

Cross-Border Actions for Collective Redress – Some Lessons from Canada

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I. INTRODUCTION

After a lengthy, contentious, controversial and tortuous process, the European Commission published its policy paper on collective redress in June 2013.¹ The paper contains proposals for addressing the violation of rights granted under EU law including a non-binding Recommendation on common principles for injunctive and compensatory collective redress mechanisms in Member States. The Recommendation does not require Member States to implement collective redress regimes or otherwise reform their existing legal systems. As is the case with many political compromises, the Recommendation satisfies almost no one.

Perhaps the most disappointing aspect of the Recommendation (other than its non-binding nature) is the adoption of an opt-in rather than an opt-out model for collective redress regimes. Although an opt-out model is not expressly excluded, it is decidedly meant to be the exception.

Much has been written on the advantages of an opt-out model compared to an opt-in model, and why an opt-in model is not a viable form of collective redress² (a view shared by the present authors). There is no intention

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¹ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights granted under the Union Law (2013/396/EU), OJ (L 201/60, 26.7.2013).

² See for example, R Mulheron, 'A Missed Gem of an Opportunity for the Representative Rule' *European Business Law Review* (2012) 49–60; R Mulheron, 'Recent Milestones in Class Actions Reform in England: A Critique and a Proposal' 127 *Law Quarterly Rev* (2011) 288–315; R Mulheron, 'Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Actions Law-Makers' 50 *Canadian Business LJ* (2011) 376–408; R Mulheron, 'The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis' 15 *Columbia Journal of European Law* (2009) 409–453; R Mulheron, 'Reform of Collective Redress in England and Wales: A Perspective of Need (Report submitted to the Civil Justice Council of England and Wales, February 2008); R Mulheron, 'Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal' (Report submitted to the

here to travel down that rabbit hole in this chapter. Instead, the focus will be on how the European Commission's preference for an opt-in model will affect related issues, including (a) jurisdiction and the enforceability of collective redress judgments in other countries, (b) the need for similar collective redress regimes in the Member States, and (c) the need for cooperation and coordination between courts in Member States in cross-border proceedings.

Canada is a federal system, but constitutionally class action legislation falls not only within the purview of the federal government, but also within each province and territory in Canada.³ As a result, Canadian courts struggle with a number of challenges arising from the filing of multi-jurisdictional, national and/or parallel class actions in more than one province. Canada's experience in this area could therefore be quite relevant to the EU and so this experience will be discussed with a view to offering insights into the challenges Member States will likely face when they begin implementing opt-in collective redress regimes.

II. JURISDICTION AND ENFORCEABILITY

Canadian class action regimes are based on the opt-out model.⁴ As a result, in a Canadian action the court certifies a defined class of people and/or entities who are then presumptively bound by a judgment in the action unless they take active steps to opt-out of the proceedings. This legislated provision is uncontroversial when applied to representative plaintiffs, because they attorn to the jurisdiction of the Canadian court by commencing the action. It is equally uncontroversial when applied to 'absent' foreign claimants from other provinces or territories in Canada (ie those who meet the class definition but who fail to opt-out), because they are subject to the court's jurisdiction by virtue of the 'real and substantial connection' to the court that exists from sharing common issues with the attorning representative plaintiff, a

Department for Business, Enterprise and Regulatory Reform, October 2008); R Mulheron, 'Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions': Final Report (A Series of Recommendations to the Lord Chancellor, November 2008), 488 pp (co-author of Report); R Mulheron, 'In Defence of the Requirement for Foreign Class Members to Opt-in to an English Class Action' in D Fairgrieve and E Lein, *Extraterritoriality and Collective Redress* (OUP, 2012), ch 14, 245-266.

³ Every Canadian province other than Prince Edward Island has enacted class proceedings legislation. Additionally, class proceedings legislation exists at the federal level in the form of Part 5.1 of the *Federal Courts Rules*, S.O.R./98-106, though its use has been limited by the jurisdictional constraints of the Federal Court.

⁴ As discussed below, there are three Canadian jurisdictions that follow an opt-in approach for non-residents: British Columbia, Newfoundland and New Brunswick. However, they still require residents to opt-out.

principle that is bolstered by the jurisdictional reciprocity shown by each court within Canada.⁵

However, different considerations apply to absent foreign claimants who are not present in Canada and have never taken positive steps to consent to its jurisdiction.

