Canada's Evolving Response to Overlapping Multi-Jurisdictional Class Actions

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NATIONAL and multi-jurisdictional class proceedings have become increasingly prevalent in Canadian courts, often resulting in parallel and overlapping class actions in a number of provinces or territories. A single, national class action may in some circumstances be preferred by defendants, maximizing efficiencies and reducing costs and inconvenience, especially if a global resolution of Canadian claims is a primary objective. Even from the perspective of plaintiffs' and their counsel, the presence of multiple, competing class actions dilute and may even evaporate the positive features of a national class action.[1]

[1] WARREN K. WINKLER, PAUL M. PERELL, JASMINKA KALAJDZIC AND ALISON WARNER, THE

The Vioxx litigation is often regarded as Canada's "low-water mark" for overlapping class actions. Two competing class actions were started and certified in Saskatchewan and Ontario in respect of the same claims and class members. After losing a "carriage motion" in Ontario (a dispute between the competing plaintiffs and law firms over which should be permitted to represent the class), the unsuccessful plaintiffs and their counsel pursued their class action in Saskatchewan and were able to have it certified there before the class certification motion was heard in Ontario.[2] The Ontario court nonetheless certified the overlapping Ontario class action, refusing a stay because the Saskatchewan court had not given comity to the Ontario court's carriage decision.[3] The Ontario certification decision was upheld on appeal.[4] The outcome, for a short period, was that some Canadian residents were members of two different class actions before courts that might reach two different results – until the Saskatchewan Court of Appeals overturned certification of the class action in that province on other grounds, noting that "[t]he potential for chaos and confusion" from the overlapping class actions was "obvious."[5]

Courts in Canada have long recognized that the Canadian constitution makes it difficult to manage overlapping class actions when proceedings are brought in the courts of different provinces.[6] Over ten years ago, Justice LeBel of the Supreme Court of Canada ("SCC") called for provincial legislatures to establish "[m]ore effective methods for managing jurisdictional disputes… in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space."[7]

Several Canadian provinces have answered this call, amending their class proceedings legislation to provide more specific tools for addressing overlapping multi-jurisdictional class actions based on

LAW OF CLASS ACTIONS IN CANADA, 170 (Canada Law Book, 2014); *see* Kowalyshyn v. Valeant Pharmaceuticals International, Inc., 2016 ONSC 3819 at para. 235 [*Kowalyshyn*].

[2] Wuttunee v. Merck Frosst Canada Ltd., 2008 SKQB 229.

[3] Tiboni v. Merck Frosst Canada Ltd., [2008] 295 D.L.R. (4th) 32 (Ont. S.C.J.) at para 38 [*Tiboni*].

[4] Mignacca v. Merck Frosst Canada Ltd., [2009] 95 O.R. (3d) 269 at para. 63 (Div. Ct.) [*Mignacca*]. The Saskatchewan Court's disregard for the specific holding in the Ontario carriage decision that Saskatchewan counsel was not adequate to represent the interests of the class featured heavily in the Divisional Court's decision – *see* paras. 68-70 *and* 85-86.

[5] Merck Frosst Canada Ltd. v. Wuttunnee, 2009 SKCA 43 at para. 16.

[6] Boehringer Ingelheim (Canada) Ltd. v. Englund, 2007 SKCA 62 at para. 31 [*Englund*].

[7] Canada Post Corp. v. Lépine, 2009 SCC 16 at para. 57.

recommendations of the Uniform Law Conference of Canada (the "ULCC"). Ontario is the most recent to adopt the ULCC amendments, with amendments applying to class actions started after October 1, 2020.

This article provides an overview of the tools available to Canadian courts for managing overlapping multi-jurisdictional proceedings and offers some strategic considerations that may affect a defendant's decision about which to use.

I. Forum Non Conveniens

Forum non conveniens is one tool available to manage competing, overlapping, multi-jurisdictional class actions, although it has been used infrequently in this context.[8] The doctrine can be used to seek a stay of one class proceeding early on in the case, where the other forum is clearly a more appropriate one to litigate the class action, looking at factors such as location of witnesses, parties and documents, impact on related/parallel proceedings, possibility of conflicting judgments, and relative strength of the connections to each jurisdiction.[9] *Forum non conveniens* may have been underutilized in the class action context because of difficulties in showing that one forum is clearly more convenient where the claims and proposed classes are national in scope. Furthermore, defendants may have preferred not to suggest or be perceived as implicitly conceding that there was a proper forum for any such class action in any province.

