

Recognizing Multijurisdiction Class Action Judgments within Canada: Key Questions—Suggested Answers

Janet Walker*

*The law of res judicata may have to adapt itself to the class proceeding concept.*¹

I—	WHO is affected by recognizing class action judgments from other jurisdictions?	2
II—	WHAT did <i>Morguard</i> really say about recognizing class action judgments?.....	3
III—	WHEN have courts recognized class action judgments (and when have they refused)? .	6
IV—	WHERE should multijurisdiction class actions be decided in Canada?	7
V—	WHY should Canadian courts recognize class action judgments?	9
VI—	HOW should the appropriate forum be determined?	11

With the advent of parallel multijurisdiction class actions in Canada we need to develop a workable means of coordinating them. To do so we must establish standards both for granting or denying preclusive effect to class action judgments and for exercising jurisdiction and we must find ways to assess when parallel actions should be consolidated and which courts should decide them.

In this paper I offer some suggestions on how we might approach these questions. First, we should focus not only on the interests of the named parties and the class members who could sue separately because the interests of these groups are already addressed by the existing law of *res judicata* and by relatively straightforward adaptations of it. Rather, we should concentrate on the interests of those class members who could not or would not sue separately because their interests reflect the special interests of class actions.

Second, while the *Morguard* principles may provide inspiration for the answers we seek, the *Morguard* decision cannot supply the details of the standards and practices that we need to develop because it was a case about the preclusive effect of judgments as they affect the interests of named parties, and in particular, named defendants, and not about the interests of class members, and in particular, unnamed plaintiffs who could not or would not sue separately.

Third, despite the relative generosity that Canadian courts have shown to foreign judgments generally, and foreign class actions judgments in particular, there have been some striking refusals to recognize Canadian class action judgments and to grant preclusive effect to them. These situations highlight the concerns of these courts that the interests of this third group in ensuring adequate recovery or adequate incentives to more responsible conduct on

* Professor, Osgoode Hall Law School.

¹ *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 129 D.L.R. (4th) 110 (Gen. Div.).

the part of the defendants would not best be served by recognizing the decision of another court and foregoing the opportunity to try the matter locally.

Fourth, while the refusal to recognize a judgment in a class action suggests that the issuing court lacked jurisdiction to decide the case, the question is better understood as a question of appropriate forum.

Fifth, an appropriate forum is one that engenders confidence that the interests in adequate recovery or adequate protection from continued harm will be well served by the trial of the matter there obviating the need for the matter to be heard elsewhere. Other factors may be developed to choose between appropriate fora where it is desirable to do so.

Sixth, in the final analysis, this critical determination of appropriate forum should be made at or before the certification stage and not after a judgment or settlement approval has been rendered. Further, it is best done in by a multilateral body, one modeled on the US MDL Panel with necessary procedural modifications to address the fact that it would operate in Canada as a joint body comprised of the members of otherwise independent courts.

I— WHO is affected by recognizing class action judgments from other jurisdictions?

As with all procedural reforms, to make workable rules for the recognition of multijurisdiction class action judgments in Canada, we must be guided by a sense of whose interests are affected and how these interests can best be served. Clearly the named parties are affected by recognizing a class action judgment from another jurisdiction, but their interests are similar to those of the parties in named party litigation. Their interests can be safeguarded by the existing rules for the recognition of judgments.

A second group—class members—is also affected by recognizing class action judgments from other jurisdictions. Their interests present special concerns. They have not participated in the proceeding, but they will be precluded from bringing their claims in the court recognizing the judgment.² The interests of this second group are new, but they have been considered on a number of occasions. Safeguarding the rights to notice and an opportunity to opt out, and to adequate representation, all support the interests of those whose

