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INTRODUCTION
Harvey T. Strosberg, Q.C.

EXCLUSIVE FORUM SELECTION IN NATIONAL CLASS ACTIONS: A COMMON ISSUES APPROACH
Scott Maidment

INTERNET AND JURISDICTION INTERMIXED: *DESJEAN V. INTERMIX MEDIA, INC.* AND THE EVOLUTION OF THE REAL AND SUBSTANTIAL CONNECTION TEST
Shaun Finn and Louis Brousseau

SILVER V. IMAX AND *AINSLIE V. CV TECHNOLOGIES*: WHAT HAS BEEN LEFT OUT OF THE LEAVE REQUIREMENT
Andrea Laing and Brian Donnelly

PHARMACEUTICAL DRUG CLASS ACTIONS: PLAINTIFFS' CONSIDERATIONS
Harvin Pitch and Cindy Kieu

TWO STEPS FORWARD, NO LOOKING BACK: CONFRONTING THE PROBLEM OF THE INDETERMINATE PLAINTIFF
James Zaitsoff

NARROWING SECTION 31(1): THE EFFECTS OF THE SUPREME COURT OF CANADA DECISION IN *KERR V. DANIER* ON THE ONTARIO COSTS REGIME
Robert Carson

THREE'S A CROWD: THIRD-PARTY LITIGATION FUNDING OF CLASS ACTIONS IN CANADA
Peter Senkpiel

LA REVUE CANADIENNE DES RECOURS COLLECTIFS

IRWIN LAW

EXCLUSIVE FORUM SELECTION IN NATIONAL CLASS ACTIONS: A COMMON ISSUES APPROACH

Scott Maidment[*]

> *I have grown to see that the process in its highest reaches is not discovery but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of the mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.*[1]

A. INTRODUCTION

This paper argues that *forum non conveniens* principles should be adapted and applied to prohibit the prosecution of parallel national class actions in more than one Canadian province. A national class action should proceed exclusively in that forum which has the most real and substantial connection with the common issues that may arise in that proceeding.

With the enactment of class action legislation throughout the Canadian provinces, the commencement of multiple duplicative or overlapping national class actions has become commonplace.[2] In many cases, duplicative class actions are commenced by a consortium of class counsel acting in concert across provincial borders. In other cases, duplicative class actions are commenced by class action law firms acting in competition with one another. In either circumstance, each firm of class counsel

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1 Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921) at 166–67.

2 All Canadian provinces except Prince Edward Island have now enacted class action legislation.

may seek to maximize its own participation in the action and thereby maximize its share of associated fees.[3]

Faced with numerous instances of overlapping national class actions, Canadian superior courts have adopted what may be called a "subclass deference model" in response to disputes regarding the choice of forum. Thus any court in which a national class action is brought will generally refuse to engage in true forum selection. Instead, the court will generally "defer" to the superior court of another province in respect of the subclass of persons residing in that other province.

This "deferential" approach is frequently justified on the basis of judicial comity, as if comity were the fundamental value to be served by the principles of forum selection. Judicial comity, however, is simply a *means* of giving effect to the fundamental values of order and fairness that underlie the common law approach to forum selection.[4] By treating judicial comity as an end in itself, Canadian courts have begun to undermine the values that comity is intended to serve. Instead of order and fairness, the "subclass deference model" has produced disorder and unfairness. It has also resulted in inefficiency, confusion, and uncertainty for defendants and class members alike.

Law reform commissions have noted the need for reform in order to alleviate these problems, and have called for legislative and other measures that would permit effective coordination and management of multiple national class actions. Legislative reform holds little promise of relief, however, because Canada's constitution confers exclusive jurisdiction over property and civil rights, and the administration of justice within the provinces, upon the provincial legislatures.[5] Administrative arrangements among provincial superior courts, while laudable, are ultimately unenforceable to deprive a determined litigant of the right to pursue litigation

3 It is not suggested that the motive of profit maximization on the part of individual law firms is generally improper, unethical, or contrary to the public interest. Indeed, the profit motive facilitates access to justice by creating an incentive for class counsel to pursue actions that might not otherwise be pursued. Nevertheless, when the profit motive for individual law firms is combined with an absence of effective forum selection rules, this encourages the commencement of duplicative national class actions that offer no marginal benefit to class members and encourages practices that create unnecessary chaos, confusion, and cost.

4 "[O]ne must exphasize that the ideas of 'comity' are not an end in themselves but are grounded in notions of order and fairness to participants in litigation with connections to multiple jurisdictions," *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at 325 [*Hunt]*.

5 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92, paras. 13 & 14.

in the forum of her choice, subject to common law rules on forum selection and jurisdiction.[6] Thus, absent coordinated legislative action by all provinces[7] or a constitutional amendment to transfer necessary powers to the federal Parliament,[8] this problem will not be meaningfully addressed through legislative or administrative reform.

In the absence of any reasonable prospect for a legislative or administrative solution, Canadian courts must work to fashion their own solution through the development and application of existing common law concepts and principles. On that level, the means of addressing the problem of duplicative national class actions is readily available to Canadian courts. It lies in the proper *contextual* application of the common law principles of *forum non conveniens*. As demonstrated below, a contextual application would allow Canadian courts to bring greater efficiency and certainty to Canadian class action litigation and to provide meaningful guidance for class action practitioners throughout Canada. It would also serve the goals of order and fairness.