II. Abuse of Process

Abuse of process is another tool that can be used without the need to suggest that there is any single convenient forum for the proposed class action. Abuse of process exists to prevent the misuse of the court's procedure in a way that would be manifestly unfair to a party in the litigation or would bring the administration of justice into disrepute.[10]

This tool gained prominence when, as national class actions became more common, some firms began commencing overlapping actions "in as many jurisdictions as

[8] At least where the jurisdiction simpliciter of the local court is not in issue. In *Englund, supra* note 6, the Saskatchewan Court of Appeal noted at para. 37 that *forum non conveniens* might be used to seek a stay action where the concern is the most appropriate forum for the action to be heard. A *forum non conveniens* analysis was applied in Ring v. The Queen #2, 2007 NLTD 213 to determine whether Newfoundland & Labrador or New Brunswick was the most appropriate forum for the proposed class action.

[9] Club Resorts Ltd. v. Van Breda, 2012 SCC 17 at para. 110.

[10] Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63 at paras. 35-37.

possible in order to claim turf and secure carriage for law firms."[11] This practice has been roundly criticized by Canadian courts[12] and, in many cases, held to be an abuse of process.[13]

Canadian courts have widely acknowledged that, despite the problems they can create, overlapping multi-jurisdictional class actions are not inherently problematic or *per se* abusive,[14] particularly before one of the class actions is certified. Courts have developed a "legitimate purpose" test to determine whether an overlapping or duplicative class action should be stayed as an abuse of process.

The Manitoba Court of Appeal's decision in *Hafichuk-Walkin v. BCE Inc.*[15] described the test as follows:

> In our federation, parallel multi-jurisdictional class actions are permissible. However, multi-jurisdictional class actions are abusive when they are duplicative and *no legitimate purpose would be served by allowing more than one class action to proceed* on behalf of overlapping class members from one or more provinces.[16]

To determine whether parallel or overlapping multijurisdictional class actions are an abuse of process, the court held it is necessary to examine the context of the proceedings and whether the degree of overlap between them is such that there is no legitimate purpose behind the action.[17] The *Hafichuk* test asks whether the proposed class proceeding (i) is duplicative and (ii) would serve a legitimate purpose if it were allowed to proceed on behalf of overlapping class members. *Hafichuk* has been applied widely across Canada.[18]

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[11] *Tiboni, supra* note 3, at para. 37.

[12] *See, for example, Tiboni, supra* note 3 at para. 37; BCE Inc. v. Gillis, 2015 NSCA 32 at para. 19, leave ref'd 2016 CanLII 89810 (S.C.C.); *Kowalyshyn, supra* note 1, at para. 249.

[13] *See Gillis, supra* note 12, at paras. 41, 76; Bear v. Merck Frosst Canada & Co., 2011 SKCA 152 at paras. 74-76 [*Bear*].

[14] *See, for example, Kowalyshyn, supra* note 1, at para. 254; *Englund, supra* note 6, at para. 40; *Mignacca, supra* note 4, at para. 86; Silver v. IMAX, 2013 ONSC 1667 at para. 92 [*Silver (2013)*], leave ref'd 2013 ONSC 6751 (Ont. S.C.J. – Div Ct.).

[15] Hafichuk-Walkin v. BCE Inc., 2016 MBCA 32 at para. 40, leave ref'd 2016 CanLII 89836 (S.C.C.).

[16] *Id*. at para. 40 (emphasis added, citations omitted).

[17] *Id*. at para. 41.

[18] *See, for example*, Ammazzini v. Anglo American PLC, 2019 SKQB 60 at paras. 66-67 [*Ammazzini #3*], leave ref'd 2019 SKCA 142 (Sask. C.A.), leave ref'd 2020 CanLII 102976 (S.C.C.); Johnson v. Equifax, 2018 SKQB 305 at para. 21; Asquith v. George Weston Limited, 2018 BCSC 1557 at para. 77 [*Asquith*], aff'd Fantov v. Canada Bread Company, Limited, https://www.canlii.org/en/bc/bcca/doc/2019/2019bcca447/

In *Asquith v. George Weston Limited*,[19] the court held that differences found to exist between claims provided a legitimate purpose for an overlapping class action to proceed, at least to the class certification stage. The class action in that case was one of several brought in respect of claims alleging a conspiracy to fix, raise, maintain, or stabilize prices of bread. The B.C. Supreme Court heard a series of connected applications, including for carriage of competing actions brought in B.C. and to stay the B.C. actions in favor of an overlapping national class action commenced in Ontario.

