Qu'Appelle – The National Class

The Beginnings: Thoughts and Cases

1. These thoughts focus on the direction of the national class debate. Is a national class desirable? How can a national class system function? Ought every jurisdiction to examine the issue in relation to our different approaches to justice in our regions and ought that to be a particular focus in Quebec? Part of these thoughts is to examine where the Quebec first to file rule fits, to examine questions regarding contests over carriage between law firms or groups of firms, and to examine the priority that ought to be given to the issue of getting to certification and the benefits that flow to the class with focused and rapid access to justice.

2. The cases are more than just an aid to this discussion. The cases are focused on trying to assist class action practitioners. The cases come in groups related to the thoughts, address the direction of American legal developments, and sometimes lists of cases are provided or footnoted as an aid to research if practitioners face a problem where those cases may be of assistance, even though the cases may not support the view being advanced in case you are arguing the other side of the issue.

Desire for the National Class

3. The common law jurists believe that resolution of class proceedings by one national class is preferable. This view is also held by the Supreme Court of Canada, based on this paper predicting that Société canadienne des postes c. Lépine, 2007 QCCA 1092 (argument November 17, 2008), will be overturned. No common law jurist has written or implied that they oppose the desirability of a national class. Many have written about this concept as being desirable. To the limited extent that the Canadian Bar Association speaks for lawyers, the

Canadian Bar supports the national class concept and established a website to facilitate it. And even judges who have not rendered decisions on these issues have, through the meetings *en banc* of the various courts, implied support establishing a national registry system

with the purpose of facilitating national class notice.

4. Five provinces, Nova Scotia, Quebec, Ontario, Manitoba, and Saskatchewan, have established opt out jurisdictions - the national class concept. Saskatchewan went further, talking about "multi-jurisdictional" certifications.

5. With appropriate reticence about the possibility of Ontario judges governing the people of Quebec, Quebec's jurists have not embraced the national class.

National Class - Benefits and Burdens

6. Generally, a national opt-out action is in the best interests of a class. It promotes judicial economy and all Canadians having a sense of justice, because they are treated uniformly. These benefits can result notwithstanding the fact that jurists acknowledge that there is no specific legislation to deal with multi-jurisdictional aspects[1] although the five legislatures and the courts expect that

1 McCarthy v. Canadian Red Cross Society, 2007 CarswellOnt 3735, at para. 4: (" Unlike the United States federal court system, Canada does not have specific legislation to deal with the multi-jurisdictional aspects of class proceedings where putative class actions in respect of the same subject matter have been commenced in the superior courts of two or more provinces.") Wilson (Sept. 13th, 2000), ¶93; Bondy v. Toshiba of Canada Limited (March 2nd, 2007), 39 C.P.C. (6th) 339, ¶28; Nantais v. Telectronics Proprietary (Canada) Ltd. (Aug. 29th, 1995) ("Nantais"), 127 D.L.R. (4th) 552,¶82; Craig Jones, "The Case for the National Class" (January, 2004), 1 Canadian Class Action Review 29; Celeste Poltak, "Ontario and Her

comity will facilitate interprovincial integration.[2]

7. But as a former member of a provincial legislature, and having noted the Ontario centric approach of Ontario lawyers, and lawyers become judges, the legislators, jurists, and people of Quebec, should be suspicious of the *impact of the national class*. Why does our constitution require that a judge have ten years at the bar in the province of appointment? It is because we believe that a judge from Newfoundland and Labrador understands their people, their issues, and their sense of justice and fair play. The people of Newfoundland and Labrador see issues differently and so do their judges. The people of Quebec see issues differently and so do their judges. Having appeared in eight Canadian jurisdictions and three American jurisdictions, be assured: the courts are different, the attitude of judges is different, a sense of what is right and what is fair is different. Embracing the national class concept involves giving up part of sovereignty.

Sisters: Should Full Faith and Credit Apply to the National Class?" (July, 2006), 3 Canadian Class Action Review 437

2 *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.*, 169 D.L.R. (4th) 565, 9 C.C.L.I. (3d) 253, per Brenner C.J.S.C.: ("In my view judicial comity and the goal of certainty in litigation outcomes makes it essential that the courts in the class action jurisdictions in Canada afford considerable weight to the decisions in other Canadian jurisdictions in identical class action claims.:)

VE Corporation v. Ernst & Young, 860 S.W. 2d 83, 84 (Tex. 1993): ("Identical suits may be pending in different states...In such a situation, the principle of comity generally requires the later-filed suit to be abated."). *1 Am.Jur. 2d*, "Abatement, etc.", §10, pp. 70-1: ("Although the pendency of an action in the courts of one state or country is not a bar to the institution of another action between the same parties and for the same cause of action in the court of another state or country, it is usual for the court in which the later action is brought to stay proceedings under such circumstances until the earlier action in the other jurisdiction is

8. The judiciary is the third arm of governance. And just as we want members of the National Assembly to come from Quebec, members of the Parliament of Canada to come from Canada, so too do we want judges, the third arm of governance, to think about issues from a Quebec perspective. The people of Ontario feel a sort of entitlement to run the nation. The onset of the national class which is beneficial, very definitely involves a partial loss of sovereignty.

9. Generalizations are always flawed but as a generalization, Ontario and Alberta judges are more favourable to the business and defence side of justice. They are more likely to take a strict approach to rules, time limitations, arguments regarding prescription periods. Costs of huge amounts in Ontario have a chilling effect on plaintiffs but are almost irrelevant to large corporations. Costs awards in Ontario are much larger than costs awards in British Columbia or Alberta which in turn are much larger than Manitoba or Saskatchewan. No costs have ever been paid in Saskatchewan class actions to plaintiffs or from plaintiffs.

10. The people, lawyers, jurists, and the National Assembly of Quebec may all bridle against the Ontario centric approach to litigation and fairness. But that is not a part of this analysis.

Lépine

11. The subject of our inquiries relate to class actions, national class actions, and class action approaches in the United States. The watershed case on "carriage" actions will be decided by the Supreme Court of Canada in *Lépine* after argument on November 17, 2008. The facts in *Lépine* are entertaining. In the summer of 2001 the Government of Canada, through the Postal Service,

determined.")

offered Canadian consumers free internet access for life upon payment of a one-time $9.95 subscription fee. . Lepine, a consumer resident in the province of Quebec, saw the advertisement in the newspaper La Presse and soon thereafter subscribed to the service. The packaging on the CD ROM, which was necessary to initiate the “free” internet service, indicated that Canada Post offered the promotion in collaboration with Cybersurf Corporation. The terms and conditions stated that, contrary to the advertisement in La Presse and other Canadian dailies, Cybersurf could terminate the free service at its whim and that Canada Post was excluded from any liability. In August of 2001 Cybersurf decided to terminate the free internet service and began to demand that consumers pay a monthly service fee of either $7.95 or $9.95, depending on the service package selected by the user. Less than two months after subscribing to the free “lifetime” service the service was terminated. Assumably, for the Government of Canada and Canada Post two months is a lifetime.

12. The Government of Alberta, to its credit, launched legal proceedings. Unfortunately those proceedings were settled on terms that were less than favourable to those who had subscribed to the offer and had relied on the representations made by Canada Post and Cybersurf. Under this settlement consumers were entitled to the reimbursement of the initial $9.95 fee they paid. This, despite all the time and effort lost due to the defendants’ decision to renege on their promise. Proceedings were also launched in the provinces of British Columbia, an opt-in province, Ontario, an opt-out province, and Quebec, an opt-out province. But a province which has not been prepared to exercise opt-out jurisdiction.

