

## Are National Class Actions Constitutional?—A Reply to Hogg and McKee

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This article argues that there is no constitutional impediment to the certification of multi-jurisdictional class actions by provincial superior courts, and no constitutional requirement to confine plaintiff classes to those in which each claim has a real and substantial connection to the forum. Neither the text of the Constitution nor the constitutionally mandated rules of the conflict of laws restrict court jurisdiction in this way. Rather, the principles of order and fairness require Canadian courts to exercise jurisdiction over multi-jurisdictional class actions in a way that maximizes the objectives of class actions, and minimizes the incidence of overlapping classes and competing actions. This may require us to develop new institutional mechanisms and bodies to facilitate the process of coordinating national class actions to ensure that they meet these constitutional standards.

Le présent article fait valoir qu'il n'y a pas d'obstacle constitutionnel quant à la certification des recours collectifs multi-juridictionnels par les cours supérieures provinciales, ni d'exigence constitutionnelle de restreindre les catégories de demandeurs à celles au sein desquelles chaque demande a une connexion réelle et substantielle au tribunal compétent. Ni le libellé de la constitution, ni les règles du conflit des lois mandatées par la constitution restreignent ainsi la juridiction de la cour. À l'opposé, les principes de l'ordre et de l'équité exigent que les cours canadiennes exercent leur juridiction sur un plus grand nombre de recours collectifs multi-juridictionnels, afin de porter au maximum les objectifs des recours collectifs et de réduire au minimum l'incidence du chevauchement des catégories et des recours concurrents. Cela peut exiger que nous élaborions de nouveaux mécanismes et organismes institutionnels visant à faciliter le processus de la coordination des recours collectifs nationaux afin d'assurer qu'ils satisfassent à ces normes constitutionnelles.

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IN THEIR RECENTLY PUBLISHED ARTICLE, "Are National Class Actions Constitutional?"<sup>1</sup> Professor Peter Hogg and Gordon McKee ("Hogg and McKee") argue that the jurisdiction of the provincial superior courts in Canada to decide the claims of non-resident class members is restricted to claims that have a "real and substantial" connection to the forum province. The purpose of this article is to argue that there is no such restriction on the certification of multi-jurisdictional class actions.<sup>2</sup> Neither the text of the Constitution nor the

1. Peter W. Hogg & S. Gordon McKee, "Are National Class Actions Constitutional?" (2010) 26 N.J.C.L. 279. Similar arguments have been made concerning constitutional restrictions by Stephen Lamont, "The Problem of the National Class: Extra-territorial Class Definitions and the Jurisdiction of the Court" (2001) 24 Advocates' Q. 252; S. Gordon McKee & Jeff Galway, "Constitutional Considerations Concerning National Class Actions" in *Law Society of Upper Canada: Special Lectures 2001—Constitutional and Administrative Law* (Toronto: Irwin Law, 2002) 27; F. Paul Morrison, Eric Gertner & Hovsep Afarian, "The Rise and Possible Demise of the National Class in Canada" (2004) 1 Can. Class Action Rev. 67; and Colin K. Irving & Mathieu Bouchard, "National Opt Out Class Actions, A Constitutional Assessment" (2009) 26 N.J.C.L. 111.
2. The term "*multi-jurisdictional* class actions" is used interchangeably with the term "*national* class actions" in this article. "Multi-jurisdictional class actions" is a more accurate term because such actions do not always span the entire country. See Uniform Law Conference of Canada, "Supplementary Report on Multi-Jurisdictional Class Proceedings in Canada: Special Working Group on Multi-Jurisdictional Class Proceedings" (Edmonton: Civil Section, Uniform Law Conference of Canada, August 2006) at paras. 3-6, online: <[http://www.classactionlitigation.com/Class\\_Actions\\_Supplementary\\_Report.pdf](http://www.classactionlitigation.com/Class_Actions_Supplementary_Report.pdf)> [Uniform Law Conference, "Supplementary Report"]. The term "class actions" is used in place of the term "class proceedings" in this article, because it is the more common term. However, the term "class proceedings" may be more apt as some matters can be brought either by way of application or by way of action in Canada. The generic term "proceeding" refers to both actions and applications.

constitutionally mandated rules of the conflict of laws restrict court jurisdiction in this way. Furthermore, introducing such a restriction would not improve the operation of the Canadian judicial system, and such a restriction is not constitutionally required. Rather, the principles of order and fairness require courts to exercise jurisdiction over national class actions in a manner that maximizes the objectives of class actions—including access to justice, judicial economy, and behaviour modification—and minimizes the incidence of overlapping classes and competing actions. This may require us to develop new institutional mechanisms and bodies to facilitate the process of coordinating national class actions.

This article proceeds in three parts. Part I argues that, since jurisdiction to prescribe is different from jurisdiction to adjudicate, and since the *Constitution Act* provides only for the jurisdiction of the provinces to prescribe legislation, the legislatures' lack of competence to prescribe laws with extraterritorial effect does not also apply to the jurisdiction of the provincial superior courts to adjudicate civil disputes. Also, class proceedings are certified pursuant to a legislative scheme, not because the courts depend upon the legislation for their jurisdiction to do so, but because the complexity of class actions procedure and the potential for controversy when it was first introduced warranted introducing it by way of legislation.

Part II argues that the constitutional limits on judicial jurisdiction developed in the jurisprudence following the *Morguard* decision do not establish a territorial restriction on the jurisdiction of Canadian courts to certify multi-jurisdictional class actions. First, *Morguard* was a case concerning jurisdictional standards for enforcement purposes (“indirect jurisdiction”), and while these standards must correlate with the standards for exercising jurisdiction (“direct jurisdiction”), the two standards do not correspond precisely with one another. Second, while the real and substantial connection test might be described as territorial in nature, it is not the only basis upon which a court may exercise jurisdiction. Third, while there is a special link between direct and indirect jurisdiction in class actions, the standards for direct jurisdiction should, nevertheless, be derived from the anticipated likelihood of the judgment being considered enforceable in courts in which the claimants might otherwise sue (*i.e.*, appropriate standards for indirect jurisdiction), and not from pre-emptive restrictions on jurisdiction based on the standards that have been developed for named-party litigation.

Part III identifies some of the interests of claimants in class actions that are different from the interests of parties in named-party litigation, and it explains

why opt-in and hybrid regimes compromise those interests in ways that cannot be justified because such regimes cannot ensure certainty in multi-jurisdictional class actions that could be certified in more than one jurisdiction. The article concludes by identifying some of the factors that might serve as guidance in determining the scope of the classes that should be certified in multi-jurisdictional class actions. It argues that the procedure for making such determinations could require us to develop new institutional mechanisms and bodies.

## I. TEXT MATTERS

Hogg and McKee describe the limitation on the jurisdiction of the provincial superior courts as follows:

The superior court of each province is a court of inherent jurisdiction that is not subject to jurisdictional limitations like those that restrict the Federal Court. Of course, it is subject to the Legislature of the province, which can restrict its jurisdiction (or augment its jurisdiction), but, in practice, there are few subject matters that are outside the jurisdiction of the superior court of a province. And the court is not restricted to matters governed by provincial law: it makes no difference to the court's jurisdiction whether a matter is governed in part or in whole by federal law or constitutional law or foreign law.

There is, however, an important limitation on the jurisdiction of a provincial superior court. It is not a subject-matter or source-of-law limitation, but a *territorial* limitation. *The superior court of the province only has jurisdiction inside the boundaries of the province.* And the provincial Legislature lacks jurisdiction to enact laws with effect outside the boundaries of the province, so that the Legislature cannot expand the jurisdiction of its courts outside the boundaries of the province, which, of course, is territory exclusively occupied by the courts of the other provinces (or foreign countries).<sup>3</sup>

The first point of departure in considering the nature of any constitutional limitation on the jurisdiction of the provincial superior courts is the text of the Constitution. The *Constitution Act, 1867*<sup>4</sup> provides that the jurisdiction of the superior courts is subject to adjustment by provincial legislation. However, a

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3. Hogg & McKee, *supra* note 1 at 284 [former emphasis in original, latter emphasis added] [footnote omitted].

4. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act*]. This is to be distinguished from “the Constitution,” which is used here to refer to the common law or traditional understandings and practices in addition to the text of the *Constitution Act*.

careful reading of its text reveals that the inherent jurisdiction of the provincial superior courts is not territorially limited by a mandate specified by the Constitution, as is the jurisdiction of the Federal Court (Canada).<sup>5</sup> Nor is that jurisdiction limited by the lack of extraterritorial competence that characterizes the mandate of the provincial legislatures.

#### A. JURISDICTION TO PRESCRIBE IS DIFFERENT FROM JURISDICTION TO ADJUDICATE

To understand why the territorial restrictions described in the *Constitution Act* do not create territorial limits on judicial jurisdiction in the superior courts, it is necessary first to understand the difference between *jurisdiction to prescribe*, which is provided for in the *Constitution Act*, and *jurisdiction to adjudicate*, which is not.

*Jurisdiction to prescribe* is the authority to make laws that are applicable to particular activities or persons. This form of jurisdiction is most commonly associated with legislative authority. In a federation, jurisdiction to prescribe is often divided between two levels of government. In Canada, sections 91 and 92 of the *Constitution Act*—which are the first two sections of part VI, “Distribution of Legislative Powers”<sup>6</sup>—contain lists of the areas within which the Canadian Parliament and the provincial legislatures have the exclusive authority to make laws. These provisions give the legislatures their jurisdiction to prescribe.

In Canada, the provincial legislatures’ jurisdiction to prescribe is subject to restrictions on extraterritorial competence derived from the phrase “in the province,” which is found in the various heads of prescriptive jurisdiction.<sup>7</sup> Much of the constitutional jurisprudence and commentary in Canada was once devoted to questions of jurisdiction to prescribe.<sup>8</sup> Many of these questions concerned whether certain matters were beyond the jurisdiction of Parliament or beyond the jurisdiction of a provincial legislature. If a legislative body acted beyond its jurisdiction, its actions were said to be *ultra vires*. Generally speaking, once a

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5. *Ibid.*, s. 101. The Federal Court (Canada) was created under the authority of this section of the *Constitution Act* to establish “Courts for the better Administration of the Laws of Canada.” Its jurisdiction is accordingly limited to that mandate.

6. *Constitution Act*, *supra* note 4, ss. 91, 92.

7. Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Toronto: Thomson Reuters Canada, 2007) vol. 1, c. 13.

8. That is, before the advent of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

law was declared *ultra vires*, it was considered to be invalid, and therefore of no effect.<sup>9</sup>

The question of “jurisdiction” in constitutional law is usually a question of the jurisdiction to prescribe as it arises for a legislative body. However, questions of jurisdiction to prescribe can also arise indirectly in the conflict of laws. For example, questions of “choice of law” are questions concerning which law should be applied to determine the rights and obligations of the parties to a dispute. The court determines which legal system would reasonably be expected to have the authority to make laws that are applicable to certain activities or persons, and it applies those laws to the facts of the case.<sup>10</sup> When a court decides not to apply a particular law to resolve a dispute, it does not declare that law to be *ultra vires*; rather, it simply does not apply the law. As a result, questions of jurisdiction to prescribe operate differently in the conflict of laws from the way that they operate in constitutional law.<sup>11</sup>

Nevertheless, when questions of jurisdiction to prescribe arise in the adjudication of cross-border disputes within a federation, the way that the courts decide these questions can affect the operation of the federal system and, accordingly, the analysis may be subject to constitutional principles. For example, when a question of jurisdiction to prescribe arises in a cross-border dispute within a federation, as it did in *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*,<sup>12</sup> it can have constitutional implications, even though it is a question of the conflict of laws. When Justice La Forest spoke of the territorial principle of international law<sup>13</sup> in the Supreme Court of Canada decision in *Tolofson*, this

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9. Hogg, *supra* note 7, s. 5.5(b).

10. For cases that were animated by these questions, see *e.g.* *Royal Bank of Canada v. Rex*, [1913] 1 A.C. 283 (P.C.); *Ladore v. Bennett*, [1939] 1 A.C. 468 (P.C.); and *Reference re: Upper Churchill Water Rights Reversion Act 1980 (Newfoundland)*, [1984] 1 S.C.R. 297. However, these cases are not relevant authorities for determining the *adjudicatory* jurisdiction of the courts. *Contra* Irving & Bouchard, *supra* note 1.

11. When faced with the question of whether a Quebec statute could operate to interfere with litigation in British Columbia, the British Columbia courts hesitated to declare that this would be contrary to the constitutionally mandated principles of order and fairness. However, the Supreme Court held that, in this situation, it was within the provincial superior courts’ jurisdiction to declare the legislation of another province inapplicable by reason of the Constitution. See *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at para. 26 [*Hunt*].

12. [1994] 3 S.C.R. 1022 [*Tolofson*].

