

UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

**REPORT OF THE UNIFORM LAW CONFERENCE OF CANADA'S
COMMITTEE ON THE NATIONAL CLASS AND RELATED
INTERJURISDICTIONAL ISSUES: BACKGROUND, ANALYSIS,
AND RECOMMENDATIONS**

Vancouver, B.C.

March 9, 2005

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“The Court is not hungry after jurisdiction”

– Sir Walter Scott, *The Two Friends* (1799)

I. Mandate

[1] In recognizing the importance of issues relating to national and multijurisdictional class actions, the Uniform Law Conference of Canada established a National Class Actions Project, and appointed a Chair of the Project to form a Committee¹ to prepare a report on those issues and to recommend any legislative changes that could be introduced into the Uniform Act on Class Proceedings. The Committee’s recommendations and analysis of the relevant issues are set out below.

II. Recommendations of the Committee

[2] 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. All current or proposed class proceedings legislation in all Canadian jurisdictions should require that all class action filings be directed to this registry. In addition or alternatively, courts in each jurisdiction should issue practice directions setting out the details of such filings.

[3] 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 such notice to make submissions at or before the certification application, including submissions that their action is the preferable procedure for all or part of the overlapping class;

**REPORT OF THE UNIFORM LAW CONFERENCE OF CANADA'S
COMMITTEE ON THE NATIONAL CLASS AND RELATED
INTERJURISDICTIONAL ISSUES: BACKGROUND, ANALYSIS,
AND RECOMMENDATIONS**

- (d) require the court, in certifying any class proceeding, to consider whether there are one or more class proceedings relating to the same or similar subject matter that have been commenced in one or more other Canadian jurisdictions and to consider whether such class proceedings may be a preferable procedure for the resolution of the claims of all or some of the class members;
- (e) require the court, in assessing whether related class actions in other jurisdictions may be a preferable procedure for the resolution of the claims of all or some of the class members, to consider all relevant factors including:
 - (i) the nature and the scope of the causes of actions advanced, including any variation in the cause of actions available in the various jurisdictions;
 - (ii) the theories offered by counsel in support of the claims;
 - (iii) the state of preparation of the various class actions;
 - (iv) the number and extent of involvement of the proposed representative plaintiffs;
 - (v) the order in which the class actions were commenced;
 - (vi) the resources and experience of counsel;
 - (vii) the location of class members, defendants and witnesses;
 - (viii) the location of any act underlying the cause of action;
- (f) permit the court the court to make any order it deems just, including:
 - (i) certifying a national or multijurisdictional 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 national or multijurisdictional class proceeding;
 - (ii) refusing to certify an action on the basis that it should proceed in another jurisdiction as a national or multijurisdictional class proceeding;

UNIFORM LAW CONFERENCE OF CANADA

- (iii) refusing to certify that portion of the proposed class that includes class members who may be included within a pending or proposed class proceedings in another jurisdiction;
- (iv) requiring that a subclass with separate counsel be certified within the certified class proceeding;

[4] 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 Canadian courts.

III. Overview

[5] For well over a decade, class actions have had a profound impact on the Canadian legal system. While a restricted version of the class action has been available for hundreds of yearsⁱⁱ -- the procedure's historical roots can be found in the courts of equity of the late seventeenth century -- by the 1980s Canadian jurisprudence had acknowledged serious limits on its usefulness and applicability.ⁱⁱⁱ The legislative recognition of class actions in Quebec, Ontario and British Columbia^{iv} between 1978 and 1995 has given the procedure new life and a national scope. In the years since that legislative reform, class actions have been instrumental in achieving fair and efficient resolution of large and complicated disputes^v arising in a wide variety of subject areas, including products liability and other forms of mass torts, environmental law, employment law, contract law, constitutional law and securities law.^{vi}

[6] Recently, the Supreme Court of Canada has recognized the critical importance of class actions; in *Dutton v. Western Canada Shopping Centres Inc.* Chief Justice McLachlin wrote:

“The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated vis-à-vis the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.”^{vii}

[7] The factors that have made Canadian class actions effective over the past decade have included the ability of class counsel from the (then) three class action jurisdictions to

**REPORT OF THE UNIFORM LAW CONFERENCE OF CANADA'S
COMMITTEE ON THE NATIONAL CLASS AND RELATED
INTERJURISDICTIONAL ISSUES: BACKGROUND, ANALYSIS,
AND RECOMMENDATIONS**

arrive at informal cooperative arrangements and the decisions by the Ontario courts that that province's *Class Proceedings Act* could be used to certify an opt-out class that includes non-residents. When there were only three provinces with statutes, co-operation between counsel was generally obtained without much difficulty. The fact that Ontario courts would certify a national class allowed class members in jurisdictions without legislation to reap the benefits of class actions, while allowing defendants to resolve disputes, whether through litigation or negotiation, with some degree of certainty.

[8] In the four years since the Supreme Court's decision in *Dutton*, much has changed. Newfoundland and Labrador, Saskatchewan, Manitoba and Alberta have all passed comprehensive class action legislation.^{viii} Even those jurisdictions without legislation are charged with accommodating class actions; as McLachlin C.J. wrote in *Dutton*, "Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them."^{ix} Moreover, those courts must look to the various class actions statutes for guidance in this task.^x The Federal Court has followed this direction in making changes to its rules.^{xi} It can now certify national classes for those matters that come under its jurisdiction.

[9] Those provinces that have recently passed legislation have tended to follow the model adopted by British Columbia and endorsed by the Uniform Law Conference of Canada in 1995, whereby non-residents must opt into the proceedings. Manitoba, however, has taken a more expansive approach in allowing the certification of classes including non-residents; whereas Ontario's legislation is silent on the question of the national class but has been interpreted by the courts as allowing the certification of classes involving non-residents, Manitoba's legislation expressly allows extra-provincial opt-out classes.^{xii}

[10] The broader availability of class actions has had several practical consequences. For example, the fact that a class action can be commenced in any jurisdiction means that it is more likely that parallel class actions will be filed across the country, and, as a result, the sort of agreements between counsel that made possible the resolution of parallel class actions such as in the Hepatitis C litigation are now considerably more difficult to achieve.

