Navigating Uncharted Waters: Multi-Jurisdictional Class Action Proceedings

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I. Introduction
The landscape of class actions in Ontario has changed significantly over the last two years. Having to defend certified class actions that have parallel or concurrent proceedings in other jurisdictions, whether in other provinces or other countries, is an increasing reality for many Ontario defendants. In the last two years, in the decisions of *Cloud*² and *Pearson*³, the Ontario Court of Appeal provided clarification of the test for certification in Ontario, making it clear that certification was intended to be a “low bar”. More recently, in *Markson*⁴ and *Cassano*⁵, the Court of Appeal addressed the preferability analysis, aggregate damages and the procedural tools in the *Class Proceedings Act*, S.O. 1992, c. 6 (the “Act”) intended to deliver efficacy to certified class actions. The effect of these four decisions is to make Ontario arguably one of the easiest jurisdictions in Canada (and the world) in which to obtain certification. As a result, it can be anticipated that more cases will be commenced in Ontario. These cases will likely not be restricted to an Ontario class but, in many cases, will propose to certify a “national” class or possibly even an international class. At the same time, cases previously certified are maturing and approaching trial and the practicalities of the preferability and manageability aspects of certification will be tested. While the recent guidance from the Ontario Court of Appeal has lead to certainty in respect of what will be sought on certification, the maturation of the class action field and the increase in multi-jurisdictional class actions has increased the uncertainties including how certification of and resolution of these cases will be treated in other jurisdictions. Previously uncharted risks must now be managed by Ontario defendants.

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4 *Markson v. MBNA Canada Book*, 2007 ONCA 334 (Ont. C.A.) (CanLii) ["Markson"].

5 *Cassano v. The Toronto-Dominion Bank*, 2007 ONCA 781 (Ont. C.A.) (CanLii) ["Cassano"].
Class action claims have case specific and, to a certain extent, type specific risks. The breadth and variety of class actions mean that all risks cannot be identified and, even where identifiable, solutions to managing these risks are not yet knowable. Nonetheless, through a review of recent decisions in multi-jurisdictional class action litigation, focusing on Ontario, we attempt to identify in this paper a few of the emerging areas of uncertainty and hence risks faced by defendants of multi-jurisdictional class actions.

II. One Action: Many Fora
The obvious challenges raised by multi-jurisdictional class actions are not new. In some circumstances it may be in the interests of defendants to limit multiple proceedings that litigate the same claims. This interest dovetails with one objective of class action litigation, that of judicial economy. One solution is consolidation of similar claims into a single action thereby reducing wasted resources and avoiding duplicative proceedings.

In the recent decision of the Ontario Superior Court of Justice in Setterington v. Merck Frosst Canada Ltd, Merck was facing the prospect of simultaneously defending a multitude of duplicative class actions. On a carriage motion brought by the national consortium of plaintiffs’ counsel that consolidated various actions into a single proceeding, the court provided a strong indication that courts are sensitive to the rationales of efficiency underlying class actions, as well as the interests of fairness to the defendant.

Winkler J., as he then was, held at para. 11:

…with respect to class actions […] most carriage motions, as is the case here, will involve multiple proceedings by essentially the same class against the same defendant for the same relief. For the purposes of the application of this principle on a practical basis in class proceedings, it is not necessary that the multiple proceedings mirror each other in every respect. Rather, the court will look to the essence of the proceedings and the similarities between them to determine whether permitting two or more to proceed would offend the prohibition against multiplicity.

7 For a more complete description and commentary on this case please see “Competing for Class Action Carriage: Setterington v Merck”, online :http://www.lerners.ca/content/documents/competing_for_class_action_carriage.pdf from which this section was adapted.
Carriage was granted to the national consortium of plaintiffs’ counsel, and all other actions in Ontario pertaining to the same subject matter were stayed.

Even when carriage is not in issue, a court may grant a stay of similar proceedings to ensure judicial economy, avoidance of unnecessary duplication of fact-finding or legal analysis, and the risk of inconsistent findings. The timing of a stay motion is important, however, since courts are reluctant to leave plaintiffs potentially without legal recourse in a given province. In the Setterington case, discussed above, counsel for the action that was ultimately stayed in Ontario was also proceeding with a proposed national class action in Saskatchewan. This action was not yet certified. The progress and proceedings in the Saskatchewan action were not given greater consideration by the Court on this carriage motion.

Recent suits against the drug manufacturer Bayer Inc. highlight the concern about staying proceedings in the jurisdictions before certification. Class proceedings were commenced in British Columbia, Saskatchewan, Manitoba, Ontario and Newfoundland. In order to avoid the cost of defending class proceedings in multiple provinces, Bayer brought motions to stay the proceedings prior to certification in Newfoundland and Saskatchewan. However, it was unsuccessful because the courts were reluctant to grant such motions without the existence of a certified proceeding in another province that would include the class of plaintiffs from its own province.