² This group is often divided into two—residents of the forum and non-residents. However, their interests are not really different from one another. Courts do not ordinarily make rulings on whether claims are barred based on the claimants' residence. Class actions regimes do not work that way either unless the class description itself refers to residence. On the contrary, recognizing a class action judgment precludes claims from being brought in the local courts by all those who fall within the description of the class whether they are residents or non-residents. And recognizing a class action judgment cannot restrain claimants, whether they are residents or non-residents, from taking their claims to some other court. Accordingly, recognizing class action judgments is less like recognizing foreign judgments than it is like the application of statutes of repose. Both combine principles of fairness between the parties with the broader interests of the public, but where the law of foreign judgments is traditionally focused more on a concern for fairness to the parties and whether they have had a chance to have their day in court, the emphasis in recognizing class actions judgments is more on the broader public interest. Recognizing a class action closes the doors of the court to anyone who might otherwise bring a claim falling within the description of the class as certified. To be sure, the difference is only one of emphasis. But it points out a distinction between named party litigation and class actions that has received little attention and will help in developing suitable rules for multijurisdiction class actions as is discussed further below.

claims could be brought separately from the class. Safeguards of this sort are well-established in domestic class actions regimes and they can be adapted to multijurisdiction class actions.

But what of class members whose claims could not readily be brought in other proceedings? From the perspective of the principles underlying named party litigation, arguably the interests of this third group have not been affected. They may have claims, but their chases in action are worthless and so their interests are not worth protecting. From the perspective of class actions, however, the situation is very different. This third group has much in common with the members of any class in a class action that has yet to be commenced. If they could receive substantial relief but their claims are not independently economically viable, their access to justice may have been restricted. If they could benefit from incentives to suppliers of goods and services to act more responsibly, then they are part of a community whose regulatory mechanisms may have been undermined. This is what a class action could, and should, achieve for them.

Notice and an opportunity to opt out do little for the members of this third group if they have no other way to seek compensation or redress. Even the adequacy of representation in terms of giving them a sense of participating in the proceeding may seem less important than whether the result is adequate in terms of the compensation or redress it provides. But focusing on the interests of this third group may help us to develop a framework for the recognition of multijurisdiction class action judgments in Canada—one based on the principles underlying class actions.

Who is affected by recognizing class action judgments from other jurisdictions?— Those affected include named parties, class members who could seek compensation or redress independently and, most importantly, class members who could not.

But I am getting ahead of myself. It is better to begin at the beginning by picking up the thread of the current discussion, one that looks for answers in the law of jurisdiction and judgments and the constitutional principles enunciated by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*.³

II— WHAT did *Morguard* really say about recognizing class action judgments?

Many have said that in the *Morguard* decision, the Supreme Court of Canada *discovered* a “full faith and credit” clause in the Constitution that required Canadian courts to recognize the judgments of other Canadian courts. And the judgment did say that the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives. As a result, the “*Morguard* principles” are principles of jurisdiction as well. They reflect constitutional standards for assuming jurisdiction.⁴

Many have also suggested that the reasoning and the standards apply equally to the preclusive effect of class action judgments on class members in other jurisdictions: where a Canadian court has exercised appropriately restrained jurisdiction, and it has provided adequate notice and an opportunity to opt out, there is a constitutional obligation to recognize

³ *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077.

⁴ Vaughan Black, “The Other Side of *Morguard*: New Limits on Judicial Jurisdiction” (1993), 22 Can. Bus. L.J. 4.

the judgment. Despite this, Canadian courts *are* refusing to grant preclusive effect to class action judgments and they are doing so for what seem to be compelling reasons.

To understand why, it is helpful to have another look at what the Supreme Court of Canada actually said in *Morguard*. Starting with the obvious, there was no “full faith and credit” clause to be discovered in the Canadian Constitution. Such a clause does exist in the US Constitution⁵ and it creates a fixed obligation for American courts to recognize one another’s judgments—whether or not it seems fair to do so under the circumstances. The American courts soon realized that this could cause considerable mischief unless they established a means of guaranteeing a measure of fairness to the persons affected. Eventually, the due process clauses in the Fifth and Fourteenth Amendments were pressed into service as a foundation for basic jurisdictional standards.⁶ These jurisdictional standards prevent the hardship and confusion that could arise from the obligation to recognize judgments from courts that ought not to have exercised jurisdiction.

