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## Crossborder Class Actions: A View from Across the Border

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# CROSBORDER CLASS ACTIONS: A VIEW FROM ACROSS THE BORDER

*Janet Walker\**

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*"You must remember this, a kiss is just a kiss, a sigh is just a sigh  
The fundamental things apply, as time goes by"*<sup>1</sup>

Nearly a generation ago, the U.S. Supreme Court decided that American courts could certify crossborder class actions.<sup>2</sup> In doing so, American courts would exercise jurisdiction over both resident and non-resident members of the plaintiff class who took no steps to be excluded from the class. At that time, the idea of aggregating claims into class actions had hardly been considered outside the United States. The idea of exercising jurisdiction over *residents* of the forum who fell within the definition of a plaintiff class and who took no steps to be excluded from the class was only beginning to be explored.<sup>3</sup> The application of this principle to *non-residents* was not even on the horizon. However, within the United States, class actions were well established and personal jurisdiction in crossborder class actions was only one of many complex challenges being addressed as the law became increasingly sophisticated.

Now, a generation later, class actions operate in a number of countries, and their implementation has been considered in many more.<sup>4</sup> In some

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1. HERMAN HUPFELD, *AS TIME GOES BY* (1931).

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

3. Like England, virtually all of the Canadian provinces and the Australian states have long had some form of representative proceeding based on the traditional model in the English courts, but this proceeding has generally been interpreted narrowly, following the English Court of Appeal decision in *Markt & Co., Ltd. v. Knight Steamship Co.* [1910] 2 K.B. 1021, to exclude cases involving claims by persons whose interests are similar but not identical and those whose claims would entail separate determinations of damages. See *Naken v. Gen. Motors of Can. Ltd.* [1983] 1 S.C.R. 72. By 1982, the Ontario Law Reform Commission had published its comprehensive three volume *Report on Class Actions*, but only Québec had passed legislation implementing class actions. Code of Civil Procedure, R.S.Q., ch. C-25, Book IX (1978). The Ontario regime was not to come into force until 1993.

4. See WARD K. BRANCH, *CLASS ACTIONS IN CANADA* (1996); MICHAEL A. EIZENGA ET AL., *CLASS ACTIONS LAW AND PRACTICE* (1999) (describing the evolving law related to class actions). Québec has had a regime since 1978. An Act Respecting the Class Action, R.S.Q. ch. R-2.1; Code of Civil Procedure, R.S.Q., ch. C-25, arts. 999-1051 (1991) (Que.). The Ontario legislation came into effect in 1993. An Act Respecting Class Proceedings, S.O., ch. 6 (1992) (Ont.). An Act to Amend the Law Society Act, S.O., ch. 7 (1992) (Ont.). See also MICHAEL G. COCHRANE, *CLASS ACTIONS: A GUIDE TO THE CLASS PROCEEDINGS ACT, 1992* (1993). The British Columbia legislation came into effect in 1996. Class Proceedings Act, R.S.B.C., ch. 50 (1996)(B.C.). See also JAMES M. SULLIVAN, *A GUIDE TO THE BRITISH COLUMBIA CLASS PROCEEDINGS ACT* (1997). The Saskatchewan and the Newfoundland and Labrador legislation came into effect in 2002. Class Actions Act, S.S., ch. 12.01 (2001) (Sask.); Class Actions Act, S.N.L., ch. C-18.1 (2001) (Nfld. & Lab.). The Federal Court amended its rules to permit class actions in 2002. Rules Amending the Federal Court Rules, 1998, SOR/98-106 (1998) (amending the *Canada Federal Court Rules*). The Manitoba legislation came into effect in 2003. The Class Proceedings Act, C.C.S.M., ch. C130 (2002) (Man.). The Alberta Law

countries the legislation has only just been passed, and in others the complexities of the issues are just beginning to emerge. The courts in these jurisdictions are now facing many of the same questions that were faced by American courts during the early development of the procedure for class actions in the United States. In some jurisdictions, notably in Canada and Australia, the courts are now grappling with the challenging questions associated with exercising jurisdiction over crossborder plaintiff classes.<sup>5</sup>

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Reform Institute has recommended the adoption of a class actions regime. *Current Projects – Class Actions* (Dec. 2000), at <http://www.law.ualberta.ca/alri/crrmtproj/classaction.html> (last visited Sept. 26, 2004). The Uniform Law Conference of Canada has adopted a model statute, available at <http://www.ulcc.ca/en/us/>. Furthermore, the Supreme Court of Canada decision in *W. Can. Shopping Centres, Inc. v. Dutton* [2001] 2 S.C.R. 534, effectively created a common law class actions regime for every Canadian jurisdiction by ruling that class actions could operate pursuant to certain guidelines despite the absence of legislation.

A number of jurisdictions outside Canada have also implemented class action regimes. Australia is one example. See S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 289 (2001). In Australia, the rules of the Federal Court were amended by the Federal Court of Australia Amendment Act, 1991, c. 181 § 3 (Cwth) to add Part IVA, in 1992, which provided for class actions; the rules of the Supreme Court of Victoria were amended by the Supreme Court (General Civil Procedure) Rules, 1996 (Order 18A Group Proceeding), but a challenge was made in *Schutt Flying Academy (Austral.) Pty. v. Mobil Oil Austral. Ltd.* (2000), 1 V.R. 545 to the regulatory authority under Section 25 of the Supreme Court Act, 1986 to create a scheme for group proceedings. The Attorney General re-introduced the scheme through legislation entitled *The Courts and Tribunals Legislation Act 2000 § 13 (Vict)* (miscellaneous amendments). The rules of court of South Australia were amended in 1987 to permit the establishment of a more modest class action-like scheme, removing some of the restrictions of the old representative proceedings rule and permitting actions to be brought on behalf of a group where there are "common questions of fact or law requiring adjudication" and where damages are sought. S. Ct. R. (S. AUSTRAL.) 34.01.

The rules of procedure of the Supreme Court in England now permit multi-party proceedings. SIR HARRY WOOLF, *ACCESS TO JUSTICE: FINAL REPORT 223-49* (1996); see also *GROUP ACTIONS MADE EASIER: A REPORT BY THE LAW SOCIETY'S CIVIL LITIGATION COMMITTEE* (1995); Harold Koch, *Non-Class Group Litigation under EU and German Law*, 11 DUKE J. COMP. & INT'L L. 355 (2001) (describing Directive 98/27/EC, 41 O.J. (L 166) 51 (1998), which affords a right of representation to consumer associations and administrative agencies). Swedish legislation permits both actions led by consumer associations and individual actions, although the plaintiff groups in the latter are formed on an opt-in basis. Robert Nordh, *Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reforms, and a Forthcoming Proposal*, 11 DUKE J. COMP. & INT'L L. 381 (2001). Finally, the Law Reform Commission of South Africa published a report recommending legislation to permit class actions: *THE RECOGNITION OF A CLASS ACTION IN SOUTH AFRICAN LAW* (S. Afr. Law Comm'n, Working Paper No. 57, 1995).

5. Multi-jurisdiction class actions were approved in principle by the High Court in *Femcare Ltd. v. Bright* (2000) 100 F.C.R. 331 and *Mobil Oil Austral. Pty. v. Victoria* [2002] H.C.A. 27 (Austl.). Multi-jurisdiction class actions have been endorsed by Canadian courts on

This article offers a view of crossborder class actions from outside the United States. It might not be obvious at first why American lawyers and legal academics would find the examination of these questions in other countries to be anything more than a matter of idle curiosity. After all, the law in the United States has "been there and done that." In contrast to this, lawyers, jurists, and academics in other countries have had good reason over the years to follow the developments in the United States. They have sought to benefit from the American experience on a variety of questions relating to class action procedure; they have expressed the desire to avoid situations that have caused concern in the United States;<sup>6</sup> and they want to consider how they might shape their class action procedure to conform to their own procedural traditions.<sup>7</sup>

On further reflection, though, the approach to jurisdiction in crossborder class actions that is developing in Canada and elsewhere may equally be of interest to members of the American legal community. For those who are interested in the theory of class actions and the law of jurisdiction, the opportunity to compare the approaches to these issues that are being taken in other legal systems can help to sharpen the understanding of the distinctive features of the approach taken in the United States. It can provide a means of appreciating the underlying reasons why different approaches have been adopted in different legal systems. It can also provide a means of assessing the efficacy of these approaches in promoting the core procedural values of various legal systems. For those who are interested in the practical implications of the various approaches, it may be possible to anticipate the effect of adopting one approach rather than another on the likelihood that a certification order in an American class action would be recognized by courts in other countries as binding on absent class members. For example, would a crossborder class action that was certified under the American approach to certification be more or less likely to be regarded by a Canadian court as binding on Canadian members of the class than one certified under the English approach? Finally, on a more whimsical note, some may wish simply to know whether, in terms of class actions and basic procedural values, as the old song suggests, "the fundamental things apply, as time goes by."<sup>8</sup>

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numerous occasions, as discussed below in the section on "Constructive Contacts."

6. See, e.g., Thomas D. Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn from Each Other?*, 11 DUKE J. COMP. & INT'L L. 157 (2001); Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 DUKE J. COMP. & INT'L L. 369 (2001); Edward F. Sherman, *Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401 (2002).

7. Michelle Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405 (2001); Garry D. Watson, *Class Actions: The Canadian Experience*, 11 DUKE J. COMP. & INT'L L. 269 (2001).

8. HUPFELD, *supra* note 1.

This article has five parts. The first part notes the difference between the jurisdictional analysis necessary for certifying multi-state class actions where full faith and credit applies, and the analysis necessary for certifying multinational class actions where full faith and credit does not apply. It argues that due process could require certifying courts in the United States to consider whether the courts in foreign fora would grant preclusive effect to certification orders made in the U.S. The second part clarifies the circumstances under which orders certifying multijurisdiction plaintiff classes can be made and thereby give rise to challenges in foreign courts. It argues that the solution to the problem of jurisdictional certainty that relies on opt-in requirements for foreign plaintiffs does not serve the procedural objectives of class actions well, and that it is desirable to seek out ways to ensure that orders certifying crossborder plaintiff classes defined on an opt-out basis will be recognized in foreign courts. The third part confronts the seemingly intractable problem of predicting when the courts of alternate fora for the claims of class members will be asked to consider challenges to the preclusive effect of U.S. certification orders. It notes the economic and logistical factors that constrain the impetus to make such challenges; and it considers the adequacy of the use of the residence of absent class members as a criterion for anticipating the scope of the preclusive effect of certification orders in other courts. The fourth part compares the objectives of class action regimes in various legal systems and the rationales used by the courts of these fora to support jurisdiction over crossborder plaintiff classes, and it considers the possible relevance of these for the recognition abroad of U.S. certification orders. In particular, it notes that interest in the United States in safeguarding individual choice in class action participation may not be felt as strongly in other countries where the focus may be more on achieving a single final and consistent resolution of related claims. The emphasis alternatively on the consent of individual class members in the United States and on connections between the forum and the dispute in other countries can affect the willingness to grant preclusive effect to foreign certification orders. Finally, the fifth part examines a recent indication of the evolving interpretation of these issues, and it identifies factors that are likely to be significant in Canadian courts, and in courts in other similar legal systems, for deciding whether to recognize foreign certification orders.

I. RE-VISITING THE JURISDICTIONAL QUESTION: "YOU MUST REMEMBER THIS . . ."

The jurisdictional question addressed by the U.S. Supreme Court in *Phillips Petroleum Co. v. Shutts*<sup>9</sup> (i.e., whether a court could exercise jurisdiction over a class that included non-residents) was a single question. Generally speaking, under full faith and credit, the determination by a court in the United States that it could exercise personal jurisdiction over absent non-resident class members would resolve this question in a single inquiry. Full faith and credit ensures that the exercise of jurisdiction will be recognized in other U.S. courts as capable of producing a judgment binding on those class members and precluding them from seeking relief for their claims in independent actions.<sup>10</sup>

However, it must be remembered that the preclusive effect of jurisdictional determinations is virtually unique to U.S. full faith and credit.<sup>11</sup> Elsewhere in the world, except under narrow circumstances that are prescribed by treaty,<sup>12</sup> it is accepted that courts that are asked to recognize or enforce judgments will review the jurisdiction of the issuing court for themselves if asked to do so by one of the parties.<sup>13</sup> They will apply standards set by their own law to determine whether the court issuing the judgment had authority to bind the parties. These standards are usually narrower than the standards

9. 472 U.S. 797 (1985).

10. For an examination of the many complexities of the operation of the preclusion doctrine in class actions procedure in the American federation that are overlooked by this simplistic statement, see Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998).

11. Except perhaps, within Australia, where full faith and credit operates pursuant to section 118 of the Australian Constitution, but the issue has largely been overcome by the operation of the scheme that cross-vests the jurisdiction of state courts with one another under the Jurisdiction of Courts (Cross-vesting) Act, 1987 (Cwth), and related state legislation.