Strategically, this means that one avenue open to defendants to their benefit may be to minimally resist a certification motion in a province of preferred law in order to be successful on motions to stay proceedings in other less favourable jurisdictions. The ability to successfully argue for a stay based on a national class is discussed below in the section on the scope of the class.

III. The Class Action Landscape in Ontario
Not surprisingly, the most critical stage of any class proceeding for the defendant is the certification motion; not only does certification determine whether the proceeding continues at all, but it also defines the scope of the class seeking relief. Ontario’s certification standard is, in

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many ways, more plaintiff-friendly compared with the Rule 23 Regime in the U.S. Federal Courts:11

Ontario plaintiffs do not need to establish the principles of numerosity (meaning that the defined class must be sufficiently numerous to warrant class certification), typicality (meaning that the claim of the representative plaintiff must be typical of claims of the other members of the prospective class) or predominance (meaning that the common issues in the action must predominate over the individual ones). [emphasis ours]

Within Canada, Quebec has traditionally been seen as the most plaintiff-friendly jurisdiction because a plaintiff is only required to establish a prima facie case of harm to succeed on a motion for certification (“authorisation”)12. When the change to the Quebec Code of Civil Procedure removed the ability to cross-examine on an affidavit filed on a certification motion13 it was thought that this would open the floodgates for class actions to be certified in Quebec. However, following the recent decision of Options Consommateurs v. Novopharm14, it does not appear that this dire prediction has proven true. Roy J. did not certify the class in Novopharm because of a lack of documentary support for the cause of action (except for one newspaper article). As stated by the Quebec Court of Appeal in Procureur general du Quebec c. Noranda15, in obiter16.

The decision on authorization (certification) follows particular rules because the legislator gave it a relatively modest role in the class action process. In fact, it only serves to filter demands that would manifestly not satisfy the requirements of article 1003 (translation).

With the recent decisions in Cloud17, Pearson18, Markson19, and now Cassano20, Ontario is now arguably the most plaintiff friendly jurisdiction in Canada and recent decisions indicate that it is

12 Claude Desmeules, “Certification of Class Actions in Quebec: Where do we stand following the amendment to the Code of Civil Procedure?” The 3rd National Symposium on Class Actions. Proceedings of a Conference Held April 6 and 7, 2006 at 7 [“Desmeules”].
13 Art. 1002 C.C.Q.
15 2006 QCCA 226 (CanLii).
16 Desmeules, supra note 13 at 8.
17 Cloud, supra note 2.
18 Pearson, supra note 3.
19 Markson, supra note 4.
20 Cassano, supra note 5.
likely to become, if it is not already, the jurisdiction in Canada from which the majority of multi-
jurisdictional class actions emanate.

In his first decision on class actions since becoming Chief Justice of Ontario, Winkler C.J.O. in Cassano essentially laid out guidelines for the conduct of class proceedings in Ontario.

The central claim in Cassano is that TD Bank breached its contract with the holders of its Visa credit cards by charging undisclosed and unauthorized fees, in particular a “conversion fee” and an “issuer fee”, in respect of foreign currency transactions.\(^{21}\)

Winkler C.J.O. took issue with the lower court’s analysis of the preferable procedure criteria and found that it reflected an error of law that required intervention, holding: \(^{22}\)

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\text{In my view, this is a case where the common issues trial judge could find, based on a review of the evidence, that it is appropriate to conduct an aggregate assessment of monetary relief under s. 24 of the CPA, as was contemplated by this court in Markson, supra. Alternatively, even if the trial judge were to conclude that an aggregate assessment of damages is inappropriate, the nature of the claim asserted is such that the provisions of the CPA might well be utilized so as to make a class proceeding under the statute the “preferable procedure for the resolution of the class members’ claims”: see Hollick v. Toronto (City), [2001] 3 S.C.R. 158 at para. 29.}
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Continuing on, he held\(^{23}\):\[
\text{I am of the view, however, that even if the common issues judge were to determine that it is not appropriate to award aggregate damages in this case, a class action is still the preferable procedure in light of the governing principles that apply to the preferable procedure inquiry under s. 5(1)(d). These principles, which were articulated by the Supreme Court of Canada in Hollick, supra, were summarized in Markson at para. 69:}
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\(^{21}\) Ibid. at para. 1.  
\(^{22}\) Ibid. at para. 38.  
\(^{23}\) Ibid. at paras. 55, 56.
(1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;

(2) “Preferable” is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and

(3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

Having regard to the first two of these principles, the court must consider judicial economy and the institutional capacity of the courts to efficiently address a matter of this potential size. It must also consider access to justice and the availability of any other remedial process to the putative class members. And finally, the court must consider the questions of general deterrence and accountability.

