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# National Class Actions in Canada: Yet Another Call for Clarity and Coordination

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## National Class Actions in Canada: Yet Another Call for Clarity and Coordination

Joseph Marcus

**Editors:**

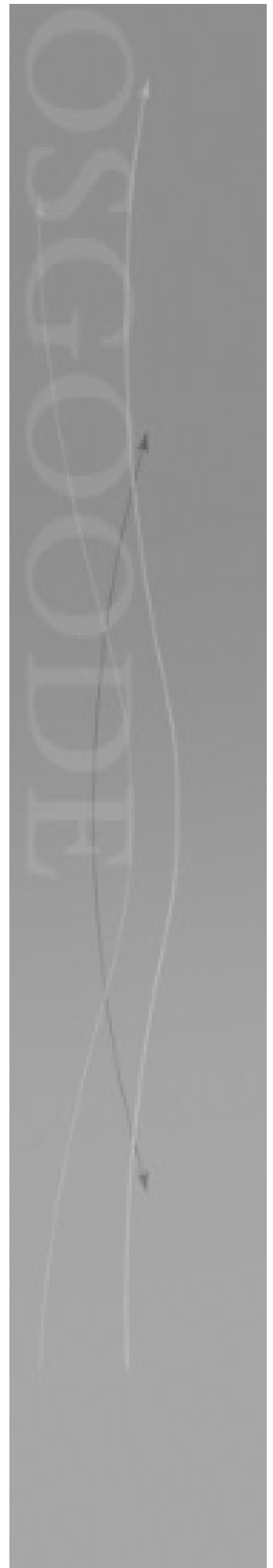
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Comparative Research in  
Law & Political Economy



# NATIONAL CLASS ACTIONS IN CANADA: YET ANOTHER CALL FOR CLARITY AND COORDINATION

Joseph Marcus

**Abstract:** Just as economic markets increasingly neglect Canada's domestic borders, so too does the consequent infliction of harm. Not surprisingly then, the national class action has emerged as a desirable vehicle for mass redress. Desirable, perhaps, but are national class actions constitutional? Distinguished Canadian scholars continue to construct persuasive arguments on both sides; meanwhile, courts continue to assume jurisdiction over national classes. Accordingly, this paper argues that while the permissibility of multijurisdictional class proceedings might make for an engaging debate, the apparent willingness of courts to certify national classes means that the path forward is not through academic discourse, but through the creation of realistic mechanisms of interprovincial judicial coordination.



# NATIONAL CLASS ACTIONS IN CANADA: YET ANOTHER CALL FOR CLARITY AND COORDINATION

Joseph Marcus\*

Legal systems and rules are a reflection and expression of the fundamental values of a society, so to respect diversity of societies it is important to respect differences in legal systems. But if this is to work in our era where numerous transactions and interactions spill over the borders defining legal communities in our decentralized world legal order, there must also be a workable method of coordinating this diversity. Otherwise, the anarchic system's worst attributes emerge, and individual litigants will pay the inevitable price of unfairness.

— Justice La Forest<sup>1</sup>

## A. INTRODUCTION

In *Bondy v Toshiba of Canada*, Brockenshire J wrote that “national class actions are now very much an unremarkable part of class proceedings litigation in Canada.”<sup>2</sup> With respect, this paper begs to differ. Now, more than ever, the permissibility of opt-out national class actions is a source of considerable debate among legal scholars, practising lawyers, and parties to class proceedings. It is understandable that Brockenshire J might ground his assertion in the apparent willingness of Canadian courts — particularly those in Ontario — to certify opt-out national classes. Frequency of certification, however, hardly renders this issue “unremarkable.” If anything, the recent proliferation of multijurisdictional claims has served to expose the issues and inefficiencies inher-

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\* The author is currently pursuing his JD at Osgoode Hall Law School, and will commence his articles with Bennett Jones LLP in 2013. He appreciates the knowledge and guidance of Professor Gary Watson. [Ed. note: This paper was awarded a 2011 JSD Tory Research and Writing Award at the Osgoode Hall Law School.]

1 *Hunt v T&N plc*, [1993] 4 SCR 289 at para 1 [Hunt].

2 [2007] OJ No 784 at para 28.

ent in Canada's current statutory regime — or lack there of. Indeed, the complexity of this debate, at least in Ontario, is often attributed to a lack of explicit statutory guidance with respect to the assumption of jurisdiction over national classes. Conversely, statutory silence may itself be symptomatic of judicial ambiguity. Just as the Supreme Court of Canada's (SCC) decision in *Western Canadian Shopping Centres v Dutton*<sup>3</sup> provided the driving force behind the enactment of numerous provincial class action statutes, Canadian legislatures appear once again to be awaiting clear judicial direction.

As both sides neglect to inject clarity, a blurry middle ground emerges, ripe for academic discourse. Scholarship has revolved primarily around the constitutionality of national class proceedings. In other words, to what extent do provincial superior courts have jurisdiction to bind non-resident class members on an opt-out basis? The answer to this question is not merely academic, of course; it has serious implications for plaintiffs and defendants alike. For the non-resident class member who fails to opt out, the doctrine of *res judicata* may preclude her from asserting a similar claim in her home province. For the defendant whose stakeholders reside nationwide, the prospect of facing parallel claims in multiple courts presents an obvious financial burden. From a fairness and efficiency standpoint, the courts themselves may have a vested interest in coordinating administration, or at least facilitating enhanced levels of cross-borders communication.

The purpose of this paper, therefore, is to examine these challenges with an eye to establishing a fairer and more efficient system. It will proceed in three parts. First, this paper will provide the necessary background, surveying the policy rationales underlying Canadian class actions and exploring the fundamental concepts of *res judicata* and sufficient notice. Second, this paper will survey and engage with some of the key practical and constitutional issues associated with permitting national class actions. Informed by the analysis and principles that emerge in the first two sections, the final part of this paper will review the Canadian Bar Association's (CBA) Judicial Protocol, as passed on 14 August 2011.<sup>4</sup> Inspired in part by the CBA's matter-of-fact approach to this issue, this paper subscribes to the notion that, despite making for an engaging academic debate with respect to their permissibility, national

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3 [2001] 2 SCR 534 [*Dutton*].

4 Canadian Bar Association, "Class Action Judicial Protocols Resolution 11-03-A" (14 August 2011), online: [www.cba.org/CBA/ClassActionsTaskForce/Main/JudicialProtocols](http://www.cba.org/CBA/ClassActionsTaskForce/Main/JudicialProtocols).

class actions are inevitable in this unprecedented era of multijurisdictional economic integration. Enhanced levels of clarity and cross-border coordination, therefore, emerge as paramount objectives, and the CBA's Judicial Protocol presents a reasonable — though entirely inadequate — starting point.

## B. BACKGROUND: POLICY, *RES JUDICATA*, AND SUFFICIENT NOTICE

### 1) Policy

In the broadest sense, a class action is a “civil lawsuit brought by one or more persons on behalf of a larger group of persons.”<sup>5</sup> While this procedure has been available in Quebec since 1978, the Canadian class action story really begins in 1982, with the release of the Ontario Law Reform Commission's (OLRC) *Report on Class Actions*.<sup>6</sup> The *Report* sets out the three fundamental goals of class actions. At this stage in Canadian class actions scholarship, these policy rationales are most certainly “unremarkable.” Nonetheless, they formulate an authoritative and principled lens through which the emergence of national class actions can be viewed and evaluated.

First, and perhaps foremost, is improved access to justice. This objective revolves around the transformation of individually non-viable claims into viable ones through aggregation. Traditionally, “individually non-viable” has been interpreted in strictly economic terms; that is to say, the viability of a claim has been grounded entirely in the monetary cost of its assertion.<sup>7</sup> Scholars now recognize, however, that the dollar value of litigation is but one of many socioeconomic barriers facing Canadians, including “cost, delay, and complexity of proceedings, as well as geographic and physical inaccessibility, socio-cultural, psychological, and demographic characteristics of litigants.”<sup>8</sup> Indeed, it may not only be the claims that are non-viable, but the claimants as well. No matter

5 Kathleen Jones-Lepidas, ed, *Defending Class Actions in Canada*, 2d ed (Toronto: CCH Canadian Limited, 2007) at 2 [Jones-Lepidas].