12. For example, the Brussels Convention, now a European Union Regulation, sets jurisdictional standards for the courts of member states in cases involving defendants from other member states, and it provides for the recognition and enforcement of judgments by the courts of member states. *Council Regulation (EC) 44/2001 of 22 Dec. 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 44 O.J. (L12/7) (2001). However, the scheme of reciprocal rights operates on the basis of fixed and independent obligations on the part of member states' courts in relation to the exercise of jurisdiction and to the recognition and enforcement of judgments respectively, and not by establishing the preclusive effect of jurisdictional determinations. In other words, the view of the court of F1 of its own jurisdiction is not relevant to the obligation of the court of F2 to recognize the judgment.

13. JEAN-GABRIEL CASTEL & JANET WALKER, *CANADIAN CONFLICT OF LAWS* ¶ 14.5 (5th ed. 2002).

applied by their own courts to decide whether to exercise jurisdiction.<sup>14</sup> The narrower standards of jurisdiction applied in the context of the recognition and enforcement of judgments are sometimes described as “jurisdiction in the international sense.”<sup>15</sup> Typically, courts will exercise jurisdiction over consenting defendants, non-consenting defendants for whom the forum is their home, and over cases with substantial connections to the forum; but they generally confine “jurisdiction in the international sense” to the first two of these bases.<sup>16</sup>

The absence of full faith and credit obligations at the international level has important practical implications for the certification of class actions by courts in the United States that purport to include absent members who reside outside the United States. It means that the jurisdictional question cannot be answered in a single inquiry in the court that decides the certification motion. It is a two-part question. The first part of the question is: “Can this court exercise jurisdiction by virtue of its local authority to do so?”; and, the second part of the question is: “Will this court’s authority to exercise jurisdiction be recognized by the court or courts in which absent class members might otherwise choose to commence claims, so that the judgment of this court will be regarded as binding on those plaintiffs and precluding them from suing separately there?”<sup>17</sup>

At the international level, the second question cannot be answered by the court that is asked to certify the class action; it can be answered only by the court that is asked to recognize the certification order as binding. The implications of this were considered in early Canadian class action

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14. These standards are not substantially narrower than the ones that are used by American courts under the Uniform Foreign Money Judgments Recognition Act, 1962 to decide whether to exercise jurisdiction. The generosity shown to foreign judgments in these standards for the recognition and enforcement of foreign judgments was one of the considerations prompting the initiative undertaken under the auspices of the Hague Conference on Private International Law to participate in the negotiation of a multilateral Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters. Further information about these negotiations can be found at <http://www.hcch.net/e/workprog/jdgm.html>. Outside of the United States, it seems that only Canada has moved unilaterally to adopt jurisdictional standards for recognition and enforcement that are similar to those applied by Canadian courts in exercising jurisdiction. *Morguard Invs. Ltd. v. De Savoye* [1990] 3 S.C.R. 1077; *Beals v. Saldanha* [2003] 3 S.C.R. 416.

15. Janet Walker, *Rule 17 - Service Outside Ontario*, in HOLMESTED & WATSON: ONTARIO CIVIL PROCEDURE (Garry Watson & Craig Perkins eds., Carswell 2003).

16. *Id.*

17. As discussed below in Section III.B on “Residence as a Determining Factor,” it would be necessary for the preclusive effect of the certification order to be recognized not only in the place or places of the prospective plaintiffs’ residence, but also in the alternative fora in which they might sue.



jurisprudence. The issue arose for Canadian courts because, until recently,<sup>18</sup> the provincial superior courts in Canada applied the international recognition and enforcement rules to the recognition and enforcement of the decisions from other Canadian courts. In the first Canadian case to raise the question of jurisdiction over a multi-province class action, the judge observed that the capacity to certify a multi-province class was an issue that seemed “to be something to be resolved in another action (by a non-resident class member) before another court in another jurisdiction.”<sup>19</sup> It was the court’s view that since this is a question regarding the effectiveness of a judgment it should not concern the parties before the court deciding the certification motion.<sup>20</sup>

It was soon realized that such a view was not tenable under the implicit full faith and credit requirement in the Canadian Constitution that was recognized by the Supreme Court of Canada in its 1990 decision in *Morguard Investments Ltd. v. De Savoye*.<sup>21</sup> As the Supreme Court explained in the decision, Canadian courts must treat the standards for the assumption of jurisdiction and for the recognition of other courts’ assumption of jurisdiction as correlatives.<sup>22</sup> Under the constitutional requirements enunciated in the *Morguard* decision, Canadian courts must exercise restraint in the assumption of jurisdiction in order to ensure that it meets the standards that would entitle the judgment to recognition in other courts. In this way, the “principles of comity, order and fairness,” which were identified by the Supreme Court of Canada as implicit in the Canadian Constitution, operate to shape the law of jurisdiction in a way that is similar to the Full Faith and Credit and the Due Process clauses of the U.S. Constitution.<sup>23</sup> Accordingly, even though the jurisdictional question might be understood as two questions (one of the

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18. That is, until the decision of the Supreme Court of Canada in *Morguard*, [1990] 3 S.C.R. 1077.

19. *Nantais v. Telectronics Proprietary (Can.) Ltd.* (1995), 25 O.R. 3d 331, 346 (Ont. Gen. Div.).

20. *Nantais*, 25 O.R. 3d at 346.

I do not see how this potential problem can prejudice the defendants. If, indeed, class members outside of Ontario are free to sue despite a class judgment here, how are the defendants any worse off than if the class was limited to residents of Ontario? Would the defendants, being aware of the potential possible problem, be any worse off if non-resident class members should later argue they were not bound by a decision, than if those persons simply opted out now?

21. [1990] 3 S.C.R. 1077. Although the *Morguard* case was not argued in constitutional terms, its rulings were held to be based on the Constitution in *Hunt v. T & N, plc*, [1993] 4 S.C.R. 289.

22. *Morguard*, [1990] 3 S.C.R. at 1094, 1103.

23. *Spar Aerospace Ltd. v. Am. Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 243; Vaughan Black & Janet Walker, *The Deconstitutionalization of Canadian Private International Law?*, 21 SUP. CRT. L. REV. 181 (2003).

exercise of jurisdiction and another of its recognition) these questions would need to be answered in Canada—just as they have long since been in the United States—by reference to a single jurisdictional standard.

In international cases, the two questions cannot be combined in this way because the recognition of the certification order occurs in a court in a different legal system from the court exercising jurisdiction. Nevertheless, there is good reason to suggest that fairness—and, possibly, due process—requires that the answer to the second question (that of recognition) be permitted to influence the answer to the first question (that of the exercise of jurisdiction). This is because it is unfair to purport to bind defendants to a result that some plaintiff class members might be free to accept or to reject as they please at some later date. To do so would require a defendant to respond to a claim by a class of indeterminate size and scope.

This unfairness has been the subject of concern for courts in the U.S. As early as 1975, it led to the re-definition of the plaintiff class in *Bersch v. Drexel Firestone, Inc.*<sup>24</sup> so as to exclude the foreign members from the plaintiff class. Adopting the words of the court below, the U.S. Court of Appeals for the Second Circuit held that “if defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been.”<sup>25</sup> The unfairness involved is not confined to class actions that proceed to trial; it is even more pronounced when certification is followed by negotiations towards a settlement, where such negotiations are predicated upon a court approval that might ultimately fail to bind a portion of the multi-jurisdictional plaintiff class. As the U.S. Supreme Court noted a decade later in the *Shutts* case:

Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.<sup>26</sup>

Although the *Shutts* case involved foreign members of the plaintiff class as well as members from other states, the Court did not advert to the special considerations affecting the requirements of jurisdiction sufficient to support

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24. 519 F.2d 974 (2d Cir. 1975).

25. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir. 1975). This unfairness was akin to that caused by the practice of “one-way intervention,” which was eliminated by the 1966 revisions to Federal Rule 23. Under the previous regime, it was possible for class members to wait and see whether the claim was going to produce an acceptable result before opting in. See Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 312 n.112 (2003).

26. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985).

a defense of *res judicata* in the case of foreign plaintiffs. In part, this may be because it was unlikely, given the size of the claims brought in the action (about \$100 on average),<sup>27</sup> that they would be pursued elsewhere in the absence of a class action regime, and no such regime existed elsewhere at that time.

Nevertheless, the point that the *Bersch* case raises is an important one. While the full faith and credit principle permits U.S. courts in multi-state class actions to rely on the recognition of a certification order where jurisdiction is exercised in accordance with due process, it must be remembered that no similar principle operates on the international level. This does not mean that the courts certifying class actions are free to be indifferent to the jurisdictional standards that will be applied by foreign courts in deciding whether to give preclusive effect to their disposition of a multinational class action. On the contrary, in cases involving multinational plaintiff classes it is arguable that fairness, and possibly due process, require jurisdictional standards to be informed by the likelihood that the certification order will be recognized by the courts in other potential fora as binding on class members who might choose to sue there. The question that arises from this is how courts in the United States might be able to anticipate whether a certification order will be recognized by a foreign court.

## II. OPT-OUT CERTIFICATION REGIMES: “. . . A KISS IS JUST A KISS . . . ” OR IS IT?

As has frequently been noted, in a world where consumer and other markets extend beyond national borders, multinational classes seem inevitable for the simple reason that “mass injury does not always honor provincial or national borders.”<sup>28</sup> Indeed, from the advent of any class action regime, it seems only to be a matter of time before the question arises as to whether the adjudication of a claim in a class action could bind the members of a class that is broader than that defined by the scope of the court’s jurisdiction, which is ordinarily conceived of as territorially determined.<sup>29</sup> However, not all class

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27. *Shutts*, 472 U.S. at 801.

28. REPORT OF THE ATTORNEY GENERAL’S ADVISORY COMM. ON CLASS ACTION REFORM, at 39 (Toronto 1990).

29. Early commentary on the certification of nationwide plaintiff classes in Canada showed considerable discomfort with the prospect that “the new procedure may have changed something as fundamental as the territorial jurisdiction of the court itself.” Stephen Lamont, *The Problem of the National Class: Extra-territorial Class Definitions and the Jurisdiction of the Court*, 24 ADVOCATES’ Q. 252, 253 (2001). This discomfort was not shared by the courts, who took a pragmatic view of the issues. Although the courts have not articulated an explanation for the exercise of jurisdiction over multi-jurisdiction plaintiff classes that is

action regimes operate in ways that give rise to jurisdictional uncertainties in multinational classes. The “kiss” of certification is often just that, and it does not necessarily produce any profound jurisdictional question. There are at least three ways in which this can be so.

#### A. Comprehensively Defined Court Jurisdiction

First, the jurisdiction of the court in which a class action regime is established might itself prevent the issue from arising. The court’s jurisdiction might be defined in ways that ensure that the certification of a class that binds absent class members who do not opt-out would not purport to bind persons who might seek relief in other courts. This could occur in civil law jurisdictions where the jurisdiction of courts is codified. For example, Title III of Book Ten of the Québec Civil Code provides comprehensively for the “International Jurisdiction of Québec Authorities.”<sup>30</sup> None of the articles it contains appears to give Québec courts the authority to determine the claims of persons outside Québec, who, as plaintiffs, have not taken steps to commence a proceeding or to join a proceeding that is otherwise within the Québec courts’ jurisdiction.<sup>31</sup> Accordingly, subject to some provision specifically addressing international jurisdiction contained in the specialized provisions in the Code for class actions, it would seem that the determination of a claim in a class action in a court with jurisdiction defined in this way would not purport to bind such persons.<sup>32</sup> For example, a class that was

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sufficiently compelling to put the matter to rest in the commentary, they have not hesitated to certify multijurisdiction plaintiff classes. See *infra* notes 94-101 and accompanying text.

30. Civil Code of Québec, S.Q., c.64, Book Ten, Title III (1991) (Que.).

31. Apart perhaps, from Article 3136 of the *Civil Code*, S.Q., c.64, which provides, “Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.” *Id.*

32. The Québec jurisprudence on crossborder class actions has not been decisive on this point. In two early cases, Québec courts expressed concerns about certifying multi-province plaintiff classes. In *Werner v. Saab-Scania AB* [1980] C.S. 798 (Que. S.C.), *aff’d* 19 Feb. 1982 Montréal 500-09-001005-800, the court suggested that the class should include only Québec residents or those whose claims arose in Québec or whose contracts were entered into in Québec. In *Bolduc v. Compagnie Montreal Trust* (1989), 15 A.C.W.S. 3d 214 (Que. C.A.) the court declined to certify a class including claimants from outside the province and it expressed concern about the need to apply other laws and the need to give non-residents a genuine opportunity to opt-out. In two more recent cases the courts have not declined to certify multi-province class actions. In *Masson v. Thompson*, [1994] R.J.Q. 1032 (Que. S.C.), *aff’d* [1995] R.J.Q. 329 (Que. C.A.), the court was able to cite factual connections to Québec that supported the exercise of jurisdiction over non-residents; and in *Bourque v. Laboratories Abbott Ltée* 9

certified to include "all persons" who had been harmed by the use of a particular product would be understood as a class that was certified to include "all persons *resident in the forum*" who had been harmed in that way.

