

Judicial Economics: Avoiding a Multiplicity of Class Proceedings*

The purpose of this paper is to discuss the difficulties of avoiding a multiplicity of proceedings when there is a multiplicity of class proceedings.

Ontario's *Class Proceedings Act, 1992*,¹ and the class proceedings statutes across the country, are designed to provide access to justice for groups of claimants, and one of the policy imperatives for the enactment of these statutes was to achieve access to justice for a group of similarly situated persons while at the same time avoiding a multiplicity of proceedings. Under class proceeding regimes, access to justice and the behaviour modification of culpable defendants are to be achieved while maximizing judicial efficiency. Indeed, class proceedings and their predecessor, the representative action, embody the idea that the administration of justice is best served by maximizing the return from a single proceeding. Through the mechanisms of a common issues trial, flexible procedural devices to streamline individual trials, and innovative procedures to distribute judgments or settlement funds, a class proceeding empowers the court to dispose of what would be a multiplicity of individual claims through a single proceeding with consistent results. Class proceedings allow both plaintiffs and defendants to maximize the efficiency of their claims and defences respectively. But how are these efficiencies of avoiding a multiplicity of proceedings to be achieved when there is a multiplicity of class proceedings about the same legal dispute?

In the context of class proceedings, the desirability of avoiding a multiplicity of class proceedings is obvious. In *The Law of Class Actions in Canada*,² the authors, W.K. Winkler, P.M. Perell, J. Kalajdzic and A. Warner, state:

The problems of multiple class actions is particularly intense where there are numerous class actions in several jurisdictions across the country, some or all of which may claim to be national class actions bringing claims on behalf of Class Members across Canada. The positive attributes of a single national class is that it avoids duplication of fact finding, efficiently uses judicial resources, and eliminates the risk of inconsistent findings. A national class maximizes the efficiencies and access to justice that may be achieved by a class proceeding, and is more fair to defendants. These positive effects are diluted and may evaporate when there are multiple class actions.

The need to control the number of class proceedings was foreseen by the Ontario Law Reform Commission when it recommended class proceedings legislation for Ontario, but the Commission was blind to the extent of the problems about a multiplicity of class actions. The Ontario Law Reform Commission, in its *Report on Class Actions*,³ dedicated just one paragraph

* P.M. Perell, Superior Court of Justice, Ontario, September 2016. Much of this paper is taken from my decisions in *McSherry v. Zimmer GMBH*, 2012 ONSC 4113; *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819; *Vaeth v. North American Palladium Ltd.*, 2016 ONSC 5015; and *Babin v. Bayer Inc.*, 2016 ONSC 5069.

¹ S.O. 1992.

² Canada Law Book (Toronto, 2014), p. 170.

³ Ministry of the Attorney General (Toronto, 1982), p. 455.

to the topic, which stated:

In the case of a mass wrong, it is easy to envisage that more than one class action, seeking similar relief, may be commenced. It is also possible that members of the class may commence individual actions against the defendant, either before a class action is brought or in ignorance of the existence of a class action on their behalf. The question that arises is whether the proposed *Class Actions Act* should contain a specific provision empowering the court to stay other class actions for the same relief or individual actions claiming similar relief. In our opinion, such an express provision is unnecessary, since a court today is able to co-ordinate related actions under its power to stay litigation pursuant to section 18.6 of the *Judicature Act*, R.S.O.1980, c. 223.

Also without envisioning the extent of the problems about a multiplicity of class proceedings, in its report on class proceedings reform, the Attorney General's Advisory Committee,⁴ simply recommended that a specific provision, now found in s. 13 of the *Class Proceedings Act, 1992*, be enacted. The provision states: "[t]he court, on its own initiative or on the motion of a party or Class Member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate." This provision, however, would not empower an Ontario court to stay a class proceeding in another jurisdiction.

The Uniform Law Conference of Canada Civil Law Section, in its *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis and Recommendations*,⁵ described the problem of a multiplicity of class proceedings across the country as follows:

17. Just as the class action is generally superior to a series of individual actions, the national class action may be superior to a series of provincial class actions, even if the latter can be coordinated to a certain extent by plaintiff's counsel. The national class serves judicial economy by avoiding duplication of fact-finding, judicial analysis and pre-trial procedures and eliminates the risk of inconsistent findings. It increases access to justice by spreading litigation costs across a larger group of claimants, thus reducing the litigation costs of each claim, increasing both settlement incentives and compensation per claim and increasing the likelihood that valid claims will be brought forward. This in turn serves the goal of behaviour modification, serving efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public.

18. By comparison, multiple provincial class actions work against the interests of absent class members, who are the intended beneficiaries of class action legislation, and frustrate the efforts of class counsel, whose economic interests determine, to some degree, whether or not class actions are brought. Absent class members want quick and effective resolution to their claims. This outcome becomes less likely when there are thirteen overlapping actions with thirteen different counsel. The uncertainty created by the potential for multiple actions may also mean that fewer class actions will be brought, since: (1) class counsel in any given jurisdiction will not know the scope of the class that he or she will eventually be granted authority to represent; and (2) this in turn will make some class actions less economically viable, since counsel will have to enter into financial arrangements with multiple counsel, thus reducing both the expected fee and potential compensation to class members.

