Chaos or Consistency?

The National Class Action Dilemma

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1. INTRODUCTION

By definition, class actions are brought by a group of individuals. These individuals will not all be resident in the same place. In many cases, the individuals injured will not even all be resident in the same province. This fundamental fact means that jurisdictional issues are more likely to arise in the context of class actions than in traditional litigation. How are these issues managed? As the number of jurisdictions in which class actions may be brought expands, there is a real potential for chaos. Can the courts and counsel prevent such chaos from occurring?

2. JURISDICTION TO COMMENCE A CLASS ACTION

The fact that an action is a proposed class proceeding does not modify the requirement that the courts have jurisdiction over the defendant, nor does it interfere with the

defendant=s right to challenge jurisdiction by applying to the court for a declaration that the proposed jurisdiction is *forum non conveniens.*[1]

While this basic principle is undoubtedly correct, the traditional tests have been the subject of some interesting interpretations in the context of class actions.

In *Ontario New Home Warranty Program v. General Electric Co.*,[2] the court suggested that the fact that the action was an intended class proceeding on behalf of many Ontario residents supported the existence of a real and substantial connection with the province of Ontario.

The court in *Furlan v. Shell Oil Co*.[3] also considered the impact of the intended class nature of an action on the issue of jurisdiction. On a motion to challenge jurisdiction, one of the defendants objected that there was no evidence that any of the proposed representative plaintiffs possessed its product. The B.C. Court of Appeal rejected this concern stating:

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1 See, for example the jurisdictional challenges launched by defendants in *Ho-A-Shoo v. Canada (Attorney General)* (2000), 47 O.R. (3d) 115, [2000] 2 C.T.C. 155, 2000 D.T.C. 6293 (S.C.J.); *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.) (granting certification), leave to appeal to Div. Ct. refused 101 A.C.W.S. (3d) 470 (Div. Ct.)) and (2002), 58 O.R. (3d) 753; *Robson v. Chrysler Canada Ltd.* (2002), 2 B.C.L.R. (4th) 1 (C.A.) (leave to appeal to S.C.C. dismissed, [2002] S.C.C.A. No. 332); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2002] 20 C.P.C. (5th) 351; *Marren v. Echo Bay Mines Ltd.* (2003), 13 B.C.L.R. (4th) 177 (C.A.); *McNaughton Automotive limited v. Co-operators General insurance Company*, [2003] O.J. No. 2914 (Ont. S.C.J.).

2 (1998), 36 O.R. (3d) 787, 17 C.P.C. (4th) 183 (Gen. Div.) (jurisdiction); (unreported, June 17, 1999, Ont. S.C.J.) (settlement certification).

3 [2000] 7 W.W.R. 433, 229 W.A.C. 235, 77 B.C.L.R. (3d) 35 (C.A.) (leave to appeal to the S.C.C. dismissed, [2000] S.C.C.A. No. 476). The author wsa counsel for Du Pont.

> [22] . . . Du Pont contends that at least before certification the references in the amended statement of claim to Athe Plaintiffs and the Class@ are not proper pleading and the respondents on this application must link causation of Du Pont resin to individual plaintiffs and not intended class members generally. In my opinion, that is too narrow a view of the pleadings in proceedings intended to be pursued under the *Class Proceedings Act*. On this application, causation should be considered in the context of the proposed class generally and not the individually named plaintiffs. On that view, the position of Du Pont does not differ significantly from that of the other two appellants.

The question is whether these courts were correct in relying on the *intended* class nature of the proceeding to support jurisdiction when the actions did not yet have that status. When these motions were argued they were simply actions by the named plaintiffs.

In the B.C. case *Harrington* v. *Dow Corning*,[4] the plaintiff sought to include a subclass of plaintiffs from the other provinces, save Ontario and Quebec.[5] The defendants were not resident in B.C. They argued that the extraprovincial subclass should be limited to women who were initially implanted with the impugned breast implants in B.C., since only these women met the Areal and substantial connection@ test necessary to found jurisdiction.

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4 (1996), 22 B.C.L.R. (3d) 97 (S.C.) (certification decision), affd 193 D.L.R. (4th) 67, [2000] 11 W.W.R. 201 (C.A.); (1998), 55 B.C.L.R. (3d) 316 (B.C.S.C.) (extraprovincial class); (1997), 29 B.C.L.R. (3d) 88, [1997] B.C.J. No. 400 (QL) (B.C.S.C.) (application to include non-residents); (1999), 64 B.C.L.R. (3d) 332 (B.C.S.C.) (striking claim against Dow Chemical Co.); (unreported, February 10, 1999, CA0218 IO, CA021843, CA021855, CA021857, CA021868, CA021929, CA022761, CA022983, B.C.C.A.) (application to extend time to appeal against defendants excluded from certification order); (1999), 29 C.P.C. (4th) 14 (B.C.S.C.) (approval of Dow settlement); (unreported, February 18, 1999) (approving fees on Dow settlement); (1999), 179 D.L.R. (4th) 326 (B.C.C.A.) (restoration of appeals to active list); appeal dismissed 2001 B.C.C.A. 534; leave to appeal dismissed 2001 S.C.C.A. 21.

5 Presumably, the decision not to include Ontario and Quebec plaintiffs was based on the fact that class actions were ongoing in these jurisdictions.

The court agreed that the *Class Proceedings Act* was procedural only, and did not intend to extend jurisdiction of the B.C. courts beyond the constitutionally recognized limits. The court held that the legislation should be read as confined by necessary implication to these limits. The court acknowledged the existence of authority in traditional litigation suggesting that the court had no jurisdiction over non-resident claims against non-resident defendants standing alone.

Nevertheless, the court approved the non-resident subclass. It noted that earlier authorities did not address the problem of mass tort claims spreading across provincial lines. The court held that the defined common issue, "Are silicone gel breast implants reasonably fit for their intended purpose?", was sufficient to create the required real and substantial connection in light of the factual framework. The court stated:[6]

> [18] . . . The demands of multi-claimant manufacturers' liability litigation require recognition of concurrent jurisdiction of courts within Canada. In such cases there is no utility in having the same factual issues litigated in several jurisdictions if the claims can be consolidated. I do not think that *Nitsuko* and *Con Pro* stand in the way of concurrent jurisdiction as they do not deal with claims inside and outside the province which raise the same common issue. It is that common issue which establishes the real and substantial connection necessary for jurisdiction. *Nantais* is a considered decision on the question which is otherwise largely a matter of first impression. I am not persuaded that *Nantais* is clearly wrong or inapplicable and accordingly I intend to follow it.

