before the Federal Court. See *Federal Court Rules*, SOR/98-106, Part 5.1 (Class Proceedings). However, as a result of a number of factors including the narrow statutory jurisdiction of the Federal Court, most plaintiffs seeking collective relief will normally elect to proceed before the provincial superior courts. See Branch MacMaster, *Class Actions in the Federal Court* (Federal Court Practice – 2007).

[4] See, e.g., *Joel v. Menu Foods Genpar Limited*, 2007 BCSC 1482 (carriage motion in B.C. proceeding).

[5] See, e.g., *Osmun v. Cadbury Adams Canada Inc*., 2010 ONSC 2643, affirmed 2010 ONCA 841, leave to appeal denied [2011] S.C.C.A. No. 55 ("*Osmun*") (settlement approval motion in Ontario proceeding).

In these cases where there are multiple filings, the parties will inevitably have to address and resolve the issues of carriage and jurisdiction, whether through agreement or by judicial determination. Even with some rationalization of the outstanding actions, by the time the parties reach a proposed settlement, there will typically be more than one class action involving the same subject matter. The existence of these multiple actions in multiple provinces can complicate the implementation of the settlement, since the settling party will normally only be inclined to settle if it can obtain some assurance that it will obtain "global peace" – namely, a national class-wide release that is binding on all class members across the country and is enforceable in every province. Moreover, the settling party will typically demand a dismissal of each and every pending class proceeding that has been filed in respect of the alleged wrong in every province.

In response to these and other challenges associated with multi-jurisdictional class actions in Canada, the Canadian Bar Association ("CBA") formed a formal Task Force on Class Actions in February 2010 to explore the legal and practical opportunities for further coordination in the administration of national class actions, including the implementation of national class action settlements (the "Task Force"). The Task Force developed three class action judicial protocols which were adopted by the CBA Council at its meeting in August 2011, including the Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions (the "Protocol").[6] The Protocol was approved by the Canadian Judicial Council in September 2011, and since that time, Canadian courts have adopted and applied the Protocol to facilitate hearings in at least four reported cases, including high-profile national class proceedings.[7]

The goal of this paper is to consider the implementation and use of the Protocol to date, as well as to consider the management of national class actions from a practical perspective, particularly at the settlement stage. More specifically, this paper will consider the historical experience in managing national class actions, the origins and purposes of the Protocol, as well as its implementation. The authors will also examine the success of the Protocol to date, and as schedules to this paper, the authors have also attached a number of materials/precedents to facilitate the use of the Protocol in future cases.

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[6] The CBA adopted three protocols as part of its resolution arising from the CBA Council meeting on August 14, 2011, namely: (i) the Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions (adopted as Annex 1)(the "Protocol"); (ii) the Protocol on Court-to-Court Communications in Canada-U.S. Cross-Border Class Actions (adopted as Annex 2); and (iii) the Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings (adopted as Annex 3). See Resolution carried by the Council of the Canadian Bar Association (Annual Meeting held in Halifax, NS on August 13-14, 2011)(the "Resolution", which can be found at the Task Force's web-site: http://www.cba.org/CBA/ClassActionsTaskForce/Main/default.aspx). The focus of this paper is limited to the adoption and implementation of the first protocol (again, the "Protocol"), and a copy of the Protocol can be found at the same web-site, namely: http://www.cba.org/CBA/ClassActionsTaskForce/Main/ (Attachment 11-03-A-Annex 1).

[7] To date, based on a search of reported case law, the Courts have adopted the Protocol in respect of multijurisdictional class proceedings in four class proceedings: *St-Marseille c. Procter & Gamble Inc.*, 2012 QCCS 1527; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2012 BCSC 1136; *Osmun v. Cadbury Adams Canada Inc.*, 2012 ONSC 3837; and *Heney v. Reebok*, 2012 ONSC 4449 (and related proceedings in other jurisdictions).

II. The Established Use of Technology in Canadian Courtrooms

The origins of the Protocol are grounded, in part, on the ability of counsel and the courts to leverage the use of technology to convene simultaneous court hearings, primarily through video-conferencing.[8] The Protocol's reliance on such technology, however, is not new. Under the current rules of most, if not all, superior courts, there is an established framework in place to accommodate joint hearings with multiple counsel and other courts. Indeed, even before the advent of video-conferencing, the use of telephone conferencing to facilitate appearances was well-known and fairly broadly used. For example, the *Criminal Code of Canada* contains a number of express provisions permitting the use of telephone conference or other means to facilitate remote attendances.[9] Similar provisions exist in various court rules and evidentiary statutes such as the Ontario *Rules of Civil Procedure*[10] and the *British Columbia Evidence Act.*[11] The introduction of video-conferencing capabilities has only increased the use of technology to facilitate hearings, including trials. One court has even observed that testimony delivered by video-conferencing is "as good or better" than a live attendance:

> In my experience, a trial judge can see, hear and evaluate a witness' testimony very well, assuming the video-conferencing arrangements are good. Seeing the witness, full face on in colour and live in a conference facility is arguably as good or better than seeing the same witness obliquely from one side as is the case in our traditional courtrooms here in the Ottawa Courthouse.[12]

The increasing demand for the use of technology is not lost on the Courts, who have strived to modernize their courtrooms with the latest technology, including videoconferencing capabilities. As of November 2012, British Columbia's courts had 220 videoconferencing endpoints covering 80% of its courts.[13] Video-conferencing is used on a daily basis in the Vancouver courts to facilitate attendance by parties who cannot travel, and in criminal proceedings (to avoid having to bring imprisoned defendants to the courts).[14] Alberta had 300 videoconferencing units available for use in its courtrooms,[15] and Ontario had 140 endpoints in courthouses across the province.[16]

The availability of technology to facilitate hearings and the increasingly greater level of comfort of courts and staff with such technology provide an ideal opportunity to facilitate the management of multi-jurisdictional class actions. Although technology has been traditionally

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[8] *Protocol*, s. 10 (referring to the ability to convene simultaneous court hearings "by video-link or other means").

[9] See for example, s. 478.1 (applications for search warrants); s. 487.05(3) (application for warrants to take bodily substances for forensic DNA analysis); s. 742.6 (arrest for allegations of breach of conditional sentence orders); and s. 515(2.2) (remote appearances of an accused at a bail hearing) in the *Criminal Code*, RSC 1985, c. C-46.

[10] *Rules of Civil Procedure*, RRO 1990, Reg. 194, R. 1.08(1)-(6).

[11] *British Columbia Evidence Act*, RSBC 1996, c. 124, s. 73(1)-(8).

[12] *Pack All Manufacturing Inc. v. Triad Plastics Inc.* (2001), 290 CPC (5th) 354 at para. 6 (Ont. S.C.J.)(per Rutherford J.).

[13] Prof. Erich P. Schellhamme, *A Technology Opportunity for Court Modernization: Remote Appearances* (Canadian Centre for Court Technology: January 2013) at p. 11 ("*Remote Appearances*").

[14] Information kindly provided by Sandra Salvador, Supervisor of In-Court Technologies for the Supreme Court of British Columbia.

[15] *Remote Appearances*, at p. 11.

[16] *Remote Appearances*, at p. 31.

used to permit remote attendances of single parties at proceedings convened in an actual courtroom, the use of the same technology to facilitate joint and simultaneous hearings of multiple courts was a logical next step.

III. The National Class Action Problem

(a) The Origins of the Problem and the Protocol

In 1995, the Ontario Superior Court concluded that the *Class Proceedings Act, 1992* authorized the certification of a class that included extra-provincial residents on an opt-out basis.[17] Since that time, courts in other provinces have reached a similar conclusion, supported by provisions in their class proceedings legislation providing for the certification of a class that includes residents of other provinces, whether on an opt-in or opt-out basis.[18] As a result of this statutory framework, it is open to a representative plaintiff to file and/or obtain certification of a class in one province that specifically overlaps with a proposed and/or certified class in another province in respect of the matter.[19] The possibility for the certification of overlapping classes, in turn, creates a live risk that a court in one province may reach a decision that is in direct conflict with the decision of a court in another province with respect to the same underlying issue in proceedings involving the same parties.

In the early years of class proceedings practice in Canada, the risk of overlapping and competing class actions was solved primarily through consent and coordination. Given the small size of the plaintiffs' bar at that time, the actual instances of conflict were relatively rare. In the event of the filing of duplicative proceedings in one or more provinces, representatives of the plaintiffs' firms would generally seek to negotiate a resolution whereby one firm would take the lead in seeking certification in one jurisdiction. After time, the plaintiff firms in the various provinces gradually built informal relationships of coordination, and it became common practice for a group of firms to file three coordinated class proceedings with inter-locking classes in the three largest jurisdictions in Canada – namely, Ontario, Quebec and B.C. Under this practice, the coordinated group of firms would select one provincial forum to litigate certification, and the remaining proceedings would be held in abeyance. In the event of a settlement, the coordinated group of firms would seek settlement approval in all three jurisdictions, with a view to obtain approval of

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[17] *Nantais v. Teletronics Proprietary (Canada) Ltd.* (1995), 127 DLR (4th) 552 (Ont. S.C.J.). The background and origin of the Task Force's mandate and the Protocol are described at some length in a companion consultation paper that was published as part of the Task Force's work. See CBA Task Force, Consultation Paper: Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions (June 2011)(the "Consultation Paper"). A copy of the Consultation Paper can be found at the Task Force's web-site: http://www.cba.org/CBA/ClassActionsTaskForce/Main/judicial_protocol_consultation.aspx.