Discussing how to avoid a multiplicity of proceedings involves considering numerous

⁴ *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: Ministry of the Attorney General, 1990).

⁵ Vancouver, B.C., March 9, 2005.

topics of civil procedure including the availability of individual actions, the availability of joinder of parties, the availability of consolidation and trial together, the nature of representative actions, the right to opt-in to a representative action, the right to opt-out of a representative action, the subject-matter jurisdiction of a court (jurisdiction *simpliciter*), the matter of *forum conveniens*, and the theory of *res judicata*. Further, avoiding multiple class proceedings also involves constitutional law and conflicts of law rules about: (1) the joinder of foreign plaintiffs and defendants; (2) choice and proof of foreign law; and (3) the enforcement of foreign judgments. Moreover, as hinted by the Uniform Law Conference of Canada Civil Law Section, the problems of multiple class proceedings involves a consideration of the policy goals of class proceedings and the economics of class proceedings, including the entrepreneurial incentives and disincentives to class counsel, who may wish to stake claim to a national or international class action and not share the spoils with rival class counsel. Moreover still, the topic of multiple proceedings also involves several hidden agenda items including court parochialism and insularity, lawyer avarice, and lawyer conflicts of interest.

Judicial economy and the avoidance of a multiplicity of proceedings is a foundational principle of civil procedure generally and the class proceedings statutes are notoriously procedural. Section 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 provides that “[a]s far as possible, multiplicity of legal proceedings shall be avoided.” This provision is fostered by s.106 of the *Courts of Justice Act*, which provides that “[a] court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.” Section 138 of the *Courts of Justice Act* is also recognized and facilitated by various *Rules of Civil Procedure*, including: the joinder of claims and parties (Rule 5); consolidation and hearing together (Rule 6); separate hearings (Rule 6.1); class proceedings (Rule 12); service outside Ontario (Rule 17); and the determination of an issue before trial (Rule 21), which rule, among other things, empowers the court to stay or dismiss an action on the ground that “the court has no jurisdiction over the subject matter” or that “another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter.”

Optimally, a class proceeding would resolve, in one proceeding, all the claims and defences and distribute compensation and releases for all of the groups’ claims. However, notwithstanding the abundance of procedural tools, in the context of class proceedings, the goal of judicial economy and the avoidance of a multiplicity of proceedings is a complex matter confronted by serious problems. There are at least seven problems.

The first problem in achieving the goal of an avoidance of a multiplicity of class proceedings is the right of a putative class member to opt-out of the class proceeding. Although s.13 of the *Class Proceedings Act, 1992* authorizes the court to “stay any proceeding related to the class proceeding,” class proceeding legislation is not intended to impede actions by individual plaintiffs who opt-out of the class proceedings.⁶ Moreover, an individual action will

⁶ *Dumoulin v. Ontario*, [2004] O.J. No. 2778 (S.C.J.); *Northfield Capital Corp. v. Aurelian Resources Inc.* (2007), 84 O.R. (3d) 748 (S.C.J.); *Abdulrahim v. Nav Canada*, 2010 ONSC 5542. See also *Kohler v. Apotex Inc.*, 2015 ABQB 610 and *Kutlu v. Laboratorios Leon Farma, S.A.*, 2015 ONSC 5976 and 2015 ONSC 7117.

not be joined; i.e., consolidated with a class action about the same subject-matter.⁷ In *Durling v. Sunrise Propane Energy Group Inc.*,⁸ Justice Horkins stated:

20. The *Class Proceedings Act, 1992* permits "freedom of choice by allowing those who do not wish to be bound by the outcome of the proceeding to opt out. Thus, the *Class Proceedings Act* clearly contemplates that there may be a multiplicity of proceedings arising from the same event or transaction": See *Abdulrahim v. Nav Canada*, [2010] O.J. No. 4660 at para. 66. Putative class members may decide to maintain their litigation autonomy, opt-out, and sue the defendant in individual actions or in actions involving the joinder of two or more plaintiffs. Thus, notwithstanding the certification of a class action, a defendant could confront a multiplicity of proceedings because of the right to opt-out.

When there is a class proceeding and individual actions about the same subject, courts do have discretion to temporarily stay the individual action.⁹ Notwithstanding that a single proceeding might optimize judicial economy, the right to opt-out means that the stay will only be temporary. In *Hollinger International Inc. v. Hollinger Inc.*,¹⁰ Justice Farley sets out the issues that courts have considered in deciding to exercise their discretion in issuing a temporary stay of a proceeding. These issues are: (a) whether there is substantial overlap of issues in the two proceedings; (b) whether the two cases share the same factual background; (c) whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources; and (d) whether the temporary stay will result in an injustice to the party resisting the stay.

Thus, because class proceedings do not preclude individual actions or joinder of claim actions, the jurisdiction provided by s. 13 of the *Class Proceedings Act, 1992* and by s. 12, which authorizes the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination" has focussed on the problem of rival class proceedings in the same jurisdiction. The problem of rival class proceedings in the same jurisdiction is the second problem in achieving the goal of an avoidance of a multiplicity of class proceedings.