6 Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) [*Report on Class Actions*].

7 See, for example, Garry Watson, “Class Actions: The Canadian Experience” (2001) 11 *Duke J Comp & Int'l L* 269 at 269 [Watson].

8 Mathew Good, “Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions” (2009) 47 *Alta L Rev* 185 at 188.

the frame — be it narrow and economic, or broad and social — access to justice provides the principled foundation upon which any informed class action debate is held.

The second policy objective, enhanced judicial economy, is advanced primarily through the avoidance of duplicative litigation. While the binding resolution of common issues in a single proceeding clearly preserves judicial time and resources, the tongue-in-cheek critic might note that if the claims were indeed individually non-viable, a class action would actually enable them to go forward, thus increasing the judicial workload.<sup>9</sup> The pursuit of judicial economy, however, entails far more than a reduction in judicial workload; it also seeks to address the risks associated with inconsistent judgments. As will become clear, these risks invoke notions of *res judicata*, a common law doctrine central to the administration of multijurisdictional class actions.

The third goal is behaviour modification. Without class actions, proponents argue, parties would be able to “[inflict] minimal harm on large numbers of persons who would be unable . . . to seek redress individually.”<sup>10</sup> As such, the class action mechanism operates, at least theoretically, as a deterrent, encouraging broader regulatory compliance. Tied to this goal, however, is the controversial tale of entrepreneurial lawyers getting rich from defective toasters. It is not surprising that lawyers generating wealth in the name of deterrence would incite controversy; nevertheless, holding parties accountable for the infliction of widespread harm remains an irrefutable object of class proceedings.

A decade later, these three goals supplied the ideological justification for the enactment of class proceedings statutes in Ontario<sup>11</sup> and British Columbia.<sup>12</sup> Not all provinces immediately followed suit; in 2001, however, a unanimous SCC “judicially enact[ed] modern class action regimes in provinces that had not even passed reform legislation.”<sup>13</sup> Not only did McLachlin CJ endorse class actions under Canadian common law, she grounded her decision — at least in part — in the three policy objectives described above.<sup>14</sup> Thirty years after they were first articulated by the OLRC, as class actions become increasing multijurisdictional in scope, these objectives remain fundamental. It follows, therefore, that

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9 Jones-Lepidas, above note 5 at 3.

10 *Ibid* at 5.

11 *Class Proceedings Act, 1992*, SO 1992, c 6 [Ontario CPA].

12 *Class Proceedings Act*, RSBC 1996, c 50 [BC CPA].

13 Jones-Lepidas, above note 5 at 5.

14 Dutton, above note 3 at paras 27–29.



they provide the pillars upon which this paper's exploration of multijurisdictional class proceedings be set.

## 2) *Res Judicata*

In addition to their availability under common law, class actions have been authorized via statute in nine of ten Canadian provinces.<sup>15</sup> Under each regime, the trial proceeds in two stages: (1) the determination of common issues, and (2) the determination of individual issues.<sup>16</sup> Before a common issues trial is allowed, however, the court must certify the claim as a class proceeding. As outlined in section 5 of Ontario's *Class Proceedings Act (CPA)*, certification requires: (a) that the pleadings disclose a cause of action, (b) that there is an identifiable class (c) with common issues, and (d) that a class action be the preferable procedure.<sup>17</sup> Of particular importance to this paper, however, is section 5(e), which requires that there be a representative plaintiff who "adequately represents the interests of the class" and who "sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding."<sup>18</sup>

As the existence of an explicit notification requirement might imply, the potential impact of certification on class members is severe. Whether the action is successful or not, class members will be barred by virtue of *res judicata* from reasserting the claim. In short, the *res judicata* doctrine seeks to eliminate three broad risks associated with "the relitigation of matters that have already been decided" — inconsistent decisions, financial burden on litigants, and drainage of public resources.<sup>19</sup> The overarching question then becomes: how does a person become a member of the class, and to what extent should that person be bound by the court's decision to assume jurisdiction?

The answer, of course, varies depending on the statutory regime under which the claim is asserted. In Ontario — as in Quebec — section 27(3) of the *CPA* makes it clear that any individual who falls within the

15 PEI has not enacted a class proceedings statute.

16 Peter W Hogg & S Gordon McKee, "Are National Class Actions Constitutional?" (2010) 26 NJCL 279 at 281 [Hogg & McKee].

17 Ontario *CPA*, above note 11, s 5.

18 *Ibid*, s 5(e).

19 Janet Walker et al, eds, *The Civil Litigation Process: Cases and Material*, 7th ed (Toronto: Emond Montgomery, 2010) at 320 [*Civil Litigation Process*]. For an exemplary look at the different branches of *res judicata*, see, for example, *Danyluk v Ainsworth Technologies*, 2001 SCC 44.

description of the class will be bound by the court's decision, so long as they have not opted out.<sup>20</sup> The issue of national classes is not discussed; as such, the opt-out requirement is said to apply to residents and non-residents alike. By contrast, the class action statutes in British Columbia, Alberta, Saskatchewan, and Newfoundland, dealing expressly with national classes, make an opt-in exception for non-residents. In British Columbia, for instance, section 16(2) of the *CPA* provides that:

[A] person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.<sup>21</sup>

In what has been attributed to “[h]uman nature,” potential non-resident class members are “unlikely” to actively join the class.<sup>22</sup> Consequently, national class actions in British Columbia — even where a non-resident sub-class has been certified<sup>23</sup> — are effectively provincial. As Jamie Cassels and Craig Jones contend in their seminal text, *The Law of Large-Scale Claims*, “passive claimants drop through the cracks, and not just to their own disadvantage.”<sup>24</sup> In other words, the “value” of their injuries is not included in the aggregate assessment, so the defendant will not be held to account for the full cost of the harm it inflicted.<sup>25</sup> On this basis, Cassels and Jones appear to be arguing that an opt-out regime would be preferable because the total value of the claim would more accurately reflect the total harm inflicted. This argument seems to place behaviour modification ahead of access to justice, and may be better suited to the provincial context, where adequate notice is less of an issue. A larger claim may force the defendant to more fully internalize its wrong; however, it does little (other than potentially pay for more expansive notice) to ensure justice is delivered to a greater number of injured parties across the country. Indeed, it is this paper's belief that the inadequate delivery of notice to the proverbial rural class member — unaware either of the

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20 Ontario *CPA*, above note 11, s 27(3).

21 BC *CPA*, above note 12, s 16(2).

22 Jones-Lepidas, above note 5 at 120.

23 See, for example, *Pearson v Boliden Ltd* (2001), 94 BCLR (3d) 133 (SC).

24 Jamie Cassels & Craig Jones, *The Law of Large-Scale Claims: Product Liability, Mass Torts, and Complex Litigation in Canada* (Toronto: Irwin Law, 2005) at 443 [Cassels & Jones].

25 *Ibid.*

class action or the wrong itself — is what makes opt-out national class actions so controversial in first place.

If “human nature” can be said to prevent non-residents from opting in, the reverse must also be true: it prevents non-residents from opting out.<sup>26</sup> As such — through an access to justice lens — the problem with any large-scale opt-out scheme is that it leaves the unaware, and by extension the unable, harmed without recourse. While future claims brought by those who fail to opt out of an Ontario-certified national class are, in theory, precluded by *res judicata*, it is important to note that the doctrine operates somewhat differently in the class action context. Justice Keenan, for the Ontario Court (General Division) in *Allan v CIBC Trust Corporation*,<sup>27</sup> addresses this issue directly, pointing first to section 27(3) of the Ontario CPA:

A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

- (a) are set out in the certification order;
- (b) relate to claims or defences described in the certification order;
- and
- (c) relate to relief sought by or from the class or subclass as stated in the certification order.<sup>28</sup>

The language of section 27(3), Keenan J notes, gives effect to a recommendation made by the OLRC back in 1982: “It is our intention to restrict the *res judicata* effect of a judgment on the common questions: the judgment should determine those issues, and only those issues, that have been raised specifically by the representative plaintiffs.”<sup>29</sup> This seemingly restrictive approach may be viewed in contrast with the non-class proceedings context, where claim preclusion applies not only to issues that were litigated, but also to issues that should have been litigated.<sup>30</sup>

26 It has been argued that less than 1 percent of class members actually opt out. See Theodore Eisenberg & Geoffrey Miller, “The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues” (2004) 57 Vand L Rev 1529 at 1532.

