UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

SUPPLEMENTARY REPORT ON MULTI-JURISDICTIONAL CLASS PROCEEDINGS IN CANADA

The Special Working Group on Multi-Jurisdictional Class Proceedings

Edmonton, Alberta
August, 2006

SUPPLEMENTARY REPORT ON MULTI-JURISDICTIONAL CLASS PROCEEDINGS IN CANADA

I. Background

[1] In 2004, the Uniform Law Conference of Canada ("ULCC") approved a National Class Actions Project and the Committee on National Class and Related Interjurisdictional Issues was established to prepare a report on issues related to national and multi-jurisdictional class actions and to recommend any legislative changes that could be introduced into the Uniform Act on Class Proceedings.[i] The Committee recommended amendments to the Uniform Act to allow courts to certify, on an opt-out basis, a class that includes class members residing outside the jurisdiction. It also recommended that current rules governing jurisdiction be changed to resolve conflicts between potentially competing class actions and that a central class action registry be developed. The Committee's recommendations were accepted by the Civil Law Section of the ULCC and its report appears as part of the proceedings of the 2005 annual conference.[ii]

[2] Subsequently, the ULCC's Civil Law Section requested further consideration be given to certain policy issues raised by the ULCC and in the paper. The four areas identified for follow-up are:

(1) ***Definition of a "National Class"*** - Some ULCC members wanted the Report to include a definition of "national class" as the phrase is used in the Report.

(2) ***Res Judicata*** - The ULCC also wanted the Report to take a definitive position on the issue of ***res judicata***. That is, if the certification of a class action by one court binds all the potential claimants in multiple jurisdictions unless they opt out, how does the Committee express the principle that the certification issue before another court is ***res judicata***?

(3) ***Criteria*** - The ULCC also favoured greater precision in the criteria found in sub-paragraph 3(e) of the Report. There was a perception that the criteria, as presented in the Report, left too much discretion to the participants and to the court.

(4) ***The Canadian Class Proceedings Registry*** - The Report made reference to a Canadian Class Proceedings Registry (the "Registry"), a searchable electronic

database of class actions filed in Canada. The ULCC requested further details about the function and benefits of the Registry.

A smaller Special Working Group on Multi-Jurisdictional Class Proceedings (the "Working Group") was struck to prepare a supplementary report addressing these follow-up issues.[iii]

II. Follow-up on Committee Recommendations

(1) *Definition of "National Class"*

[3] The Report contains recommendations and analysis concerning issues arising from class actions or putative class actions in which a proposed class includes members from more than one jurisdiction. Such class actions are multi-jurisdictional in scope. Where a multi-jurisdictional class action has class members in every Canadian jurisdiction, the action could also be certified on the basis of what would amount to a "national class."

[4] The Report uses the phrase "national class" in two senses. First, at various points it refers to "national or multi-jurisdictional" class actions. In this context, "national" is clearly intended to refer to classes that purport to cover the country. Second, elsewhere in the Report, the phrase "national class" appears on its own. In this context, "national class" is not necessarily intended to refer to classes that purport to cover the country, but rather is used as short-hand to refer to a "multi-jurisdictional class." The use of this short-hand is frequently found in the legal literature, usually in the context of classes certified on an opt-out basis.[iv] The phrase "national class" is also often used as short-hand by the courts, in contexts that suggest that the term "multi-jurisdictional" would be more exact.[v]

[5] In the first sense, it is unnecessary to refer to national classes as the issues arising in national and multi-jurisdictional class actions are the same. Further, multi-jurisdictional class actions include national class actions. In the second sense, the use of "national class" as a form of short-hand to mean multi-jurisdictional class is imprecise.

[6] The Working Group recommends that the Report be amended so as to not make reference to the phrase "national class" other than in a footnote which explains the historical use of the phrase by the courts and academic commentators. Specifically, where the phrase "national or multi-jurisdictional class" appears in the Report, the reference to

"national or" should be deleted. Where the phrase "national class" appears on its own, it should be replaced with "multi-jurisdictional class."

(2) *Res Judicata*

[7] The ULCC also wanted the Report to take a definitive position on the issue of ***res judicata***. That is, if the certification of a class action by one court binds all the potential claimants in multiple jurisdictions unless they opt out, how does the Committee express the principle that the certification issue before another court is ***res judicata***?

