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CROSS-BORDER CLASS ACTIONS— A CANADIAN PERSPECTIVE

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CLASS ACTIONS IN CANADA: A SURVEY OF RECENT DEVELOPMENTS

Canadian class actions (also called "class proceedings") are procedures whereby one or more representative plaintiffs may commence a civil action on behalf of a larger class. While they are fundamentally similar in concept and form to class actions under the U.S. Federal Rules of Civil Procedure, there are many important differences.

All Canadian jurisdictions have class actions. Several Canadian provinces[1] have enacted legislation enabling class actions[2]. In provinces that do not have class action legislation, the Supreme Court of Canada has extended the right to bring class actions notwithstanding the absence of legislation, effectively creating a "common law" class action. [3]

The rules of the Federal Court of Canada also permit the certification of class actions. Unlike the Federal Court in the United States, the Federal Court of Canada has a very narrow statutory civil jurisdiction, as it has no pendent, ancillary, diversity or common law jurisdiction.

No MDL or other co-ordinating procedure currently exists in Canada for class actions brought in multiple jurisdictions, although the judiciary is prepared to consult and informally co-ordinate to achieve judicial economy.

In all Canadian jurisdictions, the proposed class claim must raise common issues that may be determined with respect to the class as a whole, and the proceeding must be determined by the Court to be a preferable procedure for the resolution of the claims of the representative plaintiffs and putative class members. Before a class action may proceed, the Court must certify it as such.

Although Canadian class action legislation has been explicitly drafted to make certification easier than in the United States, Canadian courts (with the exception of Québec) have interpreted the legislation in a relatively conservative fashion. Notwithstanding this, class actions have been commenced and certified in a range of circumstances including investor misrepresentation, securities fraud, defective and dangerous products, franchising, and standard form contracts.

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1. Canada's federal system of government includes 10 provinces and three territories. For simplicity, references to provinces should be taken to include the territories.
2. Ontario, British Columbia, Manitoba, Saskatchewan, Alberta, Québec, Newfoundland and Labrador. Class action legislation is pending in New Brunswick.
3. *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.)

PROCEDURE

1. Commencement of a Class Action

In all Canadian provinces, other than Québec, a class action is commenced by a statement of claim (i.e. complaint) in which the proposed representative plaintiff or plaintiffs identify an intention that the action proceed as a class action.

In Québec, class actions are commenced by a motion seeking an authorization to institute a class action, which is determined prior to the filing of the actual statement of claim in the action. Québec allows for classes of natural persons and companies with fewer than 50 persons.

Whether by a motion for authorization in Québec or a statement of claim in the rest of Canada, the initiating document will generally describe the proposed class definition.

2. Test for Certification

The judicial determination of whether to certify the proceeding is made on the basis of a certification motion. These motions are brought on the basis of lengthy affidavits with numerous attached exhibits. Affidavits from experts with respect to various aspects of the certification requirements are often submitted at this stage.

In certification motions, the onus is on the plaintiff to demonstrate that the test for certification has been met. Although the test varies slightly from province-to-province, plaintiffs must generally establish that:

- The pleadings disclose a cause of action;
- There is an identifiable class of two or more persons that would be represented by the representative plaintiff(s);
- The claims of the class raise common issues;
- A class proceeding would be the preferable method for resolution of the common issues; and
- A representative plaintiff has been identified who fairly and adequately represents the class, has no conflict of interest with other class members on the common issues and has produced a plan of proceeding that is workable.

There is no requirement that common issues predominate over individual issues, although the legislation in British Columbia, Alberta and Newfoundland permits the court to have regard to that factor in its analysis of preferability.

While Ontario decisions in 2004[4] and 2005[5] appeared to lower the threshold for certification in that largest of the common law provinces, a recent decision in Ontario in the case of *Dumoulin v. Ontario*[6] reemphasized the certification threshold and the onus on the plaintiff to demonstrate that the threshold for certification has been met. The *Dumoulin* case involved a proposed class action on behalf of persons who had been exposed to toxic mould at an Ontario courthouse. Certification was opposed on the basis that the difficulty with attributing causation to the claimed health effects asserted by each proposed member of the class would outweigh any advantage to be achieved by a proposed class action. The major issue for the court was the conflicting scientific and medical evidence with respect to the nature of the alleged common issues.