Pursuant to generally accepted principles of private international law, jurisdiction cannot be asserted over a party for the purposes of a judgment that is intended to be enforceable outside of the state issuing the judgment unless the party was present in the state when the proceedings were commenced, or submitted or consented to the jurisdiction of the state.⁶ Moreover, a fundamental principle adhered to in civil law jurisdictions in Europe is that one can only become a claimant in a court proceeding by expressly asking to bring or join a claim. Pursuant to this principle, parties have the right to participate fully in proceedings brought on their behalf and to know the nature and extent of the claims. They also have the exclusive right either to compromise their claims or to have their entitlement to relief determined individually.

Prior to 1990 Canadian courts applied these generally accepted principles of private international law in deciding whether to assert jurisdiction over foreign parties. This changed in 1990 when the Supreme Court of Canada adopted a new jurisdictional test, the ‘real and substantial connection’ test, which it later extended to international litigation in 2003.⁷ This test is a radical departure from the generally accepted principles of private international law adhered to by other countries for asserting jurisdiction for the purposes of a judgment that is intended to be enforceable internationally.

Notwithstanding the radical nature of the real and substantial connection test, within Canada the intended preclusive effect of a class action judgment from one province is regularly recognized by courts in other provinces, even with respect to absent foreign claimants. This is attributable to the fact that the Supreme Court of Canada requires a province to enforce the judgments of another province that assumed jurisdiction over the parties based on the ‘real and substantial connection’ test, regardless of whether the traditional presence or consent tests are met.⁸ As well, all Canadian provinces and territories have either a formal opt-out class proceedings statute or a common law opt-out class proceedings process.⁹ Given these features of the Canadian

⁵ *Meeking v Cash Store Inc.*, 2013 MBCA 81, leave to appeal granted and appeal adjourned *sine die* [2013] SCCA No. 443. See also *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572.

⁶ *Dicey, Morris and Collins on the Conflict of Laws*, 15th ed. (Sweet & Maxwell, 2012), Rule 43.

⁷ *Beals v Saldanha* [2003] 3 SCR 416.

⁸ *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077.

⁹ *Class Proceedings Act*, SA 2003, c. C-16.5, ss. 17 and 17.1; *The Class Actions Act*, SS 2001, c. C-12.01, s. 18; *Class Proceedings Act*, CCSM c. 130, s. 16; *Code of Civil Procedure*, CQLR c. C-25, arts. 1007 and 1027; *Class Proceedings Act*, SNS 2007, c. 28, s. 19; *Class Proceedings Act*,

legal landscape, a court in one province may reasonably expect that another court in another Canadian province will recognize its assumption of jurisdiction over absent foreign claimants and so enforce a corresponding judgment.

The same cannot be said for foreign countries.¹⁰ In contrast to Canadian courts,¹¹ the courts of foreign countries do not accept the real and substantial connection test as a proper jurisdictional basis for enforcing a judgment issued by a Canadian court. Rather, foreign courts will only enforce a judgment from another country where the other country asserted jurisdiction over the parties based on the traditional grounds of presence or consent. A foreign judgment pronounced on other jurisdictional grounds is considered a nullity and will not be enforced.¹²

As a consequence, when a Canadian court certifies a class that includes absent foreign claimants, it purports to assert jurisdiction over potential plaintiffs on a basis that will not be recognized by the countries in which they reside. This means that a Canadian class action judgment will not have preclusive effect and the issues that are the subject of that judgment may be relitigated by absent foreign claimants in their home countries.

This result is firmly supported by courts and commentators worldwide. Professor Briggs summarizes a widely accepted view outside of Canada that the real and substantial connection test is a radical departure from the law in other countries:

As a matter of English law, such a development [ie adopting a 'real and substantial connection' test] would require legislation. And it is important to understand how radical the Canadian departure is. For the English common law enquires into whether the party to be bound to the judgment has acted in such a way as to have assumed a personal obligation to obey the judgment: his submission to the jurisdiction of the court is the commonest example, but his presence within the jurisdiction also places him in the way of obedience. The Canadian development, however, does not focus on whether the party to be bound has assumed an obligation, but on whether the Canadian court should impose one for reasons of its own.

RSBC 1996, c. 50, s. 16; *Class Proceedings Act*, RSNB 2011, c. 125, s. 18; *Class Actions Act*, SNL 2001, c. C-18.1, s. 17 and *Western Canadian Shopping Centres Inc v Dutton* [2001] 2 SCR 534, ¶49. See also: *Federal Courts Rules*, SOR/98-106, Rule 334.21.