[11] As a case in point, consider the situation in early 2004, when courts in six provinces (B.C.^{xiii} Saskatchewan^{xiv}, Manitoba^{xv}, Ontario^{xvi}, Quebec^{xvii} and Newfoundland^{xviii}) struggled to manage the litigation surrounding Baycol, an allegedly defective anti-cholesterol drug. The B.C. action was certified and an appeal of the certification decision was filed, but a partial settlement was reached before it was heard. In the Ontario case, the Ontario Superior Court of Justice was presented with a settlement that provided compensation for those who were diagnosed with a particular condition called rhabdomyolysis, but only as defined by the settlement, a definition that excluded significant numbers of potential class members. The agreement expressly excluded B.C. residents and embraced the Quebec action but was silent on the status of class members

UNIFORM LAW CONFERENCE OF CANADA

in the other three provinces. The agreement also contained a clause that rendered it null and void in the event that a class action that included any member of the class covered by the settlement was certified in another province.^{xix} In approving the settlement, Mr. Justice Cullity remarked:

“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 interests 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.”^{xx}

[12] Manitoba subsequently certified a national class that excluded those covered by the Ontario settlement. In granting certification, Mr. Justice McInnes noted that an action with virtually identical evidence and issues was underway in Newfoundland and Labrador courts:

“... 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, is it fair that the defendant should have to defend essentially the same action in more than one province?

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.”^{xxi}

[13] The difficulties arising from class actions on similar subject matter is also exemplified by the Vioxx litigation, in which numerous class actions were filed across the country. Some of these, commenced in Manitoba and Ontario, seek to certify a national class. It is by no means clear how these apparent conflicts will be resolved. We understand that some considerable efforts have been made by counsel in the various jurisdictions to work together, but not all cases have been brought within an alliance.

[14] Unless the conflicts can be resolved, the potential for chaos and confusion remains high: potential class members may find themselves presumptively included in more than one class action and may be subject to conflicting determinations; defendant 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 decisions.^{xxii}

[15] The question is further complicated by constitutional and extra-territorial concerns raised surrounding the Ontario national class certifications, some of which predate *Dutton*.^{xxiii} For example, in its first decision certifying a national class, the Ontario court refrained from addressing the crucial question of whether a judgment or settlement would

**REPORT OF THE UNIFORM LAW CONFERENCE OF CANADA'S
COMMITTEE ON THE NATIONAL CLASS AND RELATED
INTERJURISDICTIONAL ISSUES: BACKGROUND, ANALYSIS,
AND RECOMMENDATIONS**

preclude non-resident class members from bringing an action in another jurisdiction. This issue, the court said, was “something to be resolved in another action (by a non-resident class member) before another court in another jurisdiction.”^{xxiv}

[16] In addition, it has been argued that the broader availability of class action procedures after *Dutton* undermines the reasoning that a national class is the only way in which extra-provincial class members can avail themselves of the benefits class actions offer.^{xxv} Some have suggested that it may be time to abandon the national class in favour of a series of provincial proceedings, which may or may not be coordinated by the use of co-counsel agreements.^{xxvi} We respectfully disagree. Given the outcome in *Dutton*, in which the class included persons resident outside of Canada, given the Supreme Court's positive endorsement of the policy objectives of class actions in its trilogy of cases on certification,^{xxvii} and given its decisions on comity in the Canadian federal structure, we think it unlikely that the Supreme Court of Canada would be unsympathetic to the concept of the national or multijurisdictional class.

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

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

IV. Opt-In/Opt-Out Mechanisms

[19] In the British Columbia Ministry of the Attorney General's *Consultation Document[:]* *Class Action Legislation for British Columbia* (May, 1994), the brief

UNIFORM LAW CONFERENCE OF CANADA

treatment of interjurisdictional issues (at p. 22) seemed to reflect a concern that including class members not resident in the province on an opt-out basis would be ineffective; using the example of the Ontario legislation, the *Consultation Document* questioned whether a national opt-out class action would have preclusive effect on those residents outside the forum. It then made the following enigmatic observation:

“The availability of an expanded class action procedure in a number of provinces could result in several class actions involving the same defendant and the same issues being commenced in each jurisdiction. In some cases, this could undermine the goals of judicial economy which underlie class actions. These issues have not been resolved by the Ontario legislation.”

[20] In this passage the *Consultation Document* seemed to be trying to say that it could be problematical if B.C., like Ontario, purported to allow opt-out national classes, which could contradict rather than support judicial economy, a suggestion that one commentator has described as “perplexing”.^{xxix}

[21] The Interjurisdictional Issues section in the *Consultation Document* concluded as follows:

“One commentator has suggested that class members could be sub-classed into two groups – provincial residents and extra-provincial residents. Class members residing in the province under whose legislation the class action was filed, or whose cause of action arose in the jurisdiction would be subject to the ordinary opt out requirements of the Act. Extra-provincial class members would be required to opt in in order to be part of the class.”

[22] Thus, in British Columbia the opt-in requirement for non-resident class members came into being with little explanation of the rationale for its introduction, other than (one infers) that it could prevent Ontario and B.C. from having competing opt-out national classes, and (again one infers) that it could give greater certainty to the preclusive effect of B.C. judgments on non-resident class members.

[23] The Uniform Law Conference of Canada’s subsequent *Discussion Paper on a Uniform Class Actions Statute* was written by the main author of the B.C. *Consultation Document*,^{xxx} and perhaps not surprisingly the language of the *Discussion Paper’s* section on interjurisdictional issues followed closely that of the *Consultation Document*; it concluded by pointing out that “This recommendation [i.e., requiring extra-provincial class members to opt in] has been adopted in the British Columbia legislation.”