At the initial hearing, the court noted that the determination of causation would require protracted and expensive individual trials that would necessitate expert evidence. The judge also noted that the litigation plan put forward by the plaintiff did not adequately address how the complex individual issues of causation and damages would be determined or how the financial burden of addressing those individual issues would be addressed. The court therefore adjourned the hearing to permit the plaintiff to file supplemental material in support of certification including a revised plan of proceeding.

At the further hearing, the court reviewed the additional materials it had received and denied the motion for certification, concluding that the complexity of the individual trials that would be needed would overwhelm any advantage which might otherwise be obtained through the trial of the proposed common issues. The court further held that where the question of preferable procedure depends on a disputed question of fact (in this case the issue of whether the methodology of the plaintiff's expert constituted proof of exposure to biotoxins), the motions judge should decide the question of fact at the certification motion and not at the common issues trial.

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4. *Cloud v. Canada (A.G.)* [2004] O.J. No. 4924 (QL)
5. *Pearson v. Inco Ltd.* [2005] O.J. No. 4918 (QL)
6. [2006] O.J. 1233 (QL), following the decision previously issued at [2005] O.J. No. 3961 (QL)

Of importance was the court's affirmation that the question of fairness must be examined from both the perspective of the plaintiff and the defendant. In this particular case, one of the significant issues was whether anyone other than the proposed representative plaintiff would enforce their individual claims. In considering this issue the judge stated:

> The requirement of fairness involved in an inquiry into the preferable procedure applied particularly to defendants. In this case, they should not be required to defend an action brought ostensibly on behalf of a class of, possibly, 500 persons if there is reason to believe that few, if any, of them would be willing to attempt to enforce their individual claims...
>
> The evidence provided by the plaintiff does not persuade me that certification would have any appreciable effect on access to justice. Even if, without evidence, I were to conclude that it is likely that an appreciable number of class members would attempt to enforce their claims, the difficulty and the complexity of the issues involved in the individual trials would, in my opinion, overwhelm any advantage to be obtained from a trial of the common issues that have been identified. Quite apart from the difficulty of establishing causation between exposure to toxic mould and the injuries allegedly suffered by each class member, it would be inevitable that much of the ground traversed at the trial of common issues would have to be revisited in determining, in each case, whether the claimant was exposed to dangerous levels of mould at particular locations in the courthouse, and in linking this to the defaults of particular defendant. The plaintiff has not, in my judgment, discharged the burden of proving that a class proceeding would be preferable to individual proceedings by persons—if there are any—who are prepared to assume the financial risks attaching to them.

In Québec, the test for certification provided by article 1003 of the *Code of Civil Procedure*[7] requires the court to determine whether:

- The recourses of the members raise identical, similar or related questions of law or fact;
- The facts alleged seem to justify the conclusions sought;
- The composition of the class makes the application of article 59 C.C.P. (person using the name of another to plead) or 67 C.C.P. (joined claims) difficult or impracticable; and;
- The member to which the Court intends to ascribe the status of representative is in a position to represent the members adequately.

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7. *Code of Civil Procedure*, R.S.Q., c.C-25 (C.C.P.)

Of importance is the fact that if a class action is authorized in Québec, the decision cannot be appealed by the respondent, but if the class action is not authorized the would-be plaintiff has a right of appeal. Québec's procedure is further unique in that rights of the respondent to adduce evidence prior to and at the certification is discretionary (article 1002 C.C.P.).

3. Timeline for Certification

With the exception of Québec, where the motion for authorization usually sets a date on which the first court appearance is to be made, other provincial class action legislation requires that the certification motion is to be brought within 90 days of the date a defence is delivered. In practice, however, motions for certification have been brought well outside the 90-day period and defences are generally not filed in defence of the action prior to certification unless insisted upon by plaintiffs' counsel or required by the court.

A timetable leading up to certification in all provinces is worked out either between the parties, or at the direction of the judge assigned to manage the action through to the conclusion of the certification motion. Generally speaking no schedule for the hearing of the certification motion is set unless plaintiffs' counsel takes the initiative of arranging for a case conference with the case management judge who will then work with counsel in setting a timeline for the delivery of the plaintiff's certification motion materials, the delivery of responding materials, a date by which cross-examination on affidavits is to take place, dates by which legal argument (briefs) are exchanged and a date or series of dates for the argument of the certification motion. Typically, the time line for the steps leading up to certification motion may range from six to eight month.