Ontario as a jurisdiction now appears to favour certification and class actions as preferable procedures. The above decisions, in particular Cassano and Markson, are generally viewed as pro-plaintiff. However, these decisions may also be useful to defendants. In fact, these cases may be used to support defendants’ arguments to limit multiplicity of proceedings, for recognition of foreign settlements, or for certification of larger multi-jurisdictional classes, particularly in applications for certification and settlement.

The practical cost-benefit approach that is endorsed by Chief Justice Winkler above considers not only the impact on class members but also the impact on defendants and on the court. The court must also accord the defendant fairness. Winkler C.J.O. has also recognized that a class proceeding is often times meant to resolve more than just common issues. When presenting a settlement for approval by the court, these principles, recently touted as favourable arguments by which plaintiffs may achieve certification, may prove to be just as forceful in the hands of a defendant that seeks to achieve finality in multiple jurisdictions. Access to justice is increased in those jurisdictions where no class action legislation exists, where there are other bars to class actions, lacuna in existing class action legislation, or even where the proceeding is not as
advanced. Court resources are used economically as in each jurisdiction need not preside over the same action, and further, the potential for inconsistent decisions is lowered.

For those situations where a defendant chooses to resist certification, it behooves a defendant to raise the arguments that speak directly to these issues. Then, a decision on point exists that may be usefully presented to other jurisdictions indicating how the certifying court considered the effect of its decision.

If Ontario does become the preferred forum for certification of multi-jurisdictional class actions for plaintiffs’ counsel, it is not a forum that is without recourse for defendants. The recent Danier decision, where the Supreme Court of Canada upheld and awarded costs in a class action against a representative plaintiff, and the recent Poulin decision, where costs were awarded against both Canadian and U.S. co-counsel, indicate that Ontario courts will enforce a loser pay costs regime in the context of class actions. The willingness of the courts to look at the context of a class action and to examine the business arrangements behind class actions are significant developments. In fact, it is arguable that the costs consequences in these recent examinations may have a chilling effect or, at the very least, right any perceived imbalance of a strictly plaintiff friendly jurisdiction.

The Danier case was firmly within the commercial litigation/securities arena. The representative plaintiff, Mr. Durst, was a wealthy individual that had a significant interest in the outcome of the litigation. The Supreme Court of Canada, per Binnie J., stated that:

...there is no doubt that the representative plaintiff, Mr. Durst, was outraged by what he regarded as the devious conduct of the respondents, and considered that it was in the public interest to call them to account. Nevertheless, he also has a major personal financial interest in the outcome. He purchased 222,600 shares in Danier’s IPO and made a profit of approximately $1.5 million when he sold these shares. If the trial judgment had not been reversed on appeal, he would also have recovered an additional $518,410 by way of damages. He acknowledged that he was a person of substance, with an investment portfolio in the range of $11-22 million.

27 Danier, supra note 25 at para. 62.
There is nothing to be criticized in any of this. The trial judge noted that the costs incurred by Mr. Durst in this litigation outweighed any personal financial benefit.

Nonetheless, the Supreme Court of Canada continued:\(^{28}\):

However, protracted litigation has become the sport of kings in the sense that only kings or equivalent can afford it. Those who inflict it on others in the hope of significant personal gain and fail can generally expect adverse cost consequences.

The appellants are correct to point out that there is a strong public interest in setting the rules of adequate disclosure by issuers prior to closing, that indeed proper disclosure is the heart and soul of the securities regulations across Canada. However, regard must also be had to the situation of the respondents/defendants who have incurred the costs of a 44-day trial and 5 days in the Court of Appeal and one day here to defend themselves against serious allegations, and who in this instance have prevailed.

Nor do general concerns about access to justice warrant a departure from the usual cost consequences in this case. While I agree with counsel for the appellants that “[a]n award of costs that exceeds or outweighs the potential benefits of litigation raises access to justice issues” (Supp. A.F., at para. 39), it should not be assumed that class proceedings invariably engage access to justice concerns to an extent sufficient to justify withholding costs from the successful party.

Juxtaposed against the Cassano decision in the Ontario Court of Appeal, the language of the Supreme Court of Canada in Danier, suggests a potential discontinuity between the two levels of court in terms of the nature and utility of class actions.

In Poulin\(^ {29}\), MacKenzie J. considered costs requested on a substantial indemnity basis against the plaintiff’s solicitors and against the U.S. co-counsel that they alleged, financed, managed and controlled the litigation. Despite the fact that the U.S. counsel were non-parties to the action, the Court held that they were subject to the ’s jurisdiction for the purposes of making an award of costs and awarded costs against them, in addition to Canadian counsel (and the

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\(^{28}\) Ibid. at paras. 63, 64, 69.
representative plaintiff) on a substantial indemnity basis. What appears to have driven the Court's decision was the 's apparent disapproval of the arrangements between the plaintiff's Canadian and U.S. counsel.

