

**Chaos or Consistency?**  
**The National Class Action Dilemma**

**Ward Branch**  
**Branch MacMaster**  
**1210-777 Hornby Street**  
**Vancouver, BC**  
**V6E 3G2**  
**Email: [wbranch@branmac.com](mailto:wbranch@branmac.com)**  
**Website: [www.branmac.com](http://www.branmac.com)**

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**“The world is chaos. Nothingness is the yet-to-be-born god of the world.”**

**Georg Büchner (1813–1837), German dramatist, revolutionary.  
Trans. by Gerhard P. Knapp (1995). Danton’s Death, act IV (1835)**

## **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.

## **2. JURISDICTION TO COMMENCE A CLASS ACTION**

The fact that the 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 apply to the court for a declaration that the proposed jurisdiction is *forum non conveniens*.<sup>1</sup>

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

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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.); (2000), 100 A.C.W.S. (3d) 4, [2000] O.J. No. 3722 (Q.L.) (S.C.J.) (staying publication of notice pending determination of leave to appeal motion); (2000), 101 A.C.W.S. (3d) 470, [2000] O.J. No. 4735 (Q.L.) (S.C.J. (Div. Ct.)) (refusing leave to appeal certification decision); and *Robson v. Chrysler Canada Ltd.* (2001), 101 A.C.W.S. (3d) 1107, 2001 B.C.S.C. 40.

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

The relevance of the fact that an action is an intended class proceeding was also considered in *Furlan v. Shell Oil Co.*<sup>3</sup> On a motion to challenge jurisdiction, one of the defendants objected that there was no evidence that any of the proposed representative plaintiffs had its product. The B.C. Court of Appeal rejected this concern stating:

...Du Pont contends that at least before certification the references in the amended statement of claim to the 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.

Finally, in *Harrington v. Dow Corning*,<sup>4</sup> the plaintiff sought to include a subclass of plaintiffs from the other provinces, save Ontario and Quebec. Presumably, the decision not to include Ontario and Quebec plaintiffs was based on the fact that class actions were ongoing in these jurisdictions.

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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. has been sought. The author is counsel for Du Pont.

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); (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.

The defendants were not resident in B.C. They argued that the extraprovincial subclass should be limited to those who were initially implanted in B.C., since only these women met the Areal and substantial connection@ test necessary to found jurisdiction.

The trial court agreed that the *Class Proceedings Act* was procedural only, and did not intend to extend the jurisdiction of the B.C. courts beyond the limits constitutionally recognized. The court stated that the legislation should be read as confined by necessary implication to these limits. The court also 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. Nonetheless, the court approved the non-resident subclass. The court noted that the earlier authorities did not address the problem of mass tort claims spreading across provincial lines.

The trial court held that the defined common issue, AAre 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:

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 trial 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 would be deprived of the

opportunity to try the same question in several jurisdictions, this was outweighed by the advantage to class members of having a single determination. The court noted that the defendants would continue to have the benefit of any substantive defences available in the other jurisdictions, pursuant to *Jensen v. Tolofson*.<sup>5</sup>

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

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....

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...

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

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5 [1994] 3 S.C.R. 1022, 120 D.L.R. (4<sup>th</sup>) 289, [1995] 1 W.W.R. 609. This approach differs from that adopted by the Ontario court in *Carom v. Bre-X Minerals Ltd.* (1998), 20 C.P.C. (4<sup>th</sup>) 163, supplementary reasons 82 C.P.R. (3d) 187, 20 C.P.C. (4<sup>th</sup>) 187 (Ont. Ct. (Gen. Div.)) (pleadings motion); (1998), 41 O.R. (3d) 780, 41 B.L.R. (2d) 246, 43 C.C.L.T. (2d) 310, 27 C.P.C. (4<sup>th</sup>) 73 (Ont. Ct. (Gen. Div.)) (pleadings amendment); (1999), 43 O.R. (3d) 441, 30 C.P.C. (4<sup>th</sup>) 133 (Ont. Ct. (Gen. Div.)) (national class); (1999), 44 O.R. (3d) 173, 46 B.L.R. (2d) 247, 35 C.P.C. (4<sup>th</sup>) 43 (S.C.J.) (certification decision), affd 46 O.R. (3d) 315, 6 B.L.R. (3d) 82 (Div. Ct.), revd 51 O.R. (3d) 236 (C.A.). As noted above, 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.

to deal with any individual case where a different forum is established as more appropriate...