While preliminary motions may be brought in advance of the certification motion, in practice these are only brought with leave of the court. Recent decisions suggest that only certain motions which may narrow the litigation substantially or dispose of the issues in the action will be permitted by the court in advance of the certification motion. When such motions are permitted by the court, this will usually mean that setting of the certification motion timetable will await the outcome of the preliminary motion or motions.

4. Jurisdictional and Multiplicity Issues

The legislation of Ontario, Manitoba and Québec permits the certification of a mandatory "opt-out" national class.

In the other provinces with legislation, while a national class may certified, only the residents of the province in which the action is commenced are bound by the proceeding unless they opt out. Residents outside those province may "opt in" to the proceeding and become part of the class, if the certification order provides for this. The situation in provinces without legislation is unclear.

Where two or more class actions are commenced in the same province in respect of the same alleged harm against the same defendants, either the plaintiffs' counsel will come to an arrangement as to which action will proceed, or the question will be decided by the court on a carriage motion. Defendants are not parties to a carriage motion.

Where two or more actions are commenced in two or more provinces in respect of essentially the same alleged harm against the same defendants, those separate actions can proceed independently. These may be subject to challenges on the basis of jurisdiction and *forum conveniens*. While there are a few examples of the provincial courts engaging in informal co-ordination of multi-jurisdictional class actions, the law in this area is developing slowly, and, in the absence of an effective federal jurisdiction and any MDL processes, will play a significant role in the management of these types of proceedings.

5. Legal Fees

In Ontario, Alberta and Québec, if a certification motion is dismissed, it is within the discretion of the judge hearing the motion to award an amount on account of legal fees (or "costs" as they are called here) to the successful defendants. Recent Ontario decisions on this point appear to signify an increasing judicial comfort with granting legal fee awards to defendants in such cases. That being said, the quantum of legal fees awarded has been inconsistent and collection can be challenging.

British Columbia, Manitoba, Saskatchewan and Newfoundland and Labrador are "no-costs" jurisdictions in which costs will only be awarded on certification motions in rare and exceptional circumstances.

SOME KEY DIFFERENCES BETWEEN CANADIAN AND U.S. CLASS ACTIONS TO KEEP IN MIND

There are a number of practical differences between class actions in Canada and the United States. Some of these are:

- There is no requirement of predominance or numerosity for a Canadian class action. The courts have endorsed the weighing of common issues in relation to individual issues as part of the preferability analysis, but have explicitly rejected a requirement that common issue predominate over individual issues.
- Canadian courts have explicitly adopted a highly purposive test in considering the preferability of a class action for certification, explicitly considering whether the proposed action will promote the class action goals of access to justice, judicial economy, and behaviour modification.
- For those provinces which allow jury trials in civil actions either party may request that the common issues trial proceed before a jury. However, there is no right to trial by jury in a civil action in Canada, and the few class actions that have proceeded to trial have been determined by a judge without a jury;
- Courts have approved levels of contingent fees for plaintiff's lawyers which, although much greater than the norm in Canada, are relatively low compared to the fees approved in litigated and settled cases in the U.S. Such fees are often determined as a multiplier of actual time spent by plaintiffs' counsel on the file;
- Both compensatory and punitive damage awards tend to be much smaller in Canada than in the United States and are more subject to appellate review; and
- There is no federal civil jurisdiction of significance in Canada, and any class action of significance will proceed in one or more provincial courts. The management of multiple proceedings is subject to the common law approaches to jurisdiction and forum conveniens.

CROSS-BORDER AND RELATED ISSUES

With the expansion of class action legislation across Canada and the recognition that a class action can be brought in those provinces without legislation, Canada is experiencing a rapid growth in lawsuits which copy claims being pursued in the United States.

Carriage disputes, forum shopping and copycat lawsuits are seen as opportunities for plaintiffs' counsel to advance their position. Indeed, no one would dispute that view. At the same time, defence bar look at each of these procedural issues to discover what strategic advantages may be gained, or what defensive posture should be taken.

