RECOGNIZING MULTIJURISDICTION CLASS ACTION JUDGMENTS WITHIN CANADA: KEY QUESTIONS — SUGGESTED ANSWERS

The law of res judicata may have to adapt itself to the class proceeding concept.[1]

1. Introduction

With the advent of parallel multijurisdiction class actions in Canada, we need to develop a workable means of coordinating them. To do so we must establish standards for granting or denying preclusive effect to class action judgments and for exercising jurisdiction over them, and we must find ways to assess when parallel actions should be consolidated and to determine which courts should decide them.

In this commentary I offer six suggestions on how we might approach these issues. I do so in response to the following questions:

WHO is affected by recognizing class action judgments from other jurisdictions?
WHAT did *Morguard* really say about recognizing class action judgments?
WHEN have courts recognized class action judgments (and when have they refused)?
WHERE should multijurisdiction class actions be decided in Canada?
WHY should Canadian courts recognize class action judgments?
HOW should the appropriate forum be determined?

The suggestions I make are as follows:

First, we should not limit our concerns to the interests of the named parties and the class members who might sue separately because their interests are already addressed by the existing law of *res judicata* and by relatively straightforward adaptations of it. Rather, we should also consider the interests of a third group of class members — those

1. *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 129 D.L.R. (4th) 110, 25 O.R. (3d) 331 at p. 347 (Ont. Ct. (Gen. Div.)), leave to appeal to C.A. refused 7 C.P.C. (4th) 206.

who are unlikely to sue separately, as their interests reflect the special concerns of class actions.

Second, while the *Morguard* principles may provide inspiration for the answers we seek, the *Morguard* decision cannot supply the details of the standards and practices that we need to develop because *Morguard* was a case about the preclusive effect of judgments on the interests of named parties, and in particular, named defendants. It was not about the special interests of class members, and in particular, the interests of this third group — unnamed plaintiffs who could not or would not sue separately.

Third, despite the deference that Canadian courts have shown to foreign judgments generally, and to foreign class actions judgments in particular, there have been some striking instances in the past year in which Canadian courts have refused to recognize Canadian class action judgments and to grant preclusive effect to them. These decisions highlight the concerns of these courts for the interests of this third group in ensuring adequate recovery or adequate incentives to more responsible conduct on the part of the defendants and whether these interests are best served by recognizing the decision of another court and refusing to try the matter again locally.

Fourth, while the refusal to recognize a judgment in a class action suggests that the issuing court lacked jurisdiction *simpliciter* to decide the case, this question is better understood as a question of appropriate forum.

Fifth, an appropriate forum is one in which we are confident that the interests in adequate recovery or adequate protection from continued harm or similar harm will be well served, thus obviating the need for the matter to be heard elsewhere. Other factors may need to be developed to choose *between* appropriate fora where it is desirable to do so.

Sixth, this critical determination of appropriate forum is better made at or before the certification stage than after a judgment or settlement approval has been rendered. Further, such a determination is best made by a multilateral body, such as one modeled on the U.S. Multidistrict Litigation Panel with necessary procedural modifications to address the fact that it would operate in Canada as a body comprised of the members of otherwise independent courts.

2. WHO is Affected by Recognizing Class Action Judgments from Other Jurisdictions?

As with all procedural reforms, to make workable rules for the

recognition of multijurisdiction class action judgments in Canada, we must be guided by a sense of whose interests are affected and how these interests can best be served. Clearly, the named parties are affected by recognizing a class action judgment from another jurisdiction, but their interests are similar to those of the parties in named party litigation. Their interests can be safeguarded by the existing rules for the recognition of judgments.

A second group — class members — is also affected by recognizing class action judgments from other jurisdictions. Their interests present special concerns. They have not participated in the proceeding, but they will be precluded from bringing their claims in the court recognizing the judgment.[2] The interests of this second group are new, but they have been considered on a number of occasions. Safeguarding the rights to notice and an opportunity to opt out, and to adequate representation, all support the interests of those whose claims could be brought separately from the class. Safeguards of this sort are well established in domestic class actions regimes and they can be adapted to multijurisdiction class actions.

But what of class members whose claims could not readily be brought in other proceedings? They constitute a distinct subset of the second group or, perhaps, even a third group, in that their interests may be different from those who might sue separately. From the perspective of the principles underlying named party litigation, it is arguable that the interests of this third group are not affected by recognizing a class action judgment. They may have claims, but their choses in action may be said to be worthless because those claims are not economically viable and, as a result, their interests are not worth protecting according to traditional standards. From the perspective of class actions, however, the situation is very different. This third group has much in common with any group of people in society who have been harmed by wrongful conduct. If the members of this group could receive substantial relief but their claims are not independently economically viable, then their access to justice has been restricted. If they could benefit from incentives to suppliers of goods and services

2. This group is often divided into two — residents of the forum and non-residents. However, the interests of these two groups are not really different from one another. Courts do not ordinarily make jurisdictional rulings based on the claimants' residence. Class actions regimes do not work that way either unless the class description itself refers to residence. On the contrary, recognizing a class action judgment precludes claims from being brought in the local courts by all those who fall within the description of the class, whether they are residents or non-residents. And recognizing a class action judgment cannot restrain claimants, whether they are residents or non-residents, from taking their claims to some other court.

to act more responsibly, then they are part of a community whose regulatory mechanisms may have been undermined. This is what a class action could, and should, achieve for them.