## B. Opt-in Class Action Regimes

Second, although the jurisdiction of the court might not be circumscribed in this way, the class action regime might not purport to bind absent class members. This would be the case if the regime operated on an *opt-in* basis. For example, in some places, such as in England, recent innovations in aggregating civil claims have been conceived and constructed differently from those in the United States and in Canada. Under Civil Procedure Rule Part 19.III, multi-party litigation in England proceeds on the basis of a Group Litigation Order that consolidates claims for the purpose of efficient case management<sup>33</sup> but that does not designate one claimant as the representative of the others.<sup>34</sup> While this procedure tends to streamline the litigation process, it does not dispense with the need for individual plaintiffs to take the initiative to commence their own claims. Under ordinary principles of estoppel, persons who take the initiative to participate in litigation are generally regarded as bound by the result. In the crossborder context, such persons are regarded as having "submitted" or "attorned" to the jurisdiction of the court deciding the class action and, as a result, they are bound by the order of that court. For example, even if the claims of persons from overseas were included in a Group Litigation Order made by an English court, they would still be claims that the

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Apr. 1998, Montreal 500-06-00023-966 (Que. S.C.) the claim was one for return of funds to a pension plan, and so, if it had been commenced in a common law jurisdiction, it might have fallen within the traditional representative proceedings requirements that are described above in note 3.

33. LORD CHANCELLOR'S DEPARTMENT, ACCESS TO JUSTICE IN MULTI-PARTY SITUATIONS: PROPOSED NEW PROCEDURES (1997); WOOLF, *supra* note 4; CIV. P. R. 19.10-15; United Kingdom Civil Procedure; Practice Direction, Part 19, available at [http://www.dca.gov.uk/civil/procrules\\_fin/contents/parts/part19.htm](http://www.dca.gov.uk/civil/procrules_fin/contents/parts/part19.htm) (2001).

34. See CHRISTOPHER J. S. HODGES, MULTI-PARTY ACTIONS ch. 3 (Oxford 2000). Multiparty Litigation under the 2000 amendments to the 1998 Civil Procedure Rules is to be distinguished from the long-standing Representative Proceeding, now under Rule 19.6, in which one plaintiff may represent other persons with the same interest. While such a proceeding does not require court approval and the representative plaintiff does not need the permission of those represented to act in this capacity, the court is not empowered to make an award of damages encompassing the losses of the persons represented. Each claimant must make a separate claim for damages. According to Neil Andrews, it is this feature that has rendered the Representative Proceeding a "procedural backwater." Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. COMP. & INT'L L. 249, 253 (2001).

plaintiffs had submitted to the jurisdiction of the English courts. Accordingly, again, no jurisdictional uncertainty would arise.

### C. Hybrid Regimes and Certification Orders

Third, even where the jurisdiction of the court might permit the court to bind absent class members abroad, and even where the class action regime generally operates on an opt-out basis, the class action regime might include a special provision requiring non-residents to opt-in. In some places, like British Columbia, the designers of class action regimes were persuaded of the merit of presumptively binding absent class members who were residents of the province, but they were concerned about the uncertainty that could arise from the operation of this model on a multi-jurisdictional scale.<sup>35</sup>

The British Columbia class action legislation was drafted at a time when the Ontario legislation was the only such legislation in a common law province of Canada. The drafters carefully examined several features of the Ontario legislation for the purposes of developing their own legislative regime. As the discussion paper prepared by the British Columbia Ministry of the Attorney General explained,

A class defined in a class action brought under the Ontario Act may purport to include individuals whose causes of action arose in B.C. If such an individual did not opt-out of the Ontario class action and attempted to sue the defendants in B.C., he or she would likely be met by the argument that he or she was bound by the Ontario judgment and was barred from bringing an individual action. The response of the B.C. litigant would be that legislation in Ontario did not bind him or her. The availability of an expanded class action procedure in a number of provinces could result in several class actions involving the same defendant and the same issues being commenced in each jurisdiction. In some cases, this could undermine the goals of judicial economy which underlie class actions. These issues have not been resolved in the Ontario legislation. In the U.S. national class actions, referred to as "multi-district litigation," are conducted under special rules and have been legitimized in court decisions.

One commentator has suggested that class members could be sub-classed into two groups—provincial residents and extra-provincial residents. Class members residing in the province under whose legislation the class action was filed, or whose cause of action arose in the jurisdiction would be subject to the ordinary opt-out requirements of the Act. Extra-provincial class members would be required to opt-in in order to be part of the class.<sup>36</sup>

The British Columbia legislators adopted this suggestion and reversed the presumption for potential plaintiffs who, because they were resident elsewhere,

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35. British Columbia Ministry of the Attorney General, *Class Action Legislation for British Columbia; Consultation Document*, c. 12 "Interjurisdictional Issues," at 22 (1994).

36. *Id.*

might ordinarily seek relief in other courts. Instead, it required those non-residents to take steps to opt-in to the class.<sup>37</sup> Accordingly, while the Ontario Class Proceedings Act makes no special provision for non-resident class members,<sup>38</sup> the British Columbia Class Proceedings Act does so by adopting an opt-in requirement for non-residents.<sup>39</sup> The British Columbia Act provides that a British Columbia resident may commence an action on behalf of a class of residents<sup>40</sup> who will be bound unless they opt-out; then the legislation goes on to provide that non-residents may participate in the proceeding by opting in and joining a sub-class.<sup>41</sup>

Hybrid models of this sort have also operated in several American states, including New Jersey, New York, Pennsylvania, Connecticut, Missouri and New Hampshire,<sup>42</sup> and this model has since been adopted by the Uniform Law Conference of Canada.<sup>43</sup> It has also been implemented in Saskatchewan, Newfoundland and Labrador, and it is proposed for Manitoba.<sup>44</sup> The combined effect of the residency requirement for the local operation of the opt-out class action regime and the opt-in requirement for non-residents is intended to prevent uncertainty from arising in respect of the binding effect of the certification of a multi-jurisdiction class. Local legislators have extended the *res judicata* effect of judicial decisions to persons falling within the description of a plaintiff class who, as residents, might apply to the local courts, and ordinary principles of estoppel preclude persons who have taken steps to join the local class action from seeking relief in other courts.<sup>45</sup>

Just as legislators have established this hybrid approach as a fixed feature of their class action regime, so too have courts occasionally adopted this approach in defining the class for purposes of certification. As mentioned above in *Bersch v. Drexel Firestone*,<sup>46</sup> a securities fraud class action that had been certified in New York, the U.S. Court of Appeals for the Second Circuit was presented with affidavits

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37. Class Proceedings Act, R.S.B.C., ch. 50, § 21(1) (1996) (B.C.).

38. An Ontario court is, nevertheless, free to include in the certification order a requirement that non-residents opt-in to the class.

39. Class Proceedings Act § 21(1).

40. *Id.* § 2.

41. *See id.* §§ 6, 16. *See, e.g.,* *Hoy v. Meditronic* (2001) 94 B.C.L.R. 3d 169 (B.C. S.C.).

42. *See* THOMAS A. DICKERSON, CLASS ACTIONS: THE LAW OF 50 STATES (1988).

43. Uniform Law Conference of Canada, Uniform Class Proceedings Act, § 16 (1996).

44. Manitoba Law Reform Comm'n, Draft Bill, s. 16, in *Class Proceedings* (1999).

45. However, as is discussed below in Section III.B on "Residence as a Determining Factor," the certainty sought through residence as defining the rights of potential plaintiffs is ultimately illusory.

46. 519 F.2d 974 (2d Cir. 1975).

that England, the Federal Republic of Germany, Switzerland, Italy, and France would not recognize a United States judgment in favor of the defendant as a bar to an action by their own citizens, even assuming that the citizens had in fact received notice that they would be bound unless they affirmatively opted out of the plaintiff class.<sup>47</sup>

Based on this evidence, the Court of Appeals directed the District Court to eliminate from the class action all purchasers of the securities other than persons who were residents or citizens of the United States, and it noted that

had an 'opt-in' form of notice—one which required a class member to sign and return a writing agreeing to be bound by any judgment in the proceeding—been adopted by the district court as urged by certain of the defendants, it was far more likely, although still not certain, that in several of these jurisdictions a prior judgment for defendant in the class action would serve as a bar to an action by any person who had joined the class.<sup>48</sup>

The hybrid system of opt-out requirements for residents and opt-in requirements for non-residents, suggested in this observation and ultimately chosen by some American states and Canadian provinces was also adopted by Judge Pointer in the 1994 settlement approval of the breast implant litigation against Dow Corning and others.<sup>49</sup> Judge Pointer eliminated from the class claimants in Québec, Ontario and Australia on the basis that access to class actions in their own jurisdictions made their claims viable independently of the proceeding before him.<sup>50</sup> The availability of class actions in their home jurisdictions rendered their share of the portion of the proposed global settlement allotted to foreign claimants inadequate.<sup>51</sup> The ruling permitted them to join the class if they wished, but they were not otherwise included in it.

Do hybrid systems of opt-out requirements for residents and opt-in requirements for non-residents provide a suitable solution to the fairness concerns raised by crossborder plaintiff classes? Ultimately, they do not. While hybrid regimes and certification orders may have increased certainty in the size and composition of the plaintiff class<sup>52</sup> at a time when class actions

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47. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996-97 (2d Cir. 1975).

48. *Bersch*, 519 F.2d at 997 n.48.

49. *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Nos. CV 92-P-10000-S & CV 94-P-11558-5, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994). Although it should be noted that the action was subsequently dismissed on *forum non conveniens* grounds with respect to these claims. *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 887 F. Supp. 1469 (N.D. Ala. 1995), *aff'd in part, rev'd in part sub nom.*, *U.S. v. Baker Int'l, Inc.*, 345 F.3d 866 (11th Cir. 1995), *cert. denied sub nom.*, *Baxter Int'l, Inc. v. U.S.*, 124 S. Ct. 2907 (2004).

50. *Silicone Gel*, 887 F. Supp. at 1478.

51. *Id.*

52. Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 *FORDHAM L. REV.* 41 (2003).



operated only in the United States, they will do so less and less as class action regimes are introduced in other countries. Requiring the members of a plaintiff class to opt-in to the class, whether resident or non-resident, necessarily results in a class that is comprised of far fewer members than it might otherwise contain.

Under-inclusive plaintiff classes diminish the capacity of the class action procedure to meet its policy objectives in several ways. First, to the extent that class actions are intended to have a regulatory effect by requiring market actors to internalize the costs of wrongful conduct, under-inclusive plaintiff classes mean that the costs internalized are less than the costs generated by the wrongful conduct.<sup>53</sup> While the primary regulatory concern may be to redress the costs of wrongful conduct borne by members of the local community, the behavior modification objective may be met more effectively through incentives measured by the losses experienced by all who fit within the class description. Second, to the extent that class actions are intended to facilitate compensation for wrongs suffered, under-inclusive plaintiff classes result in the failure of members of the plaintiff class to receive compensation. Again, the primary concern may be to secure compensation for local members of the plaintiff class, and there may be some justifiable indifference to the ability of foreign members of the class to secure compensation. However, as foreign plaintiffs increasingly seek access to courts in the United States and elsewhere, under-inclusive plaintiff classes seem likely to only generate more litigation and reduce the efficiency objectives of the class action procedure. Finally, to the extent that class actions are intended to also bring closure to matters for defendants, the under-inclusiveness of plaintiff classes means that defendants will be left with unresolved claims that might be brought in other actions or in other fora. Certainty with respect to the size of the plaintiff class in the local action, if it comes at all, comes at the expense of certainty with respect to claims that might be brought elsewhere.

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53. This observation does not presume to enter upon the complex questions relating to the varying standards of care that might apply to the conduct of businesses that engage in activities in more than one market or in markets outside the United States. Whether American standards of care should be applied to the engagement in regulated activities in other markets has been treated in some cases as a question of subject matter jurisdiction. *See, e.g.,* *McNamara v. Bre-X Minerals Ltd.*, 32 F. Supp. 2d 920, 925 (E.D. Tex. 1999) (excluding Canadian plaintiffs from a securities fraud claim). As the court explained:

Because the Canadian Plaintiffs have failed to show that the domestic conduct of any Defendant directly contributed to the losses of which they complain, the Court finds that it lacks subject matter jurisdiction over their Exchange Act claims. Because that leaves the Canadian Plaintiffs with no federal question before this Court, their state common law claims must also be dismissed.

*McNamara*, 32 F. Supp. 2d at 925.

All in all, the concerns raised by opt-in requirements for foreign plaintiffs replicate the concerns that would be raised by opt-in requirements for local plaintiffs. While the opt-in requirement appears to enhance certainty with respect to the size of the plaintiff class, it does so at the expense of the ability of the class action to serve some of the fundamental purposes of the procedure. It seems desirable, therefore, to develop some means of increasing certainty in opt-out regimes in the assertion of jurisdiction over absent class members in other countries.<sup>54</sup>

In questions of jurisdiction over multinational classes, like a kiss, certification may just be certification. Generally speaking, uncertainty in respect of the binding effect on absent non-resident class members arises only in courts, such as common law courts, that do not have a comprehensively defined jurisdiction and that sit in fora in which the class action regime operates on an opt-out basis and does not provide for territorial limits on the opt-out regime. Still, in this small but growing number of situations, a means of determining whether a certification order will bind absent non-resident plaintiffs will further the goals of opt-out class action regimes generally.