B. THE "SUBCLASS DEFERENCE MODEL" — DISORDER AND UNFAIRNESS

Class action legislation in most provinces provides an effective means of managing duplicative class actions pending before the same court. Under section 13 of the Ontario *Class Proceedings Act, 1992* for example, the Ontario court is given the power to stay any related class action before

6 A Saskatchewan resident, for example, would be entitled to insist upon the application of common law jurisdiction and forum selection rules to a Saskatchewan action regardless of what administrative or cooperative arrangements may have been put in place by agreement among provincial chief justices.

7 Provincial enactments that are designed to manage "multi-jurisdictional class actions," such as s. 6.1 of the Saskatchewan *Class Actions Act*, S.S. 2001, c. C-12.01, as amended, are commendable but are unlikely to be of substantial value unless uniformly enacted by all provinces. Even with uniform enactment, such efforts will not be effective unless courts take a disciplined approach and make a consistent effort to apply *forum non conveniens* principles in a contextual manner.

8 It has been suggested that a solution to the problem would be to confer upon the Federal Court of Canada exclusive jurisdiction over national class actions, but this cannot be effectively achieved without a constitutional amendment. Canada's experiments with statecraft since the 1980s suggest that any such constitutional amendment is most unlikely.

that court.[9] This power is commonly exercised to stay duplicative class actions so that only one of the actions will move forward to the certification stage. Motions seeking such stays are commonly referred to as "carriage motions," since they effectively determine which law firm will have "carriage" of the class action on behalf of the class. It must be remembered, however, that the fundamental purpose of the underlying statutory stay power is not to select class counsel, but rather to control (and effectively prohibit) unnecessary duplicative class proceedings.[10]

The statutory provisions that authorize the orders made on "carriage motions" do not, however, confer upon a superior court the power to stay class proceedings in other jurisdictions.[11] There is no statute that specifically authorizes a court in one province to control a class proceeding before a court in another province. To effectively eliminate or control duplicative *extra-provincial* class proceedings, the necessary authority must be found in the common law.

Outside of the class action context, the problem of duplicative proceedings in other jurisdictions has generally been managed through the application of *forum non conveniens* principles. In general, to obtain an effective remedy a domestic party, faced with a duplicative foreign proceeding, needs only to establish that the domestic forum is clearly a more appropriate forum for the resolution of the issues in dispute. Where this is established, the foreign proceeding will generally be stayed by the foreign court or, in some cases, an anti-suit injunction will be issued by the domestic court to prohibit the party from proceeding in the foreign court.[12]

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9 Section 13 of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [*CPA*] provides that "The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate." Similar provisions are found in the class proceedings legislation of other provinces.

10 The existence of these provisions would suggest that provincial legislatures recognized the importance of controlling or eliminating duplicative class proceedings.

11 It would be impossible to argue that these provincial statutes were intended to confer upon that province's superior court a power to "stay" a foreign proceeding. Plainly the legislatures don't have this power. The only mechanism generally available to a domestic court to exercise control over litigation in a foreign court is the *in personam* remedy of an anti-suit injunction.

12 Regardless of whether the remedy sought is a stay of proceedings or an anti-suit injunction, the principles of *forum non conveniens* are applied by Canadian courts to control forum selection. In the case of a motion for an anti-suit injunction, the moving party must establish that the domestic forum is the

To date, however, no Canadian court has been prepared to stay or enjoin a duplicative class proceeding on the grounds that there is a competing national class action in a more appropriate forum.[13] On the contrary, it has become commonplace for Canadian courts to tolerate multiple overlapping national class actions. This is so despite the confusion and judicial inefficiency that is necessarily produced by this. The prevailing attitude of tolerance is reflected in the Ontario Superior Court's decision in *Sollen v. Pfizer*:

> The above aspects of class proceedings reduce the likelihood that one of the different jurisdictions will be clearly more appropriate than others, and will make it more difficult for a defendant to obtain a stay of a proceeding in any of the jurisdictions. The result is that — on the assumption that national classes are permitted — there are likely to be many cases of identical or overlapping class actions in more than one jurisdiction in which no stay would be justified by an application of the principles of *forum non conveniens* . . . .[14]

This judicial tolerance for duplicative class proceedings lies in stark contrast to judicial attitudes toward duplicative proceedings generally. Outside of the class action context, Canadian courts have shown antipathy towards duplicative lawsuits, and with good reason. A multiplicity of proceedings is problematic because, among other things, it creates a risk of conflicting decisions. In *Westec Aerospace*, the British Columbia Court of Appeal outlined the rationale for avoiding inconsistent decisions:

> . . . There are two policy concerns with parallel proceedings. Litigating the same dispute twice, in two sets of proceedings in different juris-

forum that on the basis of relevant factors has the closest connection with the action and the parties, and that there is no other forum that is clearly more appropriate. See *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* (1993), 102 D.L.R. (4th) 96 at 117 (S.C.C.) [*Amchem*]. See also *Bell'O International LLC v. Flooring and Lumber Co.* (2001), 11 C.P.C. (5th) 327 at para. 9 (Ont. S.C.J.) [*Bell'O International*].