The balance between the duty to recognize judgments and the duty to be fair to the parties affected is echoed in *Morguard* in the “principles of order and fairness.”⁷ However, there is a difference. In *Morguard*, the Supreme Court’s analysis proceeded from the opposite direction. It did not take a fixed obligation to recognize judgments and make it workable by adding constitutional safeguards to ensure fairness. Rather, the Court observed that “concerns about differential quality of justice among the provinces can have no real foundation” in Canada and therefore “a full faith and credit clause *was unnecessary...*”. Generous standards for the recognition of judgments are implied in a federation and, in any event, within the Canadian federation, there were unlikely to be sound reasons for a party to object to the recognition of judgments from other parts of Canada on the basis of fairness.

This difference in the Supreme Court’s reasoning is important in understanding the recent refusals by Canadian courts to recognize class action judgments from other Canadian courts. It would be wrong to dismiss these refusals as recalcitrance or a failure to appreciate the constitutional obligations enunciated in the *Morguard* decision. Canadian courts recognize Canadian judgments because no unfairness results. That is why a full faith and credit clause, though necessary to the operation of a federation, did not have to be written into the Canadian Constitution. The recognition of class action judgments may also be necessary to the Canadian federation, but where Canadian courts find that unfairness would result, we must find ways to ensure that the process is fair so that a workable system can be established.

⁵ Article IV.1 provides that “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.”

⁶ *International Shoe Co. v. State of Washington*, 326 U.S. 310 at 316 (1945).

⁷ Which, in the common law provinces operates through the counterpart to the US “minimum contacts test”, the “real and substantial connection test.” Although it was necessary for the common law provinces to add this ground of jurisdiction to those of “consent” and “presence of the defendant” in their rules for recognizing judgments, this was not necessary for Québec, where the international jurisdiction of Québec authorities is provided for in Title III of Book X of the Code Civil: *Spar Aerospace Ltd. v. American Mobile Satellite Corp.* [2002] 4 S.C.R. 205, 220 D.L.R. (4th) 54, 2002 SCC 78.

The decisions of courts refusing to recognize Canadian class actions judgments are important indications of the way forward. They highlight the ways in which class actions are different from named party litigation. In adopting a regime for class actions, we might have thought that we were just tweaking the rules of procedure to facilitate the aggregation of claims and to enhance the ability of ordinary named party litigation to promote three well-established objectives of litigation (access to justice, judicial economy and behaviour modification). But in the years since, the rivers of ink spilled and the forests felled in coming to terms with the specialized practice of class actions bear testament to the fundamental differences between class actions and ordinary litigation. Class actions are not so much a procedural adjustment designed to facilitate the adjudication of claims that would otherwise be difficult to pursue as they are a way of enabling courts to participate in a kind of regulation that would otherwise be beyond their purview and, as a result, to play a new role in society.

This is a discussion that is far larger than the scope of this paper, but it is relevant to understanding the equities at stake in recognizing class action judgments. That class actions do much more than we thought they would, and so require special rules for jurisdiction and judgments, is news—not only to us, but, it would seem, to almost every country that has adopted them. Taking the US as an example, in the history of American class actions, it was forty years after the US Supreme Court made its famous pronouncement on due process,⁸ and almost twenty years after the introduction of class actions,⁹ that the US Supreme Court considered in the *Shutts* case how the due process clause would apply in the class actions context.¹⁰ Twenty years later, it is still not obvious to outsiders reading the Court's reasoning in *Shutts* how the due process guarantees are the appropriate analytical framework for serving the interests of the third group described above.

Accordingly, the question in Canada is not whether a constitutional requirement of full faith and credit that was discovered by the Supreme Court in *Morguard* can be applied to multijurisdiction class actions, but whether workable standards can be established to make it reasonable to recognize class action judgments as precluding the claims of class members from being commenced afresh. *Morguard* was a decision that enunciated important general principles of broad application, but in its specifics, it was about the law of foreign judgments. That law was designed for the interests of the first group (named parties) and, at best, it can be adapted to serve the interests of the second group (those who could sue independently), but it cannot serve the interests of the third group—ordinary class members with no other means of compensation or redress. It is possible that the refusals in recent decisions of Canadian courts to recognize class action judgments from other Canadian courts were motivated by a sense that the interests of this third group needed to be served better. Pursuing that line of inquiry seems far more promising than straining to find applicable rules in a decision on the law of foreign judgments.

