

Litigating a Cross-Border
Class Action in Canada

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I. Introduction

For many decades, Canada had a reputation of being less adversarial and less litigious than our friends south of the border. However, with the advent of class proceedings legislation in some jurisdictions in Canada in the early 1990s, and its proliferation in the 2000s, companies and financial institutions have faced broader claims of greater magnitude – often in circumstances where litigation might not previously have been commenced at all. By giving plaintiffs the option of pursuing common claims together, class action legislation raised the stakes for defendants in Canada.

As the class action landscape in Canada has matured, the world has also become increasingly interconnected. Statements made or products distributed in North America often affect individuals north and south of the border. At the same time, plaintiffs' counsel north and south of the border have developed progressively closer alliances, such that defendants facing litigation in the United States can no longer be surprised when parallel proceedings follow in Canada. The claims often look similar in both jurisdictions, sometimes despite underlying differences in facts and regulatory issues. Unfortunately, the efficiencies for plaintiffs in commencing copycat proceedings often do not translate into efficiencies for defendants, who are routinely compelled to mobilize international defence teams to respond to a multiplicity of proceedings.

In addition, Canadian courts have shown overwhelming support for class actions as promoting broadly-articulated goals of judicial economy, access to justice, and behaviour modification. These goals have led courts to approach the statutory certification criteria somewhat liberally – criteria which, in many cases, are already relatively easy to satisfy. Among other things, legislation allows courts to consider issues “common” even if they do not raise identical issues of fact or law, and class actions can be certified even if common issues do not predominate. The province of Québec, in particular, has been known at times for a “rubber stamp” approach to certification as a purely procedural issue that should not delay getting on with the merits of the case. If this trend continues, Canada may soon become a test jurisdiction for class actions that are more difficult to certify in the United States.

As class actions have matured, more cases are advancing beyond certification to trials on the merits. Defendants are increasingly prepared to take class actions to trial despite the potentially high stakes, rather than settling cases after certification. Some of the largest trials in Canadian history have been heard as class proceedings in recent years, and others are ongoing. As a result, Canadian courts now have a significant body of well-developed case law addressing everything from pre-certification motions through to evidentiary issues at trial and beyond. Although these cases are costly to litigate through trial, the pioneer defendants of class action trials in Canada have in some cases seen enormous turns of tide after years of litigation. While initial certification orders often seemed generously favourable to plaintiff classes, defendants in several high-stakes cases have ultimately succeeded at trial or on appeal, leaving plaintiffs with nothing (or even with an order to pay costs).

We now have a wide array of sophisticated strategies for responding to class litigation in Canada, from inception through to the exhaustion of final appeals and the determination of costs issues. Depending on the defendants' objectives, the strategies for responding to class litigation will vary considerably, particularly in multi-jurisdictional cases. In some cases, defendants will have good reason to consolidate actions and/or classes to minimize the need to multi-task in defence of numerous cases or classes. In other cases, defendants may resist consolidating cases that are more appropriately brought in different provinces or countries for jurisdiction reasons, or they may seek to splinter proposed classes that are overbroad or rife with conflicts.

But in every case, success depends on a well-developed understanding of the acceptable risk profile, litigation readiness, early case assessment, seamless coordination of international teams (internal and external), and a strong strategic vision to guide each step from beginning to end. Among the most complex procedural issues today, Canadian courts regularly grapple with the coordination of proceedings within and between Canadian provinces, as well as between Canada and the United States. As a result, this paper focuses on strategic issues largely in the context of multi-jurisdictional class proceedings.

II. The Class Actions Landscape in Canada

By way of brief introduction to some basics, Canada has two court systems for the purposes of class actions: the Federal Court, and the provincial (territorial) superior courts. Canada's Federal Court is a statutory court with jurisdiction over certain matters specified in federal statutes, such as admiralty, intellectual property and federal taxes. Class actions related to enumerated subjects may be commenced in the Federal Court.

In contrast, the superior courts in Canada's provinces and territories are courts of inherent jurisdiction to which the Canadian Constitution gives jurisdiction over "property and civil rights" within that province or territory. As a result, the vast majority of commercial, consumer, and personal injury cases falls within the jurisdiction of the provincial superior courts.

Litigating in a federal system comprised of many separate jurisdictions can lead to multiple and sometimes overlapping cases about the same subject matter. One critical difference between the American and Canadian class action experience, however, is that Canada does not have a multi-district litigation (MDL) procedure. When overlapping or multiple actions arise in the United States Federal Court, they can be coordinated using MDL rules.² There is no equivalent procedure in Canada. If a particular matter arises in two provinces, the Federal Court does not have jurisdiction. Rather, the superior courts of both provinces may have overlapping

² This procedure is used to transfer all pending civil cases of a similar type in the United States to one federal judge. The decision to transfer such cases is made by a panel of seven federal judges appointed by the Chief Justice of the United States Supreme Court. If the panel decides to transfer the cases to one judge, that judge (the MDL court) will coordinate pre-trial matters, then the case is remanded back to the original court for trial.

jurisdiction over the matter. This can give rise to an apparent multiplicity of proceedings that must be resolved or reconciled through cooperation of the parties and their counsel, or with the assistance of the courts.

Canada is mainly a common law jurisdiction, influenced heavily by legal traditions from the United Kingdom but with many similarities to the United States as well. The substantive law within each of the Canadian common law provinces is essentially a combination of applicable federal legislation, provincial legislation and case precedents from the courts. Québec, on the other hand, is a civil law jurisdiction, governed by a civil code, with heavy influence from the French civil law system. The procedural law across Canada is governed by each province, including the statutory requirements for certification of a class action. This gives rise to some critical differences for the purposes of class actions, such that defendants are often sued in one or more Canadian common law jurisdictions and in Québec.

As noted above, class actions are relatively new in Canada, gaining momentum with the passage of class proceedings legislation in the early 1990s in some of the common law provinces.³ Almost all Canadian provinces followed suit sooner or later.⁴

Class proceedings legislation in the Canadian common law provinces is similar but not identical. While some differences are subtle, others are significant. For example, in British

Columbia, the legislation creates opt-out class actions for residents of British Columbia, but opt-in class actions for non-residents. As a

Practice Tip

In Canada, some have argued that national opt-out class actions do not comply with the constitutionally-imposed geographic limits on provincial superior courts. While national classes (often with some exclusions) are now relatively common in Canada, defendants can capitalize on this issue in appropriate cases to try to reduce the size of the certified class.

result, the outcome of a British Columbia class action will bind all resident class members who do not take the active step of opting out of the proceeding, but it will not bind non-residents unless they take the active step of opting into the proceeding.⁵ In Ontario, by contrast, the

³ Québec passed class proceedings legislation in 1978, but in 2003 it gained traction with amendments to the Code of Civil Procedure: SQ 1978, c 8, later Book IX of the Code of Civil Procedure, RSQ C-25 [C.C.P.].

⁴ Ontario led the common law provinces with the *Class Proceedings Act, 1992*, SO 1992, c 6 [Ontario CPA]. Most other provinces followed suit over time: *Class Proceedings Act*, RSBC 1996, c 50 [BC CPA]; *Class Actions Act*, SS 2001, c 12.01 [Saskatchewan CAA]; *Class Actions Act*, SNL 2001, c C-18.1; *Class Proceedings Act*, CCSM c C130; *Class Proceedings Act*, SA 2003, c C-16.5 [Alberta CPA]; *Class Proceedings Act*, SNB 2006, c C-5.15, RSNB 2011, c 125 [NB CPA]; *Class Proceedings Act*, SNS 2007, c 28; *Code of Civil Procedure*, RSQ, c C25, Book IX. Prince Edward Island has not passed class action legislation but has representative proceedings. No territories have passed class action legislation.

⁵ British Columbia, New Brunswick and Newfoundland and Labrador have taken this non-resident opt-in approach.

legislation allows opt-out classes for residents and non-residents alike, such that the judgment or court-approved settlement in an Ontario class action purports to bind passive non-resident plaintiff class members.⁶

III. Key Strategic Issues in Multi-Jurisdictional Class actions

Not surprisingly, there is no uniform Canadian response when different groups of plaintiffs commence separate class proceedings involving similar issues. The strategy will depend on the defendants' goals, as well as the existence and status of proceedings in different jurisdictions.

In some cases, the parties, their lawyers and the courts work together to coordinate overlapping issues and bring cases to a quick and efficient resolution. In other cases, consolidation is either impossible or undesirable. The extent of consolidation is often debated extensively between plaintiffs' counsel and defence counsel but, notably, a multiplicity of proceedings can also plague relations between plaintiffs' law firms jockeying for the role of lead counsel.

