Focus on Civil Litigation: Inter-jurisdictional Muddle Inspires Class Actions Report Recommendations

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Inter-jurisdictional muddle inspires class actions report recommendations

The Uniform Law Conference of Canada recently drafted a report that addressed the desirability of allowing national or multi-jurisdictional class actions.

By Rod Hayley and Chris Dafoe

When Merck Frosst Canada & Co. pulled Vioxx from the market on September 30, 2004, following reports that the drug increased the risk of heart attack, the Canadian legal reaction was swift and wide-ranging. By the end of the following day, several class actions had been filed. Within three months, more than 30 actions had been filed in 10 provinces. At least three of these claimed to represent all Canadian Vioxx users.

While aggrieved Vioxx consumers might take comfort knowing that numerous law firms were lining up to represent them, this ungainly mass of mass litigation presented major difficulties for all involved — the defendant, putative class members, counsel and the courts. Since class actions operate on the principle that a single representative plaintiff can advance the claims of many similarly situated claimants, it was clear there were overlapping classes. What was unclear was what claims should proceed. Should there be one class action for the whole country, one for each province, various multi-jurisdictional actions, or some combination of these? Who should decide? And how would *res judicata* operate in those circumstances?

If this situation had arisen before 2001, the answer would have been reasonably straightforward. Since the procedure was only available in Quebec, Ontario and B.C., and since only Ontario had the ability to certify a class that automatically included non-residents unless they opted out, resolving jurisdictional issues was, if not simple, at least manageable.

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In some cases, such as the Hepatitis C litigation, the issue was sorted out by way of arrangements among counsel. In others, such as *Wilson v. Servier Canada Inc.*, the Ontario court would certify a national class but defer to any action certified in B.C. or Quebec. Even when a class action originated in another province, Ontario's legislation was routinely used by counsel teams to "cover the country".

However, in 2001, not only did Saskatchewan enact class actions legislation, but in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2. S.C.R. 534, the Supreme Court of Canada further opened the doors of this previously exclusive club. Chief Justice Beverley McLachlin gave new life to the old non-statutory representative action when she wrote, "Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them."

In the wake of *Dutton*, several other provinces and the Federal Court embraced the procedure. Most of the new statutes were based on the model put forward in 1995 by the Uniform Law Conference of Canada, which allowed non-residents to opt into an action, but otherwise limited the class to residents of the province. Only Manitoba allowed its courts to certify non-resident opt-out classes.

It was in this context that the U.L.C.C. decided to revisit the issue of class actions, and specifically the desirability of allowing national or multi-jurisdictional class actions. A committee was struck, made up of government lawyers, private practitioners and leading academics. It included both vigorous supporters of the national class and those who were skeptical about its constitutionality.

The committee quickly reached a consensus that, whatever the constitutional concerns, the multi-jurisdictional class amplified the benefits of class actions. It promoted judicial efficiency by eliminating duplication. It increased access to justice by lowering the litigation cost per class member. It promoted behaviour modification by making it harder for wrongdoers to escape responsibility.

The challenge, however, was

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how to coordinate multi-jurisdictional class actions in a federal state like Canada, where the provinces have jurisdiction over the conduct of civil litigation and the Federal Court has limited subject matter jurisdiction.

The committee considered a number of possibilities, including increasing the powers of the Federal Court or establishing a sort of "class action traffic cop", using the model of the U.S. Federal Court's Judicial Panel on Multi-District Litigation.

In the end, the committee agreed that best solution – and the most practical – was to fine-tune and clarify existing procedures to allow the courts to resolve the conflicts themselves. In developing recommendations, the committee aimed to build on the spirit of comity that already exists among Canadian courts, both by improving communications and by creating a level playing field among the provinces so that any province could certify a national or multi-jurisdictional class action under appropriate circumstances.

Detailed recommendations can be found in the report, which can be accessed online, but the following should offer a sense of the main recommendations. These are:

1. Create an online Canadian class proceeding registry for use by the public, class counsel and the courts.

2. Amend existing statutes and draft any future legislation to:

a) Expressly allow the certification of non-resident classes on an opt-out basis.

b) Require those filing class actions to notify the plaintiffs in any similar action and allow those plaintiffs to make submissions that theirs is the preferable procedure.

c) Require the court to consider whether a similar class action in another province might be the preferable procedure, based on certain enumerated factors.

d) Allow a court to certify a national or multi-jurisdictional class if it decides the case before it is appropriate for such a procedure, or refuse to certify if there is another, more appropriate case pending.

3. Adopt certain court-to-court communications protocols to help manage multiple (but not overlapping) class actions.

The report was approved by the ULCC at its annual meeting in 2005. Since then, a smaller committee has been working on an addendum, which will refine some of the report's recommendations.

In the meantime, the first recommendation, a national class action registry, may soon be a reality, thanks to the Canadian Bar Association, which has been considering the practicalities of establishing and maintaining it.

Once a national registry is in place, lawyers, judges and members of the public will be easily able to determine what class actions have been launched on any particular topic and whether they aim to cover all of Canada or only part of it. That information will allow counsel to notify one another of parallel actions, allow members of the public to inform themselves, and allow the courts to make certification decisions, having heard from all interested parties.

The report has received a positive response from counsel and the courts. With the national registry taking shape, it is now up to the provincial legislatures to take the next step: consider amendments to their class proceedings acts to fix the inter-jurisdictional muddle that has become the most pressing problem in Canadian class action litigation.

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