13. *Ibid.* at paras. 36-42.

was a reference to the jurisdiction to prescribe the law that would apply to the facts of the case. The issue of territoriality arose in the context of a question of choice of law—not a question of the jurisdiction to adjudicate the dispute.<sup>14</sup>

In multi-jurisdictional class actions, courts might need to apply different laws to different groups of claimants within a plaintiff class. This could happen, for example, if a claim was made in tort. In *Tolofson*, the Supreme Court held that the law of the place where the harm occurred should govern the parties' rights and obligations.<sup>15</sup> If a plaintiff class included persons from different provinces who suffered harm from a tort that occurred in their home provinces, and the laws of those provinces differed from one another, the court might need to apply those laws to the claims of the members of the class from each of those provinces.

This situation occurred in *Pearson v. Boliden Ltd.*,<sup>16</sup> where the court was asked to certify a multi-jurisdictional class in a claim for securities misrepresentations. The court observed that the class members' claims were based on trades that were governed by the laws of the various provinces in which they were made. As a result, it was necessary to form subclasses in adjudicating their claims to facilitate the application of the various provincial laws.<sup>17</sup>

Hogg and McKee observe that the jurisdiction of the superior courts could not be expanded “outside the boundaries of the province, which, of course, is territory exclusively occupied by the courts of the other provinces (or foreign countries).”<sup>18</sup> This is a meaningful observation only when it is made in reference to jurisdiction to prescribe. In principle, only one set of legal standards can govern a particular issue of the rights and obligations of parties to a dispute. An issue in dispute can be governed by the law of only one province or country. A court exercising jurisdiction to adjudicate the claims of a plaintiff class that

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14. To the extent that the application of one law rather than another could reflect a constitutional imperative, it could raise some difficult and, as yet, unanswered questions. For example, is it appropriate for the introduction of the applicable law of another province or country to be left to the discretion of the parties where the application of a particular law is constitutionally mandated? And, is it constitutionally permissible to enact statutes that purport to override the constitutionally mandated applicable law? These are significant questions and they are best left to other occasions, but they highlight the complexity of the concept of “constitutional requirements” as it arises in the context of choice of law.

15. *Tolofson*, *supra* note 12 at para. 69.

16. 7 B.C.L.R. (4th) 245 (C.A.); leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 29.

17. *Ibid.* at para. 94.

18. Hogg & McKee, *supra* note 1 at 284 [footnote omitted].

includes claims governed by the laws of other provinces or countries could be obliged to apply the laws of those other places if it determines that those places have jurisdiction to prescribe the laws that apply to those claims, and the forum province does not.

*Jurisdiction to adjudicate* is different. To say that the provincial superior court's jurisdiction to adjudicate is limited to the boundaries of the province or that its jurisdiction is exclusive within the boundaries of the province is not meaningful, and it is not correct. Jurisdiction to adjudicate is the authority to make a binding determination of a dispute concerning certain activities or persons. For example, courts may be called upon to adjudicate disputes in cases involving service outside the province. These decisions affect the rights of persons outside the province and, in many cases, they relate to events that have occurred outside the province. If jurisdiction to adjudicate was territorially limited, it would not be possible to adjudicate cross-border disputes. Much of the subject of the conflict of laws would not exist.

Moreover, in many cross-border disputes, the courts of more than one legal system have jurisdiction.<sup>19</sup> As the Supreme Court of Canada has observed, there are "cases in which the best that can be achieved is to select an appropriate forum. Often there is no one forum that is clearly more appropriate than others."<sup>20</sup> Accordingly, while it might make sense to speak of *prescriptive* jurisdiction as exclusive and territorially defined, it rarely makes sense to describe adjudicatory jurisdiction in civil disputes in such a way. If Hogg and McKee are saying that "[t]he superior court of the province only has [*adjudicatory*] jurisdiction inside the boundaries of the province ... [because] outside the boundaries of the province ... is territory exclusively occupied by the courts of the other provinces (or foreign countries),"<sup>21</sup> such a statement would not be correct.

Whether legislatures have jurisdiction to prescribe is usually a constitutional question, but it can sometimes arise in cross-border disputes, which many would regard as conflict of laws cases. Correlatively, the question of jurisdiction to

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19. The law of *forum non conveniens* is based on the recognition of this principle. See *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 [*Amchem*].

20. *Ibid.* at para. 21. Moreover, even though it may be desirable to avoid situations where more than one court adjudicates the same or a related dispute at the same time, it may not always be appropriate to take steps to eliminate a multiplicity when it occurs. See *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, [2009] 1 S.C.R. 321.

21. Hogg & McKee, *supra* note 1 at 284 [footnote omitted].

adjudicate most often arises in conflict of laws cases, but it can sometimes also arise in cases concerning which court within a federation has authority to decide a dispute, in which case it would be a matter of constitutional law. Nevertheless, jurisdiction to prescribe is different from jurisdiction to adjudicate.<sup>22</sup>

The provincial legislatures' jurisdiction to *prescribe* is territorially defined and limited by the Constitution. However, the main question that has been raised by the certification of multi-jurisdictional class actions has been one of the provincial superior courts' jurisdiction to *adjudicate*. This is a question of whether there is a constitutional limitation on the provincial superior courts' ability to decide cases.

Hogg and McKee describe that limit as "territorial" as well. This seems to suggest that the principles governing jurisdiction to adjudicate should be assimilated to the principles governing jurisdiction to prescribe, and that the territorial limitation that applies to the provincial legislatures also applies to the provincial superior courts. However, the jurisdiction of the provincial superior courts to adjudicate disputes is different from that of the jurisdiction of the provincial legislatures to prescribe laws. It operates on different principles. The jurisdictional issues that commonly arise in the conflict of laws are different from the jurisdictional issues that commonly arise in constitutional law because they address different kinds of jurisdiction.

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22. In Canada, however, these cases are relatively rare. As in many federations, jurisdiction to adjudicate is divided between two levels of government, *i.e.* the two court systems. In the latter part of the twentieth century, jurisdictional conflicts emerged between the Federal Court and the provincial superior courts. Some cases were at risk of being split between the two court systems because the *Federal Courts Act* purported to establish exclusive adjudicatory jurisdiction over certain subjects and its jurisdiction was statutorily limited to those subjects. See *Federal Courts Act*, R.S.C. 1985, c. F-7 [*Federal Courts Act*]. The statutory jurisdiction of the Federal Court is to be distinguished from the inherent jurisdiction of the provincial superior courts. This jurisdiction is confined to "the better Administration of the Laws of Canada" and finds its mandate in *Constitution Act*, *supra* note 4, s. 101. Following a series of decisions in the 1970s, the *Federal Courts Act* was amended to adjust the jurisdiction of the Federal Court to prevent the occurrence of such conflicts. See Janet Walker, *The Constitution of Canada and the Conflict of Laws* (DPhil Thesis, Oxford University, 2001) [Walker, *Constitution of Canada*]. As a result, as Hogg and McKee acknowledge: "In practice there are few subject matters that are outside the jurisdiction of the superior court of a province." *Supra* note 1 at 284. Today with the amendments to the statute governing the jurisdiction of the Federal Court, questions of jurisdiction to adjudicate rarely arise as questions of constitutional law, except in the sense discussed in the *Morguard* decision. See *infra* note 59.

In the rest of this article, it is argued that the provincial superior courts' jurisdiction to adjudicate is not territorially defined or restricted. In Part I(B), below, it is argued that there is no territorial restriction on the jurisdiction of the provincial superior courts to be found in the text of the *Constitution Act*.

## B. THE SCOPE OF JUDICIAL JURISDICTION IS NOT DEFINED BY THE CONSTITUTION ACT

Hogg and McKee do not argue explicitly that the *Constitution Act* is the source of the territorial restriction on the provincial superior courts' jurisdiction to adjudicate. However, in examining the claim that there is a constitutional basis for a territorial restriction on the courts' adjudicatory jurisdiction, it is important to dispel any notion that such a restriction might be found in the text of the *Constitution Act*.

The manner in which the text of the *Constitution Act* provides for the legislative authorities' jurisdiction to prescribe and the judicial authorities' jurisdiction to adjudicate is unique. The text must be read carefully to understand what it has to say about the scope of judicial jurisdiction of the provincial superior courts. To reiterate, in support of the thesis that "[t]he superior court of the province only has jurisdiction inside the boundaries of the province,"<sup>23</sup> Hogg and McKee state:

[T]he provincial Legislature lacks jurisdiction to enact laws with effect outside the boundaries of the province, so that the Legislature cannot expand the jurisdiction of its courts outside the boundaries of the province, which, of course, is territory exclusively occupied by the courts of the other provinces (or foreign countries).<sup>24</sup>

In the footnote reference to this sentence, the authors observe that:

A provincial law that is in relation to a matter inside the province can incidentally affect the rights of persons outside the province. ... But all heads of provincial legislative power are limited to laws within the province, and it seems unlikely that there is any kind of valid provincial law that could remove the real and substantial connection requirement for the jurisdiction of the province's courts.<sup>25</sup>

It is clear from the references in this passage to the provincial legislatures' "jurisdiction to enact laws with effect outside the boundaries of the province,"

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23. Hogg & McKee, *ibid.* at 284.

24. *Ibid.* [footnote omitted].

25. *Ibid.* at 284, n. 15.

“incidental effects,” and “heads of provincial legislative power ... limited to laws within the provinces,”<sup>26</sup> that Hogg and McKee are referring to section 92 of the *Constitution Act*. The relevant parts of section 92 provide:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ...

13. Property and Civil Rights *in the Province*.

14. The Administration of Justice *in the Province*, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.<sup>27</sup>

These provisions describe subjects connected with the adjudication of civil disputes. On the one hand, judgments in civil matters affect the “property and civil rights” of the parties to the dispute. On the other hand, “the Constitution, Maintenance, and Organization of Provincial Courts ... of Civil ... Jurisdiction” are clearly related to the operation of the courts.

Hogg and McKee’s argument that the jurisdiction of the provincial superior courts is territorially limited appears to rely on the view that it is derived from the grants of legislative authority for property and civil rights and the administration of justice. However, these provisions do not define the scope of judicial jurisdiction.<sup>28</sup> Sections 91 and 92 of the *Constitution Act* provide for the “Powers of the Parliament” and for the “Exclusive Powers of the Provincial Legislatures” and are contained in part VI, “Distribution of Legislative Powers.”<sup>29</sup> In other words, sections 91 and 92 define the scope of authority of the *legislative* branches of government in the provinces and their authority to prescribe laws. These sections do not define the scope of authority of the *judicial* branch of government to adjudicate disputes.

Therefore, one might wonder where the provision defining the scope of the judicial authority of the courts of the provincial superior courts to adjudicate

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26. *Ibid.* at 284.

27. *Constitution Act*, *supra* note 4, s. 92 [emphasis added] [footnote omitted].

28. It may be that Professor Hogg had forgotten this argument—first made in the spring of 2000—in the wake of the many “interesting” theories of constitutional interpretation, no doubt, pressed upon him by others since. See Walker, *Constitution of Canada*, *supra* note 22 at 41-54; *Hocking c. Haziza*, [2008] R.J.Q. 1189 at n. 5, para. 29, n. 31, para. 151 (C.A.) [*Hocking*]. See also *supra* note 5, *infra* note 31.

29. *Constitution Act*, *supra* note 4.

disputes can be found in the *Constitution Act*. The relatively recent advent of digital versions of the *Constitution Act*—versions that are indexed and searchable—has made it easier to see the structure and contents of the *Constitution Act*, but the section relating to judicial jurisdiction or jurisdiction to adjudicate is still not easy to locate.

Moving systematically through the text of the *Constitution Act* and following the initial recitals, parts III and IV provide for the executive and the legislative branches of the federal government, part V provides for the executive and the legislative branches of the provincial governments, and part VI provides for the distribution of legislative authority between the two federal and provincial governments. Up to this point, there is no mention of the judicial branch of government, let alone any provision for its mandate or its scope of authority.

The title of part VII—“Judicature”—seems promising, but its contents are limited to provisions for the appointment, tenure, and salary of the judges that sit in the courts of inherent jurisdiction, which are administered by the provinces.<sup>30</sup> The only reference in this part of the *Constitution Act* to the mandate of a Canadian court is found in section 101, which authorizes Parliament to establish “additional Courts for the better Administration of the Laws of Canada.”<sup>31</sup> This describes the mandate and scope of the judicial authority of the Supreme Court of Canada and the Federal Courts, but not that of the provincial superior courts.

The remaining parts of the *Constitution Act*, parts VIII-XI, which provide for “Revenues, Debts, Assets, Taxation”; “Miscellaneous Provisions”; “Inter-colonial Railway”; and “Admission of Other Colonies,” seem unlikely to contain the elusive provision for the judicial authority of the provincial superior courts.