[18] For example, the B.C. *Class Proceedings Act* specifically provides that a person who is not a resident of British Columbia may participate in a class proceeding in B.C. but only on an "opt-in" basis. See *Class Proceedings Act*, RSBC 1996, c. 50, s. 16 ("B.C. *Class Proceedings Act*")

[19] There remain ongoing constitutional concerns relating to the purported statutory ability of a superior court of one province to exercise jurisdiction in respect of both the procedural and substantive rights on an extra-provincial resident, particularly in respect of an absent class member who has no other connection to the forum. See, e.g., P. Morrison, E. Gertner & H. Afarian, "The Rise and Possible Demise of the National Class in Canada" (2004) 1 Can. Class Action Rev. 67; P.W. Hogg & S.G. Mckee "Are National Class Actions Constitutional?" (2010) 26 N.J.C.L. 279. Given the narrow scope of this article, the authors do not intend to survey or opine on these constitutional issues, aside from noting that there remains ongoing debate relating to the constitutional ability of a superior court to certify an extra-provincial class.

the settlement agreement and class-wide release based on a seamless national class (typically based on a resident class in B.C.[20], a resident class in Quebec (consisting of residents with less than 50 employees)[21] and a "rest-of-provinces" class plus Quebec large employers in Ontario (for convenience, an "inter-locking national settlement class"). This model of coordination prevailed in many class proceedings in the 1990s, and was largely workable – there were very few carriage disputes in these cases and the instances of judicial conflict were rare to non-existent.

This cooperative model was dramatically challenged in 2006-2008, largely as a result of contentious proceedings in the Vioxx case.[22] In brief, in 2004, Merck-Frost voluntarily withdrew Vioxx, a popular anti-inflammatory drug, from the market as a result of concerns that it created a higher risk of heart attack and strokes. Shortly thereafter, more than thirty class actions were filed in jurisdictions across Canada. While a number of plaintiff firms coordinated their efforts and formed a national consortium of plaintiffs counsel, a number of firms declined to join the consortium and disputed carriage of the class proceedings. The carriage dispute mushroomed into competing motions for certification in different provinces, and ultimately led to the concurrent certification of overlapping classes in Ontario and Saskatchewan.

The dispute in Vioxx ultimately dissipated as a result of the Saskatchewan Court of Appeal's eventual decertification of the class proceeding in Saskatchewan[23], thereby eliminating the risk of duplicative and/or contradictory rulings. But the sour experience in Vioxx led a number of practitioners to explore the possibility of a more formal mechanism to coordinate class proceedings among the provinces. In his decision on certification in Vioxx in Ontario, Justice Cullity specifically identified the need for an agreement or protocol among the Superior Courts. As he stated:

> If decisions of provincial courts on carriage motions are not to be respected throughout Canada, this merely underlines – and makes even more urgent – the need for an agreement or protocol among the superior courts that will provide

[20] Under ss. 6(2), 8(1)(g) and 16(2) of the B.C. *Class Proceedings Act*, the court may certify a class of non-residents of B.C. as a separate sub-class, but only on an opt-in basis. As a result, as part of a national class settlement, the B.C. settlement class will typically be limited to B.C. residents while the Ontario settlement class will capture the residents of other provinces on an "opt-out" basis, in order to maximize the number of class members who will be covered by the settlement.

[21] Under art. 999 of the Quebec *Code of Civil Procedure*, RSQ, c. C-25, the court may only certify a class of individuals or companies that have less than 50 individuals under a contract of employment. As a result, as part of a national class settlement, the Quebec settlement class will typically be limited to Quebec residents with less than 50 employees while the Ontario settlement class will capture larger employers in Quebec and the residents of other provinces on an "opt-out" basis, again in the interests of maximizing the number of class members who will be covered by the settlement.

[22] This was the result of a series of decisions in Ontario and Saskatchewan, including: *Setterington v. Merck Frosst Canada Ltd*., [2006] OJ No. 376 (S.C.J.) (Ontario carriage motion); *Wuttunee v. Merck Frosst Canada Ltd*., 2008 SKQB 78 (certification of Saskatchewan class action); *Wuttunee v. Merck Frosst Canada Ltd.*, 2008 SKQB 229 (Saskatchewan class action converted to a multijurisdictional class action include extra-provincial classes, following changes to the Saskatchewan legislation); *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32 (Ont. S.C.J) (certification of Ontario multijurisdictional class action); *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 (certification of Saskatchewan action overturned on class definition issues); *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 CanLII 57570 (leave to appeal and leave to cross-appeal to S.C.C. dismissed). This summary of the Vioxx decisions is set out in the *Consultation Paper*, at p. 5, fn. 10.

[23] *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 (certification overturned).

> for nationally-accepted carriage motions and determine the jurisdiction in which such motions will be heard.[24]

Similarly, in *Canada Post*, the Supreme Court took notice of the challenge of administrating national class proceedings in Canada, and encouraged the creation of "more effective methods of managing jurisdictional disputes" outside the litigation process. Writing for the Court, Justice LeBel stated:

> As can be seen in this appeal, the creation of national classes also raises the issue of relations between equal but different superior courts in a federal system in which civil procedure and the administration of justice are under provincial jurisdiction. This case shows that the decisions made may sometimes cause friction between courts in different provinces. This of course often involves problems with communications or contacts between the courts and between the lawyers involved in such proceedings. However, the provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space. It is not this Court's role to define the necessary solutions. However, it is important to note the problems that sometimes seem to arise in conducting such actions.[25]

IV. Managing Multi-Jurisdictional Settlements Before The Protocol

Before the adoption of the Protocol, there were two principal approaches to managing multi-jurisdictional class action settlements. In some cases, the approval process was carried out from at least one "opt out" jurisdiction, which would include residents of other provinces. This approach, while highly efficient, required a high degree of comfort with the enforceability of the settlement, and in particular, the release, all of which could be subsequently challenged. In other instances, motions for settlement approval were brought in each and every jurisdiction where proceedings were commenced, necessitating in attendances before all courts. In a settlement context, this meant having to make the same submissions in relation to the same settlement a number of times, an exercise that seemed to run against the "judicial economy" objective of class proceedings legislation.

The first tentative step in trying to manage multi-jurisdictional settlements in a more efficient manner was the development of the "travelling roadshow" used in the Indian Residential Schools settlement approval process (the "IRS Settlement").[26] In that case, the same team of lawyers embarked on a settlement approval journey that saw them conducting 9 settlement approval hearings in different jurisdictions from August 2006 to October 2006. This approach, while still very expensive and undoubtedly duplicative, resulted in some significant efficiencies in that the same set of highly educated counsel was able to give essentially the same presentation to all courts involved. Efficiencies notwithstanding, the travelling roadshow approach to multi-jurisdictional settlement approval is far from a complete answer to the problem, for a number of reasons:

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[24] *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 DLR (4th) 32, at para. 41 (Ont. S.C.J.).

[25] *Canada Post Canada v. Lépine*, 2009 SCC 16, at para. 57.

[26] For a review of the court materials relating to the IRS settlement, see the settlement web-site at: http://www.residentialschoolsettlement.ca/english_index.html

- Logistical Issues: The coordination of travel and attendance by one group of counsel to courts in multiple jurisdictions can result in a protracted approval process and delays in the implementation of the settlement. In the IRS Settlement approval process, the hearings began in Ontario at the end of August 2006, and the requisite final unanimous approval of all courts was not obtained until March 2007.

- Efficiency Issues: The investment associated with having one set of counsel preparing for one joint hearing is significantly more efficient than having the same set of counsel prepare for multiple hearings. Even if the hearings involve the same subject matter, there is bound to be more preparation time involved in staggered hearings than in one single hearing.

- Consistency Issues: Even if counsel uses the same set of base submissions for all jurisdictions, the reality is that each court will make its decision based on different presentations. The consistency problem also arises when a court raises a question or concern that was not raised by the earlier courts, or that is not raised by subsequent courts. These problems materialized in the IRS Settlement approval process, where the initial decisions saw five courts approving the settlement with conditions, and four approving without conditions. As the settlement required unanimous approval, it became necessary to satisfy the concerns of the five courts, and for a further hearing of all judges to approve the settlement, as modified, to address the concerns of the five courts.