¹⁰ *Teck Cominco Metals Ltd v Lloyd's Underwriters* [2009] 1 SCR 321, ¶30 ("A distinction should be made between situations that involve a uniform and shared approach to the exercise of jurisdiction (e.g. interprovincial conflicts) and those, such as the present, that do not"). See also *Beals v Saldanha* [2003] 3 SCR 416, ¶26-28 and 30 (noting that the real and substantial connection test "may give rise to different considerations internationally").

¹¹ *Beals v Saldanha* [2003] 3 SCR 416.

¹² TJ Monestier, 'Foreign Judgments at Common Law: Rethinking the Enforcement Rules' 28 *Dalhousie LJ* (2005) 163 at 164-165, 168-171 and 183.

There is nothing wrong with such a development, but far from being a modernisation of the details, it represents a fundamental reorientation of the law on foreign judgments. *It is not clear that the Supreme Court fully appreciated what it was doing.*¹³

Other commentators have expressed similar views that their countries will not recognize and enforce Canadian judgments if the only basis for the Canadian court's jurisdiction over foreign parties is the existence of a real and substantial connection.¹⁴

Further, a series of judicial decisions from outside Canada have expressly rejected the real and substantial connection test as a basis for recognizing and enforcing foreign judgments. In 2012, the Supreme Court of Ireland held in *Flightlease* that “the Canadian approach would represent a radical change in the common law” which “appears not to have been followed in any other common law jurisdiction”, and stated:

... The learned trial judge set out clearly his reasons for holding that the Canadian jurisprudence should not be adopted. These are as follows:-

1. *The court was not referred to judgments of any other common law jurisdiction which suggested that common law courts generally have followed the Canadian lead.* That remains the position.

¹³ A Briggs, *The Conflict of Laws*, 2nd ed. (Oxford University Press, 2008) at 138–139, emphasis added.

¹⁴ J Fawcett and JM Carruthers, *Cheshire, North & Fawcett's Private International Law*, 14th ed. (Oxford University Press, 2008) at 527 and 530–531 (“The Supreme Court of Canada in *Morguard Investments Ltd v De Savoye* has adopted a radically different approach towards the recognition and enforcement of foreign judgments at common law in inter-provincial cases”); A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) at 347–348 (“English common law does not and cannot accept the existence of a strong connection between the adjudicating court and the cause of action as a distinct basis for the recognition of a judgment... The developments taking place in Canada, for example, are alien to the structure of the English common law. ... [T]he Canadian approach to the recognition of foreign judgments is not just an updating of the traditional common law, but a revolutionary change in its basic structure”); R Fentiman, *International Commercial Litigation* (Oxford University Press, 2010) at 697–698; Lord Collins of Mapesbury, ed., *Dicey, Morris and Collins on the Conflict of Laws*, 15th ed. (Sweet & Maxwell, 2012), Vol. 1, at 708 (“There is no authority in England which suggests that this is the appropriate test for the recognition and enforcement of foreign judgments in personam”); R. Mulheron, ‘The Recognition, and *Res Judicata* Effect, of a United States Class Actions Judgment in England: A Rebuttal of *Vivendi*’ 75 *MLR* (2012) 180 at 208–209; JJ Chan, ‘Problems in the Recognition and Enforcement of U.S. Class Action Judgments in Singapore’ 25 *SAC LJ* (2013) 51 at 72–74 (“[T]he Singapore courts would and should be extremely cautious before following the directions marked out by *Morguard* and *Beals*”); D Kenny, ‘*Re Flightlease*: The “Real and Substantial Connection” Test for Recognition and Enforcement of Foreign Judgments Failure to Take Flight in Ireland’ 63 *ICLQ* (2014) 197 at 198 (“[I]t has been a lonely revolution for Canada. As of yet, no other common law jurisdiction has decided to follow Canada’s lead and reshape the common law rules”).

2. There has been some academic commentary which cautions against adopting the Canadian approach and *it would not be correct to describe the area under consideration as one where there has been a broad acceptance in the common law world of a new direction. ...*
4. ... [A] *radical change in common law* has the potential to have a retrospective effect which would not in the ordinary way arise in the event of a statutory amendment. Such a change can work an injustice.
5. The courts in this jurisdiction cannot engage in *an alteration of the common law which would amount to legislation* as opposed to allowing for the orderly evolution of common law principles.
6. *There is no consensus in the common law world as to the need for the change identified by the Supreme Court of Canada.*

I concur with each of the foregoing propositions. In relation to *Indyka v Indyka*, both in the United Kingdom and insofar as that has been followed in other common law jurisdictions, it has not been extended to proceedings other than matrimonial proceedings.