What did Morguard really say about recognizing class action judgments?—The Morguard decision supplies the constitutional principles of order and fairness but we must

⁸ In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)

⁹ Rule 23, Federal Rules of Civil Procedure, 1966.

¹⁰ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

develop jurisdictional standards and other procedures appropriate to the interests of all three groups affected by the recognition of class actions in order to develop a system consistent with the needs of the Canadian federation.

III— WHEN have courts recognized class action judgments (and when have they refused)?

It would probably surprise persons from outside Canada to learn that Canadian courts have seemed more willing to recognize foreign class action judgments than they have been to recognize class action judgments from other parts of Canada. Still, examining the situations in which the courts have recognized class action judgments and the situations in which they have refused to do so can shed light on the jurisdictional considerations underlying a workable system for the recognition of class action judgments.

In *Currie v. McDonald's Canada*, a class action against McDonald's Canada for fraud in the allocation of prizes in promotional games offered to Canadian customers, McDonald's sought to dismiss the Canadian action on the basis that the matter had been resolved by an Illinois judgment approving the settlement of a class action that purported to include the Canadian class members. The Court of Appeal for Ontario held that a foreign class action judgment could have preclusive effect provided there was a real and substantial connection between the matter and the forum, the non resident class members were adequately represented and they were accorded procedural fairness, including adequate notice and an opportunity to opt out.¹¹ This reasoning was consistent with the several previous decisions in challenges to the jurisdiction of Ontario courts to certify multijurisdiction class actions.¹² This reasoning addresses the interests of the first and second groups of persons described earlier—the named parties and those whose claims could be brought elsewhere.

However, in other cases that considered the preclusive effect class actions judgments from other provinces, the courts held that the judgments could not operate to preclude a local class from bringing an independent claim seeking a different result. For example, in *Lépine v. Canada Post*,¹³ Cybersurf sold its software for \$9.95 through Canada Post and said it would provide free Internet access in exchange for posting advertisements on the user's computer screen. When it began to charge its users \$9.95 per month for access, class actions were commenced in Ontario and Québec. The Ontario class action purported to include Québec residents, and so residents of Québec received notices for both class actions. When the defendant brought a motion in Québec to have the Ontario decision recognized as precluding the Québec action, the Québec Court refused to do so because the duplicate notices received by the Québec caused confusion.¹⁴

¹¹ *Currie v. McDonald's Restaurants of Canada Ltd.* [2005] O.J. No. 506 (C.A.) at para. 30.

¹² *Nantais v. Telectronics Proprietary (Canada) Ltd.*, *supra*, note 1; *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441 (Gen. Div.); *Wilson v. Servier* (2000), 50 O.R. (3d) 219 (Ont. S.C.J.).

¹³ *Lépine c. Société Canadienne des Postes* [2005] Q.J. No. 9806; J.E. 2005-1631; EYB 2005-93155; (C.S.) [2007] J.Q. no 8498; 2007 QCCA 1092; [2007] R.J.Q. 1920; J.E. 2007-1615; EYB 2007-122903 (C.A.); leave to appeal granted [2007] S.C.C.A. No. 495.

¹⁴ *Ibid.* at para. 38.

In *HSBC v. Hocking*,¹⁵ penalties were charged improperly to mortgagors who paid out their mortgages early and, again, two class actions were brought—one in Ontario on behalf of all Canadian residents and one in Québec on behalf of residents of Québec. This time, the plaintiff in the Québec action sought to intervene in the Ontario action but was denied permission to do so. The class action was certified in Ontario and a settlement was approved. The defendant brought a motion in Québec to have the Ontario judgment recognized as precluding the Québec action from proceeding. The Court refused because the claims before it had no connection with Ontario, the representative plaintiff in the Québec action was not able to participate in the negotiations between the parties to the Ontario action, the members of the class would not receive any compensation, and they were denied an opportunity to participate in the Ontario proceeding when their motion to intervene was rejected.¹⁶

When have courts recognized class action judgments (and when have they refused)?—Procedural fairness requires adequate representation and notice and an opportunity to opt out, but this is not always enough. To serve the interests of the third group, they must be assured that their particular concerns will be addressed in the proceeding, and that they will not be deprived of appropriate recovery or redress as a result of having the matter decided in a distant forum that is insensitive to their particular interests.