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...

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 ...<sup>6</sup>

So the traditional rules apply, but the courts have developed some unique evidentiary rules for class actions:

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6 *Ibid.* (193 D.L.R. (4th)).

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<sup>7</sup> and Newfoundland<sup>8</sup> have recently joined Ontario, B.C. and Quebec in implementing formal class action legislation. Further, the Supreme Court of Canada's judgment in *Western Canadian Shopping Centres v. Dutton*,<sup>9</sup> 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.

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7 See *Class Actions Act* at <http://www.qp.gov.sk.ca/documents/english/firstread/2001/bill-13.pdf>. Their Act came into force on January 1, 2002.

8 See *Class Actions Act* at <http://www.gov.nf.ca/hoa/sr/>. Their Act is expected to come into force in April 2002.

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 Motivations**

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

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.

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 *Western Canadian Shopping Centres*, defendants who intended to contest the merits of the case had an economic incentive to oppose national classes, in the hope 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 Saskatchewan and Newfoundland legislative initiatives and the *Dutton* case, the Defendants' calculus may change. If defendants are reasonably confident that they are likely to face multiple class actions across all Canadian jurisdictions in any event, they may now seek to work together with class counsel in their jurisdiction of choice to ensure that one action covers the whole country so as to minimize legal costs.

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 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.*<sup>10</sup> At issue was section 37 of the Ontario Act, 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 jurisdiction. 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.

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10 (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. (4<sup>th</sup>) 72 (Ont. Ct. (Gen.Div.)) (certification decision in parallel action); (unreported, December 21, 1999, Ont. Ct. (Gen. Div.)) (scope of examination for discovery).

The issues were canvassed in greater detail in *Nantais v. Teletronics Proprietary (Canada) Ltd.*<sup>11</sup> 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 a later date. The court said that the issue was governed by the Supreme Court of Canada's reasoning in *Morguard Investments Ltd. v. De Savoye*<sup>12</sup> and *Hunt v. T&N plc.*<sup>13</sup> Certification was eventually granted on an "opt out" basis, such that class members from outside the jurisdiction were bound by the result even if they did not take any positive steps to participate in the Ontario action. Notice would be issued on a national basis however.

The approach in *Nantais* is similar to that adopted in most U.S. states.<sup>14</sup> U.S. 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 U.S. Constitution. However, the extent of due process required in order to bind class members outside of the state is still a matter of some controversy.<sup>15</sup> Where state courts have accepted the inclusion of non-resident class members, direct individual notice has sometimes been required to bind them to the result.<sup>16</sup>

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11 (1995), 127 D.L.R. (4<sup>th</sup>) 552, 25 O.R. (3d) 31, 40 C.P.C. (3d) 245 (Gen. Div.), leave to appeal dismissed 129 D.L.R. (4<sup>th</sup>) 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. (4<sup>th</sup>) 206; (unreported, October 3, 1997, 95-GD-31789, Ont. Ct. (Gen. Div.)) (settlement approval).

12 [1990] 3 S.C.R. 1077, 76 D.L.R. (4<sup>th</sup>) 256, [1991] 2 W.W.R. 217.

13 [1993] 4 S.C.R. 289, 109 D.L.R. (4<sup>th</sup>) 16, [1994] 1 W.W.R. 129.

14 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*, 3<sup>rd</sup> ed. (Colorado Springs: McGraw-Hill Inc. 1992) at para. 13.21.