Where two or more class proceedings are brought with respect to the same subject-matter, a proposed representative plaintiff in one proceeding may bring a "carriage motion" to stay all other present or future class proceedings relating to the same subject-matter.¹¹ The rationale of a carriage motion is that there should not be two or more class proceedings that proceed in respect of the same putative class asserting the same cause(s) of action, and one class proceeding must be selected.¹²

Given the enormous investment of class counsel in a proposed class proceeding, when they occur, carriage fights are intensely adversarial and very hard fought. Carriage fights have

⁷ *Obonsawin (c.o.b. Native Leasing Services) v. Canada*, [2002] O.J. No. 2502 (S.C.J.); *Northfield Capital Corp. v. Aurelian Resources Inc.* (2007), 84 O.R. (3d) 748 (S.C.J.); *Abdulrahim v. Nav Canada*, 2010 ONSC 5542.

⁸ 2011 ONSC 266 at para. 20.

⁹ *Rooney v. Arcelormittal S.A.*, 2013 ONSC 6062,

¹⁰ [2004] O.J. No. 3464 (S.C.J.), leave to appeal to Div. Ct. refused, [2005] O.J. No. 708 (Div. Ct.) at para. 5.

¹¹ *Settlington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.) at paras. 9-11; *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (S.C.J.).

¹² *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.).

developed into a very complex type of interlocutory motion that dwarfs all other motions in a class proceeding.

The court will grant carriage to the putative class counsel whose proposed proceeding in the province is better for the interests of the putative class members while being fair to the defendants and while promoting the prime objectives of class proceedings, which are access to justice for plaintiffs, class members, and defendants, behaviour modification, and judicial economy.¹³ Courts generally consider a list of non-exhaustive factors in determining which action should proceed including: (1) The Quality of the Proposed Representative Plaintiffs; (2) Funding; (3) Fee and Consortium Agreements; (4) The Quality of Proposed Class Counsel; (5) Disqualifying Conflicts of Interest; (6) Preparation and Readiness of the Action; (7) Relative Priority of Commencement of the Action; (8) Case Theory; (9) Scope of Causes of Action; (10) Selection of Defendants; (11) Correlation of Plaintiffs and Defendants; (12) Class Definition; (13) Class Period; (14) Prospect of Success: (Leave and) Certification; (15) Prospect of Success against the Defendants; and (16) Interrelationship of Class Actions in more than one Jurisdiction.¹⁴

The third problem in achieving the goal of an avoidance of a multiplicity of class proceedings is, in part, a corollary of the second problem, and it is a compound problem because it also adversely affects the access to justice purposes of class proceeding legislation. The third problem is the influence and importance of class size and class member loyalty.

In class proceedings, class size and class member loyalty are influential matters. For instances of their significance, if many putative class members exercise their right to opt-out, or to opt-into another class proceeding, perhaps by participating in that class proceeding's settlement, then the class proceeding to which they were disloyal might suffer because: (1) it might not be certified; (2) it might be decertified; (3) any settlement might scupper or never occur; or (4) the representative plaintiff and class counsel may request leave to discontinue the rejected class proceeding because it is no longer sustainable.

Silver v. IMAX,¹⁵ demonstrates the problem and the interrelationship between class size

¹³ *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at para. 48; *Genier v. CCI Capital Canada Ltd.*, [2005] O.J. No. 1135 (S.C.J.); *Settington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (S.C.J.) at para. 13; *Sharma v. Timminco Ltd.* (2009), 99 O.R. (3d) 260 (S.C.J.) at para. 14; *Joel v. Menu Foods Gen-Par Limited*, [2007] B.C.J. No. 2159 (B.C.S.C.); *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.), sub. nom. *Mignacca v. Merck Frosst Canada Ltd.*, leave to appeal granted [2008] O.J. No. 4731 (S.C.J.), aff'd [2009] O.J. No. 821 (Div. Ct.), application for leave to appeal to C.A. ref'd May 15, 2009, application for leave to appeal to S.C.C. ref'd [2009] S.C.C.A. No. 261; *Simmonds v. Armtec Infrastructure Inc.*, sub. nom. *Locking v. Armtec Infrastructure Inc.*, 2012 ONSC 44, leave to appeal to Div. Ct. granted, 2012 ONSC 5228, affirmed 2013 ONSC 331 (Div. Ct.).

¹⁴ *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (S.C.J.); *Gorecki v. Canada (Attorney General)*, [2004] O.J. No. 1315 (S.C.J.); *Genier v. CCI Capital Canada Ltd.*, [2005] O.J. No. 1135 (S.C.J.); *Sharma v. Timminco Ltd.* (2009), 99 O.R. (3d) 260 (S.C.J.); *Smith v. Sino-Forest Corporation*, 2012 ONSC 24; *McSherry v. Zimmer GMBH*, 2012 ONSC 4113; *Wilson v. LG Chem Ltd.*, 2014 ONSC 1875; *Mancinelli v. Barrick Gold Corp.*, 2015 ONSC 2717 (Div. Ct.); *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819.