### III. POTENTIAL JURISDICTIONAL CONFLICTS: “. . . A SIGH IS JUST A SIGH . . . ” OR IS IT?

When it does arise, the jurisdictional question in crossborder class actions could seem so intractable as to produce a sigh of exasperation. How could the willingness of foreign courts to grant preclusive effect to certification orders be predicted in a sufficiently reliable way to ensure that certification is fair?

#### A. Economic Viability and Foreign Class Action Regimes

Fortunately, in many cases, a sigh is just a sigh. As in *Shutts*, the nature of the class claim may be such that the individual claims of the members of the plaintiff class are unlikely to be pursued elsewhere in any event because they would not be individually economically viable. Where this is the case, there

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54. See Craig Jones, *The Case for the National Class*, 1 CAN. CLASS ACTION REV. 29 (2004) (arguing that “province-by-province adjudication of nationwide claims undermines the principal goals of aggregate litigation”). It should be acknowledged that the desirability of comprehensive resolution of related claims rests on the assumption of the adherence to particular goals for class actions. The various goals of class actions and their varying significance in different legal systems are discussed below in Section IV. However, the significance of the differences for opt-in and for opt-out regimes can also vary from case to case in that potential class members will not be motivated to opt one way or the other in some cases, while in other cases class counsel will be motivated to solicit opt-outs to facilitate competing actions.

is little if any risk that a plaintiff would test the preclusive effect of the certification order by attempting to sue individually in a foreign court. Even in borderline cases, the individual claims of members of the plaintiff class might be economically viable only under the plaintiff-friendly circumstances found in courts in the United States. Again, where this is the case, the preclusive effect of the certification order is unlikely to be tested.

Thus, where the claims in question are not individually economically viable, the practical concern about whether preclusive effect would be given to a certification order by foreign courts is limited to courts in places that have class action regimes. Where those class action regimes require plaintiffs to opt-in, as occurs in the English courts, it could be possible to define the class in the United States so as to exclude all those who fall within the definition of a class certified abroad or who choose to opt-in to a foreign class action. Questions of timing would arise with regards to being deemed to be included in a class certified in a foreign court or in joining a foreign class certified in a foreign court, but it is likely that these questions could be addressed in the certification order. For example, the certification order could exclude all those who, by a specified date, had commenced a claim or had joined a group proceeding arising out of the same events as the claim sought to be certified. Alternatively, where the foreign class action regime operates on an opt-out basis for residents of the forum, as it does in British Columbia, it may be possible to improve the accuracy with which the plaintiff class-size may be predicted by presumptively excluding the residents of a place where a class action has been certified or may be certified.<sup>55</sup>

The challenge of predicting the preclusive effect of a certification order would still remain significant, though, in respect of the small but growing number of jurisdictions outside the United States in which the courts may certify multinational plaintiff classes on an opt-out basis. The answer would seem likely to turn on whether the objectives of those jurisdictions' class action regimes would best be served by recognizing the certification order of the court in the U.S. action.

## B. Residence as a Determining Factor

The challenge of predicting the preclusive effect of a certification order in these circumstances is compounded by the fact that the residence of members of the plaintiff class is not, in fact, the criterion that determines

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55. Many certification decisions in Canadian courts reflect the fact that counsel representing claimants from various parts of the country have come to terms on arrangements for certification that would serve to obviate concerns about competing claims. *See, e.g.*, *Wilson v. Servier Can. Inc.* (2000), 50 O.R. 3d 219 (Ont. S.C.J.).

whether they will be able to resort to another forum. In other words, questions about the preclusive effect of a certification order are not determinable by referring to the nature of the class action regime solely in the *residence* of absent class members, whether local or foreign. Rather, it is necessary to consider the nature of the class actions regime in the alternate forum or fora in which absent members might sue, regardless of their place of residence.

This discrepancy highlights a feature of the class action procedure that has received little attention. In most discussions of crossborder class actions, emphasis has been placed on the jurisdiction of the court to adjudicate claims of absent class members, whether resident or non-resident. This is because the legislative regimes that support class actions are understood as enabling courts to decide class actions by expanding the jurisdiction of courts to enable them to decide the claims not only of named plaintiffs, but also of absent class members. In the ordinary course, it has been thought that such expanded authority could properly extend only to residents of the forum. However, it is probably more accurate to say that the key support for the class action regime is not the legislative provision that expands the jurisdiction of the court certifying the class action. Rather, it is the effect that this provision has in requiring the courts of the forum *other than the court deciding the class claim* to refuse to entertain the claims of the class members on the basis that the claims are *res judicata* because the class action has been decided, or that they are duplicative because another court has assumed jurisdiction over them. While this feature is an obvious incident of the class action procedure, it has generally been accorded no more importance than that. However, this is the mechanism that makes class actions possible. In other words, the operative legislative provision enabling class actions is not the one that permits the court to decide the class claim. Rather, the operative provision is the one that requires the other courts of the forum to treat the class members as precluded from bringing the class claim independently. In this way, the approach taken by the Divisional Court in the first Canadian case to raise these issues may have been strangely prescient. The court rejected the submission that the settlement of a multi-province class action raised questions of jurisdiction and, instead, the court observed that “the law of *res judicata* may have to adapt itself to the class proceeding concept.”<sup>56</sup>

While this may be a distinction without a difference in purely local class actions, it becomes significant in crossborder class actions. When residents of the forum are precluded from bringing claims in non-class litigation in the forum because their claims are *res judicata*, we think of that restriction as a

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56. *Nantais v. Telectronics Proprietary (Can.) Ltd.* (1995), 25 O.R. 3d 331 (Ont. Gen. Div.).

disability that attaches to the *claimants* with regard to the *claims* in question. Following this logic, in the context of local class actions, we tend to regard the legislation as extending the application of this preclusive effect to absent class members. We describe the situation as one in which absent class members are precluded from bringing their claims. However, in the crossborder context, since the legislation does not operate extraterritorially—since it cannot direct a foreign court to treat the claim as *res judicata*—it cannot prevent absent class members from claiming in the foreign court. Thus, the restriction is not properly described as one affecting claimants and their claims but rather one affecting courts and their ability to hear certain claims. In this way it is not akin to an *in rem* determination of the claim or of the status of certain persons as potential claimants, it is merely a direction to the local court to treat the claim as *res judicata*. Of course, within a federal state, such as the U.S., it is possible for the law to evolve, as it did in *Shutts*, to expand the application of the local preclusive effect to encompass the courts of states other than the forum in which the class action is decided. However, this does not change the fact that the operative feature of a class action regime is the preclusive effect that courts other than the court seized of the class claim must grant to that court's decisions in claims brought by members of the class, and it does not change the fact that foreign courts are not bound by the legislation in the state in which the class action is certified to do so.

One immediate implication of this observation is to call into question the increased certainty in class definition that would be achieved by presumptively excluding residents of other jurisdictions with class action regimes. This challenges the effectiveness of the approach that was taken by Judge Pointer in defining the worldwide class in the breast implant litigation. Such an approach would do little to increase the certainty of the class. It is true that the residents of Québec, Ontario, and Australia would likely be presumptively included in class actions commenced in those places. However, this would not prevent residents of Québec, Ontario, or Australia from being presumptively included in class actions in other places (where multi-jurisdiction plaintiff classes were certified), or from taking steps to join other class actions; nor would it prevent residents of other places from being included in class actions in Québec, Ontario or Australia. Accordingly, as suggested above, to the extent the claims brought in the class action are not individually economically viable and would be brought only in other class actions, presumptive exclusion might more appropriately be directed at persons who are included in class actions in other places, regardless of their residence.

The inappropriateness of residence as a factor in defining plaintiff classes arose in a slightly different way in the British Columbia Court of Appeal

decision in *Pearson v. Boliden Ltd.*<sup>57</sup> This decision concerned the certification of a multi-province claim for securities misrepresentations where the right of action existed only by virtue of provincial legislation that applied to “the distribution of securities taking place within the province’s boundaries.”<sup>58</sup> The class claim relied on certain features of the British Columbia statute that did not exist in some of the other provinces’ statutes.<sup>59</sup> The defendants successfully resisted a definition of the plaintiff class that included persons whose claims could not be made out under the applicable statutes in the provinces where the securities had been distributed.<sup>60</sup> In the course of its reasons, the court observed that the relevant legislation governed the distribution of securities in the province—not the sale of securities to persons residing in the province.<sup>61</sup> Accordingly, while the B.C. legislation ordinarily provided for the plaintiffs to be sub-classed according to the province of their residence, that would not be appropriate for deciding these claims. As the court explained:

This distinction will in fact be insignificant in most cases: the typical investor will be solicited in the province of his or her residence or place of business and will place his or her order to buy or sell with a dealer or broker in the same province. But this will not always be the case. . . . In recognition of this distinction, I will use the phrase “British Columbia purchasers” to refer to persons who acquired their shares as a result of a distribution in British Columbia, regardless of their place of residence.<sup>62</sup>

The *Pearson* case demonstrated the vagaries of the use of residence as a criterion for defining plaintiff classes in respect of the existence of a right of action and not in respect of access to an available forum. Still, if a court in the United States was to consider whether to include these Canadian plaintiffs in a class action that it was to certify, it would do so more effectively by determining the definition of the class based on the province where the securities were purchased rather than the province where the claimants resided.

### C. The Challenge Clarified

Clarifying the nature and scope of the uncertainty could enable the sense of exasperation to give way to a sigh of relief. First, it is now clear that the

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57. (2002), 222 D.L.R. 4th 453 (B.C.C.A.), leave to appeal dismissed [2003] S.C.C.A. No. 29.

58. *Pearson v. Boliden Ltd.* (2002), 222 D.L.R.4th 453, 490-91 (B.C.C.A.), leave to appeal dismissed by [2003] S.C.C.A. No. 29.

59. *Pearson*, 222 D.L.R.4th at 462.

60. *Id.* at 492.

61. *Id.* at 482.

62. *Id.*

most significant challenges to the composition of a crossborder plaintiff class are likely to come from fora in which competing class actions are likely to be brought.<sup>63</sup> Second, the willingness of these foreign courts to recognize the certification of a class action will not turn on their willingness to support the foreign class action *per se*, so much as their willingness to treat claimants, whether local or foreign to them, as precluded from bringing claims before them. For courts that are likely to serve as alternate fora for class action claims, the question would seem to be whether granting preclusive effect to the American certification order is consistent with the ends of their civil litigation traditions and with the ends of their class action regimes. Comparative analysis of the basic premises of class actions in alternate fora could shed light on this question.

#### IV. RATIONALES FOR GROUP PROCEEDINGS AND FOR CERTIFYING CROSSBORDER CLASSES: “*THE FUNDAMENTAL THINGS APPLY . . .*”

It seems likely that courts outside the United States might consider their own standards for certifying class actions in determining whether to recognize the certification of a class action by another court and to treat absent class members as precluded from bringing claims before them. If a court regards the reasons for including absent non-resident plaintiffs in a class certified elsewhere to be consistent with the objectives of its own class action regime, it may be more likely to give preclusive effect to the certification order.

The challenge that arises from following this logic is that the objectives of class actions articulated in various legal systems are far from uniform. Indeed the differences are such that it could seem difficult to identify a single framework on which the differences may be compared.<sup>64</sup> However, one framework that might serve as a suitable basis for examining the objectives set

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63. Although some claims brought as class actions would support individual actions in the U.S. and possibly in other countries as well. *See In re Ski Train Fire in Kaprun*, Aus. on Nov. 11, 2000, 220 F.R.D. 195 (S.D.N.Y. 2003).

64. Suggesting that it is possible to compare the underlying rationales for class actions in various legal systems assumes a degree of consensus that may not exist on the rationale for class actions within any given legal system. For example, although behavior modification may be a social purpose for civil litigation, it does not necessarily follow that comprehensive recovery for all potential claimants is the best way to achieve that purpose. Similarly, although judicial economy may also be a purpose, it does not follow that the aggregation of claims that would not otherwise be brought serves this purpose, particularly where the enabling effect of class actions procedure promotes parallel actions. Finally, the implications for the goal of access to justice are unclear when the applicable law varies so that the nature and extent of recovery for plaintiffs and legal liability for defendants may be determined by no more than the choice of forum.

for the class action regimes of various countries is that described by the Ontario Law Reform Commission (OLRC) in its 1982 three-volume Report on Class Actions.<sup>65</sup> The OLRC Report has been cited widely by proponents of class action regimes in other countries<sup>66</sup> and the three objectives for class actions that it identifies have been relied upon in developing other regimes. These objectives are (1) judicial economy, (2) behavior modification, and (3) access to justice.<sup>67</sup> Although all three objectives have tended to be cited, they have not been embraced equally by the various countries that have considered the merits of developing class action regimes.<sup>68</sup> While it would be artificial to suggest that there are bright line distinctions to be drawn between legal systems on the basis of their emphasis on one objective, or their rejection of another objective, or between the kinds of claims that serve an interest in one or another of objectives,<sup>69</sup> the comparison may still assist in explaining the willingness of some courts to recognize the certification orders of other courts.