The absence of a specific provision for the mandate of the judiciary is all the more puzzling, especially when the *Constitution Act* is compared with its counterpart in the United States, which devotes the first three of its seven articles to each of the three branches of government.<sup>32</sup>

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30. *Ibid.*

31. *Ibid.*, s. 101.

32. In the US Constitution, Article I provides for legislative authority, Article II provides for executive authority, and Article III provides for judicial authority. See U.S. Const. arts. I-III; Janet Walker, “What’s with Article III? The Nature of Judicial Authority and Private International Law,” online: <<http://ssrn.com/abstract=1490737>>. The authority of courts in civil law systems is often provided for comprehensively in civil codes. See e.g. Book Ten, C.C.Q. See also EC, Council Regulation (EC) No 44/2001 of 22 December 2000 on

It is tempting to fill the apparent gap in the text of the *Constitution Act* by reading judicial authority into the relevant section 92 provisions for the legislative authority of the provinces, as these provisions speak about matters affecting the courts. However, the intention *not* to provide for a clearly defined and circumscribed mandate for judicial authority for the provincial superior courts is indicated in the Preamble. According to the Preamble, the purpose of the *Constitution Act* is “not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared.”<sup>33</sup> The Preamble makes it clear that the *Constitution Act* provides for executive and legislative authority alone. The Preamble makes no reference to any intention to have the *Constitution Act* serve as the source of the adjudicatory authority of the courts and, in this way, to define its contours.<sup>34</sup>

Despite the drafters’ evident intention that the *Constitution Act* *not* serve as the source of authority for the judicial branch, they did not fail to acknowledge the existence or operation of the provincial superior courts. A careful review of part IX, “Miscellaneous,” reveals that section 129 acknowledges the continuing authority of the courts.<sup>35</sup> That section provides: “Except as otherwise provided by this Act ... all Courts of Civil ... Jurisdiction ... existing therein at the Union, shall continue ... as if the Union had not been made; subject nevertheless ... to [authorized and applicable legislation].”<sup>36</sup> A similar affirmation of the continuing

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jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] O.J. L 12/3.

33. *Constitution Act*, *supra* note 4, Preamble.

34. *Ibid.* The Preamble provides:

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America.

35. *Ibid.*, s. 129.

36. *Ibid.*

authority of the courts exists in the statutes governing the courts, such as the Ontario *Courts of Justice Act*, which states: “The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.”<sup>37</sup>

Accordingly, the restrictions on the extraterritorial competence of the provincial legislatures, which are established in section 92 of the *Constitution Act*, do not apply to the judicial jurisdiction of the provincial superior courts. Section 92, therefore, is concerned only with the authority of the provinces’ legislatures to prescribe laws. The authority of the superior courts to adjudicate is not derived from section 92.

Hogg and McKee are correct in saying that “the provincial Legislature lacks jurisdiction to enact laws with effect outside the boundaries of the province, so that the Legislature cannot expand the jurisdiction of its courts outside the boundaries of the province.”<sup>38</sup> However, this does not mean that the courts’ jurisdiction to adjudicate was confined to the territorial boundaries of the province in the first place. It does not mean that the courts’ jurisdiction to adjudicate would need to be expanded by legislation in order for them to be capable of deciding matters with connections to other places, such as multi-jurisdictional class actions. Such a restriction is not to be found in the text of the *Constitution Act*.

If such a restriction existed, as is discussed in Part II of this article, it would need to arise in some other way—perhaps, as discussed below, as a necessary incident of the operation of multi-jurisdictional class actions within the Canadian federation.

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37. R.S.O. 1990, c. C-43, s. 11(2) [*Courts of Justice Act*]. The continuing evolution of judicial jurisdiction through the courts’ own interpretation is to be contrasted with the situation of US courts that, for many aspects of their jurisdiction, rely primarily on statutorily mandated changes. See *e.g.* *Grupo Mexicano De Desarrollo, S.A., et al. v. Alliance Bond Fund, Inc., et al.*, 527 U.S. 308 at 309:

The federal courts have the equity jurisdiction that was exercised by the English Court of Chancery at the time the Constitution was adopted and the Judiciary Act of 1789 was enacted. ... The various weighty considerations both for and against creating the remedy at issue here should be resolved not in this forum, but in Congress.

38. Hogg & McKee, *supra* note 1 at 284.

### C. THE JURISDICTION TO CERTIFY CLASS ACTIONS IS NOT BASED ON LEGISLATION

Before turning to a more detailed consideration of the nature of the limits of the courts' jurisdiction to adjudicate multi-jurisdictional class actions, it is important to clarify one further misconception that may be inferred from the statement made by Hogg and McKee that the "Legislature cannot expand the jurisdiction of its courts outside the boundaries of the province."<sup>39</sup>

Even if the restrictions on the extraterritorial competence of provincial legislatures do not ordinarily apply to the judicial jurisdiction of the provincial superior courts, it might be thought that they do apply in the case of class actions because the courts certify class actions pursuant to a statutory regime. Such an assumption might suggest to some that the authority of the courts to certify class actions is derived from the class actions statutes. This appears to be one of the bases of the view taken by Hogg and McKee, in part, because, as they explain:

In the case of residents of the forum province (Ontario in our example), there is no doubt that their rights can be affected by legislation enacted by the forum province, and the class proceedings statute expressly provides that a judgment will be binding on all members of the plaintiff class who have not opted out of the proceedings.<sup>40</sup> ... In the case of non-residents of the forum province, can the law of the forum province have the extraprovincial effect of taking away without their consent their rights to sue the defendant in their own province ... ?<sup>41</sup>

Hogg and McKee's view might be taken to suggest that Canadian courts derive their authority to certify class actions from the class actions legislation. However, as they themselves acknowledge, the Supreme Court of Canada held in *Western Canadian Shopping Centres Inc. v. Dutton*<sup>42</sup> that the provincial superior courts could certify class actions in the absence of legislation.<sup>43</sup> If the

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39. *Ibid.*

40. Citing *Class Proceedings Act*, 1992, S.O. 1992, c. 6, s. 27(3) [*Ontario Class Proceedings Act*].

41. Hogg & McKee, *supra* note 1 at 287-88 [footnote omitted].

42. [2001] 2 S.C.R. 534 [*Dutton*].

43. See *ibid.* at para. 34.

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. ... However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice. [footnotes omitted].

provincial superior courts have such authority, then they do not derive their jurisdiction to do so from the class action statutes.

It seems odd to suggest that the courts could act without legislation in an area, such as class actions, that has been so dependent on legislative initiatives for its development. If that is so, then why were class actions introduced by legislation and not simply by amendments to the rules of procedure? On what basis could the Supreme Court of Canada decide that, although class actions legislation would be helpful, it is not the basis of the court's authority to certify class actions?

The need to introduce class actions through legislation has been controversial in common law legal systems. In the United States, class actions were not introduced into the Federal Court practice by legislation. Class actions are provided for in the *Federal Rules of Civil Procedure*.<sup>44</sup> These Rules are promulgated pursuant to the *Rules Enabling Act*, which provides that the Rules may not alter substantive rights.<sup>45</sup> Class actions were, therefore, capable of being introduced by rules in the United States because they were considered to be merely a procedural device.<sup>46</sup>

In contrast, class actions were introduced in Ontario through legislation, and not through reform of the *Rules of Civil Procedure*. Was this because Canadian legislators thought differently from their American counterparts—that class actions might alter substantive rights? If so, then it might be argued that they should be subject to the territorial limits on the provisions governing “Property and Civil Rights in the Province” from section 92.13.<sup>47</sup> However, the Ontario *Rules of Civil Procedure*, unlike the US Federal Rules, are not required to refrain from altering substantive rights. The Ontario *Courts of Justice Act* grants authority to the Civil Rules Committee to “make rules ... even though

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44. Fed. R. Civ. P. 23.

45. 28 U.S.C. § 2072(b) (1934). This section provides, in part, that “[s]uch rules shall not abridge, enlarge or modify any substantive right.”

46. It was on this basis that Cumming J. held in *Wilson v. Servier* that the capacity to include extra-provincial class members, like joinder, was a matter of procedure. According to Cumming J., where the court had jurisdiction over some of the class members' claims, the joinder of the other class members' claims was a question of procedure, like other questions of joinder. See *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 at para. 66 (Sup. Ct. J.) [*Wilson*].

47. *Constitution Act*, *supra* note 4, s. 92.13.

they alter ... the substantive law,”<sup>48</sup> and so, this is not the explanation for the enactment of class actions legislation.

Nevertheless, the *Report of the Attorney General’s Advisory Committee on Class Action Reform* recommended that any provision for class actions be made by legislation, rather than through rule changes, because:

The procedure represents a significant development in the administration of justice in Ontario. It has been the subject of controversy and debate. The recommended reforms call for the removal of substantive obstacles to class proceedings. ... The new procedure requires a specificity and, in some cases, a priority over other litigation which the Rules of Civil Procedure are unaccustomed and inappropriate in providing.<sup>49</sup>

Whether or not it was strictly necessary to introduce class actions through legislation, it appears in hindsight to have been a prudent approach in view of the experience with the introduction of class actions in the Australian State of Victoria. In Victoria, the debate over whether class actions procedures are merely procedural or whether they affect substantive rights was more dramatic. Following the failure of the Victorian Legislature to take up the recommendation of the Law Reform Commission to introduce class actions, the Rules Committee simply amended the rules to provide for class actions.<sup>50</sup> In a constitutional challenge to the Rules, it was argued that this exceeded the rule-making power of the judges. The challenge was defeated,<sup>51</sup> but to avoid further challenges, the government passed a statute for class actions that was almost identical to the Rules that had been challenged.<sup>52</sup>

Whether class actions procedures go beyond facilitating the purposes of the rules of procedure in securing “the just, most expeditious and least expensive determination of every civil proceeding on its merits”<sup>53</sup>—whether they alter substantive rights—is a significant question, and one on which

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48. *Courts of Justice Act*, *supra* note 37, s. 66(2).

49. Ontario, *Report of the Attorney General’s Advisory Committee on Class Action Reform* (Toronto: Ministry of Attorney General, 1990) at 24-25.

50. *Supreme Court (General Civil Procedure) Rules 2005* (Vic.), Order 18A-Group Proceeding.

51. *Schutt Flying Academy (Australia) Pty Ltd v. Mobil Oil Australia Limited*, [2000] 1 V.R. 545 (C.A.).

52. *Supreme Court Act 1986* (Vic.), Part 4A—(Group Proceeding).

53. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 1.04 [*Rules of Civil Procedure*].

perspectives may evolve as class actions practice develops.<sup>54</sup> However, even if class actions do affect substantive rights, this does not appear to be the reason why they were introduced by legislation, nor does it support the conclusion that operating in accordance with a provincial legislative scheme is evidence that the courts' adjudicatory jurisdiction is subject to the territorial limitations of provincial legislation.

In the *Dutton* case,<sup>55</sup> the Supreme Court provided a different explanation for introducing class actions by way of legislation: class actions procedure is complex and it warranted comprehensive treatment in a statute, rather than piecemeal introduction through discrete rulings in specific cases. The idea that the role served by legislation is primarily a practical one is supported by the experience of introducing class actions in the Federal Court (Canada). Once the details of class actions procedure had been established by legislation in several provinces—and once the Supreme Court had ruled in *Dutton* that the courts could determine matters by way of class actions in the absence of legislation—it was possible to introduce class actions into the practice of the Federal Court by amendments to the Federal Court Rules, rather than through the enactment of legislation.<sup>56</sup>

The Supreme Court of Canada's suggestion in *Dutton* that class actions could be developed through the inherent capacity of the courts is consistent with the view that the judicial jurisdiction of the provincial superior courts in Canada develops organically, and not merely as an application of fixed provisions in the text of the *Constitution Act*. The prospect that Canadian courts would be capable, with or without legislation, of fashioning a modern class actions procedure from the representative procedure found in Rule 10,<sup>57</sup> suggests that the aspects that touch upon the courts' jurisdiction are amenable to development and refinement by the courts in accordance with the evolving needs of the judicial system. This is consistent with the provision that the "Superior Court of Justice has all the jurisdiction, power and authority historically exercised by

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54. In a different context, the Supreme Court has observed that class actions are procedural and do not create new rights. See *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666 at para. 17; *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 at paras. 105-08.

55. *Dutton*, *supra* note 41.

56. *Federal Courts Act*, *supra* note 22.

57. *Dutton*, *supra* note 42 at para. 24, citing *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, r. 10.

courts of common law and equity in England and Ontario”<sup>58</sup> and with an essentially tradition-based rather than text-based understanding of judicial jurisdiction. The idea that the superior courts of the provinces have *inherent* authority suggests that their authority is capable of evolving to meet the needs of the Canadian federation and is not circumscribed by the *Constitution Act*.