Notice and an opportunity to opt out do little for the members of this third group if they have no other way to sue for compensation or redress. Even the adequacy of representation as a means of giving them a chance to participate in the proceeding may seem less important than whether the result provides adequate compensation or redress. Focusing on the interests of this third group may help us to develop a framework for the recognition of multijurisdiction class action judgments in Canada — one based on the principles underlying class actions.

Who is affected by recognizing class action judgments from other jurisdictions?—Those affected include named parties, class members who could seek compensation or redress independently and, most importantly, class members who could not.

But I am getting ahead of myself. It is better to begin at the beginning by picking up the thread of the current discussion, one that looks for answers in the law of jurisdiction and judgments and the constitutional principles enunciated by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*.[3]

3. WHAT Did *Morguard* Really Say About Recognizing Class Action Judgments?

Many have said that in the *Morguard* decision, the Supreme Court of Canada *discovered* a "full faith and credit" clause in the Constitution that required Canadian courts to recognize the judgments of other Canadian courts. And the judgment did, in fact, say that the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives. As a result, the "*Morguard* principles" are principles of jurisdiction as well. They reflect constitutional standards for assuming jurisdiction.[4]

Many have also suggested that the reasoning and the standards enunciated in *Morguard* apply equally to the preclusive effect of class action judgments on class members in other jurisdictions. If it does, then where a Canadian court has exercised appropriately restrained jurisdiction, and it has provided adequate notice and an opportunity to opt out, there is a constitutional obligation to recognize the judgment. Despite this, some Canadian courts *are* refusing to grant

3. [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256.
4. Vaughan Black, "The Other Side of *Morguard*: New Limits on Judicial Jurisdiction" (1993), 22 C.B.L.J. 4.

preclusive effect to class action judgments and they are doing so for what seem to be compelling reasons.

To understand why class action judgments are being denied recognition, it is helpful to have another look at what the Supreme Court of Canada actually said in *Morguard*. Starting with the obvious, there was no "full faith and credit" clause to be discovered in the Canadian Constitution. Such a clause does exist in the U.S. Constitution[5] and it creates a fixed obligation for American courts to recognize one another's judgments — whether or not it seems fair to do so under the circumstances. The American courts soon realized that a fixed obligation such as this could cause considerable mischief unless they established a means of guaranteeing a measure of fairness to the persons affected. Eventually, the due process clauses in the Fifth and Fourteenth Amendments were pressed into service as a foundation for basic jurisdictional standards.[6] These jurisdictional standards prevent the hardship and confusion that could arise from the obligation to recognize judgments from courts that ought not to have exercised jurisdiction.

The balance between the duty to recognize judgments and the duty to be fair to the parties affected is echoed in *Morguard* in the "principles of order and fairness."[7] However, there is a difference. In *Morguard*, the analysis proceeded from the opposite direction. It did not take a fixed obligation to recognize judgments and address the harm it could cause by adding constitutional safeguards to ensure fairness. Rather, the court observed that "concerns about differential quality of justice among the provinces can have no real foundation" in Canada and therefore "a full faith and credit clause *was unnecessary* . . ." Generous standards for the recognition of judgments are implied in a federation and, in any event, within the Canadian federation, there were unlikely to be sound reasons for a party to object to the recognition of judgments from other parts of Canada on the basis of fairness.

This difference in the Supreme Court's reasoning is important in

5. Article IV.1 provides that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

6. *International Shoe Co. v. State of Washington*, 326 U.S. 310 at p. 316 (1945).

7. Which in the common law provinces operate through the counterpart to the U.S. "minimum contacts test," the "real and substantial connection test." Although it was necessary for the common law provinces to add this ground of jurisdiction to those of "consent" and "presence of the defendant" in their rules for recognizing judgments, this was not necessary for Québec, where the international jurisdiction of Québec authorities is provided for in Title III of Book X of the Code Civil: *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 220 D.L.R. (4th) 54.

understanding the recent refusals by Canadian courts to recognize class action judgments from other Canadian courts. It would be wrong to dismiss these refusals as recalcitrance or a failure to appreciate the constitutional obligations enunciated in the *Morguard* decision. Canadian courts recognize Canadian judgments in named party litigation because no unfairness results. That is why a full faith and credit clause, though necessary to the operation of a federation, did not have to be written into the Canadian Constitution. It is true that recognition of class action judgments may also be necessary to the Canadian federation, but where Canadian courts find that unfairness would result, we must find ways to ensure that the process is fair so that a workable system for their recognition can be established.