As set out in the certification decision, MacKenzie J. noted that the primary affidavit in support of the motion for certification was filed by the U.S. attorney, Mr. Jekel of Motley, Rice. No affidavit was sworn by the proposed representative plaintiff. At certification the defendants argued that the representative plaintiff was "incapable of fairly or adequately representing the interests of the proposed class, contending that, "he is an unwitting pawn in this action, which was contrived and commenced by plaintiff's counsel and his U.S. colleagues." The arrangement between Canadian and U.S. counsel in this case was described as a "co-counsel association agreement". U.S. counsel agreed to supply "litigation support", where Canadian counsel had to obtain the prior consent of U.S. counsel before incurring and paying disbursements above $2,500, and "guidance", and to fund the litigation costs. As well there was a provision for fee splitting after reimbursement of all litigation expenses incurred by Motley Rice, split 70% Canadian and 30% U.S. MacKenzie J. found that the "co-counsel association agreement" was essentially an underwriting agreement and held:

This latter fact becomes particularly poignant in terms of the capacity of the representative plaintiff to bear any costs that could be ordered against the representative plaintiff. The plaintiff acknowledged in the course of his Rule 39.03 examination that his retainer agreement with Canadian counsel did not provide for any indemnity to him with respect to costs. Although this would in the ordinary course be considered a matter between a litigant and his or her counsel, subject to either judicial or regulatory oversight as the case may be, it is a significant matter in the context of the plaintiff's capacity to be a representative plaintiff for a class proceeding.

Having regard to his general lack of understanding or awareness of the primary evidence, i.e. the Jekel affidavit, in support of the certification motion; his lack of any input to or even review of, the Jekel affidavit; his unawareness of what constitutes a litigation plan is or of what the financial arrangements are between

29 Poulin, supra note 26.
30 Ibid. at para. 15.
31 Ibid. at para. 85.
his Canadian counsel and Motley, Rice, I have serious reservations as to whether the plaintiff has capacity to properly instruct counsel on behalf of the members of the putative class.

The fact that the representative plaintiff was not found to have been sufficiently informed was held to mean that counsel had proceeded without proper authority. In addition, the lack of an indemnity at the time of the certification motion (although one was subsequently provided), lead the judge to conclude that counsel stood in the position to be able to obtain large fees without any potential adverse effects. These were important factors for the court in deciding to award costs against both sets of counsel on a substantial indemnity basis.

Depending on the result on appeal, defendants facing class proceedings in Ontario may now refer to both of these cases in arguing against certification and for costs.

IV. Scope of the Class

In addition to limiting the number of proceedings, it can be, in certain circumstances, in a defendants’ interest to certify as large a class as possible. Although it is arguable that national classes are becoming more commonplace, and may even be considered “unremarkable” by some in Ontario, they are not necessarily seen as such by other provinces.

In Saskatchewan and Ontario, two actions were commenced within one day of each other against the same defendants on behalf of essentially the same proposed representative plaintiffs by the same counsel. Neither of the two actions had yet progressed towards certification. A defendant brought an application to stay the Saskatchewan proceeding, Englund v. Pfizer Canada Inc. Klebuc J., the case management judge, dismissed the stay application and held:

I reject [the defendant’s] submission that the Ontario [Class Proceedings Act] allows for the creation of a “national class” that binds non-Ontario residents unless they opt out of a class action certified in Ontario because the laws of

32 Ibid. at paras. 93, 94.

33 Depending on the strategy adopted by the defendant, it is open to argue that a national class is undesirable, depending on its utility in a given case, based on the principles set out in the Supreme Court of Canada decisions in Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 (S.C.C.); Hunt v. T&M Plc, [1993] 4 S.C.R. 289 (S.C.C.); and, Beals v. Saldanha, [2003] 3 S.C.R. 416 (S.C.C.). However, the trend appears to lean toward class certification at the national level in order to avoid duplication and ensure efficient use of judicial and party resources. The advent of the National Database of Class Proceedings hosted by the Canadian Bar Association evidences this trend.

Saskatchewan do not recognize legislation enabled by other jurisdictions that intentionally encroaches on the right of its residents to seek judicial recourse for losses they suffered as a consequence of a tort or other breach of the law committed within the Province.

However, this decision was recently overturned by the Saskatchewan Court of Appeal. The Court considered squarely the issue of whether the Saskatchewan action should be stayed in light of a parallel proceeding, that involved the same parties and same subject matter, that had been launched in Ontario but that was not yet certified. The Court acknowledged that

...the phenomenon of overlapping and parallel class actions commenced in different jurisdictions has become increasingly significant. There is now an active national debate as to how the difficulties posed by such proceedings might best be addressed.... However, this appeal does not require us to engage in an exploration of the general approach which Saskatchewan courts should take in the face of typical overlapping multi-jurisdictional class proceedings, i.e. proceedings where different proposed representative plaintiffs, acting in separate jurisdictions, have commenced similar claims. Rather, in the unusual circumstances of this case, we have concluded that Canada’s abuse of process argument is the appropriate basis for resolving the appeal.