13. In February of 2002 Lepine brought a motion for authorization to institute class proceedings against both defendants pursuant to art. 1002 C.C.P..

14. Soon thereafter Canada Post entered into a settlement with the lawyers in Ontario, who in turn made an arrangement with the lawyers on the British Columbia action, and a consent certification for a national class including Quebec was granted on December 22, 2003 while simultaneously approving the settlement agreement. The next day, on December 23, 2003, Fournier J. rendered a judgment authorizing the institution of class proceedings against the defendants in the province of Quebec, notwithstanding the national certification granted in Ontario based on legislation which permitted such a certification to encompass the people of Quebec. The decisions of the Ontario Superior Court of Justice and the Superior Court of Quebec were incongruous, thus producing a serious legal impasse.

15. Canada Post applied to Mr. Justice Baker to decertify. He refused.

16. Canada Post appealed to the Quebec Court of Appeal. That Court upheld the decision of Baker J.

17. Canada Post received leave to appeal to the Supreme Court of Canada.

18. In *Lépine*, Fournier J., in this respectful submission *(without considering the sovereignty impact on the change for Quebec if Ontario justice attitudes take hold)*, should have recognized the Ontario certification and settlement approval order pursuant to §3155 of the Civil Code of Quebec, L.Q., 1991, C. 64.

19. For convenience, the following time line summarizes the various proceedings

taken against Canada Post before the courts in four Canadian provinces:

Alberta:

•In December 2002 the government of Alberta, and the appellant Cybersurf reached an

agreement in principle under which all Canadian residents who had accepted Canada Post's offer could obtain reimbursement. A notice of settlement was published in the Globe and Mail and La Presse on June 13, 2003. Canadian consumers wishing to take advantage of this offer had to do so before July 31, 2003.

Ontario:

•On or about March 28, 2002 Paul McArthur commenced and subsequently served on each of the defendants a Statement of Claim before the Ontario Superior Court of Justice.

•A national class action was certified by the Ontario Superior Court of Justice (Crane J.) in Ontario on December 22, 2003.

•The parties signed a settlement document between July 3 and 7, 2003.

•On December 22, 2003 the class action was certified and the settlement was approved for Ontario only.

British Columbia:

•On May 7, 2002 John Chen commenced and subsequently served a Statement of Claim before the Supreme Court of British Columbia for BC residents only.

•Settlement discussions commenced between plaintiffs and defendants in 2002 and continued in 2003 but Lepine declined to accepted any of the offers.

•In July 2003, the parties to the class proceedings in Ontario and British Columbia achieved a settlement, defining the "Ontario Class" as all class members not resident in British Columbia.

•On April 7, 2004 notices were published across Canada, including Quebec, notifying class members of the settlement. The settlement was approved in BC on April 7, 2004.

Quebec:

•In February 2002 and pursuant to article 1002 C.C.P. the plaintiff filed a motion for

authorization to institute class proceedings against both defendants.

•On December 23rd, 2003 Fournier J. rendered a judgment authorizing the bringing of class proceedings.

•On February 21, 2004 a notice was published across Quebec for Quebec residents only.

•On March 18, 2004 Lepine served on each of the defendants an application to commence class proceedings.

•On July 20, 2005 Baker J. (corrected on August 5, 2005) refused to recognize and declare enforceable a judgment of the Ontario Superior Court of Justice.

•On August 10, 2007 the Quebec Court of Appeal denied the appeal to recognize the Ontario certification and enforce the settlement.

20. In light of the events in Lépine, this paper submits that even if there has been a prior authorization or certification, in a province, a national class ought in appropriate circumstances to be certified. The nub of Lépine is minimally this. If deferring to the jurisdiction of a court to certify or authorize is thought to be appropriate, deferring to the jurisdiction of some other province based on any other pre-certification court disposition is not appropriate.

21. Where no court has authorized or certified, and likely even if a court has, a court in a national opt-out jurisdiction has the power to certify a class of all Canadians, and may do so before another court has done so, even if pre-certification steps have developed elsewhere. Once one court certifies a national opt-out class action, others should recognize it and decline to certify an overlapping class. Unless that approach becomes the attitude of jurists nation wide, we will not have national class proceedings.

22. In particular, §3155(4) did not apply because there was no dispute pending, and Fournier J., with respect, erred in granting authorization. When Fournier J. authorized in Quebec:

• if he did not know of the Ontario certification decisions, upon learning of it, he should have de-authorized the Quebec class action pursuant to §1022.

• if he knew of the Ontario certification decision, he should have declined to authorize the Quebec class action.

23. Examinations of notice in this circumstance are relevant. What is the notice proposal to members of the class in the province of Quebec and elsewhere? What has the notice been to counsel to the representative plaintiffs in the proceedings ongoing in Quebec?

24. §3155(3) did not apply. Because the Ontario Superior Court provided notice to Lépine's counsel of the proposed Ontario national opt-out certification hearing and an opportunity to be heard, the Quebec Superior Court should have recognized the Ontario certification and settlement approval order without readjudicating whether notice to the class was adequate and whether Paul McArthur and his Ontario counsel provided adequate representation, and thereby re-judging decided issues.

25. If every court in every jurisdiction gets to adjudicate once again on the appropriate nature of these issues of notice, notice to counsel, and notice to the people in the class, then we are not creating a national class.

Carriage Motions (*lis pendens*) in *Lépine*

26. The Quebec Superior Court should have attached no significance to the pre-authorization steps in Quebec. The "first to file" rule is equivalent to "carriage motions" in common law provinces. An extra-provincial "carriage" order is not entitled to deference when a court certifies a national opt-out class action, and is not a basis for refusing to recognize a national certification order from another province.

American Law – Canadian Law

27. Before returning to a further analysis of *Lépine* with the issues of notice and *lis pendens*, consideration of the national class and its Canadian and American treatment is worthwhile. While supported by theoretical discussion, the truly national class in our country, to date, is a Canadian myth.

> *Nantais v. Telectronics Proprietary (Canada) Ltd.*, 40, C.P.C. (3d) 245, 127 D.L.R. (4th) 552:
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> > [82] It seems eminently sensible, for all the reasons given by LaForest J. In *Morguard* and the policy reasons given for passage of the Act, to have the questions of liability of these defendants determined as far as possible once and for all, for all Canadians.
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> *Wilson v. Servier Canada Inc*., 50 O.R. (3d) 219, 49 C.P.C. (4th) 233, [2000] O.J. No. 3392:
>
> > [93] This approach is efficacious in extending the policy objectives underlying the *CPA* for the benefit of non-residents. If there are common issues for all Canadian claimants, this approach facilitates access to justice and judicial efficiency, and tends to inhibit potentially wrongful behaviour. This is to the advantage of all Canadians and to Canada as a federal state. This procedural flexibility serves in the nature of oil in the institutional and jurisdictional machinery of Canadian federalism. Courts in Australia and the United States, both federal states, have addressed similar issues in like manner. See generally *Femcare Ltd. v. Bright*, [2000] FCA 512 (19 April 2000) (Australia); *Shutts, supra*.
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> *McCutcheon v. Cash Store Inc.*, 2006 CarswellOnt 2973, 27 C.P.C. (6th) 293:
>
> > [42] I believe it is fair to say that the learned judges in the decisions at first instance in Ontario and British Columbia were influenced by the utility of having all claims decided in one court in the same proceeding and, also, in the earlier cases, by the fact that class proceedings statutes were then in force in only three provinces.