Having grounded jurisdiction, the court went on to consider the *forum conveniens* question. The court found that the *Class Proceedings Act* provided an efficient and flexible procedure which minimized any additional complexity. Although the defendants

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[6] *Harrington v. Dow Corning* (1997), 29 B.C.L.R. (3d) 88, [1997] B.C.J. No. 400 (QL) (B.C.S.C.) at para. 18

would be deprived of the opportunity to try the same question in several jurisdictions, this was outweighed by the advantage to class members of a single determination. The defendants would continue to have the benefit of any substantive defences available in the other jurisdictions, pursuant to *Jensen v. Tolofson*.[7]

The B.C. Court of Appeal affirmed certification of the extraprovincial class, stating:

> [89] When regard is had to the considerations underlying the imposition of limits to claims of jurisdiction, I consider that Mr. Justice Mackenzie was right to find jurisdiction *simpliciter* had been established. . . .
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> [90] The jurisdictional rules being functional, the values protected by the real and substantial connection test dictate the factors relevant to its application. The fundamental values are fairness to the parties and orderly decision-making . . . A decision whether a court has jurisdiction must not depend on a mechanical application of a rigid test. . . .
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> [92] Where the traditional rules are not adequate to ensure fairness and order then other considerations will become relevant. One such consideration will be the nature of the subject matter of the action. In this case, the alleged wrongful acts are defective manufacture or failure to warn. When a manufacturer puts a product into the market place in any province in Canada, it must be assumed that the manufacturer knows the product may find itself anywhere in Canada if it is capable of being moved. . . . In these circumstances, there can be no injustice in requiring a manufacturer to submit to judgment in any Canadian province. The concept of *forum non conveniens* is available to deal with any individual case where a different forum is established as more appropriate. . . .

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7 [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289, [1995] 1 W.W.R. 609. This approach differs from that adopted by the Ontario court in *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441, 30 C.P.C. (4th) 133 (Ont. Ct. (Gen. Div.)) (national class). The court in *Carom* suggested that a class member who does not opt out of the Ontario action could take the benefit of Ontario limitation period deferrals.

. . .

> [97] The appellants acknowledge the jurisdiction of British Columbia courts to determine the claims of at least those resident and non-resident class members implanted in British Columbia. . . . I accept that presence in the jurisdiction for the purpose of the defence of one claim does not create presence in the jurisdiction for the purpose of the defence of the prosecution of another independent claim. However, I do not accept that proposition as precluding a court from taking account of that presence for the purpose of determining whether the existence of a certified class action with a common issue provides a real and substantial connection between the province and the subject matter of the claim that a non-resident seeks to have resolved in the same class proceeding.
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> . . .
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> [99] New types of proceedings require reconsideration of old rules if the fundamental principles of order and fairness are to be respected. To permit what the appellants call Apiggybacking@ in a class proceeding is not to gut the foundation of conflict of laws principles. Rather, as I have tried to explain, it is to accommodate the values underlying those principles. To exclude those respondents who do not reside in British Columbia from this action because they have not used the product in British Columbia would, in these circumstances, contradict the principles of order and fairness that underlie the jurisdictional rules. By opting in, the non-resident class members are accepting that their claims are essentially the same as those of the resident class members. To the extent the appellants can establish they are not, they can be excluded by order of the case management or trial judge upon application. So can a class certified in another province . . .

Each of these cases stretched the concepts surrounding jurisdictional review to accommodate the perceived interests of justice in certifying a class action with the greatest breadth possible. So the traditional rules apply, but the courts developed certain unique evidentiary rules:

1. The presence of hypothetical resident class members with a cause of action against the proposed non-resident defendant may be sufficient

to create the necessary jurisdictional link with a non-resident defendant (*Furlan)*;

2. The existence of a common issue between resident and non-resident class members may be sufficient to ground jurisdiction for non-resident class members against a non-resident defendant (*Harrington*);

3. Even before a case is certified as a class action, the existence of many other class members within the jurisdiction can be evidence of links with the jurisdiction when assessing the *forum non conveniens* test (*Ontario New Home Warranty*).

3. NATIONAL CLASSES

3.1 The Issue

Assuming that the court determines that it has jurisdiction to hear the action, how will a class action commenced in one jurisdiction effect class members or class actions in other jurisdictions?

This issue will only become more prominent as more provinces come on stream with class action legislation. Saskatchewan[8], Newfoundland and Labrador[9], and Manitoba[10]

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8 See *Class Actions Act*, S.S. 2001,, c.12.01 at http://www.qp.gov.sk.ca/documents/english/statutes/statutes/c12-01.pdf. Their Act came into force on January 1, 2002.

9 See *Class Actions Act*, S.N.L., 2001, c.18.1 at http://www.gov.nf.ca/hoa/sr/. Their Act came into force in April 2002.

have recently joined Ontario,[11] British Columbia[12] and Quebec[13] in implementing formal class action legislation. Further, the Supreme Court of Canada's judgment in *Western Canadian Shopping Centres v. Dutton*,[14] has essentially "read in" the basic elements of class action legislation into the traditional representative proceeding rules in place in the remaining jurisdictions. The prospects for interjurisdictional class action chaos have been substantially magnified.

The paradoxical aspect of this problem is that class actions were designed to avoid chaos by ensuring that all litigation involving the same issue is managed within one proceeding. While this purpose is achieved within any individual jurisdiction, procedural chaos may well be heightened if the courts and class action lawyers are unable to develop efficient rules for managing the potential chaos between jurisdictions

3.2 The Motivation

What are the motivations of the parties in terms of the geographic scope of any class action?

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10 See *Class Proceedings Act*, C.C.S.M. c.C130 at http://web2.gov.mb.ca/laws/statutes/ccsm/c130e.php. Their Act came into force on January 1, 2003. .

11 *Class Proceedings Act, 1992*, S.O. 1992, c.6

12 *Class Proceedings Act*, R.S.B.C. 1996, c.50

13 *An Act Respecting the Class Action*, R.S.Q., c. R-2.1

14 2001 SCC 46

Class counsel will normally wish to ensure that the class is as large as possible in order to maximize the pressure on the defendant, and maximize the potential fees flowing from the action. However, class counsel in other jurisdictions obviously have the same incentive, creating potential tension.

Defendants generally prefer to compel individual class members to sue individually where possible. As such, if excluding extraprovincial class members from a class action forces excluded class members to sue individually, then there is an incentive to limit the geographical scope of the class.

Therefore, up to the date of the decision in the *Dutton* case,[15] defendants who intended to contest the merits of the case had an economic incentive to oppose national classes. The defendants' hope was that class members from jurisdictions without class proceedings legislation would not have the resources to sue individually in their home jurisdiction. Although opposing certification of a national class action could result in having to face actions in each of the three class action jurisdictions, the additional legal costs associated with a possible battle on three fronts was normally overwhelmed by the savings inherent in not having to face actions for recovery from injured persons resident in non-class action jurisdictions.