The decisions of courts refusing to recognize Canadian class actions judgments are important indications of the way forward. They highlight the ways in which class actions are different from named party litigation. In adopting a regime for class actions, we might have thought that we were just tweaking the rules of procedure to facilitate the aggregation of claims and to enhance the ability of ordinary named party litigation to promote three well-established objectives of litigation (access to justice, judicial economy and behaviour modification). But in the years since, the rivers of ink spilled and the forests felled in coming to terms with the *sui generis* issues arising in class actions bear testament to the fundamental differences between class actions and ordinary litigation. What we are discovering as class actions procedure develops is that class actions are not so much a procedural adjustment designed to facilitate the adjudication of claims that would otherwise be difficult to pursue as they are a way of enabling courts to participate in a kind of regulation that would otherwise be beyond their purview and, as a result, to play a new role in society.

A detailed discussion of this new role is beyond the scope of this paper, but the point is relevant to understanding the equities at stake in recognizing class action judgments. That class actions do much more than we thought they would, and so require special rules for jurisdiction and judgments, is news — not only to us, but, it would seem, to almost every country that has adopted them. Taking the United States as an example, in the history of American class actions, it was 40 years after the U.S. Supreme Court made its famous pronouncement on due process,[8] and almost 20 years after the introduction of class actions,[9] that the U.S. Supreme Court

8. In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
9. U.S. Federal Rules of Civil Procedure, r. 23.

considered in the *Shutts* case how the due process clause would apply in the class actions context.[10] Twenty years later, it is still not obvious to outsiders reading the court's reasoning in *Shutts* how the due process guarantees provide the appropriate analytical framework for addressing the interests of the third group described above.

Accordingly, the question in Canada is not whether a constitutional requirement of full faith and credit that was discovered by the Supreme Court in *Morguard* can be applied to multijurisdiction class actions, but whether workable standards can be established to make it reasonable to recognize class action judgments as precluding the claims of class members from being commenced afresh. *Morguard* was a decision that enunciated important general principles of broad application, but in its specifics, it set the standards for recognizing and enforcing judgments in named party litigation. Those standards were designed for the interests of the first group (named parties) and, at best, they can be adapted to serve the interests of the second group (those who could sue independently), but they cannot serve the interests of the third group — ordinary class members with no other means of suing for compensation or redress. It is possible that the refusals in recent decisions of Canadian courts to recognize class action judgments from other Canadian courts were motivated by a sense that the interests of this third group needed to be served better. Pursuing that line of inquiry seems far more promising than straining to find applicable rules in a decision on the law of foreign judgments.

What did Morguard really say about recognizing class action judgments? The *Morguard* decision supplies the constitutional principles of order and fairness but we must develop jurisdictional standards and other procedures for serving the interests of all three groups affected by the recognition of class actions in order to develop a system consistent with the needs of the Canadian federation.

4. WHEN Have Courts Recognized Class Action Judgments (and When Have They Refused)?

It might surprise persons from outside Canada to learn that Canadian courts have seemed more willing to recognize foreign class action judgments than they have been to recognize class action judgments from other parts of Canada. Nevertheless, examining a few of the situations in which the courts have recognized class action judgments and those in which they have refused to do so can shed light

10. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

on the considerations underlying a workable system for the recognition of class action judgments.

In *Currie v. McDonald's Canada*, a class action against McDonald's Canada for fraud in the allocation of prizes in promotional games offered to Canadian customers, McDonald's sought to dismiss the Canadian action on the basis that the matter had been resolved by an Illinois judgment approving the settlement of a class action that purported to include the Canadian class members. The Ontario Court of Appeal held that a foreign class action judgment could have preclusive effect provided there was a real and substantial connection between the matter and the forum, the non-resident class members were adequately represented and they were accorded procedural fairness, including adequate notice and an opportunity to opt out.[11] This reasoning was consistent with the previous decisions rendered in challenges to the jurisdiction of Ontario courts to certify multijurisdiction class actions:[12] it addresses the interests of the first and second groups of persons described earlier — the named parties and those whose claims could be brought elsewhere.

However, in other cases that have considered the preclusive effect of class actions judgments from other provinces, the courts have held that the judgments could not operate to preclude a local class from bringing an independent claim seeking a different result. For example, in *Lépine v. Canada Post*,[13] Cybersurf sold its software for $9.95 through Canada Post and said it would provide free Internet access in exchange for posting advertisements on the user's computer screen. When it began to charge its users $9.95 per month for access, class actions were commenced in Ontario and Québec. The Ontario class action purported to include Québec residents, and so the residents of Québec received notices for both class actions. When the defendant brought a motion in Québec to have the Ontario decision recognized as precluding the Québec action, the Québec court refused to do so because the duplicate notices received by the Québec residents might cause confusion.[14]