#### A. Judicial Economy

Of the three objectives for aggregating claims in group proceedings, the concern to enhance judicial economy is the only objective that seems to have received widespread acceptance.<sup>70</sup> This may seem fairly obvious. Few would quarrel with the suggestion that it is in the public interest to aggregate claims in class actions both to avoid placing unnecessary burdens on the courts and to increase the consistency in the results of similar claims and the efficiency of the administration of justice, thereby reducing the expense to litigants.

Indeed, where the aggregation of claims serves solely to enhance judicial economy (*i.e.*, it does not seek to enhance access to justice for plaintiffs who might not otherwise sue and it does not seek to enhance behavior modification by increasing the sanctions that might otherwise be imposed on the defendant),

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65. ONTARIO L. REFORM COMM'N, REP. ON CLASS ACTIONS (1982).

66. *See, e.g.*, SCOT. L. COMM'N, REP. 154, FINAL REP. ON MULTI PARTY ACTIONS (1996); AUSTL. L. REFORM COMM'N REP. 46, GROUPED PROCEEDING IN FEDERAL COURT (1988).

67. ONT. L. REFORM COMM'N, *supra* note 65, at 117.

68. On the controversy over the merits of class actions procedure in the U.S., Deborah Hensler has observed that "[d]eciding [w]hether the [b]enefits [a]re [w]orth the [c]osts [r]equires a [p]olitical [j]udgment." Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 204 (2001).

69. As Professor Edward Cooper astutely observed on reading a draft of this article, "Sorting through the various purposes is both value-laden and context-dependent. General categories are slippery."

70. ONTARIO L. REFORM COMM'N, *supra* note 65; SCOT. L. COMM'N, *supra* note 66; AUSTL. L. COMM'N, *supra* note 66.



the inclusion of absent class members who could otherwise sue elsewhere seems unlikely to be challenged. Defendants are unlikely to challenge the inclusion of these members because they stand to gain closure on the claims that might be brought against them and to reduce the costs of litigating these claims. Absent class members are likely to challenge their inclusion in the class only if the outcome is sufficiently less favorable to them to make it worthwhile to seek recovery in another forum. And, provided that recovery in the class claim is adequate, the interests of foreign courts in judicial economy will also be well served by treating persons who are purported to be included in the class as precluded from suing separately.<sup>71</sup>

An example of a class claim that was instituted primarily for reasons of judicial economy occurred in Canada in the settlement of the tainted blood litigation.<sup>72</sup> The defendant governments had no desire to challenge the plaintiffs' access to compensation, and the circumstances did not suggest a strong need to mete out sanctions, particularly in the face of an earnest desire to use the class actions procedure as a means to compensate victims.<sup>73</sup> Thus, the aggregation of claims arguably served mainly to promote judicial economy. The claim was a crossborder class claim because it was brought collectively against the provincial governments and it was not obvious that they were subject to the jurisdiction of the superior courts of other provinces.<sup>74</sup> The plaintiffs and defendants shared an interest in resolving the matter without undue duplicative litigation. This resulted in applications for approval of a pan-Canadian agreement that included the approval of settlements in companion class actions in Québec,<sup>75</sup> Ontario<sup>76</sup> and British Columbia.<sup>77</sup> The defendant governments intervened in the proceedings for the purposes of participating in the settlement.

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71. Admittedly, litigation strategies can affect these inclinations significantly. Defendants who are not prepared to settle and who are not confident of winning will want to minimize the class size for negotiation purposes, where plaintiffs will seek out the forum where they are likely to have the greatest success. Indeed, parallel class actions may be commenced by competing or cooperating class counsel to determine in which forum the recovery is likely to be the greatest. Defense counsel may also engage in this process to find ways to divide the class or to consolidate the action in a forum that will favor their interests. All of this will frustrate judicial economy.

72. See *Honhon v. Can.*, [1999] J.Q. No. 4370 (Que. S.C.); *Parsons v. Can. Red Cross Soc'y* (2000), 49 O.R.4th 281 (Ont. S.C.J.); *Endean v. Can. Red Cross Soc'y* (1999), 68 B.C.L.R. 3d 350 (B.C. S.C.).

73. CRAIG JONES, *THEORY OF CLASS ACTIONS* n.10-13 (Toronto: Irwin, 2003).

74. See Janet Walker, *Interprovincial Sovereign Immunity Revisited*, 37 OSGOODE HALL L.J. 379 (1997).

75. *Honhon*, [1999] J.Q. No. 4370.

76. *Parsons*, 49 O.R.4th 281.

77. *Endean*, 68 B.C.L.R.3d 350.

Another example of multi-jurisdiction claims commenced as a class action for the purpose of judicial economy occurred in the settlement of *In re Holocaust Victims Assets Litigation*.<sup>78</sup> In that case, the defendants initially resisted the aggregation and consolidation of the claims in the Eastern District of New York, but subsequently agreed to the settlement in return for broad releases from the settlement class.<sup>79</sup> In view of the widespread international sympathy for the plaintiffs' claims, the willingness of foreign courts to grant preclusive effect to the settlement would seem likely to depend primarily upon the fairness of the settlement. Therefore, as may be expected, this was addressed in detail in the decision.<sup>80</sup> Moreover, since the interests of members of the plaintiff class were represented by internationally-based community groups, the willingness of such groups to support the settlement seemed likely to curtail challenges to its preclusive effect that might otherwise have been brought in foreign courts.

The certification of class actions that are undertaken purely for the purpose of promoting judicial economy seem likely to enjoy broad acceptance and support by the courts of other countries. Indeed, judicial economy may be a stronger incentive for support from foreign courts than from the court deciding the claim. After all, the presumptive inclusion of foreign claimants who might not otherwise sue for recovery in the forum does not promote local judicial economy; and the presumptive inclusion of claimants who might otherwise wish to sue separately for recovery is generally seen as requiring justification on other grounds (i.e., that the claimants' interests will best be served by inclusion in the claim). From the perspective of the court deciding the class action, judicial economy is a neutral and inevitable feature of class actions—it is unlikely to be decisive in determining when a class action should or should not be certified beyond the standard analyses of commonality and typicality. It does, however, represent a benefit to the courts in other legal systems that might otherwise be required to determine the claims. Provided that the outcome is regarded as generally beneficial to the class as a whole, it

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78. 105 F. Supp. 2d 139 (E.D.N.Y. 2000).

79. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 142-43 (E.D.N.Y. 2000), *aff'd* 14 Fed. Appx. 132 (2nd Cir. 2000).

80. The decision begins by citing the following endorsement of the settlement by a member of the class:

I have no quarrel with the settlement. I do not say it is fair, because fairness is a relative term. No amount of money can possibly be fair under those circumstances, but I'm quite sure it is the very best that could be done by the groups that negotiated for the settlement. The world is not perfect and the people that negotiated I'm sure tried their very best, and I think they deserve our cooperation and . . . that they be supported and the settlement be approved.

*In re Holocaust Victims*, 105 F. Supp. 2d at 141 (quoting Transcript of Fairness Hearing).

may well be supported by those courts on the grounds that the entertainment of separate suits is not in the interest of justice.

Even where individual litigants might fare better in independent litigation, there may be support for a collective result. One example of this, though not involving a class action, *per se*, was the Lloyd's Names' litigation.<sup>81</sup> Following the insurance crisis of the 1990s, efforts were made in consolidated litigation to recover monies owed on Lloyd's policies from individual underwriters or "Names."<sup>82</sup> The Names made numerous efforts in various courts to resist inclusion in the collective result reached in the London courts.<sup>83</sup> Despite compelling arguments that the individuals' obligations were vitiated by breaches of local securities regulations, courts in the U.S.,<sup>84</sup> Canada,<sup>85</sup> and elsewhere were uniformly reluctant to segregate these claims from the larger issues that compelled the collective result.<sup>86</sup>

## B. Behavior Modification

In sharp contrast to the objective of judicial economy, the objective of behavior modification has proved very controversial. The OLRC cited the varying acceptance and rejection of behavior modification as indicative of "a fundamental philosophical dispute relating to the functions that may be legitimately served by civil actions" and a possible basis for acceptance or rejection of class proceedings generally.<sup>87</sup> As the OLRC explained,

it has been argued that the only proper function of civil actions is to achieve the peaceful resolution that might otherwise lead injured parties to take the law into their own hands. One commentator has identified this philosophy as the "Conflict Resolution Model." Although most persons agree that conflict resolution is an important function to the civil process, many have suggested that civil actions, including class actions also play an important role in encouraging adherence to social

81. *Soc'y of Lloyd's v. Jaffray*, [2000] E.W.J. No. 5731 (Q.B.D.).

82. *Soc'y of Lloyd's*, [2000] E.W.J. No. 5731.

83. *Soc'y of Lloyd's v. Leighs*, [1997] CLC 1398 (Eng. C.A.).

84. *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156 (7th Cir. 1993); *Riley v. Kingsley Underwriting Agencies*, 969 F.2d 953 (10th Cir. 1992); *Lipcon v. Lloyd's*, 148 F.3d 1285 (11th Cir. 1998); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996).

85. *Soc'y of Lloyd's v. Saunders* (2001), 55 O.R. 3d 688 (Ont. C.A.); *Crockett v. Soc'y of Lloyd's* (2000), 189 Nfld. & P.E.I.R. 129, 571 A.P.R. 129 (P.E.I. S.C.); *Morrison v. Soc'y of Lloyd's* (2000), 574 A.P.R. 1 (N.B. C.A.).

86. See *The Soc'y of Lloyd's v. Jaffray*, [2000] E.W.J. No. 5731 (Q.B.D.) (describing the litigation brought by the Names in the United Kingdom, the United States, Canada, Australia, Belgium and before the European Commission); Genevieve Saumier, *What's in a Name? Lloyd's International Comity and Public Policy*, 37 CAN. BUS. L. J. 388 (2002).

87. ONTARIO L. REFORM COMM'N, *supra* note 65, at 114.

norms by imposing appropriate costs on wrongdoers and depriving them of the fruits of their misconduct. This philosophy has been identified as the "Behaviour Modification Model."<sup>88</sup>

The use of the civil justice system to deter wrongful conduct by requiring defendants to "internalize" the costs of engaging in it is a central feature of the "Behaviour Modification model," which has gained widespread acceptance in the United States but which is less accepted elsewhere. As one commentator explained, those who favor this approach to civil litigation, see "the courts and civil process as a way of altering behavior by imposing costs on a person. Not the resolution of the immediate dispute but its effect on the future conduct of others is the heart of the matter."<sup>89</sup>

Behavior modification was decisively rejected as a role for class proceedings and for civil litigation generally by the Scottish Law Commission in its report on *Multi-Party Actions*.<sup>90</sup> According to the Law Commission, the establishment of a "multi-party litigation" regime should serve the same objectives as any reform to non-class litigation and these objectives did not include behavior modification.<sup>91</sup> As the Law Commission explained,

it may be argued that . . . there is a public element in the litigation which requires, or permits, the court to adopt the aim of "behaviour modification" or punishment. We reject this view of a public element in multi-party actions. . . . [A] claim for damages should not be used as a pretext for what essentially amounts to a public inquiry; the sole proper object of such claims is to obtain compensation. The principal aims of reform remain the traditional aims of reformers of court procedures: the reduction of complexity, delay and expense.<sup>92</sup>

The Law Commission's concern to guard against any alteration of civil litigation traditions through the introduction of class action procedures has been reiterated in the strongest terms on a number of occasions. In the foreword to *Multi-Party Actions*<sup>93</sup> Lord Steyn wrote:

The question is sometimes raised whether this [multi-party litigation] system should be replaced by the far more comprehensive and far-reaching system of class actions as it is known in the United States. There are marked cultural differences. . . . Massive awards for injuries, which are not of the most serious kind, would rightly not be tolerated by English public opinion. . . . [I]t is a feature of class actions in the United States that firms of lawyers earn billions of dollars in cases which do not even come to trial and often result in meager recoveries by individual

88. *Id.* at 114-115 (footnotes omitted).

89. Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 938 (1975).

90. SCOT L. COMM'N, *supra* note 66, ¶ 2.23.

91. *Id.*

92. *Id.* (footnotes omitted).

93. HODGES, *supra* note 34.

claimants. This too would be unacceptable in England. Finally, I would say that in England there is a general perception among judges, in this respect reflecting public opinion, that the tort system is becoming too expansive and wasteful. There is also an unarticulated but nevertheless real conviction among judges that we must not allow our social welfare state to become a society bent on litigation. The introduction of United States style class actions cannot but contribute to such unwelcome developments in our legal system.<sup>94</sup>

Rejection of the behavior modification objective for class actions may explain why the English courts chose to establish an opt-in regime rather than an opt-out regime. But does it also imply the likely rejection of foreign certification orders of classes that are undertaken to promote behavior modification? In legal systems, such as the American legal system, where an accepted purpose of class actions is to encourage the modification of socially irresponsible behavior, it could be presumed to be the responsibility of those affected by this behavior to participate in the class. Whether or not individual claimants wished to benefit from compensation, they might be expected to support the efforts of those who are prepared to take steps through the commencement of a class action to encourage behavior modification.<sup>95</sup> Indeed, in cases where the harm and the recovery are nominal, the involvement of absent class members might be quite notional: their claims might stand as mere proxies for the harm suffered by the general public. An opt-out regime for class actions would seem to follow naturally from such an approach. However, in legal systems that reject the behavior modification objective for class actions, as has Britain and other countries in Europe, there seems to be little basis for support of an opt-out regime.<sup>96</sup> In fact, the Law Commission Report seemed to endorse the right of potential claimants to be free of involvement in litigation in the courts:

[T]he primary consideration appear[s] to us to be the preservation of the liberty of the individual to participate in litigation only if he or she wishes to do so: a person should not be required to dissociate himself or herself from a litigation which he has done little or nothing to promote. Litigation, as a means of resolving a dispute, should be undertaken only as a last resort, after mature consideration of the advantages and disadvantages of doing so. Our preference accordingly was for an opt-in procedure.<sup>97</sup>

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94. Lord Steyn, *Foreword to HODGES*, *supra* note 34.