Aside from the travelling road show, the IRS Settlement approval process is also noteworthy for the joint hearings that were conducted in the second stage of the approval process. Since the courts were not unanimous in their approval of the settlement agreement, it became necessary to address the concerns of the five courts that had imposed conditions for their approval. Upon satisfying those conditions, the parties conducted a joint hearing of all courts in Calgary for approval of the modified settlement agreement. Eight of the nine judges were present in person for that joint hearing, with the remaining judge from Nunavut participating by means of telephone.

Obviously it is not often that the courts are prepared to travel to conduct joint hearings. Aside from jurisdictional issues arising from extra-provincial sittings, it took a “perfect storm” of a historical settlement involving a very large number of settlement class members with significant claims (and a healthy serving of political issues on the side) to create the momentum to convene a joint hearing. As a result, in the absence of some more formal framework, the concept of joint in-person hearings could not be counted on as a regular solution to the management of multi-jurisdictional class action settlements.

Based on the seed planted by the IRS Settlement approval process, the management of multi-jurisdictional class actions took another giant leap forward with the *Menu Foods* settlement approval process. The case arose in March 2007 with a wide recall of almost 100 brands of dog and cat food following a discovery that one of the ingredients imported by the manufacturer was contaminated with melamine. 17 proposed class actions were commenced throughout Canada. At least 50 actions were commenced in the United States.

By the time the parties reached a North American settlement of the underlying claims, the U.S. proceedings had been consolidated pursuant to the multi-district litigation system (the "MDL System"), and there was a well-established process in place for seeking approval of the settlement before a single U.S. federal court. By contrast, there is no equivalent to the MDL System in Canada. There had been some rationalization of the various proceedings up that time, but there remained proposed class actions in all Canadian provinces, save and except for Prince Edward Island. As the parties' settlement was subject to approval of all courts, it was necessary to seek approval of nine Canadian courts, including courts in jurisdictions when there had been no active steps in the litigation other than the filing of the initial pleadings. The approval had to be obtained by a certain date in order to accommodate certain termination rights arising from opt-outs in the U.S. and in Canada. As a complicating factor, the parties were attempting to mirror in Canada the same two-stage approach adopted in the U.S., which would have resulted in a total of 18 individual hearings.

Although there were no processes in place for conducting joint hearings, the parties made inquiries and determined that it was technologically possible to link nine courts simultaneously by video-conference. The parties then wrote a letter to all nine courts, proposing:

> In order to promote judicial economy while at the same time maximizing the amount of information available to all Canadian Courts, the parties would like to propose that, technology permitting, the hearings be conducted concurrently by all Canadian Courts, by videoconference and/or teleconference. The plaintiffs propose to make our submissions in a court in British Columbia, and all other Canadian Courts would be able to see and/or hear us, and pose questions.

As all judges were in agreement, there were two sets of joint video-conference hearings conducted in connection with the *Menu Foods* settlement approval: an initial conditional certification and notice approval hearing, held on June 23, 2008, and a settlement approval hearing, held on November 3, 2008. Both hearings were conducted with lead counsel appearing and making submissions out of Vancouver, British Columbia, and local counsel appearing to provide assistance to their respective courts in the other jurisdictions. All courts were linked by video-conference, with the end result that each judge had a monitor with nine squares, each representing one of the nine courts. Counsel acted as the "host" of the hearings, inviting each court to ask questions and addressing those questions, such that by the end of the hearings, all courts had an opportunity to not only ask their own questions, but also hear the questions and comments of the other courts and counsel's response to same. The modifications made to address a court's concern (such as the broadening of notice to include certain specific publications) were heard by all, such that by the end of the day, all courts had the same understanding as to the modifications that had been made to the agreement, and no further hearings were required. It was a remarkably efficient way to seek approval of nine courts to a single settlement agreement.

Although undeniably creative and efficient, the joint hearings in each of the IRS Settlement and *Menu Foods* settlement approval processes were convened at the request of counsel, and ultimately proceeded on the basis of the consent of all of the parties. In the absence of such consent, there was no governing framework whereby the courts, on their own initiative, could manage parallel multi-jurisdictional proceedings that were more contested. As a result, given these limitations and the resulting experience in Vioxx, representatives of the judiciary and the practicing bar sought to explore a formal framework for addressing the management of multi-

jurisdictional class actions that avoid the risk of duplication and create efficiencies for the parties while at the same time respecting the boundaries of the jurisdiction of the individual courts.

V. The Establishment and Operation of the Protocol

In February 2010, the CBA appointed the National Task Force on Class Actions (again, the "Task Force") with a view to exploring the possibility of a protocol that would, among other goals, "coordinate and harmonize activities in proposed overlapping class proceedings" and "implement a general framework … to address basic administrative issues arising out of national and multi-jurisdictional class actions".[27] More specifically, the Task Force described its mandate in the following terms:

> The CBA National Task Force on Class Actions was launched with the aim of solving the difficult problem of overlapping multijurisdictional class actions. Overlapping, multijurisdictional class actions (class actions commenced in more than one jurisdiction ostensibly covering extra-jurisdictional claimants) impede access to justice. They create confusion for members of the public who may be presumptively included in more than one class action and subject to conflicting court judgments. They also create uncertainty as to the size and composition of class membership in a class action, thereby increasing litigation costs, jeopardizing the viability of existing class actions, and magnifying the risk to law firms litigating such cases. They dissipate court resources as different courts in different jurisdictions might hear and issue decisions on the same set of facts involving the same claimants. The public, the judiciary, and the litigation bar alike are frustrated by the existing system.[28]

The members of the Task Force included representatives of the judiciary as well as experienced class action plaintiff and defence counsel from across Canada.

In their deliberations, the Task Force did not seek to resolve the lingering constitutional questions relating to the certification of national classes in Canada.[29] In addition, they did not seek to establish an equivalent of the U.S. multi-district litigation system, given the fundamental differences between the U.S. federal court system relative to Canada.[30] However, the Task Force did seek to create a coordinated system of case management that would permit one court in one province to exercise case management authority over a number pending class actions in respect of the same matter.

The Task Force circulated draft protocols for consultation with the bar and the public in June 2011. The draft protocols resulted in significant commentary and objections, particularly with respect to the Task Force's proposal for active case management by a judge in province in respect of proceedings in another province. After further consideration, the Task Force proposed a more streamlined and modest protocol that did not include the case management proposal, and was focused instead on facilitating inter-judicial communications and coordinating the process for settlement approval in national class action settlements.

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[27] See *Consultation Paper*, at p. 1 (outlining mandate of Task Force).

[28] This summary statement of the Task Force's mandate is found at the Task Force's web-site, posted at: http://www.cba.org/CBA/ClassActionsTaskForce/Main/PrintHTML.aspx?DocId=42025

[29] *Consultation Paper*, at p. 6.

[30] *Ibid*.

The Task Force's resulting protocols consisted of the Protocol (Annex 1) and two protocols developed in conjunction with the American Bar Association for use in US/Canada cross-border class action litigation (Annex 2 and Annex 3).[31] The Protocol (Annex 1) was approved by the CBA Council "as best practices" in August 2011.[32] The other two protocols were endorsed at the same meeting. The Protocol was subsequently approved by the Canadian Judicial Council in September 2011 and has since been approved by certain provincial courts.[33] Although the Protocol does not have any independent statutory force on its own, each provincial court has the ability to adopt the Protocol for the purposes of a class proceeding as part of their general power to control their own procedure and to make orders that facilitate the "fair and expeditious determination" of the proceeding.[34] As reviewed in more detail below, the Protocol builds upon the recommendation of the reports prepared for the Uniform Law Conference of Canada ("ULCC") in 2005 and 2006 that a system of mandatory notices be implemented to allow the courts and counsel to know what is happening in other jurisdictions.[35]

(a) The Application of the Protocol

Under the terms of the Protocol, a court may adopt the application of the Protocol "in whole or in part for" the purposes of an "Action".[36] An "Action", in turn, is defined to include a "putative, certified or authorized class action" that shares the same subject matter as a "putative, certified or authorized class action in two or more provinces".[37]

The application of the Protocol to an Action is not automatic. Rather, the Protocol contemplates a process where either a party or the court, acting on its own initiative, will seek the application of the Protocol to the particular proceedings. Either way, all parties must be given notice of the intended application of the Protocol and have an opportunity to make submissions. If the Court concludes that the Protocol should apply, in whole or in part, the court must issue an order that specifically implements the Protocol. Based on the practice that has emerged to date, this type order has acquired the name/acronym of an "MCMO" (a "Multi-Jurisdictional Case Management Order"). While the term is arguably a misnomer (the phrase does not appear in the Protocol, and the case management provisions of the Protocol were not adopted), the phrase has stuck and has been endorsed by the courts to date.