Regardless, defendants and their advisors need to develop a strong, well-coordinated vision early in the case, anchored by key substantive objectives. This will help formulate an appropriate strategy for procedural issues, maximizing the chances of success and minimizing costs in view of the

desired outcome. In the longer term, managing the defence of complex multi-jurisdictional class actions requires a disciplined focus on long-term

Best Practice

Companies at risk of being sued in a class action should create standard procedures to improve class action readiness, including evaluating incidents that could give rise to a class action, preserving and collecting evidence, and considering multi-jurisdictional issues and strategies in advance. See Schedule A.

objectives, and a deft hand at coordinating the work of defence teams efficiently and seamlessly. In cases involving parallel litigation north and south of the border, it is critical to ensure that the defence teams (both external and internal) coordinate closely in all litigation within and between the countries.

When cases involving the same subject matter are started in more than one province or more than one country, several key issues can be expected to shape the early stages of the case.

A. Principles of Jurisdiction *Simpliciter*

As a basic principle, a superior court in a Canadian province must have a minimum level of objective, real and substantial connection over the subject matter of a dispute. Jurisdiction issues often arise with respect to defendants outside the jurisdiction of the forum court. As discussed

⁶ Alberta, Saskatchewan, Manitoba, Ontario, Québec and Nova Scotia have taken this non-resident opt out approach.

further below in Section E, if a defendant intends to take the position that the court does not have jurisdiction over it, then the defendant's first step must be to object to the court's jurisdiction.

Although jurisdiction issues often arise with respect to out-of-province defendants, they can also affect *plaintiffs* in class proceedings depending on the breadth and composition of the proposed class. When a proposed class includes individuals resident outside the court's territorial jurisdiction, defendants sometimes have reason to argue that there is insufficient connection for the court to decide the dispute with respect to those individuals. The defendant usually raises this concern at the certification motion when the court is defining the class to be certified. For example, a court may conclude in the circumstances of a particular dispute that it only has jurisdiction over plaintiffs within provincial borders, in which case the defendant could face separate class actions in multiple provinces. On the other hand, depending on the facts of any given case, a court may conclude that it has jurisdiction over a national or even international class because of the subject matter. We discuss the Canadian approach to jurisdiction (which is different from the American approach) further in Section IV, below.

Once it has been established that the court in a province has jurisdiction *simpliciter* over the subject matter, the ultimate configuration of the class or classes and the coordination of proceedings in different provinces will generally be determined by class proceedings principles. These issues arise regularly in the context of attempts to certify national classes. Canadian courts typically try to avoid a multiplicity of proceedings and will pore over preferable procedure issues to minimize the potential for overlap or conflicting results. As a result, as a practical matter, a "national" class that is certified in one province (such as Ontario) often excludes plaintiffs who belong to proposed or certified classes in other specified jurisdictions (such as Québec and British Columbia). The timetable to advance the various proceedings can then be coordinated between the parties. However, timetabling of multi-jurisdictional proceedings can be challenging if the parties' objectives differ.

B. Carriage Motions

Timetabling can also be affected if different groups of plaintiffs' lawyers have commenced separate class actions about the same subject matter. The plaintiffs' class action bar in Canada is relatively small and consolidated. With a few notable exceptions, the usual players are relatively cooperative and have often devised comprehensive national "consortiums" to share carriage of large class actions. However, some high profile, acrimonious carriage disputes have erupted recently, in some cases between plaintiff firms that have traditionally cooperated.

Carriage motions are essentially a contest between two or more groups of plaintiffs' counsel who seek to control the class litigation in a province against the defendants. They typically involve essentially the same potential class members (or significant overlap) seeking essentially the same relief against the same defendants. The courts generally accept that they have inherent jurisdiction to hear carriage motions before certification to avoid a multiplicity of proceedings.

In deciding a carriage motion, the court is guided by the policy objectives of class proceedings legislation and must ultimately decide what resolution is in the best interests of the putative class members and at the same time fair to the defendants. Carriage motions often engage issues of jurisdiction, issues surrounding the use of “consortiums” of class counsel, and scrutiny of the claims advanced and materials relied upon by counsel in different cases. A variety of factors can influence who should be appointed solicitor of record in a class action, including the nature and scope of the causes of action advanced; the existence of any conflicts of interest; the theories advanced by counsel; the state of each class action, including preparation; the number, size and extent of involvement of the proposed representative plaintiffs; the relative priority of commencing the class actions; and the resources and experience of counsel.⁷

As noted recently in the high profile *Sino-Forest* carriage battle, these motions generally have two steps. First, the rival law firms “extol their own merits as class counsel and the merits of their client as the representative plaintiff. During this step, the law firms explain their tactical and strategic plans for the class action, and, thus, a carriage motion has aspects of being a casting call or rehearsal for the certification motion.” Then the rival law firms make submissions as to how their own skills and litigation plan would serve the best interests of the class members. This can be a “hardhearted” and “tough” review where rival law firms point out “flaws, disadvantages, and weaknesses” in their rivals’ strategy against the defendants.⁸

If there are overlapping class actions and consolidation is not possible, a court will stay the duplicative action(s) and grant carriage to the firm that will best represent the class in the circumstances of the particular case. These carriage battles have implications for cross-border cases, particularly when a parallel class action has already progressed in the

Practice Tip

Defendants often benefit from carriage motions because the competing plaintiffs’ counsel must transparently showcase their claims and strategy early in the case. Courts hearing carriage motions have sometimes commented extensively on the relative effectiveness of those strategies. This insight comes at limited or no cost to defendants watching from the sidelines.

United States, and plaintiffs’ counsel in the United States are challenged to identify the group of plaintiffs and counsel who will ultimately have carriage in Canada.

C. Who is Funding the Class?

One factor that may affect which firm receives carriage of the case is who is funding the action. Given that the driving purpose of class action legislation is access to justice, legislatures and courts have taken steps to ensure that representative plaintiffs are not prevented from starting

⁷ *Vitapharm Canada Ltd v F Hoffman-La Roche Ltd*, [2000] OJ No 4594 (SCJ) at paras 48-49, <http://canlii.ca/t/1vz3m>.

⁸ *Smith v Sino-Forest Corporation*, 2012 ONSC 24 at paras 2-3, <http://canlii.ca/t/fpm1z>.

class actions because they cannot afford to do so or because they cannot afford the risk of an adverse costs award.

Recognizing that the expense of class action litigation can impede access to justice, Québec and Ontario created funds to aid in financing the prosecution of class actions. In Québec, the *Fond d'aide aux recours collectif* can assist certain types of plaintiffs by paying a portion of legal fees and disbursements on written request. In Ontario, a representative plaintiff can apply to the Class Proceedings Fund for assistance with disbursements and indemnification from adverse costs awards. Both funds are subject to strict criteria, and not all applicants receive funding. In addition, both funds set terms of reimbursement if the class action results in a settlement or damages award. The Class Proceedings Fund, for example, receives a levy of 10% on any awards or settlements in funded proceedings.

Contingency fee arrangements have been largely prohibited in Canada until recently, but class proceedings legislation has been on the forefront of relaxing the prohibition. Most class proceedings statutes now permit lawyers to enter into a written agreement with the representative plaintiffs, providing for the payment of fees and disbursements only in the event of success in the class proceeding. This has opened the door for well-heeled lawyers to champion the cause of plaintiffs who otherwise might not have the resources to pursue claims against corporate defendants. Agreements respecting fees and disbursements are not enforceable unless approved by the court, making fee approval motions a routine part of any Canadian class proceeding. As the court has inherent jurisdiction to protect the class, it is not uncommon for courts to amend or reduce the proposed contingency fee and, in some cases, courts have refused to approve a settlement if it deems the proposed fee to be unreasonable.

Most Canadian class proceedings legislation also contemplates the use of “multipliers” in written agreements, allowing class counsel to make a motion to the court to have their fees increased by a multiplier. To ensure proportionality with the degree of success in the proceeding, the motion to increase the fee by a multiplier must typically be heard by the judge who decided common issues in the plaintiffs’ favour, or approved a settlement that benefits a class member. Multipliers are generally applied to achieve fair and reasonable compensation for class counsel in view of the risks taken in commencing and continuing a proceeding that only provides for payment in the event of success.

Recently, third-party investors have sought to fund class actions in Canada. These arrangements generally require the third-party funder to fund the action and indemnify representative plaintiffs against adverse costs awards in exchange for a share of the proceeds. Although relatively new, third-party funding arrangements have been considered a few times by the Ontario courts. The courts noted that the nature and content of third-party funding arrangements is relevant to certification as they can affect whether the representative plaintiff is appropriate. For example, the court must ensure that the representative plaintiff retains the

ability to independently instruct counsel rather than being directed by the third-party funder.⁹ As a result, plaintiffs relying on third-party funding seem to be bringing motions for approval before certification.

From a defendant's perspective, the funding arrangements, particularly third-party investor arrangements, raise two critical questions: first, if there is a third-party funder, will that funder have access to the defendant's produced documents; and second, if the defendant succeeds and is awarded costs, will those costs be paid?