95. Whether this expectation applies despite the potential for individual class members to disagree with the view that the behavior is wrongful or requires modification sits uneasily with the tort law commitment to individual choice that operates through the principle of party prosecution.

96. In fact, the issue was joined in a debate over the relative merits of English representative proceedings and multi-party actions, which are, in effect, opt-out and opt-in regimes respectively. Some English lawyers have expressed dissatisfaction with the capacity of the Multi-Party Regime, which has benefitted from recent procedural innovations, to provide adequately for access to justice for claimants. Andrews, *supra* note 34, at 262-65.

97. SCOT. L. COMM'N, *supra* note 66, ¶ 4.51. While the foreign public law exception

It is less clear, though, whether the rejection of this purpose for local class actions amounts to a reason for refusing recognition of a foreign order certifying a class for this purpose. If a class action is certified elsewhere to promote a local objective in that jurisdiction, there would seem to be little justification to interfere with it. Furthermore, a class action certified primarily to promote behavior modification may be less likely to include claims that would be pursued individually elsewhere. In theory, the desire for freedom from presumptive inclusion in one action would seem likely to be tested only upon the commencement of another action, which would seem to contradict the reason for preserving it.<sup>98</sup> Accordingly, in the ordinary course, there would not be much occasion for a court other than the certifying court to pronounce on the issue.<sup>99</sup>

Furthermore, class actions may be rejected as a means of behavior modification and social regulation in places like Britain and Europe because that function is carried on by public bodies.<sup>100</sup> Indeed, although this function is carried on by public bodies there may be some provision made for including compensation for victims. For example, claimants in France may join criminal proceedings as “parties civiles” and receive compensation upon a determination by the court of criminal liability.<sup>101</sup> Still, such mechanisms are regarded merely as secondary means of obtaining compensation for harm from mass wrongs.

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(see CASTEL & WALKER, *supra* note 13, at 14-24) would not be implicated directly, the rejection of the public purpose for class actions certified to promote behavior modification would appear to rely on broadly similar principles.

98. In practice though, putative class members may not share the same interest in behavior modification with respect to a given claim, and class counsel may well have a financial incentive to pursue independent claims in other fora.

99. It should be stressed that this indifference would be confined to the exercise of jurisdiction over absent non-resident members of the plaintiff class. Any perceived excess in the exercise of jurisdiction over a defendant subject to such a claim could give rise to a refusal to recognize the order of the court, or to an order restraining the plaintiffs from proceeding, where such an order was available. See, e.g., *Midland Bank Plc. v. Laker Airways*, [1986] 1 Q.B. 689 (Eng. C.A.).

100. As Christopher Hodges noted:

It is important to recognize that social security systems—not tort law— . . . are the principal mechanism of providing security and finance for injured citizens in Europe. This contrasts with the USA where tort law has a much higher social and Constitutional importance, the basic mechanisms for healthcare provision is by private insurance and perhaps 23% of the population have no coverage.

HODGES, *supra* note 34, at 339-40.

101. See, e.g., C. PÉN. (Fr.), ART. 121-3, C. COM [Fr], ART. L 221-1– L 221-3, L 223-1, L 223-2, R 223-1 and R 223-2. See Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT'L L 321, 331-32 (2001).

While class actions may be rejected as a means of ensuring socially responsible behavior and of regulating market actors to that end, the means of pursuing this end seem likely to be regarded as a matter within the purview of the community in which the class action is brought. Provided that the persons regulated are seen as properly subject to the standards and requirements applied to them, it would seem unlikely for foreign courts to have much occasion or reason to refuse preclusive effect to the determinations of the courts. The main concern will be one of appropriate forum. The results of parallel proceedings in the securities litigation in *McNamara v. Bre-X Minerals Ltd.*<sup>102</sup> and in *Paraschos v. YBM Magnex International, Inc.*<sup>103</sup> indicate considerable willingness on the part of American courts to cede jurisdiction to Canadian courts where, in their view, those fora had a greater interest in determining the claims.<sup>104</sup> In both *Bre-X* and *YBM*, where class litigation was proceeding in the United States and in Canada in respect of the same complaints regarding securities traded on Canadian exchanges, the U.S. courts held that the complaints were properly determined in Canadian courts and not in American courts. These relatively coherent results may be obtained in cases involving formally regulated industries in which there is a measure of agreement on the scope of the regulation. The prospects for coherent results are much less likely in cases in which both the standards of conduct and the

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102. 256 F. Supp. 2d 549 (E.D. Tex. 2002).

103. 130 F. Supp. 2d 642 (E.D. Pa. 2000).

104. In *Paraschos*, the court observed:

As defendants state in their Motion, it is now apparent that this is a securities fraud action pertaining to Canadian registered securities, brought by a purported class of investors who are virtually all Canadian, against predominantly Canadian defendants, concerning a Canadian corporation whose stock was sold only on Canadian stock exchanges. Furthermore, in addition to this consolidated civil action, the related ancillary bankruptcy proceeding, and a federal grand jury investigation taking place in the United States, eleven proceedings are currently pending in Canada relating to the same alleged securities fraud dispute: one brought by the Ontario Securities Commission ("OSC"), a Canadian provincial government agency; two involving YBM's Canadian court-appointed receiver; six by defendants against either the OSC or the Crown (actions that cannot be heard in the United States); and two class actions mirroring the same securities fraud alleged in this case by virtually the same proposed class of plaintiffs. . . . In light of the foregoing reasons, the Court finds that Canada's interests in this action have become abundantly clear and that the action is now so overwhelmingly dominated by Canadian interests it should be dismissed in deference to Canadian law and the Canadian courts on the basis of international comity. The Court concludes that Canada has a greater interest than the United States in the subject matter of this case, that dismissal of the instant action would not be contrary or prejudicial to the interest of the United States, and that this action would be duplicative of the many related proceedings pending before Canadian courts.

*Paraschos v. YBM Magnex Int'l, Inc.*, 130 F. Supp. 2d 642, 645-46, 647 (E.D. Pa. 2000).

views regarding the scope of application of those standards vary between legal systems, particularly where the regulation differs both in substance and procedure.<sup>105</sup>

### C. Access to Justice

In legal systems that reject behavior modification as an objective for class actions, the willingness to grant preclusive effect to foreign certifications that presumptively include absent non-resident class members could turn on whether it seems likely that reasonable persons under those circumstances would consent to inclusion. Courts would consider whether a reasonable person would wish to participate in view of the nature of the litigation, society's attitude to civil redress, the burden of involvement in the class claim, and the likely benefits of involvement. When this question is posed in the context of claims that are not otherwise independently economically viable, it closely resembles the question whether the certification of the class action promotes access to justice. Put the other way around, concerns for access to justice presume the desirability of participation in the litigation of a particular claim or kind of claim.

It should not be surprising, then, that in explaining why behavior modification played only a minor ancillary role in determining the merits of a class action regime and the merits of certification in individual cases, the Australian Law Reform Commission and the OLRC both emphasized the significance of the access to justice objective for class actions within their legal systems.<sup>106</sup> The Australian Law Reform Commission recognized that grouped proceedings "could render substantive law more enforceable and thus encourage a greater degree of compliance with laws the purpose of which is

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105. The far more complex issues associated with the aggregation of claims that are subject to different laws is not within the scope of the analysis, despite the recent prominence given to them in decisions, such as *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), *In re Bridgestone/Firestone*, 288 F.3d 1012 (7th Cir. 2001), and *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002). See also Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(b)(3)*, 2004 MICH. ST. L. REV. 799 (considering these issues). The choice of law analysis in aggregated claims involving multiple applicable laws is considerably simplified in Canada by the broad uniformity of choice of law rules across the country, particularly in the common law provinces. *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. Nevertheless, Canadian courts have exercised caution in aggregating claims involving the application of more than one law. See, e.g., *McNaughton Auto. Ltd. v. Co-operators Gen. Ins. Co.* (2003), 66 O.R. 3d 112 (Ont. S.C.J.).

106. Garry Watson placed the three objectives in the order of priority accorded by the courts: access to justice, judicial economy, behavior modification. *Watson*, *supra* note 7.



to prevent or discourage activities which cause loss or injury to others.”<sup>107</sup> However, ultimately, the “need for a new grouping procedure” was articulated in terms of the ways in which such a procedure would enhance access to justice and judicial economy.<sup>108</sup>

The OLRC took a similarly circumspect position on the objective of behavior modification. The OLRC observed that the Canadian tradition of private law adjudication recognizes that there may be cases in which, in the absence of effective legal regulation (either because of a gap in the law or the particular nature of the situation), wrongdoing may be peculiarly attractive or profitable.<sup>109</sup> In situations where wrongdoing needs to be discouraged, the law provides for exemplary remedies or the disgorging of profits.<sup>110</sup> Arguably, class proceedings that operate to overcome barriers to access to civil remedies by facilitating individually non-viable claims can serve a useful function in this area where the barrier to the civil remedy has had the effect of encouraging carelessness or indifference, for example, in the manufacture of consumer products. However, as the OLRC concluded,

the justification for endorsing class actions aggregating individually recoverable and individually nonrecoverable claims lies mainly in the ability of these types of class action to achieve either judicial economy or increased access to justice. Behaviour modification is essentially an inevitable, albeit important, by-product of class actions.<sup>111</sup>

In legal systems where access to justice is seen as the primary rationale for certifying a class claim, it appears likely that the courts will have little reason to reject the possibility of granting preclusive effect to a foreign order certifying a claim that presumptively includes absent class members in other jurisdictions. Indeed, where their presumptive inclusion does, in fact, promote access to justice, the court would seem likely to give effect to it. However, to the extent that the interest in recognition is one of a shared commitment to access to justice, there would seem to be room for absent non-resident class members to argue that they should not be precluded from suing separately. They may even be permitted to argue that they should not be bound by the requirements for opting out of the foreign class action where this requirement could create a barrier for them to gain access to local courts. Under these circumstances, the analysis undertaken to determine whether they should be released from a foreign class would seem likely to resemble the kind of analysis undertaken in deciding whether to set aside a default judgment.

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107. AUSTL. L. REFORM COMM'N, *supra* note 66, ¶ 67.

108. *Id.* ¶ 62.

109. ONTARIO L. REFORM COMM'N, *supra* note 65, at 140-145.

110. *Id.*

111. *Id.* at 145.

Absent class members who have not taken steps to participate actively in a foreign class action would be presumed to have acquiesced in the proceedings and in the result unless they demonstrate the hardship of preclusion and provide some compelling reason for failing to have taken active steps to assert their right to be free to commence separate actions.<sup>112</sup>

#### D. Constructive Consent Versus Constructive Contacts

Summarizing the impact of the varying emphasis on the three basic objectives of class actions, it would seem that judicial economy enjoys broad acceptance in most legal systems and it alone is accepted as the purpose for group proceedings in the British legal system; and behavior modification is strongly endorsed only in the American legal system. However, subject to the qualifications noted above, reliance on either of these rationales to support the certification of a particular class does not seem likely to engender resistance to the recognition of its preclusive effect. Nevertheless, the third of the three basic objectives, access to justice, which is given prominence in the Canadian and Australian commentary as a decisive factor in determining the merits of class actions, does seem likely to give rise to challenges in individual cases by absent non-resident class members wishing to avoid the preclusive effects of a class certification.

How will the courts of absent non-resident class members be likely to determine whether the interests of their legal system in promoting access to justice are best served by granting preclusive effect to foreign certification orders? Put another way, if an interest in access to justice is closely related to the presumption that a reasonable person under the circumstances would wish to participate in class litigation, what factors will be relied upon to make such a determination? One place to look for the answer to these questions is in the rationales that have been used by courts to decide whether to include absent non-residents in class actions that they have been asked to certify. Interestingly enough, a review of the decisions containing formulations of these rationales by American and Canadian courts highlights a surprising contrast between the approaches taken in those two legal systems.

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112. As with the other objectives for class actions, distinguishing between legal systems on the basis of their emphasis on one or another of the objectives can be as artificial as distinguishing between the objectives for particular class claims. Among claims that are not individually economically viable, and even among those that are, there will be many claimants who are not interested in taking the trouble to read and respond to a notice either to secure participation or to secure the right to make a separate claim. Accordingly, it could be largely artificial in some cases to speculate on the standards that should apply to determine whether to permit claimants to make separate claims.