*... The change contended for by Swissair is of such significance that it would in my opinion exceed the judicial function to re-state the common law in such a way. Such a change should be by legislation. ...*¹⁵

The United Kingdom Supreme Court (formerly the House of Lords) later reached the same conclusion in *Rubin*:

Consequently, *if the judgments in issue on the appeals are regarded as judgments in personam within the Dicey rule, then they will only be enforced in England at common law if the judgment debtors were present... in the foreign country when the proceedings were commenced, or if they submitted to its jurisdiction. ...*

The principles in the Dicey rule have never received the express approval of the House of Lords or the UK Supreme Court... But there can be no doubt that the references by the House of Lords in the context of foreign judgments to the foreign court of “competent jurisdiction” are implicit references to the common law rule...

The *Rubin* respondents question whether the rules remain sound in the modern world. *It is true that the common law rule was rejected in Canada*, at first in the context of the inter-provincial recognition of judgments. *The Supreme Court of Canada held that the English rules developed in the 19th century for the recognition and enforcement of judgments of foreign countries could not be transposed to the enforcement of judgments from*

¹⁵ *In re Flightlease (Ireland) Ltd* [2012] IESC 12, emphasis added.

sister provinces in a single country with a common market and a single citizenship. Instead *a judgment given against a person outside the jurisdiction should be recognised and enforced if the subject matter of the action had a real and substantial connection with the province in which the judgment was given: Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077, para 45. This approach was applied, by a majority, to foreign country judgments in *Beals v Saldanha* [2003] 3 SCR 416...

There is no support in England for such an approach except in the field of family law: ... It has never been adopted outside the family law sphere in the context of foreign judgments.

The Supreme Court of Ireland in In re Flightlease (Ireland) Ltd [2012] IESC 12... also held that the Dicey rule should not be rejected in favour of a real and substantial connection test. ...¹⁶

Finally, the Rule 43 in *Dicey Morris & Collins* that was uniformly endorsed and applied by the courts in the cases cited above was revised in the most recent edition to clarify that the rule applies to all parties, including absent foreign claimants, and not just to defendants. Adrian Briggs explained the significance of this in a recent affidavit filed in a Canadian proceeding:

The second point is to note the change in wording in the relevant Rule in *Dicey Morris & Collins*. In the 14th edition, Rule 36 (as it then was) dealt with whether a foreign judgment was liable to be recognised by asking whether the ‘judgment debtor’ had been present within the jurisdiction of the foreign court, or had submitted to it, *et cetera*. It seemed to me, in my capacity as member of the editorial team with primary responsibility for this Chapter, that this wording had the potential to mislead. *For where a claimant’s claim had simply been dismissed by a foreign court, the judgment would be recognised as res judicata as against the claimant, even though it seemed unnatural to refer to him as a ‘judgment debtor’.* The intended sense of the Rule was that if a foreign judgment purported to tie the hands of a party to the foreign proceedings, that person was bound by the foreign judgment if he had submitted to or had been present within the jurisdiction of the foreign court. If he were referred to, not as the ‘judgment debtor’, but as ‘the person against whom the judgment was given’, it might be easier to see that the proper question was whether that person had submitted to or had been present within the jurisdiction of the foreign court. It can be seen from the

¹⁶ *Rubin v Eurofinance CA* [2013] 1 AC 236 (UKSC), para 9 and 108–111, emphasis added. See also *Islamic Republic of Iran Shipping Lines v Phiniquia International Shipping LLC* [2014] HKCFI 1280, para 29–31 and 33–35 (accepting that “[I]n the absence of exceptional justification, the Hong Kong court should and would not see fit to even start considering the application of the Canadian approach in place of the well-established approach”).

judgment in *Rubin* that Lord Collins, the General Editor of *Dicey Morris & Collins*, regarded this as a clarification of the existing rule which did not alter its material effect: see *Rubin* at paragraphs 7 to 10.¹⁷

In other words, the revised Rule 43 in *Dicey Morris & Collins* precludes the recognition and enforcement of foreign judgments against claimants who do not meet the traditional jurisdiction tests of presence, consent or submission, ie, absent foreign claimants in the parlance of this paper. Where an action by an absent foreign claimant is unsuccessful, Rule 43 would permit that claimant to relitigate the action against the defendant abroad. Applied to a Canadian class action involving absent foreign claimants, this deprives defendants of any certainty that those claimants will not relitigate the class action abroad should the defendant be successful in dismissing the Canadian proceeding.