For these reasons, the restrictions on extraterritorial competence that apply to provincial legislation, such as the class actions statutes, do not constrain the reach of the adjudicatory jurisdiction of the provincial superior courts in their certification of class actions. It may be true that provincial legislation could not enlarge the adjudicatory jurisdiction of the courts, but this is not relevant if the courts’ jurisdiction to adjudicate class actions does not depend upon provincial legislation in the first place.

In sum, there is little, if anything, to be gleaned from the text of the *Constitution Act* on the question of whether national class actions are constitutional. The question of the constitutionality of national class actions is one as to how the provincial superior courts must operate within the Canadian judicial system to support the country’s legal traditions and the functioning of the Canadian federation. This is a question that requires an understanding of the law of jurisdiction, as it has been developed in the conflict of laws. If there is a constitutional limit on the certification of national classes, it is not primarily a question of constitutional law—it is a question of the conflict of laws.

## II. CONFLICTS OVER CONFLICTS

Although no jurisdictional restriction can be found in the text of the Constitution, this does not mean that the jurisdiction of the provincial superior courts is unlimited. Indeed, the *law of jurisdiction* in the conflict of laws is devoted to the study of the scope of the jurisdiction of courts in their adjudication of matters with connections to other legal systems.

In situations where those other legal systems are part of the Canadian federation, the jurisdictional reach of the courts can affect the operation of the federation. Accordingly, the Supreme Court of Canada has held that there are *constitutional* limits on the jurisdiction of Canadian courts. It is helpful to describe these limits as constitutional with a small “c” (or as arising from the Constitution, rather than from the *Constitution Act*), because these limits are a

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58. *Courts of Justice Act*, *supra* note 36, s. 11(2).

product of the way in which the Canadian legal system must operate to serve the needs of the Canadian federation, and not a product of the provisions of the *Constitution Act* itself.

Having ruled out the potential for provincial legislation to expand the judicial jurisdiction of the courts, Hogg and McKee move on in their article to summarize the jurisdiction of the superior courts of the provinces as follows: “The Supreme Court has established a rather liberal test for the territorial restriction on the provincial courts. A court will have jurisdiction over a matter that has a ‘real and substantial connection’ to the forum province.”<sup>59</sup>

The above references to having “established a rather liberal test for... territorial restriction” and to the “real and substantial connection” test are references to the jurisprudence emanating from the Supreme Court of Canada’s decision in *Morguard Investments Ltd. v. De Savoye*.<sup>60</sup> For reasons that will be discussed later in this Part, it may be appropriate to describe the “real and substantial connection test” as a test that relates to jurisdiction based on territoriality. However, this does not mean that there is a territorial restriction on the adjudicatory jurisdiction of the superior courts of the provinces in every case because a real and substantial connection between the matter and the forum province is not a jurisdictional requirement in every case.

In order to understand the extent of the guidance provided by the *Morguard* decision for the law of jurisdiction as it applies to multi-jurisdictional class actions, it is necessary to clarify three points that may not be obvious to those who do not specialize in the conflict of laws. First, the *Morguard* case concerned *indirect* jurisdiction; only by implication did the decision address the limits of *direct* jurisdiction. Second, in *Morguard*, the Supreme Court of Canada did not replace the traditional bases of jurisdiction with the fundamentally territorial basis of a real and substantial connection. Third, there is a special link between direct and indirect jurisdiction in class actions that makes it necessary to confine the extent of direct jurisdiction to the limits of indirect jurisdiction.

However, the process of determining the appropriate scope of jurisdiction remains a referential one—that requires us to engage in what Hogg and

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59. Hogg & McKee, *supra* note 1 at 284-85.

60. [1990] 3 S.C.R. 1077 [*Morguard*].

McKee describe as a “backward ordering of the issues”<sup>61</sup>—in which the standards of jurisdiction are guided by what can reasonably be expected to be recognized in courts in which the plaintiffs might otherwise sue. By clarifying these issues about the conflicts principles, it is possible to begin to appreciate the challenges that face the Canadian legal system in providing a way for courts to exercise jurisdiction over national class actions in a manner that comports with the constitutional principles of order and fairness.

#### A. THE MORGUARD DECISION WAS CONCERNED PRIMARILY WITH INDIRECT JURISDICTION

While the *Morguard* decision concerned the “law of jurisdiction” generally, it is important to understand that its reasons were developed primarily to address questions of *indirect* jurisdiction or “jurisdiction in the international sense,” and only by implication, to address questions of *direct* jurisdiction. Thus, it would be a mistake to infer that the *Morguard* decision gave rise to a specific test for direct jurisdiction that governs the courts’ authority to certify multi-jurisdictional class actions.<sup>62</sup>

*Indirect* jurisdiction is the authority to issue a judgment that will be recognized by other courts as binding on the parties to it. It is described as “indirect” because the standards for it are not set by the court that exercises jurisdiction to decide the case but, rather, by other courts that may be called upon to recognize, and where appropriate, enforce the judgment of that court.

This kind of jurisdiction is also indirect in another way. In exercising jurisdiction in cross-border cases, particularly in those cases in which the decision may be sought to be recognized and enforced elsewhere, courts are often mindful of the obligations of comity. By exercising appropriate restraint, it is hoped that their judgments will be recognized elsewhere. In other words, when courts determine the scope of their own jurisdiction in cross-border cases, they do so with an eye to the way in which this determination will be viewed by other courts.<sup>63</sup>

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61. Hogg & McKee, *supra* note 1 at 290.

62. Janet Walker, *Castel & Walker: Canadian Conflict of Laws*, 6th ed., looseleaf (Markham: LexisNexis, 2005) at para. 14.4 [Walker, *Castel & Walker*] (discussing jurisdiction in the international sense).

63. *Van Breda v. Village Resorts Ltd.* (2010), 98 O.R. (3d) 721 (C.A.), Sharpe J.A.

Within federations like Canada, it may be possible for the standards of direct jurisdiction to be set by an authority, such as the Supreme Court of Canada, that is also empowered to mandate the effectiveness of the judgments issued. In *Morguard*, the Supreme Court determined the scope of indirect jurisdiction within Canada and said that it should correlate with the scope of direct jurisdiction.

The question of indirect jurisdiction arose in *Morguard* because, until that time, Canadian courts had recognized only two bases for indirect jurisdiction. These bases included situations in which the defendant had consented to the determination of the dispute by the court that had issued the judgment, and situations in which the defendant was a local person in the forum of the court that had issued the judgment.<sup>64</sup> This was the prevailing approach to indirect jurisdiction in cases involving the international enforcement of judgments, and it remains so today. At that time, it was also the prevailing approach in Canada to cases involving the interprovincial enforcement of judgments.

The Supreme Court said that Canadian courts should expand the scope of indirect jurisdiction to include cases where there was a real and substantial connection between the matter and the forum in which the matter was decided.<sup>65</sup> This applied to cases where the defendant had not consented to the determination of the dispute by the court in another part of Canada and in which the defendant was not a local person in that other part of Canada. The Supreme

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64. See *Morguard*, *supra* note 60 at para. 16, citing *Emanuel v. Symon*, [1908] 1 K.B. 302 at 309 (C.A.). The bases enunciated in this decision of the English courts are as follows:

(1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained.

It is suggested that these can be reduced to jurisdiction based on consent or residence. Nationality has since been doubted as appropriate for judicial jurisdiction in civil disputes.

65. Incidentally, the prevailing test for indirect jurisdiction has never included a requirement that the issuing court have direct jurisdiction pursuant to its own law. This is contrary to the suggestion made by Hogg and McKee that the test for indirect jurisdiction requires a court to have jurisdiction under its own law. *Supra* note 1 at 286. The validity of the issuing courts' exercise of jurisdiction under its own law is irrelevant. See Lawrence Collins, ed., *Dicey, Morris and Collins on the Conflict of Laws*, 14th ed. (London: Sweet & Maxwell, 2006) at 589; J.J. Fawcett, J. M. Carruthers & Peter North, *Cheshire, North and Fawcett: Private International Law*, 14th ed. (Oxford: Oxford University Press, 2008) at 516; and Walker, *Castel & Walker*, *supra* note 62 at para. 14.4.

Court held that one Canadian court should, nevertheless, recognize the jurisdiction of another Canadian court to issue a binding judgment where there was a real and substantial connection between the matter and the forum in which the matter was decided.

The decision in *Morguard* was concerned with the standards for *indirect* jurisdiction, but it affected the standards for *direct* jurisdiction as well. Justice La Forest explained that in a federation, these two kinds of jurisdiction (*i.e.*, indirect and direct) should correlate with one another. If Canadian courts were to have an obligation to recognize the authority of other courts when those courts exercised appropriately restrained jurisdiction, then they also had an obligation to show appropriate restraint in the assumption of jurisdiction themselves (so that their judgments would merit recognition). According to Justice La Forest, this was not merely a matter of a vague notion of enlightened self-interest or *comity*, as it existed in international litigation, but, rather, a result of the requirements of the judicial system within the Canadian federation.<sup>66</sup>

Until that time, it was understood that courts would sometimes exercise jurisdiction over extra-provincial defendants that had not consented to the determination of the dispute by them. This would result in a judgment that could be enforced elsewhere only if the defendants subsequently agreed to participate in the matters and, thereby, consented to the court's adjudication of them. Where the defendants did not consent, the resulting judgments would probably be unenforceable outside the forum in which they were issued.

Although courts might exercise *direct* jurisdiction variously on all three bases—consent, the presence or residence of the defendant, or a real and substantial connection between the matter and the forum—enforcing courts might recognize the judgments only when jurisdiction had been exercised on one of the first two of these bases. This discrepancy between the standards for direct and indirect jurisdiction persists in international recognition and enforcement in many places around the world. It remains the case that the judgments issued by courts exercising jurisdiction on the basis of a real and substantial connection generally have local effect alone and cannot be enforced internationally.<sup>67</sup>

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

67. Interestingly enough, for this reason, a judgment issued by an English court on the basis of jurisdiction founded on a real and substantial connection may be enforceable in Canada, but

When the Court held that the limits of direct and indirect jurisdiction should correlate with one another within the Canadian federation, it went on to observe that the precise limits remained to be defined:

In *Morguard*, a more accommodating approach to recognition and enforcement was premised on there being a “real and substantial connection” to the forum that assumed jurisdiction and gave judgment. Contrary to the comments of some commentators and lower court judges, this was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction. ... *The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined*, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these. However, though some of these may well require reconsideration in light of *Morguard*, the connections relied on under the traditional rules are a good place to start. More than this was left to depend on the gradual accumulation of connections defined in accordance with the broad principles of order and fairness.<sup>68</sup>

The existence of a distinction between the standards for direct jurisdiction and for indirect jurisdiction was recently highlighted by the Court in *Canada Post Corp. v. Lépine*.<sup>69</sup> In that case, one reason given by the Quebec courts for refusing to enforce an Ontario judgment was that the Ontario court did not properly exercise its discretion to decline jurisdiction. The Court has previously suggested that the exercise of discretion to decline jurisdiction forms an integral part of the decision-making that is subject to the constitutionally mandated standards of jurisdiction.<sup>70</sup> However, in *Lépine*, the Court held that “[e]nforcement by the Quebec court depends on whether the foreign court had jurisdiction, not on how that jurisdiction was exercised.”<sup>71</sup> Accordingly, although the Constitution requires a correlation between the

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not vice versa. See *Dodd v. Gambin Associates*, [1997] O.J. No. 1330 (C.A.), rev’g *Evans v. Dodd v. Gambin Associates* (1994), 17 O.R. (3d) 803 (Gen. Div.).

68. *Hunt*, *supra* note 11 at para. 58 [emphasis added].

69. [2009] 1 S.C.R. 549 at para. 34 [*Lépine*].

70. See *Hunt*, *supra* note 11 at para. 59. As La Forest J. explained:

I need not, for the purposes of this case, consider the relative merits of adopting a broad or narrow basis for assuming jurisdiction and the consequences of this decision for the use of the doctrine of forum non conveniens. ... Whatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness.

71. *Lépine*, *supra* note 69 at para. 34. LeBel J. clarified that this was subject to the exceptions provided for in the Civil Code of Quebec. Note that, in this context, the term “foreign courts” includes courts of other Canadian provinces.

standards for direct and indirect jurisdiction, there may remain distinctions between them.

In sum, the exercise of (direct) jurisdiction on a basis that does not give rise to a judgment enforceable elsewhere may be a cause for concern within a federation where there should be a correlation between indirect and direct jurisdiction. However, the issues before the Court in *Morguard* related to the failure to recognize that a real and substantial connection between the matter and the forum could serve as a basis for indirect jurisdiction. The Court was concerned primarily with the standards for indirect jurisdiction, not the standards for direct jurisdiction. The Court considered the possibility of constitutional restrictions on the scope of adjudicatory jurisdiction only as they might foster the conditions for the recognition of the resulting judgment.