11. *Currie v. McDonald's Restaurants of Canada Ltd.*, [2005] O.J. No. 506 (QL) at para. 30, 250 D.L.R. (4th) 224 (C.A.).
12. *Nantais v. Telectronics Proprietary (Canada) Ltd, supra*, footnote 1; *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441, 30 C.P.C. (4th) 133 (Gen. Div.); *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219, 49 C.P.C. (4th) 233 (S.C.J.), leave to appeal to Div. Ct. refused 52 O.R. (3d) 20, 143 O.A.C. 279 (Div. Ct.), leave to appeal to S.C.C. refused 154 O.A.C. 198*n*.
13. [2005] Q.J. No. 9806 (QL), J.E. 2005-1631, EYB 2005-93155 (C.S.), affd [2007] J.Q. No. 8498, [2007] R.J.Q. 1920, 2007 QCCA 1092, J.E. 2007-1615, EYB 2007-122903 (C.A.), leave to appeal to S.C.C. granted [2007] S.C.C.A. No. 495.

In *HSBC Bank Canada v. Hocking*,[15] penalties were charged improperly to mortgagors who paid out their mortgages early and, again, two class actions were brought — one in Ontario on behalf of all Canadian residents and one in Québec on behalf of residents of Québec. This time, the plaintiff in the Québec action sought to intervene in the Ontario action but was denied permission to do so. The class action was certified in Ontario and a settlement was approved. The defendant brought a motion in Québec to have the Ontario judgment recognized as precluding the Québec action from proceeding. The court refused because the claims before it had no connection with Ontario, the representative plaintiff in the Québec action was not able to participate in the negotiations between the parties to the Ontario action, the members of the class would not receive any compensation under the terms of the award, and they were denied an opportunity to participate in the Ontario proceeding when their motion to intervene was rejected. All in all, it was not clear that their particular concerns would be addressed in the resolution of the matter in the Ontario proceeding.[16]

When have courts recognized class action judgments (and when have they refused)? Procedural fairness requires adequate representation and notice and an opportunity to opt out, but this is not always enough. To serve the interests of the third group — those who are unlikely to sue separately but who, nevertheless, are entitled to have their interests adequately represented — it must be assured that this group's particular concerns will be addressed in the proceeding, and that it will not be deprived of appropriate recovery or redress as a result of having the matter decided in a distant forum that may be insensitive to its particular interests.

5. WHERE Should Multijurisdiction Class Actions Be Decided in Canada?

For the reasons considered at length in a number of decisions,[17]

14. *Ibid.*, at para. 38.
15. [2006] J.Q. No. 507, [2006] R.J.Q. 804, 2006 QCCS 330, J.E. 2006-517, EYB 2006-100504 (S.C.), affd *Hocking v. Haziza et HSBC Bank Canada*, [2008] 500-09-016435-067 (C.A.) (citing this commentary as presented to the National Judicial Institute on April 9, 2008).
16. *Ibid.*, at para. 78 ("La situation prévalant dans le présent dossier, aux yeux du Tribunal, n'est pas conforme aux principes d'ordre et d'équité : la réclamation des membres québécois n'a aucun lien avec le forum ontarien, le représentant québécois a tenté sans succès de participer aux négociations entreprises entre Hocking et HSBC, les membres ne reçoivent aucune compensation suite au règlement et ils n'ont pas réussi à faire valoir leur point de vue devant le Tribunal ontarien, leur intervention ayant été rejetée").

there is simply no credible challenge to be made to the basic jurisdiction of Canadian courts to certify multijurisdiction class actions.[18] This is not to say that there is no jurisdictional question to be raised in determining whether to recognize a class action judgment or, to put it another way, that there are no jurisdictional standards to be developed in creating a workable regime of multijurisdiction class actions in Canada. Rather, it is to say that the question is not properly one of jurisdiction *simpliciter*.

Several courts have recognized the merits of having common issues decided in a single proceeding despite the fact that these might involve the claims of persons arising in different provinces. While it stretches the logic of a "real and substantial connection" to say that the real and substantial connection test supports jurisdiction over those claims, some Canadian courts have felt obliged to base their conclusion on that test. For example, in response to a challenge to its jurisdiction to determine on an opt-in basis claims that had arisen in other provinces, the British Columbia Supreme Court said that the common issue could serve as a basis for jurisdiction because "it is that common issue which establishes the real and substantial connection necessary for jurisdiction."[19] Similarly, in a recent Ontario decision, it was observed that the courts in Ontario accept "as a sufficiently real and substantial connection a commonality of interest between non-resident class members and those who are resident in the forum and whose causes of action have sufficiently real and substantial connections to it to ground jurisdiction over their claims against the defendants."[20]

But this does not end the matter. There may be no question of jurisdiction *simpliciter*, but there is certainly a question of