Following the recent legislative initiatives and the *Dutton* case, defendants' calculus may change. If defendants are reasonably confident that they may face multiple class actions

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[15] 2001 SCC 46

across all Canadian jurisdictions, they may seek to work with class counsel in their jurisdiction of choice to ensure that one action covers the whole country, so as to minimize legal costs and the prospect of inconsistent approaches to discovery or the merits.

Where a defendant wishes to settle a class action, the calculus is different. The defendant then wishes to ensure that the case has maximum *res judicata* effect. Through various procedural routes, the Defendant will want to ensure that the action or actions cover off the ongoing risk in as much of the country as possible. The structures used in this regard are discussed below.

3.3 The Legal Regimes

With these motivations in mind, we turn to the legal regimes in the various provinces.

Ontario=s legislation does not specifically address non-resident class members. The scope of the Ontario Act was peripherally considered in *Millgate Financial Corp. v. BF Realty Holdings Ltd.*[16] At issue was section 37 of the Ontario Act,[17] which states that the Act does not apply to proceedings commenced before the Act came into force. The court held that the term "proceedings" included proceedings commenced in other Canadian

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16 (1994), 15 B.L.R. (2d) 212 (Ont. Ct. (Gen. Div.)) (application of S. 37), affd June 24, 1994 (Ont. Div. Ct.); (1995), 19 B.L.R. (2d) 271 (Ont. Ct. (Gen. Div.)) [097/136/024-8pp.] (stay application); (1997), 74 A.C.W.S. (3d) 348 (Ont. Ct. (Gen. Div.)) [097/283/009-13pp.] (scope of examinations for discovery); (1998), 28 C.P.C. (4th) 72 (Ont. Ct. (Gen.Div.)) (certification decision in parallel action); (unreported, December 21, 1999, Ont. Ct. (Gen. Div.)) (scope of examination for discovery).

17 *Class Proceedings Act, 1992*, S.O. 1992, c. 6

jurisdictions. The court noted that there was no provision in the Act limiting its application to litigants in Ontario. Thus, the court refused to certify an Ontario action where similar proceedings had been brought in British Columbia prior to the Act coming into force. This was the first clue that Ontario courts were going to read their statute as having national force notwithstanding the absence of any express language to that effect.

The Ontario court canvassed the issue in greater detail in *Nantais v. Teletronics Proprietary (Canada) Ltd.*[18] The plaintiff sought to certify a national class of persons who had received a specific brand of pacemaker. The defendant argued that it would be improper to certify a national class given that the extraprovincial class members would be bound by the result.

The court disagreed and allowed certification of a national class. The court stated that the issue of whether particular class members from outside the jurisdiction would be bound by the result could be considered at a later date. The issue, according to the court, was governed by the Supreme Court of Canada's reasoning in *Morguard Investments Ltd. v. De Savoye*[19] and *Hunt v. T&N plc*.[20] Certification was eventually granted on an "opt out" basis, such that class members from outside Ontario were bound by the result even if they did not take any positive steps to participate in the Ontario action. However, notice would be issued on a national basis.

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18 (1995), 127 D.L.R. (4th) 552, 25 O.R. (3d) 31, 40 C.P.C. (3d) 245 (Gen. Div.), leave to appeal dismissed 129 D.L.R. (4th) 110, 25 O.R. (3d) 331 at p. 347, 40 C.P.C. (3d) 263 (Gen. Div.) (certification application), leave to appeal to C.A. refused 7 C.P.C. (4th) 206; (unreported, October 3, 1997, 95-GD-31789, Ont. Ct. (Gen. Div.)) (settlement approval).

19 [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, [1991] 2 W.W.R. 217.

20 [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16, [1994] 1 W.W.R. 129.

The approach in *Nantais* is similar to that adopted in most American states.[21] American state courts have certified national "opt out" class actions on the grounds that residents from outside the state can be fairly bound by the local proceeding so long as they are granted the "due process" required by the American Constitution. However, the extent of due process required in order to bind class members outside the particular state is still a matter of some controversy.[22] Where state courts have accepted the inclusion of non-resident class members, direct individual notice has sometimes been required to bind those individuals to the result.[23]

The *Nantais* analysis was adopted by the court in *Carom v. Bre-X Minerals Ltd.*[24] Once again, the court approved a nationwide opt-out class. The court held that the necessary Areal and substantial@ connection with Ontario was present. Furthermore, order and fairness could be achieved for non-resident class members through the various procedures in the Act such as notice.

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21 The Supreme Court=s decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) suggests that state courts could exercise jurisdiction over non-resident plaintiffs in a class action if procedural due process guarantees were met. See also Herbert B. Newberg and Alba Conte, *Newberg on Class Actions*, 3rd ed. (Colorado Springs: McGraw-Hill Inc. 1992) at para. 13.21.

22 *Ibid*. at paras. 13.25-13.27.

23 *Miner v. Gillette Co*., 428 N.E.2d 478 (Ill. 1981); cert. dismissed 459 U.S. 86 (1982); *Phillips Petroleum Co. v. Shutts, supra*, footnote 8.

24 *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441, 30 C.P.C. (4th) 133 (Ont. Ct. (Gen. Div.)) (national class)

The court in *Carom* suggested that the limitation period protections of the Ontario Act could apply to all plaintiffs failing to opt out, whether resident inside or outside Ontario.[25] It is difficult to fit this finding with the Supreme Court of Canada=s treatment of limitation periods as part of the substantive law in *Jensen v. Tolofson*.[26] Plaintiffs should not be allowed to choose between two alternate limitation periods depending on their opt-out decision.

In *Robertson v. Thomson Corp.*,[27] the court certified a worldwide class of authors who had submitted their works to the defendant. The court noted that there was a question as to whether a foreign court would recognize the binding effect of the Ontario judgment on non-resident class members, but held A[45] . . . that would be an issue for the foreign court in which the [foreign class member] brought proceedings. . . .@

Ontario courts continue to certify national opt-out classes.[28] However, the concept remains controversial.[29] For example, one could argue that the real and substantial

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25 *Ibid.* at p. 453 (O.R.).

26 [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289, [1995] 1 W.W.R. 609, 84 W.A.C. 241, 100 B.C.L.R. (2d) 1, 77 O.A.C. 81, 26 C.C.L.I. (2d) 1, 22 C.C.L.T. (2d) 173, 32 C.P.C. (3d) 141, 7 M.V.R. (3d) 202, 175 N.R. 161.

27 (1999), 171 D.L.R. (4th) 171, 43 O.R. (3d) 161, 30 C.P.C. (4th) 182, 85 C.P.R. (3d) 1 (Gen. Div.) (application to strike); (1999), 43 O.R. (3d) 389, 43 C.P.C. (4th) 166 (Gen. Div.) (costs).