Canadian courts are required to confine themselves to “appropriately” or “properly” exercised jurisdiction. The existence of a real and substantial connection between the matter and the forum was cited as meeting the constitutional requirements of the principles of order and fairness in the exercise of jurisdiction. However, as will be argued next, a real and substantial connection may be territorial in nature, but it is only one of several jurisdictional bases that may meet these requirements. The Court did not establish the principle of territoriality as a comprehensive limitation on the exercise of jurisdiction any more than the Court established the existence of a real and substantial connection between the matter and the forum as an inevitable requirement for the exercise of jurisdiction.

#### B. “REAL AND SUBSTANTIAL CONNECTION” DID NOT REPLACE THE OTHER BASES OF JURISDICTION

In *Morguard*, the Court identified a constitutional imperative to exercise appropriate restraint in applying the assumption of direct jurisdiction. The Court held that this included the exercise of jurisdiction over matters with a real and substantial connection to the forum. The Court did not *replace* the existing bases of direct jurisdiction, such as consent and defendant’s home forum, with the single basis of a real and substantial connection. There are several features of the law that demonstrate this.

First, as was suggested in the *Morguard* decision itself, the Court sought to revise the standards for indirect jurisdiction by *supplementing* the existing bases of jurisdiction, including defendants’ consent and presence, with the

basis of a real and substantial connection—not by replacing these two bases with a third basis:

[W]hen has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments—in the case of judgments in personam where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.<sup>72</sup>

Since there was no intention to subsume consent and presence under a single jurisdictional test for the purposes of *indirect* jurisdiction, there is no reason to suggest that the various bases of jurisdiction were intended to be subsumed under the real and substantial connection test for the purpose of *direct* jurisdiction.<sup>73</sup>

Second, Canadian courts have exercised jurisdiction over disputes between parties who consent to the resolution of disputes in the forum, even in the absence of real and substantial connections between the matter and the forum, and they continue to do so. Centres that aspire to serve as commercial hubs, such as London<sup>74</sup> and Singapore,<sup>75</sup> actively seek to become dispute resolution centres of choice for parties and matters, regardless of whether those parties or matters have any connection to the forum. Where the bulk of the expense in litigation is borne by the parties and the benefits of attracting business dealings

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72. *Morguard*, *supra* note 60 at para. 43.

73. This analytic framework is arguably different from that in the United States, in which the equivalent to the real and substantial connection test—the “minimum contacts test”—may be said to constitute the primary basis of jurisdiction; one which includes local service of the defendant and the defendant’s consent. However, both the doctrinal history and the legal culture in which the two tests operate are different. See Walker, *Constitution of Canada*, *supra* note 22.

74. See “England and Wales: The Jurisdiction of Choice” (London: The Law Society of England and Wales, 2008), online: <[http://www.lawsociety.org.uk/documents/downloads/jurisdiction\\_of\\_choice\\_brochure.pdf](http://www.lawsociety.org.uk/documents/downloads/jurisdiction_of_choice_brochure.pdf)>.

75. See Singapore Academy of Law, “Welcome to [www.singaporelaw.sg](http://www.singaporelaw.sg),” online: <<http://www.singaporelaw.sg>>. The Academy asserts that: “The legal system in Singapore has received numerous international accolades for its efficiency and integrity. As a consequence of this, there is now wide recognition of Singapore as a leading legal hub in Asia.” See also Singapore Academy of Law, “Singapore: Your Partner for Legal Solutions in Asia,” online: <<http://www.sal.org.sg/content/ebooks/Singapore%20Law/index.html>>.

tend to accrue to the local bar and local industry, the additional public expense incurred in adjudicating cases is thought to be unobjectionable. Serving as a centre for international dispute resolution would be impossible if Canadian courts adopted the parochial view that they could decide cases only if either the parties or the matter had a real and substantial connection to the forum.

Moreover, as a matter of national policy, Canada's support for the adoption of the *Hague Choice of Court Convention*<sup>76</sup> suggests that the independent sufficiency of a choice of court agreement as a basis of jurisdiction is unlikely to be regarded as controversial.

Imposing an overriding requirement of a real and substantial connection to the territory of the forum on cases in which the court had exercised jurisdiction with the consent of the parties would also create logistical complications for the trial process. In cases where a dispute had arisen elsewhere, a court would be obliged to question the parties about their connections to the forum. If none of them was found to be a member of the local community, the Court would then need to send the parties away.<sup>77</sup>

Third, the possibility that the Constitution imposed a jurisdictional requirement of a real and substantial connection on matters to which the Quebec Courts would otherwise apply Title Three of the *Civil Code* was rejected in

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76. Kathryn Sabo, "Hague Convention on Choice of Court Agreements" (Quebec: Civil Section, Uniform Law Conference of Canada, August 2008), online: < <http://www.ulcc.ca/en/poam2/Hague%20Conv%20Choice%20of%20court%20Agreements.pdf>>.

77. In one extraordinary instance, an Ontario court took it upon itself after the hearing had progressed for a few days to raise the question and then to declare itself without jurisdiction because there was no real and substantial connection between the matter and the forum. See *Shekhdar v. K&M Engineering and Consulting Corp.* (2004), 71 O.R. (3d) 475 (Sup. Ct. J.). The court's declaration that it lacked jurisdiction due to the absence of a real and substantial connection was reversed by the Court of Appeal. See *Shekhdar v. K&M Engineering and Consulting Corp.* (2006), 148 A.C.W.S. (3d) 568 at para. 2 (Ont. C.A.). The Court of Appeal held:

The defendants, respondents to this appeal, concede that, if their attornment to the courts of Ontario is sufficient to constitute consent, the appeal must succeed. ... [T]hey participated in almost three days of the trial of this action before Matlow J. who, on his own motion, raised the question of jurisdiction. ... He rejected consent as a separate basis of jurisdiction and focused on assumed jurisdiction. He concluded that ... the action had no real and substantial connection with Ontario and the Superior Court therefore had no jurisdiction to entertain it. ... [H]is decision was wrong in law.

See also *Litecubes, L.L.C. v. Northern Light Products Inc. (c.o.b. Glowproducts.com)*, [2009] B.C.J. No. 262 at para. 46.

*Spar Aerospace*.<sup>78</sup> The Court held that the only constitutional requirement was adherence to the provisions of the *Code*, which reflected the principles of order and fairness. Some of the provisions of Title Three relate to connections between the matter and the forum. Others do not. Unless the jurisdiction of Quebec courts is radically different from that of other Canadian courts, this would suggest that Canadian courts may exercise jurisdiction in certain cases on bases other than the existence of a real and substantial connection.

Contrary to the view that the requirement of a real and substantial connection serves as a comprehensive jurisdictional standard, it may be suggested that each of the three main bases of jurisdiction serves a legitimate purpose. *Consent*, whether by agreement or attornment, fosters support for the parties' choice of forum, whether that choice is made before or after the dispute arises. Even where the parties choose not to resolve their dispute informally, and prefer, instead, to have resort to the courts, the benefits of supporting their choice of forum—subject to appropriate protections for parties of weaker bargaining power—are readily apparent.<sup>79</sup> The exercise of jurisdiction based on consent is legitimate because the parties are estopped from complaining later about the choice of a forum to which they agreed.

The exercise of jurisdiction in the *defendant's home forum* ensures that where the parties have not agreed or cannot agree upon a forum, there will, nevertheless, be some forum in the world in which an aggrieved plaintiff can be confident of having its day in court and obtaining a judgment that is enforceable elsewhere. There will be situations in which a defendant who is local to the forum nevertheless persuades the court that another forum is clearly more appropriate. However, apart from those situations, it may be assumed that a trial in the defendant's home court will best ensure fairness and convenience to the defendant. The exercise of jurisdiction in such a forum is legitimate because it is reasonable to assume that persons should be answerable for their conduct in the courts of the legal system with which they are most closely connected.

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78. *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205; Title Three C.C.Q.

79. Vaughan Black, "The Hague Choice of Court Convention and the Common Law" (Charlottetown: Civil Section, Uniform Law Conference of Canada, September 2007), online: <[http://www.ulcc.ca/en/poam2/Hague\\_Choice\\_of\\_Court\\_Convention\\_Common\\_Law\\_En.pdf](http://www.ulcc.ca/en/poam2/Hague_Choice_of_Court_Convention_Common_Law_En.pdf)>.

Finally, in cases where the parties have not agreed on a forum, there may be situations where it is more appropriate for a forum other than that with which the defendant is most closely connected to exercise jurisdiction. This will usually be a result of close connections between the matter and the forum that make the evidence and the witnesses more available to that court than they are to courts in other fora. Where this is the case, the exercise of jurisdiction may be seen as legitimate also because there is a reasonable expectation that activities occurring within the territory of the forum may be subject to the jurisdiction of the courts there—unless the parties have agreed otherwise.<sup>80</sup>

In this sense, jurisdiction based on a real and substantial connection might be said to be territorially oriented. However, a real and substantial connection is only one of the bases on which a court may exercise jurisdiction. Accordingly, and contrary to the suggestion of Hogg and McKee, the jurisdiction of the provincial superior courts cannot properly be described as territorially restricted. Other bases of jurisdiction, such as consent and the defendant's home forum, each with a scope and rationale that is not territorially defined, operate together with real and substantial connection to comprise the three most widely recognized bases of direct jurisdiction.<sup>81</sup> Each of them is independently sufficient to found jurisdiction.

### C. THE LINK BETWEEN DIRECT AND INDIRECT JURISDICTION DOES NOT GIVE RISE TO PEREMPTORY RESTRICTIONS

Despite the extensive discussion of the law of direct jurisdiction, Hogg and McKee acknowledge that the constitutionality of national class actions is “at

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80. Janet Walker, “Beyond Real and Substantial Connection: The *Muscutt* Quintet” in Todd Archibald & Michael Cochrane, eds., *Annual Review of Civil Justice* (Toronto: Thomson Carswell, 2002) 61 at 73-74 [Walker, “Beyond Real”].

81. Other subsidiary or exceptional grounds for the exercise of jurisdiction may be justified in special circumstances. These may include the exercise of jurisdiction over ancillary claims and those involving necessary or proper parties as well as the exercise of jurisdiction in situations where the court serves as a forum of necessity. See text accompanying notes 89-92; Janet Walker, “*Muscutt* Misplaced: The Future of Forum of Necessity Jurisdiction in Canada” (2009) 48 Can. Bus. L.J. 135. While the use of these bases of jurisdiction may be extraordinary, and the international enforceability of the resulting judgments less assured, continued reliance on them underscores the fact that the introduction of the constitutional principles of order and fairness was not intended to give rise to fixed limits on direct jurisdiction, whether confined to a real and substantial connection or to the three main bases.

bottom” a question of the law of judgments, *i.e.*, indirect jurisdiction.<sup>82</sup> They are right to point out the special link between direct and indirect jurisdiction in class actions. However, this Part explains why, despite this special link, any restrictions on the exercise of jurisdiction reflect the anticipated likelihood of the judgment being considered enforceable by courts elsewhere.

This is not an obvious point, but it is important. If there is a special link between direct and indirect jurisdiction in national class actions, one may wonder why it has been so important to emphasize the distinction between these kinds of jurisdiction. And, if the *Morguard* principles of indirect jurisdiction imply certain principles of direct jurisdiction, why do those principles of direct jurisdiction not also apply in multi-jurisdictional class actions? Why has it been so crucial to insist that any constitutional limits on the authority of courts to certify multi-jurisdictional class actions must be inferred from the reasonable standards for indirect jurisdiction and, in particular, those that are appropriate for class actions?

Hogg and McKee<sup>83</sup> have suggested that the reason is that the Constitution creates clear jurisdictional restrictions that preclude the certification of national classes. They have suggested that the *Morguard* jurisprudence gives rise to a fixed jurisdictional standard that would be breached by the certification of a national class, regardless of whether the judgment would be recognized by other courts. They have suggested that the Supreme Court has interpreted the Constitution as giving rise to a jurisdictional requirement of a real and substantial connection between the matter (or the parties) and the forum. They argue that this is a peremptory or “foundational” requirement.<sup>84</sup>

The possibility of such a pre-emptory restriction was explored in *Harrington v. Dow Corning*.<sup>85</sup> In that case, a constitutional challenge was made to the legislative provisions under which non-residents could take steps to join class actions certified in British Columbia. It was argued that claims that had arisen in other provinces had no real and substantial connection to the province and, therefore, were beyond the jurisdiction of the British Columbia court. Even if persons who fell within the definition of the class wished to

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82. “If a national class action has something for everyone to love, can there be any constitutional objection to it? That is at bottom a question about the recognition of judgments, which is the topic to which we now turn.” Hogg & McKee, *supra* note 1 at 285.

83. For the suggestion made by Hogg & McKee and others, see *supra* note 1.

84. *Ibid.* at 290.