In dismissing the stay motion, the court held that the Asquith claim raised regional market differences unique to B.C., including advancing claims against retailers who participated in the supply chain in Western Canada but not elsewhere,[20] and advancing a common law cause of action unavailable to the plaintiffs in the Ontario action.[21] The court held these substantive differences between the B.C. and Ontario actions provided a legitimate purpose for the former to continue as a parallel action, and the B.C. Court of Appeal agreed.[22]

The timing of a motion to stay an action as an abuse of process, in relation to the certification of the impugned action and the overlapping competing action, may be critical to the success of such a motion. While abuse of process motions may be brought at any time,[23] unless the competing action is one of the "turf protecting" class actions by the same plaintiff firm as described above, Canadian courts have generally been reluctant to stay an action as abusive if the competing action has not yet been certified. Courts have often said that the impact of a competing class action in another province should be determined at the certification hearing.[24] If no other class action has been certified, courts have often been of the view that class members' ability to pursue their claims elsewhere remains uncertain; if the competing action is ultimately not certified, there may be a legitimate purpose to continuing the impugned action (although it is arguably also an abuse of process to make the same certification arguments twice, even in two different courts). While not

2019bcca447.html 2019 BCCA 447 [*Fantov*]; Gomel v. Ticketmaster Canada LLP, 2019 BCSC 2178 at para. 67.

[19] *Asquith, supra* note 18.

[20] *Id.* at paras. 40-47.

[21] *Id.* at paras. 47-55, 78.

[22] *Fantov, supra* note 18, at para. 71.

[23] *See, for example, Johnson, supra* note 18, at para. 7; Spicer v. Abbott Laboratories, 2017 SKQB 271 at paras. 29-30.

[24] *See, for example, Fantov, supra* note 18, at paras. 66-69; DALI 675 Pension Fund v. SNC Lavalin, 2019 ONSC 6512 at paras. 41-42 [*DALI*]; Forster v. Monsanto Company, 2020 BCSC 1376 at para. 55.

determinative in itself, the absence of an overlapping certified class action has made it more difficult to obtain a finding that a duplicative action is abusive, at least if not brought by the same counsel and/or plaintiff.[25]

III. Preferable Procedure

In the provinces other than Québec, there is a third tool that can be used to manage overlapping class actions in other provinces. The class certification test in those provinces requires the court to consider, among other things, whether the local class action is the preferable procedure for resolution of any common issues found to exist as compared to alternatives.[26] The court should consider a parallel class action in another province as an alternative.[27]

In *Hollick v. Toronto (City),* the Supreme Court of Canada established a two-part test for determining preferability: the Court must consider "first the question of 'whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim', and second, the question of whether a class proceeding would be preferable 'in the sense of preferable to other procedures.'"[28] The second part of the preferability inquiry is comparative, assessing the proposed class action against other reasonably available means of resolving the class members' claims, through the lens of the three principal goals of class actions: judicial economy, access to justice, and behavior modification. Where the alternative is another class action, especially one that has been certified (rather than a regulatory or other type of proceeding), it should be difficult for the plaintiff (who bears the burden on preferability) to establish that a second class action is needed to achieve the goals already achieved by the first.

In *AIC Limited v. Fischer*, the SCC focused on the meaning of access to justice as a fundamental goal of class proceedings in the context of the preferability analysis.[29] The Court in *Fischer* held that a proposed class action will serve the goal of access to justice for the

[25] *Bear, supra* note 13, at paras. 76-77.

[26] Quebec does not mandate consideration of preferability at the authorization stage. However, as noted below, the Quebec Court of Appeal recently affirmed the inherent jurisdiction of Quebec courts to suspend a Quebec class action in favor of one elsewhere having regard for the interests of class members and the proper administration of justice, and noted the benefits of a consistent approach to the issues across provinces.