¹⁵ 2013 ONSC 1667, aff'd 2013 ONSC 6751.

and the multiplicity of proceedings. *Silver v. IMAX* was a class action for misrepresentations harming investors purchasing IMAX's shares in the securities marketplaces in Canada and outside Canada. In that case, after certification, the defendants moved to amend the class definition in the Ontario action, which was a global class action, to exclude "overlapping Class Members;" i.e., class members who were eligible to participate in either the Ontario proceeding or in a parallel U.S. class action. The defendants' request arose because in the litigation in the U.S., a settlement had been reached, and in Canada, the defendants wished to narrow the class definition. Among several unsuccessful arguments opposing the amendment, the plaintiff submitted that the economic viability of the claims of the remaining class members, the TSX purchasers, would be reduced by the order downsizing the class in Canada. Colloquially speaking, the Ontario action was being "gutted" by the diminishment in class size by the settlement in the competing class action in the U.S.

The problem of class size, however, is subtle because sometimes there may be nothing objectionable about having a multiplicity of identical class actions in more than one jurisdiction where each proceeding is sustainable and where there may be good reason for more than one jurisdiction to be involved. The payday loans class actions against National Money Mart Co. are an example. In that case, there was a class action in Ontario confined to Ontario claimants and this action was economically viable without including claimants from British Columbia, where there was an identical class action. While one national class action might have been possible, there were advantages in each province providing access to justice just for its own residents.

For another example of the desirability of more than one class proceeding, in *Brunet v. Zimmer of Canada Ltd.*,¹⁶ a proposed class action with respect to a defective medical device, the defendant requested a stay of the class action proceedings in Québec because there was already a national class action in British Columbia. The Québec Superior Court refused a stay because the interests of the Québec Class Members to have their claims analyzed and decided on the basis of applicable Québec law were not protected.

In *Turner v. Bell Mobility Inc.*,¹⁷ the Alberta Court of Appeal noted that overlapping and

¹⁶ 2012 QCCS 1461.

¹⁷ In *Turner v. Bell Mobility Inc.*, 2016 ABCA 21, the Alberta Court of Appeal reversed 2015 ABQB 169. The *Turner* action was a proposed national opt-out class action brought by the Merchant Law Group in 2014 against Bell Mobility for allegedly improperly charging access fees to its wireless customers. In 2004, in nine provinces, the Merchant Law Group commenced national class actions against Bell Mobility to recover the access fees. Although at the time, Ontario and Manitoba were "opt-out" jurisdictions; i.e., a jurisdiction in which class members must take steps to not be bound by the proceedings. The Merchant Law Group decided to prosecute only the action in Saskatchewan, which at the time was an "opt-in" jurisdiction, i.e., a jurisdiction in which class members outside of the province must take steps to be included in the action. The Merchant Law Group was successful in having the Saskatchewan action certified as an "opt-in" class action; see *Frey v BCE Inc.*, 2006 SKQB 328 and *Frey v Bell Mobility Inc.*, 2008 SKQB 79, affirmed 2011 SKCA 136, leave denied [2012] SCCA No 42. However, after Saskatchewan amended its legislation to become an opt-out jurisdiction, the Merchant Law Group was unsuccessful in having its Saskatchewan action converted into a national opt-out action; see: *Frey v Bell Mobility Inc.*, 2009 SKQB 165 dismissed for other reasons *Frey v. BCE Inc.*, 2013 SKCA 26. And when the Merchant Law Group filed a second class action in Saskatchewan the second action was stayed as an abuse of process: see *Collins v BCE Inc.*, 2010 SKQB 74 and *Chatfield v Bell Mobility Inc.*, 2013 SKQB 293. The Merchant Law Group's parallel class actions in Manitoba, Nova Scotia and British Columbia were dismissed as an abuse of process; see: *Hafichuk-*

parallel class actions are not necessarily abusive or vexatious; the Court stated:¹⁸

Overlapping and parallel class actions commenced in different jurisdictions are not, necessarily, abusive or vexatious. There may be justification for commencing actions in more than one jurisdiction. Canada is, after all, a federal country and there are differences in approaches to "property and civil rights" in each province: see s 92:14 of the *Constitution Act, 1982*. Federalism is a foundational part of the rule of law in Canada: *Reference Re: Secession of Quebec*, [1998] 2 SCR 217 at para 32. Further, as evidenced by ss 8.1 and 8.2 of the *Interpretation Act*, RSC 1985 c I-25, "[b]oth the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada". The position of Quebec in our federation is distinctive: see e.g. *Canada Post Corporation v Lépine*, 2009 SCC 16, [2009] 1 SCR 549. Comity must also recognize differences.