85. (1997), 29 B.C.L.R. (3d) 88 [*Harrington*].

join the class, they could not do so because their claim had no real and substantial connection to the forum.

A simple response to this objection might have been that the non-residents have opted in and, therefore, the court has jurisdiction based on their consent. However, in those days, many commentators thought that a real and substantial connection might be an absolute requirement in every case.<sup>86</sup> They said that if there was no real and substantial connection between the claim and the forum, a court could not rely upon the class members' consent to join the class as sufficient to take jurisdiction over their claims.<sup>87</sup>

In any event, the Court in *Harrington* rejected the challenge and upheld the legislative provision for including non-residents in class actions. The Court did not dispute the requirement of a real and substantial connection, but, instead, held that “[i]t is that common issue which establishes the real and substantial connection necessary for jurisdiction.”<sup>88</sup>

This unusual interpretation of the term “real and substantial connection” could prompt a raised eyebrow on the part of some readers. A common issue seems to be a different kind of connection from that which is ordinarily understood as a real and substantial connection. Nevertheless, a rough equivalent to the rationale in *Harrington* for the exercise of jurisdiction might be found exemplified in the Ontario rules for service out of the province, which provide for the joinder of a “necessary or proper party.”<sup>89</sup> This provision permits the exercise of jurisdiction over parties whose claims would not ordinarily be subject to the jurisdiction of the court. The jurisdiction is exercisable when there is a claim brought before the court that is within its jurisdiction, but which requires the court to exercise jurisdiction over claims involving these additional parties. “Necessary or proper parties” jurisdiction has survived challenges to its constitutionality,<sup>90</sup> but it has been controversial because

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86. As discussed in Joost Blom, Q.C. & Elizabeth Edinger “The Chimera of the Real and Substantial Connection Test” (2005) 38 U.B.C. L. Rev. 373.

87. A legitimate question could be raised as to why the legislators might be content that consent would suffice for indirect jurisdiction if it was inadequate for direct jurisdiction.

88. *Supra* note 85 at para. 18.

89. See e.g. *Rules of Civil Procedure*, *supra* note 53, r. 17.02(o); Art. 3139 C.C.Q.

90. See *McNichol Estate v. Woldnik* (2001), 150 O.A.C. 68 (C.A.).

it appears to operate beyond the three traditional bases of jurisdiction, *i.e.*, consent, service in the province, and real and substantial connection.<sup>91</sup>

Despite the controversy over whether it constitutes a “real and substantial connection,” the rationale for “necessary or proper parties” jurisdiction echoes some of the considerations relevant to the question of when a class action judgment should be granted preclusive effect. The Court has described the representative proceedings regime that operated before the advent of modern class actions as one of “compulsory joinder,”<sup>92</sup> in which the binding effect of the judgment would extend beyond the representative party to those who shared a common interest in the outcome of the dispute.

The representative procedure was itself not a novel idea. It was rooted in the doctrine of *res judicata*, according to which not only parties, but also those who share with them a privity of interest, may be regarded as bound by the judgment and precluded from re-litigating the claim. In *Harrington*, the Court sought to account for the jurisdiction over the claims of non-residents arising elsewhere in situations where the claimants had *opted in* to the class. However, an analysis that draws support from analogous situations involving “necessary or proper parties” or the representative procedure suggests that jurisdiction could also be exercised in appropriate circumstances over such claims in an *opt-out* arrangement, *i.e.*, even where the members of the class had not demonstrated their consent by taking affirmative steps to opt in.

The functional similarity between the concepts of “necessary or proper parties,” “privies,” and class members may help to explain why the British Columbia court’s decision in *Harrington* to reject the constitutional challenge has not been subject to extensive criticism in the subsequent jurisprudence. However, it does not address the objection made by Hogg and McKee that treating the common issue as the real and substantial connection conflates the test for certification with the test for jurisdiction.

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91. Walker, “Beyond Real,” *supra* note 80 at 81-82. For example, it was not among the bases for jurisdiction endorsed by the Uniform Law Conference of Canada in the Court Jurisdiction and Proceedings Transfer Act as presumptively constituting a real and substantial connection. See Uniform Law Conference of Canada, “Uniform Court Jurisdiction and Proceedings Transfer Act,” s. 10 at 8ff, online: <[http://www.ulcc.ca/en/us/Uniform\\_Court\\_Jurisdiction\\_+\\_Proceedings\\_Transfer\\_Act\\_En.pdf](http://www.ulcc.ca/en/us/Uniform_Court_Jurisdiction_+_Proceedings_Transfer_Act_En.pdf)>.

92. *Dutton*, *supra* note 42 at paras. 19-24.

Hogg and McKee correctly point out that the jurisdiction that is exercised over claims that are connected with the forum only through a common issue differs from jurisdiction based on a real and substantial connection. Nevertheless, the lack of a real and substantial connection would impair jurisdiction only if, contrary to the arguments made earlier, a real and substantial connection is a *sine qua non* for jurisdiction, and if, contrary to the arguments made below, the ability to exercise jurisdiction in multi-jurisdictional class actions is not primarily a question of indirect jurisdiction.

Hogg and McKee insist that the real and substantial connection operates as an *a priori* or pre-emptive jurisdictional restriction that could preclude a court from exercising jurisdiction over a national class. This could be a result of assimilating the way in which the jurisdictional analysis operates in the conflict of laws to the way it operates in constitutional law. It could be a result of inferring that the constitutional implications of this jurisdictional analysis make this conflict of laws question subject to the kind of analysis usually applied to the authority of legislative bodies.

When a legislative body acts beyond its constitutional jurisdiction by prescribing a law that is *ultra vires*, that law is a nullity and of no effect. In the context of *legislative* jurisdiction, the jurisdictional analysis is, as Hogg and McKee describe it, a “foundational” concept.<sup>93</sup> In the case of provincial legislative bodies, this constitutional jurisdiction is defined territorially and, as a result, legislation that has impermissible extraterritorial effect is *ultra vires* and, therefore, invalid and of no effect.

However, courts around the world often exercise jurisdiction in international cases on bases that are not recognized by other courts—perhaps the most common example being jurisdiction that is based on a real and substantial connection. When courts exercise jurisdiction that is not recognized elsewhere, their judgments are not nullities. Rather, their judgments are simply not recognized in other countries and, as a result, have only local effect.<sup>94</sup> The limits of adjudicatory jurisdiction in the conflict of laws are *prudential*. They exist because courts wish to comply with the obligations of comity in order to have their judgments recognized elsewhere. These limits are not *foundational*.<sup>95</sup>

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93. Hogg & McKee, *supra* note 1 at 290.

94. Collins, *supra* note 65 at 363-64; Fawcett, Carruthers & North, *supra* note 65 at 529-31.

95. This may, in part, explain why courts have not readily acceded to the arguments that they were incapable of exercising jurisdiction over national classes. See *e.g.* *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Gen. Div.) leave to appeal to Div. Ct.

In the first edition of his work on the conflict of laws, A.V. Dicey described what, in his view, was the general principle governing jurisdiction as “the principle of effectiveness”: a court “has jurisdiction over (*i.e.*, has a right to adjudicate upon) any matter with regard to which ... [it] can give an effective judgment.”<sup>96</sup> In cases where a judgment will be effective only upon recognition and enforcement by a court in another legal system, there is an important link between direct and indirect jurisdiction.<sup>97</sup>

Perhaps one of the most significant consequences of the jurisprudence following the *Morguard* decision has been the emergence of the idea that if direct and indirect jurisdiction were correlative, then fixed, *a priori* standards of direct jurisdiction based on territoriality were outmoded. To enable the judicial system to meet the needs of the Canadian federation, it is necessary to approach the limits of judicial jurisdiction in a principled and pragmatic way, rather than through a return to fixed notions of territoriality.

Still, the nature of class actions and, in particular, national class actions makes the link between direct and indirect jurisdiction particularly significant. This is because the feature of class actions, whether local or national, that makes them effective is not the exercise of (direct) jurisdiction but, rather, the recognition of the binding effect of the judgment on the members of the class. The class actions statutes establish a detailed set of provisions designed to assist courts in deciding which of the actions that have been proposed as class actions should be certified and, therefore, over which persons’ claims the court should exercise jurisdiction. However, these are not the provisions that make the class action function as a class action. The provision that ultimately renders the result effective is not found among the provisions for certification. The effectiveness of a class action depends upon the provision that a “judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding.”<sup>98</sup>

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refused [*Nantais*, (1995)], (1996), 7 CPC (4th) 199 (C.A.); *Carom v. Bre-X Minerals Ltd.* (1999) 43 O.R. (3d) 441; and *Wilson*, *supra* note 46.

96. A. V. Dicey, *A Digest of The Law of England with reference to the Conflict of Laws* (London: Stevens and Sons, 1896) at 38.
97. *Ibid.* For Dicey, this principle was peremptory in cases in which the relief purported to order transfer to title of an immovable, but it was merely cautionary in most situations involving *in personam* awards.
98. Ontario *Class Proceedings Act*, *supra* note 40, s. 27(3); Janet Walker, “Crossborder Class Actions: A View from Across the Border” (2004) Mich. St. L. Rev. 755 at 773 [Walker, “Crossborder Class Actions”].

This provision<sup>99</sup> is not one that creates specific rights or obligations for class members, nor is it one that regulates the process in the court that decides the class action. Rather, it is a provision that directs *other* courts to stand down and to treat the matter as *res judicata*.<sup>100</sup> It is a domestic equivalent of the cross-border concept of indirect jurisdiction. It tells courts, other than the court deciding the case, that once the proceeding is certified they should treat the judgment as binding on the parties whom it includes as members of the class.

Hogg and McKee are justified in saying that the provincial class actions legislation cannot require the courts of *other* provinces to treat the judgment as binding on the class members, because that legislation is subject to restrictions on extraterritorial competence under section 92 of the *Constitution Act*.<sup>101</sup> Similarly, as was observed by an Ontario court fifteen years ago, the capacity to certify a national class action was “something to be resolved in another action (by a non-resident class member) before another court in another jurisdiction.”<sup>102</sup> In other words, the true reach of a plaintiff class can only be assessed upon the determination by another court of the *res judicata* effect of the decision in the class action. It is only when members of the class who have not taken steps to exclude themselves seek to sue separately and are denied the opportunity to do so that it becomes clear that the decision in the class action is binding on them.

In named-party litigation, courts exercise jurisdiction on the basis of a real and substantial connection with no assurance that their judgment will be recognized elsewhere. Similarly, the binding effect of a decision of a court that exercises jurisdiction over a class containing non-resident plaintiffs who do not respond to the notice of jurisdiction will only be determined when another court grants or denies preclusive effect to the decision.

However, there is a difference between the situation involving named-party litigation and that involving a class action. The *indirect* jurisdiction of

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99. See *e.g.* Ontario *Class Proceedings Act*, *ibid.*, s. 27.

100. The suggestion here that the *res judicata* effect is prescribed by provisions such as s. 27(3) of the Ontario *Class Proceedings Act* is not intended to suggest that the ability of one court to make rulings that will have this effect and the obligation of other courts to accept the ruling as binding are dependent on legislation. See Ontario *Class Proceedings Act*, *ibid.*; Dutton, *supra* note 42.

101. *Supra* note 4, s. 92.

102. *Nantais*, (1995), *supra* note 95 at para. 77.

the certifying court has a special significance in class actions. The question of whether the judgment will be recognized has a much more immediate impact on whether the court *should* exercise jurisdiction in class actions than the impact it has in named-party litigation. In most situations in named-party litigation, the question of whether the ensuing judgment will be recognized or enforced elsewhere is regarded as a matter for the parties to consider under the principle of party prosecution. For example, although a judgment may not be enforceable in the defendant's home jurisdiction, this might not be a reason for declining jurisdiction; the plaintiff may wish to seek enforcement elsewhere, or may wish to have the matter rendered *res judicata* for other reasons. Whether the effort to obtain the judgment is worthwhile is a matter for the plaintiff to decide, and not a reason, per se, for the court to question whether it should exercise jurisdiction.<sup>103</sup>

In class actions, the situation is different. The nature and quantum of the award, whether it is negotiated or determined by the court following a trial, will be based on an estimate of the size of the plaintiff class. In the case of a multi-jurisdictional class, this is possible only if there is a clear indication of whether the courts in other fora will regard the claims as preclusively determined by the decision in the multi-jurisdictional class action. In the absence of a clear indication of who will be bound, a defendant will be wary of entering into negotiations to settle the matter and a court would find it difficult to quantify an award. In this way, in class actions, the scope of indirect jurisdiction can be crucial to deciding whether the action should be certified. It is arguable that in certifying a class action, a court should exercise jurisdiction over a class only as large as that comprising members who would reasonably be expected to be precluded from suing elsewhere. This can only be determined through a review of the law of indirect jurisdiction in the places where they might otherwise sue.<sup>104</sup>

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103. *Wilson v. Servier*, *supra* note 46 at para 29.