13 Duplicative class proceedings have been stayed on the grounds of abuse of process. See *Englund v. Pfizer* (2007), 43 C.P.C. (6th) 296 (Sask. C.A.) [*Englund*, C.A.] and *Marandola v. General Motors*, [2004] Q.J. No. 9795 (S.C.). Abuse of process is unlikely to afford a remedy, however, where the duplicative action is brought by a different group of plaintiffs. Under Quebec law, the doctrine of *lis pendens* is similarly limited in its application by virtue of the requirements of Art. 3137 of the *Civil Code of Quebec*, S.Q. 1991, c. 64 [C.C.Q.].

14 *Sollen v. Pfizer Canada Inc.* (2008), 290 D.L.R. (4th) 603 at para. 26, 55 C.P.C. (6th) 340, 164 A.C.W.S. (3d) 748 (Ont. S.C.J.) aff'd on other grounds (2008), 63 C.P.C. (6th) 1 (Ont. C.A.) [*Sollen*].

> dictions creates obvious inefficiencies and waste. More importantly, parallel proceedings raise the possibility of inconsistent or conflicting judgments being given. In *The Abidin Daver*, *supra*, Lord Diplock, at 477 (All E.R.), said that the danger of conflicting decisions if two actions were to proceed concurrently in different jurisdictions is a significant one and that:
>
> > Comity demands that such a situation should not be permitted to occur as between courts of two civilized and friendly states. It is a recipe for confusion and injustice.
>
> If additional costs and inconvenience and the possibility of conflicting decisions are to be avoided, the focus of the inquiry as to whether there are parallel proceedings should remain on the substance of the dispute and not on how it is framed in any given action.[15]

Canadian courts appear willing to overlook the fact that the same risk of conflicting and confusing decisions arises in the context of duplicative class actions. In its 2005 Report on "The National Class and Related Interjurisdictional Issues," the Uniform Law Conference concluded that the potential for chaos and confusion remains high unless the problem of duplicative class actions is resolved. It noted that potential class members may find themselves presumptively included in more than one class action and may be subject to conflicting determinations, defendants and class counsel may be plagued by uncertainty as to the size and composition of the class, and it will be difficult to determine with certainty which class members will be bound by which decision.[16]

Certification proceedings are the primary focus of class proceedings, and conflicting certification decisions are as problematic as conflicting trial decisions. The recent decisions in Saskatchewan and Ontario in national class actions related to Vioxx prove beyond doubt that the risk

15 *Westec Aerospace Inc. v. Raytheon Aircraft Co.* (1999), 173 D.L.R. (4th) 498 at para. 28 (B.C.C.A.).

16 Rodney Hayley et al., "Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations" (Paper presented to the Uniform Law Conference of Canada Civil Law Section, Vancouver, BC, March 2005) online: www.ulcc.ca/en/poam2/National_Class_Actions_rep_en.pdf. See also Maria Lavelle et al., "Supplementary Report on Multi-Jurisdictional Class Proceedings in Canada" (Paper presented to the Uniform Law Conference of Canada Civil Law Section, Edmonton, AB, August 2006) online: www.ulcc.ca/en/poam2/National_Class_Actions_Supplementary_Report_En.pdf.

of conflicting certification decisions is a real one.[17] Class action legislation typically requires that any certification order must not only describe the class and any subclasses, but also must set out the common issues for the class and any subclasses.[18] Different courts might ultimately certify different classes or different subclasses. Different courts might also order the trial of different common issues for the same class or different common issues for the same subclasses. More confusing still, the two courts might order the trial of different common issues for two different classes or different common issues for multiple different subclasses. Put simply, the simultaneous prosecution of identical class proceedings in multiple provinces is a recipe for conflict and confusion, all of which is completely unnecessary.[19]

Notwithstanding these risks, motions to stay a duplicative class proceeding in one province in favour of a class proceeding in another province on the basis of *forum non conveniens* are routinely dismissed.[20] In some cases, these decisions appear to be based, at least in part, upon the notion that class members in one province should have the right to proceed with a national class action in their own province notwithstanding that a duplicate national class action is pending in a sister province. A

17 *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.) [*Tiboni*] and *Wuttunee v. Merck Frosst Canada Ltd.*, [2008] S.J. No. 101 (Q.B.) [*Wuttunee*]. *Wuttunee* was subsequently decertified by the Saskatchewan Court of Appeal, but not on the grounds of jurisdiction or forum, see *Merck Frosst Canada Ltd. v. Wuttunee* (2009), 69 C.P.C. (6th) 60 (Sask. C.A.). The Saskatchewan Court of Appeal did note at para. 16 that, with the two certification orders, "the potential for chaos and confusion is obvious."

18 See, for example, the *CPA*, above note 9, s. 8.

19 On this point, there would appear to be widespread agreement. See, for example, Ward Branch & Christopher Rhone, "Chaos or Consistency? The National Class Action Dilemma" (2004) 1:1 Can. Class Action Rev. 3; Craig Jones, "The Case for the National Class" (2004) 1:1 Can. Class Action Rev. 29; Fiona Hickman, "National Competing Class Proceedings: Carriage Motions, Anti-suit Injunctions, Judicial Co-operation and Other Options" (2004) 1:2 Can. Class Action Rev. 367; Geoffrey P. Miller, "Overlapping Class Actions" (1996) 71 N.Y.U.L. Rev. 514.