[24] Thus, the Uniform Act provided for an opt-in requirement for non-resident classes. With class action legislation in Canada still in its infancy in 1995, one could argue that the ULCC acted with justifiable caution in recommending an opt-in mechanism, since at that point the implications of Ontario’s opt-out regime were just receiving their initial consideration by the courts.^{xxxi} However, we are of the view that the policy reasons

**REPORT OF THE UNIFORM LAW CONFERENCE OF CANADA'S
COMMITTEE ON THE NATIONAL CLASS AND RELATED
INTERJURISDICTIONAL ISSUES: BACKGROUND, ANALYSIS,
AND RECOMMENDATIONS**

supporting the national opt-out class may now be accorded greater weight, given what we believe is a diminished risk that such a mechanism would be found to be unconstitutional^{xxxii}.

[25] Not only have several Ontario cases supported the viability of opt-out national classes – despite the Ontario *Act's* silence on the point – but, as we have noted above, the Supreme Court of Canada in *Dutton* saw fit to certify a class of foreign residents. More recently, the Ontario Court of Appeal found that, so long as there had been a proper consideration of jurisdiction and the provision of due process, a U.S. class judgment could have preclusive effect on Canadian class members.^{xxxiii}

[26] Unless and until the Supreme Court of Canada were to take a contrary view (which we think unlikely), national opt-out class actions do subsist in Canada. The recommendations of the Committee (the members of which have differing views on the constitutional debate) are based on the current state of the law; we do not propose to analyze the constitutional arguments for and against the national class, on which there is already a well-informed commentary.^{xxxiv}

[27] Certainly, there are strong policy arguments in favour of the national class. The *Report of the [Ontario] Attorney General's Advisory Committee on Class Actions* (February, 1992) stated:

“Once a class proceeding is commenced members of the class are presumed to be in the proceeding unless they take concrete steps to ‘opt-out.’

The value of such a model is that defendants to class proceedings are assured that they face all potential claimants in one lawsuit. Those who opt-out can be specifically identified and dealt with on that basis. The opt-out model also increases the effectiveness of a class proceeding by not requiring potential litigants to take steps to be in the suit. This is particularly so in cases involving individual claims that are relatively small.”

[28] These points apply equally to national classes.

[29] Craig Jones has provided a persuasive economic rationale for an opt-out national class:

“In an opt-in action, passive claimants drop through the cracks, and not just to their own disadvantage: the value of their claims, and the costs of their injuries, do not factor into the assessment against the defendant, diminishing deterrence. Moreover, the claims-value they represent does not contribute to the economy of scale of the litigation, and therefore per-

UNIFORM LAW CONFERENCE OF CANADA

claim litigation costs are increased; as a result, as explained earlier, both global settlements and per-claim compensation will be decreased. As such, the decision not to opt in (or even the failure to make the decision) does not simply deprive the passive class member of compensation, it also diminishes the recovery of his or her fellow class members who *do* opt in.^{xxxv}

[30] Jones concluded by suggesting that within the Canadian federation there is no real reason for treating members of a national class differently from those in an intra-provincial one.

[31] In light of the current reality and these important policy objectives, we recommend that all Canadian jurisdictions that currently have or are considering enacting class proceedings legislation should expressly allow for the creation of national opt-out class actions.

V. Coordinating Multijurisdictional Class Actions

A. Introduction

[32] Even if the courts in all provinces could certify a national class, we would still be left with the question of which court should take jurisdiction. There are several possible approaches to answering this question. The most radical approach would be to take national class actions out of the s. 96 courts and assign jurisdiction to the Federal Court. A more modest and realistic approach might be to use the Federal Court or a newly constituted court to determine which provincial superior court should have jurisdiction over the action. Finally, it may be possible to resolve the conflicts between competing class actions simply by using the existing structures and adapting the current rules governing jurisdiction to the national class problem. This latter approach, which we recommend, would require some modification of existing class proceedings legislation, including with respect to certification processes, and the development of a central class action registry.

B. Providing the Federal Court with Exclusive Jurisdiction to Hear National Class Actions

[33] Perhaps the simplest answer to the current problem, as some writers have noted, is one that is both obvious but impractical: that is, grant the Federal Court of Canada jurisdiction over all class actions in which class members are resident in multiple jurisdictions and which involve issues of national scope.^{xxxvi} The benefits of the approach are obvious because the Federal Court is the only trial court in Canada that has a national presence and national jurisdiction. The court holds hearings in every province and territory.^{xxxvii} As noted above, it also has the ability to certify class actions.^{xxxviii} However, granting the Federal Court jurisdiction over the entire breadth of subject matter of class actions may well require a constitutional amendment, which could be difficult or impossible to obtain. Further, the Federal Court is a statutory court, created pursuant to s.

**REPORT OF THE UNIFORM LAW CONFERENCE OF CANADA’S
COMMITTEE ON THE NATIONAL CLASS AND RELATED
INTERJURISDICTIONAL ISSUES: BACKGROUND, ANALYSIS,
AND RECOMMENDATIONS**

101 of the Constitution. As a statutory court, it lacks inherent or general jurisdiction, and can only deal with those matters assigned in its enabling legislation, the *Federal Courts Act*.^{xxxix} Its possible jurisdiction is further limited because, as a s. 101 court, its role is restricted to the “better administration of the Laws of Canada,” a phrase which has been found to mean applicable and existing laws passed by Parliament.^{xl}

[34] Could Parliament pass a law giving the Federal Court broad enough jurisdiction to take in claims involving mass tort, product liability and other matters commonly subject to class actions? It seems doubtful that the provinces or the Supreme Court of Canada would countenance such an intrusion on provincial jurisdiction, even if the intrusion could be justified under the national concern branch of the federal “peace, order and good government” power.