27 (1998), 39 OR (3d) 675 [*Allan*].

28 Ontario CPA, above note 11, s 27(3).

29 *Report on Class Actions*, above note 6 at 767. See generally, *Allan*, above note 27.

30 See, for example, Garry Watson, “*Res Judicata* and Class Proceedings” (Osgoode Hall Law School, Class Materials, 2011) at 341.

On its face, section 27(3) favours plaintiffs by limiting the scope of claim preclusion to issues actually recognized in the court's certification order. Furthermore, as articulated by Professor Garry Watson, it also presents a potential "trap" for defendants — to achieve the desired level of claim preclusion, the defendant might be forced to seek an action broader than the one originally brought by the plaintiffs.<sup>31</sup> Though section 27(3) appears to mitigate the issue of *res judicata* in the national class action context, it by no means eliminates it. By most accounts, application of this common law doctrine remains highly discretionary; it is a principle of public policy, balancing "the public interest in the finality of litigation with the private interest in achieving justice between litigants."<sup>32</sup>

### 3) Sufficient Notice

Given the discretionary power of *res judicata* to prohibit an injured party's day in court, the issue of notice begs to be addressed. Not surprisingly, the adequacy of notice delivery is also highly discretionary, as sections 17–22 of Ontario's CPA provide courts with the authority to impose whatever notice requirements they deem appropriate.<sup>33</sup> Section 19(1) illustrates the breadth of this authority: "At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding."<sup>34</sup> It may appear limitless, but the authority allocated in section 19(1) is clearly grounded by a notion of fairness, an ambiguous yet crucial theme prevalent throughout this discussion. So, what constitutes fair notice in a national class proceeding? In *Dutton*, the SCC makes it clear that sufficiency of notice is not at issue; nevertheless, it weighs in:

[P]rudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.<sup>35</sup>

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31 *Ibid* at 342.

32 *Minott v O'Shanter Development* (1999), 42 OR (3d) 32 at para 50.

33 Ontario CPA, above note 11, ss 17–22.

34 *Ibid*, s 19(1).

35 *Dutton*, above note 3 at para 49.

It has been suggested that the true function of notice is simply to conjure up enough plaintiffs to constitute adequate representation.<sup>36</sup> Such an argument would, at least on the surface, position behaviour modification and judicial economy ahead of access to justice. In other words, it would be more concerned with the class action moving ahead than with providing individual class members with the chance to assert their litigative opt-out rights. Conversely, as reflected in the quote provided above, the SCC seems to subscribe to the idea that fairness in this context will only be achieved when *all* potential class members have received notification. Needless to say, the delivery of actual notification to each potential class member is considered somewhat unrealistic, and courts have not insisted upon it.<sup>37</sup>

Cassels and Jones, in considering this issue,<sup>38</sup> point to the leading US Supreme Court (USSC) case of *Phillips Petroleum Co v Shutts*, where the USSC permitted class actions to bind non-resident class members, so long as the non-residents were provided with “minimal procedural due process protection.”<sup>39</sup> Justice Rehnquist for the USSC explained that “due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class.”<sup>40</sup> In 1995, nearly a decade later, Brockenshire J, for the Ontario Court (General Division) in *Nantais v Telectronics Proprietary (Canada) Ltd.*, found the *Shutts* decision to be “most persuasive.”<sup>41</sup> It should be made clear, though, that in *Nantais* — as in *Shutts*, to a lesser extent — the class members were known and easily contacted. Indeed, it was known that just over 1,100 Canadians had been implanted with the allegedly defective pacemaker.<sup>42</sup> Justice Brockenshire certified the national class, yet he imposed no additional notice requirements for non-residents due to the fact that “a list of names and addresses should be easily available.”<sup>43</sup> Looking back, it seems somewhat unfortunate that Canada’s foundational national class proceeding was certified on such a unique set of facts, where the provi-

36 For a thorough inquiry, see Owen M Fiss, “The Political Theory of the Class Action” (1996) 53 Wash & Lee L Rev 21, as cited in Jeffrey Haylock, “The National Class as Extraterritorial Legislation” (2009) 32 Dal LJ 253 at 265 [Haylock].

37 Hogg & McKee, above note 16 at 287.

38 Cassels & Jones, above note 24 at 460.

39 472 US 797 (1985) at 811–12.

40 *Ibid.*

41 (1995), 25 OR (3d) 331 at para 12 (Gen Div) [*Nantais*].

42 [1995] OJ No 3069 at para 9 (Div Ct), Zuber J, refusing leave to appeal to CA.

43 *Nantais*, above note 41 at para 81.

sion of sufficient notice was not a legitimate concern. While Brockenshire J recognized that opt-out rights were fundamental to his decision to permit the expansion of class proceedings across provincial borders, he was not forced to consider the extent to which extraprovincial class members are entitled to enhanced levels of notice in situations where “a list of names and addresses” is not readily available.

Perhaps, given the very nature of national class actions — as borderless responses to borderless inflictions of harm — the distinction between resident and non-resident may be slightly artificial. Surely there are multiple factors, aside from a class member’s home province, that influence a court’s sufficiency analysis on a case-by-case basis. In this age of mass communication, for example, it would be unreasonable to assume that residents of northern Ontario are necessarily easier to contact than residents of downtown Winnipeg. In Australia, the High Court has highlighted potential recovery as a factor in determining adequate notice: “[T]he more at stake for each person, the more effective the notice should be.”<sup>44</sup> Cassels and Jones build on this idea, arguing that in a case where the potential recovery is low and the class is expansive, it would “often be better to provide excellent notice to only a part of the class than poor notice to the class as a whole.”<sup>45</sup> Given the irrefutable financial constraints on notice provision, it makes sense that resources be employed pragmatically; nonetheless, there is something uncomfortably utilitarian about Cassels and Jones’ argument.

It makes for an interesting discussion, but there is little reason to think that courts will offer a standardized definition of sufficient notice any time soon. Courts have been given a considerable amount of discretion with respect to determining sufficiency, and it seems only reasonable that such a determination be made on a case-by-case basis. Having said that, sufficiency is not solely concerned with the extent of provision; clarity is also an issue. Justice LeBel, for a unanimous SCC, recently discussed this issue in his *Canada Post Corp v Lépine* decision.<sup>46</sup> Parallel class actions were brought in both Ontario and Quebec, and the defendant corporation sought to have the Ontario-approved settlement recognized in Quebec. The Quebec courts refused to enforce the extrajurisdictional settlement, and the corporation appealed to the SCC. In rejecting the corporation’s appeal, LeBel J explains that the obligation to supply potential class members with sufficient notice is highly context-

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44 *Femcare Ltd v Bright*, [2000] FCA 512 at para 74 (HCA).

45 Cassels & Jones, above note 24 at 465.

46 [2009] 1 SCR 549 [*Lépine*].

ual. As a matter of procedural principle, “it may be necessary to word the notice more precisely or provide more complete information to enable the members of the class to fully understand how the action affects their rights.”<sup>47</sup> In this particular case, it was held that the notice of settlement failed to explain the situation clearly, and could have easily led recipients in Quebec to conclude that it “simply did not concern them.”<sup>48</sup>

The *Lépine* decision sheds light on the issue of sufficient notice; however, it is really a case about overlapping class actions, and the enforcement of extrajurisdictional court decisions. As such, it presents an ideal segue into Part C of this paper. In an effort to provide context, this paper has discussed the fundamental goals of class proceedings, and used them as a lens through which to explore the role of *res judicata* and sufficient notice in the context of national class actions. Moving from general to specific, this paper will now zero in on the more functional issue of constitutional jurisdiction, and the extent to which provincial courts are willing to recognize extraprovincial judgments.