A further obstacle to the enforcement of a Canadian opt-out class action judgment is that very few other countries have opt-out collective redress or class action regimes. Consequently, a Canadian class action judgment is burdened with an additional objectionable element – the fact that parties are presumptively bound by a judgment even though they have not expressly asked to bring or join the claim in question.

In the EU, at least as between Member States, the provisions of the Brussels I Regulation address and resolve most of the jurisdiction and enforceability issues Canada initially struggled with but has largely resolved within its own borders. Like the rules that govern the Canadian federation, Brussels I contains rules that govern the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in Member States. The Regulations specify which Member State has jurisdiction, and why. The Regulations also require Member States to recognize judgments from other Member States without special procedures applying.

The fact that the EU is urging all Member States to adopt opt-in collective redress regimes rather than opt-out regimes will also eliminate many jurisdiction and enforceability issues as between Member States.

However, just as Canada's laws fail to provide a means of overcoming the serious obstacles to enforcing its class action judgments outside of Canada, Brussels I offers little assistance to Member States in respect of these issues in relation to non-Member States, and in particular in relation to non-European non-Member States such as Canada, Australia and the United States. Moreover, the EU preference for opt-in regimes conflicts with the long-standing opt-out class action systems in federalist countries such as Canada,

¹⁷ Supplemental Affidavit of Adrian Briggs sworn 2 January 2014, in *Airia Brands Inc et al v Air Canada et al* Ontario Superior Court of Justice, Court File No. 50389CP, para 6.

Australia and the United States. It will also conflict with the imminently expected opt-out collective redress regime proposed for the UK.

That being said, opt-in regimes have some advantages in respect of matters relating to jurisdiction and enforceability. An opt-in regime eliminates virtually all jurisdiction issues relating to both domestic and foreign claimants. In either instance, anyone who wishes to participate in the action must expressly opt-in to the proceeding, a process that satisfies generally accepted principles of private international law for asserting jurisdiction over a party for the purposes of securing a judgment that can be enforced internationally.

This is the main reason the Civil Justice Council of England and Wales has proposed an opt-in regime in the UK for foreign or non-resident claimants. (Notably the Council has proposed an opt-out regime for domestic or 'resident' claimants because they are subject to the UK courts and corresponding legislation by virtue of their presence in the country.) The opt-in proposal for foreign claimants was designed to address concerns over the enforceability of UK class action judgments abroad:

Class members who are not domiciled in England and Wales will only be able to join an opt-out action if they give notice to the class representatives that they want to opt into it. This reflects similar provisions in the Financial Services Bill relating to persons not domiciled in the UK. *It is intended to avoid any arguments in relation to national sovereignty which might arise if the provisions purported to assert jurisdiction to decide cases for foreign domiciliaries who have taken no active part in the proceedings.*¹⁸

Accordingly, the Civil Justice Review Council was concerned that if an English court certified an opt-out class that included non-resident claimants, other jurisdictions would neither recognize nor enforce any judgments issued by that English court against the foreign claimants.

This proposed legislative initiative in the UK mirrors legislative provisions that already exist in the Canadian provinces of British Columbia, Newfoundland and New Brunswick which have implemented opt-out regimes for resident or domestic claimants and an opt-in approach for non-resident or foreign claimants.¹⁹ This opt-in feature of the legislation avoids the jurisdictional issues created when a court applies the real and substantial connection test to absent foreign claimants, instead of requiring their presence or consent.²⁰ As the British Columbia Court of Appeal explained in *Harrington*:

¹⁸ Civil Justice Council, 'Response to European Commission Public Consultation: Towards a Coherent European Approach to Collective Redress' (SEC (2011) 173 Final), 56.

¹⁹ *Class Proceedings Act*, RSB 1996, c. 50, s. 16; *Class Proceedings Act*, RSNB 2011, c. 125, s. 18; *Class Actions Act*, SNL 2001, c. C-18.1, s. 17.