Court approval of funding arrangements helps to mitigate these risks by ensuring that

Practice Tip

How the plaintiffs fund the class action raises two primary concerns for the defendant: (1) will the defendant's documentary productions be shared with third parties; and (2) will the plaintiffs be able to pay an adverse costs award?

the defendant has notice of the arrangement and potentially-associated risks, can negotiate or request appropriate protections for its documents, and can even request and obtain security for costs from the third-party funder in appropriate cases.

The law on contingency fee arrangements and third-party funding arrangements is developing, uncertain and may be approached differently in different jurisdictions. As a result, when faced with actions in multiple jurisdictions, the defendant should ensure that its interests are adequately protected across the constellation of class actions.

D. Local Practice: To Defend or Not To Defend

Once jurisdictional and carriage issues are resolved, the defendant must consider whether to file a substantive defence before the certification hearing. This decision typically involves weighing a number of "pros and cons" in the context of each particular case. This decision can have added complexity when similar cases are proceeding in more than one jurisdiction. Court procedures are not identical across the provinces; a strategy that makes sense in one province may not work in another province, or the rules and practices in one province may simply not be accepted in another. Coordinating requires a careful consideration of local practice and how steps taken in one jurisdiction could affect the proceedings in another.

The law on whether a defendant can delay filing a statement of defence until after the plaintiffs' motion for certification continues to evolve in Canada. Outside the class action context, the rules of court often require a Notice of Intent to Defend and substantive Statement of Defence to be

⁹ *Fairview Donut Inc v The TDL Group Corp*, 2012 ONSC 1252 at para 361, <http://canlii.ca/t/fq8sb>. See also *Dugal v Manulife Financial Corporation*, 2011 ONSC 1785, <http://canlii.ca/t/fkp0j> and *Fehr v Sun Life Assurance Company of Canada*, 2012 ONSC 2715, <http://canlii.ca/t/fr7rv>.

filed relatively quickly,¹⁰ subject to consent extensions of time, requests for particulars¹¹ and any preliminary jurisdiction or pleadings motions (discussed further below).

In the class action context, on the other hand, courts have traditionally relied on the broad discretionary powers conferred in class proceedings legislation¹² to alleviate the requirement to file a Statement of Defence until after certification. This has largely been driven by experience in practice: the Statement of Claim often goes through several iterations before, during or after the certification process to address concerns expressed by the defendants or the court. As a result, it is often thought to be more efficient for defendants to wait for the issues to be crystallized and pleadings deficiencies remedied at certification, before requiring a Statement of Defence.

Practice has been inconsistent in some jurisdictions, like British Columbia. However, the practice of delaying filing a statement of defence until after certification has recently come into question even in jurisdictions that have historically been very consistent in not requiring one. A prominent Ontario class proceedings judge recently surprised the class action bar by requiring the defendants in the *Pennyfeather v. Timminco* case¹³ to file a Statement of Defence before the certification motion, contrary to popular practice. Although the circumstances that led to the

¹⁰ The Notice of Intent to Defend is a simple standard form and not a substantive defence. The timelines for filing such a Notice depend on whether the defendant is served in the forum province (typically 20 days), in the United States (typically 40 days), or outside of Canada or the United States (typically 60 days). The rules of court typically require the defendant to serve a substantive Statement of Defence within ten days after the Notice of Intent to Defend. As a practical matter, the timelines to file a defence are often extended on consent while counsel investigates the claim. However, plaintiffs' counsel can insist on strict adherence to the timelines.

¹¹ The defendant may take steps to clarify or narrow the allegations in the Statement of Claim in order to plead in defence. Statements of Defence in Canada are typically much more detailed than defences in the United States. Where a defendant to a Canadian proceeding intends to prove a version of the facts that is different from that pleaded by the plaintiffs, it is not sufficient simply to deny the plaintiffs' version of the facts. Rather, the rules of court generally require defendants to plead their own version of the facts in the Statement of Defence. The rules of court thus allow defendants to demand particulars or ask to inspect documents referenced in the Statement of Claim. If particulars are not forthcoming, or if there are other problems with the Statement of Claim, the defendant may bring a motion to strike all or part of the Statement of Claim as failing to disclose a reasonable cause of action. As noted below, however, a request for particulars can have implications for the timing of filing a defence.

¹² For example, section 12 of the Ontario *Class Proceedings Act* provides: "The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate."

¹³ *Pennyfeather v Timminco Limited*, 2011 ONSC 4257, <http://canlii.ca/t/fmb7c> [*Pennyfeather*].

motion in that case were somewhat unique,¹⁴ Justice Perell opined that, as a general rule, a Statement of Defence *should* be filed before certification.

Justice Perell observed that it would be advantageous to require pleadings to be closed before the certification motion as it would, among other reasons, “call out” defendants to bring substantive challenges to the Statement of Claim and lay out their defence before certification.¹⁵ In his view, this approach could streamline the certification hearing by effectively resolving the first requirement for certification – whether there is a cause of action – in advance of certification. This called into question the long-standing practices in most Canadian common law provinces that certification is the first step in any proposed class proceeding, that pleadings issues are generally resolved at the certification stage, and that defences follow certification (even when class proceedings legislation suggests otherwise).

In a subsequent decision,¹⁶ Justice Perell acknowledged that it may not always be appropriate to require Statements of Defence before certification, particularly in the context of proposed class proceedings involving claims for secondary market misrepresentations under the *Securities Act*. In *Sino-Forest Defence*, the defendants reasoned that, because the plaintiffs needed leave to bring certain claims under the *Securities Act*, there was no cause of action for the defendants to defend unless and until

leave had been granted. Justice Perell took this argument into account and only required the defendants who

Practice Tip

In Québec, parties cannot file claims and defences until after the court decides the plaintiffs’ motion for authorisation (Québec’s version of a certification motion). Similarly, the parties cannot bring motions for summary judgment until after the class is authorised.

contested the plaintiffs’ leave motion under the *Securities Act* and filed responding affidavit evidence under s. 138.8 of the *Act* to deliver Statements of Defence before certification.¹⁷

¹⁴ Certain of the defendants brought a motion for particulars in advance of the certification motion. Particulars are generally required to enable the defendants to plead in defence. The plaintiff countered that it was premature to order particulars because the defendants did not intend to deliver statements of defence until after certification. Perell J. granted the request for particulars on the condition that the defendants also deliver their statements of defence before certification.

¹⁵ See below for the discussion of pre-certification motions to strike.

¹⁶ *Trustees of the Labourers’ Pension Fund v Sino-Forest*, 2012 ONSC 1924, <http://canlii.ca/t/fqrrf> [*Sino-Forest Defence*].

¹⁷ For further discussion regarding this case, see Laura Fric, Craig Lockwood, and Geoffrey Grove, *Statements of Defence Required In Advance of Certification in Sino-Forest Class Proceeding*, Osler Update (April 3, 2012) <http://www.osler.com/NewsResources/Statements-of-Defence-Required-In-Advance-of-Certification-in-Sino-Forest-Class-Proceeding/>.

At the time of writing this paper, other Ontario judges have not commented much on whether they are persuaded by Justice Perell's reasoning or whether it may lead to a broader change in Ontario practice. It is also unclear whether and to what extent courts in other jurisdictions will choose to follow Justice Perell's lead.¹⁸ As a result, it remains to be seen whether the delivery of statements of defence before certification becomes the new normal practice. However, where plaintiffs have often resisted motions being brought prior to certification, the door is now open for defendants in Ontario to bring pleadings motions and file defences before certification. Further, defendants should be aware that they could be compelled to defend before certification, particularly if they take certain steps (such as demanding particulars) beforehand.

As a matter of strategy, depending on the case, defendants may be disadvantaged if required to file a Statement of Defence before certification. Because the Statement of Claim is often amended during the certification process, a defendant who files a Statement of Defence before certification will likely have to amend the Defence. If certain issues are struck or not certified, defendants may have unnecessarily expended costs and divulged information and strategies related to claims that are no longer relevant.

On the other hand, defendants in some cases may prefer to file a Statement of Defence before certification to narrow the issues or to allow them to bring a motion for summary judgment (see the discussion below). In addition, it may be desirable in some cases to put an early and strong Statement of Defence into the public record denying culpability or presenting facts from the defendants' perspective. Although defendants run the risk of joining issue with the plaintiffs' claims, such that common issues are more readily defined for certification purposes, compelling reasons sometimes exist to tell the defendants' side of the story up front despite the risks.

As the law in this area is still evolving, and different provinces approach the timing of defences differently, defendants will have to assess these issues on a case-by-case basis. Defendants may be influenced by the number of other purported class actions, where they have been filed, and whether and how they are being coordinated. For example, if a defendant is facing class actions in Québec (where defences are not filed before authorization) and Ontario (where defences might be required), filing a defence in Ontario may have strategic implications for the Québec action.

¹⁸ Courts in many provinces have historically allowed defendants to delay filing a Statement of Defence until after certification. In Saskatchewan and Newfoundland, the courts consistently allow defendants to delay filing a statement of defence. In British Columbia and Alberta, the motions judge has discretion to determine whether a defendant should be required to deliver a defence pre-certification or granted an extension of time on a case by case basis.