28 See cases collected at Branch, *Class Actions in Canada* (Aurora: Canada Law Book) at para.11.120 In *Webb v. K-Mart Canada Ltd*, 45 O.R. (3d) 389, (Ont S.C.J.) (certification decision and partial summary judgment of a class including class members in all provinces save for British Columbia and Quebec) the court stated that the lack of comparable class action legislation elsewhere in Canada (except for British Columbia and Quebec) was a telling argument for extending the reach of the Ontario legislation. The court also suggested, as did the court in *Robertson v. Thomson Corp., supra*, footnote 13, that the local court is the appropriate forum to determine whether or not the extra-provincial plaintiff should be bound by the results of the Ontario proceeding.

29 See the discussions of this issue in Walker, Janet, AMaking Class Actions Work Nationally@, First Annual Class Actions Symposium, Class Actions: Where Are We and Where are We Going@

connection analysis conducted by the court in *Carom* did not properly assess the facts relating to the claims of each non-resident class member.

First, from a jurisdictional perspective, if the extraprovincial class member=s only complaint was that his local broker purchased an unsuitable stock of an Alberta company on the Alberta Stock Exchange, is there in fact a real and substantial connection to Ontario?

Second, from a constitutional perspective, certification of a national opt-out class requires a class member from outside Ontario to take active steps to opt out of an Ontario proceeding in order to retain the right to maintain an individual action in his or her home province. How can an Ontario court, applying an Ontario statute, obtain constitutional authority to require a positive response from extraprovincial class members to free themselves from the effect of the Ontario action? Does the removal of this right to sue individually not come within the local province's jurisdiction to govern property and civil rights in their own province?

The reasons in *Robertson* and *Nantais* suggest that this issue can be considered at some later date, presumably when a class member in another jurisdiction seeks to challenge the binding effect of the Ontario class action judgment in their home jurisdiction. But is this satisfactory? Would it not be preferable for the Ontario court to carefully assess whether

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(Toronto: Osgoode Hall Law School of York University, 2001), and McKee, S. Gordon, AConstitutional Considerations Concerning National Class Actions@, First Annual Class Actions Symposium, Class Actions: Where Are We and Where are We Going@ (Toronto: Osgoode Hall Law School of York University, 2001).

it has the constitutional mandate to remove the right before it embarks on a process designed to determine or remove that right?

This argument held even greater sway before the Supreme Court of Canada's decision in the *Dutton* case, when it could be argued that Ontario was essentially foisting class action legislation on those provinces that had expressly decided not to implement class action legislation.

It may certainly be more efficient to have a claim resolved in one province within one piece of litigation. However, irrespective of the procedural benefits, the real issue is whether there exists the legal authority for an Ontario court to undertake this role.

Recently, a more traditional analysis was adopted in *McNaughton Automotive limited v. Co-operators General insurance Company* (and 30 related actions).[30] The Ontario Superior Court of Justice refused to assume jurisdiction over claims of persons resident in provinces other than Ontario. The claim alleged that the defendant insurers had breached statutory conditions in relation to automobile insurance. The plaintiffs argued that the defendants improperly took possession of the subject automobiles without paying the full actual cash value (the insurers had subtracted a deductible). The putative classes included insured persons in Ontario, Alberta, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Yukon, Northwest Territories and Nunavut.

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30 [2003] O.J. No. 2914 (Ont. S.C.J.)

Haines J. characterized the issues as follows: first, ". . . in the context of a class proceeding, [should] an Ontario court . . . assume jurisdiction over out-of-province plaintiffs and putative class members with respect to claims for damages sustained outside Ontario for alleged breaches of contract and conversion that occurred elsewhere in Canada[?]"[31] Second, in relation to three proposed Alberta representative plaintiffs, "Should an Ontario court assume jurisdiction over the extra-territorial parties and matters to which reference is made in the plaintiffs' statements of claim?"[32]

In order to resolve the first issue, Haines J. relied heavily on the Ontario Court of Appeal decision in *Muscutt v. Courcelles.*[33] In *Muscutt*, which was not a class action, the Court considered whether Ontario courts should entertain the injured party's suit against the out-of-province defendants alleged to be liable in tort for damages. Haines J. set out the following passage from *Muscutt*:[34]

> [75] It is apparent from *Morguard, Hunt* and subsequent case law that it is not possible to reduce the real and substantial connection test to a fixed formula. A considerable measure of judgment is required in assessing whether the real and substantial connection test has been met on the facts of a given case. Flexibility is therefore important.
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> [76] But clarity and certainty are also important. As such, it is useful to identify the factors emerging from the case law that are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere. No factor is determinative. Rather, all relevant factors should be considered and weighed together.

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31 *Ibid* at para.11

32 *Ibid* at para. 48

33 (2002), 60 O.R. (3d) 20 (C.A.)

34 *McNaughton* at para. 15

Haines J. then set out and applied the following factors from *Muscutt*:[35]

> (i) The connection between the forum and the plaintiff's claim.
> (ii) The connection between the forum and the defendant.
> (iii) Unfairness to the defendant in assuming jurisdiction.
> (iv) Unfairness to the plaintiff in not assuming jurisdiction.
> (v) The involvement of other parties to the suit.
> (vi) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis.
> (vii) Whether the case is interprovincial or international in nature.
> (viii) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

Applying these factors, Haines J. held that "there is a demonstrated absence of any real connection between potential out-of-province class members and this forum and [I] conclude that order and fairness would not be served by assuming jurisdiction over claims of persons in those provinces and territories where the relevant statutory provisions are materially different from those in Ontario."[36]

Haines J.'s primary reason for refusing to assume jurisdiction was based on "significant differences" between the relevant insurance statutes of Ontario and the other provinces (except for Newfoundland and Labrador).[37] Concerning Newfoundland and Labrador

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35 *McNaughton* at para. 16

36 *McNaughton* at para. 38

37 In this regard, Haines J. held as follows: "[35] In Ontario the claims of the representative plaintiffs and the proposed members of the class are based on McNaughton where the Court of Appeal found that statutory conditions are to be accorded priority over other contractual terms in the insurance policy by operation of s. 234(2) of the Insurance Act, R.S.O. 1990, c. I.8, as amended, which stipulates that "no variation or omission of or addition to a statutory condition is binding on the insured". In all of the other provinces and territories referred to in the statements of claim, with the exception of Newfoundland and Labrador, the equivalents of s. 234(2) are made. . . ." "subject to" the statutory provision that permits the application of deductibles.