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

16 *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.

What about the issue of a potential competing class action? The court in *Nantais* suggested that if a class proceeding were commenced in another jurisdiction, the court might consider removing the residents of that province from the definition of the class in the Ontario proceeding. From a practical perspective, once the case is certified on a national opt-out basis in Ontario, on what basis would counsel in another jurisdiction recommend that a possible local class representative start his own 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 *Nantais* analysis was adopted by the court in *Carom v. Bre-X Minerals Ltd.*<sup>17</sup> 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.

The court in *Carom* suggested that the limitation period protections of the Ontario Act could apply to all plaintiffs who do not opt out, whether resident inside or outside Ontario. 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*.<sup>18</sup> Plaintiffs should not be allowed to choose between two alternate limitation periods depending on their opt-out decision.

In *Robertson v. Thomson Corp.*,<sup>19</sup> 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 Athat would be an issue for the foreign court in which the [foreign class member] brought proceedings.@

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17 (1998), 20 C.P.C. (4<sup>th</sup>) 163, supp. reasons 82 C.P.R. (3d) 187, 20 C.P.C. (4<sup>th</sup>) 187 (Ont. Ct. (Gen. Div.)) (pleadings motion); (1998), 41 O.R. (3d) 780, 41 B.L.R. (2d) 246, 43 C.C.L.T. (2d) 310 (Ont. Ct. (Gen. Div.)) (pleadings amendment); (1999), 43 O.R. (3d) 441, 30 C.P.C. (4<sup>th</sup>) 133 (Ont. Ct. (Gen. Div.)) (national class); (1999), 44 O.R. (3d) 173, 46 B.L.R. (2d) 247, 35 C.P.C. (4<sup>th</sup>) 43 (S.C.J.) (certification decision), affd 46 O.R. (3d) 315, 6 B.L.R. (3d) 82 (Div. Ct.) revd 51 O.R. (3d) 236 (C.A.).

18 [1994] 3 S.C.R. 1022, 120 D.L.R. (4<sup>th</sup>) 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.

19 (1999), 171 D.L.R. (4<sup>th</sup>) 171, 43 O.R. (3d) 161, 30 C.P.C. (4<sup>th</sup>) 182, 85 C.P.R. (3d) 1 (Gen. Div.) (application to

Ontario courts continue to certify national opt-out classes.<sup>20</sup> However, the concept remains controversial.<sup>21</sup> For example, one could argue that the real and substantial 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 does an Ontario court applying an Ontario statute obtain the constitutional authority to require a positive response from extraprovincial class members in order to free themselves from the effect of the Ontario action?

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20 strike); (1999), 43 O.R. (3d) 389, 43 C.P.C. (4<sup>th</sup>) 166 (Gen. Div.) (costs).  
*Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4<sup>th</sup>) 262, 39 C.P.C. (4<sup>th</sup>) 287 (Ont S.C.J.); (2000), 50 O.R. (3d) 345 at p. 348 (S.C.J.) (venue), leave to appeal granted *loc. cit.* at p. 347, *revd loc. cit.* (Div Ct); *909787 Ontario Ltd. v. Bulk Barn Foods Ltd.* (1999), 87 A.C.W.S. (3d) 268 (Ont. Ct. (Gen. Div.)) (application to strike); (1999), 90 A.C.W.S. (3d) 352 (Ont. S.C.J.) (certification), *revd* 99 A.C.W.S. (3d) 919 (Div. Ct.); *Webb v. K-Mart Canada Ltd.* (unreported, November 16, 1998, 98-GD-43927, Ont. S.C.) (scope of examinations); (1999), 45 O.R. (3d) 389, 45 C.C.E.L. (2d) 165, 99 C.L.L.C. pp. 210-038 (Ont S.C.J.) (certification decision and partial summary judgment); (unreported, June 20, 1999, 98-GD043927, S.C.) (approval of retainer agreement); (1999), 45 O.R. (3d) 425, 46 C.C.E.L. (2d) 293 (Ont S.C.J.) (settling terms of certification order), leave to appeal to Ont S.C.J. refused 45 O.R. (3d) 638, 49 C.C.E.L. (2d) 59; (2000) 96 A.C.W.S. (3d) 735, [2000] O.J. No 1454 (Q.L.) (S.C.J.) (motion to amend certification order, appoint an ADR panel, and conduct discoveries of individuals with claims over \$25,000) (class members in all provinces save for British Columbia and Quebec). The court in *Webb* 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 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; *Wilson v. Servier Canada Inc.*