COPYCAT ACTIONS:

Since the introduction of class actions in Ontario there has been a proliferation of actions that share common issues and defendants (or related defendants) as proceedings in the United States. This has given rise to a number of procedural and substantive issues arising from the interplay, or potential interplay of proceedings in the two jurisdictions.

In *Vitapharm,* Canadian plaintiffs sought access to discovery evidence that was under protective order in a parallel U.S. lawsuit *re: Vitamins Antitrust Litigation.*[8] The defendants in both the Canadian and U.S. action opposed the plaintiff's action and moved in Ontario to have the plaintiffs restrained from obtaining the evidence. It was in this context that Cumming J., made the following statement:

> As a result of the inexorable forces of globalization and expanding international free trade and open markets, there will be an ever-increasing inter-jurisdictional presence of corporate enterprises. This is seen particularly in respect of American and Canadian business activity, given the extent of cross border trade. If both societies are to maximize the benefits of expanding freer trade and open markets, the legal systems of both countries must recognize and facilitate and expedious, fair and efficient regime for the resolution of litigation that arises from disputes in either one or both countries.[9]

Though we are a long way from formal cooperation between American and Canadian courts, Cumming J's comments also speak to the need for counsel across borders to collaborate. Indeed, experience has shown that much can be gained by communicating with our American colleagues when facing a class action on a matter that is in progress, settled or has

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8. *In re: Vitamins Antitrust Litigation, Memorandum Opinion re: Canadian Plaintiffs' Motion to Intervene,* (19 March 2001) MDL No.1285 (Dist. Columbia).
9. *Vitapharm* (26 January 2001) Cumming J. 99-GD-46719 (S.C.J.)

been tried in the United States. Cross border sharing of documents, information and experts is particularly fruitful.

Daubert-style rulings on admissibility of evidence can be helpful when trying to assess the reliability and relevance of expert testimony. Using the *Daubert* test, courts will consider:

1. Whether the scientific theory or technique can be and has been tested
2. Whether it has been the subject of publication and/or peer review
3. The known or potential rate of error
4. The existence or maintenance of standards controlling the technique's operation
5. General acceptance in the scientific community.[10]

Having access to a judicial determination on this type of information can give the defence counsel a head start in determining the merits of a claim in a pharmaceutical, product liability or environmental class action.

The case of *Currie v. Macdonald's Restaurants of Canada Ltd.*[11] is a good example of how advance communication across borders can enhance the effectiveness of class action resolutions. Between January 1, 1995 and December 31, 2001, Macdonald's sponsored numerous games at its restaurants across North America. In the course of running these games a rogue employee of the marketing company hired to administer the contests, diverted a significant number of prizes to his own benefit and to the benefit of his friends. Class proceedings were commenced in Illinois and subsequently settled with an agreement being concluded which would have application across North America. Prior to seeking to have the settlement approved in Illinois and despite the fact that Canadian objectors appeared at the U.S. fairness hearings, there was no consultation with Canadian defence counsel with respect to the propriety of the settlement nor was the proposed notice campaign vetted to ensure consistency with the practice followed in Canada. A so-called "Notice Expert", while having prepared a reach and frequency analysis for the United States, did not do so for the Canadian claimant population.

When Canadian class proceedings were commenced, Macdonald's unsuccessfully sought to have the settlement they had reached in the parallel American action enforced in Canada. The Ontario Court of Appeal

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10. *Daubert v. Merrell Dow Pharmaceuticals, Inc* (1993), 509 U.S. 579(QL).
11. [2005] O.J. No.506.(QL).

refused to overturn the decision of the motions judge and found that the notice campaign was inadequate and violated the principles of natural justice. The Court held that provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out of a foreign class proceeding.

The lesson learned from this case is that had counsel for parties in the Illinois action consulted with Canadian counsel experienced in the prosecution or defence of class proceedings they may have avoided the inability to enforce the Illinois judgment in Canada and they may have discovered that their notice campaign was inadequate for Canadian class members. Had they corrected their plan it is conceivable that procedural fairness would have been achieved and been recognized by the Canadian court which would have resulted in the settlement being enforced in Canada. The Court has made it clear that it will assess the adequacy of the notice given to proposed members of the class with reference to clarity of the notice, the method of dissemination of notice and the standard of the notice given. While not specifically stated as a factor in refusing to enforce the Illinois settlement, the Courts in Canada appear to also be willing to examine the adequacy of the settlement to ensure both that the affected members are treated appropriately in relation to other class members situate within the jurisdiction seeking to enforce the settlement and the settlement itself is fair, reasonable and in the best interest of the class. (these being the general standards by which Canadian Courts consider settlements in their respective provincial jurisdictions).