## C. CHALLENGES: JURISDICTION AND RECOGNITION

In this era of global economic integration, the operative function of political borders comes into question. Just as economic markets have neglected political boundaries — especially those drawn within a single country — so too has the consequent infliction of harm. As such, the emergence of class proceedings that are multijurisdictional in scope should come as no surprise. The *Nantais* and *Lépine* cases offer fairly typical national class action scenarios, where a large corporation distributes an allegedly defective product across the country, giving rise to similar, and often simultaneous, claims in multiple provinces. Inevitably, such circumstances invoke issues of jurisdiction and recognition. This section of the paper is divided accordingly.

### 1) Jurisdiction

“At first blush,” Professor Peter Hogg and Gordon McKee acknowledge that the simple “solution to national class actions would seem to be to confer the jurisdiction on the Federal Court.”<sup>49</sup> The Federal Court is

47 *Ibid* at para 43.

48 *Ibid* at para 46.

49 Hogg & McKee, above note 16 at 284.

limited in territorial jurisdiction only by national borders (as opposed to provincial), giving it the power to bind a national class. Hogg and McKee explain, however, that the Federal Court is not a court of inherent jurisdiction —rather, it is the creature of a statute that restricts its jurisdiction in accordance with the “laws of Canada” requirement under section 101 of the *Constitution Act, 1867*.<sup>50</sup> Essentially, Hogg and McKee are saying that even if Parliament expanded the Federal Court’s statutory jurisdiction to include tort and contract claims against defendants other than the federal Crown, the constitutional “laws of Canada” requirement would mean that most class actions would remain outside the Federal Court’s jurisdiction.

Hogg and McKee offer a fairly standard analysis in this respect, acknowledging the Federal Court’s theoretical appeal, and then dismissing its practical potential from a constitutional perspective. This sentiment is echoed by, for example, Ward Branch and Christopher Rone, who describe the Federal Court as the “obvious and impossible” answer.<sup>51</sup> Absent a constitutional amendment enabling the jurisdictional expansion of the Federal Court, Branch and Rone contend that interprovincial coordination is “the key tool in managing the potential chaos.”<sup>52</sup> Though Branch and Rone are referring specifically to cross-border coordination among class counsel, their argument highlights the broad notion that some form of enhanced interprovincial cooperation is necessary to address the chaotic nature of overlapping national class actions. A call for interprovincial cooperation seems reasonable enough — indeed, it represents the crux of the CBA’s Judicial Protocol discussed below — however, it rests on the assumption that provincial courts have sufficient jurisdiction to certify opt-out national class proceedings in the first place.

As mentioned, the Federal Court’s jurisdiction is restricted in terms of subject matter, but far-reaching in terms of territory; the opposite is true for provincial superior courts.<sup>53</sup> These so-called section 96 courts are courts of inherent jurisdiction, free to hear nearly all matters of law, from provincial to federal to foreign.<sup>54</sup> They represent, as such, natural vehicles for the commencement of provincial class actions. With respect to national class actions, however, territorial restrictions become the key

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50 *Ibid* at 283.

51 Ward Branch & Christopher Rhone, “Chaos or Consistency? The National Class Action Dilemma” (2004) 1 *Can Class Action Rev* 3 at 23.

52 *Ibid* at 31.

53 For an overview of constitutional jurisdiction, see generally Hogg & McKee, above note 16; Cassels & Jones, above note 24; *Lépine*, above note 46.

54 *Constitution Act, 1867* (UK), 30 & 31 *Vict*, c 3, s 96.



issue. If legislatures cannot enact extraprovincial laws, it should follow that one provincial superior court cannot render judgment on an issue that falls within the exclusive jurisdiction of another — as provided by section 92 of the *Constitution Act, 1867*.<sup>55</sup> National class proceedings, by definition, require courts to do exactly that. Not surprisingly, this contradiction has given rise to an array of scholarship devoted to the question of whether national class actions are constitutional.

The discussion necessarily begins with the SCC's decision in *Morguard Investments Ltd v De Savoye*, which is fundamentally a case about interprovincial judgment recognition.<sup>56</sup> Essentially, the defendant residing in British Columbia defaults on a mortgage in Alberta. The plaintiff then obtains a judgment in Alberta against the non-resident defendant, and a British Columbia court elects to enforce the Alberta court's judgment. Justice La Forest, for the SCC, supports the decision to enforce, offering a robust interpretation of interprovincial comity "in the light of a changing world order."<sup>57</sup> This new world order, writes La Forest J, includes "modern means of travel and communication," "a world economy," and "decentralized political and legal power."<sup>58</sup> In La Forest J's borderless vision, provincial superior courts are expected to give "full faith and credit" to the decisions of their Canadian sisters.<sup>59</sup> This "full faith and credit" expectation — discussed at greater length in the following subsection — rests, of course, on jurisdiction having been properly exercised at the outset.

As La Forest J sees it, basic principles of "order and fairness" dictate that a court may only exercise jurisdiction where there exists a "real and substantial connection" between "the damages suffered and the [province assuming] jurisdiction."<sup>60</sup> A few years after *Morguard*, La Forest J, for the SCC in *Hunt v T&N plc*, had the opportunity to entrench his "real and substantial connection" test as a "constitutional imperative."<sup>61</sup> This means, in practice, that if a court's jurisdiction is challenged, the plaintiff must demonstrate that a real and substantial connection exists. Once the plaintiff offers a "good arguable case" to that effect, the burden effectively

55 *Ibid*, s 92. See specifically ss 92(13) & 92(14), which allocate jurisdiction over "property and civil rights in the province" and "the administration of justice in the province," respectively.

56 [1990] 3 SCR 1077 [*Morguard*].

57 *Ibid* at para 33.

58 *Ibid* at para 34.

59 *Ibid* at para 38.

60 *Ibid* at para 50.

61 *Hunt*, above note 1 at para 56.

shifts to the defendant.<sup>62</sup> Ultimately, the *Morguard* and *Hunt* decisions establish a fairly liberal constitutional threshold — based on principles of order and fairness — “which must be satisfied prior to a provincial court exercising its power and authority over a national class in a class proceeding.”<sup>63</sup>

In *Carom v Bre-X Minerals*, Winkler J, as he was then, considered whether the Ontario CPA applied to non-residents.<sup>64</sup> The defendants argued that the CPA directly impacts the “civil rights” of non-residents, and thus offends (to the extent of being unconstitutional) the principle of territoriality. Justice Winkler, in rejecting the defendants’ argument, draws on *Morguard* and *Hunt* to support his conclusion that the contemporary nature of Canadian federalism and provincial relations calls for a domestic modification to the traditional principles of territoriality. He puts it this way:

*Morguard* and *Hunt* permit the extra-territorial application of legislation where the enacting province has a real and substantial connection with the subject matter of the action and it accords with order and fairness to assume jurisdiction.<sup>65</sup>

This debate continued in the case of *Wilson v Servier Canada*, where the plaintiffs proposed a national class made up of every Canadian resident who ingested a certain diet drug.<sup>66</sup> Much like in *Bre-X*, the defendants in *Servier* argued (1) that the Ontario CPA was *ultra vires* Ontario’s legislative authority, and (2) that the Ontario court lacked jurisdiction over non-resident class members.<sup>67</sup> In addressing the first question, Cummings J starts by reviewing the law of territoriality: “The pith and substance of provincial legislation,” he writes, “must relate to matters within provincial legislative powers, while extra-provincial effects must be merely collateral or incidental.”<sup>68</sup> Considering this paper’s earlier discussion of *res judicata*, it seems highly problematic to assume that the “extra-provincial effects” of an opt-out national class would always be incidental. Nonethe-

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62 Cassels & Jones, above note 24 at 407.