21 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@* (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).

Does the removal of this right 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? Shouldn't the Ontario court carefully assess whether it has the right to remove the right before it embarks on a process designed to determine or remove that right?

This argument held even greater sway before *Western Canadian*, 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 be more efficient to have the claim resolved in one province. However, irrespective of the procedural benefits, the real issue is whether there exists the legal authority for Ontario court to take this step.

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 also 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 more 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 Ontario 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.*,<sup>22</sup> the Ontario court created a separate B.C. subclass within a national opt-out class action. The court found that certification of such a subclass was warranted given the different contributory fault regime in B.C., and the benefit of having B.C. counsel involved for any individual damage assessments for B.C. 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 the B.C. counsel on unwilling Ontario counsel for the sole purpose of addressing some of the unique B.C. 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*,<sup>23</sup> 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. In 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.<sup>24</sup>

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22 (2001), 104 A.C.W.S. (3d) 1007, [2001] O.J. No. 1615 (S.C.J.) [001/124/024 - 4 pp.].

23 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.).

24 *Bourque v. Laboratoires Abbott Ltee* (unreported, April 9, 1998, Montreal 500-06-000023-966, Que. S.C.).

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*,<sup>25</sup> 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*,<sup>26</sup> 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 is somewhat doubtful given the lack of any comprehensive appellate consideration of the constitutionality.

The B.C., Saskatchewan and Newfoundland 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.<sup>27</sup> The certification order must describe the procedure to opt in.<sup>28</sup> The court must create a special subclass for extraprovincial class members.<sup>29</sup> The constitutionality of these provisions has yet to be tested (*Harrington* was a jurisdictional challenge rather than a constitutional challenge to the framework of the B.C. 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.

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25 [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.

26 (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*.

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

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

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

### 3.4 The Potential for Chaos

Difficult jurisdictional issues would exist even if all jurisdictions adopted either the opt-in or opt-out approaches, and the courts approved both approaches, as constitutionally and jurisdictionally sound.<sup>30</sup>

In particular, what is the effect of competing actions? In assessing whether a class action is preferable, courts in B.C., Newfoundland and Saskatchewan are specifically required to consider whether the class action involves claims that are the subject of other proceedings. Should a court in B.C. decline to certify a class action covering issues already purportedly certified on a national opt-out basis in Ontario or Quebec? The court in *Carom* suggested that courts in other jurisdictions may decide to invoke the principles in *Morguard Investments Ltd. v. De Savoye*<sup>31</sup> to prevent parallel actions in other provinces.

Should the rule be “first to the post” 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

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30 Kay, Katherine L. and Lan, Adrian C., *A 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).

31 [1990] 3 S.C.R. 1077, 76 D.L.R. (4<sup>th</sup>) 256, [1991] 2 W.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.

in Ontario in *Vitapharm v. F. Hoffman-Laroche*<sup>32</sup>? 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 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)?

### **3.5 The Answer to the Chaos**

The answer to the potential chaos is obvious and impossible: grant the Federal Court of Canada exclusive jurisdiction over class actions in which class members are resident in multiple jurisdictions. 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.<sup>33</sup> MDL panels determine how all of the actions will advance, and are involved in

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32 [2000] O.J. 753

33 See the home page of the Judicial Panel on Multi-District Litigation at <http://www.jpml.uscourts.gov>. There

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 is likely to implement class proceedings shortly, this alone cannot 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 necessary steps being taken within the class action area.