(where the statute was similar to the Ontario statute), Haines J. found that issues raised surrounding the process by which the Newfoundland and Labrador insurance statutes were implemented should be addressed by a Newfoundland and Labrador court, not an Ontario court.[38]

In resolving the second issue regarding the suitability of out of province representatives, Haines J. adopted a similar approach and refused jurisdiction over these plaintiffs. As well, he relied upon a broad interpretation of *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.*[39] for the following proposition:

> [47] . . . [I] conclude that [the proposed Alberta representative plaintiffs'] claims have no connection with this forum and therefore this court has no jurisdiction over the subject matter of these actions. Although there may be putative class members in these actions who do have claims in Ontario, it is my view that it is incumbent upon a proposed representative plaintiff in a class proceeding to establish, as a threshold issue, that the court has jurisdiction over his or her claim just as it is necessary for a representative plaintiff to plead an identifiable cause of action against a named defendant in order to sustain that action: see *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.) and *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433 (C.A.).

Haines J. distinguished the earlier national opt-out cases as follows:

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38 In particular, the defendants raised issues with respect to the legislative process in Newfoundland and Labrador: "[46] . . . An amendment was made to the Automobile Insurance Act which may have exceeded the mandate given to legislative counsel under the Statutes and Subordinate Legislation Act. This is an issue that will have to be determined in order to address the entitlement of any putative class members in Newfoundland and Labrador and, in my opinion, is one which ought to be addressed by a Newfoundland and Labrador court. . . ."

39 (2000), 51 O.R. (3d) 603 (S.C.J.)

> [34] It appears from a review of these cases that a substantial connection was found where the subject matter of the extra-provincial claims was the same as those of the domestic members of the class and resolution of the claims on a national basis was not only consistent with the general principles of order and fairness but served the specific objectives of the applicable class proceedings legislation. It is also noted that the legal principles pleaded in support of both the domestic and extra-provincial claims were similar in all the jurisdictions being embraced. The defendants suggest that *Muscutt* has altered the jurisdictional landscape to the extent that those cases might well be decided differently today. I disagree. It seems to me that the results in those cases are entirely consistent with the administration of justice model approved in *Muscutt*. Nonetheless, I have concluded this court should not assume jurisdiction over the extra-territorial claims in these actions…
>
> [35] The plaintiffs submit that it is open to an Ontario court to interpret and apply the laws of other jurisdictions. It is acknowledged that this can be done and that there may be circumstances where it would be appropriate. However, in these intended class actions where: (1) the contract was made outside of Ontario pursuant to the laws of another jurisdiction that are materially different; (2) the defendant is licensed under and subject to the laws of the other jurisdiction; (3) the alleged breach occurred outside Ontario; (4) the claimants reside outside of Ontario; (5) the events which gave rise to the claim occurred outside Ontario; and (6) the damages were sustained outside Ontario, it seems to me the administration of justice would not be served by this court undertaking the task of interpreting the legislation of other provinces to determine whether the residents of those provinces have sustainable claims. In my view, that is a task for the courts of those jurisdictions in these circumstances. Of some interest is the fact that since these motions were argued Rooke J. has rendered judgment in *Pauli* [*v. Ace Ina Insurance*, [2003] A.J. No. 175 (Q.B.)], and has held that the applicable Alberta legislation permits the taking of a deductible on total loss claims.

So *McNaughton* indicates that there are limits to the Ontario court's willingness to extend its jurisdiction. In particular, where the factors outlined above are present, the court may decline jurisdiction.

The ability to certify national opt-out cases has never been considered at the appellate level in Ontario. That is unfortunate. It may well be that the provision of notice and an opt-out right is sufficient to meet any constitutional concerns, including the other jurisdictions' right to control property and civil rights in their province. There are obvious practical reasons why national opt-out cases make sense. However it would be helpful to have detailed appellate authority walking through the constitutional quagmire surrounding the issue. For the reasons expressed above, the consideration may never come to pass, as both class counsel and the defendants' self-interested motivations are now reasonably aligned with the Ontario approach. The only persons remaining with some possible interest in raising the issue are:

(1) competing class counsel from other jurisdictions (but they would need a client who cares enough about constitutional principles!), or

(2) an extraprovincial class member who is barred from proceeding with an individual action as a result of a negative judgment or unsatisfactory settlement of the national opt-out case (but the whole reason for the initial certification would be based on the fact that no one individual had a realistic incentive or ability to advance their own litigation!).

In *Wilson v. Servier Canada Inc.,*[40] the Ontario court created a separate British Columbia subclass within a national opt-out class action. The court found that certification of such a

[40] (2001), 104 A.C.W.S. (3d) 1007, [2001] O.J. No. 1615 (S.C.J.) [001/124/024 - 4 pp.].

subclass was warranted given differences in the British Columbia contributory fault regime, and the benefit of having British Columbia counsel involved for any individual damage assessments for British Columbia class members. Is this how the issue will be managed on a long-term basis? Will the Ontario courts allow class counsel from each of their other 11 jurisdictions to come cap in hand with a request to serve as subclass counsel for their jurisdiction within the overarching Ontario proceeding? In *Wilson*, the Ontario class counsel was not opposing the motion. What if they had? Would the Ontario court have been willing to foist British Columbia counsel on unwilling Ontario counsel for the sole purpose of addressing some of the unique British Columbia legal features that might arise long down the road?

In Quebec, as in Ontario, there is no statutory consideration of multi-jurisdictional issues. In *Masson v. Thompson*,[41] an action brought by employees of a bankrupt company, the Quebec Court of Appeal stated that the fact that some class members were outside Quebec did not invalidate the class action, nor did it prevent the extraprovincial members from participating in the class action. The court relied on the number of factual connections to Quebec in authorizing the class proceeding. Again however, the case lacked a full consideration of the constitutional concerns.

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41 Unreported, January 29, 1992, Montreal 500-06-000005-914 (Que S.C.) (certification decision), affd [1993] R.J.Q. 69 (C.A.); [1994] R.J.Q. 1032 (S.C.) (jurisdiction over non-resident class members), affd [1995] R.J.Q. 329, 67 Q.A.C. 75 (C.A.) (application to sever third party proceedings); [1997] R.J.Q. 634 (S.C.) (decision on the merits in favour of the class), appeal allowed in part 101 A.C.W.S. (3d) 463 (C.A.).

In another Quebec case, *Bourque v. Laboratoires Abbott Ltee*[42] (a pension case), the Quebec Superior Court approved a national class stating that the fact that there were pension plan members across the country illustrated the necessity of resolving the issue in one proceeding. The court noted that the relief sought - the return of funds to the pension plan - would benefit all pension plan members in any event.