However, sometimes, having identical class actions in more than one province is a waste of judicial and counsel resources, because if the truth be told, the heavy lifting will be done mainly by one court and it is a waste of judicial and legal resources to have more than one action.¹⁹ And, as noted by the Alberta Court of Appeal in *Turner v. Bell Mobility Inc.*, sometimes a multiplicity of class proceedings is an abuse of process.²⁰ The Court stated:²¹

8. Multiple jurisdiction class actions can, however, become abusive through various reasons. Those reasons include matters which make an ordinary suit abusive, and many include matters which are abusive by reason of the magnifying effect of a class action. Such factors can include delay to the point where the defendant is denied a fair opportunity to defend: see e.g. *Grovit v Doctor*, [1997] 2 All ER 417 at p 424. This may be a peril of class actions in particular because class actions legislation often provides for a suspension of the running of limitation periods either after certification or at some earlier stage. Although the actions discussed in this judgment appear to be moving at glacial speed, delay has not been raised as a separate and independent basis of a claim of abuse here. Nonetheless, delay is factor which is relevant as the following narrative shows.

9. Abuse of process may also arise through procedural or tactical decisions made in the course of class actions which generate unfairness or which waste court resources rather than serving the aims of preferable procedure and proper adjudication. Control of the certification process by the Courts is also necessary in part to ensure that the administration of justice is not brought into disrepute. This is one such case. The background here clearly exemplifies why the Turner action amounts to an

Walkin v. BCE Inc., 2014 MBQB 175, affd. 2016 MBCA 32; *Gillis v BCE Inc.*, 2015 NSCA 32, affirming 2014 NSSC 279; *Drover v BCE Inc.*, 2013 BCSC 50, 2013 BCSC 1341 and appeal dismissed for other reasons 2015 BCCA 132.

¹⁸ *Turner v. Bell Mobility Inc.*, 2016 ABCA 21 at para. 6.

¹⁹ The price-fixing class action known as *Pro-Sys Consultants Ltd. v. Infineon Technologies Inc.* in British Columbia and known as *Option Consommateurs c. Infineon Technologies AG* in Québec and *Eidoo v. Infineon Technologies AG* in Ontario is an example where parallel national class actions were unnecessary. I have managed the parallel national class action in Ontario known as *Eidoo v. Infineon Technologies AG*, but the heavy lifting and superb judicial work was done by Justice Masuhara in British Columbia and Justice Gagnon in Québec. The citizens of Ontario did not need their own class action, which was parked but occasionally roused to implement consent certifications and settlements. In my opinion, the Ontario action could have simply been stayed or it should not have been started at all.

²⁰ See: *Bear v Merck Frosst Canada*, 2011 SKCA 152; *Englund v. Pfizer Canada Inc.*, 2007 SKCA 62; *Duzan v. Glaxosmithkline*, 2011 SKQB 118 at para. 37 ("This multi-jurisdictional game of class action "whack-a-mole" would in itself be sufficient basis for an unconditional stay on the basis of abuse of process"); *BCE Inc. v. Gillis*, 2015 NSCA 32; *Turon v. Abbott Laboratories Ltd.*, 2011 ONSC 4343, aff'd 2011 ONSC 4676 (Div. Ct.).

²¹ 2016 ABCA 21 at paras. 8-9.

abuse of process and should be unconditionally stayed.

The circumstances of each case must be examined to determine whether there is a legitimate reason to have a multiplicity of class actions. As noted by Justice Scanlan in *BCE Inc. v. Gillis*:²²

35. In the context of class actions, I am not saying that commencing actions in multiple jurisdictions is *prima facie* vexatious or an abuse of process. There may well be appropriate justification for commencing actions in more than one jurisdiction. The fact that such justification may exist does not prevent the courts from reviewing each case to assess whether there has been an abuse of process in the circumstances of the litigation as it has been prosecuted within that jurisdiction.

A fourth problem in achieving the goal of an avoidance of a multitude of class proceedings is a law firm prospecting for a quick profit from class action work. In other words, like a prospector staking mining claims, a law firm commences a proposed class action in numerous jurisdictions with the design that its stake will be purchased by other law firms. This prospecting leads to a multiplicity of claims and to the problems described by The Uniform Law Conference of Canada Civil Law Section.

*Gagnon v. General Motors of Canada*²³ is an example of the problem. General Motors manufactured vehicles with defective ignition switches and defective power steering. The Merchant Law Group commenced eleven national class proceedings including in Québec. Other law firms commenced national class actions in Québec, Ontario, and Nova Scotia. In all, seventeen class actions were brought against General Motors by six law firms. (There were also class actions in the United States.) Ultimately, the six Canadian law firms formed a consortium that agreed to prosecute the class proceedings in Ontario. The Québec court suspended the Québec proceedings on terms that the parties represent themselves before it at regular intervals to keep the Court apprised of the progress in the Ontario proceedings.

The fifth problem in achieving the goal of an avoidance of a multiplicity of class actions, and another hidden agenda item, is the double dealing of defendants. For culpable defendants, while they protest against strike suits, and extortive settlements, class proceedings are more often a godsend, because class counsel takes on the responsibility of distributing the compensation to the injured and the defendant's liability is discharged on mass, perhaps at bargain prices that may be just a license fee for ill-gotten gains.