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[31] See the description of the Task Force's three protocols at footnote 6 of this paper.

[32] *Resolution,* at p. 1.

[33] See, e.g., Notice to the Profession from Chief Justice R.D. Laing of the Court of Queen's Bench of Saskatchewan (dated December 5, 2011) (confirming approval of the Protocol by the Court of Queen's Bench).

[34] See, e.g., the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 12 ("The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate").

[35] *Consultation Paper,* at p. 3 (referring to the Uniform Law Conference of Canada (Civil Law Section), "Report of the Uniform Law Conference of Canada's Committee on National Class Actions and Related Interjurisdictional Issues: Background & Analysis" (March 2005) and "Supplementary Report on Multijurisdictional Class Proceedings in Canada" (August 2006)(the "ULCC Reports").

[36] *Protocol*, ss. 1(a) & 2.

[37] *Ibid.*

More significantly, the Protocol conspicuously does not require consent of the parties for its application. In other words, it is possible for a party to move for the application of the Protocol over another party's objection and for the court to direct the application of the Protocol in the face of that objection. As a matter of fact, the first reported instance of the adoption by a court of the Protocol in the *Procter & Gamble* case involved a contested application.[38] In deciding to apply the Protocol in *Procter & Gamble*, Justice Claude Auclair noted that the Protocol would, among other things, address the "problems with communications" highlighted by the Supreme Court of Canada in the *Lépine* case.[39]

(b) The Notice Obligations

In the event that the court orders the application of the Protocol, the parties will be subject to a number of notice obligations.[40] Those notice obligations generally reflect the recommendations of the ULCC Reports that all parties and courts in class actions involving a certain subject matter be made aware of similar proceedings in other jurisdictions. As explained in by the Task Force in its Consultation Paper, "the goal of this provision is to provide for the more efficient sharing of information and reduce the risk of inconsistent decisions between courts".[41]

Once the Protocol is applied, all parties will be under a positive obligation to advise the court of any other pending Action (to the event that they are aware of such an Action), which as noted above is very broadly defined. The plaintiff's counsel is also responsible for posting the pleadings for their action on the CBA Class Action Database (an obligation which already exists in most jurisdictions, but which is not always discharged). Finally, the parties are responsible for generating a Notification List that identifies the names and contact information for all Actions, and are obliged to share this Notification List with the Court. In the event of future motions, the parties are responsible for serving every counsel on the Notification List, to ensure that all parties in each Action are informed of motions and developments that might affect their interests. This means, in practice, that if the Protocol is applied to an uncertified action, notice of the certification motion (and all other motions) will need to be given to counsel in all other putative, certified or authorized class proceedings that share the same subject matter as the proceeding in which the MCMO is made.

(c) The Motion for Settlement Approval

The heart of the Protocol relates to the establishment of a coordinated process for settlement approval. The provisions dealing with settlement approval of multi-jurisdictional actions comprise 7 of the 14 provisions of the Protocol.

Under the Protocol, the process for multi-jurisdictional settlement approval is triggered if the parties enter into a "joint settlement" of the Actions.[42] While this term is undefined, it presumably includes a settlement covering one or more of the proceedings. In such circumstances, the parties are obliged to bring a "Motion for a Multijurisdictional Settlement

[38] *Sophie St-Marseille v Procter & Gamble Inc.*, 2012 QCSC 1527.

[39] *Ibid.* at paras. 20-21.

[40] *Protocol*, ss. 3-6.

[41] *Consultation Paper*, p. 7.

[42] *Protocol*, s. 7.

Approval" that will be served on all parties and filed in all courts. Although "parties" is also not defined, the requirement in the Protocol that all motions be made on notice to the broader Notification List means, in practice, that "parties" should include parties in the other Actions. Once the motion has been brought, the courts are authorized to engage in direct communications with respect to the motion. In particular, the courts may communicate for the purpose of determining the schedule of approval hearings, whether a single order or multiple orders should issue, the content of the settlement approval order, the manner of settlement administration and the form and content of notice to the settlement class.[43]

The Protocol also sets out certain minimum requirements of a class notice for the purpose of the impacted jurisdictions. In particular, the multi-jurisdictional settlement notice is required to include the following for the benefit of class members:

- A summary of the case.
- A definition of the settlement class, and any related sub-classes.
- A list of the class proceedings that are the subject of the Motion for a Multijurisdictional Settlement Approval.
- A description of the essential terms of settlement, including the amount of the settlement, the distribution plan for allocating the funds, the method of filing a proof of claim, a summary of maximum amounts sought by class counsel for fees, disbursements and taxes.
- The time and location of the settlement approval hearings.
- A description of the process for delivering objections to the settlement and/or class counsel fees.
- A description of the process for opt-ing out of the settlement and/or the proceeding (if applicable).
- A statement confirming the binding nature of the settlement for class members who have not opted out.
- The contact information for class counsel and the settlement administrator.[44]

(d) The Settlement Approval Hearing and Order

The Protocol expressly contemplates that the courts may convene a joint settlement approval hearing.[45] More specifically, if the court determines that the hearing should be held jointly in respect of one or more Actions, the courts may direct that the hearing shall be conducted "in a manner that will permit all parties and all judges to participate in the hearings". The Protocol

[43] *Ibid.*, s. 9.

[44] *Ibid.*, s. 8.

[45] *Ibid.*, s. 10.

also specifically authorizes the courts to convene a joint hearing through the use of technology, by way of "video link or other means".

Once the hearing has been convened, the courts are empowered to issue a settlement approval order. In particular, the Protocol contemplates that the courts may issue a single consolidated order, called a "Multijurisdictional Class Settlement Approval Order".[46] This order may be issued "in any form and in any manner" which is "just and expeditious". In particular, the courts may issue a single order, or separate orders that reflect the applicable legislation in each province. Finally, the courts may approve a final notice of settlement approval, provided that the notice contains all of the information provided in the first notice of settlement approval hearings.

(e) Settlement Administration

Finally, the Protocol contemplates a coordinated process for settlement administration. In particular, under the Protocol, the courts may designate a single judge who will act as the supervising judge for the purpose of administering the approved settlement. Once designated, the appointed judge may determine any dispute arising from the settlement, regardless of the jurisdiction in which that dispute arises, and may make such orders as are just and expedient for the orderly administration of the settlement agreement. However, as a cautionary provision to address constitutional concerns associated with inter-provincial delegation, the Protocol expressly provides that each court will retain the jurisdiction to deal with the issues arising from their own respective jurisdictions.

VI. The Protocol

(a) Joint Hearings: From Bright Idea to Reality

Although the courts are empowered to seek to apply the Protocol on their own initiative, as a matter of practice the Protocol is usually adopted at the request of one or more parties. While there has been a reported instance of the Protocol being adopted in contested circumstances outside the settlement context,[47] based on the record of cases so far, the Protocol has been most frequently invoked upon the entry of a settlement that requires multiple approvals – and the request has typically originated at the initiative of the plaintiff that is seeking to obtain those multiple approvals. As a result, for the balance of this paper, we have considered the application of the Protocol for the purposes of the settlement approval process.

If the goal is to facilitate multi-jurisdictional approval of a settlement, the parties negotiating the settlement agreement will typically include a provision that provides that the parties may seek approval of the various courts by way of a joint hearing. The first order of business will be to obtain the requisite MCMO from each of the courts involved in the settlement approval process. The motion for the MCMO will be relatively straightforward. Typically, it will include an affidavit indicating that the parties have agreed to the application of the Protocol for the purposes of the approval of the settlement and any "ancillary orders" (so as to avoid the need to return to the Courts for another MCMO should any additional issues arise). In experience of the authors,

[46] *Ibid.*, s. 11.

[47] The defendant in *Sophie St-Marseille v Procter & Gamble Inc.*, 2012 QCSC 1527 sought to invoke the Protocol at an early stage in the management of the proceeding, prior to the entry of any settlement.

the affidavit material will also include prior orders the same court has already issued (for example, in the price-fixing context where there are multiple settlements with multiple parties at varying stages of the proceeding) as well as a proposal as to how the settlement approval process will be conducted. If the judge assigned to the matter has never participated in a joint hearing, it is wise to include in the materials an explanation of how prior hearings have been successfully conducted in other cases. If a hearing date is either obtained or proposed, then that information should also be included in the material.

The motion for the MCMO can be brought before each of the courts separately, or combined with another motion such as a notice approval motion. Given coordination difficulties, bringing the MCMO motion separately before the various courts may be the faster option, in particular in jurisdictions that allow for motions to be made in writing, without the necessity for a court appearance. Having regards to the form of the MCMO, the Protocol does not prescribe any actual forms, but a practice has developed for MCMOs to include the following orders:

- An order adopting the Protocol for the purposes of the approval of the settlement agreement at issue, and all ancillary orders required to give effect to the terms of said settlement agreement, including, if applicable, any partial conditional certification of the action. This order is required in order for the Protocol to apply.