[8] The answer is found neither in the concept of jurisdiction, nor in provincial class action legislation. A certification of a class action by one court will not in and of itself preclude another court from also exercising jurisdiction where there is a real and substantial connection between the matter and the other forum. Courts have found this connection in factors such as the subject matter of the litigation or the common cause of the action.[vi] In addition, provincial class action legislation cannot operate extraterritorially so as to oblige the courts in other provinces to give preclusive effect to the determinations of the certifying court. Rather, as indicated in the Report,[vii] such an obligation on the part of a subsequent court is a consequence of the principles of order and fairness when an earlier certifying court has properly exercised jurisdiction.

[9] Consequently, the key issues are (i) when should a court consider certifying a proceeding that purports to bind a claim with a reasonable and substantial connection with another forum and (ii) conversely, when should a subsequent court, where the claims of a person are already included in a class certified by another court, give preclusive effect to the certification of a class action by the other court. Rather than attempting to direct one universal outcome on these issues, the Report (further refined by this supplementary report) sets out criteria in paragraph 3(e) to assist the court to answer these key issues. Over time, it is expected that the application of these criteria will become clearer so that the determination made by a court can reasonably be anticipated.

(3) *Criteria*

[10] The criteria contained in paragraph 3(e) of the Report are consistent with the principles of order and fairness and will assist a court in answering the key issues, identified above. With measures in place to ensure greater participation and fuller

information, an earlier court's determination to certify a multi-jurisdictional class action is more likely to be sound. Further, while an earlier court's decision is not determinative, subsequent courts are more likely to defer to the certification of an earlier court where it is clear that the court in certifying an action has considered the kinds of factors outlined in the criteria in paragraph 3(e).

[11] With respect to the criteria in paragraph 3(e), the ULCC asked that they be defined with greater precision than in the Report. This supplementary report recommends refinements to the criteria contained in paragraph 3(e), as well as to the related paragraphs 3(d) and (f). (Appendix 1 contains the Recommendations of the Committee, including revised paragraphs 3(d) to (f)).

[12] Before turning to paragraph 3(e), we note that in certifying a class action, a court also has additional powers to provide for the special circumstances of claimants who might commence their claims in other courts. These powers include matters concerning cooperative case management; certification of a sub-class; identification of a group representative for a defined sub-class; and notice provisions. The granting of such orders is clearly contemplated within the general powers described in paragraph 3(f). Furthermore, depending on the nature of the claims, a court could determine that it is the most suitable forum for the resolution of all or part of the common issues, while assessment of other individual issues should be determined by other fora. Cooperative case management would have to be sought in such a case.

[13] Turning then to the preamble to paragraph 3(e) of the Report, the Working Group recommends that the overarching objective of this paragraph be embedded in the preamble. The addition of an objective would assist the court and others in applying the non-exhaustive criteria delineated in 3(e) and in determining what other factors might be relevant. The Working Group has expressed the objective of 3(e) as "whether a related class action in another jurisdiction may be the most suitable forum, based on the interests of all the parties and the ends of justice, including the risk of irreconcilable judgments and judicial economy." This language draws upon the principles of suitable forum articulated earlier by the Supreme Court of Canada's decision in ***Amchem Products Inc. v. British Columbia (Workers Compensation Board)***.[viii] The Working Group also added the phrase "including the risk of irreconcilable judgments and judicial economy" to reflect concerns that are of particular relevance in the multi-jurisdictional class action context.

[14] With respect to the specific criteria identified in 3(e) the Working Group recommends the following refinements:

(i) ***the basis of alleged liability, including the applicable laws;***

This criterion replaces the former 3(e)(i) and (ii). The primary concern of this criterion is the legal basis for the claim, and any difference in the laws applicable between jurisdictions. It encompasses the kind of relief available for the harm suffered. The current formulation is more precise and avoids the potential for duplication between the former (i) concerning the nature and scope of the causes of action advanced and (ii) the theories offered by counsel in support of their claims.

(ii) ***the stage of proceeding of the class action and the plan for the proceeding, including the resources and experience of counsel, as well as the method of advancing the proceeding on behalf of the class;***

This criterion replaces the former 3(e)(iii) and (v) concerning the "state of preparation of the various class actions" and "the order in which the class actions were commenced." Both of these elements are subsumed within the concept of "stage of proceeding." "Stage of proceeding" also includes considerations such as the status and execution of the plan for proceeding. This criterion also includes the former (vi) concerning the resources and experience of counsel. The "plan for the proceeding" includes consideration of both the resources and experience of counsel and how the proceeding is to be advanced on behalf of the class.