28. But Cullity J.'s commentary in *Coleman v. Bayer Inc.* (2004), 47 C.P.C. (5th) 346 is perceptive:

> [84] ... the notice of motion seeks an order certifying the proceedings as a "national class action". This is not a term used in the CPA and, given the exclusion of consumers of Baycol in British Columbia and Quebec, a reference to a national class in the order would be misleading.

29. Indeed, no Canadian court has certified a truly national class action:

(a) *Killough v. Canadian Red Cross Society*, 2007 BCSC 836:

> "...there is no authority for the commencement and settlement of a national class action."

(b) *McCarthy v. Canadian Red Cross Society*, 2007 CarswellOnt 3735:

> [4] Unlike the United States federal court system, Canada does not have specific legislation to deal with the multi-jurisdictional aspects of class proceedings where putative class actions in respect of the same subject matter have been commenced in the superior courts of two or more provinces.

30. Lépine is no exception to the absence of a truly national class. Ontario and British Columbia were split.

31. The aim, to effect judicial economy, the avoidance of potentially embarrassing contrary decisions, and a one court process, to the benefit of the class and the defendants, is that a court should certify as large of a class as possible, and decided to be appropriate, only to the extent that it does not include those already in a certified/authorized class action respecting the same issues.

32. And even at that, this issue of deference to another jurisdiction which is already certified needs to be theoretically examined.

33. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, merits consideration as to its analysis respecting choice of law. The Americans would not defer, even to a certified jurisdiction. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797,105 S.Ct. 2965, 86 L.Ed.2d 628, 2 Fed. R. Serv. 3d 797, Rehnquist J., for the majority, stated, beginning at page 2979, that:

> The Supreme Court of Kansas in its opinion in this case expressed the view that by reason of the fact that it was adjudicating a nationwide class action, it had much greater latitude in **applying its own law to the transactions in question** than might otherwise be the case:
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> > "The general rule is that **the law of the forum applies** unless it is expressly shown that a different law governs, and in the case of doubt, the law of the forum is preferred. Where a state court determines it has jurisdiction over a nationwide class action and procedural due process guarantees of notice and adequate representation are present, we believe **the law of the forum should be applied** unless compelling reasons exist for applying a different law. Compelling reasons do not exist to require this court to look to other state laws to determine the rigthts of the parties involved in this lawsuit." 235 Kan., at 221-222, 679 P.2d, at 1181.
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> In our submission this is something of a "bootstrap" argument. The Kansas class-action statute, like those of most other jurisdictions, requires that there be "common issues of law or fact." But while a State may, for the reasons we have previously stated, assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering **the permissible constitutional limits on choice of substantive law**. It may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a "common question of law." The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of **the constitutional limitations on choice of law**; the

latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.

Kansas must have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests," in order to ensure that the choice of Kansas law is not arbitrary or unfair. *Allstate*, 449 U.S., at 312-313, 101 S.Ct., at 639-640. Given Kansas' lack of "interest" in the claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.

When considering fairness in this context, an important element is **the expectation of the parties**. See *Allstate, supra*, 449 U.S., at 333, 101 S.Ct., at 650 (opinion of POWELL, J.). There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control. Neither the Due Process Clause nor the Full Faith and Credit Clause requires Kansas "to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state," *Pacific Employees Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502, 59 S.Ct. 629, 633, 83 L.Ed. 940 (1939), but Kansas "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Home Ins. Co. v. Dick, Supra*, 281 U.S., at 410, 40 S.Ct., at 342.

Here the Supreme Court of Kansas took the view that in a nationwide class action where procedural due process guarantees of notice and adequate representation were met, "the law of the forum should be applied unless compelling reasons exist for applying a different law." 235 Kan., at 221, 679 P.2d, at 1181. Whatever practical reasons may have commended this rule to the Supreme Court of Kansas, for the reasons already stated we do not believe that it is consistent with the decisions of this Court. We make no

> effort to determine for ourselves **which law must apply to the various transactions involved in this lawsuit**, and we reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law. But the constitutional limitations laid down in cases such as *Allstate and Home Ins. Co. v. Dick, supra*, must be respected even in a nationwide class action.

34. An issue in the national class debate is how does a jurisdiction impose their law on people from another jurisdiction. For example, consumer legislation is quite different between provinces. In the class action field, Quebec, in a thorough manner, and Ontario, to a slightly lesser degree, have both moved to abolish the unfair effect of forcing consumers to sign arbitration clauses and thereby in effect taking from consumers any possibility of working together in a class action. Would a person from New Brunswick be able to avoid consequences of an arbitration clause because the litigation, perhaps by way of a national class, was being pursued in Quebec? Or would the Quebec court, although exercising national jurisdiction, apply New Brunswick law regarding a New Brunswick purchase?

35. Rehnquist J., for the majority, in *Phillips Petroleum*, did not overturn the Supreme Court of Kansas's choice of law rule, which was that Kansas could apply Kansas law to all claimants, resident and non-resident. In the United States, there are many instances of one state applying its law to non-residents: *Peterson v. BASF Corp.*, 657 N.W. 2d 853, 875 (Minn. Ct. App. 2003), aff'd, 675 N.W. 2D 57 (Minn 2004) is an extreme example.

36. Developing *Phillips Petroleum* in the Canadian constitutional context, the test for choice-of-law in national class action may be "sufficient connection", a much lower standard than the jurisdictional "real and substantial connection". On the "sufficient connection" standard, a provincial statutory cause of action could

apply to all resident and non-resident class members. *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, addressed "constitutional applicability" and "permissible reach" of provincial laws. Both are seemingly synonyms for "choice of law". Valid provincial laws can affect "matters" which are "sufficiently connected" to the province.

> In *Reference re Uper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, the Court opined that valid provincial legislation can affect extra-provincial rights in an "incidental" manner. I am of the view that valid provincial laws can affect "matters" which are "sufficiently connected" to the province.

37. The true standard for assuming jurisdiction should be whether there is a reasonable basis to do so. Assuming jurisdiction where there is a "real and substantial connection" or sufficient connection is reasonable. A certified common issue can provide a "real and substantial connection" between the forum and non-resident class members. Including non-residents will not complicate the common issue or its resolution. Nor will hypothetical arguments that choice-of-law will be different for class members.

> • ***Harrington (Feb. 14th, 1997) (BCSC); ¶4, 5, 12-15, 18-9; Harrington (Nov. 8, 2000), (BCCA),¶96; Nantais (Oct. 4th, 1995), 40 C.P.C. (3d) 263 (Ont. Gen. Div.), ¶14-15***

38. If a national class jurisdiction certifies a national class, other courts lose "subject matter jurisdiction". Whether non-residents are in fact bound, or another court will recognize a judgment, is better decided by a court faced with an identified claimant who, after a common issues trial, attempts to bring an individual action which asserts a different position on the common issue than that set out in the certifying order. Courts should rule on past events, not future hypotheticals and courts should not judicially legislate a rule in advance of an applicable situation arising, establishing false tests not in legislation.

• Nantais (Aug. 29th, 1995), ¶79-80; Nantais (Oct. 4th, 1995), ¶12-13

39. A court may apply its substantive laws to participating class members who opt-in or fail to opt-out of the national class. That is the power that the National Assembly gave to the Quebec Courts. That is the power that Queens Park gave to the Ontario Courts. That is the power that the Saskatchewan legislature gave to the Saskatchewan Courts. Use the power.

40. Developing *Phillips Petroleum* choice of law in a Canadian national class action should be based on a "sufficient connection" rather than the "real and substantial connection" that can ground a court's reasonable assumption of jurisdiction over a national class action. A provincial statutory cause of action could apply to all Canadian class members if there is a "sufficient connection" between the province and that incident.