Note, the process is different in Québec: parties may not file a Statement of Claim or Statement of Defence until after the authorisation motion is heard (instead of bringing a certification motion, Québec plaintiffs request authorisation from the Québec Court to institute a class action).

E. Local Practice: Pre-Certification Motions

Defendants also need to consider potential pre-certification motions early in the case. Certain motions must be brought immediately; others can wait until the certification hearing, and some may be best heard after certification.

First and foremost, as mentioned above, a defendant who wishes to challenge the court's jurisdiction over it must bring a motion at the outset of the case, before filing an appearance or taking any other step in the proceeding. Otherwise, the defendant risks attorning to the jurisdiction of the court.

For other types of preliminary motions, it is ultimately a matter of judicial discretion as to whether they will be permitted before certification in any given case. The court may consider: (a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined; (b) the likelihood of delays and costs associated with the motion; (c) whether the outcome of the motion will promote settlement; (d) whether the motion could give rise to interlocutory appeals and delays that would affect certification; (e) the interests of economy and judicial efficiency; and (f) generally, whether scheduling the motion in advance of certification would promote the fair and efficient determination of the proceeding.¹⁹

In the *Pennyfeather* case discussed above, Justice Perell pointed out the possible benefits of an early motion to strike inadequate pleadings, especially when the challenge may result in a stay or dismissal of the action, thus saving the enormous costs typically associated with certification motions.²⁰ Indeed, defendants have deployed this strategy successfully in some very significant cases. For instance, in *Ragoonanan Estate v Imperial Tobacco Canada Ltd*,²¹ two of the three defendants successfully argued that the entire case against them should be dismissed because there was no representative plaintiff with a cause of action against them. By disposing of the claim so early in the proceeding, the defendants saved the cost of arguing the certification motion. Further, even if the whole claim is not struck, the plaintiffs may be forced to narrow or refine their claims before the certification motion. While this can benefit defendants by narrowing the case or at least streamlining the certification motion so that they are not responding to a moving target, the practical reality is that a more refined set of pleadings can also improve the plaintiffs' chances of success when it comes to certification.

Having said that, the usual test to determine whether to strike a claim in Canada is onerous: it must be plain and obvious that the pleading discloses no reasonable cause of action and the

¹⁹ *Sino-Forest Defence*, at note 16 at para 77.

²⁰ *Pennyfeather*, at note 13 at para 89.

²¹ (2000), 51 OR (3d) 603 (SC), <http://canlii.ca/t/1w9n0>.

impugned claim is certain to fail because it contains a radical defect.²² This test must be satisfied on the face of the pleadings and argument, as evidence is not typically permitted on a motion to strike. As a result, defendants generally bring such motions only in the clearest of cases.

In some provinces, a defendant may also seek to bring a motion for summary judgment (or similar relief) prior to certification.²³ However, pre-certification summary judgment motions are not universally available, and courts may prefer that issues of fact be resolved on a class-wide basis after certification in order to bind the entire class and preserve scarce judicial resources.²⁴ Pre-certification summary judgment is available in Ontario and Alberta,²⁵ but not in Québec²⁶ and only exceptionally in Saskatchewan.²⁷ In British Columbia, similar motions called summary trial applications have been brought pre-certification.²⁸

²² *Hunt v Carey Canada Inc*, [1990] 2 SCR 959, <http://canlii.ca/t/1fst2>. In Québec, the test may be even more stringent – whether it is clear and evident, leaving the judge with no doubt about the claim’s inadmissibility.

²³ Note that summary judgment motions generally require the filing of a Statement of Defence.

²⁴ In *Charette v Trinity Capital Corp*, 2012 ONSC 2824, <http://canlii.ca/t/frgjjg>, the plaintiff alleged that the defendants provided a negligent legal opinion regarding a charitable donation tax credit program. The defendants brought a pre-certification summary judgment motion to dismiss the plaintiff’s claim on the ground that it was commenced after the limitation period expired. The Court ultimately found that there was a genuine issue requiring a trial and the motion was dismissed on this basis. However, the Court also held that pre-certification summary judgment was not appropriate when issues of fact could be resolved post-certification on a class-wide basis.

²⁵ *Stewart v Enterprise Universal Inc*, 2010 ABQB 259, <http://canlii.ca/t/29c6n>. The court held, at paragraph 36, that “while it may be preferable to deal with most applications at the certification hearing, there are sometimes good and compelling reasons for them to be addressed earlier” and allowed the summary judgment motion prior to certification.

²⁶ As discussed above, in Québec parties are not even allowed to file a Statement of Claim or Statement of Defence before the class is authorised, since the authorization motion is considered the first step in the process.

²⁷ See, for example, *Alves v MyTravel Canada Holidays Inc*, 2009 SKQB 77, <http://canlii.ca/t/22m8q>, where the court refused to allow a motion to strike and a motion to dismiss before certification. At paragraph 32, the court wrote, “In my view to obtain an exception to the general rule that the certification motion should be the first motion heard on a class action, the defendants must provide a compelling reason for the court to treat matters sequentially.”

²⁸ In *Consumers’ Assn of Canada v Coca-Cola Bottling Co*, 2005 BCSC 1042, <http://canlii.ca/t/114nl>, the Court held that pre-certification summary trials are appropriate when they narrow or define the nature and scope of the case for certification.

Where available, however, a successful summary judgment motion can avert years of costly litigation. For example, one recent \$200 million claim was dismissed on a summary judgment motion less than a year after the claim was started, ending the litigation.²⁹

In a motion for summary judgment in jurisdictions like Ontario, the party seeking judgment generally has the onus to prove that there is no genuine issue requiring a trial. However, all parties are required to “put their best foot forward” in presenting their case. The “best foot forward” evidentiary standard is more onerous than the evidentiary standard a plaintiff is required to meet at certification – namely, that there be “some basis in fact” for each of the certification criteria. A pre-certification summary judgment motion may therefore dispose of claims that would otherwise have survived certification.

In Ontario, the summary judgment rule was recently amended to give judges greater powers to evaluate the credibility of witnesses, review evidence and make factual determinations.³⁰ Certain scenarios are more appropriate than others for summary judgment, such as:

- Where the case is focused on documentary evidence;
- Where limited factual issues are in dispute;
- Where only a few witnesses are testifying (in writing or orally) to only a few disputed issues;
- Where the discovery process is complete or would not be necessary to permit a fair and just resolution of the dispute;
- Where the claims or defences have no chance of success; and
- Where the case turns on questions of law.

The amendments in Ontario expand the range of cases for which summary judgment may be appropriate, but they also raise the stakes for defendants. Under the old rule, a party who brought and lost a summary judgment motion almost always had a second chance at trial: bringing and losing a summary judgment motion did not mean losing the case. Under the new

²⁹ *TA & K Enterprises Inc v Suncor Energy Products Inc*, 2010 ONSC 7022, <http://canlii.ca/t/2f1rj>. In this case, the court rejected the plaintiff’s argument that Suncor was required to pay claimed damages of \$200 million due to an alleged failure to deliver a disclosure document to franchisees, holding that a “one year, no non-refundable franchise fee” exemption prescribed by the *Arthur Wishart Act (Franchise Disclosure)*, 2000, SO 2000, c 3 applied. (Osler represented *Suncor* and successfully obtained summary judgment dismissing the class action.)

³⁰ See *Combined Air Mechanical Services Inc v Flesch*, 2011 ONCA 764, <http://canlii.ca/t/fp510>, for the Ontario Court of Appeal’s approach to summary judgment under the new rules.

For further discussion regarding this case, see Craig Lockwood, Mary Paterson, Adam Hirsh, *Ontario Court of Appeal Gives Teeth to Summary Judgment Rule*, Osler Update (December 6, 2011), <http://www.osler.com/NewsResources/Details.aspx?id=4014>.

summary judgment rule, however, the court is more likely to weigh evidence and make important conclusions on the motion that could have the practical effect of ending the whole case.

As noted above, in past practice, plaintiffs' counsel have frequently objected when defendants have attempted to bring preliminary motions (particularly motions for summary judgment) before the plaintiffs' motion for certification. At a minimum, they ask the supervising judge to hear preliminary motions concurrently with the motion for certification. If this request is granted, some of the tactical and procedural advantages of bringing a motion to strike or motion for summary judgment may be undermined, as the proceedings can effectively become merged with the certification issues. However, the fact of bringing a summary judgment motion will allow the court to hear evidence that might otherwise not be permitted on a certification motion. A proactive motion could also emphasize deficiencies more effectively than simply arguing in response to the motion for certification.