63 Michael Eizenga & Mark Poland, “Conflict of Laws and National Class Actions” The Canadian Institute, The 2nd Annual National Forum on Litigating Class Actions, September 2001, online: [www.siskinds.com/Publications/All.aspx](http://www.siskinds.com/Publications/All.aspx).

64 (1999), 43 OR (3d) 441 (Gen Div) [*Bre-X*].

65 *Ibid* at para 33.

66 (2000), 50 OR (3d) 219 [*Servier*].

67 *Ibid* at para 59.

68 *Ibid* at para 61.

less, Cummings J refutes the defendants' argument on the basis that the CPA has "merely a procedural" extraprovincial impact.<sup>69</sup>

With respect to the defendant's second objection — that the Ontario court lacked jurisdiction over the non-resident class members — Cummings J notes that the power to assume jurisdiction is limited, as per *Morguard* and *Hunt*, by the principles of order and fairness. These principled objectives will be achieved if it is established that a real and substantial connection exists between the litigative subject matter and the forum province. In holding that this connection test is satisfied, Cummings J considers a number of factors; significant among them, though, is the notion that some "43 per cent of putative class members reside in Ontario."<sup>70</sup> This is quite a drop from *Nantais*, where roughly 64 percent of the class lived in Ontario.<sup>71</sup> It is thus conceivable, by extension, that even where the vast majority of class members reside outside the forum province, a court might deem this test to be met. Justice Cummings does not seem bothered by this; in fact, he acknowledges that it is entirely possible for more than one province to have a sufficient connection: "The court needs to find only a real and substantial connection, not the *most* real and substantial connection, to assume jurisdiction."<sup>72</sup> The idea that this test could be satisfied simultaneously, in multiple provinces, certainly puts superior courts in a tight spot in terms of abiding by the principle of "full faith and credit." Despite the obvious potential for conflict, Cummings J justifies his decision primarily on efficiency grounds:

This approach is efficacious in extending the policy objectives underlying the CPA for the benefit of non-residents. If there are common issues for all Canadian claimants, this approach facilitates access to justice and judicial efficiency, and tends to inhibit potentially wrongful behaviour. This is to the advantage of all Canadians and to Canada as a federal state. This procedural flexibility serves in the nature of oil in the institutional and jurisdictional machinery of Canadian federalism.<sup>73</sup>

Not only is Cummings J saying that national classes are constitutional, he is advocating for the opt-out regime as the preferred means of achieving the three foundational policy objectives of class proceedings. In his

69 *Ibid* at para 66.

70 *Ibid* at para 21.

71 In *Nantais*, above note 41, the court references the fact that roughly 700 of the 1,100 class members resided in Ontario ( $700/1,100 = 64\%$ ).

72 *Servier*, above note 66 at para 92.

73 *Ibid* at para 93.

2004 article, “The Case for National Class Actions,” Craig Jones builds on Cummings J’s efficiency argument.<sup>74</sup>

Jones describes this constitutional debate as a “conflict between a decentralized economy and centralized legal jurisdictions.”<sup>75</sup> As the title of his article might suggest, he contends that the benefits of opt-out national class actions in Canada’s increasingly national marketplace outweigh any jurisdictional issues that may arise. National classes allow for larger recovery amounts, and offer a more robust measure of deterrence. For the defendants in particular, national classes supply the desired level of claim preclusion. His argument boils down to: “[T]he defendant’s litigation scale is national, and therefore so must be the plaintiffs.”<sup>76</sup> In terms of the jurisdictional question, Jones believes that if province A has appropriately assumed jurisdiction over a national class, province B has absolutely no grounds to certify a competing class. Implicitly, this argument dismisses the substantive, extraprovincial impact that certification in province A would have on the class members residing in Province B. Jeffrey Haylock, in his award-winning article, “The National Class as Extraterritorial Legislation,” takes issue with this dismissal.<sup>77</sup>

Haylock’s central contention is that scholars like Jones — and judges like Winkler and Cummings JJ — have effectively ignored the “substantive character of class action legislation, which necessarily entails the applicability of the law of extraterritoriality.”<sup>78</sup> In demonstrating this “substantive character,” Haylock makes a compelling comparison with the evolving law of limitation periods. Traditionally, under common law, limitation periods were considered matters of procedural law, thought to restrict remedies, not rights. Over time though, courts began to see limitation periods as a defendant’s vested right against being sued. In *Tolofson v Jensen*, La Forest J fully embraces this shift, stating that the old view of limitation statutes as strictly procedural is completely “out of place in the modern context.”<sup>79</sup> Haylock makes sure to highlight the fact that limitation periods, much like opt-out class actions, have “substantial” powers of claim preclusion.

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74 Craig Jones, “The Case for the National Class” (2004) 1 Can Class Action Rev 29.

75 *Ibid* at 41.

76 *Ibid* at 56.

77 Haylock, above note 36. Haylock’s paper won the 2009 Torys Award for Excellence in Legal Writing.

78 *Ibid* at 253.

79 [1994] 3 SCR 1022 at para 82.

Haylock's argument relies unapologetically on Bastarache J's concurring reasons in *Castillo v Castillo*, a case where the SCC considered whether the Province of Alberta was allowed to pass legislation that would give effect to its domestic limitation period for matters governed by foreign law.<sup>80</sup> Justice Bastarache explains that:

In order for provincial legislation to be valid, there must be a meaningful connection between the enacting province, the legislative subject matter and the persons made subject to it. By contrast, the existence of a “real and substantial connection” is a more flexible inquiry that is meant to determine which court should hear the case as a matter of convenience.<sup>81</sup>

In other words, Bastarache J is saying that the “meaningful connection” standard applied to legislative validity is much more stringent than the “real and substantial connection” standard applied to jurisdictional assumption. “The two notions,” Bastarache J writes, “cannot be conflated.”<sup>82</sup> Conflating the threshold for adjudicative jurisdiction with that of legislative jurisdiction, however, is exactly what Haylock thinks the Ontario courts have been doing since *Nantais* was certified over fifteen years ago. By using the easily met “real and substantial connection” test to assume jurisdiction, courts have effectively circumvented the not-so-easily met “meaningful connection” test. On the assumption that national opt-out class proceedings do impact the substantive rights of non-residents, Haylock reaches the predictable conclusion that such proceedings are *ultra vires* the Canadian provinces:

The Supreme Court's jurisprudence makes clear that provincial substantive law must not apply outside provinces' constitutionally mandated territorial spheres. The national opt-out classes that courts have been certifying over the past thirteen years have therefore offended the constitutional principles of extraterritoriality.<sup>83</sup>

It should be stressed that Haylock is in agreement with Jones in terms of the benefits of opt-out class actions — specifically, he understands that an opt-out regime promotes access to justice and behaviour modification by encouraging a larger class. Put simply, Haylock endorses opt-out class actions, but finds them to be unconstitutional at a national level. As a

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80 2005 SCC 83. For an interesting review and critique of this case, see Janet Walker, “*Castillo v. Castillo*: Closing the Barn Door” (2006) 43 Can Bus LJ 487.

81 *Ibid* at para 42.

82 *Ibid* at para 41.

83 Haylock, above note 36 at 286.

result, he suggests rather causally that these nationwide claims be pursued as a series of collaborative, parallel, provincial opt-out classes. On its face, such a proposal has little respect for judicial economy, not only in terms of the burden placed on provincial superior courts, but also in terms of the expansive litigative burden placed on defendants.