C. Providing a Judicial Body the Power to assign Jurisdiction over a National Class Action

1. The Judicial Panel on Multi-District Litigation Model

[35] Since the late 1960s, the Federal Court system in the United States has dealt with the challenges presented by multiple actions involving common questions of fact or law and filed in more than one judicial district by transferring all actions to one district court for consolidated pre-trial procedures.^{xii} This centralization takes in both ordinary and class actions, and the transferee court has plenary jurisdiction over all pre-trial procedures. It can designate lead and liaison counsel, order common discoveries and depositions and certify class actions. It can also dispose of actions through summary judgment or by approving a settlement.^{xiii}

[36] The decision whether actions should be centralized and to which court they should be transferred lies with the Judicial Panel on Multi-district Litigation, commonly known as the “MDL Panel.” This seven-judge body is drawn from the Federal Court bench and meets six times a year. The time allotted for oral argument regarding any particular matter is usually limited to 30 minutes.^{xliii} In deciding whether to transfer an action, the panel considers three factors:

1. Are there one or more common questions of fact or law?
2. Will the transfer serve the convenience of parties and witnesses?
3. Will transfer promote the just and efficient conduct of the actions?^{xliv}

[37] The MDL panel has absolute discretion as to the designation of the transferee court. For example, in theory, the panel could transfer actions filed in two New York districts to Alaska for pre-trial procedures. In practice, when selecting the transferee court, the panel

UNIFORM LAW CONFERENCE OF CANADA

considers about a dozen factors, most of them analogous to those a Canadian court might consider in a *forum non conveniens* analysis.^{xlv}

[38] While the Canadian superior court system differs from the U.S. Federal Court system in a number of important aspects, it might be possible to create a similar process whereby some body would be given the power to assign jurisdiction of a national class action to the most appropriate court. Any such process would, of course, present political and constitutional challenges. Presumably, it would require federal legislation granting the power to assign jurisdiction, legislation that could be viewed as trenching on the provinces' jurisdiction over civil procedure. Even if such legislation might be justified as a valid exercise of federal power under the national concern branch of the "peace, order and good government" power, it would probably be difficult to achieve.

[39] Assuming, *arguendo*, that such a grant of power would be constitutional, one must also consider what is the appropriate body to exercise it. Two possible options would be to assign the role of determining the most appropriate forum to the Federal Court or to create a new body for the task.

2. The Federal Court Option

[40] Using the Federal Court as a sort of "class action traffic cop" may be an attractive option for several reasons. The court has a national presence; while its judges reside in Ottawa, the court sits in every province and territory. It would bring with it a well-developed administrative structure, with a principle registry in Ottawa and sixteen offices across the country.^{xlvi}

[41] However, it may be that providing the Federal Court with such an enhanced role would be politically difficult, and gaining the cooperation of provincial legislatures would be necessary to make any national or multijurisdictional class action system work efficiently. Moreover, the Federal Court will not always be disinterested in the assignment of jurisdiction, since it has its own class action regime. If a conflict were to arise – as it might if multiple class actions were commenced against the federal crown – it might be inappropriate for the Federal Court to have to choose between assigning the action to itself and sending it to a provincial superior court.

3. The New Body Option

[42] A somewhat more attractive option might be to create a new body for the specific purpose of determining the most appropriate jurisdiction for national class actions. This might be done in various ways. For example, such a body could take the form of a new s. 101 court made up judges from the various provincial superior courts and perhaps from the Federal Court. Alternatively, it could operate as a committee of the Canadian Judicial Council,^{xlvii} a body established "... to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts."^{xlviii}

**REPORT OF THE UNIFORM LAW CONFERENCE OF CANADA'S
COMMITTEE ON THE NATIONAL CLASS AND RELATED
INTERJURISDICTIONAL ISSUES: BACKGROUND, ANALYSIS,
AND RECOMMENDATIONS**

[43] Like the American MDL Panel, this new body could meet on a regular basis to determine if proposed class actions should proceed as national class actions and, if so, in which jurisdiction. By leaving the decision on jurisdiction to s. 96 judges, albeit operating outside of a s. 96 court, this approach might be seen a more in keeping with what has been described by Hogg as the “compulsory cooperative federalism”^{xlix} anticipated by the judicature sections of the Constitution.

[44] However, such a body would be a constitutional novelty and establishing it would likely require considerable political will and negotiation. In any event, as we show in the next section, we have concluded that the challenges presented by the national class can be suitably addressed within our current courts system with some modest innovations and amendments to existing class proceedings statutes.

D. Modifying Existing Certification Processes¹

[45] Any proposal to address the threat of competing multijurisdictional class actions must address two kinds of questions. First it must set out clear standards and criteria for determining the appropriate definition and scope of the class or classes in any given matter. This is the substantive question. There could be debate about these standards, and there will certainly be further development and refinement of our understanding of the criteria to be applied in individual cases. However, to the extent that the standards and criteria can be articulated, the discussion of how best to coordinate multijurisdictional class actions can then focus on the separate procedural question.

[46] Second, it must identify the institutional mechanisms that exist or need to be developed to allows courts to make certification rulings that avoid conflicting or duplicative classes. This is the procedural question. We have considered and rejected mechanisms involving the Federal Court or any other s. 101 court, for the reasons discussed above. This section will consider only the means by which multijurisdictional class actions might be regulated through existing certification processes.