However, two earlier Quebec decisions express a reluctance to include extraprovincial class members. In *Werner v. Saab-Scania AB*,[43] the court in *obiter* suggested that it would be improper to certify a class of all vehicle purchasers in Canada. The court suggested that the class, if otherwise proper, should be limited to Quebec residents, residents outside Quebec whose cause of action arose in Quebec, or persons whose contracts were concluded in Quebec. In *Bolduc v. Compagnie Montreal Trust*,[44] the court refused to certify the proposed national class action on several grounds, including a concern about the need to apply the law of several jurisdictions and the inability to provide extraprovincial class members with an effective opt-out opportunity.

Therefore, like Ontario, the ability to certify national opt-out class actions lacks any comprehensive appellate consideration of the constitutionality principles.

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42 unreported, April 9, 1998, Montreal 500-06-000023-966, Que. S.C..

43 [1980] CS 798 (Que. S.C.), affd (unreported, February 19, 1982, Montreal 500-09-001005-800, Que. C.A.). The court refused to amend the class to a proper scope given that the representative offered no information as to the size of the restricted class definition.

44 (1989), 15 A.C.W.S. (3d) 214 (Que. C.A.) [089/125/061-6pp], leave to appeal to S.C.C. refused 102 NR 397*n*.

The British Columbia, Saskatchewan and Newfoundland and Labrador Acts deal with multi-jurisdictional issues directly. The statutes provide that a representative may seek to certify a class that includes extraprovincial class members. However, in order to be bound by or benefit from the class action, class members resident outside the province must specifically opt into the class action.[45] The certification order must describe the procedure to opt in.[46] The court must create a special subclass for extraprovincial class members.[47] The constitutionality of these provisions has yet to be tested (*Harrington* was a jurisdictional challenge rather than a constitutional challenge to the framework of British Columbia's Act). However, the act of opting in will make it difficult for extraprovincial class members to deny that they have been granted due process. The attornment to the jurisdiction created by the opt-in decision should be sufficient to address any constitutional concerns.

Manitoba's new legislation is a hybrid of the others. It specifically contemplates the participation of non-resident class members.[48] However, unlike the British Columbia Act, it does not require that such individuals opt into a certified class action. Rather, the general opt-out provisions should apply. This, coupled with the general rule against costs awards,[49] makes Manitoba a highly favourable jurisdiction for class counsel. It will be interesting to see if actions of national scope begin to be filed in Winnepeg's courts.

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45 B.C. Act, s. 16(2).

46 B.C. Act, s. 8(1)(g).

47 B.C. Act, ss. 6(1), 6(2), 16(4), 16(5).

48 Manitoba Act, s. 6(3).

49 Manitoba Act, s. 37

3.4 The Potential for Chaos

Difficult questions exist even if the opt-in or opt-out approaches are accepted as constitutionally and jurisdictionally sound.[50]

What is the effect of competing actions? Should a court decline to certify a class action covering issues already purportedly certified on a national opt-out basis in some other jurisdiction? In assessing whether a class action is preferable, courts in British Columbia, Manitoba, Newfoundland and Labrador, and Saskatchewan are specifically required to consider whether the class action involves claims that are the subject of other proceedings. This could theoretically support a decision not to certify the action if already certified elsewhere, although no court has yet applied it in this way.

The Newfoundland and Labrador Rules of Court[51] deals most specifically with this issue stating:

> 7A.04(6) Where it appears that a class or representative proceeding covering all or a part of the matters to be dealt with in a class proceeding in this province has been certified in another jurisdiction in Canada, the court in considering whether and to what extent to grant the certification application

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50 Kay, Katherine L. and Lan, Adrian C., "National Class Proceedings: Are They Unmanageable? Practical and Tactical Considerations", First Annual Class Actions Symposium, Class Actions: Where Are We and Where are We Going" (Toronto: Osgoode Hall Law School of York University, 2001).

51 Rules of the Supreme Court of Newfoundland and Labrador, 1986, as amended, Rule 7A.04(6)

> (a) may consider whether it would be appropriate to define the class as excluding the class certified in the other jurisdiction or as excluding persons who do not opt out of the other proceeding;
>
> (b) may consider whether the other jurisdiction is a more convenient forum for the matter, and where the interests of the class resident in this province can be adequately represented in the other proceeding by the resident class members opting into that proceeding, stay the application
>
> (c) may grant the application without reference to the other proceeding; or
>
> (d) make such other disposition as may be desirable

Recently, in *Pardy v. Bayer Inc.*, [2003] N.J. No. 182, a product liability action, the Newfoundland and Labrador Court considered Rule 7A.04(6). The defendant in the proposed class action brought an application seeking to dismiss or permanently stay the Newfoundland action. A similar action had been commenced in Manitoba, which action purported to cover Newfoundland residents. The same plaintiff's counsel was involved in both cases. During a Manitoba case management conference, plaintiffs' counsel had indicated that if national certification were granted in Manitoba he would likely seek instructions to discontinue class actions in other provinces, including Newfoundland and Labrador.

In seeking dismissal of the Newfoundland proceeding, the defendant argued that a party cannot bring more than one claim for the same cause of action, and that continuation of multiple proceedings against the defendant, by the same counsel, seeking to certify overlapping classes in different jurisdictions, was an abuse of process.

The court denied the defendant's application. The Newfoundland plaintiffs were not at the time parties to the Manitoba action (the action had not yet been certified in Manitoba). As such, "[24] . . . the Defendant is not facing a multiplicity of proceedings respecting such Plaintiffs. . . ." Continuing, the Court held that "[24] . . . If class certification were granted in Manitoba prior to this Court's decision on certification the effect of the Manitoba certification can be addressed as contemplated in Rule 7A.04(6)."

The court noted that Rule 7A.04(6) "clearly contemplates that a stay of a class action proceeding in Newfoundland may be warranted where a similar proceeding has been certified in another province. . . ." However, the Court found that it does not compel that outcome. Rule 7A.04(6)(c) specifically enables the court to grant certification without reference to the other proceeding. Citing *Wilson v. Servier Canada Inc.*,[52] and *Nantais v. Electronics Propriety (Canada) Ltd.*[53], the Court found this to be consistent with "[21] . . . recent Canadian cases which recognize that potentially overlapping class actions can arise in different provinces and that appropriate adjustments in the definition of a class may be required."

The court also rejected the defendant's argument that there would be prejudice or unfairness to the Defendant if it is required to contest applications in Manitoba and in Newfoundland and Labrador covering the same putative class. The court noted that the defendants opposed class certification in both provinces. As such, "The Defendant's contention respecting legal costs in contesting two class certification actions appears

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52 (2001), 104 A.C.W.S. (3d) 1007, [2001] O.J. No. 1615 (S.C.J.) [001/124/024 - 4 pp.].

53 (1995), 25 O.R. (3d) 331 (Div. Ct.)

inconsistent with that desire to litigate numerous individual actions. . . ." The court also refused the stay the Newfoundland and Labrador action, finding that the plaintiffs would be prejudiced by a stay.