17. See cases cited *supra*, footnote 12.
18. Although class actions legislation is promulgated pursuant to the constitutional grant to the provinces of exclusive authority to make laws in relation to procedure in civil matters and this grant contains a limit on the extraterritorial operation of that authority, s. 92 provides for *legislative* authority, not *judicial* authority. The judicial jurisdiction of the superior courts of Canada is founded on the traditional authority of the courts of England and the provinces as reflected in s. 129 of the Constitution Act, 1867 and it is informed by the principles of order and fairness. See J. Walker, *The Constitution of Canada and the Conflict of Laws* (D. Phil. Thesis, Oxford University, 2001) [available at the Library of Canada].
19. *Harrington v. Dow Corning Corp.* (1997), 29 B.C.L.R. (3d) 88, 8 C.P.C. (4th) 262 (S.C.).
20. *McCutcheon v. Cash Store Inc.*, [2006] O.J. No. 1860 (QL) at para. 49, 80 O.R. (3d) 644 (S.C.J.). In *Risorto v. State Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 676 (QL), 47 C.C.L.I. (4th) 78, 38 C.P.C. (6th) 373 (S.C.J.) the court held that including class members subject to different statutory regimes was not a bar to certification.

appropriate forum. If there was only one court in Canada capable of determining class actions, we would find ways to ensure to the extent possible that the benefits of the class actions decided in that court were enjoyed in all the communities throughout the country where the cause of action arose. But now we have class actions in most Canadian jurisdictions and we must find ways to address the concerns arising from overlapping and competing class actions without losing the benefits to the various communities that might be gained by local representation, local adjudication and local awards. In this way it is not so much that the rules of jurisdiction and judgments need to be adapted to the class actions context as it is that the procedures developed for contested carriage motions and settlement approval hearings in class action procedure need to be adapted to take into account the special concerns of multijurisdiction situations.

Englund v. Pfizer Canada Inc. illustrates the challenges we face. The Saskatchewan Court of Queen's Bench refused to stay a proposed class proceeding on behalf of Saskatchewan residents who were presumptively included in the multijurisdiction class action that was pending in Ontario because that would "recognize legislation enabled by other jurisdictions that intentionally encroaches on the right of its residents to seek judicial recourse for losses they suffered as a consequence of a tort or breach of the law committed within the Province."[21] On appeal, the decision was reversed by the Saskatchewan Court of Appeal because the plaintiffs, who, it seems, were the same in both proceedings, had shown no reason why the matter could not be heard in a single proceeding in either forum and the court held that they should be put to their election. In its order, the Saskatchewan Court of Appeal granted a stay that could be lifted if the Ontario action was discontinued.[22] The plaintiffs were then permitted by the Ontario court to discontinue the Ontario opt-out national class in favour of the Saskatchewan opt-in national class, which counsel preferred because Saskatchewan is a "no costs" jurisdiction.[23] It is not clear whether combining the interests of plaintiffs' counsel in trial in a "no-costs" jurisdiction with the interests of defendants in trial in a jurisdiction that requires non-resident class members to opt in also served the best interests of the class members. What is clear is that it is difficult for courts to resolve

21. *Englund v. Pfizer Canada Inc.*, [2006] S.J. No. 9 (QL) at para. 44, [2006] 7 W.W.R. 128 (Q.B.).
22. *Englund v. Pfizer Canada Inc.*, [2007] S.J. No. 273 (QL), 284 D.L.R. (4th) 94, (C.A.).
23. *Sollen v. Pfizer Canada Inc.*, [2008] O.J. No. 866 (QL), 290 D.L.R. (4th) 603 (S.C.J.).

questions of overlapping class actions in the course of independent, unilateral and sequential rulings based only on the submissions of counsel for one class.

To facilitate these determinations Saskatchewan passed the Class Actions Amendment Act, 2007,[24] which came into force on April 1, 2008. Sections 2 and 4 of the Saskatchewan Class Actions Act were amended to include a definition of multi-jurisdictional class action as "an action that is brought on behalf of a class of persons that includes persons who reside in Saskatchewan and persons who do not reside in Saskatchewan" and to require a person who commences such an action to "give notice of the application for certification to the representative plaintiff in any other multi-jurisdictional class action, or any proposed multi-jurisdictional class action, commenced elsewhere in Canada that involves the same or similar subject-matter."

Where should multijurisdiction class actions be decided in Canada? This is the key question that we face, but it is best answered in two parts, which will comprise the last two parts of this commentary. First, we must develop a more nuanced approach to the choices between appropriate fora by considering the interests of the third group and why, from their perspective, it might be reasonable to recognize class actions judgments from other courts. Second, we must develop adjudicative mechanisms to enable the multilateral determination of the appropriate forum for class actions in Canada that can operate in a legal system comprised of independently administered courts.

6. WHY Should Canadian Courts Recognize Class Action Judgments?

All private law litigation serves the combined purposes of compensating persons for losses suffered and creating incentives to others to act responsibly so as to avoid causing such loss. One extraordinary feature of class actions that has only become clear with experience is that as the aggregation of claims increases the ability of private law litigation to serve these purposes, it also tends to drive a wedge between them.