41. In *Lépine*, the court had before it several notices:

> (a) November, 2003: Canada Post gave notice to Lépine's counsel that it was seeking an Ontario national class and settlements approval order, and that the hearing would take place in Hamilton, Ontario, on December 22nd, 2003.
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> (b) February 21st, 2004: notice of authorization to class members was published across Quebec for Quebec residents only.
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> (c) April 7th, 2004: Canada Post published notices to class members in Canadian newspapers, including those in Quebec, notifying class members of the settlement, how to make claims, and their right to opt-out of the class action.

42. How far are we going to go with notice? How ridiculous need we become? A *class member* is not entitled to notice of a national opt-out certification hearing,

whether resident in the province or not. A *named plaintiff* in a parallel class action, however, should receive notice and the right to make submissions. As mentioned the Canadian Bar, obviously supporting the idea of a national class, has established a notice website, and the various courts, with the same intent, by Practice Directives, require posting on the website by plaintiffs' counsel (generally within two weeks of issuance) of notice of any class action issued and the subject matter.

43. Every statute regarding notice may not be examined. Hence, examining the Saskatchewan statute provides an example of notice, *The Class Actions Act*, S.S. 2001, c. C-12.01, S.S. 2007, c. 21 expressly requires notice of a certification application to be given to plaintiffs in related "multi-jurisdictional class actions".

In their Supreme Court factum Carriage Motion (*lis pendens*)

44. Canada Post advances that "the approach adopted in *Vitapharm*" supports allowing the *Lépine* appeal. It refers to Ontario "carriage motions" developed by Cumming J. in *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, 4 C.P.C. (5th) 169.

45. Quebec avoids carriage battles between counsel by the establishment of the "first to file" rule developed by the Quebec Court of Appeal in *Hotte v. Servier Canada Inc.*, J.E. 99-1987.

46. That concept is fraying a little because Quebec judges are chary about granting authorization where the individual applying for authorization is inadequate. The criticism of first to file is the desperation to find an appropriate person and draft pleadings, very often in a 24 hour period.

47. For an example from Merchant Law Group when the apparent gas fraud

case broke in Victoriaville - Drummondville - Sherbroke, after meetings in the late afternoon, after a lawyer worked on the pleadings from 5:00 pm until 7:00 am, after a couple of lawyers talked with dozens of people who were effected, Merchant Law Group issued our claim on the same day as did 2 other law firms. Our claim is strong. It is certainly appropriate and certainly adequate. Our representative plaintiff in this instance is wonderful. He even kept his gas purchase receipts for the past four years. Would our claim have been better and stronger a week later? The answer likely is yes. So first to file has weaknesses – but still works well for Quebecers.

48. In *Lépine*, Canada Post has tried to adopt *Vitapharm*, the rosetta stone for common law carriage motions, and in our submission first to file is not precisely the same, but more importantly, and with deference to a wonderful jurist, Cumming J. was not correct about *Vitapharm* and carriage is not a good direction to be continued in Canadian jurisprudence.

49. The *Vitapharm* approach should not be part of Quebec law or adopted on a national basis because, respectfully:

(a) Cumming J. adopted the notion of "carriage" based on a misconception of the American practice of appointing "lead counsel". In this discussion about Canadian national class action developments related to American class action developments, we are badly off course already, flowing from a mistaken application of American law to develop *Vitapharm*. We have *followed* American law that does not exist. As precedent, *Vitapharm* cited the *Manual for Complex Litigation (Third)* and four old American cases (the newest was 1973) which were copied from footnotes 227 and 239 of *Newberg on Class Actions* (3rd ed.), and misunderstood or misapplied those cases. A review of the four authorities supports the following:

• First, none of the four old American authorities (or current American practice respecting “Interim” and “Class” counsel), support framing the issue as “which class action shall proceed”. Curiously, *Vitapharm* is not even authority for itself given that Cumming J. stayed only four out of ten Ontario class actions which were before him on the motion.

• Second, none enjoined issuing further suits. Indeed, the only authority which addressed an injunction, *MacAlister v. Gueterma* questioned the jurisdiction to grant an injunction. Consolidation was seen as permitting all suits to retain their independence: *MacAlister v. Guterma*, 263 F.2d 65.

• Third, the appointment of general counsel was seen as an extraordinary remedy, rarely ordered and not where other procedural mechanisms existed. Consolidation was a pre-requisite, but that cannot occur on a national basis between various actions in various Canadian provinces.

• Fourth, these issues were considered at or after a certification hearing, and almost exclusively, certification should be the first step which is not only more appropriate for class members and defendants but in keeping with legislative intent (the 90 day certification rule).

50. The concept of getting a matter to certification early rather than having lawyers squabble back and forth about what is better for lawyers is absolutely crucial and all the more important both for members of the class and the system of justice generally, given that certification is nothing more than a first procedural step.

51. Certification should come ahead of motions to strike or motions for particulars and information. Certification should come ahead of carriage and conceptually the courts should allow anybody or groups of counsel who are ready to go to be heard with a certification application. There ought to be, for the benefit of the class, a race to see not who may succeed in a carriage motion but who may impress a court with a certification application and move the case forward by becoming certified for the benefit of the class.

52. The courts talk about the importance of the 90 day certification rule and pay lip service to certification being first but while genuflecting before the altar of timely proceedings in general, class actions are improperly allowed to languish. The cases on moving promptly are important:

- *Garland v. Consumers' Gas Co.*, 2004 SCC 25

> [90] In addition, in oral submissions counsel for the Law Foundation of Ontario made the point that in order to reduce costs in future class actions, "litigation by installments", as occurred in this case, should be avoided. I agree. On this issue, I endorse the comments of McMurtry C.J.O., at para. 76 of his reason:
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> > In this context, I note that the protracted history of these proceedings casts some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an installment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings

> through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

• The comparable American Fed. R. Civ. P. requires certification "at an early practicable time". In its *Report on Class Actions*, at p. 421, the Ontario Law Reform Commission stated:

> The Commission favours establishing a time limit for applications for certification. We believe that an early disposition of the certification application will help to ensure that the interests of the defendant and the absent class members are safeguarded. ... With respe3ct to absent class members, if certification Is denied, an early disposition will afford them an opportunity to evaluate or re-evaluate the advisability of taking other steps to secure relief. In addition, the time limit that we shall propose may help to ensure that the court deciding the issue of certification is not confronted with an action that has become stale.

• *Hoffman v. Monsanto Canada Inc.*, 2002 SKCA 120, at paras. 28 and 29:

> [28] ... it is in the interest of all parties to have the "appropriateness of the class action determined at the outset by certification": See *Dutton, supra* at p. 552, paras. 33 and 38.
>
> [29] In this way, motions to strike or similar proceedings will be unnecessary since the Court can address such issues on the certification application.

• *Attis v. Canada (Minister of Health)* (2005), 75 O.R. (3d) 302, at para. 6:

> [7] As a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined. This may be inferred from section 2(3) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6(CPA) which provides that a certification motion shall be made within 90 days after the last statement of defence, ...