(iii) ***the location of class members and of class representative(s), and the latter's ability to participate in the litigation and to represent the interests of the class members;***

This criterion replaces the former 3(e)(iv) and (vii). The previous criteria referred to the "number and extent of involvement of the proposed representative plaintiff" and the "location of class members, defendants and witnesses." The reformulation provides a more qualitative assessment of the class representative(s)' ability to participate in the litigation and most importantly to represent the interests of the class members. Further, it uses the more neutral "class representative(s)", rather than "representative plaintiff" as some jurisdictions contemplate the possibility of a "representative defendant" as well.

(iv) ***the location of evidence, including witnesses.***

This criterion combines elements from the former 3(e)(vii) and (viii), which referred to the location of ***inter alia*** "witnesses" and "the location of any act underlying the cause of action." As reformulated, this criterion has the advantage of combining all references to evidence in a single criterion. Further, it is broader than the previous iteration, so as to include other relevant evidentiary considerations such as the location of documentary evidence. It recognizes that the events giving rise to the claim may have occurred in different places, but that a court will be concerned with whether or not a case can adequately be made out from an evidentiary perspective.

[15] The Working Group has also recommended some revisions to paragraphs 3(d) and (f) in order to better convey the intent of these provisions.

[16] The principle changes to paragraph 3(d) include a change to the opening phrase so as to make it clear that a court must decide whether or not to certify a class proceeding and, if the class is certified, what is its scope. The previous wording suggested that a court had no choice but to certify a class proceeding. In addition, the revised paragraph deletes "Canadian" from "Canadian jurisdictions", to make it clear that a court could consider a related class action not only from another Canadian jurisdiction, but also from outside of Canada.

[17] Two changes are reflected in paragraph 3(f). First, the phrase "permit the court" is deleted from the preambular paragraph and the word "may" is inserted before "make any order." This change reflects the fact that the civil jurisdiction of the Canadian superior courts, as described in section 129 of the ***Constitution Act,*** is inherent and plenary, and subject only to legislation that would restrict it. Second, for the reasons outlined in Part (1) of this supplementary report, references to "national class" proceedings have been deleted, with the term "multi-jurisdictional" remaining.

(4) ***Canadian Class Proceedings Registry***

[18] As the Report identified, one of the difficulties that has emerged with the greater availability of class actions is accessibility to information on class action filings. Courts, counsel and the public face serious obstacles in discovering if a particular matter in which they have an interest has already been made the subject of a class actions in another jurisdiction. The result is a lack of efficiency and the potential for faulty decision-making.

[19] To address this problem, the Report proposed the creation of the Canadian Class Proceedings Registry (the 'Registry'), in the form of a searchable electronic database. The specific details of the database are still to be worked out, however, it would identify the subject matter of an action as well as its scope. The Registry would not replace filing in the provincial court registries, but would complement it. It would allow all those involved in the class action process to make better informed decisions as to their rights and options. It would assist courts in making certification decisions, serve as a basis for effecting the notice requirements, help potential class counsel to decide whether or not to bring competing or complementary action and allow members of the public to determine if they might qualify as class members and to start consideration, in advance of notice or certification whether they want to be class members or opt out.

[20] While the Working Group members agreed in principle as to how the Registry should function there was a difference of opinion as to how it would work in practice. Accordingly, the Working Group puts forward two options for the Conference to consider. The first option would see the Registry as a requirement of the rules of court, although failure to comply with this requirement would not invalidate an action. Class counsel moving for certification would provide notice to other class counsel with overlapping class actions based on the information contained in the Registry. Upon receiving notice, other class counsel could apply to make submissions to the court considering certification. Under the second option the Registry would alert both the court and the parties of the existence of overlapping class actions. It would leave it up to the court considering certification, however, to decide whether or not to send out notice to the other counsel and to accept submissions. Under either option, where the court considering certification decides to accept submissions from other counsel it would have the benefit of receiving more complete information in relation to the proper scope and structure of the action. Further, any subsequent court, asked to consider certification motions, would have greater confidence in the decision of the earlier court where that court had the benefit of submissions from other class counsel. While a subsequent court could still reach a different conclusion than that of the earlier court, the availability of fuller information before the earlier court, and the application of the criteria based on the principles of order and fairness should decrease the possibility of inconsistent results.

Appendix 1: Revised Recommendations

In summary, the Working Group's recommendation is to refine the Report's recommendations as follows:

[1] An on-line Canadian Class Proceedings Registry of all class action filings in each Canadian jurisdiction should be created and maintained for use by the public, counsel and courts. [Each province would be encouraged to amend their rules of court to require that all class action filings be directed to this registry.] In addition, courts in each jurisdiction should issue practice directions setting out the details of such filings.