The timing of a summary judgment motion in particular raises many strategic considerations. Defendants should consider the implications of the requirement that they must file a Statement of Defence in order to bring the motion. Further, certain summary judgment motions may be more effectively pursued after documents are produced and oral examinations for discovery are held. There is also a risk that an early summary judgment motion will simply educate the plaintiff about the defendant's case if it is not successful. Most importantly, if the defendant wishes the summary judgment to bind all potential class members, the motion must be delayed until at or after certification. On the other hand, courts have been quite willing to determine threshold issues in advance of certification if it can result in significant savings of costs and time, and particularly if it could bring an end to the entire case.

Finally, as always, the potential benefit of preliminary motions must be balanced against overall cost and timing objectives. Needless to say, financial pressures and delays associated with motions (and consequent appeals) can have a considerable impact on the course of proceedings and, in some cases, class counsel's enthusiasm for pursuing more tenuous cases.

F. Canadian Approach to Damages

When negotiating settlements in cases north and south of the border, plaintiffs' counsel often try to leverage results previously negotiated or obtained in cases in the United States. However, American lawyers are sometimes discouraged by differences between the Canadian and American approaches to damages which can influence the results in Canada:

- First, jury trials are not permitted in civil actions in Québec and they are uncommon in civil matters in the rest of the country except in personal injury cases. Further, even though product liability trials often involve personal injury claims, juries are not common in product liability cases in Canada. Because judges alone determine the amount of damages in most matters, damages awards tend to be more temperate in Canada.

- Second, although punitive damages can be certified as a common issue, they are awarded only in rare instances where the defendant's conduct is so malicious and extreme that it offends the court's sense of decency. Punitive damages have been awarded relatively sparingly in Canadian proceedings, and Canadian courts do not entertain the concept of treble damages.

Overall, the ordinary principles of damages apply in class proceedings in Canada. As a general matter, there are two ways to determine damages: aggregate class-wide assessments, or individual assessments of damages. In Canada, the courts and legislature have been more receptive to aggregate damages claims than might typically be experienced in the United States. While extensive trials of individual issues and damages are relatively common in the United States, Canadian legislation in some cases allows for determination of aggregate claims by way of statistical evidence. Plaintiffs favour and regularly pursue this approach to avoid the expense of individual damages assessments. Defendants almost always resist aggregate class-wide assessments and favour individual assessment of damages.

Further, much court time and attention has been consumed recently as a result of a notable trend of plaintiffs requesting restitutionary remedies in class actions. Plaintiffs now routinely plead and urge courts to certify "waiver of tort" as a common issue. The practical effect of pleading waiver of tort in the class actions context is that the doctrine, if applicable, could arguably be used to present damages as a common issue based on benefits obtained by the defendant through alleged wrongful conduct, thereby avoiding the need for individual proof of loss by each class member.³¹ Defendants have aggressively resisted application of the waiver of tort doctrine in the context of negligence claims, arguing further that it should not operate to alleviate any of the fundamental requirements for plaintiffs to prove the basic elements of negligence including loss or damage.

Courts have been intrigued but skeptical about the application of waiver of tort principles in Canadian law. However, pending definitive commentary on waiver of tort by the legislature or higher courts, plaintiffs have reaped the benefits of the uncertainty and lack of clarity in the law. Rather than determining the issue at the pleadings stage, most judges have conservatively certified waiver of tort as a common issue for determination on a full evidentiary record at trial.

Interestingly, a prominent Ontario judge who heard one of the first and lengthiest common issues trials in Canada in a medical device case recently stated categorically that hearing 138 days of evidence would not have helped her decide fundamental questions associated with recognizing the waiver of tort doctrine or the implications of doing so.³² Justice Lax did not have to decide the issue because she ultimately decided the case in favour of the defendants. However, she stated definitively that questions surrounding the waiver of tort doctrine are not dependent on a trial with a full factual record and may require no evidence at all. She suggested that the issue is best left to consideration by the legislature. The decision paved the way for

³¹ *Koubi v Mazda Canada Inc*, 2012 BCCA 310, <http://canlii.ca/t/fs1x1>.

³² *Andersen v St. Jude Medical, Inc*, 2012 ONSC 3660, <http://canlii.ca/t/frtzt>.

defendants to argue that a full evidentiary record is not needed to determine the issue. However, continued uncertainty may follow Justice Lax's suggestion that it should be left to the legislature to decide these issues rather than the courts.

For defendants, certification of waiver of tort claims has immediate negative repercussions as well as long-term risks. The most obvious risk is that an aggregate claim for restitution or disgorgement of profits potentially raises damages exposure exponentially. However, in the short term, certification of waiver of tort as a common issue can subject defendants to extensive production of sensitive financial information that would not otherwise be required. This can be particularly frustrating in the context of weak claims, and claims wherein waiver of tort should ultimately be determined inapplicable.

G. Local Practice: Costs Awards

The risk of an adverse costs award may influence plaintiffs in choosing where in Canada to start a class action. Many jurisdictions chose to adopt a "no-costs regime" for class actions even if the losing party would ordinarily have been required to pay a portion of the winning party's costs in individual actions.³³ The justification for no-costs regimes is that the risk of a potentially large costs award could prevent plaintiffs from starting class actions, thereby defeating the goal of class action legislation to enhance access to justice. However, the courts in these jurisdictions retain the discretion to order costs against a party who engages in frivolous or abusive conduct.

Other jurisdictions apply their standard costs rules to class actions (Alberta, New Brunswick, Nova Scotia). Similarly, Ontario applies its standard "loser-pays" approach to costs, with certain tweaks that are specific to class actions. For example, when the court is exercising its discretion to award costs, it must also consider whether the proceeding was a test case, raised a novel point of law, or involved a matter of public interest.³⁴ Perhaps not surprisingly, these factors have often been applied to justify a court refusing to award costs against an unsuccessful plaintiff. However, as the courts have become more comfortable with class actions, particularly when the class action is commercial in nature, plaintiffs have been required to pay costs to successful defendants.

When costs are awarded in individual actions, the court has the discretion to apportion the costs between parties. In class actions, however, the representative plaintiff bears the full burden of any costs award even though the class members stood to benefit from the representative plaintiff's efforts if successful. Most legislation provides that class members other than the representative plaintiff are not liable for costs except with respect to the determination of their

³³ British Columbia, Saskatchewan, Manitoba, Newfoundland and Labrador and the Federal legislation create a no-costs regime for class actions.

³⁴ *Ontario CPA*, s 31(1).

own individual issues and claims.³⁵ This obviously reduces the risk to passive members of the class who will be bound by the result sometimes without participating in the proceeding.

To alleviate the burden on representative plaintiffs (who may be appropriate representatives of the class but for their inability to finance a significant adverse costs award), the class action Funds in Ontario and Québec offer to assist with costs awards against the representative plaintiff. Similarly, class counsel and third-party funders often indemnify the representative plaintiff against adverse costs awards, making prosecution of the case a fairly low risk proposition for representative plaintiffs.

The risk of an adverse costs award can influence the dynamics of a case from beginning to end, ranging from where plaintiffs decide to commence an action to how a case is ultimately settled. However, the courts exercise broad discretion to ensure fairness to the class and regularly consider principles of access to justice and the potential for any chilling effect – such that defendants frequently bear a heavy financial burden for having been named in class litigation even if the plaintiffs' claims are ultimately defeated.

H. Certifying Class Actions in Canada

When deciding to bring a class action in Canada, plaintiffs' counsel should be aware of key differences in the test for certification, as well as important differences between the approach of the courts in Québec as compared to common law jurisdictions in the rest of Canada. The test for certification in each common law province with class action legislation sets out generally the same five requirements:

- 1) The statement of claim must disclose a reasonable cause of action;
- 2) There must be an identifiable class;
- 3) The claims of the class members must raise common issues;
- 4) The class action must be the preferable procedure; and
- 5) There must be an adequate representative plaintiff.

However, parties need to be aware of subtle (sometimes important) differences in class action criteria from one province to the next. Some very general comments may help guide the inquiry:

- 1) *Cause of Action*: Generally, the pleadings must disclose a cause of action and there must be some basis in fact for the plaintiffs' claims. Evidence is not generally permitted to satisfy this prong of the test for certification, and the issues are decided on the face of the pleadings which are assumed to be true.

³⁵ See, for example, *Ontario CPA*, s 31(2).

- 2) *Identifiable Class*: Canadian class action legislation requires that there be an identifiable class of two or more persons. Unlike in the United States, there is no requirement that the class be so numerous that joinder is impractical.³⁶
- 3) *Common Issues*: A common issue is an issue of fact or law common to all claims, and its resolution in favour of the plaintiffs must advance the interests of the class. There must be some factual basis for the common issue and a rational connection between the class definition and the proposed common issues.
- 4) *Preferable Procedure*: A class proceeding will be the preferable procedure if it is a “fair, efficient and manageable method for advancing the claim” and if it is preferable to other procedures, such as individual proceedings, joinder, test cases or consolidation. The preferability inquiry is conducted through the lens of the three principal advantages of class actions; namely, judicial economy, access to justice and behaviour modification.