²⁰ *Harrington v Dow Corning Corp* (1997), 29 BCLR (3d) 88 (S.C.), para 9 and 13 (QL)

The authorities and literature to which we were referred do not address the application of s. 16(2) [of the B.C. CPA]. However, it is expressed in the same terms as those recommended in 1996 by the Uniform Law Conference of Canada in its *Uniform Class Proceedings Act*, s. 16(2). The latter has been the subject of some comment insofar as the Legislatures have chosen *opting in over opting out*. *Opting in is seen as having the advantage of "indicating that the non-resident accepts the jurisdiction of the court such that they would be precluded by the doctrine of res judicata from later suing or benefitting from a suit brought in another jurisdiction."* ...By opting-in the non-resident class members are accepting that their claims are essentially the same as those of the resident class members.²¹

Member States will face difficult questions relating to the enforceability of collective redress and/or class action judgments from non-Member States, not only based on issues of jurisdiction but also arising from the opt-in versus opt-out dichotomy. The manner in which a Member State decides to resolve these questions will affect the enforceability of its judgments by the courts of non-Member States, and the enforceability of judgments from non-Member States in its own courts.

III. THE NEED FOR SIMILAR COLLECTIVE REDRESS REGIMES

In Canada, nine of ten provinces have formal class action opt-out legislation. Eight of these provinces are common law provinces with class action statutes that are similar or identical in most material respects. The other province, Quebec, is a civil law jurisdiction that has class action legislation which is similar in import and effect to the common law legislation. Moreover, the objectives and goals of all the class action regimes are the same – access to justice, judicial economy and behaviour modification. This similarity of class action regimes across Canada facilitates the enforcement of a class action judgment from one province in another province.

As Member States begin considering whether to implement collective redress statutes it would be helpful to have a common checklist or guide to refer to, not only to assess what provisions might be required in order to develop an effective regime, but also to strive, to the extent possible, to implement similar collective redress regimes in each Member State. This approach will be beneficial on a number of levels.

(“The non-resident opt-in procedure avoids potential difficulties in exercising jurisdiction over class members outside the province who have not taken any initiative to attorn to the jurisdiction of the BC court”).

²¹ *Harrington v Dow Corning Corp* (2000), 193 DLR (4th) 67 (BCCA), para 74, 85 and 99, leave to appeal refused [2001] SCCA No. 21, emphasis added.

First, Member States will be familiar with the provisions and goals of each other's collective redress regimes. This will make it easier to decide whether to recognize and enforce collective redress judgments from other Member States.

Second, similar collective redress regimes would result in complementary judicial decisions concerning similar issues that arise in the various collective redress regimes that can become a valuable resource for all Member States.

Third, if collective regimes are similar, forum shopping should not become an issue. The rights available to claimants will be the same or similar in every Member State.

A useful checklist of provisions that should be considered for a collective redress statute can be found in the International Bar Association's 'Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress' (Guidelines). In October 2006, the Consumer Litigation Committee of the International Bar Association created the IBA Task Force on International Procedures and Protocols for Collective Redress (Task Force) to study the potential problems associated with judgments rendered in multi-jurisdictional actions for collective redress. The objective of the Task Force was to draft guidelines that could be applied to address the recognition and enforcement of a collective redress judgment in a jurisdiction other than the jurisdiction in which the judgment was granted. The work of the Task Force culminated in the Guidelines which were formally adopted on 16 October 2008 by the Legal Practice Division of the International Bar Association.²² The purpose of the Guidelines is set out in the introductory paragraphs:

7. ... the Guidelines are intended to describe minimum internationally accepted standards for the procedural and substantive rights to be afforded by a court issuing a collective redress judgment to the persons it purports to bind. These standards can be used as a point of reference by a second court wishing to consider whether to treat those persons as bound by the judgment of the first court.

8. These Guidelines can assist the second court, for example, to determine when, and in what circumstances, it would be fair, just and reasonable for a foreign judgment for collective redress to have preclusive effect in the jurisdiction in which absent claimants reside, where, otherwise, the absent claimants might seek to re-litigate the issues which were the subject of the collective redress judgment.

²² The *Guidelines* are available on the IBA website at: www.ibanet.org/Search/Default.aspx?q=guidelines%20collective%20redress.

9. The Guidelines may also serve as a useful checklist for courts to maximise the likelihood that their judgments will be recognised elsewhere

Countries that are considering adopting collective redress legislation or that are in the process of preparing such legislation may find the Guidelines a useful benchmark of international standards that can be taken into account if foreign recognition of their judgments is among the objectives to be achieved.