[2] All current or proposed class proceedings legislation in all Canadian jurisdictions should:

(a) expressly permit the court to certify, on an opt-out basis, a class that includes class members residing or located outside the jurisdiction;

(b) [require that a plaintiff seeking to certify a class proceeding give notice of such an application to plaintiffs in any class proceeding in Canada with the same or similar subject matter;]

(c) permit plaintiffs from other jurisdictions served with a notice of class proceedings to make submissions at or before the certification application;

(d) require the court, in considering whether, and to what extent, to certify any class proceeding, to determine whether there are one or more related class proceedings involving the same or similar subject matter that have been commenced in one or more other jurisdictions;

(e) require the court to determine whether a related class proceeding is the most suitable forum for resolution of the claims of all or some of the class members, based on the interests of all the parties, the ends of justice, the risk of irreconcilable judgments and judicial economy, by considering all relevant factors, including:
   (i) the basis of alleged liability, including the applicable laws;
   (ii) the stage of proceeding of the class action and the plan for the proceeding, including the resources and experience of counsel, as well as the method of advancing the proceeding on behalf of the class;

(iii) the location of class members and of class representatives including the latter's ability to participate in the litigation and to represent the interests of the class members; and,

(iv) the location of evidence, including witnesses;

(f) The court may make any order it deems just, including:

(i) certifying a muli-tjurisdictional opt-out class proceeding, if (1) all statutory criteria for certification have been met, and (2) the court determines that it is the appropriate venue for a multi-jurisdictional class proceeding;

(ii) refusing to certify an action on the basis that it should proceed in another jurisdiction as a multi-jurisdictional class proceeding;

(iii) refusing to certify that portion of the proposed class that includes class members who may be included within a pending or proposed class proceeding in another jurisdiction; and,

(iv) requiring that a subclass with separate counsel be certified within the class proceeding;

[3] In the event that multiple class actions are certified in relation to the same issues, the courts hearing the action should adopt the ***Guidelines Applicable to Court-to-Court Communications in Cross Border Cases*** that have been promulgated in the insolvency area by the American Law Institute and have been adopted by some courts.

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i. The members of the Committee were: Rodney Hayley, Chair, Geoffrey Aylward, Ward Branch, Chris Dafoe, Dominique D'Allaire, Aldé Frenette, Craig Jones, Stephen Lamont, Peter Lown, Q.C., Andrew Roman, Geneviève Saumier, Paul Vickery, Q.C., Janet Walker and Garry Watson, Q.C. [hereinafter, the "Committee"].

ii. Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis and Recommendations, March 9, 2005 [hereinafter, "the Report"].

iii. The members of the Special Working Group are: Rodney Hayley, Peter Lown, Q.C., André Lespérance, Clark Dalton, Robert Monette, Ward Branch, Janet Walker and Maria Lavelle. The writing and research for this Report was provided by Maria Lavelle in a very capable and commendable manner, for which the Special Working Group is very grateful.

iv. See, for example:

1. Ward Branch and Christopher Rhone, "Chaos or Consistency?: The National Class Action Dilemma," (2004) 1 Can. Class Act. Rev. 3.
2. Stephen Lamont, "The Problem of the National Class: Extra-territorial Class Definitions and the Jurisdiction of the Court," (2001) 24 Advocates Quarterly 252.
3. F. Paul Morrison, Eric Gertner and Hovsep Afarian, "The Rise and Possible Demise of the National Class in Canada" (2004) 1 Can. Class Act. Rev. 67.
4. Craig Jones, "The Case for the National Class," (2004) 1 Can. Class Act. Rev. 29 at 49.
5. F. Hickman "National Competing Class Proceedings: Carriage Motions, Anti-Suit Injunctions, Judicial Co-operation, and Other Options" (2004) 1 Canadian Class Action Review 367.
6. James A. Woods, "The Jurisdiction of the Courts of Quebec in National and International Class Actions: A Comparative Analysis with the Approach Adopted in Common Law Provinces," Insight Conference on Class Actions (Toronto: Insight, 2003).

v. See for example, ***Wilson v. Servier Canada Inc.***, [2002] O.J. No. 2032, where Cumming J. stated, at para. 14: "This finding of attornment to Ontario did not preclude Biofarma from challenging the constitutional basis for a 'national class' (i.e., including non-Ontario residents in the class)."

vi. See the Report, p. 14, para. 49.

vii. Ibid.

viii. [1993] 1 S.C.R. 897.