Although common issues must “substantially advance the action” as a general matter, it is not a universal rule in Canada that common issues must “predominate” over individual issues. In some Canadian jurisdictions, such as British Columbia³⁷ and New Brunswick, the court will consider predominance as one of many “relevant matters” set out in the class proceedings legislation when determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. The court’s conclusion of whether a class action is the preferable procedure can thus be influenced by whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members. However, without an absolute predominance test, it may be easier in some cases to certify a class action in Canada than in the United States.³⁸

- 5) *Representative Plaintiff*: The representative plaintiff must fairly represent the interests of the class, have a workable litigation plan, and not be in a conflict of interest with other class members. Where an action purports to bind out-of-jurisdiction plaintiffs, courts have often appointed a plaintiff specifically to represent the out-of-province or out-of-country class members.

³⁶ See U.S. Federal Rule 23(a)(1).

³⁷ BC CPA s 4(2)(a) and NB CPA s 6(2)(a).

³⁸ See U.S. Federal Rule 23(b)(3).

To meet the test for certification in Canadian common law jurisdictions, the plaintiff often files extensive materials, including affidavit evidence, expert reports and a comprehensive litigation plan. The defendant typically files extensive responding evidence, often with responding expert reports. Although evidence is not generally permissible regarding the existence of a cause of action, much attention is typically focused on issues of commonality and preferable procedure. The examination of representative plaintiffs may also be permitted, including limited document discovery and, in some cases, examinations of additional class members.

The parties often conduct cross-examinations on the evidence filed and prepare detailed written arguments. The hearing of the certification motion itself can take considerable court time, and week-long certification hearings are not uncommon. The time and expense to certify a class action generally

imposes some discipline with respect to the decision to start an action in one of the common law provinces,

particularly where class counsel is working under a contingency fee arrangement. In multi-jurisdictional cases, class counsel may share fees among members of their consortiums, but they can also share the cost burden to advance a case through certification.

Practice Tip

In the common law jurisdictions in Canada, the ability to file evidence, cross-examine on affidavits, file expert reports, and seek production of relevant documents means the road to certification can be long and costly. As a result, class counsel may not pursue all claims they commence through to certification.

In contrast, as noted above, Québec is governed by a civil code. The plaintiffs must seek authorization before they start an action (rather than seeking certification afterwards). Article 1003 of the Québec Code of Civil Procedure sets out four requirements for authorization:

- a) the recourses of the members raise identical, similar or related questions of law or fact;
- b) the facts alleged seem to justify the conclusions sought;
- c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
- d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

For many years, this test has been viewed as more lenient than the test for certification elsewhere in Canada. Indeed, the court will grant authorization in Québec unless it concludes that the case has no chance of success. The pendulum may be swinging towards making authorization more difficult to obtain, but, at the moment, it remains an easier test to meet.

The procedure in Québec is also substantially different from that in the common law provinces. In Québec, the petitioners are not required to file an affidavit in support of their request for authorization, and the respondent does not have the right to file a formal, written contestation to the motion. Instead, the respondent must seek permission to adduce relevant evidence to

ensure that its side of the story is presented to the court. As a result, Québec is often seen as an attractive forum in which to start a class action, although the courts in Québec have been less enthusiastic about authorizing national classes out of a concern that they do not have jurisdiction over out-of-province plaintiffs.

Given the increasing number of plaintiffs seeking to certify national opt-out classes and the recurring concern about whether provincial courts have the jurisdiction to do so, two provinces have adopted explicit legislation explaining how courts should approach certifying such class actions. In

Saskatchewan and Alberta, the legislatures included specific sections in their class proceedings

Practice Tip

Certifying class actions in a common law province requires a significant investment by class counsel or the entity funding the class action; in contrast, seeking authorization for a class action in Québec is usually cheaper and often easier.

legislation allowing national opt-out classes and requiring the courts to consider whether their province is the appropriate venue for a multi-jurisdictional class action. Legislation permits the courts in those jurisdictions to refuse to include people in the class who may be included in a pending class action in another jurisdiction.³⁹ As such, some provinces have attempted to confront difficult multi-jurisdictional issues head on but, interestingly, they have also engaged some thorny constitutional issues that will likely generate much litigation before they are ultimately resolved by a higher court.

IV. Recent Developments in Jurisdiction over Out-of-Province or Foreign Parties

Ordinarily, courts wrestle with the question of jurisdiction in the context of out-of-province defendants who resist having their rights determined by a court in another jurisdiction. The court's reach over defendants outside the jurisdiction can be a factor in individual and class actions alike, and the same principles should guide the result. However, the question of whether a court has jurisdiction over out-of-province or foreign plaintiffs⁴⁰ is peculiar to class actions. Defendants can sometimes use jurisdiction issues to defeat a proposed class action or narrow the class of plaintiffs involved in the action.

A. Out-of-Province Defendants

In Canada, the courts have jurisdiction over an out-of-province defendant who has a real and substantial connection with the province. Until recently, the courts had significant discretion in

³⁹ *Saskatchewan CAA* at note 2, s 6(2); *Alberta CPA* at note 2, ss 5(6), 9.1.

⁴⁰ Throughout this section, where we refer to out-of-province parties generally, we include out-of-country parties, except where the context makes it clear that we are discussing a distinction between the courts' approach to out-of-province versus out-of-country parties.

deciding whether a real and substantial connection exists. This discretionary approach consisted of a long list of factors including whether it would be unfair to the plaintiff not to assume jurisdiction or unfair to the defendant to assume jurisdiction.⁴¹ The discretionary approach based on a host of subjective factors was criticized as being unpredictable, and some provinces passed legislation providing guidance on the issue.⁴²

The Supreme Court of Canada recently reformulated the real and substantial connection test in the context of jurisdiction over defendants in a tort action and substantially reduced judicial discretion.⁴³ The Supreme Court held in *Van Breda* that the plaintiff arguing that the court has jurisdiction must establish one of four presumptive connecting factors (or an analogous factor) that links the subject matter of the litigation to the forum:

- a) the defendant is domiciled or resident in the province;
- b) the defendant carries on business in the province;
- c) the tort was committed in the province; or
- d) a contract connected with the dispute was made in the province.

If one of these presumptive connecting factors seems to exist, the party opposing jurisdiction can rebut the presumption by showing that the factor does not in fact establish a sufficient connection to ground jurisdiction. For example, a party could argue that the contract made in the province (presumptive connecting factor (d)) has nothing to do with the dispute. If the connecting factor is rebutted, then the court does not have jurisdiction. Out-of-province defendants can sometimes achieve a dismissal of the claim against them at the outset if the court lacks jurisdiction.

B. Out-of-Province Plaintiffs

The Supreme Court's guidance on the revamped real and substantial connection concept was provided in the context of a tort action against out-of-country defendants who, on notice of the action, provided evidence on the question of whether the Ontario court had jurisdiction over them. The Supreme Court's decision provides clarity in that context but does not expressly apply to questions of the court's jurisdiction over out-of-province *plaintiffs*. In the class action context, individuals who are captured by the definition of the proposed class are not specifically named, they may not have notice of the case, and they are usually not before the court. Because the decision in a class action would purport to bind "absent" plaintiffs who are included in the certified class, defendants sometimes take issue with their inclusion in the proposed class at all.

⁴¹ *Muscutt v Courcelles* (2002), 60 OR (3d) 20 (CA), <http://canlii.ca/t/1cxt4>.

⁴² *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28; *Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1; and *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2d Sess), c 2.

⁴³ *Van Breda v Village Resorts Limited*, 2012 SCC 17, <http://canlii.ca/t/fqzt4> [*Van Breda*].

In Canada, the provinces have taken different approaches to out-of-province plaintiffs. As described above, the class action legislation in some provinces requires out-of-province plaintiffs to actively *opt into* the class action. Other provinces have legislation that allows provinces to certify national and international *opt-out* class actions. In some cases, the only connection between these out-of-province plaintiffs and the province was the fact that they shared common issues with resident class members.⁴⁴ For example, in a prospectus misrepresentation case, an international class certified in Ontario included plaintiffs who purchased the securities, received the alleged misrepresentations and experienced the harm outside Ontario.⁴⁵ These cases were decided based on the old real and substantial connection approach.

In view of the general principles articulated by the Supreme Court in *Van Breda*, certification judges in some cases might be persuaded to apply more objective criteria in determining whether or not they have jurisdiction *simpliciter* over the subject matter of a class action involving plaintiffs outside the jurisdiction. The consequence of requiring every class member to be connected directly to the forum is that certification judges may refuse to certify a national class that they would have certified before *Van Breda*. For example, in *Gammon Gold* the court may not have certified a class that contains people who purchased shares outside Ontario, instead limiting the class to people who purchased their shares in Ontario.