IV. THE NEED FOR COOPERATION AND COORDINATION BETWEEN COURTS

A major problem between provinces in Canada, and between Canada and the US is multiple, overlapping class actions. Class actions seeking the same or similar relief against the same defendants are often commenced in different provinces in Canada, or in Canada and the US at the same time. Sometimes the various courts become aware of these competing actions and sometimes they do not. When they do become aware of these competing actions sometimes they are willing and able to coordinate the actions to avoid duplication, and sometimes they are unwilling or unable to do so. This creates unfairness and prejudice for all the parties involved. Three measures have been proposed in Canada to try to address these problems.²³

The first measure was a proposal for a national registry of all class actions, much like the national registry of collective redress actions proposed in the EU policy paper. The national registry in Canada was proposed in 2005 by the Uniform Law Conference of Canada (ULCC). The mandate of the ULCC is to harmonize the laws of the provinces and territories of Canada, and where appropriate the federal laws as well. The recommendation of the ULCC relating to multi-jurisdictional class actions within Canada was as follows:

An on-line Canadian Class Proceedings Registry of all class action filings in each Canadian jurisdiction should be created and maintained for use by the public, counsel and courts. All current or proposed class proceedings legislation in all Canadian jurisdictions should require that all class action filings be directed to this registry. In addition or alternatively, courts in each jurisdiction should issue practice directions setting out the details of such filings.²⁴

²³ *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations* (March 2005), 2-3.

²⁴ *Idem*.

Unfortunately, this recommendation has not been implemented to date by any legislature. The Canadian Bar Association (CBA) is a professional, voluntary organization that represents over 37,000 lawyers, judges, notaries, law teachers, and law students in Canada. Following the recommendation of the ULCC, the CBA established the National Class Action Database. The Database was intended to provide lawyers and the public with easy access to court documents relating to class action lawsuits that were currently underway anywhere in Canada. However, the Database is a voluntary initiative which lawyers only infrequently update and so it does not contain a comprehensive listing of all class action lawsuits in Canada. The result is that it is not a very useful resource for lawyers or judges. Member States should strive to create viable, uniform accessible registries with current information in order to monitor and supervise competing collective redress actions.

The second proposal by the ULCC was legislation that obligated courts to take into consideration existing, competing class actions when deciding whether to certify a class action in its own jurisdiction:

All current or proposed class proceedings legislation in all Canadian jurisdictions should:

- (a) expressly permit the court to certify, on an opt-out basis, a class that includes class members residing or located outside the jurisdiction;
- (b) require that a plaintiff seeking to certify a class proceeding give notice of such an application to plaintiffs in any class proceeding in Canada with the same or similar subject matter;
- (c) permit plaintiffs from other jurisdictions served with such notice to make submissions at or before the certification application, including submissions that their action is the preferable procedure for all or part of the overlapping class;
- (d) require the court, in certifying any class proceeding, to consider whether there are one or more class proceedings relating to the same or similar subject matter that have been commenced in one or more other Canadian jurisdictions and to consider whether such class proceedings may be a preferable procedure for the resolution of the claims of all or some of the class members;
- (e) require the court, in assessing whether related class actions in other jurisdictions may be a preferable procedure for the resolution of the claims of all or some of the class members, to consider all relevant factors including:
 - (i) the nature and the scope of the causes of actions advanced, including any variation in the cause of actions available in the various jurisdictions;
 - (ii) the theories offered by counsel in support of the claims;

- (iii) the state of preparation of the various class actions;
 - (iv) the number and extent of involvement of the proposed representative plaintiffs;
 - (v) the order in which the class actions were commenced;
 - (vi) the resources and experience of counsel;
 - (vii) the location of class members, defendants and witnesses;
 - (viii) the location of any act underlying the cause of action;
- (f) permit the court the court to make any order it deems just, including:
- (i) certifying a national or multijurisdictional opt-out class proceeding, if (1) all statutory criteria for certification have been met, and (2) the court determines that it is the appropriate venue for a national or multi-jurisdictional class proceeding;
 - (ii) refusing to certify an action on the basis that it should proceed in another jurisdiction as a national or multijurisdictional class proceeding;
 - (iii) refusing to certify that portion of the proposed class that includes class members who may be included within a pending or proposed class proceedings in another jurisdiction;
 - (iv) requiring that a subclass with separate counsel be certified within the certified class proceeding.²⁵

This second measure has not been adopted in any Canadian jurisdictions, which has resulted in duplicate class actions in different provinces and unseemly ‘carriage motions’ between competing law firms.²⁶

Member States should implement measures similar to the measures proposed by the ULCC to avoid these same problems.

The third measure was the creation and adoption of protocols that would allow judges from the different provincial courts in Canada to communicate with each other in certain circumstances in order to coordinate competing class actions in different provinces.