[27] *DALI*, *supra* note 24, at paras. 39-40; Wilson v. Depuy International Ltd., 2019 BCCA 440 at paras. 41-48 [*Wilson (CA)*].

[28] Hollick v. Toronto (City), 2001 SCC 68 at para. 28.

[29] AIC Limited v. Fischer, 2013 SCC 69 at para. 24.

purposes of the preferable procedure analysis if: (1) there are procedural or substantive access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered.[30] Courts have applied this test to determine preferability vis-à-vis overlapping multi-jurisdictional class proceedings and, on two occasions at least, have found that a second class action is not needed to achieve the access to justice goals of class proceedings where another class action has already been certified.[31]

IV. ULCC Amendments

The provinces of Saskatchewan, Alberta, British Columbia, and, most recently, Ontario have adopted by legislative amendment a specific list of objectives and factors to consider as part of the preferability inquiry when addressing overlapping multi-jurisdictional class actions (the "ULCC Amendments").[32]

Those objectives and factors were recommended by the ULCC in 2005 and 2006 to provide a more consistent and uniform approach to determining which overlapping proceeding should move forward.[33] The ULCC Amendments mandate that a court hearing an application for certification consider the existence of overlapping proceedings and whether the proposed class action is the preferable procedure for class members' claims in light of those overlapping proceedings, and give plaintiffs in proceedings in other provinces standing to participate in that assessment of preferability. They provide a series of factors that must be considered in order to: (i) ensure that the interests of all parties in each applicable jurisdiction are given due consideration; (ii) ensure that the

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[30] *Id.* at para. 26.

[31] *See, for example*, *Silver (2013), supra* note 14, at paras. 140-189; *Wilson (CA), supra* note 27, at paras. 47, 56-59, 65-67. While the court in *Wilson (CA)* was considering the question under the B.C. *Class Proceedings Act* after the ULCC Amendments were in force, they did not apply to that case under the transition provisions applicable to the Amendments, *see* paras. 39-40 *and* 46-47.

[32] *See The Class Actions Amendment Act, 2007,* S.S. 2007, c. 21; *Class Proceedings Amendment Act*, S.A. 2010, c. 15, ss. 5(7), (8); *Class Proceedings Amendment Act*, 2018, S.B.C. 2018, c. 16, ss. 4(b)(3), (4); *Smarter and Stronger Justice Act, 2020*, Bill 161, S.O. 2020, c. 11. The amendments to the Ontario Class Proceedings Act apply only to those actions commenced after the amendments were proclaimed into force on October 1, 2020.

[33] Uniform Law Conference of Canada, *Class Proceedings amendment - multijurisdictional proceedings (2006)*, https://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/82-josetta-1-en-gb/uniform-actsa/class-proceedings-act/1396-class-proceedings-amendment-multijurisdictional-proceedings. The proposed amendments are set out in full at Appendix "A".

ends of justice are served; (iii) avoid irreconcilable judgments where possible; and (iv) promote judicial economy.

The case law applying the ULCC Amendments demonstrates their usefulness as a tool for managing overlapping class actions. In *Ammazzini v. Anglo American PLC*,[34] multiple applications were heard together for certification and a stay of a proposed multi-jurisdictional class action in Saskatchewan. Plaintiffs' counsel in an overlapping Ontario action sought a conditional stay of the Saskatchewan action pending determination of the motion for certification in the Ontario action. In considering the motion to stay, the Court of Queen's Bench applied the ULCC Amendments. It considered the pleaded causes of actions and named defendants, holding that the Saskatchewan action was duplicative of the Ontario action. It then considered the relevant factors under the *Act*, finding on balance that they favored Ontario.[35] As a result, the Saskatchewan action was conditionally stayed in favor of the Ontario action.

The order was upheld on appeal. While the Saskatchewan Court of Appeal found the application judge had incorrectly granted standing to the Ontario plaintiffs to seek a stay,[36] the legislation required the court to decide whether it would be preferable for claims or issues raised to be resolved in another class action, and the Ontario plaintiffs had standing under the Act to make submissions on that question. The Court of Appeal found there was no error in his application of the relevant factors under the *Act*.[37] It also found that he was entitled to determine the preferability question in relation to the overlapping class action without first deciding the other certification criteria.[38]

In *Ravvin v. Canada Bread Company*,[39] the defendants sought a stay of Alberta class actions in favor of an Ontario action. The court applied the factors in the ULCC Amendments, holding that the stage of the Ontario action, the location of the defendants and witnesses, and the disadvantages of conducting litigation in more than one jurisdiction strongly favored a stay of the Alberta actions. Further, the court noted that the Ontario court had accepted the viability of the proposed action. Finally, the court rejected arguments that regional differences in Alberta

[34] Ammazzini v. Anglo American PLC, 2016 SKQB 53 [*Ammazzini #1*], aff'd 2016 SKCA 164 [*Ammazzini #2]*.