Beyond these first principles of jurisdiction *simpliciter*, the courts' willingness to certify opt-out classes with unnamed out-of-province plaintiffs will undoubtedly continue to turn on traditional class action principles. To the extent that the court refuses to certify a national class in any given case, the defendant will most likely face more but smaller class actions.⁴⁶

C. Strategic Implications of Approach to Jurisdiction

If the courts continue to certify national or international classes, then defendants can deal with the dispute in fewer proceedings. While in some cases it may be advantageous to have an essentially one-front fight that resolves the entire dispute, defendants will be less able to influence the jurisdiction in which the class action is resolved (as national classes entail a certain amount of forum shopping).

⁴⁴ *Silver v Imax Corporation* (2009), 86 CPC (6th) 273 (ON SC) at para 123, <http://canlii.ca/t/2765q>, leave to appeal refused, 2011 ONSC 1035, <http://canlii.ca/t/2fpm6>; *McCutcheon v Cash Store Inc* (2006), 80 OR (3d) 644 (SC), <http://canlii.ca/t/1n7wg>.

⁴⁵ See, for example, *McKenna v Gammon Gold Inc*, 2010 ONSC 1591, <http://canlii.ca/t/28lvv> [*Gammon Gold*].

⁴⁶ As Justice Perell recently observed, fewer class actions “may not be the best way to provide access to justice for the class members of any particular province and the efficiencies of fewer class actions will dissipate...if different regions provide different remedies and causes of action for a particular wrongdoing”: *McSherry v Zimmer GMBH*, 2012 ONSC 4113 at para 104, <http://canlii.ca/t/fs1kc>.

Of course, national classes can also lead to overlapping class actions where class counsel in different jurisdictions ask courts to assert jurisdiction over the same plaintiffs. It can be extremely difficult for courts in different provinces to deal with overlapping class actions. In class litigation across Canada with respect to VIOXX, for example, the Ontario and Saskatchewan courts issued numerous decisions trying to resolve issues of forum, jurisdiction and class membership.⁴⁷ When the dust settled, Saskatchewan residents were not members of any class, and the Ontario multi-jurisdictional action was delayed by seven years.⁴⁸

If *Van Breda* signifies a trend toward a more restrictive approach to jurisdiction, courts may become more conservative about certifying national or international classes in the absence of evidence of a direct connection between a plaintiff and the forum court. If that trend carries over to issues of jurisdiction over plaintiffs in proposed class actions, defendants may be faced with more class actions of smaller size – potentially rendering certain class actions less economical for class counsel to pursue.

D. Enforcing Multi-Jurisdictional Settlements or Judgments

It is critical to resolve the issue of jurisdiction *simpliciter* at the early stages of the dispute. When the courts overreach, defendants may end up litigating and settling (or winning) a national or international class action only to find that a foreign court will not enforce the judgment or settlement. No amount of notice can save a settlement if the court does not have the jurisdiction to approve it in the first place, as notice cannot give the court jurisdiction it does not have.⁴⁹

Best Practice

To avoid problems with enforcement in multi-jurisdictional class actions, the court's jurisdiction over members of the class should be resolved at the earliest opportunity.

Given the risks, the question of jurisdiction over out-of-province plaintiffs should be considered and resolved early. Indeed, certification judges can use principles of jurisdiction *simpliciter* to address certain issues

⁴⁷ *Settingington v Merck Frosst Canada Ltd*, [2006] OJ No 376; *Wuttunee v Merck Frosst Canada Ltd*, 2008 SKQB 78; *Wuttunee v Merck Frosst Canada Ltd*, 2008 SKQB 229; *Wuttunee v Merck Frosst Canada Ltd*, 2008 SKCA 80; *Tiboni v Merck Frosst Canada Ltd* (2008), 295 DLR (4th) 32; *Mignacca v Merck Frosst Canada Ltd*, [2008] OJ No 4731; *Mignacca v Merck Frosst Canada Ltd* 95 OR (3d) 269; *Wuttunee v Merck Frosst Canada Ltd*, 2009 SKCA 43; *Mignacca v Merck Frosst Canada Ltd* 2009 ONCA 393; *Mignacca v Merck Frosst Canada Ltd* (2009), 315 DLR (4th) 563.

⁴⁸ In contrast, in the United States, the parties reached a settlement by November 2007 and by July 2010 almost 33,000 plaintiffs had received settlement payments.

⁴⁹ Of course, the failure to give proper notice to out-of-province plaintiffs can result in Canadian courts refusing to enforce foreign multi-jurisdictional settlements that purport to bind Canadians because the Canadian class members' procedural rights were not protected: *Canada Post Corp v Lépine*, 2009 SCC 16, <http://canlii.ca/t/22zdq>.

associated with multiple class actions: it may be that seemingly overlapping proposed class actions do not, in fact, overlap because the courts find that they only have jurisdiction over plaintiffs resident in their own forum. When jurisdiction is applied in this restrictive (some would say judicious) manner, class counsel may have to start class actions in multiple jurisdictions, in which case effective coordination of the actions is critical to ensure consistent and efficient resolution of the dispute. The recently adopted ABA and CBA Protocols, discussed below, may assist in coordinating multiple class actions.

V. Protocols for Multi-Jurisdictional Class Actions

In August 2011, the American Bar Association (“ABA”) and the Canadian Bar Association (“CBA”) both adopted Protocols that are meant to address the challenges of coordinating and managing overlapping multi-jurisdictional class proceedings.⁵⁰ The ABA Protocols were developed by a cross-border team of academics, lawyers and judges. Subsequently, the CBA Task Force created a parallel Protocol and also adopted the ABA Protocols.

The CBA and ABA Protocols seek to: (1) improve communication between counsel in related class actions; (2) establish standard notice requirements for multi-jurisdictional class actions; and (3) allow court-to-court communications to facilitate such actions. However, the CBA Protocol does not address certain fundamental problems related to multi-jurisdictional class proceedings in Canada. For instance, the CBA Protocol does not provide a framework for nationally accepted carriage motions in Canada.⁵¹ Furthermore, compliance with the CBA Protocol is still largely based on consent, such that it remains to be seen the extent to which the Protocols will assist in cases where the parties are not already cooperating. However, they contain a number of tools to assist in coordinating multi-jurisdictional class actions, including permitting court-to-court communications and joint hearings.

A. Counsel Communication Requirements

The CBA and ABA Protocols contain requirements designed to allow counsel in related actions to receive notice of developments in all of the actions. Both the ABA and CBA Protocols require

⁵⁰ The ABA Protocols are *Protocol on Court-to-Court Communications in Canada-U.S. Cross-Border Class Actions* and *Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings*, and can be found at http://www.americanbar.org/content/dam/aba/events/labor_law/am/1106_aball_int_crossborder_class_action_coordination.authcheckdam.pdf. The Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions can be found at http://www.cba.org/CBA/ClassActionsTaskForce/PDF/Protocol_eng.pdf.

⁵¹ *Consultation Paper: Canadian Judicial Protocol for the Management of Multi-jurisdictional Class Actions*, The Canadian Bar Association, June 2011, at p 6. This paper can be found at http://www.cba.org/CBA/ClassActionsTaskForce/PDF/Consultation_eng.pdf. Additionally, although the draft protocol included case management tools that would have allowed courts to communicate for the purpose of coordinating and scheduling proceedings, these tools were removed due to objections from the bar.

counsel to inform the court of any related class actions that are known to them. The ABA Communication Protocol designates one Plaintiff and one Defendant as “Liaison Counsel” who are responsible for providing materials to other courts involved in related class actions.⁵² The CBA Protocol does not designate specific Liaison Counsel, but requires that counsel create a Notification List of counsel in all related class actions and requires that notice of any motions will then be given to the entire Notification List.⁵³

Additionally, the CBA Protocol requires counsel to post the pleadings in their action on the CBA class action database.⁵⁴ This will make the class action database a more comprehensive and useful tool for class action counsel, but its effectiveness depends on counsel voluntarily complying with the CBA Protocol or being ordered to do so by the court.

The Protocol communications requirements facilitate the flow of information for both counsel and the courts in related class proceedings. They will be especially effective in circumstances where counsel are not cooperating with one another. Keeping the courts up to date on developments in related actions will help avoid inconsistent decisions.

B. Notice in Multi-Jurisdictional Settlements

Some of the most welcome provisions of the Protocols assist with coordination in the context of the settlement of multi-jurisdictional class actions.⁵⁵ The CBA and ABA Protocols set out the information that must be included in the notice of settlement to ensure that it is suitable in all jurisdictions.⁵⁶ A multi-jurisdictional settlement notice must include, among other things:

- A summary of the case;
- The class definition(s);

⁵² ABA Protocol on Court-to-Court Communications in Canada – U.S. Cross-Border Class Actions, at para 6.

⁵³ Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions, at paras 5 and 6.

⁵⁴ The database was initially established on the recommendation of the Uniform Law Conference of Canada. The database has not been consistently used by plaintiff’s counsel in the past (despite practice directions requiring submission of materials to the database being issued by many provincial courts).