- An order "subject to similar orders being made" in the other Actions allowing the plaintiffs to file joint motions for the contemplated motions, which may include the approval of class counsel's fees in relation to the settlement agreements at issue, using the combined style of cause of the Actions. This order, although not technically required, is useful when navigating the differing procedural requirements of each court registry, some of which may reject motions and other material filed with more than one style of cause.

- An order "subject to similar orders being made" in each of the other Actions directing that the hearing of the contemplated motions proceed by way of joint teleconference or videoconference, as the case may be, before the various courts. This order formalizes the courts' determination as to how the settlement approval hearing is to take place.

- An order "subject to similar orders being made" in each of the other Actions directing the date and time of the settlement approval hearings (if a date had been set).

Copies of MCMOs issued in prior proceedings are attached as schedules to this paper.

The most challenging aspect of coordinating a joint hearing is the scheduling issue. First of all, counsel needs to consider the location of the courts involved and the proposed length of the hearing. Canada has a number of different time zones, and depending on the geographical reach of the hearing, there may only be 4 hours of court time that will work for all courts. Second, different courts have different practices when it comes to scheduling. Some courts will give counsel a number of options for hearing dates where a judge is available, whereas others require counsel to write requesting specific dates, and will simply respond as to whether the requested dates are available. Such varying approaches can quickly turn the task of locating a suitable hearing date into a long and often frustrating game of Battleship. The problem is most often at the registry level, where the lack of familiarity with the Protocol can result in an

(understandable) unwillingness to depart from established practices. Barring the development of practices to assist in the scheduling process, the (not ideal) solution has been to involve judges in the scheduling process.

The logistical issues require some care but are not as difficult as they may appear. As noted above, most courts have their own video or audio conferencing equipment and in-house personnel who are trained in using it. To the extent that any courts still do not have their own equipment, they will likely have a relationship with an outside firm who can provide the equipment or the facilities on an as-needed basis. Audio-conferences are straightforward as they only require a conference call number, which many law firms already have. Video-conferences require the involvement of a third party carrier to "bridge" the various courts (in past experience, the parties have used the services of Telus). The party arranging the video-conference will normally contact Telus and make an appointment for the hearing. In order to make the appointment, the party will need to have the ISDN# of each of the courts being linked, and will have to provide the name and contact information of the person responsible for the video set up in each of those courts. This information can be obtained by contacting each of the courts in advance.

In addition, if any audio or video equipment is going to be used, the party organizing the joint hearing should make sure to complete any forms required by the courts. In British Columbia, a Court Video Conference Request Form is required. In Ontario, two forms are required: a Video-Conference Confirmation Form and a Request for Audio / Visual Equipment and Services. Care should also be taken to ensure that the appropriate facilities are booked in each of the courts. If the hearing is conducted by audio-conference without counsel attending, some courts will have their judges attend from their own Chambers. If a courtroom is required, counsel should ensure arrangements are made to secure same.

Telus will usually schedule a "test" call on the half hour immediately preceding the hearing. Our practice is to schedule an additional test a day or two in advance of the actual hearing, with only one counsel and no judges in attendance to ensure the courtrooms are all linking properly. Securing the necessary courtroom time to carry out this test is also not an easy task, but something that has proven worthwhile in our experience. There are often issues that need to be ironed out, and knowing the potential problems allows the organizing party to have solutions if the same issues creep up during the hearings.

On the hearing day, the organizing party should have someone in attendance who is responsible for the connection. That person should have a cell phone with email access and have the contact information for all personnel in the various courts, and for Telus in case any issues arise. Typically, the courts will convene one at a time, and there will be some waiting time before all courts have convened and are "live". Once that occurs, the hearing should proceed smoothly. The main issue will be avoiding multiple parties speaking over each other, which can interrupt the audio feed. This problem is easily managed by deciding in advance on who will act as the "host" for the hearing. The host will be responsible for eliciting submissions or questions from counsel and the other courts. From a practical perspective, as each court will have a different set of "other courts" visible on their screens, it is not possible to refer to "the court on the upper left" – courts should be referenced by name rather than position on the screen. Also, to the extent that the video feed may be interrupted and resumed, the courts may return in a different position than they appeared initially when introductions were made. In the Menu Foods case, we addressed

this problem by having a number of blank sheets with pre-drawn squares so that someone in each court would track the other courts appearing on their screens.

As is the case in usual hearings, the parties will be responsible for filing their materials with each of the participating courts. Having the application materials and supporting affidavits sworn using the various styles of cause assists in ensuring that the courts will have a uniform record. This allows a judge in one court to more easily follow any comments made in relation to materials in the record of another court. That is not however necessary. Counsel can prepare the materials in any manner they deem appropriate for the hearings in question. In the Menu Foods case, we created separate records for each of the courts which contained some specific materials (such as the representative plaintiffs' affidavits), but the binders were organized such that the same type of document (such as the proposed form of notice) would appear in the same position across all binders (e.g. Tab 4A). In the experience of the authors, the courts will be receptive to receiving materials in whatever manner will best facilitate the conduct of the joint hearings.

(b) The Implementation of the Protocol

To demonstrate the application of the Protocol in practice, the authors have summarized their experience in applying the Protocol in two significant national class actions: the *Osmun* case and the *DRAM* case.

(i) The *Osmun* Case

The class actions in *Osmun* arose out of a criminal investigation by the Competition Bureau (the "Bureau") relating to the pricing and distribution of chocolate confectionary products in Canada. In November 2007, the Bureau obtained search warrants and conducted searches at the offices of a number of chocolate manufacturers in Canada (including Nestlé Canada, Hershey Canada and Mars Canada) as well as one distributor (ITWAL). Following the completion of those searches, the public obtained copies of the underlying "information to obtain" that had been filed in support of the warrants (the "Information"). In the Information, a representative of the Bureau deposed that the Bureau had received information from a "cooperating party" under the Bureau's immunity program, and that based on that information, the representative believed that Nestlé Canada, Hershey Canada, Mars Canada and ITWAL had engaged in criminal price-fixing contrary to the *Competition Act*.

The Bureau conducted its searches on November 28, 2008. Within a mere number of hours (at 4:00 PM on that same date), a class action was filed in the province of Quebec by Siskinds DesMeules. Within the next few months, there were thirteen additional class actions filed in nine provinces, resulting in a total of fourteen class actions. Of these fourteen class actions, five class actions were filed in the western provinces by Merchant Law Group and affiliated firms. The remaining class actions were filed by a coordinated consortium of Siskinds, Branch MacMaster, Sutts Strosberg and local firms in provinces across the country. The proposed classes included significant overlap, both between the two counsel groups (e.g., the two rival class proceedings in B.C. sought to represent the same residents in B.C.) as well as within each counsel group (e.g., the claim in Ontario sought to certify a national class in spite of the filing of local claims in eight other provinces).

Following closed-door negotiations among plaintiffs' counsel, it was determined that Siskinds would lead the prosecution of the class proceedings through the main proceedings in Ontario (the Osmun claim). But prior to the commencement of the certification process in Ontario, the coordinated plaintiffs group disclosed in the fall of 2009 that they had entered into early settlements with Cadbury Adams Canada and ITWAL. Under the terms of the settlements, the plaintiffs agreed to seek conditional certification and settlement approval in three provinces (Ontario, B.C. and Quebec) that would cover a traditional "interlocking" national settlement class consisting of separate classes in three provinces.[48] Upon settlement approval, the plaintiffs undertook to seek a dismissal of the remaining overlapping proceedings.[49]

Given the absence of the Protocol at the time, the plaintiffs proceeded through separate approval applications before the Ontario, B.C. and Quebec courts. The proposed settlement classes were conditionally certified in December 2009, and the parties sought settlement approval from the three courts in April 2010. However, in each province, the non-settling defendants (led by Hershey Canada) challenged the fairness of Cadbury's and ITWAL's settlement.[50] In short, the non-settling defendants argued that Cadbury had received a preferential settlement as an early settling party and that Cadbury was receiving the benefit of an "asymmetrical" bar order – with the result that the non-settling defendants were prejudiced since the plaintiffs had reserved the right to pursue full joint and several liability against the non-settling defendants (including in respect of Cadbury's sales). The non-settling defendants pursued their arguments in each forum under the local law of each province (i.e., they argued that the bar order was unlawful under the prevailing law in Ontario, B.C. and Quebec). Following the pursuit of separate challenges in each province, the argument of the non-settling defendants was rejected in Ontario, B.C. and Quebec.[51] The non-settling defendants pursued unsuccessful appeals before the Ontario Court of Appeal and the B.C. Court of Appeal, and the Supreme Court of Canada subsequently denied leave. Following the exhaustion of these appeals, the settlements with Cadbury and ITWAL became effective by the fall of 2011.