[35] *Id*. at paras. 26-37.

[36] *Ammazzini #2*, at para. 51.

[37] *Id.* at paras. 52-54. Following certification of the Ontario action, the Saskatchewan action was subsequently stayed permanently. *See Ammazzini #3, supra* note 18.

[38] *Ammazzini #1, supra* note 34, at para. 61.

[39] Ravvin v. Canada Bread Company, 2019 ABQB 686, aff'd 2020 ABCA 424 [*Ravvin (CA)*], leave ref'd 2021 CanLII 42359 (S.C.C.).

markets necessitated a regional proceeding in that province as well.

The stay was upheld by the Alberta Court of Appeal. The court found no error in the judge's consideration of the relevant factors, including the weight he gave to the desirability of avoiding duplicate proceedings, citing with approval his statement "if there is no reason otherwise in law or in fact to depart from the general principle of avoiding duplication, that should win the day."[40] The court noted that while concerns regarding a multiplicity of proceedings weighed heavily in the judge's analysis, this was "in keeping with the evolving treatment of multi-jurisdictional proceedings."[41]

Finally, adopting the rationale of the Saskatchewan Court of Appeal in *Ammazzini (CA)*, the court also held that a stay application under the ULCC Amendments may be decided before the other certification criteria are considered "in circumstances where the case management judge has a sufficient understanding of the nature and particulars of the proposed class proceeding."[42] The judge in that case had the plaintiffs' certification application record and other materials from the Ontario consortium when he ordered a stay, and the Court of Appeal agreed that he did not need to wait for the full certification materials or hearing.[43]

V. Québec

Québec is a civil law jurisdiction with a different legal framework from Canada's common law jurisdictions. Québec courts have historically been more reluctant to stay local proceedings in favor of actions in other provinces. Particularly if the local proceeding was filed first, Québec courts apply a first to file rule. Indeed lower courts may have felt for some time that they did not have the discretion to do anything else where the Quebec case was the first filed.[44] However, two recent decisions of the Québec Court of Appeal call for a change of approach.[45] In *Micron*, the Court of Appeal ultimately upheld a lower court's decision not to suspend a Québec class action in

[40] *Ravvin,* 2020 ABCA 424 at para. 61.
[41] *Id.*
[42] *Id.* at para. 50. Subsequent decisions of the Alberta courts have followed this flexible approach to timing, as has the Court of Appeal's emphasis on avoiding duplication. *See* McColl v. Air Canada, 2021 ABPC 120; Britton v. Ford Motor Company of Canada, 2021 ABQB 17.
[43] The ULCC Amendments as adopted in the Ontario *Class Proceedings Act* contain a provision expressly providing for the consideration of stay motions prior to certification.
[44] WARD K. BRANCH AND MATHEW P. GOOD, CLASS ACTIONS IN CANADA, para. 12.270 (Thomson Reuters Canada, 2nd ed, 2020).
[45] FCA Canada Inc. c. Garage Poirier & Poirier Inc., 2019 QCCA 2213; Micron Technology Inc. c. Hazan, 2020 QCCA 1104.

favor of a parallel action in Federal Court, but held that the motion judge should have considered the possibility, noting that: "[w]e live in a federation where there is comity amongst the courts, and they should all apply similar tests and reach similar outcomes on issues like this."[46] While the Québec Court of Appeal did not expressly adopt either of the abuse of process or preferable procedure tests from the common law provinces, the analysis it conducted, which considered whether the interests of class members and the proper administration of justice militate in favor of a suspension, may well have a similar result to the approaches taken in the common law provinces. As such, *Micron* represents a step towards a more unified Canadian approach to dealing with overlapping multi-jurisdictional class proceedings.