The decision in the matter of *Currie* v. *McDonald's Restaurants of Canada Ltd.*[12] was followed by decisions of the Québec Superior Court in *Lépine v. Canada Post*[13] and *HSBC v. Hocking*[14] refusing to bind Québec residents to a settlement concluded in Ontario.

In the matter of *Lépine*, a class has been certified in Ontario which included Québec residents. A distinct class action Motion had been filed in Québec covering all Québec residents. Two sets of notices had been sent to Québec residents, one concerning the Québec class and the other with respect to the Ontario class action. Upon concluding the settlement

12. *Supra* note 11.
13. [2005] Q.J. no. 9806.
14. *HSBC Bank Canada* v. *Hocking*, [2006] J.Q. no. 507 (S.C.).

Ontario, the defendant filed a motion to have the Québec Superior Court recognize and declare enforceable the Ontario decision, which would have brought about the dismissal of the Québec proceedings.

Baker J. of the Québec Superior Court relied on the principles set forth in *Currie* v. *McDonald's Canada* to determine whether the residents of Québec had been treated fairly by the Ontario judgment and whether the laws of Québec were compatible with Ontario legislation with respect to protection of the class members in an action of this nature. The Court found that although proper notification had been given in Ontario, it was in itself insufficient to enforce the recognition of an Ontario judgment in Québec.

In the *Hocking* case[15], the Superior Court of Québec dismissed a Motion to enforce an Ontario judgment on the basis that the Ontario Court had no jurisdiction over the class members residing in Québec. *Hocking* was seeking the certification of a class action on behalf of all Canadian customers of HSBC who had incurred a penalty because of an early pay-out of their mortgage loan. A similar class action Motion had been filed in Québec by David Haziza before the Superior Court alleging identical grounds and seeking a similar remedy but limited to Québec residents. Haziza had attempted unsuccessfully to intervene in the Ontario Superior Court class action, but his intervenor status had been denied following the approval of the settlement in Ontario. *HSBC* filed a motion to have the Ontario decision recognized by the Québec Courts, which was contested by Haziza. Roy J. determined that there was no "real and substantial connection" between the Ontario jurisdiction and the cause of action. More particularly, there was no significant connection between Ontario and *HSBC's* alleged practices in Québec. In addition, it was held that there had been a breach of the principles of "order and fairness" as the Québec class representative had attempted unsuccessfully to intervene before the Ontario Court to state his position about the proposed settlement. Furthermore, the notices to the Québec residents were found to be inadequate as they did not clearly mention that the class member would not receive any compensation in virtue of the settlement and that the proceeds would be paid to charities. Lastly, the Court found that the Ontario Court should have declined to consider a case covering class members residing in Québec, but by virtue of the principles of *forum non conveniens.* Like the matter of Currie, these two subsequent decisions from Québec have confirmed the legitimacy of interjurisdictional class actions, but are also set-

15. *Supra*, note 14.

ting the rules that should be applied in terms of procedural fairness and adequate notification.

FORUM SHOPPING

Much has been written by plaintiffs' lawyers about which jurisdiction in Canada is the best one in which to start an action. The extent to which legislation supports a national class, opt in and opt out regimes, the different costs rules and the approaches to the test for certification have all been the topics of comparative study between the provinces. It makes sense that it is the counsel who initiates the action for their clients who have a strong interest in the differences between jurisdictions.