Although the two pieces appear to have been written simultaneously, an article by Hogg and McKee manages to anticipate, and effectively temper, Haylock's declaration of unconstitutionality.<sup>84</sup> The authors' aim is to reconsider the apparently uniform assumption that an opt-out national class can be certified on the basis that the claims of the national class have a "real and substantial connection" with the forum.<sup>85</sup> This is the appropriate test for assuming jurisdiction, Hogg and McKee note, except it has been misconstrued in the context of multijurisdictional class proceedings so as to unjustifiably expand the court's jurisdiction. It is an established principle that the class action procedure does not expand a court's jurisdiction; that is to say, if a provincial superior court lacked jurisdiction over an individual claim, aggregating that claim in the form of a class action would not allow the court to assume jurisdiction. Clearly, Hogg and McKee share with Haylock a concern over the power of opt-out national classes to reach past provincial borders and permanently extinguish the claims of individual non-residents. Hogg and McKee's reaction to this concern, however, is far more pragmatic. Rather than declare every multijurisdictional opt-out class proceeding over the past fifteen years unconstitutional, the authors remind their readers that a class action is a collection of individual claims, each of which, if pursued on its own, would itself require a real and substantial connection with the forum province. Such is the basis for Hogg and McKee's conclusion that:

[A] provincial opt-out class action statute will not be unconstitutionally extraterritorial if it authorizes the creation of a plaintiff class that includes non-residents who have claims that, regarded individually, all have a real and substantial connection to the province.<sup>86</sup>

To clarify, Hogg and McKee are saying that there is a constitutional barrier to opt-out national class actions, though not an unavoidable brick wall as Haylock suggests.

In reality, Hogg and McKee's approach would still permit most nationwide class actions. Consider *Lépine*, once again, a case grounded in

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84 Hogg & McKee, above note 16.

85 *Ibid* at 288.

86 *Ibid* at 292.

discontinued Internet service that was supposed to, by contract, last a “lifetime.”<sup>87</sup> It was not only the Ontario-based representative plaintiff that held a real and substantial connection with Ontario — every non-resident class member was sufficiently connected to Ontario, the province where each contract had been made and broken. As discussed earlier, the “real and substantial connection” test is not an overly high threshold; it should follow, one would think, that if the representative plaintiff — who is, by definition, sufficiently connected to the forum province — shares common issues with the non-residents, the non-residents themselves would, by extension, be sufficiently connected to the forum province as well. This perspective, Hogg and McKee warn, wrongly “conflates the test for certification (which requires common issues) with the test for jurisdiction.”<sup>88</sup> As their renowned expertise in class actions and constitutional law would predict, Hogg and McKee have constructed a persuasive argument, contending that it would be unconstitutional (read: unfair) to allow a claim that has no substantial connection to the Province of Ontario to be extinguished by the Ontario Superior Court. Professor Janet Walker, however, also boasts a renowned expertise in multijurisdictional class actions, and she is not convinced.

In her 2010 article, “Are National Class Actions Constitutional? — A Reply to Hogg and McKee,” Walker completely refutes the notion that there are any constitutional barriers to the certification of national opt-out class actions.<sup>89</sup> Fundamental to her argument is the distinction between the jurisdiction to prescribe and the jurisdiction to adjudicate, two concepts that other scholars have apparently neglected. Jurisdiction to prescribe, she writes, is often associated with legislative authority; it involves the power to “make laws that are applicable to particular activities or persons.”<sup>90</sup> If a law extends beyond its prescriptive jurisdiction, it is said to be *ultra vires*, and thus invalid. Jurisdiction to adjudicate, on the other hand, is the power “to make a binding determination of a dispute concerning certain activities or persons.”<sup>91</sup> This authority is not restricted by provincial boundaries, Walker argues, otherwise it would be impossible to adjudicate cross-border disputes. At issue in this discussion is a court’s jurisdiction to adjudicate. Hogg and McKee would probably agree

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87 *Lépine*, above note 46 at para 1.

88 Hogg & McKee, above note 16 at 290.

89 Janet Walker, “Are National Class Actions Constitutional? — A Reply to Hogg and McKee” (2010) 48 *Osgoode Hall LJ* 95 [Walker].

90 *Ibid* at 99.

91 *Ibid* at 102.

that this jurisdictional debate is one of adjudication; they would likely argue, though, that if a court assumes jurisdiction to adjudicate, it is still obliged to ensure that it has a real and substantial connection with each and every claim it hears. From Walker's perspective, the court's decision to assume jurisdiction over a nation class should not be guided strictly by the "real and substantial connection" test; rather, it should be guided by the much broader constitutional principles of order and fairness. As this paper alluded to earlier, these were the very principles upon which La Forest J formulated the "real and substantial connection" test in the first place.<sup>92</sup> Walker seems to be suggesting that order and fairness represent the ultimate seeds of solution in this national class action debate:

[T]he principles of order and fairness require courts to exercise jurisdiction over national class actions in a manner that maximizes the objectives of class actions — including access to justice, judicial economy, and behaviour modification — and minimizes the incidence of overlapping classes and competing actions. This may require us to develop new institutional mechanisms and bodies to facilitate the process of coordinating national class actions.<sup>93</sup>

Despite the intellectual — and at times intricate — nature of Walker's arguments, her view to future, as illustrated in the excerpt above, leaves plenty to be desired. Sure, it can be said that "order and fairness," as prescribed in *Hunt*, require courts to pursue the three goals of class proceedings while simultaneously minimizing competing actions, but these principles are inherently soft when it comes to instruction. Indeed, it is difficult to draw much direction — or confidence — from a statement to tune of: the fair and orderly coordination of class actions is the solution, and this solution will be achieved through a series of non-descript and non-existent "institutional mechanisms and bodies."

To Walker's credit, the purpose of her article was never to pave the road forward; it was to clear the path of constitutional barriers, making room for others to lay the pavement. In this respect, she makes a significant contribution on two fronts. First, she offers a strong and detailed rebuttal of Hogg and McKee's seemingly academic attempt to fuel the constitutionality debate with respect to opt-out national class actions. If moving forward requires putting the constitutionality question to rest, then squashing Professor Hogg's argument is a crucial first step, considering his propensity for judicial citation. Second, she makes it clear that

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92 *Hunt*, above note 1.

93 Walker, above note 89 at 97.



solving the coordination issues associated with national classes requires much more than scholarly discourse; she even hints at the establishment of a “multilateral body” like the Multidistrict Litigation Panel in the United States.<sup>94</sup> Walker is by no means alone in her call for greater levels of interjurisdictional coordination; virtually every academic article — including this one — makes a similar recommendation. It is only logical, therefore, that this paper turns now to the more pressing and practical issue of competing class actions, and the extent to which provincial superior courts are willing to recognize and enforce each other’s decisions.

## 2) Recognition

While the constitutionality of a court’s decision to assume jurisdiction over an opt-out national class makes for a thought-provoking debate, there is no debating the fact that courts are consistently doing exactly that. The practical challenges that emerge, therefore, are those associated with the commencement of duplicative or overlapping class actions in multiple provinces. A recent article by Scott Maidment provides some insightful commentary in this regard.<sup>95</sup> Putting class actions aside for a moment, Maidment reminds his readers that courts have consistently treated parallel proceedings with a great degree of skepticism. The British Columbia Court of Appeal’s decision in *Westec Aerospace v Raytheon Aircraft*, for example, highlights two obvious policy concerns with duplicative litigation: (1) the creation of inefficiency and waste, and (2) the possibility of inconsistent judgments.<sup>96</sup> Maidment notes, with the conviction of a lawyer whose practice is focused on multijurisdictional class action defence, that courts have neglected these issues when it comes to competing class actions.

It is true that superior courts have been quite tolerant — or deferential — with respect to competing class actions. As noted in *Sollen v Pfizer Canada*, it is unlikely that any single provincial court “will be clearly more appropriate than others, [which] will make it more difficult for a defendant to obtain a stay of a proceeding in any of the jurisdictions.”<sup>97</sup> Not surprisingly, these so-called carriage motions are dismissed quite

94 *Ibid* at 142.

95 Scott Maidment, “Exclusive Forum Selection in National Class Actions: A Common Issues Approach” (2009) 2 *Can Class Action Rev* 133 [Maidment].

96 (1999), 173 DLR (4th) 498 at para 28 (BCCA).