Some class actions serve primarily the needs of persons who have suffered measurable losses that would go uncompensated but for their ability to join together to seek relief. Other class actions, involving nominal losses, serve primarily the needs of the broader public to be protected from misconduct by establishing effective

24. S.S. 2007, c. 1, amending the Class Actions Act, S.S. 2001, c. C-12.01.

sanctions to encourage more responsible conduct. It would be wrong to suggest that there is an absolute distinction between these two kinds of class actions, but much confusion has resulted from trying to develop principles and procedures for both without regard to the differences between them.

In the first kind of class action that commenced primarily to promote access to justice for those who have suffered measurable losses, the pressing considerations in resolving the matter relate to the adequacy of the recovery. In class actions, adequate recovery will almost always amount to a compromise between what the claimants "should" receive and what is reasonably available. Claimants often receive far less than what they might receive if they were to claim individually, but this is an abstract consideration because, as a practical matter, their claims could not be brought independently and these claims have been aggregated to make them economically viable.

The question in the multijurisdiction context is whether the relief granted to these persons has been diminished by reason of the fact that it was granted by a court other than the court being asked to recognize the judgment. This could be as a result of differences in the legal principles that the recognizing court would itself apply, or as a result of some other jurisdiction-specific feature of the litigation. Of course, considerable care would need to be taken in conducting a review of this sort to ensure that the availability of review was not taken merely as an opportunity to re-open the litigation, or to argue why different counsel might have achieved a different result — other than for forum-specific reasons. And to the extent that review of this sort was available in principle, it would be likely that these issues would be anticipated and addressed directly in a judgment or settlement approval, perhaps one that benefited from interventions from those who might otherwise challenge the result.

Indeed, to the extent that review of the relief granted might always have an inherent tendency to undermine the finality of class action judgments it would be preferable to develop a means for addressing this concern as a matter of course, at the certification stage, as will be discussed in the next section. Where such concerns are justified, certainty would be enhanced by ensuring that the class of persons who might be prejudiced by being prevented access to the court to which they would otherwise resort are given appropriate relief as a sub-class or are presumptively excluded from the original class action.

Different considerations arise in the second kind of class action — that involving nominal losses and that is commenced primarily to serve the needs of the broader public by establishing effective sanctions to encourage more responsible conduct. In these actions,

the question is whether recognizing the judgment will provide adequate incentives to the defendant, and to others who might cause similar harm, to take steps to avoid causing such harm in the future not only in the jurisdiction where the judgment was issued but also in the jurisdiction in which recognition is sought.

In conducting this analysis there may be a tendency to assume that local measures are the best protection for the local public. But any regulatory measures, including class actions, involve public expense and so the benefits of an additional local action would be weighed against the likelihood that the judgment would provide adequate incentives to the defendant and to others similarly situated to improve their conduct in ways that would benefit not only the public in the forum where the judgment was issued but also in the forum where the judgment is recognized. That some foreign class action judgments are capable of providing effective incentives to engage in responsible conduct locally could explain the inclination of the Ontario court to recognize the U.S. judgment in the case against McDonald's discussed above. Nevertheless, where an award provides nominal or no compensation for class members and, instead, requires some contribution to the welfare of the broader community, courts may be concerned to ensure that the communities that benefit include those in the fora in which other class actions might be commenced. This could explain the disinclination of the Québec court to recognize the Ontario judgment in the case against Canada Post discussed above.

The considerations described above are reasons for recognizing class action judgments from other courts, but they can also provide guidance in the processes of defining the class, measuring the adequacy of representation and the litigation plan, resolving contested carriage motions, and assessing the adequacy of the proposed relief in a settlement hearing.

In some cases, these considerations would be enough to determine where a multijurisdiction class action would best be decided, but in other cases, these requirements might be met in more than one jurisdiction. To assist in addressing these situations s. 6 of the Saskatchewan Class Actions Act[25] now provides guidance to courts in determining when to certify a multijurisdiction class action in circumstances in which there is a competing multijurisdiction class action as follows:

> 6(2) If a multi-jurisdictional class action, or a proposed multi-jurisdictional class action, has been commenced elsewhere in Canada that involves

25. Class Actions Act, S.S. 2001, c. C-12.01.

the subject-matter that is the same as or similar to that of the action being considered pursuant to this section, the court shall determine whether it would be preferable for some or all of the claims or common issues raised by those claims of the proposed class members to be resolved in that class action.

(3) For the purposes of making a determination pursuant to subsection (2), the court shall:

(a) be guided by the following objectives:
  (i) ensuring that the interests of all of the parties in each of the relevant jurisdictions are given due consideration;
  (ii) ensuring that the ends of justice are served;
  (iii) avoiding, where possible, the risk of irreconcilable judgments;
  (iv) promoting judicial economy; and

(b) consider all relevant factors, including the following:
  (i) the alleged basis of liability, including the applicable laws;
  (ii) the stage each of the actions has reached;
  (iii) the plan for the proposed multi-jurisdictional class action, including the viability of the plan and the capacity and resources for advancing the action on behalf of the proposed class;
  (iv) the location of the representative plaintiffs and class members in the various actions, including the ability of representative plaintiffs to participate in the actions and to represent the interests of the class members;
  (v) the location of evidence and witnesses.