²⁵ *Idem*.

²⁶ *Tiboni v Merck Frosst Canada Ltd* 2008 CanLII 11372 (ON SC); *Tiboni v Merck Frosst Canada Ltd* 2008 CanLII 37911 (ON SC); *Tiboni v Merck Frosst Canada Ltd* 2009 CanLII 381 (ON SC); *Tiboni v Merck Frosst Canada Ltd* 2009 CanLII 10678 (ON SC); *Settingington et al v Merck Frosst Canada Ltd et al* [2006] OJ No. 376 (SC); *Mignacca v Merck Frosst Canada Ltd* 2008 CanLII 61238 (ON SC); *Mignacca v Merck Frosst Canada Ltd* 2009 CanLII 10059 (ON SCDC); *Mignacca v Merck Frosst Canada Ltd* 2009 ONCA 393 (CanLII); *Mignacca v Merck Frosst Canada Ltd* 2009 CanLII 68180 (ON SC); *Wuttunee v Merck Frosst Canada Ltd* 2008 SKQB 78 (CanLII); *Wuttunee v Merck Frosst Canada Ltd* 2008 SKQB 229 (CanLII); *Wuttunee v Merck Frosst Canada Ltd* 2008 SKCA 79 (CanLII); *Wuttunee v Merck Frosst Canada Ltd* 2008 SKCA 80 (CanLII); *Merck Frosst Canada Ltd v Wuttunee*, 2008 SKCA 125; *Merck Frosst Canada Ltd v Wuttunee*, 2009 SKCA 43 (CanLII).

The CBA developed a protocol for cross border judicial cooperation and communication that has as its purpose facilitating the case management of multi-jurisdictional class action proceedings and the enforcement of any resulting judgments in each participating jurisdiction.²⁷ The CBA, in conjunction with the American Bar Association (ABA), also developed a similar protocol that can be used between Canadian provincial courts and courts in the US.²⁸

These protocols have found favour with judges in both Canada and the US and have been applied on an *ad hoc* basis on numerous occasions with considerable success. Although the current scope for communication and coordination under these protocols is limited, the protocols represent an important step in the right direction and hopefully will lead to protocols that are more comprehensive in the future.

Member States should give serious consideration to developing similar protocols to prevent undesirable forum shopping and to address other inevitable problems that will be created by overlapping multi-jurisdiction collective redress actions between Member States and between Member States and non-Member States.

The IBA Multi-Jurisdictional Collective Redress Working Group (Working Group) was created to provide a forum for the discussion, and potentially the formulation of policy, with respect to the conduct of collective redress proceedings which are multi-jurisdictional in nature from the perspective of the practitioner, the judiciary and the legislators. The Working Group facilitates the exchange of ideas across a variety of stakeholder interests and jurisdictions. It aims to achieve a number of objectives with respect to the conduct of multi-jurisdictional proceedings for collective redress. These objectives include fostering awareness and dialogue with respect to the differing regimes governing collective redress remedies and addressing the possibility of judicial cooperation in simultaneous collective redress proceedings arising in different jurisdictions internationally. The Working Group is currently working on developing protocols, similar to the Canadian and US protocols for broader international applications.

²⁷ The CBA protocol can be found at: <http://www.cba.org/cba/resolutions/pdf/11-03-A.pdf>, <http://www.cba.org/cba/resolutions/pdf/11-03-A-Annex01.pdf>, <http://www.cba.org/cba/resolutions/pdf/11-03-A-Annex02.pdf>, and <http://www.cba.org/cba/resolutions/pdf/11-03-A-Annex03.pdf>.

²⁸ This protocol can be found at: <https://www.cba.org/cba/resolutions/pdf/11-03-A-bckd.pdf>.

V. CONCLUSION

Canadian lawyers, judges and lawmakers have been dealing with cross-border class actions for over twenty years. In the process they have identified many of the key problems that such actions can create and they continue to struggle, mostly on an *ad hoc* basis, to find solutions for the issues of jurisdiction and enforceability as they arise. Some viable solutions have been identified which are largely dependent on the existence of similar class action or collective redress regimes between countries. These solutions also require cooperation and coordination between courts in the different countries in order to address competing and/or overlapping class actions.

Canada has had to reframe its approach to its own class actions after the fact because its lawmakers did not anticipate these problems when the original legislation was drafted. In contrast, Member States have the benefit of the Canadian experience to draw on before they create their own legislation. Ideally they will strive to implement legislation that addresses these matters from the outset.