2. The Substantive Question: Standards for Avoiding Multiplicity in Multijurisdictional Class Proceedings

[47] While the Supreme Court of Canada has not addressed the issue of resolving a multiplicity of class proceedings and while lower courts have not articulated the standards with precision, the basis for those standards may be discerned in the law of jurisdiction generally. The Supreme Court has determined that the law of jurisdiction is subject to the constitutional requirements of the principles of order and fairness.^{li} The Supreme Court has also said that these principles are vaguely defined, serving primarily to inspire the interpretation of various private international law rules.^{lii}

UNIFORM LAW CONFERENCE OF CANADA

[48] In the context of multi-jurisdiction class actions, it might be said that the principle of fairness is reflected in the concern for access to justice and behaviour modification while the principle of order is reflected the concern for judicial economy and, in particular, the avoidance of multiple and potentially conflicting proceedings.^{liii}

(a) **Fairness and Access to Justice**

[49] In considering how class proceedings that include extra-provincial class members can be brought and resolved in a way that accords with fairness and provides access to justice, it is important to bear in mind that the operative feature of class proceedings legislation is the provision that obliges the other courts to treat the determination made by the court as binding on those who fall within the definition of the class. Clearly, class action legislation alone cannot extend this obligation beyond provincial boundaries, but an obligation to accord preclusive effect to the judgment of other Canadian court does arise from the principles of order and fairness where there is a real and substantial connection between the matter and the forum. In asserting jurisdiction over extra-provincial class members, courts have found this connection in factors such as the subject matter of the litigation^{liv} or the common cause of action.^{lv} Even where there is a real and substantial connection, however, careful attention must be paid to the situation of the class members whose rights are at stake.

[50] In *Currie v. MacDonald's Restaurants of Canada Inc.*,^{lvi} the Ontario Court of Appeal considered the effect on a proposed Ontario class action of an Illinois judgment approving a settlement that purported to cover Canadian class members. Sharpe J.A., writing for the court, said:

“To address the concern for fairness, it is helpful to consider the adequacy of the procedural rights afforded the unnamed non-resident class members in the *Boland* action. Before concluding that Ontario law should recognize the jurisdiction of the Illinois court to determine their legal rights, we should be satisfied that the procedures adopted in the *Boland* action were sufficiently attentive to the rights and interests of the unnamed non-resident class members. Respect for procedural rights, including the adequacy of representation, adequacy of notice and the right to opt-out, could fortify the connection with Illinois jurisdiction and alleviate concerns regarding fairness.”^{lvii}

[51] In our recommendations, we have attempted to address some of these concerns. Notice will clearly be an important factor in the enforceability of any national class action decision in any subsequent jurisdiction. The existing notice provisions should be sufficient to help guide this process for extra-provincial class members after certification.^{lviii} We have also recommended that notice of any certification application be given to class counsel involved in similar class actions in other provinces and that an on-line national registry, be established to allow both class counsel and potential class members to inform themselves of any class proceeding.

**REPORT OF THE UNIFORM LAW CONFERENCE OF CANADA'S
COMMITTEE ON THE NATIONAL CLASS AND RELATED
INTERJURISDICTIONAL ISSUES: BACKGROUND, ANALYSIS,
AND RECOMMENDATIONS**

(b) Order and Avoidance of Multiple Proceedings

[52] The Canadian jurisprudence on appropriate forum is among the most even-handed in the world. Canadian courts have demonstrated a strong commitment to ensuring that cases are determined in the forum that is most suitable based on the interests of all the parties and the ends of justice.^{lix} In particular, Canadian courts have regularly given priority to factors affecting litigation convenience, taking into account the relative abilities of the parties to undertake the challenges of litigating in distant forums. They have also shown great confidence in the ability of other Canadian courts in alternative forums to take a balanced approach to resolving multiplicity and thereby to be entitled to their deference in making determinations of appropriate forum in related cases.^{lx}

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

[54] In our recommendations, we have identified some criteria that we believe courts should consider in determining whether to certify a class action or, conversely, to defer to another court. We suggest that these be incorporated in existing and future class proceedings statutes.

3. The Procedural Question: Coordinating or Unifying Class Proceedings

(a) The Second Seized Court and the Deference Principle^{lxiv}

[55] As noted above, Canadian courts are well equipped to adapt the familiar principles of appropriate forum to the context of multijurisdictional class actions. The question remains, however, which of two courts seized with similar or related class claims should make the determination. While there may be some who would suggest that this function could only be served by an independent body, such as the U.S. MDL Panel discussed

UNIFORM LAW CONFERENCE OF CANADA

above, we believe that the common appreciation of the principles of order and fairness and the considerable deference that Canadian courts have shown to one another suggests otherwise.

[56] When there were only three provinces with class action regimes, Ontario courts would regularly show deference to courts in British Columbia or Quebec by excluding class members resident in those provinces when certifying national class. If all provinces can certify a national class – or even if only two can and the rest can certify only a provincial class – this form of deference would make a national or multijurisdictional class impossible.

[57] If, on the other hand, the national or multijurisdictional class is generally preferable to a series of provincial class actions, then it makes sense to presume that, having given proper consideration to competing options and having heard submissions from counsel in similar or related actions, the first court to certify should take jurisdiction over the largest appropriate class. It would then fall to counsel in any other jurisdiction to persuade the court in that second jurisdiction that some or all members of the plaintiff class would still be better served by allowing a class action to proceed before the court in the second jurisdiction.

[58] Canadian courts have shown sufficient confidence in one another to suggest that this approach could work well within Canada. Indeed, in situations of parallel class proceedings, Canadian courts have sought counsel's advice on the status of such proceedings in an informal attempt to avoid multiplicity. Further, the fact that counsel in similar or related actions in other jurisdictions would have a right to make submissions on whether the court should certify a competing class proceeding would have a cautionary effect on pre-emptive strikes by counsel seeking to secure their carriage of matters that might better be undertaken by others or in other forums.

VI. Canadian Class Proceedings Registry

[59] One of the difficulties that has emerged with the greater availability of class actions is that information on class actions filings is not easily accessible. Courts, counsel and the public face serious obstacles in discovering if the particular matter in which they have an interest has already been made the subject of a class action in another jurisdiction. The result is a lack of efficiency and a potential for faulty decision-making.