Most recently, Klebuc J. certified a national class action against the drug manufacturer Merck Frosst with respect to the drug Vioxx. This decision is interesting for two reasons: Firstly, there is another proposed national class action proceeding in Ontario (see description of Setterington case above) and so the issue of parallel class actions, not directly addressed by the Saskatchewan Court of Appeal in Englund, has again arisen. Secondly, this case is interesting because of the Saskatchewan Court’s treatment of international class members.

The question of the inclusion of international class members was specifically addressed in this case as the defendant argued that the class definition was too inclusive. Klebuc J. discussed the class definition that included resident and non-resident class members within Canada but specifically disallowed the inclusion of class members in other countries save and except those

36 ibid. at para. 31 (C.A.).
who purchased the drug from a Canadian pharmacy and ingested it while in Canada. He stated at\textsuperscript{37}:

\begin{quote}
The final argument advanced by Merck centres on membership in the class and subclass not being restricted to persons resident in Canada who purchased or ingested Vioxx in Saskatchewan or some other part of Canada. As a result, a person resident in the United States who purchased Vioxx from a Canadian pharmacy and had it sent to his or her place of residence in the United States or elsewhere, could qualify as a member of the non-resident purchaser subclass. I agree. The proposed non-resident subclasses are too inclusive and must be revised to clearly exclude persons resident in other countries save and except those persons who purchased Vioxx from a Canadian pharmacy and ingested it while in Canada.
\end{quote}

Interestingly, the Court did not consider arguments as to the effect of any judgment in the home jurisdiction of the international class members. (This type of inquiry, common in the United States, is discussed below in regards to the \textit{Viviendi} case). This may be due to the fact that the final non-resident class definition was limited to those that had resided in Canada at the material times.

Also interestingly, the Court left open the possibility that further international classes might be accepted, holding\textsuperscript{38}:

\begin{quote}
If the plaintiffs wish to add a further provision to include foreign non-residents to the class in the manner hereinbefore outlined, they will have to apply for an order granting leave to amend the approved class definition.
\end{quote}

As alluded to above, the certification of a class that encompasses non-resident litigants raises the issues related to enforcement of any judgment or settlement at the end of the proceeding. Not all class action settlements have been given effect even inter-provincially, let alone transnationally. The recent case of \textit{McDonald’s v. Currie}\textsuperscript{39} squarely raised the issue of the enforcement of a U.S. settlement in Canada. In that case, as insufficient notice had been provided to the Canadian proposed representative plaintiff, Mr. Currie, the settlement did not serve as a bar to the continuation of a class proceeding in his name. Recently the Supreme

\textsuperscript{37} \textit{Ibid.} at para. 68 (Q.B.).
\textsuperscript{38} \textit{Ibid.} at para. 70 (C.A.).
Court of Canada granted leave to hear an appeal in *Lépine c. Société Canadienne Des Postes*. In this case a settlement reached in a “national” class proceeding was not given force and effect in Quebec. The class action bar, plaintiffs and defendants, will benefit from any guidance on the subject of national classes to be offered by the Supreme Court of Canada in this case.

Lacking this guidance, some more extreme solutions to the questions of enforceability have been pursued by defendants as counsel in the Canadian Residential Schools Settlement sought approval from each province and territory’s court. Similarly, in *Kelman v. Goodyear Tire and Rubber Co.*, a global settlement worth $320 million was approved by both the U.S. District Court of New Jersey and the Ontario Superior Court of Justice. In this case, the Ontario court specifically retained jurisdiction so that Canadians would have recourse if the distribution of the settlement broke down.

**A Recent National Class and Waiver of Tort**

The dynamic nature of the law surrounding the certification of a national class in Ontario is most visible when viewed in the context of the proceedings certifying waiver of tort. The recent decision of Justice Hoy in *Medtronic* is the first decision in Ontario since the above Ontario Court of Appeal decisions, to certify a national class.

Although a full explanation of waiver of tort is not explored here, the *Medtronic* decision is the latest in a line of developing case law that addresses waiver of tort. The Court has again endorsed this “new cause of action”. Generally, the doctrine of waiver of tort is not fully understood. As recently described by Cullity J. cited by Hoy J.:

> ...the doctrine of waiver of tort is, “in certain circumstances when tortious acts have been committed by a defendant, the person affected will be permitted to elect between the remedy of compensatory damages and an accounting for a

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45 *Ibid.* at paras. 46, 47.
disgorgement of profits. The tort is not waived in any meaningful sense as it provides the basis for whichever of the two remedies is chosen”.

The Divisional Court in Serhan concluded that the law is uncertain both as to whether waiver of tort is an independent cause of action or only a choice of remedy after an actionable wrong has been established, and as to when the remedy of an accounting and disgorgement of profits is available. It is possible that waiver of tort does not require proof of loss or damage. In light of this, the Divisional Court held that a claim for disgorgement of profits for wrongful conduct (in that case, the tort of conspiracy) was not certain to fail.