97 [2008] OJ No 866 at para 28. For a complete assessment of the problems associated with duplicative litigation, consider consulting *Civil Litigation Process*, above note 19.

regularly.<sup>98</sup> Maidment attributes these dismissals, at least in part, to an overarching belief that unless a parallel class action has actually been certified (or denied) in another province, class members should have the opportunity to bring their action in their home province. Where certification in another province is still pending, courts will appeal to the principle of “judicial comity” and attempt to mitigate the potential for chaos by “excluding persons resident within their respective provinces or territories from a class.”<sup>99</sup> Maidment believes, once again with conviction, that this “subclass deference model” actually undermines the precise principles — order and fairness — that judicial comity is supposed to achieve.<sup>100</sup> This is the point at which the arguments made by Maidment intersect with those made by Walker.

Both authors perceive judicial comity as a means of achieving the more important goal of order and fairness. In turn, they believe that judicial comity should be applied in a way that promotes certainty and efficiency by minimizing overlapping class actions. This belief that judicial comity commands a reduction in parallel class actions may be viewed in direct contrast with the perspective presented by Haylock and Hogg and McKee. Where Haylock and Hogg and McKee appear at ease with allowing parallel national class actions, Walker and Maidment appear extremely uncomfortable. Looking past the constitutional dilemma, it is difficult to refute the desirability of Maidment’s central premise: “A national class should proceed exclusively in that forum which has the most real and substantial connection with the common issues that may arise in that proceeding.”<sup>101</sup> Under Maidment’s “common issues approach” to forum selection, once a superior court has found a certain province to be the most appropriate forum, that province would assume exclusive jurisdiction over the single national class action. Aside from the challenge of providing sufficient notice — which, as pointed out above, is not necessarily more onerous for non-residents — it goes without saying that an aggregated national class would promote the three policy goals of class actions. Maidment believes that this approach would represent “one small step forward” under common law — it is an appealing theory, for sure, but it may not be quite as small a step as he would like to think.<sup>102</sup> For starters, it demands an ambitious level of trust and col-

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98 *Civil Litigation Process*, *ibid* at 139.

99 *Ibid* at 141.

100 *Ibid*.

101 *Ibid* at 133.

102 *Ibid* at 153.

laboration between provincial courts. As this paper shifts towards the issue of judgment recognition, it appears that enhancing interprovincial trust and collaboration among judges may, in reality, be the only feasible way forward.

As discussed earlier, *Morguard* is the starting point for any discussion concerning the recognition of interprovincial judgments. In that case, the SCC held that a superior court's judgment, if rendered upon properly assumed jurisdiction, should be recognized and enforced in other Canadian provinces. This notion of full faith and credit between provinces was then constitutionally entrenched by the SCC in *Hunt*. This approach to judgment recognition seems straightforward in principle; however, as reflected in an article by Celeste Poltak, it may be wishful thinking to assume that courts in Quebec will accept the idea that "fair process is not an issue within the Canadian federation."<sup>103</sup>

In addition to the *Lépine* decision, discussed above, Poltak considers the Quebec Superior Court's decision in *HSBC Bank Canada v Hocking* as an example.<sup>104</sup> The story begins with Robert Hocking filing a certification motion in Ontario. Hocking was looking to certify an opt-out national class action on behalf of all Canadians who had incurred certain mortgage penalties. At the same time, David Haziza filed a nearly identical action in Quebec. The key difference was that Haziza's proposed class was limited to residents of Quebec. Despite Haziza's attempts to intervene, the Ontario Superior Court certified the class action and approved an out-of-court settlement. Naturally, HSBC sought to have this settlement recognized in Quebec. The Quebec Superior Court dismissed the motion, however, finding not only that the notice provision was insufficient, but also that there was no real and substantial connection between the individual Quebec-based claims and the Province of Ontario. Poltak offers this comment in response:

[T]he reasoning in *Lépine* and *Hocking* has fallen afoul of the admonition by the Supreme Court of Canada that fairness is not an issue within the Canadian federation and provincial superior courts cannot review the process of their sister courts: a province cannot restrict the recognition

103 *Morguard*, above note 56 at para 43, as referenced in Celeste Poltak, "Ontario and Her Sisters: Should Full Faith and Credit Apply to the National Class?" (2006) 3 Can Class Action Rev 437 [Poltak].

104 2006 QCCS 330. For a summary of this decision, see McCarthy Tetrault LLP, "Going...Going...Gone? — *Hocking v. Haziza* and the Fate of National Class Actions" (4 November 2008), online: [www.mccarthy.ca/article\\_detail.aspx?id=4177](http://www.mccarthy.ca/article_detail.aspx?id=4177).

of another province's judgment which meets the *Morguard* standards of jurisdiction.<sup>105</sup>

Evidently, Poltak's belief that full faith and credit must be afforded to extraprovincial judgments is unaffected by the Quebec Superior Court's refusal to do so.<sup>106</sup> In asking readers to "[put] aside the idiosyncrasies of these Quebec fact scenarios," Poltak appears to be dismissing this situation as unique to the courts of Quebec.<sup>107</sup> She is undoubtedly correct in her implicit assertion that Quebec's resistance to extraprovincial judgment recognition is unique, but that hardly renders it worthy of dismissal — au contraire.

The ultimate goal of Poltak's article, as it reads, is to promote the application of the constitutionally mandated "full faith and credit" principle as a means of "reduc[ing] the current sibling rivalry with respect to jurisdiction."<sup>108</sup> However, in so thoroughly considering the judicial resistance demonstrated in *Lépine*, *Hocking*, and *Englund*, Poltak inadvertently demonstrates that full faith and credit is not the means to a desired end; rather, it is the desired end. Indeed, it is only in the absence of provincial rivalry that the benefits of full faith can be fully realized. How exactly to temper this rivalry is a supremely vexing question, of course, especially if the relationship being considered is one of longstanding complexity, as is the case with Quebec and Ontario.

As Part C of this paper has made painstakingly clear, class action experts differ in their vision of what an appropriate national class action regime should look like. While Peter Hogg, for instance, believes that a non-resident class member should, in certain circumstances, be able to bring a parallel action in her home province, Craig Jones argues that the basic goals of class actions would be best pursued through a single, binding, nationwide proceeding. They may vary in detail, but each scholarly vision is grounded in the same basic need for order and fairness. There is a certain irony here, with the common thread in this academic battle being a call for collaboration. Nevertheless, it is now apparent that the existence of a fair and orderly system of interprovincial coordination is

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105 Poltak, above note 103 at 461.

106 It is worth noting that two years after Poltak's article was published, the Quebec Court of Appeal upheld the Superior Court's decision. See *HSBC Bank Canada v Hocking*, [2008] RJQ 1189.

107 Although she does highlight the case of *Englund v Pfizer Canada*, 2006 SKQB 6, where a Saskatchewan court declined to stay proceedings in the face of competing proceedings in Ontario.

108 Poltak, above note 103 at 465.

more important than the details of that system. Scholars have done their part, establishing the need for consistency in the face of chaos, and the ball now lies — pardon the pun — in the judges' court. In this respect, there is reason to believe that the CBA's distinctly non-academic National Task Force on Class Actions is appropriately positioned to construct a system of coordination that would work for courts, counsel, and parties to proceedings.

## D. THE JUDICIAL PROTOCOL

In February 2010, the CBA launched the National Task Force on Class Actions to deal with the issues of confusion, cost, and inconsistency highlighted above. The Task Force's overarching objective, as noted in its Terms of Reference, was to respond to a challenge articulated by LeBel J in his *Lépine* decision:

More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space. It is not this Court's role to define the necessary solution.<sup>109</sup>

Technically, the Task Force's mandate was threefold: (1) develop a Judicial Protocol, (2) propose potential legislative amendments, and (3) coordinate an ongoing and interactive consultation process with CBA members across the country.<sup>110</sup> "Given the urgent need to find solutions," however, the Terms of Reference stressed that "the initial focus of the Task Force will be on the creation of the judicial protocol."<sup>111</sup> In June 2011, the Task Force released a "Consultation Paper" and a "Draft Protocol," requesting feedback from the legal community.<sup>112</sup> On 8 July 2011, the consultation period officially closed. Considering that it took the Task Force a year and a half to draft these documents, a one-month consultation period seems relatively short. In any event, the feedback must not have been overly critical because the Class Action Judicial Protocols Resolution was passed the following month.<sup>113</sup>

109 *Lépine*, above note 46 at para 57.