104. See Janet Walker, "The Preclusive Effect of Judgments in Collective Actions: Implications for Jurisdiction and Appropriate Forum" (Paper presented to the ILA Committee Meeting, Paris, July 2007) [unpublished], online: <[http://osgoode.yorku.ca/osgmedia.nsf/research/walker\\_janet](http://osgoode.yorku.ca/osgmedia.nsf/research/walker_janet)>; International Bar Association Legal Practice Division Task Force on International Procedures and Protocols for Collective Redress, "Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress" (London: International Bar Association, 2008), online: <[http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)>.

In this sense, if the proposition advanced by Hogg and McKee—that a court can exercise jurisdiction only where there is a real and substantial connection to the forum—was intended in the more general sense of “a connection to the forum that meets the prevailing standards for indirect jurisdiction,” (*i.e.*, not as distinct from consent and other bases of jurisdiction) then it is correct. If they were using “real and substantial connection” as a shorthand for “appropriately restrained jurisdiction,” which need not be territorial in nature, then there is some basis for jurisdictional standards for cross-border class actions to be found in the law of jurisdiction as it has developed in named-party litigation. However, the idea that the necessary connection to the forum represents a jurisdictional standard that must be ascertained independently of the standards that might reasonably be applied to determine the enforceability of the result is not well founded. What Hogg and McKee criticized as a “backward ordering of the issues”<sup>105</sup> is essential to determining the appropriate standards for certifying multi-jurisdictional class actions in Canada.

Moreover, such standards need to be adapted from those suitable for named-party litigation to those suitable for class actions. Until the last few years, the question of the enforceability of a judgment in a multi-jurisdictional class action was largely theoretical within the Canadian federation. The Ontario courts were the only Canadian courts that certified multi-jurisdictional class actions on an opt-out basis, and they were prepared to exclude residents of the other provinces where competing class actions might have been commenced.<sup>106</sup> Provided that the plaintiff class was unlikely to encompass claimants who might participate in a competing class action elsewhere in Canada, defendants were prepared to settle matters and courts were prepared to make awards on the assumption that duplicative named-party litigation by putative class members was unlikely. The chances of class members seeking independent relief elsewhere in named-party claims were too small to generate sufficient uncertainty to impair the progress of the case.

With the establishment of class actions in other provinces,<sup>107</sup> and the emergence of other multi-jurisdictional opt-out regimes,<sup>108</sup> the prospect for competing

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105. *Ibid.* at 290.

106. See *e.g.* *Wilson*, *supra* note 46 at paras. 96-98.

107. British Columbia: *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [British Columbia *Class Proceedings Act*]; Alberta: *Class Proceedings Act*, S.A. 2003, c. C-16.5; Saskatchewan: *Class Actions Act*, S.S. 2001, c. C-12.01 [Saskatchewan *Class Actions Act*]; Manitoba: *Class*

class actions has become a real one and the need to address it has become urgent. But the question of whether a court's exercise of jurisdiction comports with the principles of order and fairness remains one as to whether it can reasonably expect its judgment to be granted preclusive effect in other courts in which class members might sue. It has not become a question of direct jurisdiction but, rather, remains one of indirect jurisdiction.

The question a court must ask itself in deciding whether to certify a multi-jurisdictional class action is not: Is there a real and substantial connection between the matter and this province? Rather, the question the court must ask itself is: What are the circumstances under which other courts in Canada—to which the putative class members might resort—might be prepared to recognize the preclusive effect of a determination in a national class action decided in this case if it is certified? A fixed requirement of a real and substantial connection between each claim and the forum in a multi-jurisdictional class action is no more required by the constitutionally mandated rules of the conflict of laws than it is by the text of the Constitution or its interpretation by the Supreme Court of Canada.

### III. CONTEXT IS (ALMOST) EVERYTHING

The purpose of this article has been to reply to the argument that national class actions are constitutional only when there is a real and substantial connection between every claimant's claim and the forum. Arguments have been provided in support of the propositions that national class actions are not unconstitutional per se, and that their constitutionality does not depend upon a real and substantial connection between every class member's claim and the forum. Part I of this article argued that the text of the *Constitution Act*—and, therefore, much of conventional constitutional analysis—had little to offer in answering the question “are national class actions constitutional?” This is a question of jurisdiction to adjudicate, and is not determined by the *Constitution Act* or by provincial legislation. Part II of this article argued that the *Morguard* decision

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*Proceedings Act*, S.M. 2002, c. 14; C.C.S.M., c. C130; Ontario: *Class Proceedings Act*, *supra* note 47; Quebec: *Code of Civil Procedure*, R.S.Q., c. C-25, arts. 999-1052; New Brunswick: *Class Proceedings Act*, S.N.B. 2006, c. C-5.15; Nova Scotia: *Class Proceedings Act*, S.N.S. 2007, c. 28; Prince Edward Island has not passed class actions legislation; and Newfoundland: *Class Actions Act*, S.N.L. 2001, c. C-18.1.

108. Saskatchewan *Class Actions Act*, *ibid.*, s. 6.

did not establish a territorial restriction on direct jurisdiction based on the real and substantial connection test.

The article could end here. But if it did, it would be no more satisfying than the answer “Yes” to the question “Do you have the right time?”

In some of the most complex areas of the law, the greatest challenge is to ask the right question. Accordingly, the article so far may be described as striving to clarify the question concerning the constitutionality of national class actions. Despite the challenge involved in finding the right question, as is often the case, that is really only the beginning. If finding the right answer is a matter of asking the right question, then finding appropriate guidance in the relevant authorities is also a matter of understanding the particular questions that were being answered in those cases.

The third and final Part of this article argues that the law of indirect jurisdiction is generally of little guidance because it was developed for named-party litigation and its underlying principles need to be adapted to the class actions context. Accordingly, the question “*Are national class actions constitutional?*” is better answered when formulated as “*Under what circumstances should Canadian courts be expected to recognize judgments issued in national class actions?*”

Posed in this way, it is possible to appreciate that the answer must respond to the particular concerns affecting the participants in class actions. Therefore, this Part identifies some of the interests of participants in class actions, some of which are different from those in named-party litigation, and explains why the reliance on traditional jurisdictional standards would be misplaced.

#### A. THE STANDARDS OF INDIRECT JURISDICTION WERE DEVELOPED FOR NAMED-PARTY LITIGATION

Despite the fact that the question is indeed “at bottom” a question of the law of judgments, and despite the fact that the *Morguard* decision was concerned with the conditions under which a judgment should be granted recognition within the Canadian federation, the specifics of the decision are of little guidance. The *Morguard* decision and the law of judgments more generally are of limited value in setting the standards for the preclusive effect of judgments in multi-jurisdictional class actions. Their principles were designed to address the interests of persons in named-party litigation—not the interests of class members in multi-jurisdictional class actions. As Justice Sharpe of the Court of Appeal for Ontario observed:

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.

Here, the tables are turned. It is the defendant who is seeking to enforce the judgment against the unnamed, non-resident plaintiffs. The settling defendants, plainly bound by the judgment, seek to enforce it as widely and as broadly as possible in order to preclude further litigation against them. ... Before enforcing a foreign class action judgment against Ontario residents, we should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected.<sup>109</sup>

The interests of class members differ from those of the parties in named-party litigation. Unlike defendants in named-party litigation—who stand to become liable to satisfy a judgment against them—class members stand to be precluded from seeking relief in a separate action.<sup>110</sup> This interest is not a greater or a lesser interest than that of defendants in named-party litigation; rather, it is a different interest and it requires different kinds of safeguards.

In addition, the interests of class members differ from plaintiffs in named-party litigation because their primary interest might not always be vested in compensation and, even if it is, it might not include an interest in personally controlling the prosecution of the claim. If the interests of class members were no different from those of plaintiffs in named-party litigation, their interests would be sufficiently served by adequate notice and an opportunity to opt out. Indeed, many commentators still seem to believe that adequate procedural safeguards of the interests of class members who might wish to sue individually should be the principal focus of certification standards, whether local or multi-jurisdictional.<sup>111</sup>

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109. *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 at paras. 16-17 (C.A.). The US Supreme Court recognized in 1985 that it was necessary to revise the minimum contacts test to ensure that it accorded with the “traditional notions of fair play and substantial justice” as required by the due process clause of the Constitution in the situation of multi-state class actions. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) citing *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

110. Walker, “Crossborder Class Actions,” *supra* note 98 at 776ff.

111. See *e.g.* Tanya J. Monestier, “Personal Jurisdiction over Non-Resident Class Members: Have We Gone Down the Wrong Road?” (2010) 45 *Tex. Int'l L.J.* 537.

In addition to an interest in compensation, class members may have a collective interest in the class action as a means to fill the regulatory gap that failed to deter or prevent the conduct that caused them harm. To the extent that this is so, their interest is not confined to the notional individual chose in action that they might lose upon certification. They might have an interest in the effectiveness of the claim in bringing about behaviour modification, which may be affected by the size of the class that is certified. Accordingly, quite apart from their legitimate interest in safeguards to protect their ability to pursue their cause of action independently, should they wish to do so, class members have a legitimate interest in ensuring that the plaintiff class is otherwise as inclusive as possible.

Furthermore, to the extent that a multi-jurisdictional class aggregates claims that differ because they have arisen in different geographic regions or have arisen in ways that make those claims subject to different legal regimes, class members may also have an interest in ensuring that the collective interests of their particular group are adequately represented. This may warrant the creation of subclasses or the certification of parallel class actions to be resolved in coordination with one another in different provinces.<sup>112</sup> Finally, class members and defendants alike share an interest in procedures that will clarify the size and scope of the plaintiff class early on in the process, so as to facilitate a decisive resolution of the matter.

Searching for ways to serve the special concerns of the participants in class actions gives rise to important insights into some of the special challenges involved in developing a workable jurisdictional framework. First, as discussed in Part III(B), below, applying the traditional jurisdictional bases does not serve the objectives of class actions of promoting access to justice and responsible conduct. Second, as discussed in Part III(C), below, applying these jurisdictional bases will fail to clarify the size and scope of the plaintiff class early on in the process. Only by coming to terms with these concerns will it be possible, as is discussed in the Conclusion, to appreciate that the real work ahead may have very little to do with the articulation of appropriate jurisdictional standards. The real work may involve questions of institutional design.

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112. Janet Walker, "Recognizing Multijurisdiction Class Action Judgments within Canada: Key Questions—Suggested Answers" (2008) 46 *Can. Bus. L.J.* 450 [Walker, "Recognizing Multijurisdiction"].

## B. OPT-IN AND HYBRID REGIMES DO NOT SUPPORT THE OBJECTIVES OF CLASS ACTIONS

The special concerns of class members with regard to the adequacy of notice and an opportunity to opt out, along with concerns with regard to the adequacy of representation to ensure that their interests in compensation and promoting more responsible conduct, are of fundamental importance. However, these interests have not figured as prominently as they may have in the discussions of national class actions because they are already well-established as basic requirements for local class actions. Clearly, these requirements operate differently in multi-jurisdictional contexts and practices, and standards must be adjusted accordingly. However, the special context of multi-jurisdictional claims does not create new questions. Equally, the additional concerns relating to the differences in the nature of the claims that might result from the claims arising in different legal systems or geographic regions of Canada have also not figured as prominently as they might. These considerations, which will not arise in every case, seem likely to come to the fore only when national class actions have become more prevalent.

The issue that has dominated the discussion of national classes has arisen from overlapping and competing class actions and the ensuing uncertainty that makes it difficult or impossible to gauge with accuracy the size and scope of the class and, as such, to move forward to resolve the matter. In fact, the recent incidents of competing national class actions might even be described as situations that do not comport with the constitutional principles of order and fairness.<sup>113</sup>

In anticipation of the uncertainties that would arise from the certification of competing class actions on an opt-out basis, some have proposed the solution of opt-in class action regimes and hybrid regimes that combine opt-out arrangements for aggregating the claims of residents and opt-in arrangements for adding the claims of non-residents.<sup>114</sup> This solution was implemented by British Columbia legislators and was endorsed by Hogg and McKee.<sup>115</sup> Relying

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113. See *e.g. Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32 (Ont. Sup. Ct. J.); *Hocking*, *supra* note 28; and *Lépine*, *supra* note 69.

114. Debra Lyn Bassett, "U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction" 72 *Fordham L. Rev.* 41.

115. British Columbia *Class Proceedings Act*, *supra* note 107, ss. 6, 16; British Columbia, Ministry of the Attorney General, *Consultation Document: Class Action Legislation for British Columbia* (Victoria: Queen's Printer for British Columbia, 1994) c. 12 at 22; and see also Ruth Rogers,

on traditional rules for the recognition and enforcement of judgments, the British Columbia legislators sought to secure the recognition of judgments by other courts by establishing a hybrid regime in which non-residents must take steps to opt in to the class to join it. This would ensure that they would later be regarded as having accepted the jurisdiction of the court deciding the claim and thus would be bound by the result.