None of the arguments advanced by Medtronic against certification of waiver of tort were successful. As a result, in addition to the uncertainty that surrounds what exactly this cause of action entails, there is the additional risk that in defending against it, defendants will be forced to disclose financial information that would otherwise be considered confidential and usually not ascertainable until after a determination of liability. In circumstances such as this, defendants may wish to limit the scope of the class and defend multiple proceedings to take advantage of actual or perceived variations in the law between jurisdictions.

International Classes
Increasingly, international classes are being proposed. With few exceptions, an international class, particularly one that extends beyond North America, will expose a defendant to increased potential liability that they should resist. While most proposed international classes have come out of the U.S., the potential of an international class in Canada is not inconceivable (see Wuttunee, supra). With national classes becoming the norm in Canada and the progression of certified cases toward trial, two recent cases, aside from the Currie case, that address international class actions, the “Royal Dutch/Shell Settlement” in Holland and the Vivendi case in the U.S. deserve examination.

In the Currie case, the Ontario Court of Appeal discussed international class actions.

46 See for example the defendants’ submission in Heron et al. v. Guidant et al. (2008), 2008 CanLII 204 (Ont. Div. Ct.).
47 The Currie case is briefly discussed supra. In addition, a good discussion of the effect of Currie, Lepine and Hocking, is in >>>>>>
49 In re Vivendi Universal, S.A. Sec. Litig., 242 F.R.D. 76 (D.N.Y. 2007) [“Vivendi”].
50 Currie, supra note 40 at paras. 15, 16.
There are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation: Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd. (2001), 6 C.P.C. (5th) 245 at para. 27 (Ont. S.C.J.), aff’d (2002), 20 C.P.C. (5th) 65 (Ont. Div. Ct.), aff’d (2003), 30 C.P.C. (5th) 107 (Ont. C.A.); Wilson v. Servier Canada Inc., above at 243-4 (S.C.J.); Wilson v. Servier Canada Inc. reflex, (2002), 59 O.R. (3d) 656 (S.C.J.) at 664-670. Conflict of law rules should recognize, in appropriate cases, the importance of having claims finally resolved in one jurisdiction. In some cases, Ontario courts will render judgments affecting the rights of non-residents and in other cases, Ontario residents will be affected by class action proceedings elsewhere. Ontario expects its judgments to be recognized and enforced, provided its courts assert jurisdiction in a proper manner and comity requires that, in appropriate cases, Ontario law should give effect to foreign class action judgments.

Recognition and enforcement rules should take into account certain unique features of class action proceedings. In this case, we must consider the situation of the unnamed, non-resident class plaintiff. In a traditional non-class action suit, there is no question as to the jurisdiction of the foreign court to bind the plaintiff. As the party initiating proceedings, the plaintiff will have invoked the jurisdiction of the foreign court and thereby will have attorned to the foreign court’s jurisdiction. The issue relating to recognition and enforcement that typically arises is whether the foreign judgment can be enforced against the defendant.

However, in the Currie case the tables were reversed as it was the defendant that wished to enforce the judgement. The Court found that:

> In my view, provided (a) there is a real and substantial connection linking the cause of action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff’s failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. I would add

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51 Ibid. at para. 30.
two qualifications: First, as stated by LaForest J. in Hunt v. T&N plc., above at p. 325, “the exact limits of what constitutes a reasonable assumption of jurisdiction” cannot be rigidly defined and “no test can perhaps ever be rigidly applied” as “no court has ever been able to anticipate” all possibilities. Second, it may be easier to justify the assumption of jurisdiction in interprovincial cases than in international cases: see Muscutt v. Courcelles 2002 CanLII 44957 (ON C.A.), (2002), 60 O.R. (3d) 20 at paras 95-100 (C.A.).

There are two sets of rules in Holland that govern the resolution of mass disputes. The first covers so-called public interest and group interest collective actions52. All causes of action and forms of relief can be pursued in a collective action except for an award of monetary damages. The inability to obtain monetary relief or a declaratory judgment on liability for sustained damages is a striking distinction from the Canadian and U.S. class actions model. Moreover, when representative organizations start a collective action, they do so in their own name and the judgment binds only the organization and the defendant but not individual class members. The second set of rules53 governing group action in the Netherlands covers opt-out collective settlements that may be approved by the courts, under which the Shell Settlement is pending approval.

In January 2004, Royal Dutch/Shell announced the re-categorization and consequent 20% reduction of its oil reserves. This resulted in the resignation of three executives at Shell, including its Chair. One of the first of its kind, Shell is attempting a “global resolution option” by achieving worldwide settlement (excluding U.S. claimants) of claims related to the reduction in its reserves. There are twenty-nine European shareholder organizations in the settlement from nine different European countries. In the agreement that is still pending approval of the Amsterdam Court of Appeal, Shell has agreed to pay USD$352.6 million, plus administrative costs, to non-U.S. investors who suffered damages because of alleged non-compliance with securities regulations with no admission of wrongdoing. If approved, Shell will have achieved finality for all claims in this matter in all non-U.S. jurisdictions.