In some cases, the choice of forum may be based on a desire to achieve a comprehensive and expedient jurisdiction with the ability to address a national class. For these, Ontario and we expect in due course Manitoba, currently seems to be the forum of choice. It has the best and most persuasive case law in the country for defendants in the common law provinces. Ontario judges are extremely experienced in class action procedure. It has a solid network of both plaintiff and defence counsel who have an ability to coordinate large actions across jurisdictional lines. Though Ontario does not have a U.S. predominance test, with the Supreme Court trilogy (*Western Canadian*[16], *Hollick*[17] and *Rumley*[18]) we approach a requirement similar to a predominance test. In *Hollick*, the court found that the test for common issues was satisfied when the resolution of an issue is necessary to the resolution of each class members' claim. The common issue must be a "substantial ingredient" of each of the class members' claims.[19]

Québec, while a significant and necessary jurisdiction in which to achieve an acceptable Canada-wide class, seems to be the least favourite jurisdiction for defendants who view the legislation as being extremely consumer oriented. There is an experienced bench, plaintiff and defence bar in Quebec as it was the first of the Canadian provinces to allow class actions. Nonetheless, lawyers in Quebec are anxious about an authorization process (certification) that can actually preclude the filing of evidence in opposition to a certification motion. Since the facts alleged in the motion for authorization are deemed to be true, the rules of evidence give an advantage to the petitioner. This amended procedure in Quebec has

16. *Western Canadian Shipping Centres v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.)
17. *Hollick v. Toronto* (2001), 205 D.L.R. (4th) 19 (S.C.C.)
18. *Rumley v. B.C.* (2001), 205 D.L.R. (4th) 39 (S.C.C.)
19. *Rumley supra*, at para. 21.

been the subject of both a Court of Appeal and Supreme Court of Canada challenge in the case of *In re Pharmascience Inc.* v. *Option Consommateurs* (C.A.M. 500-09-014659-049 (April 29, 2005) (leave to appeal to the Supreme Court of Canada refused).

The more recent decision of the Quebec Superior Court in *Billette v. Toyota Canada Inc. et al*[20] further demonstrates a more plaintiff oriented attitude toward certification and confirms the unique position taken by Quebec Courts that the plaintiff(s) need not have a cause of action against every defendant against whom certification is sought. In *Billette* the court certified a class proceeding against a number of auto manufacturers and distributors in relation to fees charged at the time of purchase financing of a vehicle, notwithstanding the fact that the named representative only had a contract with one auto manufacturer. In examining the certification test the court stated:

> The questions of law and fact raised on the occasion of the bringing of a class action do not all have to be identical, similar or related *(Comité d'environnement de la Baie v. Société d'électrolyse et de chimie Alcan,* [1990] R.J.Q. 655 (C.A.)). It is sufficient that the answer to one or more of them make it possible to establish the defendant's liability to each member of the group, and that this answer constitutes a material stage in the settlement of each member's claim. The special conditions of each individual claim may raise questions that are not identical, similar or related but these, as the case may be, can be examined at the individual claims settlement stage (Articles 1037 and following C.C.P.).

The issue of the multiplicity of defendants was recently argued before the Court of Appeal in *Bouchard* v. *Agropur*[21]. In this matter, the class representative filed a class action Motion against 3 dairy product companies alleging misrepresentations with regard to the percentage of fat in their respective milk products. It was established that the class representative had only purchased milk products from one of the defendants. The other two were arguing that there was no cause of action against them as raised also in the *Billette*[22] case. A decision on this quite sensitive issue is expected shortly by the Court of Appeal.

The Québec legislator has certainly made its class action procedure more flexible and certainly more favourable to the class representative. This is evidenced by the fact that there is no appeal by the defense from a certification decision, in addition to the fact that the legislator has consid-

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20. No: 500-06-000184-024 (released August 25th, 2005).
21. Q.C.A. 500-09-005067-050.
22. *Supra* note 20.

erably simplified the contestation of a class action in order to make the process more efficient and definitely more accessible.

Despite the fact that the rules governing class actions have been relaxed in Québec, the class representative still has to show a serious cause of action to succeed at the certification level. In the presence of minimalist or unsubstantiated allegations simply to meet the low threshold of article 1003 C.C.P., the Court will not hesitate to dismiss a class action if it concludes that the recourse is vague and imprecise as to the factual basis of the recourse against the respondent, as it was held in the matter of *Option Consommateurs et al* v. *Novopharm*[23].