IV— WHERE should multijurisdiction class actions be decided in Canada?

For the reasons considered at length in a number of decisions,¹⁷ there is simply no credible challenge to be made to the basic jurisdiction of Canadian courts to certify multijurisdiction class actions.¹⁸ This is not to say that there is no jurisdictional question to be raised in determining whether to recognize a class action judgment or, to put it another way, that there are no jurisdictional standards to be developed in creating a workable regime of multijurisdiction class actions in Canada. Rather, it is to say that the question is not properly one of jurisdiction simpliciter.

Several courts have recognized the merits in having common issues decided in a single proceeding despite the fact that these might involve the claims of persons residing in other provinces whose claims have arisen there. It stretches the concept of a “real and substantial connection” to say that the real and substantial connection test supports

¹⁵ *HSBC c. Hocking* [2006] J.Q. no. 507; 2006 QCCS 330; [2006] R.J.Q. 804; J.E. 2006-517; EYB 2006-100504 (S.C.).

¹⁶ Para 78: “La situation prévalant dans le présent dossier, aux yeux du Tribunal, n'est pas conforme aux principes d'ordre et d'équité : la réclamation des membres québécois n'a aucun lien avec le forum ontarien, le représentant québécois a tenté sans succès de participer aux négociations entreprises entre Hocking et HSBC, les membres ne reçoivent aucune compensation suite au règlement et ils n'ont pas réussi à faire valoir leur point de vue devant le Tribunal ontarien, leur intervention ayant été rejetée.”

¹⁷ See cases cited at note 12 above.

¹⁸ Although class actions legislation is promulgated pursuant to the constitutional grant to the provinces of exclusive authority to make laws in relation to procedure in civil matters and this grant contains a limit on the extraterritorial operation of that authority, section 92 provides for *legislative* authority, not *judicial* authority. The judicial jurisdiction of the superior courts of Canada is founded on the traditional authority of the courts of England and the provinces as reflected in section 129 of the Constitution Act, 1867 and it is informed by the principles of order and fairness. See J. Walker, *The Constitution of Canada and the Conflict of Laws* (2001).

jurisdiction over those claims. Nevertheless, Canadian courts have felt obliged to base their conclusion on the real and substantial connection test. For example, in response to a challenge to its jurisdiction to determine on an opt-in basis the claims of residents of other provinces whose claims had arisen in their own province, the British Columbia Supreme Court said the common issue could serve as a basis for jurisdiction because “it is that common issue which establishes the real and substantial connection necessary for jurisdiction.”¹⁹ Similarly, in a recent Ontario decision, it was observed that the courts in Ontario accept “as a sufficiently real and substantial connection a commonality of interest between non-resident class members and those who are resident in the forum and whose causes of action have sufficiently real and substantial connections to it to ground jurisdiction over their claims against the defendants.”²⁰

But this does not end the analysis. If there is no question of jurisdiction simpliciter, there is certainly one of appropriate forum. If there was only one court in Canada authorized to determine class actions, we would find ways to ensure to the extent possible that the benefits of the class actions decided there were enjoyed in all the communities throughout the country where the cause of action arose. But now we have class actions in most Canadian jurisdictions and we must find ways to address the concerns arising from overlapping and competing class actions without losing the benefits to those communities of local representation, local adjudication, and local awards. In this way it is not so much that the rules of jurisdiction and judgments need to be adapted to the multijurisdiction context as the procedures developed for contested carriage motions and settlement approval hearings need to be adapted to take into account the special concerns of multijurisdiction class actions.