Despite the range of these criteria, it may be necessary to consider additional criteria developed by the Judicial Panel on Multidistrict Litigation in the United States Federal Court (the MDL Panel) in the selection of a particular district for transfer of multi-district actions for consolidated pretrial proceedings. These factors include:

- that the district is easily accessible, or a convenient, central location with respect to all the actions, or the parties, documents or witnesses
- the district's neutral status
- the pendency in that district of a number of the actions
- the pendency of related civil actions or agency proceedings
- the district court's familiarity with the issues involved in the litigation
- the favorable status of the caseload or civil dockets in the district as where the district did not have any other multi-district litigation on its docket
- that the district is a metropolitan district, well equipped with the resources that the complex docket was likely to require
- that significant discovery is likely to take place in the district
- that the district is site of the furthest advanced action
- all of the parties' agreement to the transfer

- the transferee judge's prior, successful experience with multi-district litigation[26]

Why should Canadian courts recognize class action judgments? They should do so because, where appropriate, the persons who might otherwise seek recovery from them are not prejudiced by having had their rights being determined in another forum, or because the incentives to defendants and others similarly situated to modify their behaviour will result in sufficient benefits to the community of the recognizing court to render a local class action unwarranted. Beyond this, Canadian courts may be guided in further developing the rules for determining the appropriate forum or fora for the litigation of a class action or related class actions by referring to the factors considered by the U.S. MDL Panel.

7. HOW Should the Appropriate Forum Be Determined?

A discussion of the standards to be applied in determining the appropriate forum for multijurisdiction class actions is only of practical benefit if there is an adjudicative mechanism or body capable of making determinations binding on the parties in all the possible fora throughout Canada. It is becoming increasingly evident that there is a potential for this sort of determination, when made in the existing adjudicative structure of independently administered courts, to suffer from incomplete information or conflicts between the interests of counsel and the class.[27] Even where the court has the benefit of argument concerning the merits of deferring to an existing competing multijurisdiction class action, there continues to be a risk of conflicting determinations.

For example, in the decision by the Saskatchewan court to certify a multijurisdiction class in *Wuttunee v. Merck Frosst Canada Ltd.*[28] the court was not dissuaded from doing so by the fact that counsel seeking certification of a multijurisdiction class action had previously failed to win carriage of the same action in Ontario in a decision in which carriage in a multijurisdiction class that did not include the claims of Saskatchewan residents[29] had been awarded to a

26. C. Wright and G. Miller, *Federal Practice and Procedure*, Civil 3d (St. Paul, Minn., West, 1969), § 3864.
27. See *supra*, footnote 22.
28. 2008 SKQB 229.
29. The routine informal practice of excluding Québec claimants from multijurisdiction classes, as occurred in this case, may change as a result of the determination in *Brito v. Pfizer Canada Inc.*, [2008] J.Q. No. 4642, 2008 QCCS 2231, J.E. 2008-1215 (S.C.) that Québec courts are also competent to decide multijurisdiction class actions.

consortium of Canadian counsel. Although the Saskatchewan court relied on the expectation that the Ontario court would stay the class action before it awaiting certification, the Ontario court declined to do so and, instead, proceeded to certify the multijurisdiction class action in Ontario. The Ontario court refrained from critiquing the Saskatchewan judgment but observed that "It does not, however, follow that I should now defer to the decision to the extent of ordering a stay of the proceeding that, in this court, was held be more advantageous to the class than the similar action... in Saskatchewan. I am satisfied that, by themselves, principles of comity do not require such a result. Comity is . . . a two-way street."[30] And, after carefully reviewing the reasons indicated in favour of deferring to the Saskatchewan proceeding, the court concluded:

> None of the above suggested grounds for preferring the proceeding in Saskatchewan satisfies me that the plaintiffs in that action should be permitted to derail the decision of this court in the carriage motion to which Mr Wuttunee and their counsel, as well as Merck, were parties.
>
> . . . . .
>
> Of course a multiplicity of actions raising the same claims among the same parties is to be avoided. But why does it follow that the plaintiffs and their counsel in Wuttunee #2 should now be permitted to undermine the decision of Winkler J. by moving to expand the class in Wuttunee #2 at a time when, to their knowledge, the parties in this action had prepared for the certification motion and the hearing was imminent?
>
> . . . . .
>
> I wish to emphasise that my decision to refuse to stay this proceeding will not reflect acceptance of a principle that would assign priority to jurisdictions in which claims are first made, or issues first determined. The practice of rushing to commence overlapping actions in as many jurisdictions as possible in order to claim turf and secure carriage for law firms — rather than to advance the interests of a putative class — gives ambulance-chasing a good name and, in my opinion, smacks of an abuse of process.
>
> . . . . .
>
> While I am not convinced that the problems that will be created by the continuation of the two actions are insoluble, the result is, of course, unfortunate. 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 for nationally-accepted carriage motions and determine the jurisdiction in which such motions will be heard.[31]

30. *Tiboni v. Merck Frosst Canada Ltd.*, 2008 CanLII 37911 (Ont. S.C.), at para. 21.
31. *Ibid.*, at paras. 33-41.