VI. Strategic Considerations

When choosing which tools to use to address overlapping multi-jurisdictional class actions in Canada, defendants should consider, among other things, timing, the applicable burden of proof, and whether it may be useful to have plaintiffs' counsel from other provinces participate. For example, where a stay is sought on the basis of *forum non conveniens* or abuse of process, the defendant bears the burden of proof, and standing may be an issue for plaintiffs from other provinces. However, it may be possible to obtain a stay based on these doctrines before incurring the expense of responding to a class certification motion. Where the issue is raised under the preferability requirement for class certification, on the other hand, the burden of proof will be on the plaintiff (albeit with a lower evidentiary threshold), and other plaintiffs will have clear standing to provide evidence and make submissions on the issue where the ULCC Amendments apply. In provinces without the ULCC Amendments, it may be necessary to exchange class certification motion materials and make the preferability arguments during the certification hearing along with arguments on the other certification requirements.

Another strategic consideration will be whether to seek to have a joint hearing on the preferability of the competing class actions before the courts in some or all provinces where overlapping class actions have been brought. The Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions and the Provision of Class Action Notice (paras 9 and 10), adopted by practice direction in many provinces, provides a mechanism for seeking such a

[46] *Micron,* 2020 QCCA 1104 at para. 44.

hearing.[47] The ULCC Amendments, if already adopted by all those provinces in which overlapping class actions on a particular issue have been brought, provide uniform criteria and accordingly a uniform scope of relevant evidence for all those courts to consider. The Amendments also provide a basis for those courts to hear preferability questions in advance of a full-blown certification hearing if courts in other provinces follow the same approach as the appellate courts in *Ammazzini* and *Ravvin*. A joint hearing would be ideal in those circumstances and should increase the likelihood of consistent and uniform decisions on how the overlapping multi-jurisdictional class actions should be managed, before the parties have to incur the full expense of multiple certification motions.

VII. Conclusion

The tools for managing overlapping multi-jurisdictional class actions continue to expand and improve, particularly as more provinces adopt the ULCC Amendments and the Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions. More guidance is anticipated on the use of those tools as the appellate courts in other provinces wade in. Ultimately, however, the effectiveness of those tools will depend in large measure on the principles put forward most recently by the Quebec Court of Appeal - comity amongst the provincial courts as they move towards applying similar tests and reaching similar outcomes on issues like this.

[47] Canadian Bar Association, Resolution 18-03-A, *Class Action Judicial Protocols (2018)/Protocole judiciaire visant les actions collectives (2018)*, (Feb. 16, 2018), https://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2018/Class-Action-Judicial-Protocols-(1)/18-03-A-ct.pdf.

Appendix "A"
ULCC Proposed Amendments

Uniform Class Proceedings Act (Amendment) 2006

4(2) If a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada that involves the same or similar subject matter to that of the proceeding being considered for certification, the court must determine whether it would be preferable for some or all of the claims of the proposed class members to be resolved in that proceeding.

(3) When making a determination under subsection (2), the court must

(a) be guided by the following objectives:

(i) ensuring that the interests of all parties in each of the relevant jurisdictions are given due consideration,
(ii) ensuring that the ends of justice are served,
(iii) where possible, avoiding 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 proceedings has reached,
(iii) the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the proposed class;
(iv) the location of class members and class representatives in the various proceedings, including the ability of class representatives to participate in the proceedings and to represent the interests of class members,
(v) the location of evidence and witnesses.

Orders in multi-jurisdictional certification

4.1(1) The court may make any order it considers appropriate in an application to certify a multi-jurisdictional class proceeding, including an order

(a) certifying the proceeding as a multi-jurisdictional class proceeding if

(i) the criteria in subsection 4(1) have been satisfied, and
(ii) having regard to subsections 4(2) and (3), the court determines that [enacting jurisdiction] is the appropriate venue for the multi-jurisdictional class proceeding;

(b) refusing to certify the proceeding if the court determines that it should proceed as a multi-jurisdictional class proceeding in another jurisdiction; or

(c) refusing to certify a portion of a proposed class if that portion of the class contains members who may be included within a proposed class proceeding in another jurisdiction.

(2) If the court certifies a multi-jurisdictional class proceeding, it may

(a) divide the class into resident and non-resident subclasses;

(b) appoint a separate representative plaintiff for each subclass; and

(c) specify the manner in which and the time within which members of each subclass may opt out of the proceeding.