⁵⁵ Under the CBA Protocol, parties seeking approval for a settlement that applies to more than one class action bring a motion for Multi-jurisdictional Class Settlement Approval that is served on all parties and filed in all courts in which proceedings have been commenced.

⁵⁶ The requirements in the CBA Protocol are almost identical to those outlined in the ABA Notice Protocol, except for the requirements in the CBA Protocol to include (1) an explanation of how to obtain a copy of the originating process and (2) the method of filing a proof of claim. The ABA Notice Protocol also requires that the notice disclose any compensatory or other benefits payable or requested by the class representatives.

- A description of related class actions;
- The terms of the settlement, the nature and amount of relief, its allocation and distribution;
- If practical, information that allows class members to estimate their individual recoveries;
- The method for filing a claim for recovery;
- The fees sought by class counsel;
- The method and consequences of opting out of or objecting to the settlement; and
- A statement that the settlement is binding.

Additionally, the ABA Notice Protocol requires that the notice must be in plain language, responsive to the demographic composition of the class, in English and French (if class members reside in Canada), and should not be an advocacy piece for either side.⁵⁷

The notice requirements create a standard against which the courts can measure the adequacy of a national settlement notice.⁵⁸ The requirements will help to avoid cases like *Currie v McDonald's Restaurants Canada Ltd*,⁵⁹ where the Ontario Court of Appeal refused to enforce a court-approved settlement in an Illinois class action that purported to include Canadian class members. In *Currie*, the Court found that the Illinois court had not properly exerted jurisdiction over Canadian class members because the notice given to those class members was not adequate.⁶⁰

Best Practice
 To ensure enforcement in multi-jurisdictional class actions, counsel on both sides of the border should pay close attention to the notice requirements outlined in the CBA and ABA Protocols.

As a result, the defendant, having negotiated what it thought was a global settlement, was once again exposed to claims from Canadian litigants.

Finally, the CBA Protocol allows the courts to appoint a designated Settlement Administration Judge who may determine any dispute arising from the settlement agreement regardless of the jurisdiction in which that dispute arises.⁶¹ This feature will streamline disputes related to the settlement administration process.

⁵⁷ While notice may be adapted to suit different media used for dissemination, a long form of notice containing all the required information specified in the ABA Notice Protocol must be available to class members.

⁵⁸ The ABA Notice Protocol also specifies the contents of notice to be given in respect of certification.

⁵⁹ (2005), 74 OR (3d) 321 (CA), <http://canlii.ca/t/1js21>.

⁶⁰ The American class members received a more comprehensive notice than the Canadian class members.

⁶¹ Although each Court will retain jurisdiction to deal with issues arising from their respective orders.

C. Court-to-Court Communications

Both the CBA and the ABA Protocols encourage court-to-court communications to help courts avoid conflicting decisions. Although the CBA Protocol allows courts to communicate only in the settlement context, the ABA Communication Protocol encourages courts to communicate whenever there is commonality among substantive or procedural issues in the proceedings. Both the CBA and ABA Protocols limit the subject matter of court-to-court communications to procedural questions, issues of coordination and other non-substantive matters.⁶² The ABA Communication Protocol also requires that counsel be given advance notice as well as a subsequent summary of the communications.

The Protocols formalize an approach that has been taken voluntarily in many complex class action settlements as a result of informal cooperation between counsel and the courts in various provinces.⁶³ The CBA Protocol was used in a recent settlement with the Hershey Company in *Osmun v Cadbury Adams Canada Inc*,⁶⁴ a price maintenance class action that was brought in Ontario, British Columbia, and Québec. Each of the courts issued a multi-jurisdictional case management order pursuant to the CBA Protocol and approved standard short-form and long-form notices of hearings and a plan of dissemination for both notices.

The certification and settlement approval motions proceeded by way of joint videoconference before the three courts and the plaintiffs were allowed to file a joint motion for approval of class counsel's fees.⁶⁵ Counsel for all parties permitted the presiding judges to discuss the matter via conference call after the hearing without the presence of counsel. The courts and counsel agreed that the adoption of the CBA Protocol and the use of the teleconference resulted in an efficient hearing.

The CBA Protocol codifies a framework for multi-jurisdictional settlements that will help to prevent courts from inadvertently stepping on each other's toes. Additionally, the Protocols provide efficiencies in coordinating complex hearings (under the ABA Protocols) or settlements (under both the ABA and CBA Protocols) that may save parties both time and costs.

⁶² Specifically, the CBA Protocol allows courts to communicate only for the purposes of scheduling hearings, determining the content of the approval order(s), determining the manner and form of notice to class members, completing the administration of the settlement, and assessing any other issues relevant to the settlement approval process.

⁶³ See, for example, the 2008 *Menu Foods* settlement, where judges from nine provinces convened via videoconference (in what one counsel described as a "Hollywood Squares" formation) to approve the settlement of a class action concerning allegedly tainted pet food.

⁶⁴ 2012 ONSC 3837, <http://canlii.ca/t/frxtw>.

⁶⁵ Note that the fee approval motions were dealt with jointly for Ontario and B.C. but separately for Québec.

D. Protocols Not Binding Without a Court Order

While the Protocols are recommended best practices, they do not bind counsel unless a court incorporates them into a court order. In fact, both the CBA and ABA Protocols allow the Protocols to be applied in whole or in part. This allows parties additional flexibility to craft a customised Protocol that suits their needs. If the parties cannot consent, a court may still choose to adopt the Protocols and require counsel to follow them.

In *Sophie St-Marseille v Proctor & Gamble Inc.*,⁶⁶ the Québec Court recently decided to incorporate the CBA Protocol into a court order despite objections by the plaintiffs. Six class actions had been commenced in five provinces: one in each of Ontario, Manitoba, Saskatchewan, British Columbia, and two in Québec. Each of the actions proposed a national class that would apply to all Canadians. Proctor & Gamble sought an order to apply the CBA Protocol, which the plaintiffs resisted.

The Court observed that there is a heightened obligation to keep potential plaintiffs fully informed when certification is sought on a national level. As such, the Protocol would ensure that all parties in all six actions would receive notice of motions being brought in other jurisdictions. Applying the Protocol would be consistent with the principle of transparency in the judicial system and would not be financially onerous for the plaintiffs. The Court noted that applying the Protocol would help the courts in different jurisdictions communicate effectively.⁶⁷

Although the application of the Protocol may result in efficiencies over the long term, if a party contests the Protocol's application, a motion to apply the Protocol may simply add another delay to the resolution process.

VI. Concluding Thoughts

Multi-jurisdictional class actions raise complex legal and practical issues for litigants and the courts. Coordination of multiple proceedings is an imperative in view of the goals of class proceedings legislation to improve access to justice and increase judicial economy. However, in practice, these goals sometimes seem irreconcilable with certain practical realities – particularly, when each province is bound by principles of jurisdiction *simpliciter* and each has its own class proceedings legislation, rules, case law and practices. These complexities are often exacerbated when groups of plaintiffs or class counsel are vying for carriage of a proposed national class action.

⁶⁶ 2012 QCCS 1527, <http://canlii.ca/t/fr09q>.

⁶⁷ The plaintiff argued that the Court should not apply the CBA Protocol since it was not a law, regulation or Rule of Practice, but merely a suggested best practice. The Court dismissed this argument, and found that it was appropriate to apply the CBA Protocol since: (1) the Protocol will likely be declared a formal Rule of Practice in fall 2012 and (2) the Protocol is similar to the CBA's Rules of Professional Conduct, which are often referred to by the courts.

In conclusion, we can tailor the wide array of strategies for responding to class litigation in Canada to achieve each client's ultimate objectives, provided that we have a well-developed understanding of the client's acceptable risk profile and the support needed to engage in meaningful early assessment of the case. Further, litigation readiness and close coordination of international teams (internal and external) are critical to managing complex multi-jurisdictional class actions seamlessly and efficiently. With these essentials in place, we are best able to respond effectively to new cases as the law on multi-jurisdictional issues evolves and, indeed, to lead as we enter the next generation of class actions in Canada.

Schedule A: Class Action Readiness

The components of class action readiness include:

- Reviewing compliance/occurrence reporting policy
- Establishing privileged communication channels
- Identifying and centralizing decision-making authority
- Creating a process for conducting internal reviews/investigation
- Preparing plans and initiatives for e-discovery
- Reviewing and updating insurance coverage
- Managing the institutional perspective on litigation
- Implementing a robust document preservation and litigation hold policy
- Defining a communications plan
- Considering how to avoid a class action before it begins

Once a class action event occurs, the race belongs to the swift. Therefore, defendants must:

- Get control of the facts and documents
- Identify internal resources
- Engage external counsel and experts
- Manage relations with any regulators
- Consider public relations strategy and engage appropriate advisors
- Consider multi-jurisdictional implications
- Consider strategic options (jurisdiction, pleading, motions)
- Open a dialogue with class counsel
- Consider creative solutions (early mediation, non-cash consideration)