Englund v. Pfizer Canada Inc. illustrates the challenges we face. The Saskatchewan Court of Queen’s Bench refused to stay a proposed class proceeding on behalf of Saskatchewan residents who were presumptively included in the multijurisdiction class pending in Ontario because that would “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 breach of the law committed within the Province.”²¹ On appeal, the decision was reversed because the plaintiffs, who, it seems, were the same in both proceedings, had shown no reason why the matter could not be heard in a single proceeding in either forum and the Court held that they should be put to their election. The Court of Appeal granted a stay that could be lifted if the Ontario action was discontinued.²² The plaintiffs’ were then permitted by the Ontario court to discontinue the Ontario opt-out national class in favour of the Saskatchewan opt-in national class, which counsel preferred because Saskatchewan is a “no costs” jurisdiction.²³

¹⁹ *Harrington v Dow Corning* (1997) 29 BCLR (3d) 88 (SC), (2000) 193 DLR (4th) 67 (CA), leave to appeal to SCC dismissed SCC Bulletin 2001, 270.

²⁰ *McCutcheon v. The Cash Store Inc.*, [2006] O.J. No. 1860 (S.C.J.) at para. 49. In *Risorto v. State Farm Mutual Automobile Insurance Co.* [2007] O.J. No. 676 the court held that including class members subject to different statutory regimes was not a bar to certification.

²¹ *Englund v. Pfizer Canada Inc.*, [2006] S.J. No. 9 (Q.B.) at para. 44.

²² *Englund v. Pfizer Canada Inc.*, [2007] S.J. No. 273; 2007 SKCA 62; 284 D.L.R. (4th) 94; [2007] 9 W.W.R. 434; 299 Sask.R. 298; 43 C.P.C. (6th) 296 (C.A.).

²³ *Sollen v. Pfizer Canada Inc.* [2008] O.J. No. 866 (Ont. S.C.J.). Query whether the interests of plaintiffs’ counsel in trial in a “no-costs” jurisdiction coupled with defendants’ interests in trial in a jurisdiction that

Where should multijurisdiction class actions be decided in Canada?—This is the key question that we face, but it is best answered in two parts, which will comprise the last two parts of this paper. First, we must develop a more nuanced approach to the choices between appropriate fora by considering the interests of the third group and why from their perspective it might be reasonable to recognize class actions judgments from other courts. Second, we must develop adjudicative mechanisms to enable the multilateral determination of the appropriate forum for class actions in Canada that can operate in a legal system comprised of independently administered courts.

V— WHY should Canadian courts recognize class action judgments?

All private law litigation serves the combined purposes of compensating persons for losses suffered and creating incentives to others to act responsibly so as to avoid causing such loss. One extraordinary feature of class actions that has only become clear with experience is that as the aggregation of claims increases the ability of private law litigation to serve these purposes, it also tends to drive a wedge between them.

Some class actions serve primarily the needs of persons who have suffered measurable losses that would go uncompensated but for their ability to join together to seek relief. Other class actions, involving nominal losses, serve primarily the needs of the broader public to be protected from misconduct by establishing effective sanctions to encourage more responsible conduct. It would be wrong to suggest that there is an absolute distinction between these two kinds of class actions, but much confusion has resulted from trying to develop principles and procedures for both without regard to the differences between them.

In class actions commenced primarily to promote access to justice for those who have suffered measurable losses, the pressing considerations in resolving the matter relate to the adequacy of the recovery. The extent of recovery will almost always amount to a compromise between what they “should” receive and what is reasonably available. Claimants often receive far less than what they might receive in theory if they claimed individually, but this is an abstract consideration because, as a practical matter, their claims could not be brought independently and they have been aggregated to make them economically viable.

The question in the multijurisdiction context is whether the relief granted to these persons has been diminished by reason of the fact that it was granted by a court other than the court being asked to recognize the judgment. This could be as a result of differences in the legal principles that the recognizing court would itself apply, or as a result of some other jurisdiction-specific feature of the litigation. Of course, considerable care would need to be taken in conducting a review of this sort to ensure that this review was not taken as an opportunity to re-open the litigation, or to argue why different counsel might have provided better representation—other than for forum-specific reasons. And to the extent that review of this sort was available in principle, it would be likely that these issues would be anticipated and addressed directly in a judgment or settlement approval, perhaps one that benefited from interventions from those who might otherwise challenge the result.

requires non-resident class members to opt in, serves the best interests of the third group considered throughout this paper.