Setting aside, for a moment, the familiar due process framework for analyzing personal jurisdiction, three bases of jurisdiction have widely been recognized in courts around the world in non-class crossborder litigation. These bases are: (1) presence, (2) consent and (3) what is described in the American jurisprudence as “minimum contacts.”<sup>113</sup> Most jurisprudence and commentary on the law of judicial jurisdiction treat instances of the exercise of jurisdiction as examples of reliance on one of these three bases.<sup>114</sup> The challenge posed by the exercise of jurisdiction in crossborder class actions has been to determine the basis on which jurisdiction is to be exercised over absent non-resident members of the class. The problem that the *Shutts* court faced—as would be faced by any court trying to certify a crossborder class action—was that none of these bases, as traditionally understood, supported the exercise of jurisdiction. As a result, it was necessary either to devise a rationale that relied on some basis other than these three, or to develop some novel interpretation of one or more of these bases to meet the circumstances of class actions.

With respect to reliance on presence, it seems fairly clear in the case of absent non-resident plaintiffs that the presence of the plaintiffs in the territory of the forum could not be relied upon for personal jurisdiction over them. It is true that in non class claims presence may exist even in the case of absent non-residents. However, whereas in the case of class members, participation does not depend upon personal service of named parties, there would not be any way of demonstrating presence, even if it did exist for some class members and, therefore, reliance on presence would seem to be speculative in many situations.

Reliance on some version of consent or some version of minimum contacts may also be problematic, but perhaps less so. In an opt-out regime, where members of the plaintiff class are presumptively included unless they take steps to opt-into the class, it would seem unreasonable to conclude, on any conventional understanding of consent, that the absent members of a plaintiff class who do not respond to a notice of a proceeding have consented to membership in the class. Similarly, crossborder class actions do not necessarily involve situations in which there are minimum contacts with the

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113. This basis is elsewhere described variously as “bases for service out” (England) (See DICEY AND MORRIS ON THE CONFLICT OF LAWS 13th ed. (L. Collins ed., 2000)) ch 11; “real and substantial connection” (Canada) (see *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077); and “special jurisdiction” (see Council Regulation (EC) 44/2001, *supra* note 12, at 5-21).

114. That is, with some somewhat controversial acknowledgement of the potential for a narrow residual category of cases in which jurisdiction is assumed by a forum of last resort to prevent a denial of justice. See Art. 3, Swiss Private International Law; C.C.Q., S.Q., c.64, Art. 3136 (1991); Janet Walker, *Beyond Real and Substantial Connection: The Muscutt Quintet*, in ANNUAL REVIEW OF CIVIL LITIGATION (2d ed. 2003).

forum as traditionally conceived. If the claim related to a single incident or course of action that could be localized in the forum, such as a catastrophic event or the negligent manufacture of a product within the forum, then it might be possible to determine that there were minimum contacts sufficient to support the exercise of jurisdiction in respect of the action notwithstanding that the plaintiff class included non-residents. However, where, for example, the common issue relates to a kind of negligence in the manufacture of a product that occurred in various states and caused harm to consumers in those states, the claims might not have minimum contacts with the forum if brought individually. Accordingly, to rely on the traditional basis of jurisdiction, it would be necessary for a court to develop a theory either of constructive consent or of constructive minimum contacts.

### 1. *Constructive Consent*

Given the two options—constructive consent and constructive minimum contacts—it is interesting that in the *Shutts* case, the U.S. Supreme Court chose to rely on constructive consent to support jurisdiction.<sup>115</sup> In reaching this result, the Court began by recalling that the underlying purpose for the minimum contacts test was “to protect a defendant from the travail of defending in a distant forum” on pain of suffering a default judgment against him or her.<sup>116</sup> This was contrasted with the situation of an absent plaintiff class member.<sup>117</sup> Although the Court acknowledged that extinguishing the class member’s claim amounted to the deprivation of a “chose in action,” which was “a constitutionally recognized property interest,”<sup>118</sup> the Court focused on the burdens imposed by the litigation itself.<sup>119</sup> The Court held that the due process requirements were more easily met in the case of class actions “[b]ecause States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter.”<sup>120</sup> As was explained in the judgment, the requirement of affirmative consent “ignores the differences between class-action plaintiffs, on the one hand, and defendants in non-class civil suits on the other. Any

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115. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-13 (1985).

116. *Shutts*, 472 U.S. at 807.

117. *Id.* at 807-08.

118. *Id.* at 807.

119. *Id.* at 809-10.

120. *Id.* at 811.

plaintiff may consent to jurisdiction. . . . The essential question, then, is how stringent the requirement for a showing of consent will be."<sup>121</sup>

To be fair, the U.S. Supreme Court held that it was necessary to fashion safeguards for the absent plaintiffs' rights, including adequate representation, adequate notice and an opportunity to opt-out,<sup>122</sup> but jurisdiction could be exercised "even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant."<sup>123</sup> However, provided these requirements were met, it was reasonable to presume consent on the part of absent class members, including non-resident class members.

The decision of the U.S. Supreme Court to rely on constructive consent has been criticized on several occasions.<sup>124</sup> In non-class litigation, the use of the term consent, rather than "acquiescence" or "assent," connotes active agreement—not passive agreement. Ordinarily, consent to participation in litigation may be inferred only from some active step taken by a party. Apart from the fact that reliance on constructive consent seems to be at odds with common sense notions of consent, it is interesting that it was chosen by the U.S. Supreme Court as the rationale to support the certification of multistate class actions where the courts of other countries have relied on other bases for the exercise of jurisdiction.

## 2. Constructive Contacts

The reliance of the U.S. Supreme Court on constructive consent contrasts sharply with the analysis developed by Canadian courts in response to this challenge. In the first case to consider this issue, *Nantais v. Telectronics Proprietary (Canada) Ltd.*,<sup>125</sup> the Ontario courts certified a national class over the objections of the defendants because it seemed "eminently sensibl[e] for all the reasons . . . in *Morguard*, and the policy reasons given for passage of the Act, to have the [common issues] . . . determined as far as possible once

121. *Id.* at 812 (citation omitted).

122. *Shutts*, 472 U.S. at 811-812.

123. *Id.* at 811.

124. See Diane P. Wood, *Adjudicatory Jurisdiction in Class Actions*, 62 IND. L. J. 597 (1986) ("The *Shutts* consent finesse, whereby consent can be inferred from a failure to opt-out, does violence to the general theory of consent."); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 72 COLUM. L. REV. 1148, 1169-70 (1998) ("[T]he rationale has an obvious bootstrapping quality: 'Absence of power to compel appearance is logically inconsistent with power to compel a binding choice through compulsory filing of a paper with the court.' . . . In fact, of course, *Shutts* announced a rule of forfeiture (i.e., 'you are precluded if you do not take affirmative step X')."); Bassett, *supra* note 52, at 41.

125. (1995), 25 O.R.3d 331 (Ont. Gen. Div.).

and for all, for all Canadians.”<sup>126</sup> This rather conclusory reasoning sheds little light on the jurisdictional bases for the certification of a nationwide class. However, it appears to emphasize concerns for the administration of justice, such as finality and consistency of result, more than it does an interest in personal choice on the part of members of the plaintiff class as is implied by a rationale that addresses the burden of participating in litigation for individuals in class actions and in non-class litigation.

*Nantais*, however, was an easy case. The roughly 1,125 members of the plaintiff class (some 700 of whom were Ontario residents) had all been identified and were all in contact with class counsel.<sup>127</sup> There was, therefore, some basis for inferring consent beyond the bare presumption of the reasonableness of doing so. Under these circumstances, there was also some foundation for the Court reviewing this decision to regard the freedom to opt-out as sufficient to address any concerns about the rights of individual litigants.<sup>128</sup>

The question of the jurisdiction of Canadian courts to certify class actions with multi-province classes was revisited a few years later in *Carom v. Bre-X Minerals Ltd.*<sup>129</sup> when the defendants attempted to resist certification by seeking to persuade the Ontario court that its certification order would not be granted preclusive effect in other provinces.<sup>130</sup> The court declined to rely on these submissions because the court held that they overlooked the constitutional foundation of the law of jurisdiction.<sup>131</sup> The court held that when the Canadian test equivalent to the minimum contacts doctrine—the real and substantial connection test—was met, the courts of other provinces would likely grant preclusive effect to the certification order.<sup>132</sup> As with *Nantais*, though, the *Bre-X* case was arguably an easy case in that key features of the events giving rise to the claim had occurred in Ontario.<sup>133</sup> The brokerage houses alleged to have made the misrepresentations were Ontario corporations or corporations with subsidiaries located in Ontario, and the insiders that were individual defendants participated in preparing the information released in Ontario.<sup>134</sup>

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126. *Nantais v. Teletronics Proprietary (Can.) Ltd.* (1995), 25 O.R.3d 331, 347.

127. *Nantais*, 25 O.R.3d at 331.

128. *Id.* at 350.

129. (1999), 43 O.R. 3d 441.

130. *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R.3d 441, 446.

131. *Carom*, 25 O.R.3d at 446-50.

132. *Id.* at 450.

133. *Id.* at 451.

134. A similar justification for certification of a crossborder class action existed in *Robertson v. Thomson Corp.* (1999), 171 D.L.R. 4th 171 (Ont. Gen. Div.). A nationwide class was also certified in *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. 3d 389 (Ont. S.C.J.).

A more decisive development in the jurisprudence occurred in the British Columbia decision in *Harrington v. Dow Corning*,<sup>135</sup> a class action relating to breast implants. In that case, the defendants argued that claims arising for non-residents in other provinces against out-of-province manufacturers had no real and substantial connection to British Columbia and so were beyond the jurisdiction of the British Columbia courts.<sup>136</sup> For example, a claim involving a woman who received her implants in Manitoba and suffered injury there arguably would have no real and substantial connection to British Columbia. In a ruling that represented as much of a leap as the constructive consent of the *Shutts* decision, the British Columbia court rejected this jurisdictional challenge and held that it could rely on the common issue as a basis for jurisdiction because "it is that common issue which establishes the real and substantial connection necessary for jurisdiction."<sup>137</sup>

Despite this ruling, constitutional challenges to multi-province class actions have continued to be made in the courts (albeit unsuccessfully)<sup>138</sup> and in the commentary.<sup>139</sup> The argument most commonly made is that the jurisdiction to certify a class action is founded in provincial legislation, which is authorized by provisions of the *Constitution Act, 1867* that are territorially limited in their scope and that are permitted to have only incidental extraterritorial effects.<sup>140</sup> The objection relating to extraterritoriality appears to be misconceived. The judicial jurisdiction of the provincial superior courts is not founded in provincial legislation, which is authorized by the territorially limited grant in section 92 of the *Constitution Act*.<sup>141</sup> It is founded in the plenary authority of the courts, which, unlike the authority of the legislatures

135. (1997), 29 B.C.L.R.3d 88 (B.C. S.C.).

136. *Harrington v. Dow Corning* (1997), 29 B.C.L.R.3d 88, 94 (B.C. S.C.).

137. *Harrington*, 29 B.C.L.R.3d at 97.

138. For example, in *Furlan v. Shell Oil Co.* (2000), 77 B.C.L.R. 3d 35 (B.C. C.A.), the British Columbia Court of Appeal held that it was not necessary to link causation to individual plaintiffs rather than the class as a whole as it affected the connections with the province. Multi-province class actions were also certified, though generally without resistance in *McKrow v. Manufacturer Life*, [1998] O.J. No. 4692 (Ont. Gen. Div.); *Chada v. Bayer* (1998), 82 C.P.R. 3d 202 (Ont. Gen. Div.); *Robertson v. Thomson Corp.* (1999), 43 O.R.3d 161 (Ont. Gen. Div.); *Boulanger v. Johnson & Johnson Corp.* (2002), 64 O.R.3d 208 (Ont. S.C.J. Div. Ct.); *Pardy v. Bayer Inc.* (2003), 35 C.P.C. 5th 185 (Nfld S.C.).

139. See, e.g., *Lamont*, *supra* note 29; F. P. Morrison, E. Gertner & H. Afarian, *The Rise and Possible Demise of the National Class in Canada*, 1 CAN. CLASS ACTION REV. 67 (2004).

140. *Royal Bank of Can. v. The King*, (1913), 9 D.L.R. 337 (P.C.); *Ladore v. Bennett*, [1939] 3 D.L.R. 1 (P.C.); *In re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, 327-34. Similar objections to the Victorian class action regime were made unsuccessfully in *Mobil Oil Austl. Pty. Ltd. v. Victoria* [2002] H.C.A. 27 (Austl.).

141. CAN. CONST. (*Constitution Act, 1867*) pt. VI (*Distribution of Legislative Powers*), § 92.

or the executive is continued, rather than created, in section 129 of the Constitution Act.<sup>142</sup> While this objection to multi-province class actions and this rationale for support of multi-province class actions have not been considered in detail in the jurisprudence at the appellate level, the 2000 decision of the Superior Court of Ontario in *Wilson v. Servier Canada Ltd.*<sup>143</sup> described the class actions legislation as procedural only and as permitting persons from outside the province to be included in claims that have a real and substantial connection to the province.<sup>144</sup> Furthermore, the argument that the authority to aggregate claims in a class action needed to be found in provincial class action legislation was undermined substantially by the decision of the Supreme Court of Canada in *Western Canadian Shopping Centres v. Dutton*.<sup>145</sup> In that decision, the Court held that the courts in the provinces that did not have statutory regimes for class actions could interpret their rules of court for representative proceedings so as to function like class action regimes along

142. Section 92 of the *Constitution Act, 1867* provides for the legislative authority of the provinces (and not the judicial authority of the superior courts of the provinces) as follows:

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say, . . .