The potential for overlapping cases has also been considered in Ontario, although not in a situation where there was an active contest between two cases. The court in *Carom v. Bre-X Minerals Ltd.*[54] suggested that courts in other jurisdictions could decide to invoke the principles in *Morguard Investments Ltd. v. De Savoye*[55] to prevent parallel actions in other provinces subsequent to a decision on the merits in Ontario.

Rather than suggesting that other courts refuse to consider the case, the court in *Nantais v. Teletronics Proprietary (Canada) Ltd.*[56] suggested that if a class proceeding were certified in another jurisdiction, the Ontario court might consider excluding the residents of that province from the definition of the class in the Ontario proceeding. Similarly, in *Wilson* v. *Servier Canada Inc.*[57], the court stated "[41] . . . If a class action is commenced and certified in another Province, that certified class proceeding will take precedence for the residents of that province".

From a practical perspective, once the case is already certified on a national opt-out basis in Ontario, on what basis would counsel in another jurisdiction recommend that a

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54 *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441, 30 C.P.C. (4th) 133 (Ont. Ct. (Gen. Div.)) (national class)

55 [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, [1991] 2W.W.R. 217, 52 B.C.L.R. (2d) 160, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 122 N.R. 81.

56 (1995) 129 D.L.R. (4th) 110 (Ont. Ct. Gen. Div.) at 114.

57 [2002] OJ 2032 (S.C.)

possible local class representative start a new class action locally? Why wouldn't the client just participate in a passive way in the Ontario action? To put in crudely, "What's in it for him (or her?)"

The more interesting question is whether an Ontario Court will decline to certify a national class action when a certification is simply pending in another jurisdiction, without it having yet been certified. The author expects that the Ontario court would decline jurisdiction in these circumstances, but this expectation has not yet been tested.

How should such contests be resolved? Should the rule be "first to file" in any of the thirteen jurisdictions? On what basis would such a rule further the interests of the class?

Should it be based strictly on *forum non conveniens* considerations (which will most always favour Ontario given its large population base and the greater likelihood of business connections with the defendants)?

Will (or can) consideration be given to the strength of counsel involved in the multiple jurisdictions in determining who should have carriage of the action, such as occurred between competing actions in Ontario in *Vitapharm* v. *F. Hoffman-Laroche*[58]? Can auctions or presentations be arranged across the jurisdictions to ensure that the best counsel or team of counsel is "hired" to represent the class? Such competitive issues are highly relevant in the context of class proceedings, which only function if competent

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58 [2000] O.J. 753

class counsel, wherever resident, are given opportunities to earn sufficient fees to justify the tremendous unpaid work involved in moving such actions forward.

Will (or can) the judges managing the various actions interact in order to determine how best to manage the conduct of the various actions? This did occur with the consent of the parties in the Hepatitis C litigation, but what if the parties object?

Will "sweetheart" deals emerge? If defendants are faced with the threat of thirteen class actions, will they do what they can to ensure that the center of gravity exists in the jurisdiction with the "friendliest" plaintiff's counsel? Or will they try to ensure that the case is managed in the jurisdiction closest to the lead defendants counsel's office building (which again, will likely be in Toronto)?

The potential for chaos is obvious. But is it likely (or necessary) that it occur? This is addressed in the next section.

3.5 The Answer to the Chaos

The simplest answer to the potential chaos is obvious and impossible: grant the Federal Court of Canada exclusive jurisdiction over all class actions in which class members are resident in multiple jurisdictions and involve issues of national scope. Proposed representatives and their counsel from the various jurisdictions could argue carriage

motions before the court. The successful counsel or counsel team could then manage the action locally through the local offices of the court.

The Federal Court would serve a similar role to that presently served by the Multi-District Litigation ("MDL") panels in the United States, which will often take control of parallel actions been filed in multiple locations.[59] MDL panels determine how all of the actions will advance, and are involved in the selection of lead counsel and committees of counsel to carry the action forward. This system works relatively well, and has generally served the interests of the class.

The impossibility lies in the need for a constitutional amendment to effect the change. While the Federal Court has implemented class proceedings,[60] this did not expand the jurisdictional scope of the court. The fact there is still no national securities regulator after these many years (notwithstanding that all right-thinking individuals acknowledge the need for such a body) highlights the hopelessness of similar steps being taken within the class action arena.

In the absence of such a constitutional amendment, the author expects that informal cooperation amongst class counsel will be the key tool in managing the potential chaos.

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59 See the home page of the Judicial Panel on Multi-Distriction Litigation at http://www.jpml.uscourts.gov. There is also an excellent summary of its practice by Kenneth Halpern, "MULTI-DISTRICT LITIGATION" at http://www.bostonapartments.com/halpern/Pages/papers/multidistrict.html

60 *Federal Court Rules, 1998*, SOR/98-106, sections 51, 121, 299.1 to 299.

So long as class counsel in various jurisdictions work together, they can avoid almost all jurisdictional difficulties. Cases will only be filed in one jurisdiction, or will be filed in several with an obvious understanding as to where the case will be moved first. Throughout these early days, this management tool has operated with a high degree of efficiency. There is an obvious incentive to cooperate. The Canadian marketplace is simply not that large, and the tolerance of Canadian courts to large fee awards in not that great.[61] As such, are very few cases where the potential fee recovery is sufficiently large to justify an intercine battle. Further, the general uncertainty concerning the correct legal approach to competing actions encourages cooperation to lower the risk.

An example of such cooperation and strategic approach can be seen in the CPP survivor benefits case brought on behalf of homosexual couples. The case was brought by a team of counsel from across the country. It was initially pursued and certified in British Columbia, a jurisdiction in which the plaintiff is generally immune from adverse costs awards.[62] The defendant then consented to having the case certified nationally (except for Quebec) in an Ontario court for the trial on the merits, and agreed that they would not pursue costs in the national Ontario proceeding.[63]

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61 For example, the courts have suggested that there is a rough upper limit on any fee award equivalent to a multiplier of 3 to 4 in Ontario (*Gagne v. Silcorp Ltd.*, (unreported, April 17, 1997, 97-CU-120941, Ont. Ct. (Gen. Div.)) (certification and settlement approval); (1997), 14 C.P.C. (4th) 269, 35 O.R. 501 (Gen. Div.) (fee approval), revd 167 D.L. R. (4th) 325, 41 O.R. (3d) 417 (C.A.)); (unreported, December 15, 1998, S.C.) (final counsel fee approval)). In British Columbia, the rough upper limit is 5.5 (*Endean v. Canadian Red Cross Society*, [2000] 78 B.C.L.R. (3d) 28, appeal struck for lack of standing 82 B.C.L.R. (3d) 287, the court held that the time spent securing court approval of the fee could properly be considered).