Indeed, to the extent that review of the relief granted might always have an inherent tendency to undermine the finality of class action judgments it would be preferable to develop a means for addressing this concern as a matter of course, at the certification stage, as will be discussed in the next section. Where such concerns are justified, certainty would be enhanced by ensuring that the class of persons who might be prejudiced by being prevented access to the court to which they would otherwise resort are given appropriate relief as a subclass or are presumptively excluded from the original class action.

Different considerations arise in class actions that involve nominal losses and that are commenced primarily to serve the needs of the broader public by establishing effective sanctions to encourage more responsible conduct. In these actions, the question is whether recognizing the judgment will provide adequate incentives to the defendant, and to others who might cause similar harm, to take steps to avoid causing such harm in the future not only in the jurisdiction where the judgment was issued but also in the jurisdiction in which recognition is sought.

In conducting this analysis there may be a tendency to assume that local measures are the best protection for the local public. But any regulatory measures, including class actions, involve public expense and so the benefits of an additional local action should be weighed against the likelihood that the judgment would provide adequate incentives to the defendant and to others similarly situated to improve their conduct in ways that would benefit not only the public in the forum where the judgment was issued but also in the forum where the judgment is recognized. Still, where an award provides nominal or no compensation for class members and, instead, requires some contribution to the welfare of the broader community, courts will be concerned to ensure that the communities that benefit include those in the fora in which other class actions might be commenced.

These are reasons for recognizing class action judgments from other courts in Canada, but they can also provide guidance in the processes of defining the class, measuring the adequacy of representation and the litigation plan, resolving contested carriage motions, and assessing the adequacy of the proposed relief in a settlement hearing.

In some cases, these considerations would be enough to determine where a multijurisdiction class action would best be decided, but in others, these requirements could be met in more than one jurisdiction. In those cases, provided that the matter could be resolved effectively in a single proceeding without prejudicing the interests of members of the class, these considerations would represent only a starting point in determining which forum among the various appropriate fora should assume carriage of the matter.

In developing a means of choosing between otherwise appropriate fora, guidance may be found in the factors considered by the Judicial Panel on Multidistrict Litigation in the United States Federal Court (the “MDL Panel”) in the selection of a particular district for transfer of multi-district actions for consolidated pretrial proceedings. These factors include:

- that the district is easily accessible, or a convenient, central location with respect to all the actions, or the parties, documents, or witnesses.
- the district's neutral status.
- the pendency in that district of a number of the actions.

- the pendency of related civil actions or agency proceedings.
- the district court's familiarity with the issues involved in the litigation.
- the favorable status of the caseload or civil dockets in the district as where the district did not have any other multidistrict litigation on its docket.
- that the district is a metropolitan district, well equipped with the resources that the complex docket was likely to require.
- that significant discovery is likely to take place in the district.
- that the district is site of the furthest advanced action.
- all of the parties' agreement to the transfer.
- the transferee judge's prior, successful experience with multidistrict litigation.²⁴

Clearly not all of these factors would be relevant to the determination of the appropriate forum in the Canadian context, but they could provide a useful starting point for the development of factors suitable for Canada.

Why should Canadian courts recognize class action judgments?—They should do so because, where appropriate, the persons who might otherwise seek recovery from them is not prejudiced by having had their rights being determined in the other forum, or because the incentives to defendants and others similarly situated to modify their behaviour will result in sufficient benefits to the community of the recognizing court to render a local class action unwarranted. Beyond this, the Canadian courts may be guided in developing rules for determining the appropriate forum or fora the litigation of a class action or related class actions by referring to the factors considered by the US MDL Panel.

VI— HOW should the appropriate forum be determined?

A discussion of the standards to be applied in determining the appropriate forum for multijurisdiction class actions is only of practical benefit if there is an adjudicative mechanism or body capable of making such determinations. The potential for this sort of determination made in the existing adjudicative structure of independently administered courts to suffer from incomplete information or conflicts between the interests of counsel and the class is becoming evident.²⁵ However, to establish a mechanism or body to make a single determination within the structure of the Canadian judicial system with its independently administered courts requires considerable collective interest and some ingenuity.