13. Property and Civil Rights in the Province

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

*Id.* However, the judicial authority of the superior courts is not provided for explicitly in the *Constitution Act, 1867*, which contains no equivalent to Article III of the U.S. Constitution. The preamble to the *Constitution Act* clarifies that it provides in a comprehensive fashion only for legislative and executive authority (“And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared.”). Section 129 of the *Constitution Act, 1867* confirms this by stating that “all Courts of Civil . . . Jurisdiction . . . existing therein at the Union, shall continue . . . as if the Union had not been made; subject . . . to be . . . altered by the Parliament . . . or . . . the Legislature . . .” *Id.* at § 129. The idea that judicial authority is affirmed or continued rather than created is reflected in provisions of the *Courts of Justice Acts* of the various provinces, such as section 11(2) of the Ontario Act, which states: “The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.” Janet Walker, *The Constitution of Canada and the Conflict of Laws* (2001) (DPhil thesis, Oxford University, Worcester College).

143. (2000), 50 O.R.3d 219 (Ont. S.C.J.).

144. *Wilson v. Servier Can., Inc.* (2000), 50 O.R.3d 219, 237 (Ont. S.C.J.).

145. [2001] 2 S.C.R. 534.



guidelines provided by the Court.<sup>146</sup> Following this ruling, all the Canadian provinces, in effect, have class action regimes.

### E. Personal Subjection Versus the Administration of Justice

Why was the constructive contacts rationale relied upon to support class actions in Canada where the constructive consent rationale was relied upon to support class actions in the United States? What implications might this difference have for the recognition of an American certification order by a Canadian court as binding on plaintiffs before it? One explanation for the difference could be found in the emphases in the law of personal jurisdiction of the two countries that is variously placed on the 'personal subjection' of the parties to the forum and on the needs of the "administration of justice."<sup>147</sup> This difference has been noted in recent appellate decisions<sup>148</sup> in Canada and it bears an obvious relationship to the varying emphasis on consent and on contacts in the different theories of multi-jurisdictional class certification. Where the law of jurisdiction is governed by principles that emphasize a concern for fairness to the parties, as it is in the U.S., consent is obviously of prime importance; where the law of jurisdiction is governed by principles that emphasize a concern for order and fairness, as it is in Canada, the contacts of the litigation as a whole with a particular jurisdiction are likely to be given great significance.

Alternatively, it may be argued that the varying emphasis on consent and on contacts can be explained in a more pragmatic way. In a plaintiff-friendly legal system, such as exists in the United States--one that affords potential claimants a range of options for the pursuit of recovery--the significance of the loss of a chose in action, or of the loss of the opportunity to choose how best to pursue recovery may be greater than it is in other legal systems. In other legal systems it may seem sufficient to secure access to a civil remedy--the entitlement to choose to see separately may not be given much weight. The

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146. *W. Can. Shopping Ctrs. v. Dutton*, [2001] 2 S.C.R. 534, 551-59. This ruling also eliminated the basis for arguing that the failure of a particular province to enact class actions legislation was an exercise of provincial sovereignty that was to be respected by courts certifying class actions in other provinces.

147. Joost Blom, *Conflict of Law--Enforcement of Extra-provincial Default Judgment--Real and Substantial Connection: Morguard Investments Ltd. v. De Savoye*, 70 CAN. BAR REV. 733 (1991); Janet Walker, "Multiprovince Class Proceedings: A Study Prepared for the Department of Justice" (1998).

148. Relying upon the analysis in Janet Walker, *Rule 17--Service Outside Ontario*, in HOLMESTED & WATSON: ONTARIO CIVIL PROCEDURE (Gary Watson & Craig Perkins eds., Carswell 2001), the Ontario Court of Appeal emphasized this distinction in *Muscutt v. Courcelles* (2002), 213 D.L.R. 4th 577 (Ont. C.A.).

connection between the “personal subjection” theories of jurisdiction that are generally applied to defendants in non-class litigation and the commitment to individual choice that generally arises in respect of absent class members in class actions is evident in the following observations made by Edward Cooper in respect of the uneasy fit between class actions and American procedural values:

The abstract traditions of individualism translate into more specific concerns with litigation. The selection of time, court, co-parties, and adversaries can have important effects on outcome. Litigation choices made within the action likewise have important effects. One person may make quite different choices than another, perhaps because different choices are better for each, but perhaps because one understands the choices better is luckier. Being forced to surrender these choices in the name of group efficiency can have a profound impact on the eventual result. It also may have an impact on a party’s subjective experience, on what now are called “process values.” It is easier to accept the result after responsible participation in the process.<sup>149</sup>

In Canada, concerns about protecting the benefits to potential claimants of being able to choose whether to be included in class actions seem more likely to be subsumed in considerations for the administration of justice, including preventing duplicative litigation and ensuring that claims go forward in appropriate fora. This would suggest that the capacity of a certification of a class action by an American court to serve the interests of the administration of justice might be more compelling to a Canadian court in determining whether to grant it preclusive effect than the capacity of the certification order to secure individual choice on the part of potential participants. This is likely to be particularly significant for the recognition of American certification orders in Canadian and other courts where the challenges are brought by class counsel in parallel litigation. Canadian courts may be moved to support the finality of a comprehensive resolution reached in a foreign court despite the claims of local class counsel that they should be entitled to pursue a different result locally.

#### V. THE PROGNOSIS FOR THE PRECLUSIVE EFFECT OF CROSSBORDER CLASS CERTIFICATIONS: “. . . AS TIME GOES BY”

In the world across the U.S. border, where parallel claims are beginning to give rise to challenges to the recognition of American certification orders, the *Shutts* question, which was answered for an interstate plaintiff class in 1985, is now finally receiving judicial consideration in situations involving

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149. Edward H. Cooper, *Class Actions Advice in the Form of Questions*, 11 DUKE J. COMP. & INT’L L 215, 224 (2001).

international plaintiff classes.<sup>150</sup> As time goes by, the approach to the certification of U.S. crossborder class actions that will be taken by courts from across the border will become clearer. However, in the first Canadian case to consider this question directly, *Parsons v. McDonalds*,<sup>151</sup> the Ontario court did not discount the possibility that an American certification order might bind potential claimants and thereby preclude them from commencing a class action in Ontario.<sup>152</sup>

The claims brought in the *Parsons* action and the related Ontario action in *Currie v. McDonald's*<sup>153</sup> arose out of fraud in the conduct of promotional contests held by the defendant fast food chain.<sup>154</sup> The settlement of an American class action in this dispute was approved in Illinois.<sup>155</sup> The defendants sought to have the Ontario actions dismissed on the grounds that the claims were *res judicata*.<sup>156</sup> The representative plaintiff in the first of the Ontario actions, *Parsons*, had intervened in the Illinois action to object to the settlement.<sup>157</sup> The second virtually identical action, the *Currie* action, was commenced in Ontario on behalf of the absent class members who had done nothing in response to the notice of the Illinois action.<sup>158</sup>

The Ontario court considered the application of the existing principles for the recognition and enforcement of foreign judgments to the special circumstances arising for absent non-resident members of a plaintiff class.<sup>159</sup> The court noted that the standards for "jurisdiction in the international sense" had been developed in situations involving named defendants, not situations involving absent class members.<sup>160</sup> The court concluded that *Parsons*, himself, had attorned to the jurisdiction of the Illinois court by intervening to object to the settlement because his objections went to the merits of issues before the court in that matter.<sup>161</sup>

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150. See *Parsons v. McDonald's Rests. of Can. Ltd.* (2004), 45 C.P.C. 5th 304 (Ont. S.C.J.).

151. See *Parsons*, 45 C.P.C. 5th 304.

152. *Id.*

153. [2004] O.J. No. 1862 (Ont. S.C.J.).

154. See *Parsons*, 45 C.P.C. 5th 304 ¶ 3; and *Currie v. McDonald's Rests. of Can. Ltd.*, [2004] O.J. No. 1862.

155. *Parsons*, 45 C.P.C. 5th 304 ¶ 4.

156. *Id.* ¶ 6.

157. *Id.* ¶ 5.

158. *Id.*

159. *Id.* ¶ 19.

160. *Id.* ¶ 20.

161. Unfortunately, the analysis of this issue was complicated by the fact that the matter first came to the Illinois court on a motion to approve a settlement of the class claim. Under these circumstances, there would have been no opportunity for the representative of a class to be certified in Canada to object to the exercise of jurisdiction over those claims in advance of

With respect to the absent members of the plaintiff class, however, the Ontario court held that Parsons' own attornment could not bind them as it would bind absent class members in a local class action because the Ontario action had not, at that point, been certified in Ontario, and the absent class members had had no opportunity to exclude themselves from it.<sup>162</sup> Accordingly, the members of the *Currie* action who had participated in the objections to the *Boland* settlement approval before the Illinois court were bound as a result of Parsons' attornment, but the absent members who had not participated were not bound.<sup>163</sup> Significantly, though, the reason why they were held not to be bound was that they had not received adequate notice of the Illinois action. The court implied that they might have been held to be bound had they received adequate notice.<sup>164</sup>

The *Parsons* decision marks the first tentative step toward a rather surprising conclusion. Despite the considerable criticism of the American class action procedure by commentators from other countries and the caution that has marked the development of class actions and group proceedings in other countries, it is far from clear that rulings by the courts of those countries will seriously reduce the certainty of the certification of crossborder plaintiff classes in the United States or elsewhere by showing reluctance to grant them preclusive effect. It is an important feature of fairness to the defendant, if not a requirement of due process, for the court to take into account the likely challenges to the preclusive effect of its certification order in defining the class. Consequently, as class action regimes proliferate in alternate fora, it may become a matter of routine to require counsel to indicate the existence of parallel claims or the possibility of class members resorting to alternate fora.

Assessment of the economic viability of independent claims and of the nature of class action regimes in possible alternate fora—whether opt-in, opt-out, or hybrid—could help to clarify the extent to which competing claims pose a real threat to the certainty of the class definition. Efforts to anticipate the likelihood of particular foreign courts granting preclusive effect cannot reliably be restricted to the courts of the residences of class members, but must include the courts to which the absent class members might apply. However, apart from obvious reasons, such as these, to anticipate a denial of preclusive effect, there do not appear to be obvious systematic bases for preclusive effect to be denied.

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a hearing on the merits. Accordingly, this ruling may be subject to further consideration in future cases.

162. *Parsons*, 45 C.P.C. 5th 304 ¶ 33.

163. *Id.* ¶ 34.

164. *Id.* ¶ 45-58.

While the courts in these places may have very different appreciations of the purpose of class actions, these differences will not necessarily result in the denial of preclusive effect to foreign certification orders. This is so for several reasons. First, in legal systems that emphasize the judicial economy fostered by class actions, and that spurn other purposes for class actions, the courts may, nevertheless, welcome the fact that a crossborder claim is being resolved in a foreign court, and they may wish to discourage duplicative claims from being brought before them.

Second, in legal systems that are wary of the behavior modification function that is intended to be served by class actions, the courts may, nevertheless, be willing to respect the prerogative of another legal system to engage in a means of social regulation of its own choosing. The granting of preclusive effect to a certification order by the courts of those legal systems, should the occasion to challenge it arise, will probably depend upon whether the court regards the defendant that is subject to sanction, as properly subject to the standards imposed.

Finally, it is in legal systems that regard class actions as primarily a means of promoting access to justice, that the courts are most likely to hear challenges to the preclusive effect of foreign certification orders. In those cases, it may still be possible to establish means for enhancing the likelihood that a court would grant preclusive effect to a foreign certification order. By ensuring that the notice of the proceeding to the members of the plaintiff class who are otherwise likely to seek relief in an alternate forum is adequate, and by ensuring that the recovery is not significantly less favorable than that which might be obtained in the alternate forum, it may be possible to refute an argument by local class counsel that the members of the class are not well served by inclusion in the foreign certified class. Indeed, in the event of doubt, an application for a declaration to this effect in the alternate forum could provide positive assurance. In time, when consideration of these issues becomes more commonplace, greater cooperation between counsel in crossborder matters may evolve to address them, as has occurred on an interprovincial basis in Canada. The greater emphasis placed in legal systems outside the United States on the due administration of justice rather than individual plaintiff choice may further reduce the incidence of successful challenges to certification orders made in American courts. Thus, despite the seemingly intractable problem of predicting whether the courts of alternate fora will grant preclusive effect to certification orders, there is reason to believe that the adaptation of some of the basic safeguards of American interstate class action procedure to the international context will secure sufficient certainty to make a certification order of a crossborder class action fair. All in all, there is reason to think that the fundamental things will apply as time goes by.