Following settlement approval, Cadbury's obligations to provide substantive cooperation to the plaintiffs become effective. Within a few months, the plaintiffs entered into a new settlement agreement with Hershey Canada in December 2011.[52] Similar to the Cadbury settlement, the parties agreed that the parties would only seek court approvals in three provinces. However, since the Protocol was now in force, the plaintiffs and Hershey Canada included a specific

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[48] For a description of this traditional "interlocking" national settlement case model, see the prior sections of this paper.

[49] See Cadbury National Settlement Agreement, dated Oct. 14, 2009 (published at: http://www.classaction.ca/actions/Price-Fixing/Current-Actions/Chocolate.aspx).

[50] While this challenge to the Cadbury settlement agreement occurred outside the Protocol (and before the Protocol was adopted), the authors have included this description to illustrate the difficulties associated with an actual challenge to a settlement agreement that is prosecuted in multiple forums.

[51] See *Main v. Cadbury Schweppes* PLC, 2010 BCSC 816, affirmed 2011 BCCA 21, leave to appeal to SCC refused [2011] S.C.C.A. No. 105; *Osmun v. Cadbury Adams Canada Inc*., 2010 ONSC 2643, 2010 ONSC 2643, [2010] O.J. No. 1877, affirmed 2010 ONCA 841 leave to appeal denied [2011] S.C.C.A. No. 55; and *Roy c. Cadbury Adams Canada Inc*., 2010 QCCS 323, 2010 QCCS 334 and 2010 QCCS 4454.

[52] See Hershey National Settlement Agreement dated Dec. 30, 2011 (published at: http://www.classaction.ca/actions/Price-Fixing/Current-Actions/Chocolate.aspx).

provision within their settlement agreement that required the plaintiffs to seek a joint hearing in respect of the approval of the Hershey settlement under the Protocol.[53]

Pursuant to that provision, the plaintiffs brought motions in each of the three courts for a separate order confirming that the Protocol would apply for the limited purpose of the considering the Hershey settlement (i.e., an MCMO, as describe above).[54] In the spring of 2012, the three courts approved the MCMO, without reasons and without any opposition from the non-settling defendants.[55] The MCMO was relatively brief, and was set out in three separate orders. In particular, Justice Strathy approved the Ontario MCMO, and the order was issued on April 16, 2002. The Ontario MCMO contained the following provisions:

- The Ontario Court directed that the Protocol was adopted for the narrow purpose of the settlement.

- The Ontario Court ordered that subject to the issuance of similar orders by the B.C. Court and the Quebec Court, the plaintiffs may file joint motions for the notice approval hearing and for the conditional certification and settlement approval hearing, as well as joint motions for the approval of fees.

- The Ontario Court ordered that subject to the issuance of similar orders by the B.C. Court and the Quebec Court, the plaintiffs shall proceed with hearings by way of "joint teleconference", and the final approval hearing shall proceed by way of "joint video conference" on a specified date.

Following the issuance of the MCMO, the parties convened a joint hearing of the courts of Ontario, Quebec and B.C. in accordance with the MCMO to obtain approval of the initial class notice. Prior to the hearing, the courts had an opportunity to confer to discuss the pending motions, including the identity of the chair of the video-conference, the order of applications as well as the order of submissions.

The joint hearing involved some technical and translation challenges, resulting in a longer hearing. However, the hearing was otherwise uncontested in substance. The Courts issued the notice approval orders, each in the form of separate orders for each jurisdiction. Following the expiration of a short period for notice/objections, the parties convened a second joint hearing in

[53] *Ibid.* Section 2.5(1) of the Hershey Settlement Agreement read as follows: "The Main Plaintiffs and Hershey Canada agree to request that the Courts hold joint hearings to consider the motions [for notice approval and certification/settlement approval] pursuant to the Canadian Bar Association's Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions."

[54] It is worth noting that the Protocol appears to contemplate that a request for an MCMO must be filed in "all Courts" where there is a pending Action that is covered by the settlement. See Protocol, s. 7 ("Where there is a joint settlement of the Actions, the parties shall proceed by way of a motion for Multijurisdictional Class Settlement Approval served on all parties and filed in all Courts")[Emphasis added]. However, in *Osmun*, the MCMO was only filed in three of the nine courts where there were pending actions – namely, the three courts where the parties sought to certify settlement classes and sought to obtain a final approval order. The implications of this practice are discussed at the conclusion of this paper.

[55] See Order of Justice Butler dated April 17, 2012 in *Main v. Cadbury Schweppes* (Court File #S078807); Order of Justice La Rosa dated April 18, 2012 in *Roy c. Cadbury Adams Canada Inc*. (Court File #200-06-000094-071); Order of Justice Strathy dated April 16, 2012 (Court File #008-CV-347263PD2).

accordance with the MCMO to address conditional certification and settlement approval, as well as class counsel fees. Given that the plaintiffs did not seek to approve an interim distribution to class members, there was no distribution protocol to consider. The second hearing was heard on May 28, 2012, and posed similar technical and translation challenges. However, again, the substance of settlement approval was otherwise uncontested. Again, at the request of the parties, the Courts issued three separate approval orders.

In his reasons respecting settlement approval, Justice Strathy shared his observations on the efficiency of the process in the following terms:

> A joint videoconference was held before the three courts on May 28, 2012. Justice La Rosa of the Cour Supérieure du Québec presided over the hearing in Québec. Justice Butler of the Supreme Court of British Columbia presided in Vancouver. I presided in Toronto. Class counsel and counsel on behalf of some or all of the defendants were present in each of the three jurisdictions.
>
> Submissions with respect to certification and settlement approval were made by Mr. Charles Wright in Toronto, with Mr. Scott Maidment on behalf of Hershey providing brief additional submissions. Questions were addressed to counsel from the bench in each of the three jurisdictions. Submissions on the fee approval motion were made by Mr. J.J. Camp in Vancouver, on behalf of the plaintiffs. Again, Mr. Camp responded to questions from the various courts concerning the motion. Following the joint hearing, additional submissions were made in Québec with respect to the fee approval motion by Québec counsel, which was being dealt with as a separate matter.
>
> Counsel for both the plaintiffs and Hershey advised the courts that they had no objection to the presiding judges discussing the matter after the hearing, without the presence of counsel. They were advised that it was the intention of the courts to do so, and that they would be advised in the event that additional questions were raised. A conference call took place within ten days of the hearing. There was no difference of opinion concerning the appropriate disposition of the motions.
>
> It was the consensus of the courts and counsel that the adoption of the Protocol and the use of the teleconference resulted in an efficient hearing.[56]

A number of months later, the plaintiffs reached a third and final set of settlements with the two remaining defendants, namely Nestlé and Mars. In order to implement the settlements, the plaintiffs pursued a very similar process. To begin, the plaintiffs moved for a virtually identical MCMO, with the consent of Nestlé and Mars. In order to expedite matters, the plaintiffs brought their motion for the initial notice approval on the same date, to be returnable immediately following the granting of the MCMO. The Courts convened a similar hearing, and subsequently issued the MCMO as well as the notice approval orders for the Nestlé and Mars settlements.[57] On January 10, 2013, the Courts subsequently convened the joint hearing for settlement

[56] See the reasons of Justice Strathy relating to settlement approval of the Hershey settlement, reported at *Osmun v. Cadbury Adams Canada Inc*., 2012 ONSC 3837.

[57] See Order of Justice Belobaba (dated Oct. 31, 2012) in *Osmun v. Cadbury Adams Canada Inc.* (Court File #08-CV-347263PD2) (MCMO for Nestlé and Mars settlement, which was virtually identical to the MCMO for the Hershey settlement).

approval, and as part of this hearing, the plaintiffs also sought approval of a distribution protocol. The hearing was conducted in a similar manner as the joint hearing for the Hershey settlement.

At the final settlement approval hearing, the Courts approved the fairness of the settlements and subsequently issued three separate final approval orders. However, the Court expressed some concern in respect of the distribution protocol, and the parties arranged separate attendances before Justice Belobaba alone to resolve the distribution protocol (i.e., the subsequent attendances to address this contested issue was not conducted under the MCMO). Following some revisions, the Ontario Court approved the distribution protocol, followed by similar orders by the B.C. and Quebec Courts. And upon entry of the final approval orders, the parties initiated an entirely separate process outside of the Protocol for arranging for the dismissal of the remaining class actions across Canada as against all of the defendants.

(ii) The *DRAM* Case

In DRAM, the courts applied the Protocol to a national class action in a more contentious setting, particularly in responding to a request for counsel fees that was subject to a class member objection.