20 See, for example, *Ward v. Canada (Attorney General)* (2007), 286 D.L.R. (4th) 684 (Man. C.A.) [*Ward*] and *Ring v. Canada (Attorney General)* (2007), 272 Nfld. & P.E.I.R. 348 (N.L.S.C.T.D.), both of which involved factual matters that arose almost exclusively in New Brunswick, as well as *Yee v. Aurelian Resources Inc.*, 2007 ABQB 368 [*Yee*]; *Englund v. Pfizer Canada Inc.* (2006), 23 C.P.C. (6th) 136 (Sask. Q.B.) [*Englund*, Q.B.];and *Sollen*, above note 14. See also, *Pardy et al v. Bayer Inc.* (2003), 229 Nfld. & P.E.I.R. 242 (N.L.S.C.T.D.), aff'd 2003 NLCA 45 and *Lamb v. Bayer* (2003), 242 Sask. R. 80 (Q.B.).

court hearing a stay motion typically takes the view that unless and until a class proceeding in another province has actually been certified, the plaintiffs should have a right to prosecute their own class action before that court. The following judicial pronouncements are typical of this point of view.

In *Englund*:

> At this juncture, carriage of all claims against BI Canada has not been resolved, and none of the subject Ontario actions have been certified. . . . A stay order in these circumstances would amount to an abdication of this Court's responsibility to persons within its jurisdiction. . . . I reject BI Canada's submission that the Ontario [*Class Proceedings Act*] allows for the creation of a "national class" that binds non-Ontario residents unless they opt out of a class action certified in Ontario because the laws of Saskatchewan do not recognize legislation enabled by other jurisdictions that intentionally encroaches on the right of its residents to seek judicial recourse for losses they suffered as a consequence of a tort or other breach of the law committed within the Province. [21]

And in *Yee*:

> As there has been no certification in Ontario and no motion for certification has been filed, there is simply nothing for Alberta residents to join. A stay would mean Alberta residents would be left in legal limbo of not being allowed to proceed in their home province, while not being part of any other proceeding.[22]

It is important to note that what these courts are preserving for their provincial residents is not the right to proceed with an *individual* action in their own province.[23] Rather, they are preserving the right of provincial residents to pursue the certification and trial of a *class* action. These courts are expressly approving multiple certification and trial proceedings against the same defendant arising from the same set of facts. This practice obviously raises important issues related to order and fairness within the Canadian confederation.

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21 *Englund*, Q.B., *ibid.* at para. 44; reversed based on a finding that the duplicative Saskatchewan action was an abuse of process, but without any ruling on *forum non conveniens*, *Englund*, C.A., above note 13.

22 *Yee*, above note 20 at para. 18.

23 It would be difficult to argue that the commencement of a putative class action in one province should interfere with the right of a non-resident to prosecute an *individual* lawsuit in her home province.

It would be unfair to suggest that Canadian courts are unaware of the risk of conflicting or confusing decisions, or that they act without regard for these risks. Rather, those courts that condone duplicative class proceedings in multiple provinces commonly propose that the risk of conflicting or confusing decisions can be overcome through "comity"[24] between judges in different provinces. Thus the apparent expectation is that a court deciding a certification motion in, say, New Brunswick, will not certify a national class including residents of, say, Alberta, if a motion to certify an Alberta class is expected in that province. The operating assumption is that any certification order in such a case would "carve out" Alberta residents, who could then be included in the Alberta proceeding instead. In other words, the expectation is that the court in every province will engage in a form of "ongoing deference" to the courts of other provinces in respect of the certification of any class that includes residents of those other provinces.[25] The statement of Cullity J. in *McCutcheon v. Cash Store* is typical:

> I have, in previous cases, indicated that, for reasons of comity, I would ordinarily defer to the jurisdiction of other Canadian courts — in which substantially identical or overlapping proceedings are pending — by excluding persons resident within their respective provinces or territories from a class to be accepted for the purpose of the *CPA*.[26]

On its face, this "subclass deference model" for the resolution of forum selection disputes appears elegant. It even appears on its face to be consistent with the notion of "judicial comity." Closer examination, however, reveals that the subclass deference model actually undermines the values of order and fairness that true judicial comity is intended to achieve.[27] Disorder and unfairness follow this model, for a number of reasons.

First and foremost, a defendant can have no confidence that, if it satisfies one court that certification is not appropriate in a particular case, it will not have to fight the same battle in one or more other provinces.[28] The subclass deference model assumes that there will be repeated

24 Or "sensitivity," to quote the Saskatchewan Queen's Bench in *Englund*, Q.B., above note 20 at para. 47.

25 The "duelling" certification decisions in the Vioxx litigation have demonstrated that this operating assumption is fatally flawed.

26 *McCutcheon v. Cash Store* (2006), 80 O.R. (3d) 644 at para. 62 (S.C.J.). See also *Ward*, above note 20 at para. 65; *Englund*, Q.B., above note 20 at para. 47; *Wilson v. Servier* (2000), 50 O.R. (3d) 219 at 244 (S.C.J.) [*Wilson*].

27 See *Hunt*, above note 4.

28 It is worth noting that Merck was forced to sequentially contest certification

attempts at certification on behalf of the same class, overlapping classes, or related classes.

Second, the threat of multiple certification motions and the inherent uncertainty regarding the ultimate outcome of multiple overlapping proceedings places significant unfair pressure on defendants to negotiate a resolution. An approach to jurisdiction that forces a party to pay damages to avoid the chaos and uncertainty of multiple overlapping proceedings is inherently unfair.