For example, where there is more than one national class action, the defendant has an opportunity to shop around for a bargain settlement. Defendants may be content to have more than one class proceedings because where there is no consortium, it allows them to negotiate to the bottom of the settlement range knowing that a settlement in the hand is worth two in the bush and that a court is, therefore, unlikely to refuse a settlement or to refuse to enforce another jurisdiction's judgment because another class action might speculatively provide a more remunerative alternative for class members. The integrity of most plaintiffs' lawyers and that the court must approve the settlement is a significant safeguard against improvident settlements, but

²² 2015 NSCA 32 at para. 35.

²³ 2016 QCCS 1421.

for present purposes, the point is that defendants may be content to live with more than one class action in more than one jurisdiction.

The sixth problem, which is closely related to the seventh problem, discussed below, in achieving the goal of an avoidance of a multiplicity of class actions, is the absence in Canada, which is a confederation of provinces, of any mechanism as exists in the United States, which is a union of states, to consolidate proceedings that are initiated in several different jurisdictions. The problem is that there is no readily available procedural solution for the courts in Canada when confronted with similar proposed class actions in several jurisdictions. The fact that there may be multiple class proceedings in more than one jurisdiction is not the real problem here because, as noted above, there is nothing objectionable about having a multiplicity of identical class proceedings in more than one jurisdiction where each proceeding is sustainable and where there may be good reason for more than one jurisdiction to be involved. The problem here is that there is no available pan-Canadian procedure to address the cases where it is objectionable to have more than one class proceeding.

The seventh problem in achieving the goal of an avoidance of a multiplicity of class actions is the rarity of purely local class actions and the prevalence of parallel regional, national, or global class actions that are difficult to cull.

A purely local class action is one in which the court has jurisdiction *simpliciter* and the class members and the defendant are all within one province. The rarity of purely local class actions and the prevalence of multiple class actions in more than one jurisdiction can be explained by a combination of: (a) the defendant not being local or the defendant's wrongdoing extending beyond the boundaries of the local province and harming non-local claimants; (b) provincial parochialism, in which a court is reluctant to have another province's court provide access to justice for its citizens or to provide access to justice for foreigners; (c) Canadian constitutional law obstacles to consolidating proceedings in multiple jurisdictions; (d) law firm competition for remunerative national class actions; (e) the economics of the particular class action requiring a larger than locally constituted class; and (f) there being valid reasons for the existence of more than one class action in several provinces even when the class actions have the same class counsel.

It is difficult to cull class actions brought in multiple jurisdictions because there is no constitutional mechanism to bring together actions commenced in different jurisdictions and because, unlike choosing in a carriage motion among purely local actions, for there to be a reduction in the number of proceedings, there must be a stay motion and one or more courts must forgo having any action in their own jurisdiction. A multiplicity of class proceedings across the country may be unavoidable because, as a matter of Canadian constitutional law, the legislative power of the provinces is limited to legislating within the province and the courts of one province cannot be empowered to stop class actions in the courts of another province or territory even if that litigation is redundant, duplicative, or unnecessary. As a matter of constitutional law, it is also very doubtful whether the federal government could impose on the provinces a supervisory tribunal to decide which province should have exclusive jurisdiction when there is more than one class action.

Moreover, there is also the argument that legislation to address multiple class proceedings

across the country is, in any event, unnecessary. When the principles of the law of *res judicata* and of issue estoppel and the principles of conflicts of law, including the law of jurisdiction *simpliciter*, *forum conveniens* and the recognition of foreign judgments are added to the mix, the provincial courts may have all the authority they need to address any problems of multiple class proceedings. This approach was the recommendation of the Uniform Law Conference of Canada Civil Law Section, which stated:²⁴

... Finally, it may be possible to resolve the conflicts between competing class actions simply by using the existing structures and adapting the current rules governing jurisdiction to the national class problem. This latter approach, which we recommend, would require some modification of existing class proceedings legislation, including with respect to certification processes, and the development of a central class action registry.

Further still, apart from constitutional infeasibility precluding a meaningful statutory approach, it may be better for the provincial courts using the principles of comity between courts to address the problems with multiple class actions, because the situations of class actions are multifarious and one solution will not fit every case. Once again, the Uniform Law Conference of Canada Civil Law Section makes the point. It stated:²⁵

While the Canadian jurisprudence on appropriate forum is well developed, its application to class actions is still emerging. However, courts have begun to consider those factors that are relevant to adjudicative efficacy and administrative efficiency in the class actions context. Some of these factors have been identified in decisions on carriage and venue motions. We expect that future decisions will further clarify the special considerations that arise in multijurisdictional situations. There will, for example, be situations in which the law in a particular province creates a cause of action that is not available in other provinces; in that case, it may be appropriate to define the class to exclude that group. There may be occasions when the interests of class members are better served through multiple coordinated proceedings than they would be served through unification in a single proceeding. There may also be competing class actions in different forums, requiring the court to choose the most appropriate forum along the traditional lines often undertaken in non-class litigation. Finally, in cases where a national class would raise so many complicating issues as to render the action impossible to resolve, the court has the residual power under legislation to simply refuse to certify the class action at all.