The class actions in *DRAM* arose out a lengthy global anti-trust investigation relating to alleged price-fixing in the sale of DRAM – a memory chip that is used in computers and other electronic devices. Following a number of pleas and class settlements in the U.S., a group of coordinated plaintiffs brought class proceedings against a group of foreign manufacturers in B.C. and Quebec (and afterwards in Ontario). In contrast to chocolate, there were no filings in other provinces, and no overlapping classes – rather, the plaintiffs proposed a traditional set of three interlocking classes consisting of residents in B.C. (in the B.C. proceeding), residents in Quebec with under 50 employees (in the Quebec proceedings), and a class including all other residents in Canada and large employers in Quebec (in the Ontario proceedings) that had purchased DRAM during the class period.

The plaintiffs sought certification in first instance in B.C., and after a heavily contested certification motion and related appeals, the class proceedings in B.C. were certified by the B.C. Court of Appeal in November 2009.[58] The plaintiffs sought certification in Quebec along a parallel track, and following another heavily contested certification motion, the class proceedings in Quebec were certified by the Quebec Court of Appeal in November 2011.[59] The defendants in Quebec subsequently obtained leave to appeal from certification, and the parties argued the appeal before the Supreme Court of Canada in October 2012 in conjunction with appeals from

[58] *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575 (rejecting certification), reversed *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 (granting certification), leave to appeal denied *Infineon Technologies AG v. Pro-Sys Consultants Ltd.*, 2010 CanLII 32435 (SCC), application for reconsideration denied *Infineon Technologies AG et al. v. Pro-Sys Consultants Ltd*., 2012 CanLII 26716 (SCC).

[59] *Option Consommateurs c. Infineon Technologies*, 2008 QCCS 2781 (rejecting authorization), reversed *Option Consommateurs c. Infineon Technologies*, 2011 QCCA 2116 (granting authorization), leave to appeal granted *Samsung Electronics Co. Ltd. v. Option Consommateurs*, 2012 CanLII 26718 (SCC).

certification in two other unrelated class actions. The Supreme Court reserved judgment, and no decision has been rendered as of the present date.[60]

In the midst of these certification battles, the plaintiffs entered into a settlement agreement with one main defendant, Elpida Memory, Inc. The settlement was reached in November 2011, after the Protocol had been adopted. However, in light of the novelty of the Protocol, the parties determined to proceed by way of separate motions and hearings before the Ontario, Quebec and B.C. courts. In the spring of 2012, the Courts certified the actions as class proceedings for settlement purposes and approved an opt-out process.[61] A number of weeks later, in June 2012, the Courts convened separate but sequential settlement approval hearings, and the Courts respectively approved the settlements as fair and reasonable, without any objections.[62]

In July 2012, the parties arranged their first multijurisdictional hearing in *DRAM* to consider the plaintiffs' application for an award of counsel fees and disbursements arising from the Elpida settlement.[63] In contrast to the *Osmun* case, the plaintiffs did not seek a separate MCMO – rather, they simply included a number of MCMO provisions in the fee approval order that confirmed the application of the Protocol. The parties made their submissions by way of teleconference, and Justice Perell approved the application of the Protocol and his award of fees in an order dated July 23, 2012.[64] The operative provisions of the fee approval order for the Elpida settlement included the following provisions:

- The Court directed that the Protocol was adopted for the narrow purpose of the settlement.
- The Court ordered that the plaintiffs may file joint motions for the approval hearing as well as the approval of counsel fees.
- The Court ordered that the plaintiffs may proceed with by way of "joint video or teleconference" for the approval hearing as well as the approval of counsel fees.

The parties had arranged for the presence of a court translator during the video-conference to accommodate the Quebec proceeding, but ultimately a translator was not needed and the parties agreed to dispense with the requirement for future hearings.

A number of months later, on the day before the Supreme Court's hearing on the Quebec appeal in DRAM in October 2012, the plaintiffs announced a second and larger settlement with Micron Technologies, coupled with a number of small settlements with smaller defendants. In contrast to the settlements in chocolate, the settlement agreement with Micron did not include a specific

[60] The appeal from the Quebec Court of Appeal's certification decision in *DRAM* was argued before the Court on October 17, 2012, in conjunction with appeals in respect of *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2011 BCCA 187 and *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2011 BCCA 186.

[61] *Eidoo v. Infineon Technologies AG*, 2012 ONSC 1987.

[62] *Eidoo v. Infineon Technologies AG*, 2012 ONSC 3801.

[63] *Eidoo v. Infineon Technologies AG*, 2012 ONSC 4375.

[64] Order of Justice Perell (Elpida Settlement), dated July 23, 2012 (applying Protocol and approving class counsel fees).

provision relating to the application of the Protocol. However, the parties readily agreed that the settlement approval of the Micron settlement should proceed through by way of video-conference under the Protocol similar to the fee approval in the Elpida settlement.

The parties convened a joint hearing of the Ontario, Quebec and B.C. courts in December 2012 for the purpose of adopting certain amendments to the claim (to include new settling defendants), to approve the adoption of the MCMO, and to certify a conditional class for settlement purposes. Similar to the process that was used as part of the fee approval in the Elpida settlement, the parties did not seek a separate MCMO order, and the court considered the application of the Protocol by way of video-conference contemporaneously with the request for a conditional certification of the settlement class. In December 2012, Justice Perell approved the order for a conditional certification, and Justice Perell's order contained very similar provisions as the fee approval order in Elpida.[65]

The settlement approval hearings for the Micron settlement were heard by way of video-conference before the Ontario, Quebec and B.C. courts on January 24, 2013. The proceedings were more contentious than the prior Elpida settlement for two reasons, (i) the plaintiffs had received a significant objection from a class member relating to the absence of a distribution plan and the amount of counsel's fee request, and (ii) Justice Perell underscored the importance of the class member objection, and he expressed similar concerns relating to the plaintiff's large fee request given the absence of any interim plan to distribute the settlement funds to class members. During the joint hearing, the parties made submissions and delivered argument on these issues primarily before the Ontario Court (given that the objector was based in Ontario and given that the vast majority of class members were based in Ontario). The Courts reserved judgment, and in a decision dated February 6, 2013, the Courts approved a substantially reduced fee award.[66]

(c) The Benefits and Challenges of Joint Hearings

There are unquestionably many benefits to joint hearings beyond the obvious efficiencies gained when a single hearing replaces multiple hearings. As indicated above, a joint hearing allows all courts to receive the same submissions in relation to an issue that is put before them. To the extent that one or more courts express a concern or pose a question, the joint hearing allows all other courts to hear the concern or question, and the responses of counsel. If modifications are required to address any issues raised by any of the courts, the other courts will be made immediately aware of those modifications, thereby eliminating the need for further hearings. As the courts become more comfortable with the concept of communicating amongst themselves as allowed under the Protocol, discussions held in advance of the hearing allow the courts to come to the hearing with a very good understanding of any issues that should be addressed by counsel. This, in turn, can turn a four hour hearing into a one hour, focused hearing where no time is spent making submissions in relation to matters the courts are not concerned about.

There are, however, some downsides to joint hearings. First, as noted above, time differences may pose some limits as to the maximum duration of hearings, such that lengthier hearings may not be accommodated. Second, while joint hearings are ideal for instances where the parties

[65] Order of Justice Perell (Micron Settlement), dated Dec. 20, 2012 (applying Protocol and certifying a conditional class for settlement purposes).

[66] *Eidoo v. Infineon Technologies AG*, 2013 ONSC 853.

come before the court for approval of an issue that is no longer contentious as between the parties, joint hearings may prove more difficult in cases where there are opposing views, and the potential for interjections along the way. Third, where there are local differences in the law or in the issues before the courts, or in the languages chosen for the hearings, a joint hearing may force other courts to sit through submissions that are entirely irrelevant to the issues before them, or are in another language. One solution to this problem, depending on the scope of the difference, is to convene joint hearings for any "common" issues, and then allow the hearing to proceed individually before a single court to address any local or specific issues not shared by the other courts. This approach was adopted in part in the chocolate proceedings, where the Quebec hearings would continue after all other courts had signed off from the video feed to address Quebec issues. Fourth, the courts are not used to convening and having to wait for other courts to convene. Finally, technology is not always reliable, and for reasons that are entirely unconnected to counsel or the parties, the feed may be lost, resulting in the need for a brief adjournment to address the problem. With some planning as to what to do in the event of a problem, this last issue can be minimized, but remains a concern for some courts.

(d) The Management of Additional Actions

As illustrated in the chocolate case, the joint hearing before the three courts did not achieve a complete resolution of the matter. Since there were pending proceedings in six other provinces (and since the courts in those provinces did not participate in the joint hearing or the issuance of the MCMO), the parties still had to arrange for the dismissal of the remaining six proceedings outside of the operation of the Protocol.

In this situation, in order to ensure the dismissal process is carried out in an efficient manner, the emerging practice is that the plaintiff will usually designate a member of the counsel team to oversee this process in consultation with local counsel. This ensures that the approach taken in one court is not inconsistent with the approach taken in the other jurisdictions, and creates efficiency.