Third, a hallmark of an orderly and fair system of justice is a reasonable degree of predictability. The subclass deference model creates maximum uncertainty for the parties and members of the putative class. They do not know when their rights will finally be determined, or what court will likely determine them. Even when one court has ruled on certification, the uncertainty remains. Only when every Canadian court has ruled, or a national settlement is achieved, do the parties and the class know where they stand.[29]

Finally, another hallmark of an orderly and fair system of justice is a reasonably level playing field. The subclass deference model places considerable power unfairly in the hands of class counsel. They alone get to decide where certification motions will be brought and where the common issues will be tried. By coordinating their efforts across provincial borders, they can move forward in the jurisdiction of *their* choice. On the other hand, if they fail to coordinate their efforts, they produce confusion and chaos. With the subclass deference model, defendants are powerless to interfere. In short, the subclass deference model amounts to an abdication of the court's responsibility to ensure that a case proceeds in the jurisdiction with which it has the most real and substantial connection — it places any hope for order and fairness solely in the hands of class counsel.[30]

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of national Vioxx class actions in both Saskatchewan and Ontario. See *Tiboni*, above note 17 and *Wuttunee*, above note 17.

29 Even practices related to national class action settlements have become unnecessarily complex and costly as a result of the absence of proper forum-selection rules. Thus, the common expense of multiple, sequential settlement approval hearings in several provinces and the more novel spectacle of simultaneous settlement approval hearings conducted by video conference. A proper approach to forum selection would generally render such complex settlement procedures unnecessary.

30 Many class action defence counsel are familiar with the situation where class counsel offer to have the case in one province be the "lead case" if defence

Further, the negative outcomes of the subclass deference model are not limited to disorder and unfairness, however. This model also produces results that are directly opposite to one of the overriding goals of class action legislation — judicial economy.[31] By encouraging a multiplicity of proceedings, the subclass deference model wastes judicial resources and needlessly multiplies the parties' litigation costs.

C. THE COMMON ISSUES APPROACH

The weaknesses associated with the subclass deference model call for a fresh consideration of how jurisdictional principles should be applied in the class action context. In particular, consideration must be given to how the principles of *forum non conveniens* should be applied so as to achieve the fundamental values of order and fairness that underlie the notion of judicial comity and the traditional Canadian approach to matters of forum selection.

The doctrine of *forum non conveniens* was developed to ensure that a connection exists between the jurisdiction in which a proceeding is determined and the proceeding itself. The fundamental rule is that litigation is to be prosecuted in the jurisdiction that has the closest connection to the subject matter of the dispute.

> The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise appropriate.[32]

In view of this principle and the matters discussed above, a fresh approach to the application of *forum non conveniens* principles must meet a number of important criteria if it is to be an effective tool for the management of overlapping national class actions. First, it must be consistent with existing precedent on *forum non conveniens*, which determines the most appropriate forum based upon factors that are designed to ensure that an action is tried in the jurisdiction with which the action has the most real and substantial connection. Second, it must respect judicial comity

counsel will negotiate immediate concessions. The subclass deference model unfairly provides class counsel with unfair leverage in these negotiations.

31 *Wilson*, above note 26.

32 *Amchem*, above note 12 at 104; *Muscutt* v. *Courcelles* (2002), 213 D.L.R. (4th) 577 at para. 40 (Ont. C.A.) [*Muscutt*].

in order to give effect to established values of order and fairness within the Canadian confederation. Third, it should serve judicial economy by encouraging the prosecution of national class actions through a single proceeding, wherever possible.

One approach that meets these criteria might be described as a "common issues" approach to forum selection. This approach would operate on the basis that, in the context of a national class action, the application of *forum non conveniens* should reflect the unique nature of class proceedings and the central importance of the resolution of common issues. Specifically, the court should apply *forum non conveniens* principles so as to ensure that the litigation proceeds in the forum that is most appropriate for the resolution of any common issues in the proceeding. This approach to forum selection offers a reasonable prospect of order and fairness in the context of national class actions.

Under a common issues approach, the court would apply *forum non conveniens* in a manner designed to ensure that the certification of any common issues, and any common issues trial, would take place in that jurisdiction with which those common issues have the most real and substantial connection. It has already been established by the Ontario Court of Appeal that a superior court has the power to bind non-resident class members provided there is a real and substantial connection between the jurisdiction and the subject matter of the dispute, and there is adequate representation and procedural fairness for non-residents.[33] The subject matter of any class proceeding is inextricably bound up with common issues that arise in it. It is the resolution of common issues that gives any class action its *raison d'être*. Thus, in a national class action, it would be entirely appropriate for the connection between the forum and the subject matter of the dispute to be principally grounded in the common issues raised by the proceeding.[34]

33 See *Currie v. McDonald's Restaurants* (2005), 74 O.R. (3d) 321 at paras. 22–30 (C.A.).

34 This has a sound basis in precedent. As La Forest J. stated in *Hunt*, above note 4 at 326, "the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts." This led the Ontario Court of Appeal to state in *Incorporated Broadcasters Ltd. v. Canwest Global Comm. Corp.* (2003), 63 O.R. (3d) 431 at 456 [*Incorporated Broadcasters*], that "The factors concerning the location of the dispute and the jurisdiction in which the factual matters arose . . . are considerably more important than factors such as the location of the parties."