The case law to address the problem of multiple multi-jurisdictional class actions is still in its nascent stage, but there have been some statutory developments that have been employed in some provinces that have adopted the recommendations of the Uniform Law Conference of Canada about amendments to its *Class Proceedings Act, 1992*. These provinces employ a notice procedure to respond to the circumstance of multiple multi-jurisdictional class actions. Class Counsel in the local class action is required to notify the counsel in the rival proceedings. Then the court hearing the certification motion is directed to consider whether it would be preferable for some or all of the claims of the proposed class members to be resolved in the rival

²⁴ The Uniform Law Conference of Canada Civil Law Section, *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis and Recommendations* (Vancouver, B.C., March 9, 2005), para. 32.

²⁵ The Uniform Law Conference of Canada Civil Law Section, *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis and Recommendations* (Vancouver, B.C., March 9, 2005), para. 53.

proceeding. The Uniform Law Conference's recommendations include criteria to determine what would be the preferable choice between the multiple actions and jurisdictional provisions to enforce that choice; for example, the court hearing the certification motion is, among other things, empowered to refuse to certify if the court determines that the class action should proceed in another jurisdiction. The recommendations of the Uniform Law Conference along with their commentary are set out in Schedule "A" to this paper.

The Uniform Law Conference of Canada Civil Law Section recommended that in deciding whether a class action in another jurisdiction might be preferable for the resolution of the claims of all or some class members; i.e. in deciding whether to defer a class action in one jurisdiction to another jurisdiction's class action, the courts across the country should consider the list of facts that have been developed for carriage motions including: (1) the nature and the scope of the causes of actions advanced, including any variation in the cause of actions available in the various jurisdictions; (2) the theories offered by counsel in support of the claims; (3) the state of preparation of the various class actions; (4) the number and extent of involvement of the proposed representative plaintiffs; (5) the order in which the class actions were commenced; (6) the resources and experience of counsel; (7) the location of class members, defendants and witnesses; and (8) the location of any act underlying the cause of action.

It should be noted that all of the factors identified above are just manifestations of what might be relevant to what is the central question on a carriage motion or stay motion; i.e. what is in the best interests of the putative class members in the particular circumstances of each case. The determination of carriage or of a stay will be the fact specific to the circumstances of each particular case.

In addition to the statutory developments and the case law developments with respect to staying a parallel or overlapping class proceeding as an abuse of process, there are initiatives to encourage courts across the country to co-operate in managing their respective class proceedings when there are parallel or overlapping class proceedings.

Recently, the Canadian Bar Association revived its National Task Force on Class Actions that was originally launched during Council's Mid-Winter meeting in Ottawa in February 2010. The Task Force was given a mandate to explore the possibility of the development of a judicial protocol with the aims of: (1) allowing for communication among judges in overlapping class actions proceedings; (2) coordinating activities in overlapping class proceedings to maximize efficiency, reduce costs and avoid the duplication of effort; (3) honouring the independence and integrity of the superior courts while promoting inter-provincial cooperation and respect for comity; (4) implementing a framework of general principles to address administrative issues arising out of national and multijurisdictional class actions; and (5) providing for nationally-accepted carriage motions. The Task Force was also directed to develop proposals for amendments to legislation to facilitate the administration of national and multijurisdictional class actions.²⁶

²⁶ The Task Force developed a Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions that endorsed the American Bar Association "Protocol on Court-to-Court Communications in Canada – US Cross-

Given the seven problems of: the right of putative class members to opt-out of the class proceeding; the existence of rival class actions in the same jurisdiction; the influence and importance of class size and class member loyalty; law firm prospecting for a quick profit from class action work; the double dealing of defendants; the absence of any constitutionally valid mechanism to consolidate proceedings that are initiated in several different jurisdictions; and the prevalence of parallel regional, national, or global class actions that are difficult to cull, the National Task Force on Class Actions has taken on a challenging task.

Schedule “A”

UNIFORM CLASS PROCEEDINGS ACT (AMENDMENT) 2006

1. Section 1 is amended by adding the following definition:

“multi-jurisdictional class proceeding” means a proceeding that

- (a) is brought on behalf of a class of persons that includes persons who do not reside in *[enacting jurisdiction]*; and
- (b) is certified as a class proceeding under Part 2.

Comment: ‘Multi-jurisdictional class proceeding’ refers to class actions that involve class members who do not reside in the certifying jurisdiction. With the broad availability of class actions in Canada it is possible that overlapping multi-jurisdictional class actions concerning the same or similar subject matter could be commenced in several different Canadian jurisdictions. As a result, potential class members may find themselves presumptively included in more than one class action in more than one jurisdiction and consequently subject to conflicting determinations. Further, defendants and class counsel may be faced with uncertainty as to the size and composition of the class. In addition, there may be difficulty in determining with certainty which class members will be bound by which decisions. The amendments to the Act modify the existing class action process to resolve the problem of multiplicity in multi-jurisdictional class proceedings.

2. Subsections 2(1) and (2) are replaced with the following:

Plaintiff’s class proceeding

2(1) A resident of *[enacting jurisdiction]* who is a member of a class of persons may commence a proceeding in the court on behalf of the members of that class.