• *Stewart v. General Motors of Canada Ltd.*, 2007 CarswellOnt 3736, at paras. 1-2:

> [1] ... On May 8, 2007 – over the objection of plaintiffs' counsel – I permitted the defendants to schedule motions to be heard

> prior to certification. With the benefit of hindsight, I believe this was a mistake on my part. The motions, which were described by plaintiff's counsel as "a tactical foray" designed to delay the hearing of the certification motion, were, in my judgment, either misconceived or premature at the present stage of the proceeding.
>
> [2] Although essentially procedural, motions to certify proceedings will ordinarily be given priority over other motions and steps in the litigation. As Nordheimer J. Stated in *Moyes v. Fortune Financial Corp.*, [2001] O.J. No. 4455 (Ont. S.C.J.):
>
> > The time limits set out in section 2(3) would strongly suggest that the certification motion is intended to be the first procedural matter that is to be heard and determined. While I recognize that these time limits are rarely, if ever, achieved in actual practice, I do not consider that the reality detracts from the intent to be drawn from the section.

• *Vincent Campbell v. Canada (Attorney General)*, 2008 FC 353, at para. 16:

> In general, Canadian courts have consistently concluded that having regard to the purpose and objectives of class proceedings and the requirement that a certification motion must be brought very early in the proceeding, the certification motion should take precedence over other preliminary motions.

53. Canadian authorities have also addressed the issue of "class counsel". At pp. 359-62 of its *Report on Class Actions* (Toronto, 1982), the Ontario Law Reform Commission effectively rejected a "class counsel" test. Both "class counsel" and "representative plaintiff" should be considered at certification.

54. The notion of "carriage" or first to file may not be coloured as creating jurisdiction. Particularly since the notion of "carriage" often violates applicable legislation. An applicable substantive rule may exclude inherent jurisdiction, but

inherent jurisdiction may not be drawn upon to change substantive law. No class actions legislation addresses "carriage". The "carriage" concept, arising from "inherent jurisdiction", unless based on fair and adequate representation within statutory and *Dutton* common law tests for certification, is being wrongly used to supplant substantive and statutory law.

> *Harrison v. Tew*, [1990] 1 All E.R. 321; *Kiss v. Pilgrim*, 102 Man. R. (2d) 308 (Man. C.A.); *Gillespie v. Manitoba (Attorney General)*, 2000 MBCA 1, 145 Man. R. (2d) 229; *Best v. Paul Revere Life Insurance Co.*, 2000 MBCA 81; *Goodwin v. Rodgerson*, 2002 NSCA 137, 26 C.P.C. (5th) 14; *Fortugno v. Wickstrom*, 2005 SKQB 53, 5 C.P.C. (6th) 154; *Unity Insurance Brokers (Windsor) Ltd. v. UnityRealty & Insurance Inc.* (2005), 74 D.L.R. (4th) 368 (Ont. Div. Ct.) At paras. 32-40.

55. In Canada, those who bring "carriage motions" seek an appointment of what is referred to as "Interim Counsel" and "Class Counsel" in the American Fed. R. Civ. P. 23(g). Although over 320 Canadian authorities reference "class counsel", the OLRC considered and rejected the "Class Counsel" concept. Adequacy of representation was absorbed into the "representative plaintiff" component.

> Ontario Law Reform Commission, *Report on Class Actions*, at pp. 359-62 & 419-22; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 41. Manitoba Law Reform Commission, *Report #100: Class Proceedings*, at pp. 44-46, *Western Canadian Shopping Centres Inc. v. Dutton*, at ¶33; *Hoffman v. Monsanto Canada Inc.*, 2002 SKQB 190, at para. 20; *Richard v. British Columbia*, 2004 BCCA 337, at para. 20.

56. In British Columbia, Lowry J.A. was critical of an attempt to "derail" certification by "carriage". Lawyers use the notion of "carriage" to delay or deny access to justice. "Carriage" on a national basis, unless based on the "first to file" concept, multiplies potential delay. A person who brings a proposed class

proceeding must, within 90 days of the close of pleadings or default, apply to have a "representative plaintiff" appointed. There is no direction to anoint "lead counsel".

> Pursuant to 28 U.S.C. §1407, in Multidistrict Litigation, "lead counsel", "liaison counsel", and "steering committees" may be named under the guidance of the *Manual for Complex Litigation*.

57. Carriage awards lawyers a monopoly and consequently discourages competition to produce timely certification applications. "Carriage" creates a security interest that allows lawyers to 'sit on' a case and therefore delay the legal process to the detriment of class members but to the benefit of lawyers: *3969410 Canada Inc. v. Atofina Chemicals Inc.*, 2006 CarswellOnt 6686.

58. Clarifying the insignificance of "carriage", and other pre-certification procedural events will prevent future impasses similar to the one before the Supreme Court in *Lépine*. The Quebec Court of Appeal's attribution of significance to pre-certification events in that province (giving those events the character of a "decision" or "pending" dispute under §3155(4), especially as they relate to *lis pendens* and comity), is at the root of that court's error in *Lépine*.

59. Although "carriage" has been treated as a presumptive right by courts in many jurisdictions, including Quebec where the "first to file" rule has taken root, no such right exists in Canadian law. On the contrary, "carriage" violates the spirit and drafters' intent of several provincial statutes.

60. The notion of *Vitapharm* "carriage" and "national carriage" should not be a part of Canadian law, leads to the formation of unwieldly consortia, and encourages defendants to conduct "reverse auctions" by finding the counsel group who is willing to settle for the least. Conflicting overarching certifications absolutely play into the hands of defendants with a reverse auction, finding the

group of plaintiffs prepared to take the least on behalf of the class and finding plaintiffs' counsel prepared to take the least because of fear that the other group of plaintiffs' counsel may settle. From the lawyers' perspective, unlike the United States, the settling lawyers in Canada may be paid handsomely and the non-settling lawyers in Canada are likely to be paid not at all. That is not the lead counsel system in the United States.

61. Merchant Law Group is a part of about 25 different consortia, sometimes with many law firms. Amongst other criticisms, consortia result in a lot of meetings (If they ever give you the choice on whether you want to be an alcoholic or a drunk, choose to be a drunk. So you do not have to go to the meetings).

62. Carriage ought not to attempt to find the best counsel but only adequate counsel. If the task were to find the best counsel, then one law firm would have to conduct every class action in Canada, or every class action that they wanted to take away from others because they would be found to be best. Similarly, the task is not to find before authorization the best representative plaintiff. And it is respectfully submitted that as the pendulum seems to have swung by Quebec jurists to be overly careful about authorizations based on who the representative plaintiff may be, remembering that the statute requires only adequate representative plaintiffs.

63. Indeed, "best is not the test":

(a) *Fantl v. Tranamerica Life Canada*, 2008 CarswellOnt 2249:

> [67] In a very important point to the ultimate resolution of this

> motion, it should be emphasized that the Act does not require perfect or the best representation. It requires only fair and adequate representation for the class members.

(b) *Wuttunee v. Merck Frosst Canada Ltd.*, 2008 SKQB 229:

> [33] Since I am satisfied that the Tiboni Law Group and the Merchant Law Group are both capable of effectively prosecuting the class action agaisnt Merck, the remaining question is: Does s. 6(3)(b)(iii) contemplate the Court "grading" the respective abilities of the competing law groups, and if so, what standards must it apply and what enquiries must it make?
>
> [34] I am of the view that the legislation does not contemplate the Court going beyond confirming whether a proposed counsel or law group "is" or "is not" competent to prosecute a specific class action. To go beyond this point would require the Court to carefully analyze the relative capabilities of each counsel as they relate to a specific class action. Evidence of that nature is not before me.