CARRIAGE MOTIONS

In *Vitapharm v. Hoffman LaRoche*[24], the court set out the criteria that judges should use to choose between competing plaintiffs' counsel. The firm who will represent the class must win what has been described as a "beauty contest". Contrasted against the "first come first served" method preferred by some authors[25], which is still the rule in Quebec, the *Vitapharm* criteria requires that a plaintiff's counsel demonstrate their superiority and be prepared to face the court's scrutiny. The court will consider:

1) The nature and scope of the causes of action advanced;

2) The theories advanced by counsel as being supportive of the claims advanced;

3) The state of each class action;

4) The number, size and extent of involvement of the proposed representative plaintiffs;

5) The relative priority of commencing the class actions and;

6) The resources and experience of counsel.[26]

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23. S.C.M. 50-06-000192-035 (January 17, 2006).
24. [2000] O.J. No.4595 [*Vitapharm*].
25. Daryl-Lynn Carlson writes in the April-May 2005 article "Clash Actions" in National: Insights and Practice Trends: "But finding a means to consolidate actions that affect claimant in multiple jurisdictions has proven far tougher. One option, proposed by Branch and generally supported by other ULC members, involves a "first come, first served" rule to class proceedings..."p.36.
26. *Vitapharm* para. 21.

In Québec, little consideration is given to the above criteria as the issue will be decided essentially on a first filing basis, as it was decided by the Court of Appeal in *Hotte* v. *Servier Canada inc.*[27] and, more recently, in *Guy Campagna v. Pfizer Canada inc. et al*[28].

From a defence perspective, it may be important to consider whether a defendant wants a carriage fight at all. There may be more advantages to try and avoid a carriage motion by encouraging plaintiffs' counsel to work together.

More importantly, the defence's obligation will be to police the back door against defeated plaintiff's counsel. We have seen examples of lawyers who have lost carriage motions, but who attempt to press on with their claims in other guises.

The carriage war has come to the fore more so since the expansion of class action legislation beyond Quebec, Ontario and British Columbia. One columnist has recently described the jousting for position as starting to get bumpy with hints the honeymoon period is giving way to consortium politics and carriage fights.[29] The author suggests that with newcomers to class actions challenging the established pecking order, and powerful U.S. plaintiff firms beginning to back selected players in Canada, there are hints that the early days of accommodation between plaintiffs' counsel is beginning to fray.

A major skirmish recently erupted in the Vioxx litigation pitting a conglomeration of plaintiffs' lawyers in Ontario against a sole plaintiff's law firm for carriage of the lead Vioxx class action in Ontario. The fight moved its way into the courtroom requiring Justice Winkler to weigh the competing factors and render his decision in favour of the conglomerate group.[30] In addition to considering the factors laid out in *Vitapharm*, Justice Winkler noted that in addition to having commenced his personal injury lawsuit, the same plaintiffs' counsel had commenced a securities action on behalf of shareholders of Merck, which the court concluded placed counsel in direct conflict with the class they were proposing to represent in the personal injury litigation. In the end, this factor, coupled with the test set out in *Vitapharm* resulted in the conglomerate firms being awarded carriage and the action led by the individual law firm being stayed.

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27. [1999] R.J.Q. 2598.
28. S.C.Q. 200-06-0000049-059 (September 28, 2005).
29. *National Post*, March 1, 2006, Turf wars coming: Will competing class actions change the landscape? Sandra Rubin
30. *Setterington v. Merck Frost*, unreported Winkler J., February 2, 2006.

THE UNIFORM LAW CONFERENCE OF CANADA'S COMMITTEE ON THE NATIONAL CLASS ISSUE AND OTHER INTERJURISDICTIONAL ISSUES

From 1978 to 1992, Quebec was the only Canadian province with the legislation which specifically allowed for class actions. With the introduction of class proceedings legislation in Ontario in 1992 and British Columbia in 1995, Canadian lawyers began to develop a co-operative network which allowed for co-ordinated proceedings covering all of the country. Most national classes were certified out of Ontario with co-operation and coordination with the courts in Quebec and B.C.. In the last four years, with comprehensive class action legislation being passed in other western provinces and in Canada's most eastern province and with the allowance of class proceedings in provinces without specific legislation, Canada has seen a series of parallel actions being issued with increased competition among plaintiff law firms, making co-ordination among the provincial jurisdictions a difficult and sometimes impossible task. As the provincial legislation also varies between the ability to certify national opt-out classes and the limitation of certification of mandatory resident classes and non-resident opt-in classes, courts have struggled to balance between efficiency and fairness.