62 2002 BCSC 1149

63 *Hislop v. A.G. Canada*, (December 6, 2002) Court File No. 01-CV-221056 CP (Ont.S.C.)

What if class counsel cannot come to terms? In certain cases, actions will be filed in multiple jurisdictions. In these cases, the author expects that the following tools will be used:

(1) *forum non conveniens* principles;

(2) the broad case management powers afforded class proceedings judges;

(3) inter-jurisdictional cooperation between judges.

Efficiency will demand that not all cases proceed. Generally, the rules in relation to jurisdiction simpliciter will not, by themselves, suffice to shut an action down in its tracks. This is because each jurisdiction will have class members injured and a class proceedings statute designed by their legislature to assist. However, *forum non conveniens* principles are likely sufficiently broad to allow extensive consideration of fairness and the interests of the parties, and may be used to justify staying class actions in certain jurisdictions and not others. The case management powers under the various Acts only buttress this ability. Thirdly, as a practical matter, it will be difficult for counsel to deny their case management judge's legitimate desire to interact with his or her counterparts in the other jurisdictions to ensure that the action is carried forward efficiently.

4. OTHER NATIONAL CLASS ISSUES

4.1 The Effect of a Proposed National Class on the Ability to Certify the Action

Even if a national class is constitutionally valid and meets all jurisdictional requirements, inclusion of extraprovincial class members is a relevant factor to consider within the certification analysis. Class counsel do need to consider whether the potential pecuniary and efficiency gains of a nationwide class action merit the potential risk to certification caused by manageability and provincial legal variation concerns.

In the United States, courts have declined to certify classes with members resident in several jurisdictions unless the representative shows that the law applicable to each member=s claim is essentially the same.[64] Canadian defendants can also raise jurisdictional legal differences in attacking the preferability of a national class action. The presence of non-resident class members may also affect the manageability of the class action, making it less amenable to certification.

This issue has been considered in a few cases to date. In *Harrington v. Dow Corning*,[65] the court found that differences in provincial products liability and comparative fault law were insufficient to prevent certification of a non-resident subclass in a breast implant class action. However, in *Bittner v. Louisiana-Pacific Corp.*[66] the complexities created by the need to apply multiple legal regimes were a factor in the court=s decision to reject certification.

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64 *Castano v. American Tobacco Co.*, 84 F.3rd 734 (5th Cir. 1996).

65 *Supra*

66 (1997), 43 B.C.L.R. (3d) 324 (S.C.). The author was counsel for Louisiana-Pacific.

Some American commentators have suggested that the problems created by variations in state law could be obviated by requiring that non-resident class members expressly opt into the class action, and the opt-in form should include a provision agreeing to the applicability of the law of the state in which the class action is brought.[67] While this mechanism would minimize issue variation, it would seem unlikely that a court would deprive a defendant of defences under laws otherwise applicable to the non-resident claims. As stated in Newberg:[68]

> The simple institution of a multistate class suit in one forum cannot provide the foundation for applying that forum=s law to non-residents, without creating a substantial threat to our constitutional system of cooperative federalism. [Citations omitted]

4.2 Settling Class Actions on a National Basis

If a defendant facing class actions in several jurisdictions wishes to settle, it is necessary to carefully coordinate the applications for certification and settlement approval. The defendant will also need to consider whether and how the settlement will be made available to persons outside the class action jurisdictions. *Prima facie* the settling defendant may favour a national opt-out class certified in Ontario or Quebec in order to maximize the coverage and closure associated with the settlement.

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67 Herbert B. Newberg and Alba Conte, *Newberg on Class Actions*, 3rd ed (Colorado Springs: McGraw-Hill Inc., 1992), a para. 13.22.

68 *Ibid*, at para. 13.29

However, as noted above, the constitutionality of such a national class has not yet been tested at the appellate level. An option that provides greater constitutional certainty was adopted in the Sun Life premium offset litigation. The settlement class was simultaneously approved by the courts in Ontario, British Columbia and Quebec.[69] The defendant agreed to allow class members in the non-class action jurisdictions to opt into the Ontario class. This model has subsequently been followed in several other cases. With class actions coming on stream in the other jurisdictions, will cautious defendants now insist on separate approvals in each of the 13 jurisdictions? Early indications are that defendants are still content to follow the Sun Life model, and take their chances with the new jurisdictions.[70]

5. CONCLUSION

As Frost said "Let chaos storm! Let cloud shapes swarm! I wait for form."[71]

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69 *Romanchuck v. Sun Life Assurance Co. of Canada* (unreported, November 28, 1997, Vancouver Registry, C964248, B.C.S.C.); *Podmore v. Sun Life du Canada* (unreported, January 16, 1988, Montreal 500-06-000015-962, Que. C.A.); *Dabbs v. Sun Life Assurance Co. of Canada* (1997), 35 O.R. (3d) 269, 48 C.C.L.I. (2d) 142, 15 C.P.C. (4th) 280 (Gen. Div.)(intervention application); (1997), 35 O.R. (3d) 708, 48 C.C.L.I. (2d) 146, 14 C.P.C. (4th) 122 (Gen. Div.) (conflict decision), leave to appeal refused 36 O.R. (3d) 770, 1 C.C.L.I. (3d) 42, 20 C.P.C. (4th) 87 (Gen. Div.); (1998) 38 O.R. (3d) 781, 50 C.C.L.I. (2d) 30, 19 C.P.C. (4th) 18 (Gen. Div.) (costs on conflict decision); (unreported, February 24, 1998, Gen. Div.) (procedure for settlement hearing); (1998) 40 O.R. (3d) 429, 5 C.C.L.I. (3d) 18, 22 C.P.C. (4th) 381 (Gen. Div.) (certification decision and settlement approval), appeal quashed 165 D.L.R. (4th) 482, 41 O.R. (3d) 97, 113 O.A.C. 307 (C.A.), leave to appeal to S.C.C. refused 165 D.L.R. (4th) vii, 118 O.A.C. 399*n*, 235 N.R. 390*n*; (unreported, November 8, 1998, 96-CT-022861, S.C.) (costs against objector).

70 See, for example, *Furlan v. Shell Oil* (2002), 8 B.C.L.R. (4th) 302; and *Scott v. TD Waterhouse* settlement (http://www.tdwaterhouse.ca/settlement/).

71 Robert Frost (1874–1963), U.S. poet. Ten Mills, "V. Pertinax."

Form is beginning to develop through the potential jurisdictional chaos. In the main, class counsel are responsible for creating that form in order to minimize their risks and maximize the likelihood for national success. Plans are put in place from an early stage that have, so far, prevented interjurisdictional hostilities. All parties to the litigation process thankful that the many vexing jurisdictional issues have been avoided through such cooperation.