[60] A simple and cost-effective solution to this problem would be to establish a Canadian Class Proceedings Registry (the "Registry"), preferably in the form of a searchable electronic database.^{lxv} Such a database could be established at a modest cost, either by the courts working together, by a commercial legal database operator, or by a non-profit organization such as the Canadian Legal Information Institute.^{lxvi} The Registry 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 a competing or complementary

**REPORT OF THE UNIFORM LAW CONFERENCE OF CANADA'S
COMMITTEE ON THE NATIONAL CLASS AND RELATED
INTERJURISDICTIONAL ISSUES: BACKGROUND, ANALYSIS,
AND RECOMMENDATIONS**

action, and allow members of the public to determine if they might qualify as class members and to start considering, in advance of notice or certification, whether they want to be class members or opt out.

[61] The Registry would of course not replace filing in the provincial court registries, but merely complement it. Nor would the Registry necessarily require changes to provincial class proceedings legislation in order to function. Chief justices of the various courts could simply issue practice directions requiring that counsel first give notice to the Registry and directing the court registrars to obtain proof of such notice before accepting any class action filings. If the registry was web-based, proof of notice would be easy to provide. Counsel would file documents via email and would request confirmation that the documents had been accepted. The Registry would issue a confirmation by return email and this confirmation would be filed with the Registry of the provincial Superior Court at the same time the claim is filed. Originating documents filed with the national registry could be accompanied by a brief summary of the nature of the proceeding to be made available for immediate distribution by Listserv or similar means to interested subscribers.

VII. Communications Between Courts

[62] In his Notice to the Profession of November 22, 2004, Chief Justice Brenner of the B.C. Supreme Court announced the adoption by the Court of *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* (the “*Guidelines*”) that had originally been developed by the American Law Institute in 2000 “to enhance coordination and harmonization of insolvency proceedings which involve more than one jurisdiction by providing direction for communications between the courts in the jurisdictions involved.” Chief Justice Brenner emphasized that “the *Guidelines* require that all the rules and procedures governing proceedings in British Columbia be complied with.” Further, he stated that the *Guidelines* do not “alter or affect the substantive rights of the parties or give any advantage to any party over any other party.” The *Guidelines* have also been approved by the Commercial List of the Ontario Court of Justice; in its announcement of this approval, the Commercial List confirmed that “... the *Guidelines* are not meant to be static, but are meant to be adopted an[d] modified to fit the circumstances of individual cases, and to change and evolve as experience is gained from working with them.”^{lxvii}

[63] Whether or not our other recommendations are accepted, there will continue to be at any particular time class action cases having factual and legal parallels with cases in other jurisdictions, and, accordingly, we think that a system ensuring transparency and fairness in court-to-court communications would assist the proper coordination of such actions. For example, application of the *Guidelines* ensures that counsel will receive notice of communications between courts in which they may choose to participate. We therefore recommend that the Chief Justices of courts in all Canadian jurisdictions issue practice

UNIFORM LAW CONFERENCE OF CANADA

directions adopting the *Guidelines* for use in cross-border litigation including class actions.

ⁱ The members of the Committee are as follows: 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.

ⁱⁱ Ward K. Branch, *Class Actions in Canada*, looseleaf ed. (Vancouver: Western Legal Publications, 1996) ¶.2.50; Michael A. Eizenga, Michael J. Peerless and Charles M. Wright, *Class Actions: Law and Practice*, looseleaf ed., (Toronto: Butterworths, 1999) § 1.1-1.2 ; *Dutton v. Western Canada Shopping Centres Inc.*, [2001] 2 S.C.R. 534 at 545-548.

ⁱⁱⁱ *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72, 144 D.L.R. (3d) 385. See also Larry M. Fox, “*Naken v. General Motors of Canada Ltd: Class Actions Deferred*” (1984) S.C.L.R. 335.

^{iv} *An Act Respecting the Class Action*, R.S.Q., c. R-2.1 (1978); *Class Proceedings Act, 1992*, S.O. 1992, c.6; *Class Proceedings Act*, RSBC 1996, c-50.

^v This resolution has been achieved in almost all cases by settlement, rather than by trial of the issue.

^{vi} For a more complete list of typical class actions subject matter, see Branch, *Class Actions*, *supra* note 2 at Ch. 5.

^{vii} [2001] 2 S.C.R. 534 at para. 26 [*Dutton*].

^{viii} *Class Actions Act*, S.N.L 2001, c. C-18.1; *The Class Actions Act*, S.S. 2001, c. C-12.01; *The Class Proceedings Act*, C.C.S.M. c. C130; *Class Proceedings Act*, S.A. 2003, c. C-16.6.

^{ix} *Dutton*, *supra*, note 7 at para. 34.

^x *Ibid.* at para. 43.

^{xi} *Federal Court Rules*, 1998, SOR/98-106, Rules 299.1-299.42.

^{xii} Manitoba Act, s. 6(3): “A class that comprises persons resident in Manitoba and persons not resident in Manitoba may be divided into resident and non-resident subclasses.” (*Supra* note 8) The Quebec position on the national class remains somewhat unclear: see Stuart Kugler and Robert Kugler, “Quebec: The Class Action Haven,” (2004) 1 Can. Class Act.Rev. 155, and James A. Woods, “The Jurisdiction of the Courts of Quebec in National and International Class Actions: A Comparative Analysis and the Approach Adopted In Common Law Provinces” (presented to Insight Conference on Class Actions, Toronto, 2003) [Wood, “Quebec”].

^{xiii} *Bouchanskaia v. Bayer Inc.*, [2003] B.C.J. No. 1969, 2003 BCSC 1306.

^{xiv} *Lamb v. Bayer Inc.*, [2003] S.J. No. 692, 2003 SKQB 442.

^{xv} *Walls v. Bayer Inc.*, [2005] M.J. No. 4, 2005 MBQB 3.

^{xvi} *Coleman v. Bayer Inc.*, [2004] O.J. No., 1974.

^{xvii} *Dufour c. Bayer Inc.* [2004] J.Q. No. 11125.

^{xviii} *Wheadon v. Bayer Inc.*, [2004] N.J. No. 147; *Pardy v. Bayer Inc.* [2003] N.J. No. 1982.