64. Considerations such as whether the counsel representing the plaintiff has adequate resources, skills, and knowledge to effectively and efficiently pursue the class action have therefore taken precedence over other factors. Neither the "best counsel" nor "perfect" counsel is required. At page 4 in the March 27, 2007 oral reasons selecting Merchant Law Group for carriage over an interprovincial seven firm consortium given in the Agent Orange case *Mary Williams v. Attorney General of Canada and Minister of National Defence*, 2006 01 T 2880 CP ("*Williams*"), only "adequate counsel" is necessary.

65. In that judgement Barry J. of the Supreme Court of Newfoundland and Labrador (and now on the Court of Appeal), stated that: "I don't agree...that it is my role to select the "best" of the two groups. As was set out in the Supreme Court of Canada in *Dutton*, my responsibility is to ensure that the counsel

representing the representative plaintiff can adequately represent the class members. And in *Dutton* referred to in terms of as motivation of solicitors, the competence, and the capacity to bear costs".

66. The Court in *Williams* granted Merchant Law Group carriage on the basis that

the firm had shown that it has "experienced counsel who have considerable experience in class actions of various sorts" (at page 4).

67. Going beyond just simply assessing the adequacy of a particular counsel, as

is frequently done in carriage motions, is therefore wrong both according to the Supreme Court of Canada and according to *Williams*.

68. Carriage and the whole notion as it developed in Canada is submitted to be a wrong notion within a province.

69. And carriage has application all the less in relation to the issue of a national class. Carriage, followed by deference by other provinces, may not become the means of allowing one court to proceed.

70. In three provinces, *Vitapharm* has been used to stay and enjoin competing *uncertified* class actions against other *uncertified* class actions. The "winner" received the right to proceed towards certification sought by a law firm or group of law firms. *Vitapharm*, we respectfully submit, is bad law, both within a province and nationally. *Vitapharm* absolutely cannot apply nationally, because one court cannot stay or enjoin proceedings in the courts of other provinces. Counsel in uncertified class actions cannot seek single national omnibus stays

and injunctions in a single court. In many of the carriage motions an important factor has been whether the law firm has an adequate office in the jurisdiction in which carriage is sought. For example, Lauzon Bellanger has acknowledged strengths and competence. They might go to Ontario and lose a carriage motion simply because they do not have an Ontario office although they might be the strongest choice to run a national class from Quebec or in the Ontario courts.

71. Deciding carriage, on shaky jurisdictional ground for any purpose is ridiculous as a step of establishing *lis pendens*, an important Quebec concept, in relation to more important steps like dealing with a motion to strike. And since a motion to strike ought to be heard at certification or after certification it is hard to see where the *Vitapharm* approach can effectively coordinate plaintiffs and defendants in terms of being in one Court or another.

72. In the United States, lead counsel are not appointed as soon as class proceedings are begun. The courts allow the lawyers to war a bit, show their stuff, before the judiciary selects a law firm or more frequently two or three law firms to lead in the litigation. And even at that, other lawyers are not then cut out of the litigation. Clients in the United States who have selected Siskinds Desmeules as their law firm are not told they must now be represented by Woods Senc. Lead counsel has a better chance of being paid a multiple of fees than the firm which may have been passed over, but all law firms are expected to share in the fees if the case proceeds successfully. In Canada, a carriage motion success by Sylvestre Fafard or perhaps carriage by first to file, for example, leaves all other firms behind earning nothing. And more importantly, individuals who may have selected Trudel Johnston are told by the court that they may not have the lawyers of their choice to represent them. How can a court tell people they are to be represented by a lawyer they do not want. But in Canada, unlike the United States, that is what happens, by first to file or by

carriage.

73. If we believe there may not be multiple firms seeking to represent the same class, and the United States has not come to that view, and if we believe that a multi-jurisdictional national class or near to national class is appropriate, how do we deal with a situation where Quebec might authorize for the whole nation and Nova Scotia might certify for the whole nation notwithstanding the Quebec authorization? Noting the dangers of a reverse auction the American pattern in multi-district litigation has been to bring all the plaintiffs together. That leads to conferences sometimes involving hundreds of lawyers for plaintiffs and the defence. That for example is what emerged over Menu Foods and it was an uneconomic process. Hence, if the Canadian approach is not to bring lawyers together, and if we accept that authorization or carriage ought not to be viewed as *lis pendens* and ought not to bar certification into that jurisdiction then a "first to certify" approach on a national basis is the only realistic solution. If a firm knew that once certified, no other firm and representative plaintiff could lead the class in a reverse auction, and the outcome in *Lépine* merits consideration in that light, then the representative plaintiff and lawyers succeeding with first to certify would be in a position of power to seek an adequate settlement or move to trial on behalf of a national class.

74. Moving with dispatch to be nationally certified in the best interests of the class is further supported by the limited role that *forum non conveniens* should have on national class actions.

- In *Wilson v. Servier Canada Inc.*, 50 O.R. (3d) 219, 49 C.P.C. (4th) 233:

  > [33] The class members are Canadian residents. The Claim alleges injuries and damages from the ingestion of Pnderal

> and Redux in Canada. There are several thousand putative class members, some of whom will be in ill health and many of whom will have only modest means. In such circumstances it is not easy to establish that another forum is clearly more appropriate than the one chosen by the plaintiff. See *Ontario New Home Warranty Program v. General Electric Co.* (1998), 36 O.R. (3d) 787 (Ont. Gen. Div.); *Connelly v. R.T.Z. Corpn. Pls*, [1997] 4 All E.R. 335, [1997] 3 W.L.R. 373 (U.K. H.L.).

• In *Ward v. Attorny General of Canada (Ministry of National Defence)*, 2006 MBQB 212 Scurfield J.

> [14] Yet, the solution proposed is not without flaws. Canada concedes that this proposed solution would have little application to most class actions. Those class actions that are based on torts where the product has been distributed nationally would not be caught by this rule. In those cases, there would be an equal attachment to all provinces in which the product has been distributed. Consequently, the "new rule" would be of no assistance. Nevertheless, Canada maintains that such an absolute rule should still be imposed when the acts or omissions take place entirely within a single province. In short, some order is better than none.

• In *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, Huddard J.A., speaking for the majority stated:

> [92] ... In this case, the alleged wrongful acts are defective manufacturing or failure to warn. When a manufacturer puts a product into the marketplace in any province in Canada, it must be assumed that the manufacturer knows the product may find itself anywhere in Canada it if is capable of being moved. As I suggested earlier in these reasons, it is reasonable to infer that a manufacturer of a breast implant knows that every purchaser will wear that implant wherever she resides, and that if the implant causes injury then the suffering will occur wherever she resides, and require treatment in that location. By the action of the sale, the manufacturer risks an action in any province. In these circumstances, there can be no injustice in requiring a manufacturer to submit to judgment in any Canadian province. The concept of *forum non conveniens* is available to deal with

> any individual case where a different forum is established as more appropriate. As Mr. Justice La Forest remarked in the passage I quoted from *Tolofson*, supra, in some circumstances individuals need not be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience.

- In *Sollen v. Pfizer Canada Inc.*, 290 D.L.R. (4th) 603:

> [26] 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*, whether codified as in Saskatchewan, or under the common law.

75. If something like the first to file rule became instead the “first to certify” rule, in which a national class action certified in one province would be recognized in other provinces, that would and could become the vehicle and method to have national class actions based upon a recognition by all jurisdictions in Canada of the competence of superior court judges in other jurisdictions.

76. Applied to *Lépine*, Fournier J. ought not to have certified or, if he did not know of the Ontario certification, ought to have decertified or Mr. Justice Baker ought to have recognized the Ontario Superior Court’s multi-jurisdictional certification order and de-certified, and the Quebec Court of Appeal ought to have overturned Baker J. when he failed to decertify.