In the absence of such a constitutional amendment, the author expects that a combination of the following tools will be used to manage the chaos (1) *forum non conveniens* principles, (2) the broad case management powers afforded class proceedings judges (3) informal inter-jurisdictional cooperation between judges.

Unless certain groups or firms of class counsel become so dominant that no one is willing to challenge their authority to run all cases (which is possible), actions will presumably be filed in multiple jurisdictions in many cases. Efficiency will demand that not all cases proceed. Jurisdictional rules will not suffice to shut any action down in its tracks because each jurisdiction will have class members injured and a statute expressly designed by their legislature to assist them. 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 Acts only buttress this ability. Finally, as a practical matter, it will be difficult for counsel to deny their case management judge's legitimate desire to speak to his or her counterparts in the other jurisdictions to ensure that the action is carried forward efficiently.

The real question though is whether courts in or outside Ontario will ever disregard the demographic, legal and economic might of Ontario and allow class actions outside Ontario to serve

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is also an excellent summary of its practice by Kenneth Halpern, "MULTI-DISTRICT LITIGATION" at

as the lead jurisdiction. If not, the class action courts in Toronto could well effectively become Canadian MDL headquarters. If this occurs, will lawyers and class members outside Ontario have any status? Will they be given subclass status only? In the alternative, should Toronto class action courts require that teams of lead counsel with broad national representation carry the action forward?

#### 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 constitutional 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 U.S., 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.<sup>34</sup> 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*,<sup>35</sup> 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*

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34 <http://www.bostonapartments.com/halpern/Pages/papers/multidistrict.html>  
*Castano v. American Tobacco Co.*, 84 F.3rd 734 (5<sup>th</sup> Cir. 1996).

35 *Supra*

*v. Louisiana-Pacific Corp.*<sup>36</sup> the complexities created by the need to apply multiple legal regimes were a factor in the court's decision to reject certification.

Some U.S. 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.<sup>37</sup> 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:<sup>38</sup>

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. 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

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36 (1997), 43 B.C.L.R. (3d) 324 (S.C.). The author was counsel for Louisiana-Pacific.

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

38 *Ibid*, at para. 13.29

Ontario, B.C. and Quebec.<sup>39</sup> 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 jurisdiction? This remains to be seen.

## 5. CONCLUSION

“Chaos often breeds life, when order breeds habit.”<sup>40</sup> The next few years will certainly be interesting times for any lawyer practicing in the class action area in Canada.

As Frost said “Let chaos storm! Let cloud shapes swarm! I wait for form.”<sup>41</sup>

Chaos will storm for some time, but of legal necessity, order will start to develop out of this chaos. There are two paths to equilibrium. Either there will be extensive levels of cooperation across jurisdictions to protect the interests of class members on a case by case base, or all power will be ceded to one overarching authority.

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39 *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. (4<sup>th</sup>) 280 (Gen. Div.) (intervention application); (1997), 35 O.R. (3d) 708, 48 C.C.L.I. (2d) 146, 14 C.P.C. (4<sup>th</sup>) 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. (4<sup>th</sup>) 87 (Gen. Div.); (1998) 38 O.R. (3d) 781, 50 C.C.L.I. (2d) 30, 19 C.P.C. (4<sup>th</sup>) 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. (4<sup>th</sup>) 381 (Gen. Div.) (certification decision and settlement approval), appeal quashed 165 D.L.R. (4<sup>th</sup>) 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. (4<sup>th</sup>) vii, 118 O.A.C. 399*n*, 235 N.R. 390*n*; (unreported, November 8, 1998, 96-CT-022861, S.C.) (costs against objector).

40 Henry Brooks Adams (1838–1918), U.S. historian. *The Education of Henry Adams*, ch. 16 (1907).

41 Robert Frost (1874–1963), U.S. poet. Ten Mills, “V. Pertinax.”