**REPORT OF THE UNIFORM LAW CONFERENCE OF CANADA'S
COMMITTEE ON THE NATIONAL CLASS AND RELATED
INTERJURISDICTIONAL ISSUES: BACKGROUND, ANALYSIS,
AND RECOMMENDATIONS**

^{xix} <http://baycolclassaction.ca/docs/Settlement%20Agreement.pdf> .

^{xx} *Coleman v. Bayer Inc.*, *supra* note 16 at para. 48.

^{xxi} *Walls v. Bayer Inc.*, *supra* note 15.

^{xxii} Janet Walker, "Coordinating Multijurisdiction Class Actions through Existing Certification Processes", C.B.L.J. (forthcoming in 2005); Ward Branch and Christopher Rhone, "Chaos or Consistency?: The National Class Action Dilemma," (2004) 1 Can. Class Act. Rev. 3 [Branch, "Chaos"].

^{xxiii} Stephen Lamont, "The Problem of the National Class: Extra-territorial Class Definitions and the Jurisdiction of the Court," (2001) 24 Advocates Quarterly 252 [Lamont, "National Class"]; J. Vincent O'Donnell, Benjamin David Gross, Julia Garzon, "Multi-jurisdictional Class Actions in Canada: Pragmatism over Principle?", in *Litigating Class Actions* (Toronto: The Canadian Institute, 2002) [O'Connell, "Pragmatism"]; F. Paul Morrison, Eric Gertner and Hovsep Afarian, "The Rise and Possible Demise of Class Actions in Canada" (2004) 1 Can. Class Act. Rev. 67 [Morrison, "Demise"]; Woods, "Quebec" *supra* note 12.

^{xxiv} *Nantais v. Telectronics Proprietary (Canada) Ltd.*, (1995), 25 O.R. (3d) 331 at 346-47. This statement was echoed by Zuber J. of the Ontario Divisional Court, who, in denying leave to appeal, said, "Whether the result reached in the Ontario Court in the class proceeding will bind members of the class in other provinces who remain passive and simply did not opt-out remains to be seen": (1995) 129 D.L.R. (4th) 110 at 113.

^{xxv} Morrison, "Demise", *supra* note 23 at 89.

^{xxvi} *Ibid.*; Clint G. Docken Q.C. and Andrea Walden, "Canadian Class Actions Jurisdictional Issues: Opting IN or Opting OUT?" (paper presented to the Canadian Institute, Calgary Conference on Litigating Class Actions, 30-31 May 2002) <http://www.docken.com/CdnInstitutePaperMay2002ClassActions.pdf> (accessed 1 March, 2005).

^{xxvii} *Dutton*, *supra* note 7; *Hollick v. Toronto (City)*. [2001] 3 S.C.R. 158; *Rumley v. British Columbia*. [2001] 3 S.C.R. 184.

^{xxviii} *Dutton*, *supra* note 7 at paras. 27-29.

^{xxix} Craig Jones, "The Case for the National Class," (2004) 1 Can. Class Act. Rev. 29 at 49 [Jones, "National Class"].

^{xxx} Ruth Rogers, of B.C.'s Ministry of the Attorney General.

^{xxxi} *Nantais v. Telectronics*, *supra* note 24.

^{xxxii} We note, however, that the jurisprudence on the constitutionality of the national class is far from extensive, and for the most part reflects decisions of courts of first instance.

^{xxxiii} *Currie v. McDonald's Restaurant of Canada Ltd.*, 2005 O.J. No. 506 (C.A.).

^{xxxiv} See, for example: Lamont, "National Class", *supra* note 23; O'Donnell, "Pragmatism", *supra* note 23; Morrison, "Demise", *supra*; Woods, "Quebec", *supra* note 12; Jones, "National Class", *supra* note 29; Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003) *passim* [Jones, *Theory*]; Janet Walker,

UNIFORM LAW CONFERENCE OF CANADA

“Crossborder Class Actions: A View from Across the Border” (2004) Mich St. L. Rev 755; Peter J.M. Lown Q.C, “Class Actions and Inter-jurisdictional Issues” (paper presented at a seminar of the same name held in Winnipeg at the Canadian Bar Association’s annual national conference, August 2004) [Lown, “Issues”].

^{xxxv} Jones, “National Class”, *ibid.* at 40-41.

^{xxxvi} Branch, “Chaos”, *supra* note 22.

^{xxxvii} Further information on the location of Federal Court hearings can be found at the court’s website: http://www.fct-cf.gc.ca/business/hearings/hearing_list_e.shtml .

^{xxxviii} *Federal Court Rules*. 1998 SOR/98-106, ss. 299.2 to 299.42.

^{xxxix} R.S. 1985, c. F-7.

^{xl} *Quebec North Shore Paper Co. v. Canadian Pacific*, [1977] 2 S.C.R. 1054; Peter W. Hogg, *Constitutional Law of Canada*, looseleaf ed. (Scarborough, Ont.: Carswell, 1997) at 7.1 (b).

^{xli} The panel grew out of a coordinating committee set up by United States Supreme Court Chief Justice Earl Warren to manage a flood of actions filed against electronic equipment companies that had been found guilty of violating federal anti-trust law. Between 1961 and 1967 the committee, made up nine judges, managed nearly 2000 actions, involving 25,000 claims, using uniform pre-trial and discovery orders. Upon completion its work, the committee proposed legislation that was passed, with minor changes, as 28 U.S.C.A. §1407. Further information can be found at the panel’s website: <http://www.jpml.uscourts.gov>.

^{xlii} Stanley A. Weigel, “The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts” (1978), 78 F.R.D. 575 at 582-83.