In its Report on National Class Actions, the Uniform Law Conference of Canada's Committee canvassed the options.²⁶ The Committee acknowledged the merits of the approach taken by the United States Federal Court in establishing the MDL Panel. However, at the time it seemed unlikely that the Constitution Act, 1867 could be interpreted to permit such authority to be vested in the Federal Court of Canada, and the political will needed to create a new s. 101 court seemed unlikely to emerge. The Committee reflected on the

²⁴ C. Wright and G. Miller, *Federal Practice and Procedure: Civil 3d* § 3864.

²⁵ See note 22 above.

²⁶ The Report is available on the ULCC website at www.ulcc.ca.

possibility that such a body could operate as a committee of the Canadian Judicial Council, which was created "... to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts," but this, too, seemed ambitious.

Ultimately, the Committee proposed a series of principles that could be applied by Canadian courts in the ordinary course of determining motions for certification. Though this option was less likely to be as effective as an authoritative multilateral body, there seemed no way to endow a multilateral body with the necessary authority. How could such a body decide on behalf of a section 96 court whether it should or should not exercise jurisdiction over a matter before it? And so it was hoped that a central registry granting ready access to the information on class actions commenced across the country, and a sense of the urgency of coordinating multijurisdiction class actions, would encourage the provincial superior courts operating independently to generate an informal system of cooperation.

Since the time the Report was adopted by the Uniform Law Conference, the need to develop an effective means of coordinating multijurisdiction class actions has become even more pressing, as is evident from the rulings discussed above. Further reflection suggests that it may be possible to develop a means of overcoming the hurdles of an independently administered court system to create a Canadian version of the MDL Panel, based on a model proposed by Chief Justice Winkler, which in Canada could be called a Multijurisdiction Class Proceedings Panel ("MCP").

The procedural reforms necessary to establishing such a panel would require two components: a revised function for the national registry, and a deliberative body comprised of representatives of all the courts that might be appropriate fora for multijurisdiction class actions in Canada. In such a system a judge of the court in which the matter was first commenced would participate in a hearing panel, and would therefore decide whether to stay permanently the matter commenced in his or her court or to ask his or her Chief Justice to assign it to a member of that court, and the Attorneys-General of the other Canadian courts would act as nominal plaintiffs in actions that would be commenced pro forma and stayed pending the determination of the MCP. Here is how it could work:

With respect to the registry, each province with class proceedings legislation could pass legislation requiring parties who commence multijurisdiction class actions to forward the notice of proceeding to a centralized registry upon issuing it in the province. The registry, which could be developed from the existing National Class Actions Database, would be authorized by the legislation to receive the notices of proceedings and to forward them to the Attorneys General of each province to be re-issued in their provinces with the Attorneys General serving as the nominal applicants in matters styled "In Re Multijurisdiction Class Proceeding Concerning... "). The provincial legislation would further provide that a stay would automatically be issued in those proceedings and in any related proceedings subsequently issued in the province pending a determination by the Panel.

With respect to the Panel, the Chief Justice of each jurisdiction could designate a judge to serve as a member. Hearing panels could be struck periodically to hear applications, consisting of two judges and an alternate. Panels assigned to specific cases would be composed of the two judges and a judge of the jurisdiction in which the matter was first issued. Where the judge from the jurisdiction in which the matter was first issued was already

a member of the panel, the alternate would be called upon to join the panel. With the panels constituted in this way, the decision to issue a stay or directions to proceed could be adopted by the judge of the court in which the matter was first issued and, accordingly, would be rendered on the basis of that judge's own authority as a member of court in which the matter was commenced.²⁷ Once the panel had made its determination, the pro-forma proceedings commenced by the Attorneys General in the other jurisdictions could be dismissed on consent attaching the ruling of the MCP Panel.

How should the appropriate forum be determined?—The appropriate forum for multijurisdiction class actions in Canada should be determined a Canadian equivalent to the US MDL Panel.

²⁷ Measures would have to be developed to address situations in which the same or a related proceeding was issued on the same day in more than one jurisdiction. Adjustments in the Panel could be made to enable judges from other provinces to sit on the Panel. In cases in which counsel commence proceedings simultaneously in multiple jurisdictions it may be desirable to require them to elect one jurisdiction as the relevant jurisdiction for the purposes of MCP determinations.