The Baycol litigation illustrates this point. With a settlement achieved in Ontario which embraced Quebec residents, excluded residents in B.C. and was silent with respect to the status of members in the other three provinces with class action legislation, the court was faced with a competing actions in Manitoba, Saskatchewan and Newfoundland and a provision in the agreement which would render the settlement void if a certification order was granted in another province.[31] Justice Cullity of the Ontario Superior Court approved the settlement and in doing so stated:

> "If a court in any of the pending actions in Manitoba, Saskatchewan and Newfoundland is not satisfied that the settlement of this proceeding is in the best interest of the settlement class members, it will have the option of ignoring the settlement and exercising its jurisdiction to certify the pending action in favour of a class that includes such members. In this event, the settlement of this action will cease to have effect."[32]

31. http://baycolclassaction.ca/docs/Settlement%20Agreement.pdf
32. *Coleman v. Bayer Inc.*, [2004] O.J. No., 1974 at para. 48

The Manitoba court then went on to certify a national class excluding those covered by the Ontario settlement and in doing so the court noted the virtually identical claims issued in Saskatchewan and Newfoundland. The motions judge, Justice McInnes stated:

> " ...I understand that the plaintiffs who are residents of Manitoba have an entitlement to their day in court with reasonable dispatch. Again, however, the jurisprudence tells us that the court should attempt to strike a balance between efficiency and fairness. While recognizing the interests of the plaintiffs, it is fair that the defendant should have to defend essentially the same action in more than one province?
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> Regrettably, there is no legislation that would take control of a class proceeding for all of Canada. I am told by counsel that there is often informal accommodation achieved between counsel for the various parties. In my view, that is something that ought certainly to be done here. A stay of this action for a period of time to permit such attempts to be concluded is something that may be considered by the parties or may be sought by the defendant."[33]

In response to the growing issues relating to the recognition of national and multijurisdictional class actions, the Uniform Law Conference of Canada established a National Class Actions Project and Committee to prepare a report. The mandate consisted of preparing a report on the issue and recommending legislative changes.

In addition to recommending a on-line registry of all class action filings in each class action jurisdiction in Canada, the Committee also recommended changes to class action legislation in Canada which included:

a) the express permission being granted to certify non-resident classes from which class members would be require to opt-out;

b) a requirement that notice be given of an intent to seek certification of a class action to plaintiffs with a same or similar subject matter in another proposed or certified class proceeding;

c) allowing representation before the courts of class members from other jurisdictions to make submissions that their proceeding is preferable to the proposed proceeding in relation to all or part of the overlapping class and require the court to consider this factor in making its determination whether or not to certify the proposed proceeding;

d) a list of considerations for the court in determining which proceeding would be preferable;

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33. *Walls v. Bayer Inc.*, [2005] M.J. No. 4 MBQB 3,

e) allowing somewhat sweeping powers to the court before which the motion for certification is made to make "any order it deems just" in relation to the proposed proceeding, including the certification of a national or multijurisdictional opt-out class proceeding;

f) a requirement that the Courts co-ordinate with one another in the event of multiple class actions being certified in relation to the same issues.

Assuming that national classes will continue to be certified in those provinces which either specifically allow for it or whose legislation is silent on the issue, we remain in Canada with the dilemma of which court in which province should take jurisdiction over the national proceeding. While the granting of jurisdiction to the Federal Court of Canada would appear to some to be the obvious solution, the constitutional amendments which would be required would not make this feasible. Similarly, Canada currently has no means by which to implement a co-ordinating court which would achieve the co-ordination of class actions across Canada similar to the MDL Panel in the United States. The proposed legislative changes to class action legislation existing in the various provinces, discussed above, is intended by the Committee to achieve the required co-ordination of multiple overlapping class action claims and achieve the goals of class action legislation of fairness and access to justice balanced against the goals of judicial economy and avoidance of multiple and potentially conflicting proceedings. Pending such changes, Canada's system relies heavily on the co-ordination of counsel and sensitivity of the judiciary to encourage such co-ordination of efforts to take place.