^{xliii} Blake M. Rhodes, “The Judicial Panel on Multidistrict Litigation: Time for Rethinking”, 140 U. Pa. L. Rev. 711 at 716-17. For a practitioner’s view on practice before the panel see, Kenneth Halpern, “Multi-District Litigation”, Massachusetts Association of Trial Attorneys Product Liability Program materials, May 7, 1997: On-line: <http://halpernlaw.com:8080/Pages/papers/multidistrict.html> (Accessed Jan. 4, 2005).

^{xliv} 28 U.S.C.A. §1407(a). It should be noted that panel does not give equal weight to the three factors. Most observers suggest that judicial efficiency is given considerable weight and the convenience of the parties almost none, and that the panel will go to some length to find common issues of fact and law. See: Rhodes, *ibid.*; Stanley J. Levy, “Complex Multidistrict Litigation and the Federal Courts”, 40 Fordham L. Rev. 41 at 48.

^{xlv} Herbert B. Newberg & Alba Conte, *Newberg On Class Actions*, looseleaf ed. (Colorado Springs, Colo.: Shepard’s/McGraw-Hill, 2002) at § 9:16.

^{xlvi} Courts Administration Service, which was created in 2003 by the *Courts Administration Service Act*, S.C. 2002, c. 8, provides administrative services to the Federal Court, Federal Court of Appeal, Court Martial Appeal Court and the Tax Court of Canada.

^{xlvii} For an excellent discussion on this and other possible approaches to the consolidation/coordination of national classes, see Jones, *Theory*, *supra* note 34 at 200-209.

^{xlviii} s.60(1), *Judges Act*, R.S. 1985, c. J-1.

^{xlix} Peter W. Hogg, *Constitutional Law of Canada*, *supra* note 40 at ch. 7.1.

**REPORT OF THE UNIFORM LAW CONFERENCE OF CANADA'S
COMMITTEE ON THE NATIONAL CLASS AND RELATED
INTERJURISDICTIONAL ISSUES: BACKGROUND, ANALYSIS,
AND RECOMMENDATIONS**

ⁱ The basis of this section was drawn from Janet Walker's paper "Coordinating Multijurisdiction Class Actions through Existing Certification Processes" which is forthcoming in the C.B.L.J.

ⁱⁱ *Morguard Investments Ltd v. De Savoye*, [1990] 3 S.C.R. 1077. Although the *Morguard* case was not argued in constitutional terms, the principles of order and fairness were held to be constitutional imperatives in *Hunt v. T & N plc*, [1993] 4 S.C.R. 289.

ⁱⁱⁱ *Spar Aerospace Ltd v. American Mobile Satellite Corp*, [2002] 4 S.C.R. 205.

ⁱⁱⁱⁱ J. Walker, "Beyond Real and Substantial Connection: The *Muscutt* Quintet" in T Archibald and M Cochrane eds., *Annual Review of Civil Justice*, 2nd ed (2003).

^{lv} *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 at 241 (Gen.Div.).

^{lv} *Harrington v. Dow Corning Corp.* (2000), 82 B.C.L.R. (3d) 1 at 34-35 (C.A).

^{lvi} *Supra* note 33.

^{lvii} *Ibid.* at para. 25. This observation echoes a point made by Peter J.M. Lown Q.C, in Lown, "Issues", *supra* note 34. Noting the relationship between taking jurisdiction over a national class and ensuring procedural fairness for passive class members, Prof. Lown wrote "These are not competing questions, they are complementary questions which can be bridged through the filter of order and fairness."

^{lviii} For a more in-depth discussion of the future importance of notice, see Jones, "National Class", *supra* note 29 at 58-64.

^{lix} *Amchem Products Inc v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

^{lx} See *472900 BC Ltd v. Thrifty Canada* (1998), 168 D.L.R. (4th) 602 (BCCA); *Westec Aerospace Inc .v. Raytheon Aircraft Co* (1999), 84 A.C.W.S. (3d) 479, leave to appeal granted, 86 A.C.W.S. (3d) 697, reversed (1999) 173 D.L.R. (4th) 498 (CA), appeal dismissed without reasons: [2001] SCC 26.

^{lxi} For example, *Vitapharm Canada Ltd. v. F. Hoffmann-Laroche Ltd.* (2000), 4 C.P.C. (5th) 16 (Ont. S.C.J.).

^{lxii} As it was in the tainted blood litigation in *Honhon c. Canada (Procureur general)*, [1999] JQ No 4370 (S.C.); *Parsons v. Canadian Red Cross Society* (1999), 49 O.R. (4th) 281, 40 C.P.C. (4th) 151; *Endean v. Canadian Red Cross Society* (1999), 68 B.C.L.R. (3d) 350 (S.C.).

^{lxiii} *Wilson v. Servier Canada Inc.* (2001), 11 C.P.C. (5th) 374 (Ont. S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-Laroche Ltd.* (2002), 20 C.P.C. (5th) 351 (Ont. S.C.J.); F. Hickman "National Competing Class Proceedings: Carriage Motions, Anti-Suit Injunctions, Judicial Co-operation, and Other Options" (2005) Canadian Class Action Review (forthcoming).

^{lxiv} The second-seized principle was discussed in the context of non-class actions in J. Walker, "Parallel Proceedings-Converging Views" in (2000) *Canadian Yearbook of International Law*.

^{lxv} One possible model for such a registry might be Ontario's web-based registry for its Environmental Bill of Rights. The cost of maintaining the registry is apparently negligible. The registry can be found on-line, <http://www.ene.gov.on.ca/envision/env_reg/ebr/english/> (English site) and <http://www.ene.gov.on.ca/envision/env_reg/ebr/english/index-fr.htm> (French site).

UNIFORM LAW CONFERENCE OF CANADA

^{lxvi} The Canadian Legal Information Institute is a not-for-profit organization funded by the Federation of Law Societies of Canada with the goal of making primary sources of Canadian law accessible for free on the internet. The Institute's website and database can be found on-line at <http://www.canlii.org> .

^{lxvii} <www.ontariocourts.ca/superior_court_justice/commercial/protocol>.