When class actions are certified for international classes, the risk that a final resolution, whether a judgment or settlement, will not be recognized in a foreign jurisdiction increases. This issue was addressed under a consideration of superiority under Federal Rule 23 in the U.S. Until

52 These rules are contained in the Dutch Civil Code (art. 3:305a-c CC), which came into force on July 1, 1994.
53 These rules are contained in the Dutch Civil Code (Art. 7:907-910 CC) and the Dutch Code of Civil Procedure (Art. 1013-1018 CCP) and come into force on August 1, 2005.
Vivendi, Bersch v. Drexel Firestone, Inc.\textsuperscript{54} was the leading authority on this issue. Bersch held that where there is a near certainty that a foreign court will not recognize a class action judgment, the class action is not appropriate. Most courts interpreted Bersch to stand for the proposition that the inclusion of non-U.S. citizens in a class action is not permissible only where non-recognition is a near certainty. In Vivendi, the District Court modified the Bersch test to impose stricter conditions on the plaintiff.

Vivendi involved a shareholder class action based on alleged misrepresentations made in financial statements filed with the United States Securities and Exchange Commission. The proposed class consisted of both U.S. and European investors, which the defendants argued rendered the class action not superior. The court found that the “near certainty” test from Bersch was not useful and stated that the risk of non-recognition should instead be evaluated on the following continuum:\textsuperscript{55}

Where plaintiffs are able to establish a probability that a foreign court will recognize the res judicata effect of a U.S. class action judgment, plaintiffs will have established this aspect of the superiority requirement...Where plaintiffs are unable to show that foreign court recognition is more likely than not, this factor weighs against a finding of superiority and, taken in consideration with other factors, may lead to the exclusion of foreign claimants from the class. The closer the likelihood of non-recognition is to being a “near certainty,” the more appropriate it is for the court to deny certification of foreign claimants.

The court also noted that the res judicata issue is only one factor for consideration under the superiority analysis and that it should not be dispositive without a proper evaluation.\textsuperscript{56}

The modifications to the Bersch test in Vivendi require the plaintiff to adduce evidence of the likelihood of recognition of a judgment in the foreign jurisdiction in order to establish that the class action is superior. Vivendi is informative as it contains a detailed analysis of the laws of various European countries. The in Vivendi, based on the parties’ expert evidence, decided to certify the class action on behalf of the proposed class including class members in France, England and the Netherlands but excluded German and Austrian citizens as the court found

\textsuperscript{54} 519 F.2d 974 (2d Cir. 1975).
\textsuperscript{55} Vivendi, supra note 50 at 95.
\textsuperscript{56} Ibid.
that German courts “may well preclude” recognition of the judgment in this class action\(^{57}\) and that the “opinions fall far short of establishing a probability that an Austrian court would grant preclusive effect to any judgment or settlement issuing from this action”\(^{58}\).

The court’s decision to exclude Austrian and German citizens from the class action is counter to other decisions. In *Marsden v. Select Med. Corp*\(^{59}\), the court accepted an Austrian company as lead plaintiff for a shareholder class action. The action involved alleged misrepresentations made in the U.S. by a U.S. defendant whose shares traded on the NYSE. The defendants argued that the Austrian company was not an appropriate lead plaintiff because of *res judicata*. The court distinguished *Vivendi*, on the basis that it involved a foreign defendant trading primarily on a foreign stock exchange, rejected the defendants’ arguments and held that there was no borderline subject matter jurisdiction as the action fell “squarely” within U.S. securities law.\(^{60}\)

In *Frietsch v. Refco, Inc*\(^{61}\), a decision reached before *Vivendi*, the court decided to certify a class action composed of entirely of German citizens. The securities fraud class action involved German plaintiffs and an American defendant. The court rejected the defendant’s argument that the risk of non-recognition warranted denial of certification because “the court has seen no affidavit that makes clear the fact that a German court would not give *res judicata* effect to any decision arrived at in this case”\(^{62}\). In *Borochoff v. Glaxosmithkline*\(^{63}\), the court refused to appoint a German company as lead plaintiff in a securities fraud class action against a company headquartered in the U.K., citing *Vivendi*\(^{64}\). Therefore, it appears that where a defendant is headquartered in the jurisdiction where the action is commenced, courts may be more likely to certify an international class.

Two additional bases on which to argue that certification of a class action should be granted despite the risk that a judgment may not be recognized in a foreign jurisdiction are that there is no practical reality of re-litigation in that foreign jurisdiction, and that foreign courts may look to the U.S. judgment for guidance and the U.S. court can structure a proof-of-claim mechanism to discourage re-litigation.