Despite the urgency, establishing a mechanism or body to make a single determination within the structure of the Canadian judicial system with its independently administered courts will require considerable collective will and some ingenuity.

In its *Report on National Class Actions*, the Uniform Law Conference of Canada's Committee canvassed the options.[32] The committee acknowledged the merits of the approach taken by the United States Federal Court in establishing the MDL Panel. However, it seemed unlikely that the Constitution Act, 1867 could be interpreted to permit such authority to be vested in the Federal Court of Canada, and the political will needed to create a new court pursuant to s. 101 of the Constitution Act, 1867, seemed unlikely to emerge. The committee reflected on the possibility that such a body could operate as a committee of the Canadian Judicial Council, which was created ". . . to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts," but this, too, seemed ambitious.

Ultimately, the committee proposed a series of principles that could be applied by Canadian courts in the ordinary course of determining motions for certification. Though this option was less likely to be as effective as an authoritative multilateral body, there seemed no way to endow a multilateral body with the necessary authority. How could such a body decide on behalf of a superior court in Canada whether it should or should not exercise jurisdiction over a matter before it? And so it was hoped that a central registry granting ready access to the information on class actions commenced across the country, and a sense of the urgency of coordinating multijurisdiction class actions, would encourage the provincial superior courts operating independently to generate an informal system of cooperation.

Since the time the report was adopted by the Uniform Law Conference, the need to develop an effective means of coordinating multijurisdiction class actions has become even more pressing, as is evident from the rulings discussed above. Further reflection suggests that it may be possible to develop a means of overcoming the hurdles of an independently administered court system to create a Canadian version of the U.S. MDL Panel, based on a model proposed by Chief Justice Winkler, which in Canada could be called a Multijurisdiction Class Proceedings Panel (MCPP).[33]

32. The report is available online: ULCC <www.ulcc.ca>.
33. Correspondence with Chief Justice Winkler, re "The Winkler Amendment", April 2, 2007, Toronto.

The procedural reforms necessary to establish such a panel include two components: a revised function for the national registry, and a deliberative body comprised of representatives of all the courts that might be appropriate fora for multijurisdiction class actions in Canada. In such a system, a judge of the court in which the matter was first commenced would participate with others in a hearing panel. When it came time to adopt the decision of the panel, the judge, as a member of that court, could either stay the matter or ask the Chief Justice of that court to assign it to a member of the court. Also in such a system, the Attorneys General of the other Canadian provinces could act as nominal plaintiffs in actions commenced *pro forma* and stayed pending the determination of the MCPP. Here is how the system could work:

With respect to the registry, each province with class proceedings legislation could pass legislation requiring parties who commence multijurisdiction class actions to forward the notice of proceeding to a centralized registry upon issuing it in the province. The registry, which could be developed from the existing National Class Actions Database, would be authorized by the legislation to receive the notices of proceedings and to forward them to the Attorneys General of each province to be reissued in their provinces with the Attorneys General serving as the nominal applicants in matters styled "In Re Multijurisdiction Class Proceeding Concerning..."). The provincial legislation would further provide that a stay would automatically be issued in those proceedings and in any related proceedings subsequently issued in the province pending a determination by the panel.

With respect to the panel, the Chief Justice of each jurisdiction could designate a judge to serve as a member. Hearing panels could be struck periodically to hear applications, consisting of two judges and an alternate. Panels assigned to specific cases would be composed of the two judges and a judge of the jurisdiction in which the matter was first issued. Where the judge from the jurisdiction in which the matter was first issued was already a member of the panel, the alternate would be called upon to join the panel. With the panels constituted in this way, the decision to issue a stay or directions to proceed could be adopted by the judge of the court in which the matter was first issued and, accordingly, would be rendered on the strength of that judge's own authority as a member of the court in which the matter was commenced.[34] Once the panel had made its determination, the *pro*

34. Measures would have to be developed to address situations in which the same or a related proceeding was issued on the same day in more than one jurisdiction. Adjustments in the panel could be made to enable judges from other provinces to

forma proceedings commenced by the Attorneys General in the other jurisdictions in which the matter was not to proceed could be dismissed on consent attaching the ruling of the MCP Panel.

How should the appropriate forum be determined? The appropriate forum for multijurisdiction class actions in Canada should be determined by a Canadian equivalent to the U.S. MDL Panel adapted to meet the needs of the Canadian federation.

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sit on the panel. In cases in which counsel commence proceedings simultaneously in multiple jurisdictions it may be desirable to require them to elect one jurisdiction as the relevant jurisdiction for the purposes of MCP determinations.

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