110 Canadian Bar Association, "Terms of Reference" (2010), online: [www.cba.org/CBA/ClassActionsTaskForce/Main/CATF\\_Terms\\_of\\_Reference](http://www.cba.org/CBA/ClassActionsTaskForce/Main/CATF_Terms_of_Reference).

111 *Ibid.*

112 Canadian Bar Association, "Consultation Paper: Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions" (June 2011), online: [www.cba.org/CBA/ClassActionsTaskForce/PDF/Consultation\\_eng.pdf](http://www.cba.org/CBA/ClassActionsTaskForce/PDF/Consultation_eng.pdf)

113 Judicial Protocols, above note 4.

Before reviewing the details of the Judicial Protocol, it is important to recognize the makeup of the Task Force, which is chaired by Norton Rose's Sylvie Rodrigue, an expert in multijurisdictional class action defence. Rodrigue is joined on the defence side by accomplished lawyers such as Gordon McKee, Andrew Borrell, and Brian Foster. These opinions are balanced, in theory, by plaintiff-oriented counsel such as Kirk Baert and Harvey Strosberg. Complementing counsel are six judges from six different courts. Notable among them is the chief justice of Ontario, Warren Winkler, whose judgments have long advocated for interprovincial comity, purporting generally that courts in the Canadian federation must not be subject to the traditional laws of extraterritoriality.<sup>114</sup> Equally notable is the absence of academia. The Consultation Paper does mention that the Task Force will consult "distinguished legal scholars as the need arises"<sup>115</sup> — however, it goes on to state that the Task Force "is not intended to resolve the vexed question of whether national classes are constitutionally valid," pointing specifically to the abovementioned articles by Janet Walker and Peter Hogg.

There are two ways to interpret the Task Force's refusal to truly engage with the "constitutionally contentious" issues that serve not only as fuel for academic discourse, but also as concrete factors in the efficacious administration of justice. The first interpretation is understandably critical, frustrated by the Task Force's severely limited scope. Having assembled such an impressive array of class action experts, it does seem counterintuitive to restrict their analytical capacity. The second interpretation, however, and the one to which this paper subscribes, is far more supportive of the Task Force's pragmatic approach. A significant portion of the Consultation Paper is devoted—somewhat defensively—to justifying its limited mandate. It points first to the fact that courts and counsel have been collaborating informally for years to promote the fair and orderly coordination of competing class proceedings. Perhaps the most illustrious example of this came about in response to the tainted pet food scandal of 2007, where competing class actions were launched North America-wide against Menu Foods. In what the Consultation Paper describes as a "Hollywood Squares formation," judges from nine Canadian provinces approved a nationwide settlement by way of video-conference.<sup>116</sup>

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114 See, for example, *Bre-X*, above note 64.

115 Judicial Protocols, above note 4.

116 One lawyer at Stikeman Elliot LLP described the process as "the Brady Bunch approach to settlement."

Accordingly, the Task Force's goal was to build on these ad hoc attempts at coordination, providing a standardized "framework for cooperation, while still respecting the jurisdiction of individual courts over matters such as certification, carriage and other substantive matters." This approach may be contrasted, for example, with the Uniform Law Conference of Canada's (ULCC) 2005 report, which recommended that every Canadian province should, among other things, "expressly permit the court to certify, on an opt-out basis, a class that includes class members residing or located outside the jurisdiction."<sup>117</sup> Though Saskatchewan and Nova Scotia have adhered in part to the ULCC's advice, it is not particularly surprising that other Canadian provinces were less enthusiastic about opening up their class proceedings statutes. Rather than demand legislative amendments, the CBA's Judicial Protocol presents a timid, yet adoptable template for coordination, focusing solely on notice obligations and settlement approval.

Coordination requires awareness, and awareness stems from communication; as such, it is recommended that counsel advise the court — by way of a detailed and up-to-date "notification list" — of any competing actions of which they are aware. It is also expected that all pleadings will be posted on the National Class Action Database. This seems to be happening already, although compliance rates are unavailable, and the CBA does not advertise the database as exhaustive. In the event that a joint settlement is reached, the parties may file a multijurisdictional class settlement approval motion in all applicable courts. Fundamental to a successful motion will be its detailed plan for notice delivery. The notice proposal must include a summary of the case, a definition of the class, and a complete list of the different class actions involved in the joint settlement, as well as the key terms of the settlement. The notice must also clearly set out the options available to class members, including their right to object to (or opt-out of) the settlement, and the binding effect of not doing so.

Once a multijurisdictional class settlement approval motion has been filed, the courts may communicate with each other, as they see fit, to determine all aspects of how the motion will proceed, from the timing and structure of approval hearings to the details of notice provision. If the courts decide to host a joint settlement approval hearing, all parties

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117 Uniform Law Conference of Canada, Civil Law Section, "Report of the Uniform Law Conference of Canada's Committee on the National Class Action and Related Interjurisdictional Issues: Background Analysis" (9 March 2005), online: [http://www.ulcc.ca/en/poam2/National\\_Class\\_Actions\\_Rep\\_En.pdf](http://www.ulcc.ca/en/poam2/National_Class_Actions_Rep_En.pdf).

must be able to participate, which “may be done by video link.” There is clearly nothing novel about this videoconference suggestion; in fact, there is nothing particularly novel about any of the Judicial Protocol’s suggestions. It is worth noting, though, that in the Draft Protocol, there was a “Case Management Procedure” section permitting parties to request a multijurisdictional case management order. If all courts agree, an order may designate a single judge as the case management judge. While this judge would not be allowed to unitarily determine carriage, jurisdiction or certification issues, she would carry standard case management powers, such as the ability to impose timelines. The Case Management section is nowhere to be found, however, in the final Judicial Protocol, demonstrating all too clearly the Task Force’s overwhelming reluctance to push the envelope. Having said that, it is this paper’s contention that where more ambitious attempts at encouraging standardized coordination have faltered, the entirely inoffensive nature of the CBA’s Judicial Protocol may actually give it a chance to succeed.

## E. CONCLUSION

The initial objective of this paper was to explore, with an eye to the future, the challenges associated with the emergence of national class proceedings. Against the backdrop of access to justice, judicial economy, and behaviour modification, it was immediately clear that Canada’s decentralized approach to national class certification presents very real concerns for all parties invested in the efficacious administration of justice. For a non-resident class member, there is a fear of unreasonable claim preclusion. Conversely, for a defendant, there is a fear of obtaining an unreasonably low level of claim preclusion, and thus having to pay the price of duplicative litigation. For a judge, there is a fear of wasting judicial resources and permitting inconsistent judgments.

In considering these fears, scholars have reached a variety of conclusions. Craig Jones, Scott Maidment, and Janet Walker, for example, have argued that the traditional objectives of class actions require a more centralized approach. In other words, the fair and orderly administration of justice is best achieved by encouraging opt-out national classes and minimizing the incidence of competing actions. Other scholars, such as Peter Hogg and Jeffrey Haylock, have said that there are constitutional barriers to a superior court’s assumption of jurisdiction over a national class. While both scholarly camps continue to construct persuasive arguments, courts continue to assume jurisdiction over national classes. The



response to these fears, therefore, lies not in academic debate, but in the creation of realistic mechanisms of interprovincial judicial coordination.

Encouraging interprovincial judicial coordination is easier said than done. As touched on in an article by Celeste Poltak, historic rivalries between provinces may deter the recognition and enforcement of extraprovincial judgments. It is this underlying rivalry — or jurisdictional protectionism — that will make it difficult to move forward with any overly ambitious attempt at centralization, such as Janet Walker's idea of adopting the United States' Multidistrict Litigation Panel model. Fortunately, there is nothing ambitious about the CBA's Judicial Protocol. It is easily criticized in this regard, yet this paper believes there is some value in supplying an entirely uncontentious framework that promotes interprovincial coordination and stresses the need for sufficient notice delivery.