Once any Canadian court had properly determined that Alberta, for example, is the most appropriate forum for the resolution of any common issues in a particular national class action, any duplicative class action in any other province would generally be stayed or prohibited by an anti-suit injunction. The common issues approach would thereby foster the efficient prosecution of class claims in a single national class action.[35]

D. APPLICATION OF THE "COMMON ISSUES" APPROACH

It can be demonstrated that a common issues approach to forum selection does not require a marked departure from precedent. Numerous authorities provide guidance on the factors to be considered in determining the most appropriate forum. Those factors commonly include the residence or place of business of the parties, the location of the majority of witnesses, the location of key witnesses, the location from which the bulk of the evidence will come, the jurisdiction in which the factual matters arose, any geographical factors suggesting a natural forum, the applicable law, the desirability of avoiding a multiplicity of legal proceedings, and any loss of a legitimate juridical advantage.[36] As shown below, a common issues approach to forum selection in the class action context would involve a consideration of these same factors.

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35 It is clear that a single national class action is both a viable and a preferable form of proceeding. In *Nantais et al. v. Telectronics Proprietary (Canada) Ltd. et al.* (1995), 127 D.L.R. (4th) 552 (Ont. Ct. Gen. Div.) [*Nantais*], the Ontario Court held that the *CPA*, above note 9, allowed the creation of a "national class," relying upon the principles established in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 and *Hunt*, *ibid.* As stated in *Nantais* at 567:

> It seems eminently sensible, for all the reasons given by La Forest J. in *Morguard*, and the policy reasons given by the passage of the [*CPA*], to have the questions of liability of these defendants determined as far as possible once and for all, for all Canadians. There is nothing in the [*CPA*] to prevent it. Any questions of the treatment of non-members of the class, either through opting out or through some future successful jurisdiction argument, would be dealt with separately. I do not see the possibility of a future adverse finding on jurisdiction as a present bar to certification of all affected Canadian residents.

36 *Muscutt*, above note 32 at para.41; *Eastern Power v. Azienda* (1999), 178 D.L.R. (4th) 409 (Ont. C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 542.

1. The Location of Witnesses, Evidence, and Factual Matters

The court is generally required to consider the location of parties, witnesses, evidence, and factual matters with a view to determining the most appropriate jurisdiction for the trial of the action. In the class action context, however, the new approach to forum selection would reflect the fact that it is the common issues trial that is at the core of a class proceeding. It is the common issues trial, and not the process for resolving individual issues, that principally allows the class action to fulfil its purposes of efficiency and access to justice. Thus, in weighing matters such as witnesses, evidence, and factual matters, the nature of a class action would be kept in perspective, and the court would not give undue weight to the possibility of individual trials. Appropriate weighting is important for a number of reasons:

i) Individual issues in a national class action will never be determined if a common issues trial results in a dismissal of the action.
ii) Class action legislation provides the certifying court with a broad spectrum of options in terms of the procedure used to resolve individual issues, many of which do not require resort to individual trials.
iii) If any individual issues are ultimately to be determined, they may be determined without trial through some form of reference, private arbitration, summary procedure, or settlement grid.
iv) The certifying court's powers are sufficiently broad that if individual issues are eventually determined, they could be determined for each provincial subclass in that subclass's own jurisdiction.[37]

The common issues approach to the location of witnesses, evidence, and factual matters would properly reflect the nature of a class proceeding, the central function of the common issues, and the limited role of individual class members in the resolution of common issues. The issues determined in a common issues trial must be "common" to the class or a subclass. By definition, any issue that turns on the conduct or evidence of any particular individual plaintiff will be an individual issue and not a common issue. Accordingly, the place of residence of an individual

37 See, for example, the *CPA*, above note 9, s. 25.

plaintiff or class member may be largely irrelevant to forum selection in the class action context.[38]

Common issues are more likely to be determined by evidence related to the conduct of the defendants. A pharmaceutical product-liability case, for example, is commonly based on allegations of negligence and non-disclosure of material information. The essence of the plaintiffs' claim will typically be that the defendant had knowledge of certain risks associated with the use of the drug in question and that the defendant concealed those risks from the public. The nature of the allegations means that the common issues, if any arise, would relate principally to the alleged conduct of the defendant. Common issues that have been certified in negligence cases, for example, include whether the defendant owed a duty of care, the nature of that duty and the standard of care, and whether the defendant breached the applicable standard of care. Thus the location of the defendants and their witnesses and documents, as opposed to the place of residence of individual plaintiffs, is likely to be more relevant in determining the most appropriate forum in such cases.

It does not follow, however, that the location of the defendant will itself be determinative. Factors concerning the location of the dispute and the jurisdiction in which the factual matters arose are considerably more important than factors such as the location of the parties.[39]

The fact that the court must consider a common issues trial in determining the most appropriate forum does not mean that the court should determine jurisdiction only *after* certification, when the court has defined the common issues as part of a certification order. There are three reasons for this.

First, courts applying *forum non conveniens* principles outside of the class action context have consistently determined jurisdiction at the outset of the proceeding. Among the reasons for this is the fact that an immediate jurisdiction ruling best achieves the policy objectives of avoiding waste and inefficiency and avoiding the risk of inconsistent results.[40]

38 Canadian courts have yet to recognize this, however. In *Sollen*, above note 14, Cullity J. concluded that the presence of national class members in various provinces will commonly rule out the possibility of a stay based on *forum non conveniens*. Similarly, in *Englund*, Q.B., above note 20, Klebuc J., as he then was, gave significant weight to the place of residence of individual plaintiffs or putative class members in considering the most appropriate forum. See *Sollen*, *ibid.* at para. 30, and *Englund*, Q.B., *ibid.* at para. 28.