2(2) The member who commences a proceeding under subsection (1) must

- (a) apply to the court for an order
 - (i) certifying the proceeding as a class proceeding, and
 - (ii) subject to subsection (4), appointing the member as the representative plaintiff for the class proceeding; and
- (b) give notice of the application for certification to
 - (i) the representative plaintiff in any multi-jurisdictional class proceeding, and
 - (ii) the representative plaintiff in any proposed multi-jurisdictional class proceeding,

commenced elsewhere in Canada that involves the same or similar subject matter.

Comment: To facilitate the provision of notice in section 2(2)(b), a Canadian Class Proceedings Registry is to be established as a searchable electronic database of class proceedings. The Registry would include all class action filings and annotation of any subsequent material events. It would be operated by an appropriate national body. Counsel applying for certification of an action would be responsible for providing the relevant information at the time the statement of claim is filed and for updating the information at certification, and/or when material events occur.

3. *The following is added after section 3:*

Plaintiff in other proceeding may appear

3.1 A person who receives notice of an application for certification under clause 2(2)(b) may make submissions at the certification hearing.

Comment: A plaintiff in a class proceeding who receives notice under section 2(2)(b) may then apply to the make submissions to the court considering certification of the other class proceeding.

4. *Section 4 is amended*

(a) *by renumbering it as subsection 4(1);*

(b) *by striking out “The court must certify” and substituting “Subject to subsections (2) and (3), the court must certify”; and*

(c) *by adding the following as subsections 4(2) and 4(3):*

4(2) If a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada that involves the same or similar subject matter to that of the proceeding being considered for certification, the court must determine whether it would be preferable for some or all of the claims of the proposed class members to be resolved in that proceeding.

4(3) When making a determination under subsection (2), the court must

(a) be guided by the following objectives:

- (i) ensuring that the interests of all parties in each of the relevant jurisdictions are given due consideration,
- (ii) ensuring that the ends of justice are served,
- (iii) where possible, avoiding irreconcilable judgments,
- (iv) promoting judicial economy; and

(b) consider all relevant factors, including the following:

- (i) the alleged basis of liability, including the applicable laws,
- (ii) the stage each of the proceedings has reached,
- (iii) the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the proposed class;
- (iv) the location of class members and class representatives in the various proceedings, including the ability of class representatives to participate in the proceedings and to represent the interests of class members,
- (v) the location of evidence and witnesses.

Comment: In an effort to reduce the problems caused by overlapping multi-jurisdictional class actions, section 4(3) is added to the Act. This provision assists both the certifying court and a subsequent court in determining whether a related class action in another jurisdiction may be the

most suitable forum. It sets out the overarching objective – to consider which jurisdiction would be the most suitable forum based on the interests of all the parties and the ends of justice, including the risk of irreconcilable judgments and judicial economy. It then outlines criteria that a court is to consider in making this determination.

5. The following is added after section 4:

Orders in multi-jurisdictional certification

4.1(1) The court may make any order it considers appropriate in an application to certify a multi-jurisdictional class proceeding, including an order

- (a) certifying the proceeding as a multi-jurisdictional class proceeding if
 - (i) the criteria in subsection 4(1) have been satisfied, and
 - (ii) having regard to subsections 4(2) and (3), the court determines that *[enacting jurisdiction]* is the appropriate venue for the multi-jurisdictional class proceeding;
- (b) refusing to certify the proceeding if the court determines that it should proceed as a multi-jurisdictional class proceeding in another jurisdiction; or
- (c) refusing to certify a portion of a proposed class if that portion of the class contains members who may be included within a proposed class proceeding in another jurisdiction.

4.1(2) If the court certifies a multi-jurisdictional class proceeding, it may

- (a) divide the class into resident and non-resident subclasses;
- (b) appoint a separate representative plaintiff for each subclass; and
- (c) specify the manner in which and the time within which members of each subclass may opt out of the proceeding.

Comment: The addition of section 4.1(1) provides that a court considering certification has the flexibility to consider a range of orders; not simply whether or not to certify a multijurisdictional class proceeding. It may also refuse to certify a portion of the proposed class who may be included within a pending or proposed class proceeding in another jurisdiction. Furthermore, depending on the nature of the claims, a court could determine that it is the most suitable forum for the resolution of all or part of the common issues, while assessment of other individual issues should be determined by other fora.

6. Subsection 6(2) is repealed.

7. Subsection 8(1) is amended by adding “and” at the end of clause (f) and repealing clause (g).

8. Section 16 is replaced with the following:

Opting out

16. A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

Comment: The amendments to section 16 reflect the recommendation that an opt-out mechanism

be adopted for a class that includes class members residing outside the jurisdiction. The reasons for this recommendation are as follows:

- (a) There are strong policy reasons in favour of an opt-out mechanism;
- (b) There is diminished risk that such a mechanism would be found to be unconstitutional; and,
- (c) There is no real reason for treating members of a multi-jurisdictional class differently from those of an intra-provincial class.

9. Clause 19(6)(c) is repealed.