77. The doctrine of *lis pendens* could apply only after a certification order issued in one province that identifies common issues for a specific multi-

jurisdictional class. Carriage, an issue between counsel, cannot be as significant as many other types of motions, and may not, just as first to file may not, become an impediment to another jurisdiction certifying on a national basis.

78. If a national class may only be certified in instances where there has been essentially nothing done in other jurisdictions, then the concept of a national class will be an illusory notion.

79. Deferring to a certification order is the only principled point on the incremental judicial flow of action where other courts should stand down. In *Lépine*, on what basis should the court have held that a multi-jurisdictional Ontario order was inappropriate:

- because Quebec proceedings were launched?
- because the "first to file" rule established class counsel in Quebec?
- because the Chief Justice appointed a Coordinator Class Action Chambers judge?
- because the Coordinator Class Action Chambers judge met with counsel?
- because the Coordinator Class Action Chambers judge heard a preliminary motion to amend, substituted the proposed representative, ordered cross-examination on an affidavit (more likely in the common law jurisdiction), heard a motion to strike (very frequently made in the common law jurisdictions)?
- because the Coordinator Class Action Chambers judge appointed a Case Management judge?
- because a Case Management judge heard other preliminary applications, and had them on reserve or decided them?
- because counsel filed an authorization application?
- because a Case Management judge scheduled an authorization hearing?

- because authorization was heard, on reserve, or had been granted?
- or, in none of the above, if the Ontario court believed that it was preferable that an Ontario national order be granted?

80. It is respectfully submitted that the error of the Quebec Court of Appeal regarding *lis pendens* is partly due to a misconception of the significance of the notion of the right to proceed by the first to file rule, or by "carriage", at the pre-authorization stage.

81. Canada has roughly the same population as California. California class proceedings are subsumed in national class proceedings, for the benefit of the class, and out of considerations of fairness to defendants. Certainly California class proceedings are not divided into an action on behalf of the people of Los Angeles, another for San Diego, a third for Palm Springs and Palm Desert, with the result that the people of California have nine or ten class actions which is what emerged in Canada over Indian Residential Schools, is ongoing today over Menu Foods, and is part of the squabble regarding Vioxx, to name three of the actions in which Merchant Law Group is involved. California becomes involved in all of the United States and Canada is having difficulty even uniting in one class action approach for a nation of almost insignificant size in the world of class proceedings.

Alternatives to "First to Certify"

82. The alternatives are poor.

83. The alternative of relying upon carriage motions has been discussed at length. How could it work anyway? Our Quebec offices will argue notionally that we had already been given carriage by the first to file rule and would that mean

that the first to file in Quebec has carriage for the nation because Quebec could exercise national jurisdiction? As seen in the *Tiboni* decision of Cullity J., (rendered July 28, 2008) 2008 CarsewellOnt 4523, in Vioxx, how can winning carriage in Ontario, and assumably *for* Ontario, give preemptive rights to be certified for a national class. Factors such as whether the law firm has an office in Ontario play heavily in an award of carriage. Carriage for Ontario is just that, *carriage for Ontario*.

84. But if other jurisdictions must defer to Ontario because carriage has been awarded, or defer to Quebec because the first to file rule means there was carriage, then building a national class becomes impossible. There will be bars to a national class as a result of decisions in one court or another.

85. Many things seem more important as initial procedural steps than an award of carriage. Should a Court of Manitoba defer to Saskatchewan if Saskatchewan has already decided a motion to strike? Perhaps a battle over forum *non conveniens* had been resolved in favour of the jurisdiction taking jurisdiction. A motion to strike is substantive and goes to the heart of matters. Carriage is procedural. A motion to strike is more significant than carriage but if other courts must defer because a motion to strike has been heard, a procedural battle was undertaken over pleadings or disclosure of documents, perhaps there had been a challenge to the proposed representative plaintiff prior to an application in Quebec for authorization, or perhaps carriage had been decided, then a national class can never emerge.

86. The procedure itself can be problematical unless a concept like first to certify emerges. How do courts deal with issues that arise in multiple jurisdictions.

87. For example, in Indian Residential School matters, a $5 billion settlement, agreed to by the Government of Canada on November 20, 2005, and then renegotiated and agreed again on May 10, 2006, we appeared in nine different courts, in four of those jurisdictions the legal proceedings which were the vehicle for certification were Merchant Law Group actions and in Quebec there was a shared issue between the two proceedings that had been launched in this jurisdiction. In Winners HomeSense over information breach there were proceedings in three jurisdictions launched by Merchant Law Group which became a part of the settlement in the United States and an application was made before Madam Justice Lax in Ontario last year and two other proceedings are simply going to whither on the vine. In Menu Foods, dogs and cats dying, again a settlement with American counsel, in this case involving a consortium of lawyers in which Merchant Law Group is a part, we were required by the Court to appear in nine different courts, simultaneously by video conference. Owen Falquero from the Merchant Law Group Montreal office flew to St. John's Newfoundland, lawyers from our Western offices appeared in the prairie courts, and we are required to go back and do this again on November 3. In the settlement achieved by Merchant Law Group again with American lawyers against Lord Black and Hollinger, once again there have been Merchant Law Group proceedings in three jurisdictions and, in this instance, the expectation is that each of the three courts will have to pass on certification. Without national proceedings the processes are expensive and difficult.

88. Even with the wish of common law jurists to establish a system for national jurisdiction, it is difficult to do so and arguably the courts are exceeding their constitutional authority.

89. In Indian Residential School matters, a number of the judges met in Calgary and purported to exercise jurisdiction and hear court in Calgary. How

can a judge appointed with jurisdiction in Manitoba exercise jurisdiction in Alberta. How can a Manitoba Court proceeding, where the parties, Indian victims, and clients of Merchant Law Group, who would have wanted to attend and did attend in large numbers in every jurisdiction, be expected at their expense to appear in Calgary to know what is happening in their Court process.

90. Arguably it is impossible for judge made alchemy to turn lead into gold. It may even be impossible constitutionally.

91. Notable related decisions[3] connect with *Lépine,* where, based upon inadequate notice, the Quebec Court of Appeal upheld the dismissal of an application for the recognition of a settlement approval order. When a court with jurisdiction exercises that jurisdiction, a sister court will be constitutionally bound

[3]Sollen v. Pfizer Canada Inc., 290 D.L.R. (4th) 603, ¶26; Wilson (Sept. 13, 2000), ¶33; Harrington v. Dow Corning Corp. (Nov. 8th, 2000) ("Harrington"), 2000 BCCA 605, ¶92; Ward v. Canada, 2006 MBQB 212, ¶14

Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, [2007] 2 S.C.R. 801, 44 C.P.C. (6th) 205, 284 D.L.R. (4th) 577: ("[189] As this last paragraph suggests, the rules of private international law specifically involve the three following areas: (1) choice of law; (2) choice of jurisdiction; and (3) recognition of foreign judgments... [190] "Choice of law" rules attempt to resolve the issue of which law governs a legal dispute when it becomes possible for the laws from more than one legal system to apply.... [191] **"Choice of jurisdiction"** rules attempt to resolve the issue of which jurisdiction can hear a dispute when it becomes possible for more than one jurisdiction to be seized of the matter. The issues raised by this area are logically considered prior to those raised under "choice of law". ...**Which choice of law rule will be applied is not the first question to be addressed.** A court hearing the dispute must first decide whether it can properly exercise jurisdiction over the dispute. [192] "Recognition of foreign judgments" rules operate to do just what the name suggests: they provide guidance on when the domestic jurisdiction can recognize and give force of law to foreign judgments.")

to recognize it.[4]

92. Chief Justice Klebuc of Saskatchewan, on a matter where Merchant Law Group is counsel for the representative plaintiff, has certified a class action over the drug Vioxx to encompass all Canadians with the exception of jurisdiction over the people of Quebec, in that case recognizing that authorization had already been granted in Quebec.