39 See *Incorporated Broadcasters*, above note 34 at 456.

40 It is also because of the problem of attornment if the jurisdiction and forum issues are not dealt with at the outset.

There is no compelling reason to take a different approach in the context of a class proceeding, where the potential for waste and inefficiency is arguably even greater, and the risk of chaos and confusion is clear.

Second, it is not necessary for the court to certify any common issues (as in a certification order) before deciding whether there is a more appropriate forum for any common issues trial. In ordinary individual actions, courts do not specifically define the issues in the action before deciding whether there is a more appropriate forum in which to try the proceeding. Rather, the court relies upon the pleading and the evidence filed on the motion in order to anticipate what matters might be addressed by the trial court, and determines the more appropriate forum based on that material alone. In a class action, the court can proceed in a similar fashion. It can rely upon the pleadings and the evidence filed on the motion in order to determine what matters are likely to be addressed in any common issues trial, and may determine the appropriate forum based on that record.

Third, it would be inconsistent with judicial comity, order, and fairness for one court to certify a class action and define common issues, and then determine that a different court should try those issues. As a matter of jurisdiction, it could not do so. A preferable approach is to first determine the most appropriate forum and then leave it to the court in that forum to determine the certification issues, including what common issues, if any, should be tried.[41]

2. The Applicable Law

Under the common issues approach to forum selection, the applicable law would also be considered having regard to the nature of a national class action. In an individual action, it is commonly the law of only one jurisdiction that must be applied by the trial court. This commonly weighs in favour of the forum that has the most experience in the application of that particular substantive law. In a national class action, however, the chosen forum's experience with the relevant substantive law may be of little consequence. The action is brought on behalf of a national class. If a national class action is certified in Saskatchewan, for example, the Saskatchewan court will likely have to apply the laws of other provinces

41 Just as judges applying *forum non conveniens* are now prohibited from ruling on the merits of an action on a jurisdictional motion, so too would a judge following the common issues approach to *forum non conveniens* be prohibited from deciding for the certifying court what are the common issues in the proceeding.

in respect of the claims of extra-provincial class members. The fact is that *whichever* court is to decide the issues in any trial in a national class action may have to apply extra-provincial laws.[42] Class action regimes in Ontario and elsewhere allow for the creation of provincial subclasses in order to facilitate the application of extra-provincial laws to non-resident class members in national class actions.[43]

The superior court of each Canadian province has the power to consider and make findings of fact respecting the law of another jurisdiction for the purpose of litigation before that court, and has the power to apply that law. In determining jurisdictional issues between sister provinces, Canadian courts should not be concerned about the ability of their respective courts to apply extra-provincial laws.[44]

Given these considerations, in many national class actions the applicable law is unlikely to be a significant factor at all, unless the nature of the claims are such that only the law of a single province will apply to class members regardless of their place of residence.

3. The Desirability of Avoiding a Multiplicity of Proceedings

Courts and legislatures tend not to favour a multiplicity of proceedings. Section 138 of the *Courts of Justice Act*, for example, provides: "As far as possible, multiplicity of legal proceedings shall be avoided."[45] The domestic stay power found in class action legislation shows that legislatures take a similar view of a multiplicity of class proceedings.

In the class action context, this factor means that the presence of other related class proceedings in another forum should weigh in favour of that forum as the more appropriate one.[46] That is because the domestic law in that forum will commonly permit that court to promote the joint

42 In a tort case, for example, the law to be applied is the *lex locus delecti* and not the law of the forum. Thus any plaintiffs or class members who are entitled to the benefit of Manitoba law, for example, should have that law applied regardless of whether the claim proceeds in Manitoba. See *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1049.

43 *Wilson*, above note 26.

44 *Hunt*, above note 34 at 308, 311–12, and 314–15. For this reason, Klebuc J. arguably gave undue weight to this factor: *Englund*, Q.B., above note 20 at para. 39.

45 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 138.

46 Just as the presence of related class actions in the domestic forum should weigh in favour of that forum.

management or coordination of those proceedings for the sake of efficiency.

In these circumstances, class counsel in the domestic forum may naturally argue that a "carriage motion" in the other forum may deprive the class members of class counsel's representation. The possibility that a court in the more appropriate provincial forum may appoint other counsel for the class, however, should not be a significant consideration when the domestic court is faced with the important duty of selecting the most appropriate forum for a particular national class action.[47] The determination of what class counsel should have "carriage" of a class action, like any other procedural or substantive matter, should be determined in the most appropriate forum.[48] If British Columbia, for example, is clearly a more appropriate forum, it is appropriate for the British Columbia court to determine those matters having regard to the best interests of the class.

4. Juridical Advantage

On the application of *forum non conveniens*, the court is required to consider whether an anti-suit injunction or a stay will unjustly deprive the plaintiff of a juridical advantage offered by the plaintiffs' chosen forum.[49] This factor must necessarily be considered in the class action context. Class counsel may argue that costs are generally not awarded against plaintiffs on certification motions in Saskatchewan, for example, whereas they are generally awarded in Ontario, and that the Saskatchewan costs regime is therefore a legitimate juridical advantage for the plaintiff.