\(^{57}\) Ibid. at 105.
\(^{58}\) Ibid.
\(^{59}\) 2007 WL 3145338 (E.D.Pa.).
\(^{60}\) Ibid. at 5.
\(^{61}\) 1994 WL 10014 (N.D.Ill. District Court).
\(^{62}\) Ibid. at 11.
\(^{63}\) PLC, 2007 U.S. Dist. LEXIS 74621.
\(^{64}\) Ibid. at 10.
In In re U.S. Fin. Sec. Litig., a distinction was drawn between the theoretical risk and practical reality of non-recognition. Relying on Bersch, the defendants argued that due process precluded the class action because the decision would not be binding on the foreign class members and would not be recognized by foreign courts. The court acknowledged that the defendants' fear of non-recognition was “justifiable” but concluded that a class action remained feasible and accepted the affidavit evidence of the plaintiffs that “practical difficulties in each country make lawsuits by these debenture holders virtually impossible.” These difficulties included the fact that nearly all the evidence was located in the U.S., that there was no procedure for discovery in most other countries and that there had been no other actions launched to date.

In Vivendi, the court similarly stated that the practical risk of non-recognition must not be ignored:

Furthermore, in considering whether the threat of non-recognition defeats the superiority of the proposed class, the Court should not ignore practical realities that reduce the risk that defendants would in fact be prejudiced by any potential non-recognition in the form of duplication of effort or inconsistent results. See Cromer, 205 F.R.D. at 135 n. 32; In re U.S. Fin. Sec. Litig., 69 F.R.D. at 48 (noting "that practical difficulties in each country make lawsuits by these [foreign plaintiffs] virtually impossible"); see also Buschkin, supra, at 1597. In this sense, defendants’ res judicata concerns are "more hypothetical than real," since the likelihood of relitigation by absent class members in a European forum is low. (Pls.’ Reply Mem. 11.) As plaintiffs' expert points out, absent class members who were dissatisfied with an adverse judgment, would be pressing claims (1) already adjudicated against them, (2) without the benefit of contingency fee arrangements, (3) with the added risks of having to pay defendants' counsel fees and costs of litigation. Further, such plaintiffs would be facing the risk that defendants would be able to successfully invoke this Court's jurisdiction to

65 69 F.R.D. (1975, S.D.Cal.).
66 Ibid. at para 30.
67 Ibid. at para. 31.
68 Ibid.
69 Ibid.
prevent recovery. (See Smit Decl. ¶ 105) Similar disincentives would apply to absent class members dissatisfied with a favorable judgment they deemed inadequate. (Id.) And in the case of a settlement, the Court can fashion a proof-of-claim mechanism intended to bind all participants and discourage relitigation. See Cromer, 205 F.R.D. at 135.

In view of these cases, and the supporting academic literature, the practical reality that relitigation will not occur is a viable argument that certification should not be denied simply because a foreign court may not enforce the judgment and is one of which defendants should be mindful in opposing certification of international classes.

In In re Lloyd’s American Trust Fund Litigation71, the court acknowledged that a class action may be superior despite the risk of non-recognition because foreign courts could look to the U.S. judgment for guidance. Lloyds involved a class action against a U.S. defendant for breach of fiduciary duty in relation to a trust. The proposed class consisted of trust beneficiaries from the U.S., France, England, South Africa, Canada and Switzerland. The trust was situated in New York, the alleged wrongful acts occurred in New York and New York State law applied. The uncontradicted evidence was that the judgment would not be res judicata in five foreign countries. The rejected the defendants argument that a class action was not appropriate because of the res judicata issue based on the reasoning that even if a foreign court would not automatically enforce the judgment, a foreign court may look to the U.S. judgment for guidance72. Further, the court held that if the plaintiffs were successful in the U.S. class action, the U.S. court could fashion a proof-of-claim mechanism which would likely bind participating class members and thereby discourage re-litigation73.

V. Conclusion

There exists today an international market with the same goods and services delivered in many different jurisdictions. Only a few of these jurisdictions have robust class action procedures and only a few have robust procedures for recovery of compensation in individual actions. European jurisdictions are moving slowly forward with partial group or collective actions mechanism. Social and cultural differences make the realisation of a robust class action system in those jurisdictions anytime soon an unlikely prospect. Therefore, the current trend in

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72 Ibid. at 15.
Canada towards national classes may soon be amplified by international classes as an adjunct to a Canadian class action. Defendants will have hydra-like headaches attempting to manoeuvre through the complexities of duelling national classes, carriage battles, over-reaching long-arm international classes, concurrent mass tort programs, conflicting public policies, and claims preclusion.

73 Ibid.; the reasoning in this case was cited and followed in Cromer Finance Ltd. v. Berger, 205 F.R.D. 113 (S.D.N.Y.), which involved a securities fraud class action against U.S. and Bermuda defendants and potential class members from Europe and the Caribbean (at para. 40).