However, hybrid regimes, like opt-in regimes, undermine the effectiveness of a class action in promoting the objectives of class actions. Whether class actions have opt-in requirements for all class members or only for non-resident class members, these requirements produce under-inclusive classes. Under-inclusive classes do not secure access to justice for those who fall within the class definition, but only for those who take the steps to opt in. They do not ensure that the size of the class accurately reflects the group that has been harmed so as to establish an appropriate sanction for the harm caused. They do not provide closure for the defendant by precluding non-resident class members who do not respond to the notice of the proceeding from litigating independently. And they do not minimize the potential for duplicative litigation, thereby promoting judicial economy.<sup>116</sup> Such compromises in the efficacy of the process in achieving the objectives of class actions could be justified only if such regimes achieved certainty. Unfortunately, as is discussed next, they do not.

### C. TRADITIONAL JURISDICTIONAL REQUIREMENTS DO NOT PROVIDE CERTAINTY

Despite the fact that hybrid certifications result in under-inclusive classes—or perhaps as a result of it—hybrid certifications were once popular among defendants. This was evident in situations where multi-jurisdictional opt-out regimes were rare and non-residents falling within the class definition did not have ready access to other means of collective redress. Under these circumstances, hybrid arrangements would minimize the size of the class and provide reasonable certainty. Few non-residents would opt in and the rest would have no recourse in any event. This served the interests of defendants at the expense of the

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“A Uniform Class Actions Statute” (Quebec: Civil Section, Uniform Law Conference of Canada, 1995), online: <<http://www.ulcc.ca/en/poam2/index.cfm?sec=1995&sub=1995ae>>. Hogg & McKee, *supra* note 1 at 287.

116. Walker, “Crossborder Class Actions,” *supra* note 98 at 769-71; C. Jones, “The Case for the National Class” (2004) 1 Can. Class Action Rev. 29.

interests of claimants—both those who were not presumptively included and those who were, as a result, part of a smaller class.

Now that the number of Canadian provinces with class actions—and, in particular, opt-out regimes—is growing, the opt-in requirement for non-residents does little to provide closure. As a result, defendants are now more likely to look for closure by seeking a resolution based on a national opt-out class, and the problem of competing national opt-out class actions has come to the fore.

However, with the increase in the number of provinces with multi-jurisdictional regimes that are operating on an opt-out basis, it is also becoming clear that, in many cases, hybrid regimes would not provide any real certainty in terms of the membership in the class. Often the claim could legitimately be decided in more than one forum. There is no jurisdictional basis or combination of jurisdictional bases that would serve to ensure that one court alone has jurisdiction to resolve a particular class member's claim in a multi-jurisdictional class action. It would be necessary either to create restrictions on the choice of forum for class members that would not exist if they were to pursue individual claims, or to coordinate the prosecution of the many class actions that would result.

Take, for example, a claim for product liability in respect of a product distributed in several provinces—perhaps a class action version of the familiar scenario in *Moran v. Pyle National (Canada) Ltd.*,<sup>117</sup> in which a person suffers harm in one province from a product that was manufactured in another province. It would seem appropriate for an action to be brought in the province of manufacture. But it would also seem appropriate for an action to be brought in the provinces in which consumers had acquired and used the product.

If jurisdiction was confined to classes comprised of residents of a province, an action would need to be commenced in each province in which the consumers who had acquired and used the product resided. The obvious challenges of coordinating the claims in the various provinces prompted Hogg and McKee, along with others,<sup>118</sup> to acknowledge that this might be undesirable for all concerned:

Both plaintiffs and defendants and the court systems could benefit from the substitution of a single class action for the multiple proceedings by various plaintiffs

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117. [1975] 1 S.C.R. 393. This case was discussed by Hogg & McKee, *supra* note 1 at 285.

118. *Supra* note 1.

in various courts with separate pretrial discoveries, separate trials and perhaps inconsistent verdicts.<sup>119</sup>

A requirement to permit class members to be included in claims brought in places in which there was a real and substantial connection to the forum would result in up to three options for each affected consumer. Each consumer would be included in a claim in the province of his or her residence together with the possibility of being included in claims in either the province of manufacture, or the province where the product was acquired and used or consumed (where this was not the same as the province of the consumer's residence). Whether this option was exercisable on an opt-out or opt-in basis, it would cause uncertainty about the composition of class in each forum.

If this uncertainty about the composition of the class was left to be resolved by permitting the class member to choose between available fora, it would be necessary to ensure that the claims brought in the various provinces were coordinated. This would be necessary in order to ensure that such a choice was genuinely open to the claimant and to prevent different results in the various provinces from becoming a source of confusion or a cause for complaints of unfairness.

It is conceivable that the potential membership for more than one class could be coordinated through the use of presumptions, either rebuttable or irrebuttable, in favour of one or another of the possible jurisdictions. For example, a class member could be presumed to be included in the class action in the member's province of residence, unless that person opted into a class action in a different province. However, that would involve imposing jurisdictional restrictions on class actions, either absolutely or presumptively, that do not exist in named-party litigation. Furthermore, unless a claim was commenced in each of the jurisdictions to which a potential claimant might be confined, there could be justifiable complaints about access to justice or fairness where differences in the results in the class actions in the various jurisdictions could not be justified.

In short, efforts designed to shoehorn class actions into the jurisdictional framework developed for named-party litigation seem destined to produce results that compromise the objectives of class actions and lead to situations that do not comport with the constitutional principles of order and fairness. And

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119. Hogg & McKee, *ibid.* at 285.

efforts to design new jurisdictional rules and approaches to the exercise of discretion to coordinate multi-jurisdictional class actions do not show much promise in addressing these concerns.<sup>120</sup>

#### IV. CONCLUSION: HOW WILL COURTS DECIDE WHEN TO CERTIFY NATIONAL CLASSES?

With the benefit of a question reformulated as “Under what circumstances are national class actions constitutional?” and the foregoing analysis, it is possible to identify some of the circumstances under which national class actions will meet

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120. Following the recommendations of a Task Force of the Uniform Law Conference of Canada (see *infra* note 121), Saskatchewan amended its Class Proceedings legislation to include the following standards for jurisdictional determinations in the context of the potential for parallel proceedings:

6(2) If a multi-jurisdictional class action, or a proposed multi-jurisdictional class action, has been commenced elsewhere in Canada that involves the subject-matter that is the same as, or similar to, that of the action being considered pursuant to this section, the court shall determine whether it would be preferable for some or all of the claims or common issues raised by those claims of the proposed class members to be resolved in that class action.

(3) For the purposes of making a determination pursuant to subsection (2), the court shall:

(a) be guided by the following objectives:

- (i) ensuring that the interests of all of the parties in each of the relevant jurisdictions are given due consideration;
- (ii) ensuring that the ends of justice are served;
- (iii) avoiding, where possible, the risk of irreconcilable judgments;
- (iv) promoting judicial economy; and

(b) consider all relevant factors, including the following:

- (i) the alleged basis of liability, including the applicable laws;
- (ii) the stage each of the actions has reached;
- (iii) the plan for the proposed multi-jurisdictional class action, including the viability of the plan and the capacity and resources for advancing the action on behalf of the proposed class;
- (iv) the location of the representative plaintiffs and class members in the various actions, including the ability of representative plaintiffs to participate in the actions and to represent the interests of the class members;
- (v) the location of evidence and witnesses.

See *Class Actions Act*, S.S. 2001, c. C-12.01, s. 6. Unfortunately, the application of these proceedings seemed unlikely to work effectively to eliminate the multiplicity because the analysis of appropriate forum would be conducted unilaterally and on the basis of submissions that were bound to be driven by interests in the determination of carriage. See Walker, “Recognizing Multijurisdiction,” *supra* note 112.

the requirements of order and fairness. First, whether a class action is local or national, adequate notice and an opportunity to opt out are basic requirements of fairness that serve the interests of those who wish to preserve the opportunity to pursue their cause independently. The challenges of assessing the adequacy of notice in a multi-jurisdictional setting are now being recognized and addressed. A court should exercise jurisdiction only over persons who it can be assured will be afforded this right.

Second, the appreciation of the need to provide fair and adequate representation, which is well-established in local class actions, is developing through subclassing and customized certification orders to take into account the special considerations affecting classes comprised of persons from different geographical and political regions of the country. Again, a court should exercise jurisdiction only over persons whose interests are adequately represented, and this representation may require special conditions in the certification order for particular groups within the class.

Third, to the extent that persons are entitled to benefit from class actions, as either plaintiffs or defendants, they are entitled to benefit from a claim made on behalf of a class that is as comprehensive as reasonably can be achieved. This is so whether, as members of the class, the largest possible class enhances the compensatory and regulatory benefits of the action, or as defendants it enhances the potential for a conclusive resolution of the matter. Courts should exercise jurisdiction over the largest possible class that meets the first two requirements. This feature of class actions can only be ensured with confidence once a mechanism exists to address the problem of multiplicity.

Fourth, courts should not exercise jurisdiction over overlapping classes and competing class actions. To do so would be incompatible with the principles of order and fairness. This is arguably the most pressing concern facing the Canadian legal system in the context of class actions today. It represents a difficult challenge because, as has since been demonstrated, it cannot be addressed effectively by courts acting independently even on the basis of specially tailored jurisdictional principles.

In 2008, with a proposal in hand for a series of factors that could guide courts in making certification decisions that would meet the constitutional principles of order and fairness, it rapidly became clear that the challenges had only just begun. Saskatchewan had implemented the recommendations of the Uniform

Law Conference of Canada Task Force on National Class Actions<sup>121</sup> and introduced a legislative regime clarifying the mandate to certify national opt-out classes and the relevant factors to support prudent fulfillment of that mandate. However, as it transpired in the months following this legislative reform, the new provisions served only to foster a multiplicity of actions, thereby undermining the principles of order and fairness. In doing so, it was demonstrated that the challenge of coordinating multi-jurisdictional class actions through independent determinations by the provincial superior courts was potentially insurmountable. As Chief Justice Winkler perceptively observed of these issues nearly five years ago, “it is like what they say in Hollywood: We spent a lot of time trying to get there. And we got there, but there was no ‘there.’”<sup>122</sup>

This valuable experience showed that the way forward could require more than constitutional analysis or further development of the principles of the conflict of laws. The principles of order and fairness may apply with equal force to national class actions as they do to other forms of cross-border litigation in Canadian courts. However, their application to particular cases may depend upon the establishment of a multilateral body patterned on the Multidistrict Litigation Panel in the United States.<sup>123</sup> This would be a major undertaking for the

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121. Janet Walker, “Coordinating Multijurisdiction Class Actions through Existing Certification Processes” (2005) 42 Can. Bus. L.J. 112; Uniform Law Conference of Canada, “Report of the Uniform Law Conference of Canada’s Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations” (Vancouver: Civil Section, Uniform Law Conference of Canada, 9 March 2005), online: <[http://www.ulcc.ca/en/poam2/National\\_Class\\_Actions\\_Rep\\_En.pdf](http://www.ulcc.ca/en/poam2/National_Class_Actions_Rep_En.pdf)>; and Uniform Law Conference, “Supplementary Report,” *supra* note 2.

122. Winkler *et. al.*, “Recent Class Action Developments in Canada and the United States: Panel Discussion – Friday, October 21, 2005” (2006) 43 Can. Bus. L.J. 420 at 429. The comment was, in fact, on a slightly different point:

Let’s talk for a minute about national class actions. Everybody is interested in them now because there are a lot of them going on right now. Janet [Walker], I agree with your conclusions in the CBLJ Comment [“Walker, “Coordinating Multijurisdiction,” *supra* note 121], but I don’t agree with where you go, because it seems to me that if you look at *Amchem* and you look at *Westec*, it is like what they say in Hollywood: “We spent a lot of time trying to get there. And we got there, but there was no ‘there.’” [footnotes omitted].

123. For comments from the Supreme Court of Canada, see *Lépine*, *supra* note 69 at para. 57:

[T]he provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space.

Canadian judicial system, requiring considerable imagination in institutional design and cooperation among the courts that comprise the Canadian judicial system. However challenging that work could be, no less might be required for class actions to operate effectively within the Canadian legal system.

The purpose of this article was to reply to Hogg and McKee's response to the observation that "there is simply no credible challenge to be made to the basic jurisdiction of Canadian courts to certify multi-jurisdictional class actions."<sup>124</sup> It is hoped that the reply has been sufficiently effective in supporting that proposition to enable this important work to begin in earnest.

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124. Walker, "Recognizing Multijurisdiction," *supra* note 112.