As the class proceedings legislation in British Columbia, Manitoba, Saskatchewan and Newfoundland and Labrador define "class proceedings" or "class actions" as certified actions, it is not necessary to seek court approval before disposing of a proposed class action.[67] In those provinces, obtaining an order for discontinuance or dismissal of the proceedings can be achieved in the ordinary manner, which can be as simple as submitting a desk order signed by all counsel for entry at the Registry without the need for a motion or a hearing. Conversely, the class proceedings statutes of Alberta, New Brunswick and Nova Scotia define "class proceedings" or "class actions" as including uncertified class proceedings, and therefore require court approval before a proposed class proceeding can be settled, discontinued or abandoned (or dismissed)[68].

[67] BC *Class Proceedings Act*, RSBC 1996, c. 50, s. 35 and definition of "class proceeding"; Manitoba *Class Proceedings Act*, CCSM c. C130, s. 35 and definition of "class proceeding"; Saskatchewan *Class Actions Act*, SS 2001, c. 12.01, s. 38 and definition of "class action"; and Newfoundland and Labrador *Class Actions Act*, SNL 2001, c. C-18.1, s. 35 and definition of "class action".

[68] Alberta *Class Proceedings Act*, SA 2003, c. C-16.5, s. 35; New Brunswick *Class Proceedings Act*, RSNB 2011, c. 125, s. 37 and definition of "class proceeding"; and Nova Scotia *Class Proceedings Act*, NS 2007, c. 28, s. 38 and definition of "class proceeding"

A complicating factor to keep in mind is that not all provinces that do not require motions for dismissal of uncertified class actions allow for dismissals by desk orders. In some cases, it is necessary to bring a motion to effect a dismissal simply because that is the approach to be followed in ordinary cases. In those instances, motions will have to be brought unless the parties are able to settle on discontinuance.

In those provinces where motions are required, whether because of the provisions of class proceedings legislation or because of the local practice in relation to dismissals, the preferred approach of the authors is to write jointly to all courts involved, explain the circumstances and request that the orders be granted by way of written motions, without the need for any hearings. Obviously, this approach requires that there be a case management judge allocated to the matter. To the extent that this has not yet occurred, a request will need to be made. Counsel will normally offer to convene a hearing if the courts have questions or concerns, but the goal is to provide sufficient information in the correspondence to the courts to allow them to see that there is no prejudice to the residents of their provinces and to grant the orders sought without the need for submissions. The authors have encountered some resistance to this approach from local counsel, particularly if the local rules of practice do not contemplate "written motions". However, the authors have found that if the material reaches the case management judge, they will normally be content to issue the request orders through their traditional powers to control the court's processes.

In those provinces where motions are not required, a simple desk order may suffice. The most complicated part of the process is determining the local rules with respect to dismissal motions, and the substance and form of the materials that need to be filed in support of same. Typically, however, the consortium of plaintiffs' counsel will include representatives of all jurisdictions so this information should be readily available.

Even if a desk order will suffice, in those instances where a case management judge has already been appointed, it is a prudent practice to write the judge to explain the circumstances regarding the proposed plan for dismissal, either by way of separate correspondence or by joint correspondence to the supervising judges in the other provinces.

VII. Analysis and Conclusions

Based on the experience so far, the record of the Protocol appears mixed. To date, the courts have adopted and applied the Protocol in a number of high-profile national class action settlements, and the use of the Protocol has produced some real efficiency gains. In particular, the courts have convened a number of successful joint settlement approval hearings involving three provincial superior courts (namely, the courts of Ontario, Quebec and B.C.). While these settlement hearings were longer than usual and while there were a number of logistical problems (a lengthy scheduling process, translation challenges, audio difficulties, etc.), the parties were able to obtain settlement approval through a single joint hearing as opposed to scheduling three separate hearings across the country that would have largely repeated the same underlying submissions. In so doing, the parties were able to save significant travel and other costs, and the courts have generally expressed their satisfaction with the efficiency of the underlying process. The Protocol has also created opportunities for judges in the various provinces to communicate with each other and work together on common cases with national scope, and has thereby added to the ongoing dialogue among members of our judiciary.

However, on the other hand, it is not clear that the Protocol has lived up to its initial promise (or to perhaps the expectations of counsel). To date, the Protocol has been used primarily for the purpose of convening joint settlement approval hearings – it has not been used for settlement administration or for any other forms of case management. Moreover, it is arguable that these same joint settlement approval hearings could have been convened through existing rule provisions in the absence of any protocol (as was the case in *Menu Foods*). In addition, to date, litigants have only applied the Protocol for settlement approval hearings in the three largest provinces, even in cases that involved multiple class actions outside Ontario, Quebec and B.C. Furthermore, the Protocol's novel idea for the adoption of a single settlement approval order has not been adopted by litigants or the courts – in each of these settlements, the parties still preferred to obtain three separate approval orders that contained provisions that reflected local law and practice.

More significantly, in the joint hearings to date, the Protocol has arguably been applied in "easy cases" – namely, settlement approval hearings that have proceeded largely on consent with no material contested issues. In the one case that had a disputed component (namely, the court's consideration of the approval of counsel fees in *DRAM* notwithstanding the absence of distribution plan), the submissions were focused in one jurisdiction and the presence of parties and counsel from other jurisdictions arguably delayed and prolonged the hearing. If any of these settlements had been the subject to a larger challenge, it is not clear that the Protocol could have been meaningfully or efficiently applied. For illustration, in the prior bar order challenge that occurred in the *Osmun* case, Hershey Canada challenged the bar order in the Cadbury settlement based on the prevailing local law in each of Ontario, B.C. and Quebec, arguing that the law governing bar orders was different in each jurisdiction. In such circumstances, it is not clear that a judge in Ontario or Quebec would want to participate in a 2-3 hour hearing on the law of British Columbia governing contribution rights and bar orders, or that such a hearing would serve the interests of the litigants. In other words, in a settlement approval hearing that is subject to a significant objection from a class member or a challenge from a non-settling defendant, the parties and the courts might be better served by requesting a physical attendance and separate hearings in front of the relevant courts.

Finally, one must consider whether the technology poses any limits. The authors could not agree on this point, and the reader (and the proposed users of the Protocol) should consider the following questions: is there anything that is lost through a joint hearing by way of video-conference ? To the extent that something may be lost, is something else gained ? Are there any advantages or disadvantages arising from the set-up ? There is an argument that much of what occurs in a courtroom is not captured on a grainy screen, including physical reactions of the supervising judge as well as side-bars among counsel. The authors do agree, however, that even in the cases where the Protocol has been applied successfully, the implementation of the Protocol has been impaired by recurring logistical difficulties associated with coordinating availabilities of multiple judges and parties across varying time zones without any dedicated channels or processes to facilitate scheduling.

In summary, the early experience suggests that the Protocol can be a valuable resource for the management of national class action settlements. However, while the Protocol is most certainly a step in the right direction, it is not without its limitations. Some of those limitations, such as logistical difficulties, can hopefully be addressed as the courts become more accustomed to the use of the Protocol, and appropriate practices are developed. However, other limitations are more

fundamental, and reflect the hard reality of our federal system – namely, the provincial superior courts in Canada are sovereign and independent courts with their own domestic law and their own legal practices. As a result, the Protocol may not be an appropriate solution for every national class action settlement, and counsel and the courts should carefully consider the benefits and limits of the Protocol before invoking its application for a given case.

VIII. Schedules

(a) Before the Protocol: *Menu Foods*

(i) List of Canadian Actions
(ii) June 1, 2008 Letter to all courts
(iii) June 3, 2008 Letter to all courts
(iv) June 4, 2008 Memorandum to Counsel from Hinkson J. (as he then was)
(v) June 5, 2008 Letter to Ontario Superior Court of Justice
(A) Video-Conference Confirmation Form (ON)
(B) Request for Audio / Visual Equipment and Services (ON)
(vi) June 11, 2008 Letter to all courts
(vii) June 20, 2008 Letter to all courts
(viii) Court Video Conference Request Form (BC)
(ix) Notice of Motion (certification and notice)(ON)
(x) Index to Motion Record (certification and notice)(ON)
(xi) Order (certification and notice)(ON)
(xii) Notice of Motion (settlement approval)(ON)
(xiii) Order (settlement approval)(ON)

(b) The Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions

(c) After the Protocol: *Osmun*

(i) February 9, 2012 Letter to ON, BC and QC Courts
(ii) Notice of Motion (MCMO)(ON)
(iii) MCMO Order issued re Hershey Settlement Approval (ON)
(iv) MCMO Order issued re Hershey Settlement Approval (BC)
(v) MCMO Order issued re Hershey Settlement Approval (QC)
(vi) Notice Approval Order re Hershey Settlement Approval (ON)
(vii) January 17, 2013 Memorandum to Counsel from Butler J.
(viii) March 19, 2013 Memorandum to Counsel from Butler J.
(ix) February 4, 2013 Letter to all Additional Courts