In the context of a national class action, however, courts must be careful of the weight they attach to any juridical advantage associated with a particular forum. In *Amchem*, the Supreme Court made it clear that a party "can have no reasonable expectation of advantages available in a jurisdiction with which the party and the subject matter of the litigation

47 The same applies to the selection of an appropriate representative of the class or a subclass. These are matters that are appropriately determined by the certifying court in the most appropriate forum.

48 But see *Englund*, Q.B., above note 20 at para. 23, where Klebuc J., as he then was, considered it relevant that the Merchant Law Group might lose carriage of the class action if it were to proceed in Ontario, as opposed to Saskatchewan. Justice Klebuc viewed this as a factor that weighed against a stay of the Saskatchewan action.

49 *Amchem*, above note 12 at 120.

have little or no connection."[50] To follow the Saskatchewan example, a great majority of the plaintiffs and putative class members in a national class action may have no connection whatsoever to Saskatchewan, and the subject matter of their individual claims may also have no such connection. Consequently, they may have no reasonable expectation of the advantages available in that jurisdiction. In the context of a national class action, the procedural advantages of a particular forum may therefore be of very little weight.

Where duplicative national class actions are commenced in multiple provinces by the same class counsel or by a group of class counsel and plaintiffs acting in concert, additional considerations may be relevant. If the defendant is seeking to stay a national class action in Ontario, for example, in favour of British Columbia, and the same plaintiffs' consortium has chosen to commence a duplicate class action in British Columbia, class counsel cannot reasonably argue before the Ontario court that their being forced to proceed in British Columbia amounts to an injustice. After all, they have chosen voluntarily to submit the same matters to the British Columbia court, or, at the very least, have concurred in the submission of those matters to the British Columbia court through their participation in the consortium. In this example, the consortium's voluntary submission to British Columbia would arguably weigh in favour of a stay of the proceeding.[51]

In considering the loss of a juridical advantage, the court must also bear in mind that the choice of appropriate forum for a national class action need not deprive any person of the right to proceed with an individual action in his chosen forum. In the class action context, the important objective in forum selection is to ensure that the putative class action proceeds in the most appropriate forum for the determination of the common issues. Regardless of what forum is found to be most appropriate for the class proceeding, it remains open to any representative plaintiff or putative class member to pursue an individual action in a different jurisdiction that is otherwise appropriate for such an action.[52]

50 *Ibid.*

51 See, for example, *Bell'O International*, above note 12 at paras. 16 and 20.

52 Any individual action would be subject to the normal rules on jurisdiction and forum selection, and the rules governing abuse of process.

E. PRACTICAL CONSIDERATIONS AND THE CHOICE OF REMEDY

In general, it will be open to a class action plaintiff or a class action defendant to seek a stay of proceedings or an anti-suit injunction based on the application of *forum non conveniens* principles. In any specific case, however, the particular circumstances are likely to dictate the preferable remedy. Where there is only one duplicative extra-provincial class action, for example, it will be preferable to first seek a stay of that proceeding in the "foreign" court.[53]

By contrast, where there are multiple national class actions in multiple provinces, the option of seeking a stay of proceedings is less attractive because multiple stay motions might be required in order to effectively select the appropriate forum. Admittedly, the Supreme Court of Canada has made it clear that it is "preferable" for a party to seek a stay in the foreign court before seeking an anti-suit injunction from the domestic court.[54] This "preferability" standard is sufficiently flexible, however, to permit a domestic court to issue an anti-suit injunction in appropriate circumstances even though no stay has been sought from the foreign court.[55] Thus, in cases of multiple overlapping national class actions, it may be more appropriate for a defendant, or class counsel for that matter, to seek an anti-suit injunction to restrain the prosecution of duplicative proceedings in other provinces without first seeking a stay in the foreign court.[56]

F. CONCLUSION

The common issues approach to forum selection involves little more than the application of established principles to a meet a new circumstance:

53 In that case it would seem appropriate to follow the Supreme Court's statement in *Amchem*, above note 12, that it is preferable to seek a stay in the foreign court before asking the domestic court to issue an anti-suit injunction.

54 *Amchem*, *ibid.* at 118.

55 See, for example, *Bell'O International*, above note 12, and *Dent Wizard International Corp. v. Brazeau* (1998), 31 C.P.C. (4th) 174 (Ont. Ct. Gen. Div.).

56 Since the anti-suit injunction operates *in personam*, it would be necessary to name the individual plaintiffs in the other actions as respondents in the domestic application for an anti-suit injunction. An interesting discussion of the use of anti-suit injunctions in the class action context can be found in Professor Henry Paul Monaghan's paper, "Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members" (1998) 5 Colum. L. Rev. 1148.

the prevalence of overlapping national class actions and the resulting disorder and unfairness that this prevalence tends to produce. The common issues approach can function in a manner that is respectful of precedent and it can give effect to the values of order and fairness that underlie the traditional Canadian approach to forum selection.

One of the great virtues of our system of common law is its ability to address new problems by fashioning new solutions that are grounded in precedent and principle. The present rules for determining jurisdiction and forum selection were themselves developed in response to an increasingly integrated global economy. Addressing any new legal problem naturally requires some courage and creativity on the part of the judiciary. Canadian judges have not shown themselves to be strangers to those virtues, however, particularly where legislative measures have been shown to be inadequate or are simply unavailable.[57] Once again, the time has come for our judiciary to move the common law one small step forward.

57 See, for example, *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 1. Other fine examples of judicial innovation include the *Mareva* injunction and the Anton Pillar order.