93. Unremarkably, no Canadian Court has ever refused to certify a contested class action involving the purchase and ingestion of a prescription drug.[5] Indeed, no appellate body other than the Ontario Divisional Court ever granted leave to appeal such a certification order[6] prior to the hearing which started five weeks

[4]The constitutional element of Federalism was developed extensively in *Morguard, supra* and *Hunt, supra* and their progeny. Justice LaForest emphasized a single country comprised of (a) a common market; (b) a single interprovincially mobile population; (c) a single judiciary; and (d) a single body of lawyers. The desirability of working together with the single judiciary, appointed by federal authorities provides an answer to the obstacles posed by highlighting territoriality as the primary consideration in Canadian jurisdictional disputes. When judges preside over national class actions, they do so on a federalist bench.

[5]Bouchanskaia v. Bayer Inc.(August 25th, 2003), 2003 BCSC 1306 ("*Bouchanskaia*"); *Boulanger v. Johnson & Johnson Corporation* (Jan. 18th, 2007), 40 C.P.C. (6th) 170 (Ont. Sup. Ct.) ("*Boulanger*"); *Heward v. Eli Lilly & Co.*(Feb. 6th, 2007), 39 C.P.C. (6th) 153, (Ont. Sup. Ct.) ("*Heward*"); *Pardy v. Bayer Inc.* (April 19th, 2004), 2004 NLSCTD 72; ("*Wheadon*"); *Walls v. Bayer Inc.*(Jan. 7th, 2005), 2005 MBQB 3, 189 Man. R. (2d) 262, ("*Walls*"); *Wilson v. Servier Canada Inc.* (Sept. 13th, 2000), 24 C.P.C. (5th) 175 (Ont. Sup. Ct.), (May 1st, 2001), 11 C.P.C. (5th) 374 (Ont. Sup. Ct.), (May 24th, 2002), 213 D.L.R. (4th) 751 (Ont. Sup. Ct.), (May 29th, 2002), 46 C.P.C. (5th) 359 (Ont. Sup. Ct.) ("*Wilson*")

[6]*Boulanger v. Johnson & Johnson Corporation* (May 16th , 2007), 2007 CarswellOnt 3360, (Ont. Div. Ct.) leave denied in (Sept. 13th, 2007), 2007 CarswellOnt 6100 (Ont. Div. Ct.);

ago in the Saskatchewan Court of Appeal regarding the Vioxx certification. (And the Divisional Court recently upheld the drug certification in *Wilson v. Servier*).

94. Regarding Vioxx, Denis J. certified. Klebuc CJS certified. Cullity J. certified. Denis J. certified for Quebec. Klebuc CJS certified for all of Canada excluding Quebec. Cullity J. certified for all of Canada excluding Saskatchewan and Quebec.

95. Multiple overlapping certifications are not theoretically improper or unworkable but *Lépine* seems to offer a perfect example of why they must not become the Canadian pattern. *Lépine* smacks of a reverse auction. Canada Post appears to have arranged a settlement which is minimalistic at best and unfair to class members at worst. If more than one jurisdiction is granted an overlapping certification, defendants may seek to settle with the group of counsel for plaintiffs prepared to take the least. Counsel preparing for the expense, time, and risks of a trial, in the hopes of achieving more for class members, may find their work swept away by settlement elsewhere.

96. The judge, in the *Lépine* example in Ontario, was in this disadvantaged position. No one on a settlement opposes the settlement. No one comes forward before judges used to an umpire system and puts forth the non-settlement side of the argument. As one judge wrote, 'plaintiffs' counsel appear

> *Heward v. Eli Lilly & Co.* (July 10th, 2007), 45 C.P.C. (6th) 309, 51 C.C.L.T. (3d) 167 (Ont. Sup. Ct.); *Pardy v. Bayer Inc.* (March 8th, 2005), 2005 NLCA 20, 246 Nfld. & P.E.I.R. 157, leave further denied in *Pardy v. Bayer Inc.* (Nov, 10th, 2005), 348 N.R. 199 (note); *Walls v. Bayer Inc.* (Aug. 10th, 2005), 2005 MBCA 93, 195 Man. R. (2d) 293, leave further denied in (Dec. 15th, 2005), 212 Man. R. (2d) 318 (note) (SCC), *Wilson v. Servier Canada Inc.* (Nov. 21st, 2000), 52 O.R. (3d) 20 (Ont. Div. Ct.) leave further denied in (Sept. 6th, 2001), [2001] S.C.C.A. No. 88, (Oct. 10th, 2002), 23 C.P.C. (5th) 1 (ONCA)

and indicate how weak their case is and that they probably could never have won. Defendants' counsel appear and say they were going to lose but the settlement is fair' and both sides indicate in many instances that this is all the money the company can afford, this is the limits of insurance and beyond, and all of these submissions come without any way for the consent certification judge to dig for facts or law which might result in that judge looking for a more appropriate disposition as regards the class.

97. These submissions focus on judicial economy. These submissions focus on possible methods to achieve that judicial economy. These submissions focus on the jurisprudential underpinnings which might support that judicial economy.

98. But lawyers must beware of making too much of principles like judicial economy. Judicial economy, access to justice, and behavioural modification come from *Dutton* but ought not to be overplayed.

99. The OLRC referred to "Access to Courts", "Judicial Economy", and "Behaviour Modification" as "benefits" and "advantages". But they are not an express part of any legislation. In common law class actions, *Dutton* described them as "advantages". *Rumley* did not refer to them at all. In *Hollick*, the SCC assessed preferability in Ontario-type regimes through the "lens of" these advantages – but on agreement of counsel. Here, certification would promote them.[7]

100. But as lawyers we care more about the good of the people around us than

[7] *"Report on Class Actions", OLRC, 117-40; Knowles (May 14th, 2001), ¶14, 15; Boulanger (Jan. 18th, 2007), ¶52-3; Dutton, supra, ¶27-9; Hollick, supra, ¶15; Sorotski, supra, ¶70; Pearson v. Inco Ltd., 205 O.A.C. 30, ¶67(2); Wheadon (April 19th, 2004), ¶137-43; Wilson (Sept. 13th, 2000), ¶124-6; Bouchanskaia (Aug. 25th, 2003), ¶169-70*

simply about what is efficient. That is the reason that so many of us take an interest in public life, are elected to the governments of our municipalities, the National Assembly, parliament, and serve within the third arm of governance, the strongest and most important arm of governance, the judiciary. ‘

101. Ending as this began, particularly for the people of Quebec with a separate approach to life and humanity, call it culture; with a separate approach to justice and fairness, flowing from a different view of humanity and flowing from the code and not the common law; ought we as lawyers and those of you who are or will be jurists say and act on the view that the benefits of a national class make sense for this province as well as for the common law provinces. The benefits of efficiency and fairness may mean that the people of Nova Scotia, with their separate view of justice and fairness, may to some extent be submerged in the view taken by a judge in Manitoba, but while that may be acceptable for Nova Scotians and Manitobans, from time to time to have their views subsumed by a decision maker elsewhere, that does not necessarily make sense for the people of Quebec.

102. Qu’Appelle la groupe national – et pourquoi ils le veulent.